

ICANN BOARD SUBMISSION NO. 2019.11.03.1a

TITLE: **Consideration of Reconsideration Request 19-2**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

Namecheap Inc. (Requestor) seeks reconsideration of ICANN organization's 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs).

Specifically Requestor challenges the ORG/.INFO Renewed RAs insofar as they eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.¹ The Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."² The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.³ The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs."⁴

Under the Bylaws, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.⁵ The majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-2 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2. Therefore, the Board is being asked to consider

¹ Request 19-2, § 3, at Pg 2

² *Id.* § 8, at Pg 3

³ *Id.*, § 8, at Pg 10

⁴ *Id.*, § 9, at Pg 12

⁵ See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en>

Request 19-2 and issue the Proposed Determination, attached as Attachment D to the Reference Materials, in lieu of a Recommendation by the BAMC.

The Bylaws entitle a Requestor to a rebuttal to the BAMC's recommendation within 15 days of receipt of the recommendation. Here, given the BAMC recusal circumstances, the issuance of the Board's Proposed Determination will trigger the rebuttal timeline. Accordingly, the Board will be asked to consider Request 19-2 a second time soon after the rebuttal deadline passes, and to issue a final determination after consideration of a rebuttal, if any.

PROPOSED RESOLUTION:

Whereas, Namecheap Inc. (Requestor) filed a reconsideration request (Request 19-2) challenging ICANN organization's 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (collectively, .ORG/.INFO Renewed RAs), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.⁶

Whereas, the Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."⁷ The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of .ORG and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.⁸

Whereas, pursuant to Article 4, Section 4.2(1), the Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that "the CEO and Staff acted within the scope of the powers given them by the Board," and that "no rules or duties of corporate governance were violated (including the ICANN Bylaws)."⁹

⁶ Request 19-2, § 3, at Pg 2

⁷ *Id.* at § 3

⁸ *Id.*

⁹ <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf>

Whereas, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests and make recommendations to the Board on the merits of those Requests. (*See* Bylaws, Art. 4, § 4.2(e).) However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.¹⁰

Whereas, the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-2 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2. Therefore, the Board is considering Request 19-2 in lieu of a Recommendation by the BAMC.

Whereas, the Board has carefully considered the merits of Request 19-2 and all relevant materials and concludes that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board proposes denying Request 19-2.

Resolved (2019.11.03.XX), the Board adopts the [Proposed Determination on Reconsideration Request. 19-2](#).

Commented [A1]: Hyperlink to Proposed Determination

PROPOSED RATIONALE:

The Board is taking this action today pursuant to Article 4, Section 4.2 of the ICANN Bylaws. Under Section 4.2 of the Bylaws, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. *See* Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.¹¹ The majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-2 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2. Therefore,

¹⁰ *See* BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en>

¹¹ *See id*

the Board has considered and issues the Proposed Determination in lieu of a Recommendation by the BAMC.

Commented [A2]: Hyperlink

The Board has carefully considered the merits of Request 19-2 and all relevant materials. For the reasons set forth in the Proposed Determination, which are incorporated here, the Board concludes that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board proposes denying Request 19-2.

Pursuant to Article 4, Section 4.2(q), the Requestor has 15 days from the receipt of the Board's Proposed Determination on Request 19-2 to submit a rebuttal. Following the rebuttal period, the Board will issue a final determination on Request 19-2 in accordance with Article 4, Section 4.2(r) of the Bylaws.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy Stathos, Deputy General Counsel
Date Noted: 26 October 2019
Email: amy.stathos@icann.org

Reconsideration Request Form

Version as of 21 September 2018

ICANN's Board Accountability Mechanisms Committee (BAMC) is responsible for receiving requests for reconsideration (Reconsideration Request) from any person or entity that has been adversely affected by the following:

- (a) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (b) 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
- (c) 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.

The person or entity submitting such a Reconsideration Request is referred to as the Requestor.

Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please refer to [Article 4, Section 4.2 of the ICANN Bylaws](#) and the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

This form is provided to assist a Requestor in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requestors may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12-point font. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requestor Information

Name: Namecheap, Inc. (IANA 1068)

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

On 30 June 2019, ICANN org renewed the registry agreement for the .org and .info TLD without the historic price caps, despite universal widespread public comment supporting maintain the price caps. The decision by ICANN org to unilaterally remove the price caps when renewing legacy TLDs with little (if any) evidence to support the decision goes against ICANN's Commitments and Core Values, and will result in harm to millions of internet users throughout the world. ICANN's announcement about this decision is at <https://www.icann.org/resources/agreement/org-2019-06-30-en> and <https://www.icann.org/resources/agreement/info-2019-06-30-en>.

