

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 19-4
19 December 2019**

The Requestors, Merck KGaA and Merck Registry Holdings, Inc., seek reconsideration of ICANN organization’s denial of their mutual request for a second postponement of a string contention auction for the .MERCK generic top-level domain (gTLD) (Second Request). The Requestors are the only two applicants for the .MERCK gTLD.¹ The Requestors assert that ICANN Staff’s denial of the Second Request failed to consider material information.² The Requestors also assert that the denial of the Second Request contradicted ICANN org’s policies of: (i) favoring the voluntary settlement of string contention and treating auctions as a matter of last-resort;³ and (ii) allowing for discretionary waiver of deadlines in the New gTLD Applicant Guidebook (Applicant Guidebook).⁴ Finally, the Requestors assert that the denial of the Second Request was contrary to ICANN org’s Commitment to “[m]ake decisions by applying documented policies neutrally and objectively with integrity and fairness.”⁵ The Requestors ask that the Second Request be granted, and that the auction date be postponed for nine months to allow them to consider settlement negotiations.⁶

I. Brief Summary.

The Requestors each submitted one or more applications for .MERCK, which were placed in a contention set. At the Requestors’ joint request submitted on 29 May 2019,⁷ ICANN Staff granted a postponement of the first auction date for the .MERCK contention set, and later

¹ Reconsideration Request 19-4, § 3, at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-19-4-merck-request-redacted-14oct19-en.pdf>.

² Request 19-4, § 8, at Pg. 7–8.

³ Request 19-4, § 8, at Pg. 9–11.

⁴ Request 19-4, § 8, at Pg. 11–14.

⁵ Request 19-4, § 8, at Pg. 11.

⁶ Request 19-4, § 9, at Pg. 14.

⁷ Request 19-4, § 3, at Pg. 3.

rescheduled the auction for 23 October 2019.⁸ On 24 September 2019, Requestors then submitted the Second Request, jointly seeking a second postponement of the auction, asserting that they needed the additional time to negotiate a possible settlement.⁹ ICANN Staff denied the Second Request on 30 September 2019, explaining that “ICANN cannot accommodate a subsequent postponement of the Auction Date as the .MERCK contention set had been previously postponed on 29 May 2019 from the original 17 June 2019 Auction Date.”¹⁰

The Requestors seek reconsideration of the denial of their Second Request, asserting that ICANN Staff failed to consider material information about the nature and status of their dispute and violated various ICANN org policies and Commitments. Based on its extensive review of all relevant materials, the BAMC concludes that ICANN Staff considered all material information in denying the second request, and that the denial did not violate the ICANN org policies and Commitments on which the Requestors rely. Rather, ICANN Staff applied an existing rule against granting second postponement requests that is clearly stated in the Applicant Guidebook and other ICANN org materials, and that is consistent with other ICANN policies and Commitments. Accordingly, the BAMC recommends that the Board deny Request 19-4.

II. Facts.

A. Relevant Background on the New gTLD String Contention Process.

Following a nearly two-year policy development process,¹¹ in 2007 the Generic Names Supporting Organization (GNSO) concluded that “ICANN must implement a process that allows

⁸ Request 19-4, Ex. 5, <https://www.icann.org/en/system/files/files/reconsideration-19-4-merck-exhibits-1-11-14oct19-en.pdf>.

⁹ *Id.*, Ex. 8.

¹⁰ *Id.*, Ex 1.

