

RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 14-37
4 SEPTEMBER 2014

Anschelika Smoljar, on behalf of iRegistry Ltd. (the “Requester”), seeks reconsideration of the NGPC’s¹ 30 July 2014 Resolution adopting the Name Collision Occurrence Management Framework.

I. Brief Summary.

The Requester is iRegistry, a domain name registry.

On 30 July 2014, the NGPC approved Resolutions 2014.07.30.NG01 – 2014.07.30.NG04 (the “Resolution”), which adopted the Name Collision Occurrence Management Framework (the “Framework”). The Framework sets forth procedures that registries must follow to prevent name collisions² from compromising the security or stability of the Internet. The Resolution “directs the [ICANN] President and CEO, or his designee(s), to take the necessary actions to implement” the Framework.³

On 13 August 2014, the Requester filed the instant Request seeking reconsideration of the NGPC’s Resolution. The Requester argues that the NGPC failed to sufficiently involve the public in its decision to adopt the Framework. The Requester contends that the Framework will

¹ New gTLD Program Committee.

² A name collision occurs when an attempt to resolve a name used in a private name space (e.g. under a non-delegated Top-Level Domain, or a short, unqualified name) results in a query to the public Domain Name System (“DNS”). See <https://www.icann.org/resources/pages/name-collision-2013-12-06-en>. When the administrative boundaries of private and public namespaces overlap, these name collisions may yield unintended or harmful results.

³ See Resolution, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>.

lead to confusion amongst registrants, leading to a lower volume of registrations, and thus adversely impact the Requester financially.

The BGC⁴ concludes there is no evidence that the NGPC's actions in adopting the Resolution support reconsideration. As discussed in further detail below, the Requester has not demonstrated that the NGPC failed to consider any material information or relied on false or inaccurate material information in passing the Resolution. As such, the Requester has not stated a proper basis for reconsideration.

II. Facts.

A. Background Facts.

1. Brief Background Regarding Name Collisions.

A name collision occurs when an attempt to resolve a name used in a private name space (e.g., under a non-delegated Top-Level Domain, or a short, unqualified name) results in a query to the public DNS.⁵ When the administrative boundaries of private and public namespaces overlap, name resolution may yield unintended or harmful results.⁶ The introduction of any new domain name into the DNS creates the potential for name collision. However, name collision has been discussed specifically in the context of the New gTLD Program, because the expansion of new gTLDs has brought renewed attention to the possibility that certain applied-for new gTLDs could be identical to name labels used in private networks.

Accordingly, in furtherance of ICANN's core values aimed at "[p]reserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet"

⁴ Board Governance Committee.

⁵ See <https://www.icann.org/resources/pages/name-collision-2013-12-06-en>.

⁶ For an analogy, consider calling for "Mary" in your office where there's only one "Mary", and then calling out "Mary" in a shopping mall and expecting that "office Mary" will respond. See FAQs, available at, <https://www.icann.org/resources/pages/name-collision-ro-faqs-2014-08-01-en>.

(Bylaws, Art. 1, § 2.1), on 15 March 2013, ICANN’s Security and Stability Advisory Committee (“SSAC”) published SAC057: SSAC Advisory on Internal Name Certificates.⁷ The report identified a Certificate Authority (“CA”) practice that, if widely exploited, could pose risks to the privacy and integrity of secure Internet communications. The SSAC advised ICANN to take immediate steps to mitigate the risks. The issues identified in SAC 057 are part of the more general category of name collision issues.

On 18 May 2013, the ICANN Board approved a resolution commissioning a study in response to the SSAC’s advice in SAC057.⁸

On 5 August 2013, ICANN released the study, prepared by Interisle Consulting Group, of the likelihood and potential consequences of collision between new public gTLD labels and existing private uses of the same strings.⁹

On 7 October 2013, ICANN introduced the New gTLD Collision Occurrence Management Plan (“Plan”), which permitted the use of an alternate path to delegation.¹⁰ As part of the Resolution adopting the Plan, the NGPC recommended “to the ICANN Board that it direct the ICANN President and CEO to develop a long term plan to manage name collision risks related to the delegation of new TLDs, and to work with the community to develop a long-term plan to retain and measure root-server data.”¹¹

⁷ See <https://www.icann.org/en/system/files/files/sac-057-en.pdf>.

⁸ See <https://features.icann.org/ssac-advisory-internal-name-certificates>.

⁹ See *Addressing the Consequences of Name Collisions*, available at <https://www.icann.org/news/announcement-3-2013-08-05-en>.

