

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-1**

19 MARCH 2015

The Requester, Atgron, Inc, seeks reconsideration of ICANN staff's actions in processing the Requester's request, submitted in accordance with ICANN's Registry Services Evaluation Policy (the "RSEP"), to modify the registry services that the Requester provides pursuant to its registry agreement for the .WED gTLD (the "Registry Agreement").

I. Brief Summary.

The Requester is the registry operator for .WED. Pursuant to the RSEP, a registry operator must make a written request to ICANN if the operator wants to add to or modify the registry services that the operator currently provides. On 8 October 2013, the Requester submitted an RSEP request that, if approved, would allow the Requester to offer third-level domain name registrations in .WED (the "RSEP Request"). As part of its RSEP Request, the Requester submitted a list of approximately 11,000 second-level domain names for which it would offer third-level domain registrations.

Pursuant to the RSEP process, upon receipt of the RSEP Request, ICANN staff conducted and completed an administrative completeness check and a preliminary review for significant security, stability, or competition issues. ICANN staff informed the Requester that while the RSEP Request raised no significant security, stability, or competition issues, implementation of the request would require a material change to the Requester's Registry Agreement. ICANN staff also informed the Requester that because the amendment to the

Registry Agreement had the potential to substantially affect third parties, it would require a public comment period to obtain community input.

The public comment period on the proposed amendment to the Requester's Registry Agreement was open from 6 June 2014 through 9 July 2014 ("First Public Comment Period"). The public comments received identified concerns regarding the proposed new registry service, including, among other things, the circumvention of intellectual property protections embedded within the New gTLD Program (such as the Sunrise Period, the Uniform Domain Name Dispute Resolution Policy, and the Uniform Rapid Suspension System), a potential lack of adequate rights protection mechanisms at the third level, and minimal consultation with registrars and other constituents that may be affected by the proposed registry service. Based on the nature of the comments received, ICANN staff concluded that material revisions to the proposed amendment to the Registry Agreement were necessary to address those concerns. Accordingly, ICANN staff sent the Requester a revised proposed amendment to the Registry Agreement ("Revised Amendment").

ICANN staff also informed the Requester that because the Revised Amendment was materially different from the initial proposed amendment, an additional public comment period was necessary to receive public input on the Revised Amendment. The Requester objected to a public comment period for the Revised Amendment. ICANN staff informed the Requester that a public comment period for the Revised Amendment would be required if the Requester wished to proceed with its RSEP Request. Consequently, the Requester filed this Reconsideration Request, challenging ICANN staff's decision to require a public comment period for the Revised Amendment, and more generally expressing disagreement with the manner in which ICANN staff responded to its RSEP Request.

The Requester does not demonstrate any misapplication of any policy or procedure by ICANN staff, which responded to the RSEP Request in accordance with the RSEP and related established processes and procedures. The Requester’s substantive disagreement with ICANN staff’s determination that the Revised Amendment should be subject to public comment is not a basis for reconsideration. Since the Requester has failed to demonstrate that ICANN staff acted in contravention of any established policy or procedure in responding to the RSEP Request, the BGC concludes that Request 15-1 be denied.

II. Facts.

A. Background Facts.

The Requester is the registry operator for the .WED gTLD. Pursuant to the RSEP, a registry operator must make a written request to ICANN if it wants to add to or modify the registry services it provides.¹ On 8 October 2013, the Requester submitted an RSEP request that, if approved, would allow the Requester to offer third-level domain name registrations in .WED.² As part of its request, the Requester submitted a list of approximately 11,000 second-level domain names for which it proposed to offer third-level domain registrations (the “Second-Level List”).

The RSEP and the related RSEP workflow process (“Workflow”) call for ICANN staff to first conduct an administrative completeness check, which is then followed by a preliminary review of each RSEP request.³ In accordance with the RSEP process, on 5 February 2014, ICANN staff completed its administrative completeness check of the RSEP Request.

