

**DETERMINATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-7
5 JUNE 2018**

The Requestor, Afilius Domains No. 3 Ltd., seeks reconsideration of ICANN organization's response to the Requestor's request, pursuant to ICANN organization's Documentary Information Disclosure Policy (DIDP), for documents relating to the .WEB contention set (DIDP Request).¹ Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN organization violated its Commitments established in the Bylaws concerning accountability, transparency, and openness.²

I. Facts.

A. Background Facts.

The Requestor submitted an application for .WEB, which was placed in a contention set with other .WEB applicants. The Requestor was invited to, and did, participate in an auction to secure the right to operate .WEB. The Requestor did not prevail at the auction; another applicant, Nu Dot Co, LLC (NDC), secured the winning bid.

On 23 February 2018, the Requestor submitted a DIDP Request (First DIDP Request) to ICANN organization requesting documents related to the .WEB contention set.³ The First DIDP Request requested the following ten categories of documents:

1. All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information;
2. Ruby Glen's Notice of Independent Review, filed on 22 July 2016;
3. All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;

¹ Request 18-7, § 3, at Pgs. 1-5.

² Request 18-7, § 6, at Pg. 6-11.

³ 23 February 2018 DIDP Request No. 20180223-1, *available at* <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf>.

4. All applications, and all documents submitted with the applications, for the rights to .WEB;
5. All documents discussing the importance of .WEB to bringing competition to the provision of registry services;
6. All documents concerning any investigation or discussion related to
 - a. The .WEB contention set,
 - b. NDC's application for the .WEB gTLD,
 - c. Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and
 - d. Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign;
7. Documents sufficient to show the current status of NDC's request to assign .WEB to Verisign;
8. Documents sufficient to show the current status of the delegation of .WEB;
9. All documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including:
 - a. Document productions to the DOJ,
 - b. Communications with the DOJ,
 - c. Submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions,
 - d. Communications with Verisign or NDC relating to the investigation, and
 - e. Internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board; and
10. All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ investigation.⁴

On 24 March 2018, ICANN organization responded to the Requestor's First DIDP Request (DIDP Response). ICANN responded individually to each of the ten items (and their subparts) by providing links to the publicly available documents; objecting to certain requests as vague, overbroad, or unrelated to ICANN's operational activities; or confirming that documents responsive to the items do not exist. With respect to certain requested materials that were in ICANN organization's possession and not already publicly available, ICANN organization explained that those documents would not be produced because they were subject to certain Defined Conditions of Nondisclosure (Nondisclosure Conditions) set forth in the DIDP. Notwithstanding the Nondisclosure Conditions, "ICANN organization ... considered whether the

⁴ *Id.*

public interest in disclosure of the information subject to these conditions ... outweigh[ed] the harm that may be caused by such disclosure” and “determined that there [were] no current circumstances for which the public interest in disclosing the information outweigh[ed] the harm” of disclosure.⁵ In response to Item 1, ICANN organization responded that it would contact relevant third parties to determine whether additional documentary information is appropriate for public disclosure.⁶ With respect to requests that were vague, ICANN organization suggested the Requestor could amend its DIDP request to clarify.⁷

On 23 April 2018, the Requestor submitted Request 18-7 challenging ICANN organization’s responses Items 1, 4, 5, 6, and 9 in the DIDP Response. At the same time, the Requestor submitted a Reply to the DIDP Response (DIDP Reply)⁸ in which it revised Items 1, 4, 5, 6(a-b), and 9(a) as follows:

| Request | Original Request | Amended Request |
|----------------|--|---|
| 1 | All documents received from Ruby Glen, NDC, and Verisign in response to ICANN’s 16 September 2016 request for additional information | Responses from Ruby Glen, NDC, and Verisign, indicating whether they consent to the public disclosure of their responses to ICANN’s 16 September 2016 request for information and prompt disclosure of the documents received from Ruby Glen, NDC, and Verisign related to the 16 September 2016 letter |
| 4 | All applications, and all documents submitted with the applications, for the rights to .WEB | NDC’s responses to Items 12 and 45 through 50 in its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items; |
| 5 | All documents discussing the importance of .WEB to bringing | Any documents, analyses, or studies that contain information regarding potential competition, substitution, and |

⁵ 24 March 2018 Response to DIDP Request No. 20180223-1, *available at* <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.

⁶ *Id.*

⁷ *Id.*

⁸ 23 April 2018 Reply to DIDP Request No. 20180223-1, *available at* <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-23apr18-en.pdf>.

| | | |
|--------|---|--|
| | competition to the provision of registry services | interchangeability between or among .WEB and .COM, .NET, or other gTLDs |
| 6(a-b) | All documents concerning any investigation or discussion related to <ul style="list-style-type: none"> a. The .WEB contention set, b. NDC’s application for the .WEB gTLD | Documents related to the .WEB Investigation, including: <ol style="list-style-type: none"> 1. All documents reflecting NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, 2. All documents concerning any investigation or discussion related to NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, 3. Documents sufficient to show the date on which ICANN first learned that Verisign was going to or had in fact funded NDC’s bids for the .WEB gTLD at the 28-28 July 2016 (<i>sic</i>) auction, and 4. Documents sufficient to show the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party. |
| 9(a) | All documents relating to the Department of Justice, Antitrust Division’s (“DOJ”) investigation into Verisign becoming the registry operator for .WEB (“DOJ Investigation”), including: (a) Document productions to the DOJ | All documents relating to the Department of Justice, Antitrust Division’s (“DOJ”) investigation into Verisign becoming the registry operator for .WEB (“DOJ Investigation”), including: (a) Document productions to the DOJ, excluding those documents that ICANN has reasonably identified as already being in Afilias’ possession. |