¹¹ <https://newgtlds.icann.org/en/about/program>.

the introduction of new [gTLDs].”¹² Accordingly, ICANN org established and implemented the New gTLD Program, “enabling the largest expansion of the [DNS].”¹³

“String contention” refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings.”¹⁴ As part of the New gTLD Program, ICANN org has sometimes received more than one application for gTLD strings that are identical or so similar that they are likely to cause user confusion.¹⁵ When that occurs, ICANN Staff applies a set of procedures called “String Contention Procedures” to determine which of the contending applications will be granted.¹⁶

Under the String Contention Procedures, ICANN Staff first identifies which applications are in contention with each other and publishes those contending applications in a “Contention Set.”¹⁷ Contending applicants are then encouraged to reach a voluntary resolution of the string contention, which “may occur at any stage of the process” after contention sets have been posted.¹⁸ If the contention set is not voluntarily resolved, any community-based applicants in the contention set may request a “community priority evaluation,” in which ICANN Staff evaluates whether the community-based application fulfills the community priority criteria.¹⁹ If the community priority evaluation is not available, is not elected, or does not fully resolve the string contention, then the contention set (or what remains of it) is scheduled for an auction.²⁰

¹² GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm#_Toc43798015.

¹³ <https://newgtlds.icann.org/en/about/program>.

¹⁴ New gTLD Applicant Guidebook (Applicant Guidebook), Module 1, § 1.1.2.10.

¹⁵ *Id.*, Module 4, § 4.1.

¹⁶ *Id.*

¹⁷ *Id.*, Module 4, § 4.1.1.

¹⁸ *Id.*, Module 4, § 4.1.3.

¹⁹ *Id.*, Module 4, § 4.2.2.

²⁰ *Id.*, Module 4, § 4.3.

“Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.”²¹ Where an auction is required, contending applicants receive an Intent to Auction notice stating when the auction will be held.²² The auction date may be postponed, if all members of the contention set submit a timely joint request for postponement.²³ But postponement “is a one-time option; ICANN will grant no more than one such request for each set of contending applications.”²⁴ When the auction is ultimately held, “the auctioneer successively increases the prices associated with applications within the contention set, and applicants indicate their willingness to pay these prices.”²⁵ Once enough applicants have chosen to exit the auction that the remaining applications are no longer in string contention, the auction concludes and the remaining applicant or applicants pay the resulting prices and proceed towards delegation of their respective gTLDs.²⁶

B. Relevant Background on the Requestors’ Disputes Over .MERCK

The Requestors each have trademark rights involving the word “Merck,” which have been and continue to be the subject of litigation in multiple jurisdictions for many decades.²⁷ The dispute between them regarding the .MERCK gTLD has also produced multiple ICANN Reconsideration Requests, and one Independent Review Process.²⁸ Both Requestors applied for

²¹ *Id.*

²² Auction Rules for New gTLDs (Auction Rules) ¶ 8 (11 Nov. 2014).

²³ Auction Rules ¶ 10.

²⁴ Applicant Guidebook, Module 4, § 4.2.2.

²⁵ *Id.*, Module 4, § 4.3.1.

²⁶ *Id.*

²⁷ Request 19-4 § 8, at Pg. 7–8.

²⁸ *See* Request 16-13 (Merck KGaA requesting reconsideration of ICANN Staff’s decision not to take action on Merck KGaA’s complaint against the .pharmacy registrar for awarding merck.pharmacy to Merck Sharp and Dohme Corp. instead of to it); Request 16-12 (Merck KGaA requesting reconsideration of ICANN’s acceptance of Community Priority Evaluation Report concerning the .MERCK new gTLD), Request 14-9 (Merck KGaA requesting reconsideration of ICANN’s acceptance of Expert Determinations concerning its Legal Rights Objection to Merck Registry Holdings, Inc.’s and MSD Registry Holdings, Inc.’s new gTLD applications); Request 13-8 (Merck KGaA requesting reconsideration of ICANN’s role in the acceptance of a late-filed community objection by

the .MERCK string, and were placed into a string contention set. The .MERCK contention set was scheduled for an ICANN auction on 17 July 2019.²⁹ On 29 May 2019, Requestors filed a mutual request to postpone the auction date, explaining that they “intend[ed] to resolve string contention in an agreement among themselves,” and that “[s]ettlement negotiations are planned for July 2019.”³⁰ ICANN Staff accepted the mutual request to postpone the initial auction.³¹ The auction was rescheduled for 23 October 2019.³²

