

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

BETTER LIVING MANAGEMENT CO. LTD., ) ICDR CASE NO. 50 2014 000189  
Claimant, )  
and )  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
Respondent. )  
\_\_\_\_\_ )

**ICANN'S RESPONSE TO CLAIMANT BETTER LIVING MANAGEMENT CO.  
LTD.'S REQUEST FOR INDEPENDENT REVIEW PROCESS**

Jeffrey A. LeVee  
Kate Wallace  
Jones Day  
Contact Information  
Redacted

Counsel to Respondent  
The Internet Corporation  
For Assigned Names and Numbers

## INTRODUCTION

1. The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Request for Independent Review Process (“IRP Request”) submitted by claimant Better Living Management Co. Ltd. (“BLM”).<sup>1</sup> As explained below, BLM’s IRP Request is undoubtedly time-barred and substantively deficient and, thus, should be summarily rejected.

### **Scope of the Independent Review Process**

2. This Independent Review Process (“IRP”) is conducted pursuant to Article IV, Section 3 of ICANN’s Bylaws, which creates a non-binding method of evaluating certain actions of ICANN’s Board of Directors.<sup>2</sup> This IRP Panel (“IRP Panel”) has just one responsibility – to “declar[e] whether the Board has acted consistently with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”<sup>3</sup> In particular, the IRP Panel is to “apply a defined standard of review to the IRP Request, focusing on”:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

---

<sup>1</sup> BLM submitted its Notice of Independent Review on 22 February 2014, but the Independent Review process was not considered “filed” until the dispute resolution service provider that administers ICANN Independent Reviews received the Claimant’s Notice of Arbitration, which in this case occurred on 25 March 2014. *See* Resp. Ex. 1 (26 March 2014 Letter from ICDR to Parties). Citations to “Resp. Ex. \_\_\_” refer to exhibits submitted with Respondent ICANN’s Response. Citations to “Cl. Ex. \_\_\_” refer to the English-translation exhibits submitted by Claimant BLM on 23 May 2014. BLM submitted two sets of numbered exhibits: (1) “Appendices 1-28”, which were mostly documents written in non-English language; and (2) “Appendices 1-21”, which were English language documents. Because BLM’s two submissions were not consistent in a number of respects, ICANN advised BLM and the ICDR that it understood that the second submission of English-language documents is the relevant submission. BLM did not object or otherwise respond to ICANN’s clarification. Moreover, BLM did not submit the English translations of its exhibits until 23 May 2014. The parties and the ICDR therefore agreed that ICANN’s response to the IRP Request would be due on 23 June 2014.

<sup>2</sup> ICANN’s Bylaws, *available at* <http://www.icann.org/en/about/governance/bylaws> and Resp. Ex. 2.

<sup>3</sup> Bylaws, Resp. Ex. 2, at Art. IV, § 3.4.

- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?<sup>4</sup>

3. BLM's IRP Request relates generally to ICANN's program to facilitate the creation of hundreds of new "generic Top Level Domains" or "gTLDs" on the Internet to supplement the gTLDs that have existed for many years (i.e., .com, .net, .org). ICANN is administering this "New gTLD Program" pursuant to an "Applicant Guidebook" ("Guidebook") that ICANN adopted in June 2011 following years of consideration and public input.<sup>5</sup> The Guidebook lays out the processes and standards by which parties are to apply for a new gTLD, as well as how those applications will be evaluated. The application window for new gTLDs, which was open to all interested entities, commenced on 12 January 2012; by the time the application window closed, ICANN had received 1,930 new gTLD applications.

4. In its IRP Request, BLM challenges a 10 September 2013 decision of the ICANN Board New gTLD Program Committee ("NGPC"); the NGPC has delegated authority from the ICANN Board to make decisions regarding the New gTLD Program. In that decision, the NGPC unanimously accepted advice from ICANN's Governmental Advisory Committee ("GAC")<sup>6</sup> that BLM's application for the .THAI gTLD should not proceed.<sup>7</sup> BLM argues that the NGPC should not have accepted the GAC's advice.<sup>8</sup>

---

<sup>4</sup> *Id.*

<sup>5</sup> The Guidebook is available at <http://newgtlds.icann.org/en/applicants/agb>. As noted in the Preamble of the Guidebook, the Guidebook was the product of an extensive collaborative process that involved many years of public discussion and debate, resulting in multiple drafts of the Guidebook.

<sup>6</sup> The Governmental Advisory Committee (GAC), which is discussed further below, is made up of representatives of nearly 140 countries or unique economies and advises ICANN on issues of public policy.

<sup>7</sup> See Annex 1 to NGPC Resolution No. 2013.09.10.NG03, available at <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-10sep13-en.pdf>; see also 10 September 2013 Resolution, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en>.

<sup>8</sup> IRP Request at 1.

**BLM's IRP Request Is Procedurally Barred.**

5. BLM's IRP Request is time-barred. The Bylaws provide that "[a] request for independent review must be filed *within thirty days* of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Article of Incorporation."<sup>9</sup> BLM challenges the NGPC's 10 September 2013 decision denying BLM's application for .THAI. ICANN publicly posted on ICANN's website the minutes of the 10 September 2013 NGPC meeting on 30 September 2013. Accordingly, BLM's right to file an IRP Request expired on 30 October 2013. BLM's Request was not deemed filed until 25 March 2014, nearly *six months* after ICANN posted the minutes of the 10 September 2013 meeting. As such, BLM's IRP Request must be dismissed at the outset on procedural grounds and the Panel need not address the substance of BLM's claims (which, as demonstrated below, are deficient in any event).

**BLM's IRP Request Is Substantively Deficient.**

6. Even if BLM's IRP Request is timely – which it undoubtedly is not – the challenged decisions of the NGPC were well within the NGPC's discretion. The NGPC did exactly what it was supposed to do under ICANN's Bylaws, Articles of Incorporation, and the Guidebook. As demonstrated below, the record reflects the following sequence of events:

- The accredited Thailand GAC Representative opposed BLM's gTLD application for .THAI on the grounds that "THAI" is the geographic name for Thailand.
- The GAC then issued "consensus advice" that .THAI should not proceed.
- ICANN then accepted the GAC's consensus advice, which was entirely consistent with ICANN's Bylaws and the Guidebook.