The Requestor also offered to enter into a confidentiality agreement under which the Requestor would limit disclosure of any material produced by ICANN organization in response to Requests 1, 4, 6, and 9 designated as “highly confidential” to the Requestor’s outside counsel.

The Requestor acknowledged in Request 18-7 that it had submitted the DIDP Reply and that Request 18-7 is premature. Specifically, the Requestor stated:

Requestor acknowledges that, to the extent it can reach an agreement with ICANN pursuant to the DIDP Reply, this request for reconsideration may become moot in full or in part. Requestor nonetheless submits this request to preserve its rights to contest the DIDP Response should ICANN and Requestor fail to reach an agreement based on the DIDP Reply. Requestor believes that the Board Accountability Mechanisms Committee need not and should not decide this Reconsideration Request until after the ICANN Board has considered and responded to the proposed compromise set forth in the DIDP Reply. Requestor is prepared to discuss an appropriate “tolling” agreement that would allow Requestor and ICANN to attempt to reach an agreement concerning the DIDP Request and the DIDP Reply.⁹

On 27 April 2018, ICANN organization responded to the Requestor’s DIDP Reply.¹⁰

Regarding the Requestor’s offer to enter into a confidentiality agreement, ICANN organization stated:

The concept of a confidentiality agreement for the disclosure of documents through the DIDP runs afoul of the DIDP itself, which is to make public documents concerning ICANN organization’s operations unless there is a compelling reason for confidentiality. (See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) Moreover, your proposal is asking ICANN organization to treat Afilias differently than other requestors, and to act in a manner that is contrary to what is set forth in the DIDP Process, which as you know would be in contravention of ICANN’s Bylaws.¹¹

With respect to the amended requests, ICANN organization offered, and the Requestor agreed, to treat them as a new DIDP request, with an effective submission date of 23 April 2018. ICANN organization confirmed that it will respond to the DIDP Reply in accordance with the

⁹ Request 18-7, § 3, at Pg. 5.

¹⁰ See Supplemental Response to DIDP Request No. 20180223-1, 27 Apr. 2018, *available at* <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-supp-response-redacted-27apr18-en.pdf>.

¹¹ *Id.*

DIDP Process.¹² ICANN organization provided a response to the DIDP Reply on 23 May 2018.¹³

B. Relief Requested.

The Requestor asks the BAMC to “disclose the documents requested in the DIDP Request, as amended by the DIDP Reply.”¹⁴

II. Issue Presented.

The issue is whether Request 18-7 is sufficiently stated or whether summary dismissal is appropriate.

III. The Relevant Standards for Reconsideration Requests.

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.”¹⁵

Pursuant to Article 4, Section 4.2(k) of the Bylaws, the BAMC reviews each reconsideration request upon its receipt to determine if it is sufficiently stated.¹⁶ The BAMC

¹² *Id.*

¹³ See DIDP Response to Request No. 20180423-1, 23 May 2018, *available at* <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

¹⁴ Request 18-7, § 9, at Pg. 17.

¹⁵ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

¹⁶ *Id.* at § 4.2(k).

may summarily dismiss a reconsideration request if the BAMC determines the request: (i) does not meet the requirements for filing reconsideration requests under the Bylaws; or (ii) it is frivolous.¹⁷ If a reconsideration request is not summarily dismissed, it shall be sent to the Ombudsman, who shall either recuse himself in accordance with Article 4, Section 4.2(l)(iii) of the Bylaws or shall review and consider the reconsideration request.¹⁸ The Ombudsman shall submit to the BAMC his substantive evaluation of the reconsideration request within 15 days of the Ombudsman's receipt of the request.¹⁹ The BAMC shall then promptly proceed to review and consider the reconsideration request.²⁰ The BAMC must make a nonbinding recommendation to the Board within 30 days following its receipt of the Ombudsman's evaluation (or 30 days following receipt of the reconsideration request for those matters for which the Ombudsman recuses himself), unless impractical, after which the Board will make a final decision on the merits of the request.²¹ As noted above, this Determination is limited to evaluating Request 18-7 to determine if it is sufficiently stated.

IV. Analysis and Rationale.

In evaluating whether a reconsideration request is sufficiently stated, the following factors are considered: (1) is the reconsideration request timely; and (2) does the requestor meet the requirements for bringing a reconsideration request? We conclude that Request 18-7 is not sufficiently stated. Even though Request 18-7 was timely filed and identifies established ICANN policies that the Requestor claims ICANN organization violated, it does not demonstrate that the

¹⁷ *Id.*

¹⁸ *Id.* at § 4.2(l).