On 5 September 2019, the Requestors sought a second extension of the auction date, stating that “[i]n order to be able to continue their negotiations to resolve the conflict amicably, both parties hereby request a deferment of the auction for nine months.”³³ ICANN Staff denied the request on 6 September.³⁴ ICANN Staff explained:

Thank you for providing the postponement request of the 23 October 2019 Auction for the .MERCK contention set. Unfortunately, ICANN cannot accommodate a subsequent postponement of the Auction Date as the .MERCK contention set had been previously postponed on 29 May 2019 from the original 17 June 2019 Auction Date (based on the mutual request of each member in the contention set). The MERCK contention set remains scheduled for Auction on 23 October 2019. Please note, there is still time to pursue and complete the self-resolution of the contention set. Members of the contention set may continue efforts to self-resolve the set prior to the Auction, subject to compliance with the anti-collusion provisions of the Auction Rules and Bidder Agreement up until the Deposit Deadline for the Auction (7 days prior to the Auction).³⁵

Merck & Co. to Merck KGaA’s new gTLD applications); Independent Review Proceeding *Merck KGaA v. ICANN (.MERCK/.MERCKMSD)* (independent review proceeding concerning Request 14-9).

²⁹ Request 19-4, Ex. 2.

³⁰ *Id.*, Ex. 3.

³¹ *Id.*, Exs. 4, 5.

³² *Id.*, Ex. 5.

³³ *Id.*, Ex. 6.

³⁴ *Id.*, Ex. 7.

³⁵ *Id.*, Ex. 7.

Dissatisfied with this response, the Requestors submitted the Second Request, a second, more detailed request for an extension of the auction date, on 24 September.³⁶ The Requestors referred to the ongoing “multijurisdictional litigation” between them involving “extremely complex issues in law,” and asserted that “[s]everal judgments are due in the coming months, and the outcome of the litigation will ultimately have an impact on which of us will operate the <.merck> new gTLD and how.”³⁷ The Requestors continued:

The applicants are in the process of ongoing settlement discussions, actively looking for a solution and are hopeful that they will be able to reach a global settlement agreement soon and therefore resolve the issues between us and the contention concerning the <.merck> gTLD

In order to be able to continue their negotiations to resolve the conflict amicably, we would re-iterate our request for a 9 month postponement. . . .

Apart from the applicants, no other applicant has applied for the gTLD <.merck>. Therefore, there are no third parties affected by our requested deferment of the auction.

Under these circumstances, we believe that deferment of the auction would be the solution that most closely aligns with ICANN’s core values and commitments, pursuant to which settlement at any stage is encouraged, whereas auctions are considered to be a mechanism of last resort where parties are otherwise unable to resolve their differences by voluntary agreement.³⁸

On 30 September, ICANN Staff responded and again denied the request.³⁹ ICANN Staff explained: “Unfortunately, ICANN cannot accommodate a subsequent postponement of the Auction Date as the .MERCK contention set had been previously postponed on 29 May 2019

³⁶ *Id.*, Ex. 8.

³⁷ *Id.*, Ex. 8.

³⁸ *Id.*, Ex. 8.

³⁹ *Id.*, Ex. 1.

from the original 17 June 2019 Auction Date (based on the mutual request of each member in the contention set).”⁴⁰

On 14 October 2019, the Requestors submitted Request 19-4. The Requestors claim that ICANN Staff failed to consider material information and contradicted ICANN’s Commitments and Core Values, as well as established ICANN policies, in denying their request for a second postponement of the auction. Pursuant to ICANN procedures, the 23 October 2019 Auction date was postponed pending resolution of Request 19-4.⁴¹

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 19-4 to the Ombudsman for consideration, and the Ombudsman recused himself.⁴²

III. Issues Presented.

The issues are as follows:

1. Whether ICANN Staff failed to consider material information when it denied the Requestors’ second request for a second postponement of the .MERCK contention set auction;
2. Whether ICANN Staff violated established ICANN policies favoring voluntary settlement of string contentions and allowing for discretionary waiver of deadlines when it denied the Requestors’ second request for a second postponement of the .MERCK contention set auction; and
3. Whether ICANN Staff violated ICANN’s Commitments to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly” when it denied the Requestors’ second request for a second postponement of the .MERCK contention set auction.