¹ See RSEP §§ 1, 2.4, available at <https://www.icann.org/resources/pages/policy-bd-2012-02-25-en>.

² See <https://www.icann.org/en/system/files/files/atgron-wed-request-08oct13-en.pdf>.

³ See RSEP §§ 2.3-2.4; see also RSEP Workflow, available at <https://www.icann.org/resources/pages/workflow-2012-02-25-en>. On 11 March 2015, an updated version of the RSEP Workflow was posted online. The updated version does not constitute a substantive change, but rather clarifies the existing workflow process, which has been established since the RSEP was adopted in 2006. The prior version of the RSEP Workflow is available at

On 14 February 2014, ICANN staff informed the Requester that ICANN had completed its preliminary review of the RSEP Request, and that ICANN had determined that the RSEP Request presented no significant competition, security, or stability issues. ICANN staff also informed the Requester that implementation of the request would require a material change to the Requester's Registry Agreement.⁴

On 16 May 2014, ICANN staff provided the Requester with a draft proposed amendment.⁵ ICANN also informed the Requester that because the amendment had the potential to substantially affect third parties, the amendment would be posted for public comment.⁶ On 23 May 2014, ICANN staff informed the Requester that the Second-Level List would be posted online for public comment. The Requester made no written objection, and orally confirmed to ICANN staff that the Second-Level List could be posted publicly. On 4 June 2014, ICANN again communicated with the Requester, reiterating that, pursuant to the RSEP, the RSEP Request would require an amendment to the Requester's Registry Agreement. ICANN also again indicated that it would publish the proposed amendment, together with the Second-Level List, for a public comment period.

The First Public Comment Period on the proposed amendment was open from 6 June 2014 through 31 July 2014.⁷ Both the proposed amendment and the Second-Level List were publicly posted. ICANN received three comments, including one from the ICANN Business

<https://www.icann.org/sites/default/files/unmanaged/en/registries/rsep/registry-process-flowchart-small-04aug09-en.png>.

⁴ *See id.*

⁵ Although the letter is erroneously dated 16 March 2014, it was in fact transmitted on 16 May 2014, as is reflected on ICANN's website. *See* <https://www.icann.org/resources/pages/rsep-2014-02-19-en>.

⁶ *Id.*

⁷ *See* <https://www.icann.org/public-comments/wed-amendment-2014-06-04-en>. This time period includes both the initial comments period, and the reply period.

Constituency and one from the Intellectual Property Constituency.⁸ Among other things, the comments expressed concerns regarding the circumvention of intellectual property protections embedded within the New gTLD Program (such as the Sunrise Period, the Uniform Domain Name Dispute Resolution Policy, and the Uniform Rapid Suspension System), a potential lack of adequate rights protection mechanisms at the third level, and minimal consultation with registrars and other constituents that may be affected by the Requester's proposed new registry service.⁹ The Requester had the opportunity to respond to the concerns that were raised during the First Comment Period, but did not do so.¹⁰

On 1 October 2014, ICANN staff sent the Requester a draft of a revised amendment to the Requester's Registry Agreement, which addressed the concerns raised during the First Public Comment Period. On 3 October 2014, in accordance with the public comment process, ICANN staff published a report of the public comments.¹¹ The report concluded that "[b]ased on the nature of the comments received, ICANN w[ould] propose changes to the current draft amendment to address the public comments that were received. As the revised amendment is anticipated to be a material change to the previously posted amendment, an additional comment period may be conducted to obtain additional community input and for transparency."¹² At that time, ICANN staff notified the Requester that the Revised Amendment would be posted for public comment.

On 23 October 2014, the Requester provided feedback on and requested further edits to the Revised Amendment proposed by ICANN staff. On 25 November 2014, ICANN staff sent

⁸ See Report of Public Comments, available at <https://www.icann.org/en/system/files/files/report-comments-wed-amendment-03oct14-en.pdf>.

⁹ *Id.* at Pgs. 2-3.

