

**SUMMARY DISMISSAL
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 21-1
16 APRIL 2021**

The Requestors, Dot Hotel Limited and Domain Venture Partners PCC Limited, seek reconsideration of the ICANN Board’s and ICANN staff’s approval of a change of control request from the registry operators owned and controlled by Afilias, Inc. (Afilias) related to Afilias’s proposed merger with Donuts Inc. (Donuts) (the Afilias/Donuts Transaction).¹ The Requestors claim that this approval was inconsistent with various ICANN policies, procedures, and Bylaws, and that the Requestors were harmed by ICANN’s actions.²

I. Brief Summary.

The Requestors are an applicant for the .HOTEL generic top-level domain (gTLD) and a company that controls that applicant (and 16 new gTLD registry operators). They seek reconsideration of ICANN’s approval of the Afilias change of control request, which occurred as part of the Afilias/Donuts Transaction.³ The Requestors claim that ICANN’s approval of the Afilias change of control request violated the ICANN Bylaws and Core Values of non-discriminatory treatment, transparency, and the requirement to seek broad informed participation in all levels of policy development and decision-making. The Requestors also allege that the challenged action differed from the process by which ICANN evaluated change of control requests related to the proposed acquisition of Public Interest Registry by Ethos Capital in 2020 (PIR/Ethos Transaction).⁴

¹ See Request 21-1.

² See *id.* § 8, at 7–11.

³ See *id.* § 6, at 4–6.

⁴ See *id.* § 6, at 4–6 and § 8, at 7–11

The Requestors claim that they have been materially affected by the challenged action because the Afilias/Donuts Transaction “results in Donuts owning two competing applications in the .Hotel new gTLD contention set,”⁵ including the prevailing community application for .HOTEL. The Requestors also suggest they may be harmed because ICANN might in the future let the prevailing community applicant for .HOTEL operate it as an open registry.⁶ The Requestors assert without explanation that this would be unfair to them, because they invested effort and money in hopes of operating .HOTEL themselves as an open TLD, but the .HOTEL contention set was resolved in favor of a community applicant that prevailed in Community Priority Evaluation (CPE).⁷ Finally, the Requestors vaguely assert that ICANN’s “erratic and incoherent handling of the transaction,” *i.e.*, the approval of the change request, is confusing and impacts their ability to strategically plan their business.⁸

Article 4, Section 4.2(k) of the ICANN Bylaws provides that upon receipt of a reconsideration request, ICANN’s Board Accountability Mechanisms Committee (BAMC) is to review the request “to determine if it is sufficiently stated.”⁹ The BAMC has evaluated Request 21-1 under this standard and concludes that it is not sufficiently stated. The Requestors do not sufficiently state how they are materially affected by the actions or inaction that they seek to challenge, because the Requestors do not allege that the approval of the Afilias change of control request had or will have any adverse impact or harm on them. The BAMC therefore summarily dismisses Request 21-1.¹⁰

⁵ *See id.* § 6, at 4.

⁶ *See id.*

⁷ *See id.*

⁸ *See id.* § 7, at 6.

⁹ ICANN Bylaws, 28 November 2019, Art. 4, § 4.2(k).

¹⁰ A substantive review of the merits of the Requestors’ claims is beyond the scope of this Determination. The BAMC’s conclusion is limited to only the preliminary procedural assessment of whether the Requestors’ claims meet the requirements for bringing a reconsideration request.

II. Facts.

A. Background Facts.

1. The Relevant Parties.

Requestor Dot Hotel Limited is one of seven applicants for .HOTEL.¹¹ Requestor Domain Venture Partners PCC Limited states that it “control[s]” Dot Hotel Limited, along with 16 new gTLD registry operators.¹²

The Requestors seek reconsideration of ICANN’s approval of a change of control request submitted by the registry operators owned and controlled by Afilias in connection with the Afilias/Donuts Transaction. The Afilias registry business included ownership interests in the registry operators of gTLDs such as .INFO, .GLOBAL and .MOBI, among others.¹³ Afilias also owned an interest in HOTEL Top-Level-Domain S.a.r.l (HTLD), the community applicant for .HOTEL, and is identified in HTLD’s application as the back end provider of registry services for .HOTEL.¹⁴ HTLD participated in CPE for its .HOTEL application and prevailed. As a result, HTLD prevailed in the .HOTEL contention set.¹⁵ The .HOTEL contention set is currently on hold pending resolution of an accountability mechanism.¹⁶

Donuts is the ultimate parent company of two gTLD registry operators, Dog Beach LLC and Binky Moon LLC. Collectively Donuts and its subsidiaries operate 242 gTLDs, and support 4.3 million domains under management (DUMs) across its portfolio of TLDs. Donuts also owns

¹¹ Request 21-1, § 6, at 4.