¹⁰ See *New gTLD Collision Occurrence Management Plan Frequently Asked Questions*, available at <https://www.icann.org/news/announcement-2013-12-03-en>.

¹¹ See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-10-07-en#1.a>.

In November 2013, ICANN engaged JAS Global Advisors LLC (“JAS”) to lead the development of the Framework, in cooperation with the community.¹²

From 26 February 2014 through 21 April 2014, ICANN implemented a public comment period where the community provided feedback on possible solutions to the name collision issue, including the issue of implementing a framework to manage and mitigate name collisions; ICANN received 28 comments, none of which were from the Requester.¹³

On 4 June 2014, after collection of community feedback, JAS released the final version of its Phase One Report on Mitigating the Risk of DNS Namespace Collisions.¹⁴

On 6 June 2014, SSAC published SAC066: SSAC Comment Concerning JAS Phase One Report on Mitigating the Risk of DNS Namespace Collisions, in which it offered advice and recommendations to the Board on the framework presented in the JAS Study and Name Collision Framework.¹⁵

On 30 July 2014, the NGPC approved Resolutions 2014.07.30.NG01 – 2014.07.30.NG04 (“Resolution”), which adopted the Framework. The Framework sets forth procedures that registries must follow to prevent name collisions from compromising the security or stability of the Internet. The Resolution “directs the [ICANN] President and CEO, or his designee(s), to take the necessary actions to implement” the Framework.¹⁶

On 4 August 2014, ICANN’s Global Domains Division issued each new gTLD registry operator a Name Collision Occurrence Assessment (“Assessment”), which identified which

¹² See <https://www.icann.org/resources/pages/name-collision-2013-12-06-en>.

¹³ See Report of Public Comments, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf>.

¹⁴ See JAS Report, *available at* <https://www.icann.org/en/system/files/files/name-collision-mitigation-study-06jun14-en.pdf>.

¹⁵ See <https://www.icann.org/en/system/files/files/sac-066-en.pdf>.

¹⁶ See Resolution, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>.

measures registries must take to avoid name collision issues, in accordance with the Framework.¹⁷

On 12 August 2014, ICANN presented a webinar providing an overview of the Framework specifically geared towards registry operators.¹⁸

While how to treat one category of names affected by the name collision issue is not yet part of the Framework, ICANN is in the process of gathering public input on this topic. Specifically, ICANN has opened a public comment forum on this particular issue, which will run from 25 August 2014 through 7 October 2014.¹⁹

2. Background Regarding The Request.

The Requester did not participate in the public comment forum ICANN implemented from 26 February 2014 through 21 April 2014, where the community provided feedback on possible solutions to the name collision issue.²⁰

On 27 July 2014, the Requester sent a letter to ICANN asking ICANN to “thoroughly evaluate” a proposal for addressing the problem of name collisions and providing five specific proposals as to the how the issue should be addressed. (Request, Ex. D.)

On 29 July 2014, ICANN acknowledged receipt of the Requester’s letter. (Request, Ex. E.)

On 30 July 2014, the NGPC approved the Resolution adopting the Framework.²¹

¹⁷ See Name Collision Occurrence Assessment, *available at* <http://newgtlds.icann.org/sites/default/files/agreements/name-collision-assessment-04aug14-en.pdf>.

¹⁸ See <https://www.icann.org/resources/pages/name-collision-2013-12-06-en>.

¹⁹ See Implementing Rights Protection Mechanisms in the Name Collision Mitigation Framework, *available at* <https://www.icann.org/public-comments/name-collision-rpm-2014-08-25-en>.

²⁰ See Report of Public Comments, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf>.

²¹ See Resolution, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>.

On 4 August 2014, the Requester received the Assessment via email. (Request, Ex. A.)

On 13 August 2014, the Requester filed the instant Request, seeking reconsideration of the NGPC's Resolution.

B. The Requester's Claims.

The Requester contends that reconsideration is warranted because the NGPC, in approving the Resolution:

1. "Failed to take material input from the community into account." (Request, § 8, Pg. 11); and
2. "[D]id not properly assess the implications of the [Resolution]." (*Id.*, § 8, Pg. 12.).

C. Relief Requested.

The Requester asks the Board to reverse the Resolution "or at least amend[]" it, and to then put the decision as to how to address name collisions "on hold" until the issues the Requester raises have "been solved." (Request, § 3, Pg. 3; *id.*, § 9, Pg. 18.) Specifically, the Requester asks that the implementation of the Framework "be harmonized across all gTLDs." (*Id.*, § 9, Pg. 18.)