---

<sup>9</sup> Bylaws, Resp. Ex. 2, at Art. IV, § 3.3 (emphasis added)

## BACKGROUND FACTS

### Background Information On ICANN

7. ICANN was formed in 1998 and is a California not-for-profit public benefit corporation. As set forth in Article I, Section 1 of its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.”<sup>10</sup>

8. ICANN is a complex organization that facilitates input from a wide variety of Internet stakeholders from around the globe. ICANN has an international Board of Directors, nearly 300 staff members, and an Ombudsman. ICANN, however, is much more than just a corporation—it is a community of participants. In addition to the Board, the staff, and the Ombudsman,<sup>11</sup> ICANN includes an independent Nominating Committee,<sup>12</sup> three Supporting Organizations (“SOs”),<sup>13</sup> four Advisory Committees (“ACs”),<sup>14</sup> a group of Technical Expert Advisors,<sup>15</sup> and a large, globally distributed community of members who participate in ICANN’s processes. The SOs provide policy recommendations, and ACs provide advice to ICANN.

9. Most relevant to this matter is the GAC, established pursuant to Article XI, Section 2.1 of the Bylaws, which is “to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may

---

<sup>10</sup> *Id.* at Art. I, § 1.

<sup>11</sup> *Id.* at Art. V.

<sup>12</sup> *Id.* at Art. VII.

<sup>13</sup> *Id.* at Arts. VIII-X.

<sup>14</sup> *Id.* at Art. XI.

<sup>15</sup> *Id.* at Art. XI-A, § 2.

affect public policy issues.”<sup>16</sup> Membership in the GAC is open to all national governments and distinct economies as recognized in international fora.<sup>17</sup>

10. Pursuant to GAC Operating Principle 17, all accredited GAC members are listed on the GAC’s official website, which is updated regularly.<sup>18</sup> The GAC website lists the following accredited representatives for Thailand:

- Thaweesak Koanantakool, PhD  
President  
National Science and Technology Development Agency  
Ministry of Science and Technology  
Thailand GAC Representative to ICANN
- Wanawit Ahkuputra  
Deputy Executive Director  
Electronic Transactions Development Agency (Public Organization)  
Ministry of Information and Communication Technology  
The Government Complex Commemorating His Majesty the King's 80th Birthday Anniversary  
E-Mail: Contact Information Redacted
- Pitinan Kooarmornpatana  
Assistant Director  
Office of Research and Development  
Electronic Transactions Development Agency (Public Organization)  
Email: Contact Information Redacted

11. “The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies.”<sup>20</sup>

### **Background Information On The New gTLD Program**

12. The New gTLD Program constitutes by far ICANN’s most ambitious expansion of the Internet’s naming system. The Program’s goals include enhancing competition and

---

<sup>16</sup> *Id.* at Art. XI, § 2.1.

<sup>17</sup> GAC Operating Principles 14-15, *available at* <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>.

<sup>18</sup> *Id.* at GAC Operating Principle 17.

<sup>19</sup> GAC Representatives – Contact Information (Alphabetical by Country), Thailand, *available at* <https://gacweb.icann.org/display/gacweb/GAC+Representatives#GACRepresentatives-T> and Resp. Ex. 3.

<sup>20</sup> Bylaws, Resp. Ex. 2, at Art. XI, § 2.1.j. In practice, the GAC produces various types of written advice for communication to the Board including: letters signed by the GAC Chair on behalf of the GAC, Communiqués and submissions endorsed by the GAC at face-to-face meetings and inter-sessionally, overarching “principles” documents, and “issues” documents. *See* <https://gacweb.icann.org/display/GACADV/GAC+Advice>.

consumer choice, and enabling innovation via the introduction of new gTLDs, including both ASCII and internationalized domain name (“IDN”) gTLDs. In conjunction with this process, ICANN issued the Guidebook, an extensive document that provides details to gTLD applicants and forms the basis for ICANN’s evaluation of new gTLD applications.<sup>21</sup>

13. Module 3 of the Guidebook sets out a specific process whereby the GAC may issue advice to ICANN concerning any application for a new gTLD, and states in relevant part:

The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.

GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors.<sup>22</sup>

14. The Guidebook further provides that if “[t]he GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a *strong presumption* for the ICANN Board that the application should not be approved.”<sup>23</sup>

15. Pursuant to Section 3.1 of the Guidebook, if the GAC issues consensus advice concerning an application, the Board is required to consider the GAC advice “as soon as practicable” after the expiration of the 21 day applicant response period.<sup>24</sup>

### **Relevant Facts Regarding BLM’s Application for .THAI**

16. BLM submitted its application for .THAI in the Spring of 2012.

17. In April 2013, during ICANN’s Public Meeting in Beijing, China, the application for .THAI was put on the GAC’s meeting agenda for consideration. On 11 April 2013, the GAC

---

<sup>21</sup> The Guidebook is divided into the following six “Modules”: (1) Introduction; (2) Evaluation Procedures; (3) Objection Procedures; (4) String Contention Procedures; (5) Transition to Delegation; and (6) Application Terms & Conditions. See Guidebook, available at <http://newgtlds.icann.org/en/applicants/agb>.

<sup>22</sup> Guidebook, § 3.1 (emphasis added), available at <http://newgtlds.icann.org/en/applicants/agb>.

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> *Id.* Guidebook Section 3.1 provides that upon receipt of GAC Advice, ICANN shall publish the advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have 21 days from the publication date in which to submit a response to the ICANN Board. *Id.*

issued its Beijing Communiqué identifying .THAI as one of several applied-for gTLD strings “where further GAC consideration may be warranted, including at the GAC meetings to be held in Durban.”<sup>25</sup> The GAC advised the ICANN Board to “not proceed beyond Initial Evaluation with ... .THAI.”<sup>26</sup>

18. On 18 April 2013, ICANN publicly posted the GAC Beijing Communiqué and officially notified applicants, including BLM, of the advice.<sup>27</sup>

19. BLM responded to the GAC Beijing Communiqué, noting that it had discussed the GAC’s Advice about .THAI with Mr. Wanawit Ahkuputra, Thailand’s GAC Representative and Deputy Executive Director of the Electronic Transactions Development Agency, which is managed by the Ministry of Science in Thailand.<sup>28</sup> According to BLM’s response, “after several discussions with Mr. Wanawit and management within the Ministry of Science in Thailand, the Ministry of Science have agreed that all of its concerns [with the application for .THAI] have been fully addressed by BLM”,<sup>29</sup> and that “[t]he Ministry of Science in Thailand is also considering to send a representative to the next GAC meeting in Durban in July 2013 to officially request to remove the gTLD string, .THAI from GAC Advice.”<sup>30</sup>

20. On 4 June 2013, the NGPC, after having reviewed and considered all relevant materials, including BLM’s response, accepted the GAC Beijing Advice on .THAI, stating:

The NGPC accepts [the GAC’s] advice....At this time, ICANN will not proceed beyond initial evaluation of these identified strings. In other words, ICANN will

---

<sup>25</sup> GAC Beijing Communiqué 11 April 2013, *available at* <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>.