¹² *Id.*

¹³ See <https://donuts.news/donuts-inc-to-acquire-afilias-inc>.

¹⁴ See New gTLD Application Submitted to ICANN by: HOTEL Top-Level-Domain S.a.r.l, <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1562?t:ac=1562>.

¹⁵ See <https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

¹⁶ See <https://gtdresult.icann.org/applicationstatus/contentionsetdiagram/51>.

ICANN accredited registrar Name.com, which supports 2.3 million DUMs. Donuts submitted a standard application for the .HOTEL string through its subsidiary Spring McCook, LLC.¹⁷

2. The Afilias/Donuts Transaction and the Afilias Change of Control Request.

On 19 November 2020, Donuts announced that it had entered into an agreement to purchase Afilias.¹⁸ As a result of the proposed merger, Afilias (and certain of its subsidiaries, including its registry operators) would become subsidiaries of Donuts.¹⁹ On that same day, ICANN org received a change of control request for the four registry operators owned and controlled by Afilias, namely Afilias Limited, Dot Global Domain Registry Ltd., Monolith Registry LLC, and Global Website TLD Asia Limited. ICANN org did not receive any change request from HTLD, the Afilias-controlled applicant for .HOTEL.

In accordance with Section 7.5 of the applicable registry agreements,²⁰ ICANN was required to either approve or withhold consent to the proposed changes of control of the registry operators or request additional information within 30 days. ICANN thoroughly evaluated the Afilias change of control request in accordance with Section 7.5 of the applicable registry agreements. The change of control review process included an assessment of key issues related to the continued security and stability of the affected top-level domains, and ongoing compliance with registry operator policies, including review of financial resources, operational and technical capabilities, the transaction structure, background screening and other components.

¹⁷ See <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/722?t:ac=722>.

¹⁸ See <https://donuts.news/donuts-inc-to-acquire-afili-as-inc>

¹⁹ See *id.*

²⁰ See <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.html#article7.5>.

ICANN org briefed the ICANN Board on its evaluation process and recommended action to move forward with the request. At the Special Meeting of the ICANN Board on 17 December 2020, the Board noted:

the Afilias change of control approval request has been discussed by the Board, and that the ICANN President and CEO, or his designee(s), has the support of the Board to move forward on the request.²¹

The Board did not take a resolution on the matter.²² Following the Board meeting, ICANN org approved the change of control request. The Afilias/Donuts Transaction closed on 29 December 2020.²³

3. The Reconsideration Request

On 4 February 2021, the Requestors submitted Request 21-1, challenging ICANN's actions in connection with the Afilias/Donuts Transaction.²⁴ Specifically, the Requestors assert: (a) that ICANN violated the Applicant Guidebook by allowing Donuts to own more than one application for .HOTEL as a result of the Afilias/Donuts Transaction;²⁵ (b) that as a result of the Afilias/Donuts Transaction, ICANN may at some future date not require HTLD to adhere to the community policies and restrictions within its Community Application for .HOTEL;²⁶ (c) that the process by which ICANN approved the Afilias change of control request was inconsistent with the process by which ICANN evaluated change of control request related to the PIR/Ethos Transaction;²⁷ (d) that the process by which ICANN approved the Afilias change of control

²¹ Minutes | Special Meeting of the ICANN Board (17 Dec. 2020), <https://www.icann.org/resources/board-material/minutes-2020-12-17-en#2.c>.

²² *Id.*

²³ See <https://afilias.info/news/2020/12/29/donuts-acquires-afilias>.

²⁴ Request 21-1.

²⁵ *Id.* § 6, at 4.