4. Date of action/inaction:

30 June 2019

5. On what date did you become aware of the action or that action would not be taken?

1 July 2019

6. Describe how you believe you are materially and adversely affected by the action or inaction:

As a domain name registrar, removal of price caps for legacy TLDs will negatively impact Namecheap's domain name registration business.

Uncertainty regarding future price increases (including the possibility of increases that exceed historical norms) may cause Namecheap's customers to not renew domain names or not register new domain names in legacy TLDs. This may additionally impact other legacy TLDs subject to renewal, such as .com. ICANN org ignored the overwhelming number of public comments supporting maintaining historical price caps, essentially making a mockery of the public comment process.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

All domain name registrants, especially those who have domains in legacy TLDs with longstanding price caps, will be adversely affected when legacy TLDs begin to raise prices outside of previously established norms. In addition, web developers and internet hosting companies will see decreased sales and revenue. Unrestricted price increases for legacy TLDs will stifle internet innovation, harm lesser served regions and groups, and significantly disrupt the internet ecosystem. An incredible variety of public comments was submitted to ICANN from all continents (except Antarctica) imploring ICANN to maintain the legacy TLD price caps- which were completely discounted and ignored by ICANN org.

8. Detail of Board or Staff Action/Inaction – Required Information

I. Introduction

Namecheap is submitting this reconsideration request to protect the rights and interests of Namecheap's customers and the entire internet community. Price caps for legacy TLDs have been an integral longstanding foundation for the domain name marketplace, and removing them will result in uncertainty and confusion at a minimum, and in the worst case, increased costs for domain name registrants worldwide. ICANN requested public comment regarding the changes to the .org registry agreement, and the response was overwhelmingly against removing price caps. Comments came from small non-profits, international organizations, government agencies, members of government, individuals, families, businesses, entrepreneurs, and people from lesser developed regions and those underrepresented in the ICANN community. ICANN rejected over 3,500 comments against removing price caps by stating registrants could use other TLDs, renew for 10 years if a price increases were excessive, and claiming (without evidence) that market competition would keep the prices for the third largest TLD from rising compared to other TLDs (ignoring the significant differences between .org and new gTLDs raised by commenters). The decision to ignore public comments to keep price caps in legacy TLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good.

II. Basis for the Reconsideration Request

ICANN's bylaws include Commitment 4(A), which states that ICANN will “seek input from the public, for whose benefit ICANN in all events shall act.” The bylaws also include the following Core Values:

“(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent

[...]

(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture”

In line with the Commitments and Core Values, ICANN's Public Comment Opportunities page prominently states:

“Public Comment is a mechanism that gives the ICANN community and other stakeholders an opportunity to provide input and feedback. Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption. Public Comment is also used to guide implementation work, reviews, and operational activities of the ICANN organization.”

<https://www.icann.org/public-comments> (accessed 3 July 2019)

Specifically, regarding the public comment period for the Proposed Renewal of .org Registry Agreement, ICANN stated:

“Purpose: The purpose of this public comment proceeding is to obtain community input on the proposed .org renewal agreement (herein referred to as “.org renewal agreement”).

[...]

Following review of the public comments received, ICANN will prepare and publish a summary and analysis of the comments received. The report will be available for the ICANN Board in its consideration of the proposed .org renewal agreement.”

<https://www.icann.org/public-comments/org-renewal-2019-03-18-en> (accessed 3 July 2019)

In addition to the additional information how ICANN accepts and integrates public comments, for the past few years ICANN org has undertaken efforts to conduct

outreach to domain name registrants and encourage their participation in the ICANN community. Although this can be daunting for non-technical individuals, ICANN org provides good introductory information and in part encourages individuals to provide public comments to ICANN.

ICANN's dedicated section for domain name registrants (<https://www.icann.org/registrants>), states:

“Throughout all of ICANN’s work, we endeavor to serve the global public interest, domain name registrants and end-users of the Internet by ensuring a secure and stable domain name system (DNS), all while promoting trust, choice, and competition in the industry. Domain name registrants are an integral component of the DNS; they are the entities or individuals that have acquired the right to use a domain name for a period of time via an agreement with a registrar or reseller.