<sup>26</sup> *Id.*

<sup>27</sup> See <http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en>.

<sup>28</sup> GAC Advice Response Form for Applicants, submitted by BLM on 10 May 2013, *available at* <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-2112-4478-en.pdf>.

<sup>29</sup> Mr. Ahkuputra objected to .THAI because he believed that “‘THAI’ is the geographic name for Thailand.” *Id.*

<sup>30</sup> *Id.*



allow evaluation and dispute resolution processes to go forward, but will not enter into registry agreements with applicants for the identified strings for now.<sup>31</sup>

21. On 24 June 2013, the Chairman of the ICANN Board received a letter from Anudith Nakomthap, the Minister of Information and Communication Technology of Thailand, expressing his objection to BLM's .THAI application and requesting that the Board refrain from proceeding with the application.<sup>32</sup>

22. On 12 July 2013, Secretariat of the Prime Minister Office in Thailand issued a letter advising that a Bhuwanart Na Songkhla would be attending the GAC meeting in Durban, South Africa "in order to provide comments with regard to the new gTLD program."<sup>33</sup>

23. On 18 July 2013, Bhuwanart Na Songkhla sent an email to ICANN and the GAC Chair, identifying himself as "the GAC representative from Thailand, who was recently appointed by the Office of the Prime Minister in Thailand to provide comments and the Thailand Government's position on the new gTLD Application for .THAI," and stating that he "would like to respectfully request that both GAC and ICANN not to promptly pass judgment on the new gTLD Application for .THAI."<sup>34</sup>

24. The GAC met in Durban, South Africa, on 13-18 July 2013.

25. On 18 July 2013, the GAC issued its Durban Communiqué. The GAC advised the ICANN Board that the GAC had "reached consensus on GAC Objection Advice according to Module 3.1 part 1 of the Applicant Guidebook on ... [t]he application for .THAI (application

---

<sup>31</sup> Annex 1 to NGPC Resolution No. 2013.06.04.NG01, 4 June 2013, *available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-04jun13-en.pdf>; *see also* Approved Resolution, Meeting of the New gTLD Program Committee, 4 June 2013, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en>.

<sup>32</sup> *See* 24 June 2013 Letter from A. Nakornthap to S. Crocker (Chairman of the ICANN Board), Resp. Ex. 4.

<sup>33</sup> 12 July 2013 Letter from S. Vejjajiya (Secretariat of the Prime Minister Office, Thailand), Resp. Ex. 5.

<sup>34</sup> 18 July 2013 Email from B. Songkhla to ICANN and H. Dryden (GAC Chair) Re: GAC Advice on the new gTLD Application for .THAI (Application ID: 1-2112-4478), Resp. Ex. 6.

number 1-2112-4478).”<sup>35</sup> The GAC further stated that, pursuant to Module 3.1 of the Guidebook, “[t]he GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.”<sup>36</sup>

26. ICANN publicly posted the GAC Durban Communiqué and officially notified applicants, including BLM, of the advice.<sup>37</sup>

27. BLM submitted a response to the GAC Durban Communiqué on 23 August 2013, asserting, among other things, that during the GAC meeting in Durban “[t]he Prime Minister Office in Thailand has issued an official letter to authorize Mr. Bhuwanart Na Songkhla, Advisor to the Deputy Minister of Commerce, as the Thailand GAC Representative to attend the GAC meeting and provide the comment on the new gTLD program.” Specifically, BLM claimed that Mr. Bhuwanart Na Songkhla intended to “officially request for .THAI to be removed from GAC Advice.” Mr. Bhuwanart Na Songkhla, however, apparently “had some issues attending the closed GAC meetings and making comments in his official capacity,” and therefore, according to BLM, did not present to the GAC. BLM also claimed that Mr. Wanawit Ahkputra, who BLM recognized as “one of the Thailand GAC representatives,” renewed his objection to .THAI on the grounds that it was “the geographic name for Thailand.”<sup>38</sup>

28. On 3 September 2013, in response to claims asserted by BLM in its response to the GAC Durban Communiqué concerning Mr. Bhuwanart Na Songkhla, the Secretariat of the Prime Minister Office in Thailand issued a letter clarifying Mr. Songkhla’s status during the

---

<sup>35</sup> GAC Durban Communiqué, 18 July 2013, *available at* <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>.

<sup>36</sup> *Id.* at n.3.

<sup>37</sup> See <http://newgtlds.icann.org/en/applicants/gac-advice/durban47>.

<sup>38</sup> See <http://newgtlds.icann.org/sites/default/files/applicants/28aug13/gac-advice-response-1-2112-4478-en.pdf>.

Durban GAC meetings: “Mr. Bhuwanart Na Songkhla [was] attending the 47th GAC meeting as an observer only, *and that in no way was he appointed as the representative of Thailand to GAC.*”<sup>39</sup> This letter was transmitted by Thai GAC Representative Wanawit Ahkuputra “on behalf of the Thai GAC Representatives” to the GAC Chair on 6 September 2013.<sup>40</sup> The letter was subsequently forwarded to two ICANN Board members on 9 September 2013 by Thai GAC Representative Pitinan Kooarmornpatana to clarify the status of “the observer” at the GAC’s Durban meeting and to address issues raised in BLM’s response to the Durban Communiqué.<sup>41</sup>

29. On 9 September 2013, Thai GAC Representatives Thaweesak Koanantakool and Wanawit Ahkuputra sent a letter to the GAC Chair addressing BLM’s response to the GAC Durban Communiqué.<sup>42</sup> The letter was emailed to the GAC Chair, with a copy to an ICANN Board member, on 10 September 2013, with a note asking that the information in the letter be taken into account during the NGPC meeting later that day. In their letter, Thai GAC Representatives Koanantakool and Ahkuputra clarified the role of Bhuwanart Na Songkhla at the GAC Durban meeting, advising, among other things, that:

With reference to BLM’s inaccurate claim that the Prime Minister’s Office in Thailand has issued an official letter to authorize Mr. Bhuwanart Na Songkhla to attend GAC Durban meeting as Thailand GAC representative, we would like to point out that the letter (**Attachment 1**) was meant to facilitate Mr. Na Songkhla’s attendance at the meeting as an observer. Moreover, since this claim is serious, we verified it with the Secretary-General, Secretariat of the Prime Minister, who signed the said letter and received confirmation that Mr. Na Songkhla has never been appointed as Thailand GAC representative by the letter. Please see a

---

<sup>39</sup> See 3 September 2013 Letter from S. Vejjajiva, Secretariat of the Prime Minister Office, Thailand, Resp. Ex. 7.