²⁶ *Id.*

²⁷ *Id.* § 6, at 5–6; see also Approved Board Resolutions | Special Meeting of the ICANN Board (30 Apr. 2020), <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>.

request was inconsistent with the ICANN Board’s rationale in denying Request for Reconsideration No. 20-1, relating to ICANN org’s review of change of control requests related to the PIR/Ethos Transaction;²⁸ and (e) that ICANN’s approval of the Afilias change of control request violated the Bylaws requirements and Core Values of non-discriminatory treatment, transparency, and the need to seek broad informed participation in all levels of policy development and decision-making.²⁹

The Requestors assert that they are adversely affected by the actions they challenge in three ways. First, they assert that the Afilias/Donuts Transaction resulted in Donuts “owning two competing applications in the .Hotel new gTLD contention set”—HTLD’s successful community application, and a standard application by a Donuts subsidiary—which the Requestors assert is “unfair” to them and indicative of collusion.³⁰ Second, the Requestors assert that as a result of the Afilias/Donuts Transaction, HTLD may attempt to renege on the community commitments it made in connection with its community priority application for .HOTEL, which the Requestors assert would likewise be “unfair” to them.³¹ Third, the Requestors assert that ICANN’s standards for reviewing change of control requests are “confusing and unpredictable,” and that this “adversely impacts [the Requestors’] ability to strategically plan their business.”³²

B. Relief Requested.

The Requestors ask ICANN org to:

1. Provide a “complete, published rationale for” ICANN org’s approval of the Afilias change of control request related to the Afilias/Donuts Transaction;

²⁸ *Id.* § 8, at 9.

²⁹ *Id.* § 8, at 8–9 (citing ICANN Bylaws, 28 Nov. 2019, Art. 1 §§ 1.2(a)(v), (b), Art. 2 § 2.3, Art. 3 § 3.1).

³⁰ *Id.* § 6, at 4.

³¹ *Id.*

³² *Id.* § 6, at 6.

2. Develop and publish a clear policy governing the review of “registry combination transactions,” including “clearly defined criteria” and a “clearly defined process to assess that criteria”;
3. Provide a “complete, published rationale” for the “basis for allowing Donuts to own or control two applications in the same gTLD contention set for the .hotel string”; and
4. Either “terminate the HTLD Community Application” for .HOTEL and resolve the contention set among the standard applicants, or “guarantee that ICANN will enforce the promises that HTLD made” as part of its community application.³³

III. Issue.

The issue is whether Request 21-1 meets the requirements for bringing a reconsideration request in accordance with the reconsideration criteria set forth in the Bylaws.

IV. The Relevant Standards For Reconsideration Requests.

Articles 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 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
- (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.”³⁴

Pursuant to Article 4, Section 4.2(k) of the Bylaws, the BAMC conducts a procedural evaluation upon its receipt to determine if the claims meet the requirements for bringing a reconsideration request.³⁵ The BAMC may summarily dismiss a reconsideration request if it

³³ *Id.* § 9, at 11.

³⁴ ICANN Bylaws, 18 June 2018, Art. 4 §§ 4.2(a) and (c).

³⁵ *Id.* at § 4.2(k).

determines the request: (i) does not meet the requirements for filing reconsideration requests under the Bylaws; or (ii) is frivolous.³⁶

V. Analysis and Rationale.

In evaluating whether a reconsideration request is sufficiently stated, the BAMC considers the following factors: (1) whether the reconsideration request is timely; and (2) whether the Requestors' claims "meet the requirements for bringing a reconsideration request."³⁷ The BAMC concludes that while Request 21-1 is timely, it does not meet the requirements for bringing a reconsideration request, because the Requestors fail to show that they are "person[s] or entit[ies] materially affected by" or "adversely affected by" the actions or inactions that they seek to challenge.³⁸ The BAMC therefore concludes that Request 21-1 is not sufficiently stated and summarily dismisses Request 21-1.³⁹

A. Request 21-1 Is Timely.

Pursuant to ICANN's Bylaws, a reconsideration request challenging staff action must be submitted "within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action,"⁴⁰ and a reconsideration request challenging Board action must be submitted "within 30 days after the date on which information about the challenged Board action is first published in a resolution."⁴¹

Afilias publicly announced the closing of the Afilias/Donuts Transaction on 29 December 2020,⁴² more than 30 days before the Requestors submitted Request 21-1 on 4 February 2021.

³⁶ *Id.*

³⁷ *Id.*, Art. 4, § 4.2(k); *see also id.* § 4.2(e)(ii) (the BAMC has the power to "[s]ummarily dismiss insufficient or frivolous Reconsideration Requests").

³⁸ *Id.* Art. 4, § 4.2(a), (c).

³⁹ *Id.* Art. 4, § 4.2(l).