⁴⁰ *Id.*, Ex. 1.

⁴¹ <https://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.

⁴² Ombudsman Action Regarding Request 19-4, <https://www.icann.org/en/system/files/files/reconsideration-19-4-merck-kgaa-ombudsman-action-21nov19-en.pdf>.

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.”⁴³

Request 19-4 seeks reconsideration of ICANN Staff action on the grounds that the action taken contradicted established ICANN policies and ICANN’s Commitments and Core Values and failed to consider material information. The BAMC has reviewed the Request and now provides a recommendation to the Board.⁴⁴ Denial of a Request for Reconsideration of ICANN Staff action is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁴⁵

V. Analysis and Rationale.

A. ICANN Staff Did Not Fail to Consider Material Information.

The Requestors assert that ICANN Staff failed to consider material information when it denied the Requestors’ second request for a second postponement of the .MERCCK contention set auction.⁴⁶ In particular, the Requestors contend that ICANN Staff disregarded the history of multijurisdictional litigation between them concerning the “Merck” trademark, the fact that

⁴³ ICANN Bylaws, 28 November 2019, Art. 4 § 4.2(a) and (c).

⁴⁴ *See id.* at § 4.2(e).

⁴⁵ *Id.*

⁴⁶ Request 19-4 § 8, at Pg. 7–8.

judgments in several pending cases were “due in the coming months,” and the fact that the Requestors were “hopeful” that they would be able to resolve their contention over .MERCCK by voluntary agreement “soon.”⁴⁷ The Requestors submitted much of this information to ICANN Staff in support of the Second Request.⁴⁸

As an initial matter, the Requestors do not present any evidence to support their apparent belief that ICANN Staff failed to consider information about the history of their dispute, their pending litigation, and their hope that they could resolve their contention voluntarily if given more time when it denied the Second Request. The Requestors’ long and contentious history is well known to ICANN Staff, because of the Requestors’ many submissions setting forth that history through various objection proceedings as part of the New gTLD Program as well as the numerous accountability mechanisms filed by the Requestors.⁴⁹ In the message denying the Second Request, ICANN Staff wrote, “[p]lease note, there is still time to pursue and complete the self-resolution of the contention set,” showing that ICANN Staff was aware of and had considered the Requestors’ ongoing efforts at voluntary settlement.⁵⁰

More significantly, however, whether or not ICANN Staff considered such information, the information was not material or relevant to ICANN Staff’s decision on the Second Request. ICANN Staff denied the Second Request in accordance with the process established under the Applicant Guidebook regarding requests for postponements of contention set resolution auctions, which provides:

[i]f all parties agree and present a joint request, ICANN may postpone the auction for a three-month period while the parties attempt to reach a settlement before proceeding to auction. *This is*

⁴⁷ *Id.* § 8, at Pg. 7–8.

⁴⁸ *Id.*, Ex. 8.

⁴⁹ See materials cited in n.28, *supra*.

⁵⁰ Request 19-4, Ex. 1.

*a one-time option; ICANN will grant no more than one such request for each set of contending applications.*⁵¹

ICANN’s “Auction Date Advancement/Postponement Request Form” explicitly states “ICANN may accommodate **one** postponement request per contention set.”⁵² The prior version of the Auction Rules for New gTLDs effective until 26 February 2014, also specified that “[a] postponement is intended to be a one-time option.”⁵³ ICANN Staff’s message to Requestors denying their Second Request made clear that the rule against second postponements was the reason for the denial, explaining that “ICANN cannot accommodate a subsequent postponement of the Auction Date as the .MERCK contention set had been previously postponed on 29 May 2019 from the original 17 June 2019 Auction Date (based on the mutual request of each member in the contention set).”⁵⁴ Reconsideration is therefore not warranted based on a failure to consider material information.