<sup>40</sup> See 6 September 2013 Email from W. Ahkuputra to H. Dryden (GAC Chair) Re: Clarifying Status of Mr. Bhuwanart Na Songkhla as the observer during ICANN 47 GAC meeting, Resp. Ex. 8.

<sup>41</sup> *Id.* (9 September 2013 Email from P. Kooarmornpatana to S. Crocker (Chairman of ICANN Board) and C. Disspain (Board Member) Forwarding 6 September 2013 Email Re: Clarifying Status of Mr. Bhuwanart Na Songkhla as the observer during ICANN 47 GAC meeting, Resp. Ex. 8.

<sup>42</sup> See 10 September 2013 Email from W. Ahkuputra to H. Dryden (GAC Chair) Re: Response to GAC Advice response of new gTLD .thai Applicant published on 28 August 2013, attaching 9 September 2013 Letter from Messrs. Koanantakool and Ahkuputra to GAC Chair Re: Response to GAC Advice response of new gTLD .thai Applicant published on 28 August 2013, Resp. Ex. 9.

translated copy of the letter, dated 3 September 2013, of the Secretariat of the Prime Minister, for more details. (**Attachment 2**).<sup>43</sup>

30. On 9 September 2013, the Chairman of the ICANN Board received a letter from Nikom Wairatpanij, President of the Thai Senate, withdrawing his support for BLM's application for .THAI and requesting that the Board refrain from proceeding with the application.<sup>44</sup>

31. On 10 September 2013, the NGPC, having extensively discussed and reviewed the GAC's Advice in the Durban Communiqué, as well as BLM's response and all communications concerning the validity of the GAC's advice, accepted the GAC's Advice on BLM's application for .THAI and directed that the application not be approved.<sup>45</sup>

32. ICANN posted the NGPC's 10 September 2013 meeting minutes on its website on 30 September 2013.<sup>46</sup> On 22 October 2013, notified BLM by email that its .THAI application was "not approved."<sup>47</sup>

33. The 30-day period for BLM to initiate an IRP expired on 30 October 2013. BLM did not initiate an IRP by this date and did not ask ICANN for an extension of time to do so.

34. On 8 November 2013, ICANN updated the application status for .THAI to "not approved" on the New gTLD microsite.<sup>48</sup>

---

<sup>43</sup> *Id.* (emphasis in original).

<sup>44</sup> 9 September 2013 Letter from N. Wairatpanij to S. Crocker (Chairman of the ICANN Board) Re: Letter No.001/61 dated 25 July 2013, Resp. Ex. 10.

<sup>45</sup> See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en>; <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-10sep13-en.pdf>; <https://www.icann.org/resources/board-material/minutes-new-gtld-2013-09-10-en>.

<sup>46</sup> <https://www.icann.org/resources/board-material/minutes-new-gtld-2013-09-10-en>. In addition, the Board Briefing Materials for the 10 September 2013 NGPC Meeting were posted on 30 September 2013.

<sup>47</sup> Resp. Ex. 11 (emphasis added).

<sup>48</sup> The change to BLM's .THAI application status was publicly available on ICANN's New gTLD Microsite, and garnered the attention of Domain Incite, an Internet blog, which reported on ICANN's "formal rejection" of .THAI. See <http://domainincite.com/14999-icann-rejects-third-new-gtld-bid>.

35. On 25 March 2014, nearly five months after the deadline to file an IRP had lapsed, BLM filed the instant IRP Request challenging the NGPC's 10 September 2013 decision to accept the GAC's Advice and not proceed with BLM's .THAI application.

### STANDARD OF REVIEW

36. Independent Review is a unique accountability mechanism available under ICANN's Bylaws. It is a non-binding process in which persons or entities that claim to have been materially affected by a decision or action by the Board that the person or entity asserts is inconsistent with the Articles or Bylaws may submit a request for independent third-party review of that decision or action.<sup>49</sup>

37. The IRP Panel is tasked with determining whether the Board's actions were inconsistent with ICANN's Articles or Bylaws. ICANN's Bylaws specify that a deferential standard of review be applied when evaluating ICANN Board actions, and the rules are clear that the IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.<sup>50</sup>

38. ICANN has appointed the ICDR as ICANN's IRP Provider. ICANN's Bylaws and the Supplementary Procedures that the ICDR has adopted specially for IRP proceedings apply here.<sup>51</sup> Unlike a traditional arbitration or mediation through the ICDR, which this is not, the Bylaws expressly provide that the IRP should be conducted via "email and otherwise via the Internet to the maximum extent feasible."<sup>52</sup> The IRP Panel may also hold meetings via telephone where necessary, and "[i]n the unlikely event that a telephonic or in-person hearing is

---

<sup>49</sup> See Bylaws, Resp. Ex. 2, at Art. IV, §§ 3.1, 3.2.

<sup>50</sup> See *id.*

<sup>51</sup> Absent a governing provision in ICANN's Bylaws or the ICDR's Supplemental Procedures, the ICDR Rules apply. But in the event of any inconsistency between the Supplementary Procedures and the ICDR's Rules, the Supplementary Procedures shall govern. Bylaws, Resp. Ex. 2, at Art. IV, § 3.8; see also ICDR Supplementary Procedures for ICANN, Independent Review Process, § 2, Resp. Ex. 12 and available at <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf>.