¹⁰ See <https://www.icann.org/public-comments/wed-amendment-2014-06-04-en>; Report of Public Comments.

¹¹ Report of Public Comments.

¹² *Id.* at Pg. 1.

the Requester a new version of the Revised Amendment, reflecting the Requester's feedback. On 2 December 2014, the Requester objected to a public comment period for the Revised Amendment. On 9 January 2015, ICANN staff informed the Requester that a public comment period would be required if the Requester wished to proceed with its RSEP Request. ICANN staff asked the Requester to let ICANN know by 23 January 2015 whether it intended to proceed with its RSEP Request.

On 15 January 2015, the Requester filed the instant Reconsideration Request, seeking reconsideration of ICANN staff's decision to require a public comment period for the Revised Amendment, and more generally expressing disagreement with ICANN staff's handling of its RSEP Request.

B. Relief Requested.

The Requester asks that its Registry Agreement be amended so that it be permitted to offer third-level domain name registrations in .WED.¹³ The Requester asks that ICANN allow the amendment without requiring a further public comment period.

III. Issues.

In view of the claims set forth in the Request, the issues for reconsideration are whether the ICANN staff violated established policy or procedure by:

1. Taking over 15 days to make a preliminary determination regarding the RSEP Request;¹⁴
2. Performing two preliminary reviews of the RSEP Request;¹⁵
3. Publishing the Requester's Second-Level List;¹⁶ and

¹³ Request, § 9, Pg. 5; *Id.*, § 3, Pg. 2.

¹⁴ Request, § 4, Pg. 3.

¹⁵ *Id.*

¹⁶ *Id.*

4. Determining that the Revised Amendment required an additional public comment period.¹⁷

IV. The Relevant Standards for Evaluating Reconsideration Requests and the RSEP.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹⁸ Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC¹⁹ agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

The RSEP sets out the procedure by which registry operators may seek to introduce new registry services and/or modify existing registry services.²⁰ Pursuant to the RSEP, a registry operator must make a written request to ICANN if it wants to add to or modify the registry services the operator provides.²¹ Upon receipt of that request, ICANN staff conducts an administrative completeness check to verify that the registry operator has provided ICANN with all of the necessary information to allow a thorough review and analysis of the RSEP request.²² Within 15 days of completing the administrative review, ICANN staff conducts a preliminary substantive review of the request, to determine whether the request raises any significant

¹⁷ *Id.*, § 3, Pg. 2; *Id.*, § 8, Pg. 4.

¹⁸ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN's Bylaws states 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:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

¹⁹ New gTLD Program Committee.

²⁰ See RSEP, available at <https://www.icann.org/resources/pages/policy-bd-2012-02-25-en>.

²¹ *Id.*, § 2.4, available at <https://www.icann.org/resources/pages/policy-bd-2012-02-25-en>

²² See RSEP Workflow.

competition, security, or stability issues.²³

Pursuant to the RSEP and the RSEP Workflow, if ICANN staff determines that the request raises no significant competition, security, or stability issues, the RSEP request is approved.²⁴ If the RSEP request is approved, ICANN staff must then determine whether implementation of the request requires a material change to the registry's Registry Agreement.²⁵ If ICANN staff determines that an amendment to the Registry Agreement is required, ICANN staff works with the registry operator to draft a proposed amendment.²⁶ ICANN staff then determines whether the proposed amendment requires public comment.²⁷ The RSEP Workflow specifically notes that public comment may be required where a proposed amendment would set a new precedent or have a substantial effect on ICANN or on third parties.²⁸ Whether or not the proposed amendment undergoes public comment, it is ultimately forwarded to the Executive Team²⁹ or to the ICANN Board for final approval.³⁰

V. Analysis and Rationale.

The Requester seeks reconsideration of ICANN staff's actions in processing its RSEP Request. However, the Requester demonstrates no basis for reconsideration.