B. ICANN Staff Did Not Violate ICANN Policies Favoring Voluntary Settlements.

The Requestors next assert that ICANN Staff’s denial of the Second Request violated ICANN org’s policies favoring voluntary settlements of contention sets and treating contention-set auctions as a means of last resort only.⁵⁵ The Requestors point out that the Applicant Guidebook states that

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the

⁵¹ Applicant Guidebook § 4.2.2 (emphasis added).

⁵² <https://newgtlds.icann.org/en/applicants/auctions/date-advancement-postponement-form-09nov17-en.pdf> (emphasis in original).

⁵³ Auction Rules for New gTLDs (12 Dec. 2013), ¶ 10, <http://newgtlds.icann.org/en/applicants/auctions/rules-12dec13-en.pdf>. The current version of the Auction Rules for New gTLDs, effective 3 November 2014, does not directly refer to the one-postponement limit, but they refer to the Auction Date Advancement/Postponement Request Form, which in turn does describe that limit. See Auction Rules for New gTLDs (3 Nov. 2014), ¶ 10, <https://newgtlds.icann.org/en/applicants/auctions/rules-03nov14-en.pdf>.

⁵⁴ Request 19-4, Ex. 1.

⁵⁵ Request 19-4 § 8, at Pg. 8–11.

process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.⁵⁶

The Requestors also rely on the statement in the Applicant Guidebook that:

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved Applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.⁵⁷

The Requestors argue that granting the Second Request and allowing further settlement discussions would have furthered ICANN's pro-settlement policy and been consistent with the policy of treating auction as a tie-breaker method only, and that denying the Second Request violated those policies.⁵⁸

The denial of the Second Request, and ICANN's rule against second postponements of contention set auctions more broadly, is consistent with and does not violate ICANN's policy favoring the voluntary resolution of string contentions and treating auction as a tie-breaker method only. The rule against second postponements does not prevent settlements, but merely prevents parties from indefinitely prolonging gTLD disputes, by providing a hard deadline (the second auction date) by which they must either settle or proceed to auction. As ICANN Staff explained in denying the Second Request, the denial still left the Requestors with "time to pursue and complete the self-resolution of the contention set," as they could "continue efforts to self-resolve the set" up until 7 October 2019, seven days before the auction date.⁵⁹ By that time, the Requestors had known for more than three years that they were competing applicants for the .MERCCK gTLD; they could have attempted to resolve their competing applications throughout

⁵⁶ *Id.* § 8, at Pg. 9; Applicant Guidebook Module 4, § 4.1.3.

⁵⁷ *Id.*, § 8, at Pg. 10; Applicant Guidebook Module 4, § 4.3.

⁵⁸ *Id.*, § 8, at Pg. 10.

⁵⁹ *Id.*, Ex. 1.

those three years.⁶⁰ And the Requestors have had more than five months to voluntarily resolve their competing applications since the auction for the contention set was first scheduled on 2 May 2019.⁶¹ Contrary to Requestors' arguments, this use of the auction process to provide a backstop if settlement efforts fail after a reasonable time is consistent both with ICANN's pro-settlement policy and with its designation of auctions as a method of last resort to resolve string contention. Accordingly, reconsideration is not warranted.

C. The Use of a Rule Against Second Postponement Requests Is Consistent with ICANN's Commitments.

The Requestors also assert that ICANN's Commitments require that ICANN Staff have discretion to depart from any ICANN policy against second postponements of string contention auctions, and that ICANN Staff's failure to recognize and use that discretion violated ICANN's Commitments.⁶² The Requestors further contend that ICANN Staff's denial of the Second Request violated ICANN's Commitment to make "decisions by applying documented policies neutrally and objectively with integrity and fairness."⁶³ The Requestors argue that applying case-by-case discretion to requests for second postponements of string contention auctions would be more consistent with this value than is ICANN org's rule of always denying them.