[...]

Program Goals

Identifying and raising awareness about issues and challenges that registrants are facing.”

- ICANN GDD: Raising Awareness About Registrant Issues and Challenges (presented at ICANN64 <https://64.schedule.icann.org/meetings/962101>) (accessed 3 July 2019)

The domain name registrants page provides links to encourage registrants to participate in ICANN policy, to provide public comments, and to get involved in the ICANN community.

III. Public comments submitted to ICANN

Namecheap reviewed the approximately 3,538 public comments that were submitted in response to the public comment proceedings for the renewal of the .org and .info registry agreements¹. An analysis of the data shows that while a large number of commenters were Namecheap customers, a majority were not and represent a varied cross-section of internet users. Some key takeaways include:

1. 725 comments were submitted by Namecheap customers (20% of all comments)

¹ Comments for the renewal of .biz and .asia registry agreements were reviewed, and were similar in content and support of maintaining price caps as the comments for the .org and .info agreements. They are not included in this analysis because many are duplicates comments submitted by the same commenters.

2. 3,474 comments supported maintaining the price caps (98%)
3. 9 comments supported removing the price caps (0.25%)
4. 450 comments were from nonprofits (13%)
5. 1,197 comments were from domain name registrants with domains in the .org, .info, or .biz TLDs (34%)

Many more comments were submitted by domain name registrants. Although it is not possible to accurately determine how many came from registrants, it appears to have been a large majority of commenters.

A number of commenters raised concerns about including the Uniform Rapid Suspension (URS) in the .org registry agreement. Because the URS is being considered in other ICANN forums, Namecheap is not raising this as an issue during this Request for Reconsideration.

The public comments represent a truly global coalition. Although a majority of comments were from North American and Europe, there were comments from Africa, Asia, Australia, and South America. This represents all continents except Antarctica. The comments from Africa were particularly poignant, pleading with ICANN to help maintain a level playing field for them to be able to grow businesses.

Many nonprofits (which will be directly impacted by the removal of the price caps) submitted comments. They represent an incredible diversity of organizations. Below is a summary of the types of organizations that submitted comments, including multiple organizations of the same type. They include:

Advocacy
Aging
Agriculture
Animal Rescue
Arts
Association
Aviation
Charity (20)
Chess
Civic
Club
Community group
Consumer protection
Education (47)
Emergency response

Environmental protection (16)
Government agency (10)
Health
Historical society
Housing
Human Trafficking
Humanitarian
Industry organization
Job support
Justice
Library (6)
Media (4)
Medical (7)
Meditation
Mentoring
Model train
Motorcycle club
Music (8)
Networking
Open source software
Policy
Poverty
Professional
Publishing
Religious (69)
Research
Sailing
Science
Scouting
Service
Social
Software
Sports
Suicide prevention
Support
Support for the disabled (4)
Surgeons

Technology
Theater
Trade group
Trade organization
Transportation
Veterans support
Voting rights
Wellness
Youth

Contained within the comments are appeals to maintain price caps to ensure the survival of organizations that have extremely limited resources:

"[removing the price cap] will negatively affect nonprofit organizations who struggle to survive as it is"

"A rise in any administrative costs means I give less money to sick and disabled children."

"Every dollar you take from us doesn't get to the people who need it."

"A significant increase in the price of our domain would diminish our ability to offer these benefits and threaten our survival."

"Why, in God's name, would anyone decide that .org domains in particular should be a market free-for-all?"

"Every \$1 in increased prices on the 10+ million .org domain users would generate more revenue each year than is utilized by all but the top one-percent of charitable nonprofits. Each one-dollar hike in costs per domain would divert more than \$10 million from nonprofit missions for the enrichment of the monopoly. By anyone's estimate, this money would be better spent delivering an additional 1,600,000 meals by Meals on Wheels to seniors to help maintain their health, independence and quality of life. Or \$10 million could enable nonprofits to provide vision screenings for every two- and three-year-olds in California. Or pay for one million middle school students to attend performances of "Hamilton" or "To Kill a Mockingbird". Nonprofits should not need to choose between paying for a domain name and helping people."