1. ICANN Timely Completed its Preliminary Review of the RSEP Request.

The Requester claims that ICANN did not timely complete its preliminary review of the RSEP Request.³¹ As an initial matter, the BGC notes that ICANN staff completed its

²³ RSEP, § 2.4.A; *see also* RSEP Workflow.

²⁴ RSEP, § 2.4.D; *see also* RSEP Workflow.

²⁵ RSEP, § 2.4.D; *see also* RSEP Workflow.

²⁶ RSEP, § 2.4.D; *see also* RSEP Workflow.

²⁷ *See* RSEP Workflow.

²⁸ *See* RSEP Workflow.

²⁹ The President of the Global Domains Division has signing authority for amendments forwarded to the Executive Team.

³⁰ RSEP, § 2.4.D; *see also* RSEP Workflow.

³¹ Request, § 4, Pg. 3.

preliminary review on 14 February 2014, almost a year ago. The Bylaws require that reconsideration requests must be submitted within 15 days of ICANN staff's action or inaction.³² As such, this claim is time-barred.

In any event, the Requester's claim is unsupported. The RSEP Workflow calls for two separate staff reviews of an RSEP request: first an administrative completeness check, and then a preliminary review, which follows the administrative completeness check.³³ During the administrative completeness check, ICANN staff confirms that it has all the information necessary to allow a thorough review and analysis of the RSEP request. Only if the RSEP request passes the administrative completeness check will the RSEP request proceed to the preliminary review phase. During the preliminary review, ICANN staff assesses whether the request raises any significant competition, security, or stability issues, and if it does not, whether the proposed new or modified registry service, if approved, requires any amendment(s) to the applicable Registry Agreement.³⁴

Pursuant to the RSEP process, ICANN must conduct its preliminary review of an RSEP request within 15 days of completing its administrative completeness check.³⁵ Here, the Requester submitted its RSEP Request on 13 October 2013. ICANN staff completed its administrative completeness check of the RSEP Request on 5 February 2014. The extended period required to complete the administrative completeness check was due in part to the Requester repeatedly revising its Second-Level List. ICANN staff completed its preliminary review of the RSEP Request on 14 February 2014, less than 10 days after the completion of the

³² Bylaws, Art. IV, § 2.5.

³³ See RSEP Workflow.

³⁴ RSEP § 2.4(A); RSEP Workflow.

³⁵ RSEP § 2.4(A).

administrative completeness check. As such, the Requester has not demonstrated a basis for reconsideration with respect to the timeliness of the preliminary review of its RSEP Request.

2. ICANN Staff Did Not Perform Two Preliminary Reviews of the RSEP Request.

Citing two letters that it received from ICANN staff—one dated 14 February 2014, and a second transmitted on 16 May 2014³⁶—the Requester claims that ICANN staff improperly conducted two preliminary reviews of the RSEP Request. As a preliminary matter, the BGC notes that insofar as the Requester’s claim is based on actions taken almost eight months ago, it is time-barred.³⁷ In any event, the Requester’s claims are unsupported. ICANN staff conducted only one preliminary review, which was completed on 14 February 2014. During that review, ICANN staff “did not identify any significant competition, security or stability issues,” but determined that the RSEP Request did “require[] a modification to the .WED Registry Agreement”³⁸ ICANN staff subsequently corresponded with the Requester regarding the proposed amendment. Contrary to the Requester’s position, the 16 May 2014 letter does not establish that ICANN undertook a second preliminary review. Instead, the 16 May 2014 letter merely reiterated the findings of the preliminary review, stating, again, that:

ICANN’s preliminary review did not identify any significant competition or security and stability issues. The implementation of your proposal has the potential to substantially affect third parties and would require an amendment to the .WED Registry Agreement between Atgron, Inc. and ICANN (dated 01 October 2013). As a result, ICANN will post the amendment for public comment. ICANN looks forward to working with you on the proposed amendment that will be posted for public comment, and provides the attached amendment language to help facilitate discussions.³⁹

³⁶ Again, although this letter is erroneously dated 16 March 2014, it was in fact transmitted on 16 May 2014.