As support, the Requestors rely on a resolution of the New gTLD Program Committee, 2013.07.13.NG04, which provided that:

in the interests of fairness and reasonableness, notwithstanding the deadlines set out in the Applicant Guidebook, in the future, the DRSPs (Dispute Resolution Service Provider) are permitted and encouraged to use their discretion, in light of the facts and circumstances of each matter, and in cases where it is shown that the affected party is making a good faith effort to comply with the deadlines, as to

⁶⁰ See Request 16-12, at 7-8 (Aug. 25, 2016).

⁶¹ Request 19-4, Ex. 2.

⁶² Request 19-4, § 8, at Pg. 11-14.

⁶³ *Id.*, § 8, at Pg. 11; ICANN Bylaws § 1.2(b)(v).

whether to grant extensions, or deviate from the deadlines set forth in the Applicant Guidebook.⁶⁴

The Requestors also rely on the text of the prior version of the Auction Rules quoted above, stating that “postponement is intended to be a one-time option,”⁶⁵ which the Requestors contend leaves open the possibility of a second postponement.

Resolution 2013.07.13.NG04 does not support the Requestors’ assertion that ICANN Commitments require the exercise of case-by-case discretion concerning requests for second postponements of string contention auctions. Resolution 2013.07.13.NG04 concerned a different issue that did not involve auctions at all: whether dispute resolution providers should have discretion to consider materials filed after a filing deadline.⁶⁶ In that context, the New gTLD Program Committee decided that granting dispute resolution providers the discretion to overlook minor violations of filing deadlines better served “fairness and reasonableness” than applying a categorical rule.⁶⁷ But nowhere does the resolution suggest that categorical rules of all sorts are always and everywhere a violation of ICANN’s Commitments.⁶⁸ The resolution does not even say that strictly applying filing deadlines would violate ICANN’s Commitments, only that allowing for discretion was preferable under those circumstances.⁶⁹ And nothing about the resolution addressed the entirely distinct context of multiple postponements of contention set auctions.⁷⁰

Nor do the Auction Rules support the Requestors’ position that ICANN Commitments require the application of case-by-case discretion. The Auction Rules supplement the Applicant

⁶⁴ Request 19-4, Ex. 9; New gTLD Program Committee Resolution 2013.07.13.NG04.

⁶⁵ Auction Rules for New gTLDs (12 Dec. 2013), ¶ 10, <http://newgtlds.icann.org/en/applicants/auctions/rules-12dec13-en.pdf>.

⁶⁶ New gTLD Program Committee Resolution 2013.07.13.NG04.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

Guidebook; they do not create new rules superseding those in the Applicant Guidebook. And the Applicant Guidebook states unequivocally that postponement “is a one-time option; ICANN will grant no more than one such request for each set of contending applications.”⁷¹ In any event, the use of a categorical policy against second postponements is entirely consistent with the statement in the prior version of the Auction Rules that “postponement is intended to be a one-time option.”⁷²

Finally, ICANN Staff’s enforcement of a rule against second postponements does not violate ICANN’s Commitment to make “decisions by applying documented policies neutrally and objectively with integrity and fairness,”⁷³ the sole Commitment or Core Value that the Requestors identify. As the remainder of that Commitment makes clear, it is an antidiscrimination provision, precluding ICANN org from “singling out any particular party for discriminatory treatment.”⁷⁴ ICANN org’s existing rule treats every request for a second postponement equally, by providing that all such requests will be denied, and is therefore “neutral[,],” “objective[,],” and “fair.”⁷⁵

Neither ICANN’s Commitment to apply policies neutrally (nor any other Commitment) precludes the use of rules like ICANN’s rule on second postponements or requires the use of case-by-case discretion in all instances. That Commitment therefore does not require that ICANN Staff make a discretionary, case-by-case determination as to whether to accept each request for a second postponement of a string contention auction received, rather than applying a blanket rule that no subsequent postponements are allowed. Reconsideration is not warranted.