<sup>52</sup> Bylaws, Resp. Ex. 2, at Art. IV, § 3.12.

convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.”<sup>53</sup>

39. Consistent with ICANN’s Bylaws, the IRP Panel is to issue a written declaration designating, among other things, the prevailing party.<sup>54</sup> The IRP Panel’s declaration is not binding, but the Board will, of course, give serious consideration to the IRP Panel’s declaration and, “where feasible,” shall consider the IRP Panel’s declaration at the Board’s next meeting.<sup>55</sup>

## ARGUMENT

### I. BLM’S IRP REQUEST IS TIME BARRED.

40. ICANN’s Bylaws are clear that “[a] request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Article of Incorporation.”<sup>56</sup>

41. This provision bars BLM’s IRP Request. BLM’s IRP Request challenges the NGPC’s 10 September 2013 decision to accept GAC Advice and not proceed with BLM’s .THAI application. The 10 September 2013 meeting minutes and briefing materials were publicly posted on 30 September 2013.<sup>57</sup> Under ICANN’s Bylaws, any IRP Request challenging

---

<sup>53</sup> Bylaws, Resp. Ex. 2, at Art. IV, § 3.12; ICDR Supplementary Procedures, ¶ 10. The Bylaws provide that requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument, and that ICANN’s response shall not exceed that same length. BLM states that “[u]pon understanding Respondent’s reasoning for this action and inaction, [BLM] shall file an Amended Notice of Independent Review Process which takes into account any rationale provided by Respondent.” See IRP Request at 10-11. ICANN does not agree that BLM has any right to unilaterally file supplemental materials on the issues presented in its IRP Request, but will reserve discussion on that topic unless and until BLM seeks leave to place additional information before the Panel.

<sup>54</sup> Bylaws, Resp. Ex. 2, at Art. IV, § 3.18.

<sup>55</sup> *Id.* at Art. IV, § 3.21.

<sup>56</sup> Bylaws, Resp. Ex. 2, at, Art. IV, § 3.3.

<sup>57</sup> See Minutes, Meeting of the New gTLD Program Committee, 10 September 2013, *available at* <https://www.icann.org/resources/board-material/minutes-new-gtld-2013-09-10-en>. The date on which the meeting minutes were posted is reflected at the end of the document, where it states: “Published on 30 September 2013.” *Id.*

the NGPC's decision at that meeting must have been filed on or before 30 October 2013. As BLM did not commence this IRP until 25 March 2014, BLM's claims are time barred.<sup>58</sup>

42. BLM claims that it received an email from ICANN on 24 January 2014, "and only then understood that Claimant's application had been rejected" by ICANN.<sup>59</sup> Consequently, BLM claims that its thirty days to file an IRP Request should be triggered from 24 January 2014.<sup>60</sup> BLM is wrong on both the facts and its interpretation of ICANN's Bylaws.

43. First, contrary to BLM's position, the time within which an IRP Request must be filed is not dependent on when a claimant claims to have "understood" the implication of certain alleged Board action. The Bylaws expressly provide that an IRP Request must be filed within 30 days of the posting of the minutes of the Board meeting where the challenged decision was made.<sup>61</sup> In this case, the minutes from the 10 September 2013 NGPC meeting – which gives rise to BLM's claims here – were posted on 30 September 2013. BLM's belated commencement of an IRP on 25 March 2013 is untimely under ICANN's Bylaws.

44. Second, BLM's claim that it only understood on 24 January 2014 that its .THAI application had been denied<sup>62</sup> is not plausible. BLM was well aware that its .THAI application was the subject of GAC Advice, as evidenced by BLM's submission of written responses to the ICANN Board to address the GAC Advice set forth in the GAC Beijing and Durban Communiqués. The purpose of BLM's written responses to the GAC Advice concerning its .THAI application was to provide the NGPC with BLM's view on the propriety of the GAC Advice before the NGPC made a decision on BLM's .THAI application. And as ICANN had

---

<sup>58</sup> BLM submitted its Notice of Independent Review on 22 February 2014, but this alone did not commence the Independent Review process. The Independent Review process begins when the ICDR receives the Claimant's Notice of Arbitration, which in this case occurred on 25 March 2014. *See* Resp. Ex. 1.

<sup>59</sup> IRP Request, ¶ 12.

<sup>60</sup> *Id.*

<sup>61</sup> Bylaws, Resp. Ex. 2, at, Art. IV, § 3.3.

<sup>62</sup> IRP Request, ¶ 12.

made clear throughout the New gTLD Program, the NGPC “will consider applicant responses in formulating its response to GAC advice.”<sup>63</sup> Moreover, the Guidebook provides that ICANN will consider the GAC’s Advice “as soon as practicable” after the 21-day response period.<sup>64</sup> BLM was thus very much aware that a decision on its .THAI application was imminent.

45. Further, the agenda for the NGPC’s 10 September 2013 meeting, publicly posted on 4 September 2013, clearly indicated that the NGPC would be conducting a comprehensive review of the NGPC’s response (“Scorecard”) to the GAC Durban Communiqué, including the GAC’s advice on BLM’s application for .THAI.<sup>65</sup> The NGPC accepted the GAC Advice to deny BLM’s .THAI application at that 10 September meeting, only 17 days after BLM responded to the GAC Advice. The NGPC’s resolution adopting the GAC Advice and finding that .THAI will not be approved was publicly posted on 12 September 2013.<sup>66</sup> The meeting minutes from the NGPC’s 10 September 2013 meeting were publicly posted on 30 September 2013.<sup>67</sup>

46. Any claim that BLM was not aware of these developments is particularly specious in light of BLM’s active participation in the process leading up to the denial of its application for .THAI. Further, the Bylaws make clear that any IRP must be filed within 30 days of the posting of the Board minutes: BLM’s knowledge that the minutes had been posted is irrelevant.

---

<sup>63</sup> See <http://newgtlds.icann.org/en/applicants/gac-advice/durban47>.

<sup>64</sup> See Guidebook, § 3.1.

<sup>65</sup> See Agenda, New gTLD Program Committee, 10 September 2013, *available at* <https://www.icann.org/resources/board-material/agenda-new-gtld-2013-09-10-en> (listing “GAC Communiqué Durban – Comprehensive Review of the Scorecard” and “GAC Communiqué Beijing – Comprehensive Review of the Scorecard” as agenda items).

<sup>66</sup> Approved Resolutions, Meeting of the New gTLD Program Committee, 10 September 2013, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en> (stating “Published on 12 September 2013”).

<sup>67</sup> Minutes, Meeting of the New gTLD Program Committee, 10 September 2013, *available at* <https://www.icann.org/resources/board-material/minutes-new-gtld-2013-09-10-en> (stating “Published on 30 September 2013”).



