

**SUMMARY DISMISSAL OF RECONSIDERATION REQUEST 23-2
BY THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
4 APRIL 2024**

I. Introduction and Summary

The Requestor, the Intellectual Property Constituency (IPC), seeks reconsideration of the following alleged actions and inactions of the ICANN Board and Staff:

- ICANN Board Resolutions 2023.10.26.11 and 2023.10.26.12, which the Requestor alleges revisited the Board’s prior action on Recommendation 7 from the Cross-Community Working Group on New gTLD Auction Proceeds (CCWG-AP) Final Report (26 October 2023 Resolutions).
- Certain alleged actions or inactions during the course of the CCWG-AP’s work that led up to the 26 October 2023 Resolutions:
 - “(a) the ICANN Board’s public comment of 6 December 2018 on the Initial Report of the [CCWG-AP],”
 - “(b) the organization of the public comment phase on the Proposed Final Report of the [CCWG-AP],” and
 - “(c) the ICANN Board Resolutions 2022.06.12.13 to 2022.06.12.16.
- “[T]he actions and inactions involving the implementation of the ICANN Grant [] Program.”¹

The Requestor claims that the alleged actions and inactions violate ICANN’s Amended and Restated Articles of Incorporation (Articles), Sections 2 and 3, as well as ICANN Bylaws Sections 1.2(a)(iv)-(vi), 1.2(b), 2.3, and 3.1, by:

- (i) failing to meet ICANN’s accountability obligations, insofar as the 26 October 2023 Resolutions seek to contractually prohibit applicants (but not non-applicants) from using ICANN’s accountability mechanisms to challenge decisions on individual applications within the ICANN Grant Program;²
- (ii) not operating in an open and transparent manner when reaching its decision without community consultation;³

¹ See Request for Reconsideration 23-2 (Request 23-2), 22 November 2023, § 3 at Pgs. 2-3.

² See *id.*, § 8 at Pg. 18.

³ See *id.*, § 8 at Pgs. 18-19.

(iii) failing to act with sufficient information or input;⁴ and

(iv) failing to act in the global public interest and in good faith by not adopting the CCWG-AP's Recommendation 7 as originally submitted to the ICANN Board through the CCWG-AP's Final Report on New gTLD Auction Proceeds (Final Report).⁵

The Requestor asks that the Board reverse the 26 October 2023 Resolutions and review the implementation of Recommendation 7 to determine whether a Fundamental Bylaws change is feasible, and if not, refer Recommendation 7 and any related recommendations back to the CCWG-AP.⁶

Article 4, Section 4.2(k) of the ICANN Bylaws provides that upon receipt of a reconsideration request, the BAMC is to review the request “to determine if it is sufficiently stated.”⁷ A request that is not sufficiently stated is not a proper reconsideration request and must be summarily dismissed.⁸ The BAMC has evaluated Request 23-2 under this standard and concludes that:

- The Requestor's request for reconsideration of the 26 October 2023 Resolutions is not sufficiently stated. Although it was timely filed and sufficiently identifies the Bylaws provisions and established ICANN policies that the ICANN Board allegedly violated, it fails to sufficiently identify an alleged adverse effect of the challenged conduct on the Requestor; we therefore summarily dismiss this claim.
- The Requestor's request for reconsideration of the Board's 6 December 2018 public comment on the Initial Report of the CCWG-AP is not timely; we therefore summarily dismiss this claim.
- The Requestor's request for reconsideration of Staff's organization of the public comment phase on the Proposed Final Report of the CCWG-AP between December 2019 to February 2020 is not timely; we therefore summarily dismiss this claim.
- The Requestor's request for reconsideration of Board Resolutions 2022.06.12.13 to 2022.06.12.16 is not timely; we therefore summarily dismiss this claim.

⁴ See *id.*, § 8 at Pgs. 19-20.

⁵ See *id.*, § 8 at Pgs. 20-21.

⁶ *Id.* § 9 at Pg. 21.

⁷ ICANN Bylaws (Bylaws), 17 November 2023, Art. 4, § 4.2(k).

⁸ *Id.*

- The Requestor’s request for reconsideration of the actions and inactions involving the implementation of the ICANN Grant Program is not sufficiently stated because it fails to identify any specific Board or Staff action or inaction; we therefore summarily dismiss this claim.

The BAMC therefore summarily dismisses Request 23-2.⁹ Although the Requestor has failed to sufficiently state grounds for reconsideration of the challenged action required under Article 4, Section 4.2(a) and (c) of the Bylaws, the BAMC recognizes and appreciates the importance of the ICANN Grant Program to ICANN and the broader ICANN community. The BAMC further notes that the Board has already effectuated the Requestor’s sought-after relief by initiating a Fundamental Bylaws Amendment process to limit access to ICANN’s accountability mechanisms in specific circumstances, engaging with the community about the concerns raised in Request 23-2, and adopting Resolution 2024.03.07.03, which made approval of the initial ICANN Grant Program applications “dependent” on the successful completion of both “the Chartering Organizations’ updating of the CCWG-AP Recommendation 7” and “full implementation” of the Fundamental Bylaws Amendment process.¹⁰ The BAMC recommends that the Board continue to maintain a dialogue with the ICANN community regarding the concerns raised in Request 23-2.¹¹

II. Factual Background

The Requestor is one of the constituencies which comprise the Commercial Stakeholder Group (CSG), which is part of the Generic Names Supporting Organization (GNSO).¹² The

⁹ A substantive review of the merits of the Requestor’s claims is beyond the scope of the BAMC’s procedural evaluation. The BAMC’s conclusion is limited to the preliminary procedural assessment of whether the Requestor has sufficiently stated a reconsideration request.

¹⁰ <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-07-03-2024-en>.

¹¹ See *infra*, § IV.D at Pg. 22.