III. Issues.

In view of the claims set forth in Request 14-37, the issues posed by the Requester are whether the NGPC:

1. Failed to consider material input from the community in approving the Resolution (Request, § 8, Pg. 11); and
2. Improperly underestimated the Resolution's potential negative consequences. (*Id.*, § 8, Pgs. 7-8.)

IV. The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in

accordance with specified criteria.²² (Bylaws, Art. IV, § 2.) Requester is challenging a Board action. A Board action may be subject to reconsideration where it was undertaken “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, where it was “taken as a result of the Board’s reliance on false or inaccurate material information.” (Bylaws, Art. IV, § 2.)

Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and in this case the NGPC agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws. Further, summary dismissal of a request for reconsideration is appropriate if the BGC recommends, and in this case the NGPC agrees, that the requesting party does not have standing because the party “had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable.” (Bylaws, Art. IV, § 2.9.)

V. Analysis and Rationale.

The Requester has not demonstrated that the Board failed to consider material information or relied on false or inaccurate material information in passing the Resolutions; therefore, reconsideration is not appropriate.

²² 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.

A. The Request Warrants Summary Dismissal.

Section 2.9 of Article IV of ICANN’s Bylaws permits the BGC to summarily dismiss a request for reconsideration if “the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action[.]” (Bylaws, Art. IV, § 2.9.) From 26 February 2014 through 21 April 2014, ICANN implemented a public comment period where the community provided feedback on the possible solutions, including a framework, to name collision issues.²³ The public comment forum was announced on ICANN’s website so as to provide notice to the community of its existence.²⁴ The forum generated 28 comments from a wide variety of stakeholders and community members.²⁵ The comments were used by JAS Global Advisors to modify the proposed framework, “provide a final report,” and also “for ICANN to provide a proposal based on input from the community” for the NGPC’s consideration.²⁶ Many concepts and procedures that the Requester discusses in the Request are discussed in the public comments, including the need for outreach and trainings related to any name collision proposals, block list timing, and controlled interruptions.²⁷

The Requester did not participate in the public comment forum, and has offered no justification, excuse or explanation for its decision to refrain from doing so. The only communication it claims to have had with ICANN regarding name collisions is a letter dated 27 July 2014, which was well after the public comment period had closed and mere days before the

²³ See Report of Public Comments, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf>.

²⁴ See Public Comment Invited: Implementing Rights Protection Mechanisms in the Name Collision Mitigation Framework, *available at* <https://www.icann.org/news/announcement-5-2014-08-25-en>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

NGPC approved the Resolution adopting the Framework.²⁸ Pursuant to Section 2.9 of Article IV of ICANN's Bylaws, and given that the public comment period here indisputably related to the Resolution, summary dismissal is warranted on the basis of the Requester's non-participation. However, in the interest of completeness, the BGC will nonetheless address the merits of the Request.

B. The NGPC Considered All Material Information.

The Requester's suggestion that the NGPC failed to consider material information is not accurate. In order to state a basis for reconsideration of a Board action, the Requester must demonstrate that the Board (or in this case the NGPC) failed to consider material information or considered false or inaccurate material information in adopting the Resolution. (Bylaws, Art. IV, § 2.2.) The Requester does not argue that the NGPC considered false or inaccurate material information, but it does claim that the NGPC failed to consider material information in two ways. First, the Requester claims that the NGPC did not sufficiently consult with the public prior to adopting the Resolution. Second, the Requester claims that the NGPC failed to consider how the Resolution will have material adverse effects on registries and internet users. Neither argument withstands scrutiny, and neither is grounds for reconsideration.

1. The NGPC Considered Public Comments Solicited During A Lengthy Public Comment Period.

The Requester claims the NGPC "failed to take material input from the community into account." (Request, § 8, Pg. 11.) Contrary to the Requester's claims, however, the NGPC did

²⁸ The Requester states that it sent a letter to the NGPC "well in advance" of the NGPC meeting, but that statement is wrong given the mere three days between the date of the letter and the 30 July 2014 NGPC meeting. (See Request, § 8, Pg. 9.)