⁷¹ Applicant Guidebook Module 4, § 4.2.2.

⁷² Auction Rules for New gTLDs (12 Dec. 2013), ¶ 10, <http://newgtlds.icann.org/en/applicants/auctions/rules-12dec13-en.pdf>.

⁷³ ICANN Bylaws Art. 1, § 1.2(a).

⁷⁴ *Id.*

⁷⁵ *Id.*

D. The Requestors' Disagreement with the Rule Against Second Postponements of Auctions is not a Basis for Reconsideration.

Finally, the Requestors dispute the merits of ICANN org's rule denying second postponements in all cases. Requestors contend that the rule "hinders ICANN's reputation for accountability" and state that ICANN org will receive the proceeds from the .MERCK auction.⁷⁶ The Requestors argue that a second postponement of the .MERCK auction will not harm ICANN org or anyone else, as they are the only two applicants for the .MERCK gTLD and disputes over other gTLDs have been pending for longer.⁷⁷ Elsewhere, Requestors also question the use of the auction process more broadly.⁷⁸ But these arguments amount only to disagreement with ICANN org's decision to follow a rule against second postponements of auctions. They do not show that the rule that ICANN follows is contrary to ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies), or otherwise provide a basis for reconsideration of the denial of the Second Request, which was consistent with that existing rule.⁷⁹ Moreover, any challenge to the Applicant Guidebook is time-barred, as the Applicant Guidebook was approved in 2012, far more than 30 days before Requestors submitted Request 19-4.⁸⁰ The Requestors' arguments about the merits of ICANN's rule against second postponements therefore provide no basis for reconsideration of the denial of the Second Request.

VI. Recommendation.

The BAMC has considered the merits of Request 19-4, and, based on the foregoing, concludes that ICANN Staff did not fail to consider material information or violate ICANN's Commitments, Core Values or established ICANN policy(ies) in its denial of Requestors'

⁷⁶ Request 19-4, § 8, at Pg. 13.

⁷⁷ *Id.*, § 8, at Pg. 8, 14.

⁷⁸ *Id.*, § 8, at Pg. 10.

⁷⁹ ICANN Bylaws, Art. 4, § 4.2(c).

⁸⁰ *See* Applicant Guidebook, Cover; ICANN Bylaws, Art. 4, § 4.2(g).

request for a second postponement of the .MERCCK string contention auction. Accordingly, the BAMC recommends that the Board deny Request 19-4.

The BAMC does note that the auction date has been placed on hold pending the consideration of this Request,⁸¹ and that it has now been nearly two months since the second scheduled auction would have been held had the Requestors not filed Request 19-4, five months since the first auction would have been held and nearly nine months since the Requestors were first told an auction would be scheduled. Further, there will be more lapse of time since this recommendation now has to go to the Board for consideration. And, even if the Board accepts this BAMC recommendation, it will be additional months before an auction can be re-scheduled and held. Accordingly, the delay the Requestors seek in order to have time to reach private resolution has nearly been achieved by virtue of their first postponement and their filing of Request 19-4.

Notwithstanding the above, the BAMC recommends that the Board ask ICANN org to seek an update from the Requestors on: (i) whether the Requestors have received any of the court rulings that the Requestors stated were expected this year that they indicated would assist them in resolving their dispute; and (ii) what progress, if any, the Requestors have made toward settlement. If the Requestors jointly declare they have made progress since filing Request 19-4 and that they are very close to private resolution, the BAMC recommends that the Board ask ICANN org to consider providing the Requestors with some form of discretionary relief that could allow them to finalize a settlement.

⁸¹ See Update on Application Status and Contention Sets, “On Hold,” <https://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.