BLM was obligated to monitor the progress of its application, and having failed to assert a timely challenge to the denial of its application, BLM's IRP is time-barred.

47. In any event, on 22 October 2013, ICANN notified BLM by email that on 10 September 2013, the NGPC determined that the .THAI application "will not be approved":

Dear Mr. Yen Chew Lee:

On September 10, 2013, the ICANN Board New gTLD Program Committee (NGPC) approved a Resolution (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-10sep13-en.htm> -2.c) to adopt the "ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué." Per this resolution, and as specific to the GAC Register # 2013-07-18-Obj-Thai (Durban Communiqué § 1.1.a.i.2), the NGPC directed ICANN staff that pursuant to the GAC Advice and Section 3.1 of the Applicant Guidebook, ***the above-referenced application will not be approved***. The Scorecard ... provides further information regarding the next steps for you as an applicant. ...

***Per this Resolution, the status of your application will be updated to "Not Approved"*** on the Application Status page of the New gTLD microsite (<https://gtdresult.icann.org/application-result/applicationstatus>).<sup>68</sup>

48. Accordingly, BLM ***did know***, by no later than 22 October 2013, that ICANN had accepted the GAC Advice that BLM's application not be approved. Further, on 8 November 2013, ICANN updated the public application status for .THAI to "not approved."<sup>69</sup> Accordingly, there is no possible excuse for BLM's multi-month delay in filing an IRP.

49. In light of the extensive and very public consideration of BLM's .THAI application, BLM's active participation in the GAC and the NGPC's consideration of the .THAI application, as well as the specific correspondence sent to BLM notifying it of the NGPC's decision, BLM's assertion that it was not aware of the NGPC's decision to "not approve" .THAI until January 2014 is baseless. Nevertheless, the date on which BLM claims that it became

---

<sup>68</sup> Resp. Ex. 11 (emphasis added).

<sup>69</sup> The change to BLM's .THAI application status was publicly available on ICANN's New gTLD Microsite, and even garnered the attention of Domain Incite, an Internet blog, which reported on ICANN's "formal rejection" of .THAI. See <http://domainincite.com/14999-icann-rejects-third-new-gtld-bid>.

aware of the NGPC's decision to deny BLM's .THAI application is irrelevant to the issue of whether BLM's IRP Request is time barred. As noted, ICANN's Bylaws clearly provide that an IRP Request must be filed within 30 days of the posting of the minutes of the Board meeting where the challenged decision was made.<sup>70</sup> The minutes from the meeting where BLM's .THAI application was denied were publicly posted on 30 September 2013. BLM's IRP Request was filed on 25 March 2013, which makes it untimely under ICANN's Bylaws by nearly five months.

## **II. BLM HAS FAILED TO ESTABLISH ANY VIOLATION OF ICANN'S BYLAWS OR ARTICLES OF INCORPORATION.**

50. BLM claims that ICANN has violated its Articles and Bylaws "by accepting GAC Advice to reject [BLM's] application to operate the .THAI gTLD."<sup>71</sup> Specifically, BLM alleges that ICANN should not have accepted the GAC Advice to not approve the .THAI application because neither of the GAC Representatives from Thailand – (1) Dr. Thaweesak Koanantakool; and (2) Wanawit Ahkuputra – have been properly appointed by the Thai government.<sup>72</sup> As a result, BLM claims, any objection to the .THAI application lodged by the Thai GAC Representatives was invalid, and the ICANN Board should not have accepted GAC Advice to reject the .THAI application.<sup>73</sup> BLM's claims must fail.

51. First, BLM claims that Dr. Thaweesak Koanantakool was not properly appointed because the GAC allegedly "recruited" him in violation of GAC Operating Principle 14. In support, BLM attaches a letter from Thailand's Ministry of Science stating that when the GAC was first created in 1999, "the first President of GAC started to appoint [GAC members] by sending a letter ... asking the ITU [International Telecommunications Union] representative of

---

<sup>70</sup> Bylaws, Resp. Ex. 2, at, Art. IV, § 3.3.

<sup>71</sup> IRP Request at 2.

<sup>72</sup> IRP Request, ¶¶ 8-9.

<sup>73</sup> *Id.*

each country to offer the name of the representative.”<sup>74</sup> Because the GAC President did not receive a response from Thailand’s ITU representative, “GAC found that the government sector who started the internet system in Thailand was [the] National Science and Technology Development Agency (NSTDA), [of] which Dr. Tweesak Koranantakul was the president. ... GAC, therefore, sen[t] the invitation letter to Dr. Tweesak Koranantakul to be the GAC representative from Thailand.”<sup>75</sup>

52. Notably, BLM’s challenge to the propriety of the appointment of Dr. Thaweesak Koanantakool as Thailand’s GAC Representative is also plainly time-barred, because even if BLM was permitted to challenge GAC conduct via an IRP, which it is not, BLM is challenging conduct allegedly undertaken nearly fifteen years ago.<sup>76</sup> It should also be noted that BLM is challenging activities of the GAC, not a decision of the ICANN Board, and activities of the GAC cannot be challenged via an IRP. ICANN is addressing BLM’s claims on the merits, but the record is clear that ICANN’s Board did exactly what it was supposed to do: consider the GAC’s duly issued consensus advice that .THAI should not proceed.

53. In any event, contrary to BLM’s claims, there is nothing in GAC Operating Principle 14 that prohibited the GAC Chair from sending a letter to the National Science and Technology Development Agency – a governmental agency in Thailand – seeking the appointment of a GAC representative for Thailand. GAC Operating Principle 14 has not been substantively revised since its adoption in 1999 and in its present form states:

Members of the GAC shall be national governments, multinational governmental organisations and treaty organisations, and public authorities, each of which may appoint one representative and one alternate representative to the GAC. The accredited representative of a Member may be accompanied by advisers. The

---

<sup>74</sup> See Cl. Ex. 15.

<sup>75</sup> *Id.*

<sup>76</sup> Bylaws, Resp. Ex. 2, at Art. IV, § 3.3.

accredited representative, alternate and advisers must hold a formal official position with the Member's public administration. The term 'official' includes a holder of an elected governmental office or a person who is employed by such government, public authority or multinational governmental or treaty organisation, and whose primary function with such government, public authority or organisation is to develop or influence governmental or public policies.<sup>77</sup>

54. GAC Operating Principle 14 does not impose any limitations on the manner in which potential GAC representatives may be identified, or otherwise prohibit the recruiting of GAC representatives by the GAC Chair in the form of an "invitation letter," such as that challenged by BLM here, or otherwise.