¹² Bylaws, Art. 11, § 11.5(a)(iii).

Requestor participated in the process to identify members within the GNSO to act as GNSO representatives to the CCWG-AP.¹³

On 4 June 2012, ICANN published its updated New gTLD Applicant Guidebook (Guidebook) describing the requirements and procedures for submitting applications for new generic top-level domains (gTLDs), as well as the criteria and procedures for evaluation for the 2012 round of the New gTLD Program.¹⁴ The Guidebook provides that auctions operated by an ICANN-authorized provider could be used as a last resort to resolve string contention among applicants applying for the same or similar string.¹⁵ The Guidebook further provides that “[a]ny proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that directly supports ICANN’s Mission and Core Values and also allows ICANN to maintain its not for profit status.”¹⁶

In 2015, the GNSO coordinated a community dialogue to provide feedback from the ICANN community to the ICANN Board on the use of auction proceeds.¹⁷ That process led to the 7 September 2015 publication of the Discussion Paper on new gTLD Auction Proceeds, as updated on 7 December 2015, which summarized the information and input on the use of auction proceeds for submission to the drafting team tasked with developing a Cross-Community Working Group (CCWG).¹⁸ Following deliberations, the ICANN Supporting Organizations and Advisory Committees each approved a proposed charter and subsequently formed the CCWG-

¹³ <https://community.icann.org/pages/viewpage.action?pageId=63150102>.

¹⁴ <https://www.icann.org/en/announcements/details/new-gtld-program-updated-applicant-guidebook-available-4-6-2012-en>.

¹⁵ <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-06-2022-en>.

¹⁶ <https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>.

¹⁷ <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-06-2022-en>.

¹⁸ <https://newgtlds.icann.org/sites/default/files/discussion-paper-07sep15-en.pdf>;
<https://gnsso.icann.org/en/drafts/new-gtld-auction-proceeds-07dec15-en.pdf>.

AP.¹⁹ The CCWG-AP was tasked with developing a proposal concerning the allocation of the new gTLD auction proceeds from the 2012 round.

During the course of the CCWG-AP's work, the Board and ICANN Staff each maintained two liaisons to the CCWG-AP who regularly attended and participated in meetings, and the Board maintained active correspondence with the CCWG-AP membership.²⁰ The CCWG-AP's Initial Report and Proposed Final Report were published for public comment on 8 October 2018 and 23 December 2019, respectively.²¹ The Proposed Final Report included Recommendation 7, which stated:

Applicants and other parties should not have access to ICANN accountability mechanisms such as IRP or other appeal mechanisms to challenge a decision from the Independent Project Applications Evaluation Panel to not approve an application, but applicants not selected should receive further details about where information can be found about the next round of applications as well as any educational materials that may be available to assist applicants.²²

During the public comment period, the Requestor submitted the following public comment:

Regarding CCWG Recommendation #7 on page 5 of the proposed Final Report, the IPC agrees that grants should be final and should not be subject to being overturned via appeals mechanisms. Understanding that this will require a change to ICANN's Fundamental ByLaws, the IPC recommends that the language of Recommendation 7 be revised to clarify that the appeal mechanisms should not apply to applications for grants which are "approved" in addition to stating that they will not apply to a grant application that is "not approved". The concern is that persons other than grant applicants may have standing to object to making a

¹⁹ <https://community.icann.org/display/CWGONGAP/CCWG+Background+Information>; *see also* <https://community.icann.org/display/CWGONGAP/CCWG+Charter> (the final CCWG-AP Charter, dated as of 12 December 2016).

²⁰ <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-06-2022-en>; <https://community.icann.org/display/CWGONGAP/Correspondence>. This work and correspondence included the development and publication of Board Principles against which any CCWG-AP proposal would be assessed (Board Principles). <https://community.icann.org/display/CWGONGAP/Correspondence?preview=/64075095/84224627/2018-05-30%20ICANN%20Board%20response%20to%20CCWG-AP%5B2%5D.pdf>.

²¹ <https://www.icann.org/en/public-comment/proceeding/initial-report-of-the-new-gtld-auction-proceeds-cross-community-working-group-08-10-2018>; <https://www.icann.org/en/public-comment/proceeding/proposed-final-report-of-the-new-gtld-auction-proceeds-cross-community-working-group-23-12-2019>.

²² <https://www.icann.org/en/system/files/files/proposed-new-gtld-auction-proceeds-final-23dec19-en.pdf>.

particular grant, e.g. on Human Rights or other grounds contained in ICANN's ByLaws or Core Values. This risk may be higher where grant-making administration is maintained inside the ICANN organization as contemplated by Mechanism A. Finally, the IPC believes this Recommendation should be express in stating that nothing in the Recommendation is intended to modify the rights of the Empowered Community in relation to the overall Budget with respect to the proposed line item for Auction Proceeds grants.²³

On 25 February 2020, ICANN Staff published its Report of Public Comment Proceeding for the Proposed Final Report, which referenced the Requestor's comment regarding Recommendation 7.²⁴

On 29 May 2020, the CCWG-AP issued its Final Report to its Chartering Organizations.²⁵ The Requestor, as part of the CSG, provided a minority statement objecting to the adoption of a mechanism that would establish an internal department within ICANN dedicated to the allocation of auction proceeds, noting that the "[e]stablishment of the fund and making of grants is already encumbered by a need to amend Fundamental By[L]aws so that grants may not be challenged via the Request for Reconsideration and Independent Review Panel processes."²⁶ On 23 July 2020, the GNSO adopted the Final Report and recommendations with eighteen GNSO council members voting to approve the Final Report, and two IPC members, in their capacity as GNSO council members, voting no.²⁷ Following the completion of its work, the

²³ <https://itp.cdn.icann.org/en/files/auction-proceeds/report-comments-new-gtld-auction-proceeds-final-25feb20-en.pdf>.