Some of the nonprofits that submitted comments provide truly vital services, helping the most disadvantaged people in the world. This includes organizations that:

- combat human trafficking

- work with indigenous and aboriginal communities in lesser developed regions,
- help prevent suicide
- provide resources for sick and disabled children
- provide support for people with life-threatening medical conditions
- provide food, shelter, and education to orphan children in Africa
- provide free VPN service for areas that struggle with government censorship of the internet
- help farmers in South America expand their businesses

When reviewing all of the comments, some common themes were provided by a number of commenters:

- using a .org domain name is critical to their nonprofit: it is well-known, safe, and trusted.
- many have been using their .org domain for many years, and the cost and risk of moving to another TLD (e.g. losing search engine rankings, notifying the public of the new TLD, etc) causes great concern.
- they do not want to use another TLD, because .org is known to be for nonprofits. There are no equivalent TLDs that have the established reputation of .org.
- if prices increase too much, they might abandon using a domain name in order to migrate to another platform that is outside of ICANN's remit (and would include price certainty). This includes relying solely upon social media or mobile apps.
- there was concern that ICANN was captured by Public Interest Registry (PIR), in that the removal of the price cap only benefits PIR and not registrants in .org or the internet in general.²

² Namecheap notes that under the base registry agreement that now covers .org, .info, and other legacy TLDs, registry operators may actually pay **more** fees to ICANN than under the previous agreements. The base agreement includes quarterly fees due to ICANN of US\$6,250 (plus US\$0.25 per domain transaction fee). See Section 6.1 of the registry agreement. The quarterly fee was not present in the prior registry agreements. It is telling that while under the current budget pressure, ICANN did not highlight the additional US\$25,000 that each registry operator would have to pay to ICANN annually under the new agreements (and did not consider

- questions why unrestricted price increases should be considered because at this point PIR is maintaining the .org registry and not undertaking development initiatives that would require additional resources.

- concern that removing the price cap for .org would also lead to removing the price cap for the .com registry agreement (which is subject to renewal in 2024, is the largest TLD by far, and because it is commercial in nature, is more likely to lead to price increases).

IV. ICANN org's response to public comments

In ICANN org's analysis of the public comments, ICANN rejects all of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence:

"There are now over 1200 generic top-level domains available, and all but a few adhere to a standard contract that does not contain price regulation. Removing the price cap provisions in the .org Registry Agreement is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market."

<https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf> (accessed 3 July 2019)

ICANN then goes on to state that any price increases would require 6 months advance notice and that registrants could renew domains for 10 years at that point.

The generalizations in ICANN org's analysis ignores significant information that is contrary to its sweeping conclusions:

1. The TLD .org is the 3rd largest, with over 10 million domains. This is the equivalent number as the top 10 new gTLDs by volume. The TLD .org thus commands a large share of the TLD space, and as suggested by the Registrar Stakeholder Group (RrSG) comment, additional analysis is needed to determine whether this market share can result in uncompetitive practices.

2. The TLD .org was established in 1985. It is universally known, associated with nonprofit use, and has an excellent reputation.

3. Changing domains for an established entity can be a cumbersome and costly

how registry operators would either absorb this cost or pass this cost to registrars or domain name registrants).

process, often with negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill).

4. TLDs are not interchangeable as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not usable by nonprofits (e.g. trademarks, geographic, restricted for certain uses). Additionally, a number of TLDs are whimsical (e.g. .rocks or .ooo) or targeted to certain uses (e.g. .horse or .motorcycles) and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .org.

5. While there are additional TLDs for nonprofits (launched beginning in 2015 by PIR), there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .org). According to ICANN's monthly reports for March 2019 (at <https://www.icann.org/resources/pages/registry-reports>), the TLDs have the following domain totals:

.ngo³: 3,812

.ong⁴: 3,812

.संगठन (.xn--i1b6b1a6a2e)⁵: 1,323

.机构 (.xn--nqv7f)⁶: 1,291

.opr (.xn--c1avg)⁷: 2,317

6. There are some concerns higher levels of abuse exists in new gTLD domains (which decreases the value of new gTLDs in general). This includes (but is not limited to) higher levels of spam (<https://www.techrepublic.com/article/rampant-spam-falling-registrations-show-new-gtlds-have-limited-business-value/>). Additionally, ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs: while new gTLDs represent 12% of total domains, they comprise 52% of domains identified with security threats (see ICANN DAAR report from January 2019 at <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>).