³⁷ Bylaws, Art. IV, § 2.5.

³⁸ Request, Attachment 1.

³⁹ *Id.*, Attachment 2.

The purpose of the letter was to forward the proposed amendment to the Requester, and to inform the Requester that the proposed amendment would be made available for public comment. It did not constitute a “second” preliminary review, as claimed by the Requester. The Requester therefore has not demonstrated a basis for reconsideration with respect to the preliminary review of its RSEP Request.

3. ICANN Staff Did Not Improperly Reveal Any of Requester’s Information.

The Requester claims that, in violation of the RSEP, ICANN staff revealed the Requester’s “confidential” information, specifically the Requester’s Second-Level List.⁴⁰ As a preliminary matter, the Second-Level List was publicly posted over seven months ago, on 4 June 2014, when the public comment period on the proposed amendment to the Requester’s Registry Agreement opened. As such, the Requester’s claim is time-barred.⁴¹

In any event, the Requester’s claim is unsupported. The RSEP provides that “[i]nformation provided by [a] Registry Operator and marked ‘CONFIDENTIAL’ shall be treated as confidential by ICANN.”⁴² However, the RSEP further provides that a registry operator “will not designate ‘CONFIDENTIAL’ information necessary to describe the purpose of the proposed Registry Service and the effect on users of the DNS.”⁴³

The Requester’s RSEP Request indicated that the Second-Level List was confidential. However, the Requester did not object when ICANN staff repeatedly informed it that the list would be published.⁴⁴ Here, publishing the Second-Level List was necessary to fully describe

⁴⁰ Request, § 4, Pg. 3.

⁴¹ Bylaws, Art. IV, § 2.5.

⁴² RSEP, § 2.4.B.

⁴³ *Id.*

⁴⁴ The BGC further notes that it is informed by Staff that oral confirmation was received for the publication of the list. Moreover, the BGC notes that although the Second-Level List was published over six months ago, the Requester did not object to the list’s publication until filing the instant Reconsideration Request.

the Requester's proposed new registry service and its potential effect on third parties, and to allow for meaningful public comment on the proposed amendment to the Requester's Registry Agreement. Without the list, the public would not have been able to determine whether the domain names the Requester proposed to offer for sale potentially raised intellectual property concerns. And in fact, during the public comment period, several comments specifically identified potentially problematic names that appeared on the list, including BEBE and FOREVER, which are trademarked in the United States.⁴⁵

Because the Second-Level List was "necessary to describe the purpose of the proposed Registry Service and the effect on users of the DNS,"⁴⁶ ICANN staff acted in accordance with the RSEP in publishing the list for public comment along with the first proposed amendment, and the Requester has not demonstrated a basis for reconsideration with respect to that publication.

4. ICANN's Determination that the Revised Amendment was Subject to Public Comment Does Not Contravene Any Established Policy or Procedure.

The Requester argues that ICANN staff improperly determined that the Revised Amendment should be made available for public comment.⁴⁷ The Requester does not dispute that the implementation of its RSEP Request required a material change to its Registry Agreement, or that the amendment first proposed was properly subject to public comment. The Requester instead takes issue with ICANN staff's determination that the Revised Amendment, drafted in response to the public comments received on the first proposed amendment, should also be published for public comment. In the Requester's view, no public comment period

⁴⁵ See Report of Public Comments, Pg. 2, available at <https://www.icann.org/en/system/files/files/report-comments-wed-amendment-03oct14-en.pdf>.

⁴⁶ RSEP, § 2.4.B.