⁴⁰ *Id.* Art. 4, § 4.2(g)(i)(B).

⁴¹ *Id.* § 4.2(g)(i)(A).

⁴² *See* <https://afilias.info/news/2020/12/29/donuts-acquires-afilias>.

But the Requestors assert that they did not learn of ICANN’s approval of the Afilias change of control request until one week later, on 5 January 2021, when the Preliminary Report of the ICANN Board’s 17 December 2020 Special Meeting was published.⁴³ The Requestors submitted Request 21-1 exactly thirty days after that, on 4 February 2021. The BAMC therefore concludes that Request 21-1 is timely.

B. The Requestors Do Not Have Standing.

Request 21-1 challenges ICANN’s approval of Afilias’s change of control request related to the Afilias/Donuts Transaction.⁴⁴ The Requestors were not parties to the Afilias/Donuts Transaction nor did they have any direct interest in it. The Requestors assert that they were nevertheless “adversely affected” by ICANN’s approval of the change of control request on three grounds, each of which the BAMC concludes is inadequate to sufficiently state a material harm to survive procedural evaluation. As such, the Requestors do not satisfy the standing requirements for bringing a reconsideration request.

First, the Requestors contend that they were adversely affected by the Afilias/Donuts Transaction because of its presumed effect on the .HOTEL gTLD contention set.⁴⁵ Specifically, the Requestors complain that the Afilias/Donuts Transaction “results in Donuts owning two competing applications in the .Hotel new gTLD contention set,” in which Requestor Dot Hotel Limited is also an applicant.⁴⁶ The Requestors argue that this “indicates collusion among applicants within a contention set,” and the Requestors assert that they “are adversely affected by that collusion,”⁴⁷ although they do not explain how they are adversely affected.

⁴³ Request 21-1, §§ 4, 5, at 3.

⁴⁴ See Request 21-1.

⁴⁵ *Id.* § 6, at 4.

⁴⁶ *Id.*

⁴⁷ *Id.*

The Requestors’ assertions that they are adversely affected based on the .HOTEL gTLD contention set fall short of the necessary showing. The Requestors do not explain *how* they are “adversely affected” by Donuts’ ownership of two .HOTEL gTLD applications. Nothing in the Applicant Guidebook prohibits a gTLD applicant from submitting both a community priority application and a standard application for the same gTLD,⁴⁸ and other applicants have done so previously.⁴⁹ And in any event, HTLD’s application prevailed in the CPE, and thus prevailed in the .HOTEL contention set.⁵⁰ While delegation of .HOTEL is on hold pending resolution of an Independent Review Process (IRP) proceeding, the Requestors provide no explanation of how, no matter how that proceeding may be resolved, the Afilias/Donuts Transaction could possibly prejudice the Requestors with respect to .HOTEL.

Second, the Requestors express concern that ICANN may in the future allow HTLD to violate the “Community policies and restrictions outlined in HTLD’s Community Application and subsequent public commitments” related to .HOTEL, and that HTLD may instead “operate an open registry.”⁵¹ The Requestors explain that this would be “unfair” because they and other standard applicants for .HOTEL “invested vast effort and money in hopes to operate such an open registry via their pending new gTLD applications for .hotel.”⁵² The Requestors’ alleged concern is based on an unsupported hypothetical future “inaction,” that ICANN might not enforce the contractual commitments made in HTLD’s community application that would be included in a registry agreement with HTLD. This hypothetical “inaction” by ICANN, even if it ever came to pass, has nothing to do with the action that Request 21-1 challenges—the approval

⁴⁸ See generally New gTLD Applicant Guidebook (4 June 2012),

<https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>.

⁴⁹ See Contention Set Status, <https://gtldresult.icann.org/applicationstatus/stringcontentionstatus> (search “MERCK”, “CPA”, “WEBS”, and “SHOP”)

⁵⁰ See Contention Set Status, <https://gtldresult.icann.org/applicationstatus/stringcontentionstatus> (search “HOTEL”).

⁵¹ Request 21-1, § 6, at 4.

⁵² *Id.*

of the Afilias change of control request—and therefore the Requestors have not shown, because they cannot, that they are adversely affected by *the challenged action*.