¹⁹ *Id.* at § 4.2(l)(ii).

²⁰ Where the Ombudsman has recused himself from consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman. *See id.* at § 4.2(l)(iii).

²¹ ICANN Bylaws, 22 July 2017, Art. 4 §§ 4.2(q) and (r).

Requestor is materially or adversely affected by ICANN staff action or inaction. Accordingly, the BAMC will summarily dismiss Request 18-7.

A. Request 18-7 is Timely.

Request 18-7 was timely filed. Pursuant to ICANN’s Bylaws, a reconsideration request challenging staff action must be filed “within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action.”²²

The Requestor challenges the 24 March 2018 response to the Requestor’s DIDP Request, which the Requestor became aware of on 24 March 2018. Request 18-7 was submitted on 23 April 2018, 30 days after the Requestor became aware of the challenged action.

B. The Requestor Does Not Meet the Requirements Set Forth Under Article 4, Section 4.2 of the ICANN Bylaws for Bringing a Reconsideration Request.

While Request 18-7 sufficiently identifies established ICANN policies that it claims ICANN organization violated, the Requestor has not sufficiently stated that it has been materially or adversely affected by the challenged conduct. The Bylaws provide that “ICANN shall have in place a process by which any person or entity *materially affected* by an action or inaction of the ICANN Board or Staff may request ... the review or reconsideration of that action or inaction by the Board.”²³ The Bylaws also provide that the Requestor may submit a Reconsideration Request “to the extent that the Requestor has been *adversely* affected by” Board or Staff action or inaction.²⁴

Here, although the Requestor states that it is challenging ICANN’s DIDP Response, the Requestor makes clear that in reality, it is challenging ICANN’s forthcoming response to the

²² ICANN Bylaws, 22 July 2017, Art. 4 § 4.2(g)(i)(B).

²³ ICANN Bylaws, 22 July 2017, Art. 4 § 4.2(a).

²⁴ *Id.* at Art. 4§ 4.2(c).

requests as amended in the DIDP Reply, including the Requestor's offer to enter into a confidentiality agreement. Request 18-7 alleges that ICANN violated its Bylaws by refusing to produce documents in response to Requests 1, 4-6, and 9.²⁵ These are the exact Requests addressed in the Requestor's DIDP Reply, which was pending at the time the Requestor submitted Request 18-7.

As noted above, the Requestor even acknowledges that the DIDP Reply is pending, and states that "to the extent [the Requestor] can reach an agreement with ICANN pursuant to the DIDP Reply, this request for reconsideration may become moot in full or in part."²⁶ The Requestor submitted Request 18-7 only to "preserve its rights to contest the DIDP Response." The Requestor further requests that the BAMC wait to decide Request 18-7 at least until ICANN organization responds to the DIDP Reply.²⁷ The Requestor asks the Board to "disclose the documents requested in the DIDP Request, as amended by the DIDP Reply."²⁸ In other words, the Requestor asks the Board to disclose the documents requested in the DIDP Reply. Accordingly, given that at the time the Requestor submitted Request 18-7, ICANN organization had not yet responded to the DIDP Reply, the Requestor has not demonstrated that it has been materially or adversely affected by the DIDP Response.

The Reconsideration process is not intended to be a mechanism for parties to simply file a Reconsideration Request to preserve their right to contest a future action or inaction that may or may not materially affect the parties. To do so would undermine with the purpose of the Reconsideration process as set forth in Article 4, Section 4.2(a):

²⁵ Request 18-7, § 6, at Pg. 7.

²⁶ Request 18-7, § 3, at Pg. 5; § 8, at Pg. 17.

²⁷ Request 18-7, § 3, at Pg. 5.

²⁸ Request 18-7, § 9, at Pg. 17.

ICANN shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN Board or Staff may request...the review or reconsideration of that action or inaction by the Board.²⁹

Moreover, the Requestor's suggestion of a tolling agreement on Request 18-7 "that would allow Requestor and ICANN to attempt to reach an agreement concerning the DIDP Request and the DIDP Reply" does not change the fact that there is no material adverse impact on the Requestor given that it did file Request 18-7, to which ICANN organization has now responded.

ICANN organization provided a response to the DIDP Reply on 23 May 2018.³⁰ To the extent the Requestor wishes to seek reconsideration of that response, the Requestor has the option to submit a new reconsideration request.

V. Determination.

Based on the foregoing, the BAMC concludes that the Requestor does not meet the requirements for bringing a reconsideration request, and therefore summarily dismisses Request 18-7. If the Requestor believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

A substantive review of the merits of the Requestor's claims is beyond the scope of this memorandum. The BAMC's conclusion is limited to only the preliminary assessment of whether the Requestor meets the requirements for bringing a reconsideration request. For the foregoing reasons, the BAMC concludes that Request 18-7 is not sufficiently stated and therefore is subject to summary dismissal. As a result, the BAMC hereby summarily dismisses Request 18-7.

²⁹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(a).

³⁰ See DIDP Response to Request No. 20180423-1, 23 May 2018, *available at* <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.