55. Further, the fact that Dr. Thaweesak Koanantakool was the first ever GAC representative from Thailand, has been openly serving in that capacity for *fifteen years*, and holds an official governmental position with Thailand's National Science and Technology Development Agency, demonstrates that the Thai government has duly approved of and supports his appointment as the Thailand GAC representative. And, in fact, Dr. Thaweesak Koanantakool is listed on the GAC's official website as the current GAC Representative from Thailand,<sup>78</sup> which definitively proves that Dr. Thaweesak Koanantakool has been appointed by the Thai government to serve as Thailand's GAC Representative. GAC Operating Principle 17 states:

Those who constitute the Current Membership are defined as those Members from whom the Chair has received formal notification of the name and contact details of their accredited representative. The list of current Members shall be updated regularly and be posted online.<sup>79</sup>

Because the only people listed on the GAC's website as GAC members are those for whom "the [GAC] Chair has received formal notification of the name and contact details of [the] accredited

---

<sup>77</sup> See <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles> (GAC Operating Principles as Amended in October 2011); see also <http://archive.icann.org/en/committees/gac/operating-principles-25may99.htm> (GAC Operating Principles as adopted 25 May 1999).

<sup>78</sup> See GAC Representatives – Contact Information (Alphabetical by Country), Thailand, Resp. Ex. 3, available at <https://gacweb.icann.org/display/gacweb/GAC+Representatives#GACRepresentatives-T>.

<sup>79</sup> GAC Operating Principles, Principle 17, available at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>.

representative,” it necessarily follows that Dr. Thaweesak Koanantakool – who is listed on the GAC website – is Thailand’s accredited GAC Representative.<sup>80</sup>

56. BLM next challenges the propriety of the GAC’s consideration of Mr. Wanawit Ahkuputra’s opposition to BLM’s .THAI application. BLM claims that Mr. Wanawit Ahkuputra was not properly appointed as Thailand’s Alternate GAC Representative because he was appointed by Dr. Thaweesak Koanantakool, who, as explained above, BLM asserts was himself not properly appointed as Thailand’s accredited GAC Representative.<sup>81</sup> BLM’s claim is thus dependent on its claim that Dr. Thaweesak Koanantakool was not properly appointed as Thailand’s GAC Representative. Because BLM’s claims as to Dr. Thaweesak Koanantakool fail, so too must BLM’s claims fail as to Mr. Wanawit Ahkuputra.

57. In addition, Mr. Wanawit Ahkuputra is listed on the GAC website as Thailand’s GAC Alternate Representative.<sup>82</sup> Pursuant to GAC Operating Principle 17, this is dispositive evidence that Mr. Wanawit Ahkuputra has been duly appointed by the Thai government as Thailand’s Alternate GAC Representative.<sup>83</sup> In fact, BLM recognized Mr. Ahkuputra as “one of the Thailand GAC representatives” in its response to the GAC’s Durban Communiqué.<sup>84</sup>

58. Moreover, BLM’s previous attempts to override the objections of Mr. Wanawit Ahkuputra to BLM’s .THAI application have been rejected by the Thai government. In response to the GAC Durban Communiqué, BLM claimed that “the Prime Minister Office in Thailand has issued an official letter to authorize Mr. Bhuwanart Na Songkhla, Advisor to the Deputy Minister of Commerce, as the Thailand GAC Representative ... [and that] Mr. Bhuwanart Na Songkhla

---

<sup>80</sup> *Id.*

<sup>81</sup> IRP Request, ¶¶ 8-9.

<sup>82</sup> See GAC Representatives – Contact Information (Alphabetical by Country), Thailand, Resp. Ex. 3, available at <https://gacweb.icann.org/display/gacweb/GAC+Representatives#GACRepresentatives-T>.

<sup>83</sup> *Id.*

<sup>84</sup> See <http://newgtlds.icann.org/sites/default/files/applicants/28aug13/gac-advice-response-1-2112-4478-en.pdf>.

attended the meeting [in] Durban with the intention to officially request for .THAI to be removed from GAC Advice.”<sup>85</sup> This allegation was quickly contradicted by the Secretariat of the Prime Minister Office in Thailand, who clarified that “Mr. Bhuwanart Na Songkhla would be attending the 47th GAC meeting as an observer only, *and that in no way was he appointed as the representative of Thailand to GAC.*”<sup>86</sup>

59. Finally, Mr. Wanawit Ahkuputra’s objection to the .THAI application was supported by the Thai government. On 9 September 2013, the President of the Thai Senate wrote to ICANN’s Chairman of the Board stating: “[I] reiterate once again that I withdraw the support of the application made by BLM (#1-2112-4478) and request that ICANN Board of Directors refrain from proceeding with such application.”<sup>87</sup>

60. Before passing the 10 September 2013 Resolution and accepting the GAC Advice to not proceed with .THAI, the NGPC confirmed that the Thai government supported the GAC consensus advice. As noted in the minutes from the NGPC’s 10 September 2013 meeting:

Chris [Disspain (ICANN Board Member)] noted that recently, a series of communications concerning the .THAI application were provided to the Committee, which assert that the GAC’s advice was not valid. Chris [Disspain] clarified that GAC’s position in respect to its consensus advice on the application for .THAI is supported by the government of Thailand.<sup>88</sup>

61. The foregoing facts demonstrate that Dr. Thaweesak Koanantakool and Mr. Wanawit Ahkuputra were acting as the duly appointed GAC Representatives from Thailand.

---

<sup>85</sup> *Id.*

<sup>86</sup> See 3 September 2013 Letter from S. Vejjajiva, Secretariat of the Prime Minister Office, Thailand, Resp. Ex. 7.

<sup>87</sup> See 9 September 2013 Letter from N. Wairatpanij, President of the Senate of Thailand, Resp. Ex. 10. Mr. Wairapanij’s letter reiterating his withdrawal of support for BLM’s .THAI application undermines BLM’s claim in response to the GAC’s Durban Communiqué that it had the support from the Thai Senate. See <http://newgtlds.icann.org/sites/default/files/applicants/28aug13/gac-advice-response-1-2112-4478-en.pdf>.