Third, the Requestors assert that they are adversely affected because ICANN’s approach to reviewing the Afilias change of control request was inconsistent with ICANN’s evaluation process for the PIR/Ethos transaction last year, and that this “is confusing and unpredictable to [Requestors] and other stakeholders. Thus, it adversely impacts their ability to strategically plan their business.”⁵³ In particular, the Requestors assert that as a result of this alleged inconsistency, they “ha[ve] no reasonable ability to know what process or criteria ICANN will use in deciding whether to approve or reject any sort of acquisition agreement that [Requestors] and/or [Requestors’] competitors or co-venturers may wish to enter in the future.”⁵⁴

This is an assertion of a purely procedural violation—the Requestors assert that the process by which ICANN reviewed the Afilias change of control request harmed them by creating uncertainty, even though the Requestors have not shown, because they cannot show, any harm from the outcome of that procedure, namely, ICANN’s decision to approve the requests. An IRP Panel recently rejected a very similar argument as insufficient to confer standing. In *Namecheap v. ICANN*, Namecheap contended that the process by which ICANN reviewed the PIR/Ethos transaction had adversely affected Namecheap due to ICANN’s alleged lack of transparency, even though Namecheap could not show any harm from the ultimate decision.⁵⁵ As the Panel explained, an “alleged procedural violation” such as lack of transparency does not provide standing unless it “actually culminated in the adverse decision that the claimant was seeking to overturn.”⁵⁶ The Requestors, however, fail to show that ICANN’s review of the

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Procedural Order No. 8, ¶ 32, *Namecheap v. ICANN*, No. 01-20-0000-6787 (10 Mar. 2021).

⁵⁶ *Id.*

Afilias change of control request culminated in an “adverse decision” as would be required to support standing. While the Requestors are evidently unhappy with ICANN’s approval of the requests, they offer no showing that the approval itself had any adverse effect on them at all. Instead, the Requestors complain about the possibility of harm from other, future decisions by ICANN in hypothetical future change of control requests.⁵⁷ And as the same IRP Panel explained, uncertainty about “[h]arm or injury flowing from possible future violations by the ICANN Board regarding change of control requests that are not presently pending and that may never occur does not confer standing.”⁵⁸

Fourth, and finally, the Requestors assert that they are harmed by ICANN’s alleged violation of its Core Values and Bylaws, because they “rel[y] on ICANN to fulfill its Bylaws commitments as referenced in the Applicant Guidebook, the gTLD Registry Agreements, and otherwise.”⁵⁹ But this diffuse interest in having ICANN follow its Bylaws cannot constitute the adverse impact required to support a reconsideration request; otherwise, anyone who has any relationship with ICANN would have standing to seek reconsideration of every action ICANN’s Board or staff takes, even actions having nothing to do with the requestor, based solely on an asserted interest in having ICANN follow its Bylaws. That, indeed, is ultimately what Requestors are doing here. Such a standard would improperly read the “adversely affected” requirement out of the Bylaws.

The reconsideration process is not intended to be a mechanism for requestors to challenge ICANN Board or staff actions or inactions that affect only third parties, and not the requestors themselves. To do so would undermine the purpose of the reconsideration process as set forth in

⁵⁷ Request 21-1, § 6, at 6.

⁵⁸ Procedural Order No. 8, ¶ 33, *Namecheap v. ICANN*, No. 01-20-0000-6787 (10 Mar. 2021).

⁵⁹ Request 21-1, § 6, at 6.

Article 4, Section 4.2(a) of the Bylaws, which is to provide “a process by which *any person or entity materially affected by* an action or inaction of the ICANN Board or Staff [to] request . . . the review or reconsideration of that action or inaction by the Board, . . . *to the extent that the Requestor has been adversely affected by*” Board or Staff action or inaction.⁶⁰ Because the Requestors fail to show that they were adversely affected by ICANN’s approval of the Afilias change of control request, they lack standing to pursue Request 21-1 challenging that approval. Accordingly, Request 21-1 does not meet the requirements for bringing a request for reconsideration.

VI. Determination.

A substantive review of the merits of the Requestors’ claims is beyond the scope of the BAMC’s procedural evaluation. The BAMC’s conclusion is limited to only the preliminary procedural assessment of whether the Requestors’ claims meet the requirements for bringing a reconsideration request. For the foregoing reasons, the BAMC concludes that Request 21-1 does not meet the requirements for bringing a reconsideration request and therefore summarily dismisses Request 21-1.

⁶⁰ ICANN Bylaws, Art. 4, § 4.2(a), (c) (emphasis added).