²⁴ *Id.*

²⁵ <https://gns0.icann.org/sites/default/files/file/field-file-attach/ccwg-auction-proceeds-to-gns0-council-29may20-en.pdf>.

²⁶ *Id.*

²⁷ <https://gns0.icann.org/sites/default/files/file/field-file-attach/gns0-council-motion-recorder-23jul20-en.pdf>.

During those proceedings, the Requestor again stated its minority view.

https://gns0.icann.org/sites/default/files/policy/2019/transcript/transcript-gns0-council-23Jul.en_.pdf.

CCWG-AP was dissolved on 23 July 2020.²⁸ By 1 September 2020, all Supporting Organizations and Advisory Committees adopted or supported the CCWG-AP's Final Report.²⁹

On 14 September 2020, the Final Report was sent to the Board.³⁰ On 18 September 2020, the Board responded, explaining that “the next step will be for the Board to carefully review and consider each recommendation in order to appropriately direct ICANN org to implementation of the approved,” and further “will update you on this process and will be in contact if further clarifications are needed.”³¹ The Board also established a Board Caucus on Auction Proceeds that reviewed the recommendations in CCWG-AP's Final Report and ICANN Staff's assessment of those recommendations while taking into account the Board Principles.³²

On 12 June 2022, the Board completed its review of the recommendations in the CCWG-AP's Final Report, and “adopt[ed] all recommendations within the CCWG-AP Final Report taking action on each of the recommendations as specified within” the Scorecard titled “CCWG on Auction Proceeds Final Report Recommendations – Board Action” (June Scorecard).³³ The June Scorecard stated as to Recommendation 7:

Approve recommendation and direct the ICANN President and CEO to prepare a Fundamental Bylaws amendment proposal that addresses the specific scope of the recommended change to ICANN's accountability mechanisms. The Fundamental Bylaws amendment process shall be initiated in sufficient time to allow for Empowered Community approval of the Fundamental Bylaws amendment prior to the launch of the ICANN Grant [] Program. In the event the Empowered

²⁸ See <https://community.icann.org/display/CWGONGAP/CCWG+Charter> (“The CCWG shall be dissolved following the completion of its work”)

²⁹ <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-06-2022-en>; see also <https://gns0.icann.org/sites/default/files/file/field-file-attach/ccwg-auction-proceeds-to-gns0-council-29may20-en.pdf> (Final Report).

³⁰

https://community.icann.org/display/CWGONGAP/Correspondence?preview=/64075095/147851105/Letter%20from%20CCWG%20Auction%20Proceeds%20Co-Chairs%20to%20ICANN%20Board_upd%2014%20Sept%202020.pdf. The GNSO adopted the Final Report prior to its referral to the Board. <https://gns0.icann.org/en/council/resolutions/2020-current#202007>.

³¹ <https://www.icann.org/en/system/files/correspondence/botterman-to-mann-chiao-18sep20-en.pdf>.

³² <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-06-2022-en>.

³³ *Id.*; <https://www.icann.org/en/system/files/files/scorecard-ccwg-ap-final-recommendations-board-action-12jun22-en.pdf>.

Community rejects the proposed Fundamental Bylaws change, the ICANN President and CEO is directed to seek further guidance from the Board regarding the impact of such rejection on the anticipated launch and operation of the ICANN Grant [] Program.³⁴

The Board directed the ICANN President and CEO, or their designee(s), to (i) “produce no later than within 120 days following this resolution a preliminary implementation plan, including resourcing and timeline, allowing to proceed as soon as feasible with the implementation of the ICANN Grant [] Program,” and (ii) “regularly report to the ICANN Board and the ICANN Community on the status of the implementation of the ICANN Grant [] Program.”³⁵ ICANN Staff then prepared an implementation plan, which it presented to the Board in October 2022.³⁶

Between 12 June 2022 and the 26 October 2023 Resolutions, the ICANN Board and Staff provided various updates on implementation to former CCWG-AP members, as well as other ICANN community members. ICANN held several webinars providing updates to the community on implementation, including during the ICANN77 Policy Forum.³⁷ Beginning in July 2023, ICANN Board and Staff members corresponded directly with former CCWG-AP members of the apprising them of the implementation process and discussing Recommendation 7. For example, on 17 July 2023, Xavier Calvez, ICANN Senior Vice President, Planning and Chief Financial Officer, emailed former CCWG-AP members and provided updates on progress for implementation of recommendations in the CCWG-AP’s Final Report, including a proposal for a meeting with the former members.³⁸ On 20 July 2023, Tripti Sinha, ICANN Board Chair,

³⁴ *Id.*

³⁵ <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-06-2022-en>.

³⁶ <https://www.icann.org/en/system/files/correspondence/calvez-to-former-ccwg-ap-17jul23-en.pdf>.

³⁷ See <https://www.icann.org/en/system/files/correspondence/calvez-to-former-ccwg-ap-17jul23-en.pdf>; <https://meetings.icann.org/en/icann77>; https://static.sched.com/hosted_files/icann77/a2/REV2_ICANN%20Grant%20Program-ICANN77-PrepWeek-02.pptx%20%283%29.pdf.