consider feedback received in “the public comment forum”²⁹ that was open from 26 February 2014 through 21 April 2014. The Requester does not explain why it declined to participate in that forum. Had it participated, its views would have been included along with the 28 detailed comments that were submitted by various stakeholders and members of the public, including other registries.³⁰ The Resolution expressly notes that the NGPC took into account the 28 comments received via the forum.³¹ The Requester cannot reasonably claim, then, that the NGPC did not consider public input before adopting the Resolution. The Requester nonetheless complains that “the community-at-large were [*sic*] allowed to provide input until April 21, 2014, but not after that date.” (Request, § 8, Pg. 11.) Notably, however, the public comment period for this matter was actually longer than is required. Typically, public comment periods are open 21 days, and if comments are received during that time, there is a 21-day reply period.³² Here, the public comment period was open for 33 days, with a 21-day reply period. Moreover, ICANN facilitated an entire public session about the name collision issue at the London ICANN meeting on 23 June 2014 that provided yet another opportunity for public commentary and participation; the Requester again chose not to participate.³³

In sum, the Requester does not persuasively argue that the NGPC failed to consider material information in the form of public comments in adopting the Resolution, and therefore has not stated proper grounds for reconsideration on that basis. (Bylaws, Art. IV, § 2.2.)

²⁹ See Resolution, available at <https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf>.

³⁰ See Report of Public Comments, available at <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf>.

³¹ See Resolution, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>.

³² See <https://www.icann.org/resources/pages/how-2014-03-17-en>

³³ See Name Collision Presentation, London: ICANN 50, available at <https://london50.icann.org/en/schedule/mon-name-collision/presentation-name-collision-23jun14-en>.

2. The NGPC Considered All Material Information Relevant To The Resolution.

The Requester seeks reconsideration of the Resolution because it claims the NGPC “did not properly assess the implications of the decision.” (Request, § 8, Pg. 12.) The Requester’s main basis for this assertion is that the issues raised in its own 27 July 2014 letter were not expressly addressed in the “Rationale” section of the Resolution. This argument fails to provide a basis for reconsideration for two reasons.

First, the Resolution *does* take into account the substance of the information provided in the Requester’s 27 July 2014 letter; the NGPC simply reached a different conclusion than the Requester as to what the proper solution to name collision issues should be. The 27 July 2014 letter made five requests, all related to either the “RPM rules” or the Requester’s view that one common set of rules should apply to all gTLDs. (Request, § 8, Pg. 10 & Ex. D.) Despite Requester’s claims of disregard, the same issues raised in the 27 2014 July letter were all presented to the NGPC during the public comment period by other stakeholders and were addressed by the NGPC. The Resolution acknowledges that the community expressed – during the public comment period – concerns regarding the “interaction between the name collision block lists and intellectual property rights protection mechanisms.”³⁴ The NGPC also indicated that it considered the public comments that reference how the “name collision issue is creating an uneven competitive landscape” as well as other public comments that discussed the pros and cons of treating new gTLD operators differently from legacy operators.³⁵ And, finally, ICANN has already determined that the RPM issue requires further public comment before a decision can

³⁴ See Resolution, available at <https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf>.

³⁵ See Report of Public Comments, at Pg. 11, available at <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf>.

be made as to how to handle the issue. In fact, ICANN is currently soliciting comments, between 25 August 2014 and 7 October 2014, on the approach that should be taken “regarding the appropriate Rights Protection Mechanisms for release of SLD Block List names.”³⁶ In other words, the NGPC was not lacking any material information on the applicable issues, regardless of whether it specifically considered the Requester’s 27 July 2014 letter.

Second, the Requester’s disagreement with the substance of the Framework does not form the proper basis for reconsideration; here, only if the NGPC adopted the Resolution “without consideration of material information” is reconsideration warranted. (Bylaws, Art. IV, § 2.2.) As the Resolution makes clear, the NGPC considered independent, detailed studies discussing the name collision issue, including one prepared by JAS and one prepared by Interisle Consulting Group (which was in response to advice from the SSAC).³⁷ Further, the NGPC took into account advice from the SSAC before adopting the Resolution. The SSAC’s role is to “advise the ICANN community and Board on matters relating to the security and integrity of the Internet’s naming and address allocation systems.” (Bylaws, Art. XI, § 2.a.) In sum, the NGPC considered public comments, independent analytical reports, and advice from the relevant ICANN advisory committee. While the Requester complains that the NGPC “did not mention the letter” (that the Requester sent months after the public comment period had closed) and as such “did not properly address the implications of the decision” to approve the Framework, those allegations do not amount to a claim that the NGPC failed to consider any material information. As such, no reconsideration is warranted.

³⁶ See Implementing Rights Protection Mechanisms in the Name Collision Mitigation Framework, available at <https://www.icann.org/public-comments/name-collision-rpm-2014-08-25-en>

³⁷ See Resolution, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>.