⁴⁷ Request, § 3, Pg. 2; *Id.*, § 8, Pg. 4.

should be held because the Revised Amendment is not “materially” different from the first proposed amendment.⁴⁸

Pursuant to the RSEP Workflow, if ICANN staff determines that an RSEP Request raises no significant competition, security, or stability issues, it approves the request.⁴⁹ Once a request is approved, it is ICANN staff’s responsibility to determine whether the implementation of the request requires a material change to the registry’s Registry Agreement.⁵⁰ If an amendment is required, ICANN staff works with the registry operator to draft a proposed amendment.⁵¹ ICANN staff then determines whether the proposed amendment requires public comment.⁵² The RSEP Workflow specifically notes that public comment may be required where a proposed amendment would set a new precedent or have a substantial effect on ICANN or third parties, or on the DNS.⁵³ The proposed amendment, along with the report of public comments (if applicable), is ultimately forwarded to the Executive Team or to the ICANN Board for final approval.⁵⁴

ICANN staff followed that procedure in this case. After determining that the implementation of the RSEP Request required a material change to the Requester’s Registry Agreement, ICANN staff drafted a proposed amendment. ICANN staff determined that the proposed amendment had the potential to affect third parties and would therefore require public

⁴⁸ *Id.* The Requester also claims that the Revised Amendment is not “materially” different from its existing Registry Agreement. *Id.*, § 3, Pg. 2. Insofar as the Requester is arguing that ICANN staff violated established policy or procedure in determining that the RSEP Request required an amendment to the Requester’s Registry Agreement, section 2.1 of that agreement explicitly provides that “[i]n its reasonable discretion, ICANN may require an amendment to this Agreement reflecting the provision of any Additional Service which is approved pursuant to the RSEP.” See .WED Registry Agreement, § 2.1., available at <https://www.icann.org/sites/default/files/tlds/wed/wed-agmt-pdf-01oct13-en.pdf>.

⁴⁹ See RSEP Workflow.

⁵⁰ RSEP § 2.4.D; see also RSEP Workflow.

⁵¹ See RSEP Workflow.

⁵² See *id.*

⁵³ See RSEP Workflow.

⁵⁴ *Id.*

comment.⁵⁵ As such, once the Requester had an opportunity to provide feedback on the proposed amendment, the proposed amendment was posted for public comment.⁵⁶ When the public comments on the proposed amendment raised substantive concerns, including concerns regarding intellectual property protections, ICANN staff worked with the Requester to revise the proposed amendment to address those concerns. Finally, ICANN staff determined that the Revised Amendment was materially different than the original proposed amendment, because the Revised Amendment was materially different than the original proposed amendment, an additional public comment period was necessary to receive public input on the Revised Amendment.⁵⁷

The Requester points to no policy or procedure stating that revisions to proposed amendments are not themselves subject to public comment—such a rule would defeat the purpose of making a proposed amendment available for comment in the first place. Such a rule also would defeat ICANN’s intent to make its processing of RSEP requests a transparent process and ensure that the community has an opportunity to comment on registry agreement amendments that could affect ICANN, third parties, or the DNS. The Requester’s view that the Revised Amendment is not “materially” different from the initial proposed amendment (or its current agreement) represents substantive disagreement with the determination of ICANN staff, which is not a basis for reconsideration.

VI. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Request 15-1. As there is no indication that ICANN staff violated any ICANN policy or procedure with respect to its response to the RSEP

⁵⁵ See RSEP Workflow.

⁵⁶ See <https://www.icann.org/public-comments/wed-amendment-2014-06-04-en>.

⁵⁷ See *id.*

Request, Request 15-1 should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board (or NGPC) consideration is required.⁵⁸ As discussed above, Request 15-1 seeks reconsideration of a staff action or inaction. As such, after consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing of the BGC's determination, it notes that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days, unless impractical.⁵⁹ To satisfy the thirty-day deadline, the BGC would have to have acted by 15 February 2015. The BGC first considered this Request on 5 February 2015. After discussion, the BGC requested further details and clarification regarding the Registry Agreement change review process addressed in Request 15-1, and continued its discussion regarding Request 15-1 to the next BGC meeting. The first practical opportunity for the BGC to complete its review of this Request was on 19 March 2015.

⁵⁸ Bylaws, Art. IV, § 2.15.

⁵⁹ *Id.*, Art. IV, § 2.16.