³⁸ <https://www.icann.org/en/system/files/correspondence/calvez-to-former-ccwg-ap-17jul23-en.pdf>.

emailed former CCWG-AP members regarding implementation of Recommendation 7, and shared that the Board and ICANN Staff “identified a path that both upholds the CCWG-AP’s recommendation that individual application decisions should not be challenged through ICANN’s accountability mechanisms, while also keeping ICANN’s accountability mechanisms unchanged within the Bylaws.”³⁹ Further correspondence between ICANN Board and Staff and former CCWG-AP members, including members of the CSG and each CCWG-AP Chartering Organization, proceeded prior to the 26 October 2023 Resolutions.⁴⁰ The Board continued discussing the implementation of the CCWG-AP recommendations, such as during the 26 September 2023 Board Workshop.⁴¹

On 26 October 2023, the Board approved Resolutions 2023.10.26.11 and 2023.10.26.12, which revisited the Board’s 12 June 2022 resolution as to Recommendation 7, finding that it “can be implemented in alternative ways, including ways that do not require modification to ICANN’s core Bylaws on accountability,” and “updat[ed] its action on Recommendation 7 to reflect that ICANN org should implement this Recommendation 7 directly through the use of

³⁹ <https://www.icann.org/en/system/files/correspondence/sinha-to-former-ccwg-ap-20jul23-en.pdf> (“The Board will direct ICANN org to use the contractual terms and conditions required to apply for the Grant Program to obtain applicant agreement that they cannot use ICANN’s accountability mechanisms to challenge any individual decision taken on their application within the ICANN Grant Program. This remains in line with the CCWG-AP’s recommendation regarding the accountability mechanisms as well as the intention to lower complexity and protect the total amount of proceeds available for applicants.”).

⁴⁰ See, e.g., <https://www.icann.org/en/system/files/correspondence/aikman-scalese-to-calvez-20jul23-en.pdf>; <https://www.icann.org/en/system/files/correspondence/calvez-to-aikman-scalese-2-27jul23-en.pdf>; <https://www.icann.org/en/system/files/correspondence/aikman-scalese-to-calvez-27jul23-en.pdf>; <https://www.icann.org/en/system/files/correspondence/calvez-to-aikman-scalese-27jul23-en.pdf>; <https://gnso.icann.org/sites/default/files/policy/2023/correspondence/xcalvez-to-soac-chairs-et-al-18aug23-en.pdf>; <https://gnso.icann.org/sites/default/files/policy/2023/correspondence/xcalvez-to-soac-chairs-et-al-18aug23-en.pdf>; <https://gnso.icann.org/sites/default/files/policy/2023/correspondence/ducos-to-calvez-03oct23-en.pdf>; see also <https://mm.icann.org/pipermail/council/2023-July/027097.html> (Xavier Calvez email responding to concerns from a CSG member and explaining the bases for the Board’s concerns in implementing Recommendation 7 as originally proposed).

⁴¹ <https://www.icann.org/en/blogs/details/chairs-blog-september-board-workshop-recap-26-09-2023-en>.

applicant terms and conditions rather than through a change to ICANN’s Fundamental Bylaws.”⁴²

The Board explained that Recommendation 7, as originally proposed, provided loopholes that would undermine the purpose of the recommendation.⁴³ First, the Board identified a means by which a party “could have access to ICANN’s accountability mechanisms for decisions on their individual applications as long as that action wasn’t taken by the Independent Application Assessment Panel,” and therefore “still risks the use of auction proceeds to defend against accountability challenges on individual application decisions in a manner the CCWG-AP wished to protect against.”⁴⁴ The Board also found that “[t]he ‘individual application decision’ limitation, if built into the Bylaws, is also likely to create a significant loophole through which applicants or third parties could still maintain access to ICANN’s accountability mechanisms for decisions within the ICANN Grant Program” where those mechanisms could still be “initiated on the premise that a decision that affected a singular application was actually a programmatic error” that would “force protracted consideration within the IRP or Reconsideration Process of whether or not those claims were precluded by the ‘individual application decision’ carve-out.”⁴⁵ The Board also recognized that “if the scope of the accountability mechanisms themselves were narrowed through the Fundamental Bylaws change contemplated by the CCWG-AP, such an

⁴² <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-26-10-2023-en>. The Board directed ICANN Staff to (i) “remove the dependency of the launch of the ICANN Grant Program on a Fundamental Bylaws Amendment Process that would restrict access to ICANN’s accountability mechanisms”; (ii) implement the [CCWG-AP] recommendation limiting applicant access to ICANN’s accountability mechanisms through the use of terms and conditions to which applicants will be required to agree when submitting their applications within the ICANN Grant Program; and (iii) review and analyze the experience of the first cycle of the ICANN Grant Program to advise the Board on further ways to maintain ICANN’s accountability for preserving the Auction Proceeds for grants while also remaining accountable to applicants, such as the use of meaningful opportunities for applicants to seek limited procedural review of certain decisions made when processing applications within the ICANN Grant Program.” *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

amendment would restrict not only applicants from use of accountability mechanisms, but also any third party that that might disagree with a decision made on an individual application by the Independent Application Assessment Panel.”⁴⁶

In approving an approach that relied upon contractual terms and conditions with ICANN Grant Program applicants to limit access to accountability mechanisms, the Board stated that its decision “does not signal a broader intention by the Board or the org to limit access to ICANN’s accountability mechanism through contracts,” but instead was “a specific situation where the community clearly recommended, with the support of each Chartering Organization, that [] ICANN’s accountability mechanisms should not be available for application-specific decisions.”⁴⁷ The Board indicated that ICANN Staff should “evaluate the effectiveness of the use of terms and conditions within the first cycle of the Grant Program, and whether that remains a sufficient way to uphold ICANN’s accountability for the use of the funds.”⁴⁸ The Board also resolved to simultaneously pursue and evaluate a Fundamental Bylaws change to describe how the community could limit access to ICANN’s accountability mechanisms:

Where (1) the Final Report of a CCWG, approved by all chartering organizations, recommends that one or more Bylaws-defined accountability mechanisms should not be available to resolve disputes in specified circumstances; and (2) the Board agrees that the community recommendation is in the global interest, the Board shall then be authorized to direct ICANN Org to implement the CCWG recommendation that limits access to the Bylaws-defined accountability mechanism(s).⁴⁹

On 22 November 2023, the Requestor submitted Request 23-2.⁵⁰

On 21 January 2024, the Board approved Resolution 2024.01.21.09, directing the “ICANN Interim President and CEO, or her designee(s), to initiate a Fundamental Bylaws

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Request 23-2, § 3 at Pgs. 2-3.