As a final note, the Requester also claims reconsideration is warranted because “[t]here is no indication that the GAC³⁸ has been given the opportunity to provide feedback” to the JAS reports or the SSAC advice. (Request, § 7, Pg. 7) The GAC provides “advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.” (Bylaws, Art. XI, § 2.1.) That the GAC did not issue any formal advice related to how ICANN should address name collisions does not mean the NGPC failed to consider any material information. Had the GAC issued such advice, the ICANN Board would have considered it, as is required under ICANN’s Bylaws. (Bylaws, Art. XI, §§ 2.1.i, 2.1.j.) Further, in July 2013, the GAC Durban Communiqué did advise that the Board “[a]s a matter of urgency consider the recommendations contained in the SSAC Report on Dotless Domains (SAC053) and Internal Name Certificates (SAC057),” and the latter involved name collision issues.³⁹ The Board did consider the SSAC’s advice, and in turn, put the Framework in place.

Once again, because the Requester does not persuasively argue that the NGPC failed to consider material information in adopting the Resolution, it has not stated proper grounds for reconsideration. (Bylaws, Art. IV, § 2.2.)

C. Reconsideration Is Not Warranted On the Grounds That The Requester Or Others Might Be Confused By The Framework.

The Requester complains that the NGPC failed to consider the supposed fact that the “overall majority” of registrants are not aware of the name collision problem and will therefore be “confus[ed] about the availability of domain names in general.” (Request, § 7, Pg. 6.)

³⁸ Government Advisory Committee.

³⁹ See GAC Communiqué Issued at ICANN 47, available at <https://www.icann.org/news/announcement-2013-07-18-en>; SAC057, available at <https://www.icann.org/en/system/files/files/sac-057-en.pdf>.

However, the NGPC clearly did consider information concerning the importance of educating the public about the Framework, because the Resolution dedicates an entire provision (section B.6) to “Informational Materials” and requires ICANN to “produce informational materials as needed . . . [and] work to make this information available to parties potentially affected by name collision.”⁴⁰ Even though the Framework was adopted less than one month ago, ICANN has already posted on its website a wide variety of informational materials, including webinars geared towards registry operators, handbooks and videos for IT professionals, and a “Frequently Asked Questions” page regarding the Framework.⁴¹ Moreover, ICANN has dedicated resources towards ensuring questions about the Assessment or the Framework will be answered promptly and accurately. In other words, far from failing to consider the potential for confusion regarding the Resolution, the NGPC and ICANN have taken proactive and significant steps to ensure that affected members of the public, and in particular the registries, comprehend the Framework and the steps it requires.⁴² No reconsideration is warranted on the grounds that the NGPC did not consider information regarding public outreach, as it is clear the NGPC did consider such information and acted on it by way of the aforementioned educational resources.

D. The Requester Has Not Demonstrated It Has Been Materially Affected By The Resolution.

Absent evidence that the Requester has been materially and adversely affected by the Resolution, reconsideration is not appropriate. (Bylaws, Art. IV, §§ 2.1-2.2.)

⁴⁰ See Resolution, *available at* <https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf>.

⁴¹ See Name Collision Resources & Information, *available at* <https://www.icann.org/resources/pages/name-collision-2013-12-06-en>.

⁴² ICANN has also engaged in significant outreach activities on LinkedIn and via various media outlets, as well as launching a Google Adwords promotion.

Here, the Requester argues it is materially affected by the Resolution for two reasons. (Request, § 6, Pgs. 4-5.) First, it contends that the Framework does not provide clear guidance as to how to prevent harms related to name collisions. (*Id.*, Pg. 5.) Second, the Requester contends that it will suffer “lower registration rates” due to the confusion the Framework will purportedly cause, because the Requester predicts that registrars will “not offer domain name registrations from the Name Collision lists.” (*Id.*) Neither of these concerns has yet come to fruition, however, and are merely speculative at this point. Again, only those persons who “*have been adversely affected by*” an ICANN action may file a request for reconsideration. (Bylaws, Art. IV, § 2.2) (emphasis added). Because the only harm the Requester identifies is, at this point, merely speculative and hypothetical, the request for reconsideration is premature.⁴³

As such, the Requester has failed to demonstrate it *has been* materially affected by the Resolution and, on that independent basis, reconsideration of the adoption of the Resolution is not warranted.

VI. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore recommends that Reconsideration Request 14-37 be denied.

⁴³ In fact, the Framework will permit names to be activated in the DNS now that were previously not allowed to be activated. As such, the Framework may well lead to an increase in registrations.