

**DETERMINATION OF THE
BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RE: NEED FOR URGENT CONSIDERATION OF
RECONSIDERATION REQUEST 22-2**

14 April 2022

I. Introduction and Brief Summary

The Requestors, the Namibian Network Information Center (Pty) Ltd (NA-NIC) and Blacknight Internet Solutions, Inc. (Blacknight), seek urgent reconsideration of alleged ICANN staff action regarding a travel waiver that participants are required to accept to attend the ICANN74 Public Meeting in person (ICANN74 In-Person Travel Waiver or Waiver). In Request for Reconsideration 22-2 (Request 22-2),¹ the Requestors allege that the Waiver is “unduly wide and harsh” because, among other things, it “constitutes a blanket exclusion of liability,”² grants ICANN employees, agents, and representatives discretion to require a participant to leave the event, and requires foreign nationals to review a U.S. website (the U.S. Centers for Disease Control and Prevention website) for health travel advisories.³

The Requestors ask that Request 22-2 be considered on an urgent basis pursuant to Article 4, Section 4.2(s) of the ICANN Bylaws. The Requestors claim that urgent reconsideration is warranted because ICANN74 will be held on 13-16 June 2022 at The Hague and “[t]ravel arrangements must be made, and the closer it gets to the deadline the more difficult and expensive they become.”⁴

Article 4, Section 4.2(s) of the ICANN Bylaws provides for urgent reconsideration,

¹ Request for Reconsideration 22-2, 12 April 2022, <https://www.icann.org/resources/pages/reconsideration-22-2-nmic-bis-request-2022-04-13-en>.

² Contrary to Request 22-2’s assertion of a “blanket” waiver, the waiver does not appear to release ICANN from liability for injuries “caused by the sole, gross negligence of ICANN or its affiliate.” *Id.* § 8 (quoting the waiver).

³ *Id.* §§ 6, 10.

⁴ *Id.* § 12a.

where appropriate, of only “Board action or inaction,” not staff action or inaction.⁵ As discussed in further detail below, the BAMC concludes that Request 22-2 does not meet the requirements for urgent reconsideration because the challenged action is that of ICANN staff. The Requestors have not identified any Board action that was taken related to the ICANN74 In-Person Travel Waiver. Nor can the Requestors do so because the Board has not taken any actions related to the Waiver.

The BAMC’s determination set out here is limited to its assessment of whether Request 22-2 meets the requirements for urgent reconsideration. A substantive review of the merits of the Requestors’ claims is beyond the scope of this determination.

Notwithstanding that Request 22-2 will not be treated as urgent under the ICANN Bylaws, the Requestors may still proceed with Request 22-2 under the timeline for a standard (meaning non-urgent) reconsideration request, and the BAMC will ensure, as always, that the matter will be handled expeditiously, to the extent feasible and practicable.

II. Grounds for Urgent Consideration of Reconsideration Requests

Article 4, Section 4.2(s) of the ICANN Bylaws allows requestors to submit urgent requests for reconsideration provided certain requirements are met:

If the Requestor believes that the Board action or inaction for which a Reconsideration Request is submitted is so urgent that the timing requirements of the process set forth in this Section 4.2 are too long, the Requestor may apply to the Board Accountability Mechanisms Committee for urgent consideration. Any request for urgent consideration must be made within two business days (as calculated by local time at the location of ICANN’s principal office) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.

⁵ ICANN Bylaws, Art. 4, § 4.2(s).

The BAMC shall respond to the request for urgent consideration within two business days after receipt of the request.⁶ If the BAMC agrees to consider the matter with urgency, then the Request will be processed within the time frame set forth in Section 4.2(t).

III. Request 22-2 Does Not Meet the Bylaws' Requirements for Urgent Consideration

Under Article 4, Section 4.2(s) of the ICANN Bylaws, urgent consideration is available in certain circumstances with respect to requests for reconsideration of only “Board action or inaction,” not staff action or inaction.⁷ Further, Section 4.2(s) requires requests for urgent consideration to be made “within two business days . . . of the posting of the resolution at issue,” and only the Board—not staff—can issue resolutions.⁸

Although the Requestors assert that they are seeking reconsideration of both Board and staff action,⁹ the ICANN74 In-Person Travel Waiver was not adopted by the Board. As Request 22-2 acknowledges, the Requestors were not able to identify a resolution taken by the Board related to the Waiver.¹⁰ Because the Bylaws limit urgent consideration to matters concerning “Board action or inaction,” there is thus no basis for urgent consideration of Request 22-2, which seeks reconsideration of alleged staff action.

Moreover, even if the ICANN74 In-Person Travel Waiver resulted from Board action (which it did not), the Requestors would have had to seek urgent reconsideration within two business days of the relevant Board resolution’s posting. Yet the Requestors did not seek urgent

⁶ *Id.* § 4.2(t).

⁷ *Id.* § 4.2(s).

⁸ *Id.*

⁹ Request 22-2, § 2.

¹⁰ *Id.* § 4.

reconsideration until more than a week after they say they first became aware of the Waiver on or around 1 April 2022.¹¹

IV. Conclusion

For these reasons, Request 22-2 does not qualify for urgent consideration. Pursuant to Article 4, Section 4.2(t) of the Bylaws, the Requestors are free to file a new reconsideration request within “the regular time frame” set forth in the Bylaws. However, in the interest of time, rather than requiring the Requestors to re-file, ICANN org will proceed with Request 22-2 under the regular time frame of the reconsideration process. The BAMC will ensure that Request 22-2 will be handled expeditiously, to the extent feasible and practicable.

¹¹ *Id.* § 5.