Amendment Process under Article 25, Section 25.2 of the ICANN Bylaws, through the posting of the proposed amendment to Article 4, Section 4.1 of the Bylaws for public comment . . . to define how access to ICANN’s accountability mechanisms at Article 4, Sections 4.2 and 4.3, each enumerated as Fundamental Bylaws, may be limited.”⁵¹

On 27 February 2024, ICANN org published the proposed Fundamental Bylaws updates to limit access to accountability mechanisms for public comment.⁵² The public comment period will close on 15 April 2024.⁵³

On 7 March 2024, the Board approved Resolution 2024.03.07.03, which “approve[d] the allocation of up to USD 10 million from the auction proceeds generated in the 2012 round of the New gTLD Program to be used to fund projects approved through the first application cycle that will be included in the final slate of successful applications to be presented for Board approval.”⁵⁴ In doing so, the Board stated that its action “will enable ICANN org to complete the actions needed to implement the Board-approved CCWG-AP recommendations and open the application window for the ICANN Grant Program first cycle through which the auction proceeds will be disbursed to eligible applicants and projects . . . in furtherance of Board resolutions 2022.06.12.14 – 2022.06.12.16 to implement a Grant Program.”⁵⁵ As it relates to Recommendation 7, the Board stated:

[T]he ICANN Board has requested the Chartering Organizations to the CCWG-AP to consider revising the language of the CCWG-AP’s Recommendation 7 regarding access to ICANN’s accountability mechanisms for challenges to decisions on individual applications within the Grant Program. In addition, the Board initiated a Fundamental Bylaws Amendment to specify the process for the

⁵¹ <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-21-01-2024-en>.

⁵² <https://www.icann.org/en/public-comment/proceeding/proposed-bylaws-updates-to-limit-access-to-accountability-mechanisms-27-02-2024>.

⁵³ *Id.*

⁵⁴ <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-07-03-2024-en>.

⁵⁵ *Id.*

ICANN community, through CCWG processes, to propose limitations on access to ICANN’s accountability mechanisms. The Board notes that achieving an update to the CCWG-AP’s Recommendation 7 as well as the successful completion of the Fundamental Bylaws Amendments process are dependencies to the Board’s further action on any slate of successful applications identified through the first application cycle of the ICANN Grant Program.⁵⁶

The Board acknowledged that Resolution 2024.03.07.03 “is a change in direction from the Board’s [26 October 2023 Resolutions] on the implementation of CCWG-AP’s Recommendation 7.”⁵⁷ As a result of that change in direction, “full implementation [of Resolution 2024.03.07.03] is expected to result in restricting any person or entity (whether an applicant or third party) from using an ICANN accountability mechanism to challenge a decision on an individual grant application,” which “embrac[es] the CCWG-AP’s original intent to preserve the auction proceeds for grants, as opposed to funding challenges to decisions on individual applications within the ICANN Grant Program.”⁵⁸

III. Standard of Review

Article 4, Sections 4.2(a) and (c) of ICANN’s Bylaws provide, in relevant part, that “any person or entity materially affected by an action or inaction of the ICANN Board or Staff . . . may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor 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

⁵⁶ *Id.*

⁵⁷ *Id.* (explaining that the 26 October 2023 Resolutions had previously “narrowed application of the limitation on access to ICANN’s accountability mechanisms only to ICANN Grant Program applicants through application terms and conditions”)

⁵⁸ *Id.*

(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.”⁵⁹

The BAMC reviews each reconsideration request upon its receipt to determine if it is sufficiently stated.⁶⁰ The BAMC 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.⁶¹ If the BAMC finds that a reconsideration request is sufficiently stated, the request will be evaluated on the merits in accordance with Article 4, Section 4.2 of the Bylaws.⁶²

IV. Analysis

In evaluating whether a reconsideration request is sufficiently stated, the following factors are considered: (1) is the reconsideration request timely; and (2) has the requestor met the requirements for bringing a reconsideration request? For the reasons set forth below, the BAMC concludes that Request 23-2 is not sufficiently stated and therefore it is summarily dismissed.

A. The Requestor's Request for Reconsideration of the 26 October 2023 Resolutions Fails to Sufficiently Allege That Requestor Has Been Adversely Affected by the Challenged Action.

The Requestor seeks reconsideration of the 26 October 2023 Resolutions, which revisited the Board's prior action on Recommendation 7.

1. The Challenge is Timely.

The Requestor's challenge of the 26 October 2023 Resolutions is timely because it was filed “within 30 days after the date on which information about the challenged Board action is first published in a resolution,”⁶³ as required under the Reconsideration process. Resolutions

⁵⁹ Bylaws, Art. 4, §§ 4.2(a) and (c).

⁶⁰ *Id.* § 4.2(k).

⁶¹ *Id.*

⁶² *Id.* at §§ 4.2(q) and (r).

⁶³ *Id.* § 4.2(g)(i)(A).

2023.10.26.11 and 2023.10.26.12 were published on 26 October 2023 with accompanying rationale.⁶⁴ The Request asserts that the Requestor became aware of the 26 October 2023 Resolutions on 27 October 2023.⁶⁵ The Requestor filed Request 23-2 on 22 November 2023.

