

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AMAZON EU S.A.R.L.,

Claimant,

v.

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondents.

No. 01-16-0000-7056

**ORDER NO. 2 RE MOTION TO PERMIT
TESTIMONY AND SCHEDULING
HEARING DATE**

Having considered Claimant’s motion to permit live testimony at the hearing of this matter, the Respondent’s opposition thereto, and having heard oral argument of counsel for the parties on November 11, 2016 via telephonic hearing, the Independent Review Process Panel (Panel) grants Claimant’s motion, in part, and denies it, in part. For the reasons set forth below, the Panel will allow limited oral testimony of Akram Atallah, the Interim President and Chief Executive Officer of Respondent, consisting of questions from the Panel, focused cross-examination by Claimant’s counsel and re-direct, if desired, by counsel for Respondent. Claimant’s request for the live testimony of Dr. Heather Forrest, Scott Hayden, and Heather Dryden is denied.

DISCUSSION

This Panel derives its authority from the ICANN articles of incorporation and by-laws establishing an outside, independent review process to determine, when challenged by an applicant, whether the Board of ICANN complied with the articles and by-laws. As the claim raises questions

regarding applications for generic top-level domain names (gTLDs), the procedures set forth in ICANN's gTLD Applicant Guidebook are also pertinent to our review. The procedural rules we follow in carrying out the independent review process are the International Dispute Resolution Procedures promulgated by the International Centre for Dispute Resolution (ICDR) and the applicable ICANN Supplementary Procedures for the Independent Review Process. When there is a conflict between the two, the applicable Supplementary Procedures supersede the ICDR rules. Supp. Procedures, Rule 2. Further, decisions of other IRP Panels have "precedential effect." ICANN By-Laws, Article IV, Sec. 3(21).

Rule 4 of the Supplementary Procedures, consistent with Article XII of the By-Laws, states that an "in-person hearing shall be limited to oral argument." Based on our analysis of this Rule and prior IRP rulings, this Panel concludes that it has discretion in very limited and narrow circumstances to permit live testimony at a hearing where such testimony is essential to resolving a factual issue necessary to the Panel's decision regarding the merits of the claim. *See DotConnectAfrica (DCA) Trust v. ICANN*, ICDR Case No. 50-2013-001083, (April 20, 2015). The Independent Review Panel in *DCA Trust* held that, in such limited circumstances, live testimony is permitted. *DCA Trust* at 7. Put differently, live testimony may be permitted when, but only when, material factual issues cannot be properly resolved without such testimony. The essence of the *DCA Trust* holding is that where ICANN's commitment to fairness and to a meaningful independent review are in tension with the ban on live testimony, the former should prevail.

The only other decision of an IRP Panel to consider whether live testimony should be permitted, since the adoption of the 2013 Supplementary Procedures, is *DOT Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (February 25, 2016). *DOT Registry* denied a request to permit live testimony, but it is not clear from that ruling whether the IRP Panel rejected the holding in *DCA Trust*

or merely decided that live testimony was not essential to a fair resolution of factual issues in that case. For that reason, the decision has limited precedential value on the issue before us.¹

In this matter, there are issues whether the Board² complied with its obligations under the ICANN By-Laws including, *inter alia*, whether the Board rendered an independent judgment in denying Amazon's three applications, and whether it exercised due diligence and care in considering facts contrary to the GAC Advice. Indeed, there appear to be important factual issues regarding the rationale underlying the GAC Advice, and, thus, the basis for the Board's denial of the applications. In these unusual circumstances, we believe that some limited and focused cross-examination of Mr. Atallah should be permitted.

We are not unmindful of the genuine policy concerns regarding the costs of the IRP process and the desirability of avoiding protracted and expensive hearings. An IRP resembles in certain respects a judicial review of administrative action which, absent exceptional circumstances, typically is limited to an examination of the administrative record. In this instance, however, it has already been decided that an in-person hearing will take place in Los Angeles, California, and Mr. Atallah resides in the Los Angeles area. Moreover, his live testimony ought not add more than a few hours to the hearing. Consequently, the value of a more complete factual record significantly outweighs the modest added cost and time for the IRP hearing.

Regarding Amazon's request for the live testimony of Scott Hayden and Dr. Forrest, the Panel perceives no compelling reason for permitting live testimony of these witnesses. ICANN's counsel

¹ The recently revised ICANN By-Laws, effective October 1, 2016, eliminated the no-live testimony prohibition. New Supplementary Procedures are being developed to reflect this change, but have not yet been adopted. The new bylaws are silent on whether they are retroactive to pending cases. Without deciding whether the new bylaws are retroactive or not, it is significant that ICANN itself has recognized on a going-forward basis that under some circumstances live testimony will be permitted.

² In this matter, the ICANN Board delegated its authority to accept or reject applications for top-level domain names to the New gTLD Program Committee ("NGPC").

has expressed no interest or need to cross-examine either of them on their statements. Neither witness appears to be percipient to the important factual issues referred to above. For these reasons, Amazon's request for live witness testimony of these two witnesses is denied.

Although Amazon did not seek approval for the live testimony of Heather Dryden, the former chair of ICANN's Governmental Advisory Committee (GAC), her testimony is potentially relevant to factual issues material to this matter. Unlike Mr. Atallah, however, neither side has submitted a declaration or written statement of Ms. Dryden in this IRP proceeding, and therefore, we believe permitting her live testimony, even if she were willing to appear at the hearing, is inappropriate.

Despite our ruling respecting Ms. Dryden, the Panel requests that the parties attempt to secure a written statement from Ms. Dryden, if she can competently do so, regarding these questions:

1. Based on her interactions with representatives of the nations that attended the GAC meeting in Durban, what was the rationale for the consensus GAC Advice to the ICANN Board advising the Board to deny the three Amazon applications?
2. Was all or part of the rationale for the GAC objection to the applications based on "Amazon" as a geographic name?

We do not know whether Ms. Dryden can or will answer these questions, but the Panel is interested in what the answers are if they can be obtained in the form of a written statement.

The foregoing ruling is without prejudice to ICANN moving the Panel to reconsider this Order granting live testimony of Mr. Atallah after the parties complete document exchange. Any motion to reconsider, however, should be based on a recitation of the issues of fact that the Panel will be called upon to decide at the hearing and a clear demonstration that all such issues can be decided without undue speculation based on specific citations to the record.

HEARING DATE AND FURTHER BRIEFING OF MERITS

After considering the colloquy with counsel following oral argument, the Panel is concerned that a hearing on March 6-7, 2017 will not allow the Panel sufficient time to consider the further briefs of counsel and additional exhibits developed as a result of document exchange.

In light of the limited live testimony of Mr. Atallah, we intend to set this matter down for a hearing on two consecutive days between April 17 and 24, 2017. By November 21, 2016, counsel are requested to confer and provide two consecutive dates within this block of dates.

As for briefing to augment Amazon's Request for Independent Review and ICANN's Response to the Request for Review, Amazon shall file any further briefing no later than January 16, 2016. ICANN shall have until February 20, 2017 to file its further responsive brief.

The decision of the IRP Panel is unanimous. The Chair has been authorized to sign this Order on behalf of the entire Panel.

IT IS SO ORDERED.

DATED: November 17, 2016



Robert C. Bonner, Chair
and on behalf of co-Panelists
A. Howard Matz and Robert C. O'Brien