<sup>88</sup> Minutes, Meeting of the New gTLD Program Committee, 10 September 2013, *available at*: <https://www.icann.org/resources/board-material/minutes-new-gtld-2013-09-10-en>.

They are recognized as such under the GAC's Operating Principles, and BLM's attempts to overthrow their authority was completely rejected by the Prime Minister of Thailand.

62. Accordingly, Mr. Wanawit Ahkuputra's objections to the .THAI application were appropriately considered by the GAC and, in turn, the ICANN Board's acceptance of GAC Advice not to approve that application was diligent and sound, and fully in accordance with ICANN's Bylaws and the Guidebook provisions concerning the consideration of GAC Advice.<sup>89</sup> BLM's IRP Request must be summarily denied.

### III. BLM'S VARIOUS OTHER CLAIMS ARE WITHOUT MERIT.

63. BLM also asserts various conclusory and unsupported claims in its IRP Request, none of which has merit. First, BLM claims that "[t]he Board has also violated Bylaws Art. II, Sec. 1 [*i.e.*, ICANN's General Powers], because the Board has not acted 'by a majority vote of all members of the Board,' nor followed other procedures set forth in Bylaws Art. III, Sec. 6."<sup>90</sup> Article II, Section 1 of ICANN's Bylaws, however, provides that a majority vote of all members of the Board is required only with respect "matters that would fall within the provisions of Article III, Section 6" of the Bylaws. Article III, Section 6, in turn, governs "any *policies* that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties."<sup>91</sup> BLM also claims that "[t]he Board has also violated Bylaws Art. X,

---

<sup>89</sup> Indeed, ICANN's Bylaws *require* ICANN to duly consider GAC Advice. Bylaws, Resp. Ex. 2, at Art. XI, § 2.1.j.

<sup>90</sup> IRP Request at 2, 11. BLM also claims that "there is no indication whether a majority even of the NGPC was in agreement with the decision to accept GAC Advice." *Id.* at 11. However, as stated in the 10 September 2013 minutes of the NGPC Board meeting, "all members of the Committee present voted in favor of Resolution 2013.09.10.NG03," which was the Resolution accepting GAC Advice to not approve .THAI. *See* Minutes, Meeting of the New gTLD Program Committee, 10 September 2013, *available at* <https://www.icann.org/resources/board-material/minutes-new-gtld-2013-09-10-en>.

<sup>91</sup> Bylaws, Resp. Ex. 2, at Art. II, § 1; *see also id.* at Art. III, § 6 (emphasis added).

Annex A, Sec. 9,”<sup>92</sup> which governs Board approval of policy-development process (“PDP”) recommendations made by ICANN’s Generic Names Supporting Organization.

64. Neither of these Bylaws provisions is applicable here because the evaluation of individual gTLD applications is not an evaluation of a “policy” or part of the “policy development process” within ICANN. The PDP for the introduction of new generic top-level domains began in 2005 and ended on 8 August 2007 when the Generic Names Supporting Organization (“GNSO”) published the Final Report on the Introduction of New Generic Top-Level Domains (the “GNSO Final Report”), which sets forth the principles and implementation guidelines for the introduction of new generic top-level domains.<sup>93</sup> On 28 June 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs set forth in the GNSO Final Report.<sup>94</sup>

65. After approval of the policy, ICANN undertook an open and transparent implementation process, including consultation with the GAC, culminating in the Board’s approval of the Guidebook and the launch of the New gTLD Program in June 2011. The Guidebook documents how ICANN has implemented the GNSO policy recommendations on new gTLDs. Because the Guidebook is not a “policy” or a PDP, actions taken pursuant to the Guidebook do not constitute policy or policy development. The Bylaws provisions concerning policy development invoked by BLM therefore have no application here.

66. Second, BLM’s claim that it “has every right to operate the ‘.THAI’ TLD”<sup>95</sup> is simply wrong. BLM does not have – nor does any entity have – any “right” to any particular gTLD. Indeed, in submitting its application for a new gTLD, BLM agreed to specific terms and

---

<sup>92</sup> IRP Request at 3.

<sup>93</sup> See <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>94</sup> See [http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm#\\_Toc76113171](http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm#_Toc76113171).

<sup>95</sup> See IRP Request at 13.



conditions, one of which was that “Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion.”<sup>96</sup>

#### IV. RESPONSE TO BLM’S REQUESTED RELIEF.

67. BLM requests that, in addition to various declarations that ICANN’s conduct was inconsistent with ICANN’s Articles and Bylaws, the Panel issue a declaration requiring that ICANN “deem that Mr. Wanawit Ahkupatra’s act, purportedly done as GAC member of Thailand, has no binding effect,” that ICANN “accept[] that the domain name “.THAI” is not a Geographical Name within the meaning of the Applicant Guidebook or otherwise,” and that ICANN “accept [BLM’s] application to operate the “.THAI” TLD....”<sup>97</sup>

68. Any request that the IRP Panel grant such “relief” goes far beyond the IRP Panel’s authority, which is limited to declaring whether the Board acted consistently with the Articles and Bylaws and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel.<sup>98</sup> Nothing in the Articles or Bylaws grants the IRP Panel authority to award affirmative relief or to require ICANN to undertake specific action.<sup>99</sup>

---

<sup>96</sup> Guidebook, § 6.3 (Terms and Conditions), *available at* <http://newgtlds.icann.org/en/applicants/agb>.

<sup>97</sup> *See* IRP Request at 10.

<sup>98</sup> *Id.* at Art. IV, §3.11.

<sup>99</sup> The IRP Panel in the first IRP ever constituted under ICANN’s Bylaws found that “[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.” *See* Advisory Declaration of IRP Panel, ICM Registry, LLC v. ICANN, ICDR Case No. 50 117 T 00224 08, at ¶ 133, *available at* <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>.

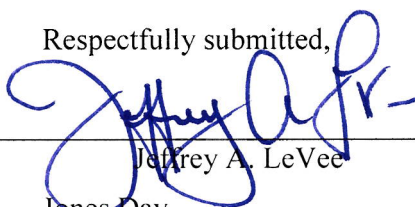
**CONCLUSION**

69. BLM's IRP Request is time barred and should be denied. Substantively, ICANN's conduct with respect to BLM's application for .THAI was fully consistent with ICANN's Articles of Incorporation and Bylaws.

Respectfully submitted,

Dated: June 23, 2014

By: \_\_\_\_\_



Jeffrey A. LeVee

Jones Day

Counsel for Respondent ICANN