2. The Challenge Does Not Sufficiently Allege that the Requestor Has Been Adversely Affected by the Challenged Action.

The Requestor’s challenge of the 26 October 2023 Resolutions does not meet the requirements for maintaining a reconsideration request because the Requestor fails to sufficiently allege that it has been adversely affected by the challenged action as required by Article 4, Sections 4.2(a) and 4.2(c) of the Bylaws. While the Requestor alleges generally that “[w]hen ICANN acts or fails to act in violation of its A[r]ticles and/or Bylaws, it causes substantial harm to Requestor,”⁶⁶ as explained in detail below, the Requestor does not identify any specific and actual harm caused by the Board’s adoption of the 26 October 2023 Resolutions. Under the Bylaws, a requestor must have suffered an actual injury from the challenged conduct in order to meet the adversely affected standard. That factor is not satisfied by claims of potential, speculative future injury to the requestor or potential injury incurred by others, such as the general public.⁶⁷

The Requestor asserts that it has been adversely affected in four ways. First, the Requestor alleges that it has been adversely affected because “any such violations – and especially this violation – creates dangerous precedent upon which ICANN may rely in the

⁶⁴ <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-26-10-2023-en>.

⁶⁵ Request 23-2, § 5 at Pg. 3.

⁶⁶ *Id.* § 6 at Pgs. 4-5.

⁶⁷ The Requestor states, on the basis of the Independent Review Panel’s (IRPs) 23 December 2022 declaration in the ICDR Case No. 01-20-0000-6787, that the “materially affected” test is met “if the Requestor has a ‘concrete interest’ in the procedural rights and alleges ‘reasonably credible injury’ that is ‘causally connected’ to the claimed procedural violation.” *Id.* § 6 at Pgs. 3-4. However, the standard outlined in that decision refers to a Claimant’s ability to bring a claim within the scope of the Independent Review Process. As to reconsideration requests, the Bylaws prescribe that requestors must be “adversely affected” by the challenged action or inaction in the manner described above. *See supra* §§ III, IV.A.2 at Pgs. 13-15 (stating the standard for reconsideration requests).

future to disregard its A[r]ticles] and Bylaws in the same or some analogous way.”⁶⁸ Specifically, the Requestor alleges that in “chang[ing] [] the manner in which [the CCWG-AP’s Recommendation 7] will be implemented,” the 26 October 2023 Resolutions “would give the ICANN Board unacceptable power to do away with Accountability Mechanisms in any future instance of its choosing.”⁶⁹ However, a requestor must identify that it has actually been adversely affected instead of speculating that it may somehow be harmed by the challenged action.⁷⁰ Here, the Requestor fails to identify how the approval of the 26 October 2023 Resolutions has caused the Requestor any actual harm because it merely speculates that it may be adversely affected somehow in the future if the Board fails to comply with ICANN Articles or Bylaws through an unidentified action or inaction that has not yet occurred. Speculative future harm does not support reconsideration.

Second, the Requestor alleges that it suffered injury because “as the A[r]ticles] and Bylaws – in particular ICANN’s Commitments – form a fundamental compact with the IPC and the entire ICANN community, the Requestor’s Members rely upon ICANN to comply with its A[r]ticles] and Bylaws in critical ways.”⁷¹ As with the first basis for injury, the Requestor fails to sufficiently identify how it has been adversely affected by the challenged action.⁷² The Requestor neither alleges any harm, nor does it state any relationship between the challenged conduct and any purported harm to the Requestor by virtue of an alleged disregard for ICANN’s Commitments. A general interest in a Bylaws provision does not establish that the particular alleged violation of that provision has harmed the Requestor in any way. If it were otherwise, then merely identifying a Bylaws provision or established ICANN policy that the challenged

⁶⁸ Request 23-2, § 6 at Pg. 5.

⁶⁹ *Id.*

⁷⁰ Bylaws Art. 4, §§ 4.2(a), (c).

⁷¹ Request 23-2, § 6 at Pg. 5.

⁷² Bylaws § 4.2(c).

conduct allegedly violated would suffice to allege a harm, and the “adversely affected” requirement would be rendered meaningless.

Third, the Requestor alleges that it has been adversely affected by the challenged action because “many IP organizations – including IPC Members, members of IPC Member associations, and entities represented by IPC Members – are interested in and/or likely to apply for grants from the ICANN auction proceeds.”⁷³ As in the case of the first grounds, this is insufficient to meet the adversely-affected requirement to maintain a reconsideration request as the alleged harm is too speculative. As a threshold matter, the Requestor does not specify any concrete intentions or identifiable plans for any IPC member, IPC member organizations, or entities represented by IPC members to seek auction proceed funding through the ICANN Grant Program. Further, the Requestor must allege harm that is connected to the alleged violation and which is not merely speculative.⁷⁴ Without more than a general suggestion that many IP organizations, including IPC members or members of IPC member organizations or entities represented by the IPC may theoretically submit an application for the ICANN Grant Program in the future, the Requestor has not sufficiently stated a concrete harm.

Fourth, the Requestor alleges that it has been adversely affected because:

[M]any volunteers in the IP community will be less inclined and/or will refuse to become members and/or participate in the IPC as they see that even a consensus CCWG-AP recommendation developed over a period of several years, with the ICANN Board’s encouragement all along the way, suddenly at the end of the process can be entirely disregarded by the ICANN Board and Staff in an opaque manner that cannot be considered reasonable or justified by the A[rticles] and Bylaws. As such, the Challenged Decision harms the IPC because the IPC relies upon volunteer participation in order to function within the ICANN Multi-Stakeholder Model.⁷⁵

⁷³ Request 23-2, § 6 at Pgs. 5-6.

⁷⁴ See *supra* §§ III, IV.A.2 at Pgs. 13-15.

⁷⁵ Request 23-2, § 6 at Pg. 6.

The Requestor’s proffered bases for asserting it has been adversely affected by the challenged action fail to meet the standard for a sufficiently stated reconsideration request. Specifically, an alleged future, unknown injury through a potential loss in volunteers is insufficient to meet the adversely-affected requirement set forth in the Bylaws that the Requestor be actually harmed.⁷⁶ The Requestor theorizes that its volunteer ranks may decrease in the future, but speculative future harm does not support reconsideration. Thus, any possible or forecasted impact on the Requestor’s future volunteers is speculative, and does not sufficiently state how the Requestor has been or may be materially and adversely affected.

Finally, as to its requested relief, Requestor specifically asks the Board to evaluate whether a Fundamental Bylaws Amendment “is feasible, and, if not, remand the Recommendation # 7 . . . to the CCWG-AP.”⁷⁷ Since the filing of Request 23-2, the Board has taken a fundamental “change in direction from the Board’s [26 October 2023 Resolutions] on the implementation of CCWG-AP’s Recommendation 7.”⁷⁸ As the Board stated in its Resolution 2024.03.07.03, the Board has initiated a Fundamental Bylaws change to limit access to ICANN’s accountability mechanisms in specific circumstances, and has now made “(1) the Chartering Organizations’ updating of the CCWG-AP Recommendation 7 to limit ICANN accountability mechanism usage for all decisions on individual applications, as opposed to just decisions taken

⁷⁶ Bylaws § 4.2(c).

⁷⁷ Request 23-2, § 9 at Pg. 21. Among the other relief sought, the Requestor also asked that the Board “remand . . . those recommendations that are dependent on Recommendation # 7 to the CCWG-AP.” *Id.* However, the Board “adopt[ed] all recommendations within the CCWG-AP Final Report taking action on each of the recommendations as specified within” the June Scorecard on 12 June 2022. <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-06-2022-en>. Moreover, the 26 October 2023 Resolutions solely relate to the Board’s “12 June 2022 decision on Recommendation 7 . . . removing the requirement and dependency that a Fundamental Bylaws Amendment is required prior to the launch of the ICANN Grant Cycle,” and “all other Recommendations within the CCWG-AP’s Final Report remain[] in place.” <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-26-10-2023-en>. For the same reasons as stated herein, *see infra* § IV.B at Pg. 21, the Requestor’s request to reconsider and seek relief regarding Resolutions 2022.06.12.13 to 2022.06.12.16 are untimely.

⁷⁸ <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-07-03-2024-en>.

by the third party assessment panel; and (2) successful completion of the Fundamental Bylaws Amendment process that was initiated on 21 January 2024” “dependencies to the Board’s further action on any slate of successful applications identified through the first application cycle of the ICANN Grant Program.”⁷⁹ Upon the successful conclusion of the processes outlined in that Resolution, “the Board intends to take a further resolution accepting [the] updated Recommendation 7 and directing full implementation as made possible through the Fundamental Bylaws Amendment.”⁸⁰ In other words, the Board has already “remanded” Recommendation 7 to the former CCWG-AP Chartering Organizations,⁸¹ and made approval of the initial ICANN Grant Program applications “dependent” on the completion of both “the Chartering Organizations’ updating of the CCWG-AP Recommendation 7” and “full implementation” of the Fundamental Bylaws Amendment process.⁸² That result aligns with and effectuates the relief sought by the Requestor, and therefore Request 23-2 is now moot.

Accordingly, and as indicated in the reasons detailed above, the Requestor’s challenge to the ICANN Board’s approval of the 26 October 2023 Resolutions is not sufficiently stated; therefore, the BAMC summarily dismisses this claim.

B. The Requestor’s Challenge to Specific ICANN Staff and Board Actions During the Course of the CCWG-AP’s Work Was Not Timely Filed.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ As previously noted, following the completion of its work in finalizing and issuing its Final Report, the CCWG-AP was dissolved on 23 July 2020. See <https://community.icann.org/display/CWGONGAP/CCWG+Charter> (“The CCWG shall be dissolved following the completion of its work . . .”). In its Resolution 2024.03.07.03, the Board requested that the Chartering Organizations to the now-dissolved CCWG-AP “updat[e] [] the CCWG-AP Recommendation 7.” <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-07-03-2024-en>.

⁸² *Id.* Additionally, as it explained in Resolution 2024.03.07.03, upon successful completion of those processes, “the Board intends to take a further resolution accepting updated Recommendation 7 and directing full implementation as made possible through the Fundamental Bylaws Amendment,” which “is expected to result in restricting any person or entity (whether an applicant or third party) from using an ICANN accountability mechanism to challenge a decision on an individual grant application.” *Id.* Where the Requestor alleged a speculative future harm from any “delay, encumber[ing] and/or terminat[ion of] pledged grant payments to successful applicants upon challenges (utilizing the Accountability Mechanisms) from non-applicants,” Request 23-2, § 3 at Pg. 6, the Board has already foreclosed such a possibility through its adoption of Resolution 2024.03.07.03.

The Requestor also seeks reconsideration of certain Staff and Board actions during the course of the CCWG-AP's work that lead up to the 26 October 2023 Resolutions:

- “(a) the ICANN Board’s public comment of 6 December 2018 on the Initial Report of the [CCWG-AP],”
- “(b) the organization of the public comment phase on the Proposed Final Report of the [CCWG-AP],” and
- “(c) the ICANN Board Resolutions 2022.06.12.13 to 2022.06.12.16.”⁸³

As to Staff actions, a reconsideration request 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.”⁸⁴ As to Board actions, a reconsideration request must be filed “within 30 days after the date on which information about the challenged Board action is first published in a resolution” unless not accompanied by a rationale, in which case “the request must be submitted within 30 days from the initial posting of the rationale.”⁸⁵

The Requestor’s challenge of “the ICANN Board’s public comment of 6 December 2018 on the Initial Report of the [CCWG-AP]”⁸⁶ is untimely. The Requestor is referring to the fact that the Board’s liaisons to the CCWG-AP provided Board input on the CCWG-AP’s work through a submission during the public comment phase of the Final Report.⁸⁷ To the extent the Board’s input during the public comment process is considered a Board action under the reconsideration process, the action occurred in 2018, significantly more than 30 days before the submission of Request 23-2.

⁸³ Request 23-2, § 3 at Pgs. 2-3.

⁸⁴ Bylaws § 4.2(g)(i)(B).

⁸⁵ *Id.* § 4.2(g)(i)(A)

⁸⁶ Request 23-2, § 3 at Pg. 2.

⁸⁷ <https://mm.icann.org/pipermail/comments-new-gtld-auction-proceeds-initial-08oct18/attachments/20181206/222b0ddf/ICANNBoardsubmissiontoCCWG-APPublicCommentonInitialReport6Dec2018.pdf>.

The Requestor also challenges “the organization of the public comment phase on the Proposed Final Report of the [CCWG-AP].”⁸⁸ As to that Staff action, the public comment period on the Final Report ended on 14 February 2020, and ICANN Staff published its Report of Public Comment Proceedings on 25 February 2020.⁸⁹ Because Request 23-2 was submitted more than 30 days after the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action, it is untimely.

Finally, the Requestor challenges “the ICANN Board Resolutions 2022.06.12.13 to 2022.06.12.16.”⁹⁰ As noted above, the Board’s rationale to those resolutions was published on 13 June 2022, which is more than 30 days before the Requestor submitted Request 23-2. Request 23-2 is therefore untimely.

C. The Requestor’s Challenge to Actions and Inactions Involving the Implementation of the ICANN Grant Program Was Not Sufficiently Stated.

Finally, the Requestor generally seeks reconsideration of “the actions and inactions involving the implementation of the ICANN Grant [] Program.”⁹¹ The Bylaws require that a reconsideration request identify the specific Board or Staff actions or inactions being challenged.⁹² The Requestor, in requesting reconsideration of “actions and inactions involving the implementation of the ICANN Grant [] Program,”⁹³ has failed to state which particular Board or Staff actions or inactions it seeks to challenge, and, without identifying any Board or Staff action or inaction, has not stated how the Requestor was or may be materially or adversely affected. If it were otherwise, then any requestor may generally allege a violation of a Bylaws

⁸⁸ Request 23-2, § 3 at Pgs. 2-3.

⁸⁹ <https://www.icann.org/en/public-comment/proceeding/proposed-final-report-of-the-new-gtld-auction-proceeds-cross-community-working-group-23-12-2019>; <https://www.icann.org/en/system/files/files/report-comments-new-gtld-auction-proceeds-final-25feb20-en.pdf>.

⁹⁰ Request 23-2, § 3 at Pg. 3.

⁹¹ *Id.*

⁹² Bylaws §§ 4.2(c), 4.2(g).

⁹³ Request 23-2, § 3 at Pg. 3.

provision or established ICANN policy as to any course of conduct taken or not taken by the Board or Staff without meeting the timing requirements for seeking reconsideration, and without satisfying the separate “adversely affected” requirement.

D. The BAMC Recommends that the Board Continue Its Dialogue with the ICANN Community.

The BAMC recognizes the years-long efforts to coordinate a community dialogue to give inputs to the ICANN Board on uses for auction proceeds. The BAMC further acknowledges the balance the CCWG-AP was trying to achieve through implementation of the ICANN Grant Program while upholding ICANN’s accountability and ensuring that auction proceeds funds are used toward grants. The BAMC values the concerns raised by the Requestor in Request 23-2. The BAMC notes that in its action on 21 January 2024 to initiate a Fundamental Bylaws Amendment process to Article 4, Section 4.1, and in its 7 March 2024 Resolution regarding implementation of that Fundamental Bylaws Amendment process, the Board took the Requestor’s concerns into account, understanding that the Board’s action is intended to achieve the same result contemplated by the Requestor. Specifically, Resolution 2024.03.07.03 requires that the “approving [of] a slate of successful [ICANN Grant Program] applications [be] dependent on” (1) “the Chartering Organizations’ updating of the CCWG-AP Recommendation 7,” and (2) “successful completion of the Fundamental Bylaws Amendment process.”⁹⁴ Accordingly, notwithstanding this Summary Dismissal of Request 23-2, the BAMC recommends that the Board continue to participate in a dialogue with the broader ICANN community to discuss the concerns raised in Request 23-2, including through the Fundamental Bylaws Amendment process outlined by the Board in its recent adoption of Resolution 2024.03.07.03.

⁹⁴ <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-07-03-2024-en>.

V. Conclusion

For the foregoing reasons, the BAMC concludes that Request 23-2 does not meet the requirements for bringing a reconsideration request, and therefore it is summarily dismissed. Further, as noted above, Request 23-2 is moot as the Board has acknowledged the concerns raised by the Requestor and has effectuated the Requestor's sought-after relief by initiating a Fundamental Bylaws Amendment process to limit access to ICANN's accountability mechanisms in specific circumstances, engaging with the community about the concerns raised in Request 23-2, and adopting Resolution 2024.03.07.03.⁹⁵ This Summary Dismissal is strictly limited to the preliminary procedural assessment of whether Request 23-2 has sufficiently stated a reconsideration request and does not reflect a conclusion as to its merits. A substantive review of the merits of the Requestor's claims is beyond the scope of this procedural evaluation. Notwithstanding this Summary Dismissal of Request 23-2, the BAMC recommends that the Board continue to participate in a dialogue with the broader ICANN community to discuss the concerns raised in Request 23-2.

⁹⁵ See *id.*; *supra* § II at Pgs. 12-13; § IV.A at Pgs. 18-19.