7. Universal acceptance (UA)- including for new gTLDs- continues to be a high

³ NGO stands for "non-governmental organization"

⁴ ONG is the equivalent of NGO in some languages including French, Spanish, and Portuguese (<https://pir.org/pir-files-applications-to-create-and-manage-ngo-and-ong-domains/>)

⁵ the equivalent of .org in Devanagari

⁶ the equivalent of .org in Chinese

⁷ the equivalent of .org in Russian

priority for ICANN org. ICANN's Board has made improving and promoting UA and Internationalized Domain Name (IDN) implementation one of five strategic priorities for FY21-FY25. (<https://uasg.tech/2018/12/icann-further-commits-to-universal-acceptance-of-domain-names-and-email-addresses/>). Due to issues with universal acceptance, it is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name.

V. Conclusion

ICANN's Commitment claims that it will seek input from the public, and always act in the benefit of the public. ICANN's Core Values allege that ICANN will seek to determine the global public interest to strike a balance and avoid capture. Additionally, ICANN appears to use the public comment process to obtain community feedback for items such as the renewal of legacy TLD registry agreements, and states that such comments will be considered and incorporated into ICANN actions. Furthermore, ICANN org actively encourages regular internet users to be involved in such processes.

Based upon ICANN org's action in the renewal of the .org and other legacy TLD registry agreements, it is clear that ICANN has failed to abide by its Commitment, Core Values, and public statements. The ICANN org will decide whether to accept or reject public comment, and will unilaterally make its own decisions- even if that ignores the public benefit or almost unanimous feedback to the contrary, and is based upon conclusory statements not supported by evidence. This shows that the public comment process is basically a sham, and that ICANN org will do as it pleases in this and other matters. It is a concern not only for the renewal of the .org and other legacy TLD registry agreements being renewed in 2019, but an even greater concern for the upcoming renewal of the .com registry agreement- as well as other vital policy issues under consideration by ICANN now and in the future.

It is disappointing that when internet users got involved on a massive scale in ICANN processes, ICANN failed its Commitments and Core Values by completely rejecting their feedback. ICANN org should revise all legacy TLD registry agreements to include the now missing price caps, otherwise it is clear that ICANN does not follow its Commitments, Core Values, nor does it serve the greater public good.

9. What are you asking ICANN to do now?

Namecheap requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs.

10. Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.

Namecheap is an ICANN-accredited domain name registrar, and as indicated above, unrestricted price increases will have a direct impact on Namecheap's domain registration business as well as additional services (e.g. domain hosting). Namecheap is additionally filing this Reconsideration Request on behalf of the 725 Namecheap customers and internet users that submitted public comments stating how they will be harmed by removing the price cap, and who all likely lack the knowledge about ICANN processes to submit their own Reconsideration Requests. All of Namecheap's customers, as well as the internet community as a whole, will be harmed by uncertainty of price increases, or will be further harmed when prices increase for .org or other legacy TLDs after price caps are removed.

Maintaining the historical price caps will ensure that prices for .org and other legacy TLDs will be predictable and not harm the greater internet population.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.

Although the resulting impact will be different for Namecheap and domain name registrants, all of them will be negatively impacted by the uncertain threat of price increases without price caps, or will be actually harmed when prices increase in .org and other legacy TLD once price caps are removed.

12. Are you bringing this Reconsideration Request on an urgent basis pursuant to Article 4, Section 4.2(s) of the Bylaws?

Yes

No

12a. If yes, please explain why the matter is urgent for reconsideration.

13. Do you have any documents you want to provide to ICANN?

No.

Terms and Conditions for Submission of Reconsideration Requests

Reconsideration Requests from different Requestors may be considered in the

same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

The BAMC shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The BAMC may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The BAMC's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

Hearings are not required in the Reconsideration Process; however, Requestors may ask for the opportunity to be heard. The BAMC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BAMC's decision on any such request is final.


For all Reconsideration Requests that are not summarily dismissed, except where the Ombudsman is required to recuse himself or herself and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request. The BAMC shall make a final recommendation to the Board with respect to a Reconsideration Request following its receipt of the Ombudsman's evaluation (or following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable).

The final recommendation of the BAMC shall be documented and promptly (i.e., as soon as practicable) posted on the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en> and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BAMC's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the ICANN Reconsideration Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the BAMC's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

The ICANN Board shall not be bound to follow the recommendations of the BAMC. The ICANN Board's decision on the BAMC's recommendation is final

and not subject to a Reconsideration Request.

By submitting my personal data, I agree that my personal data will be processed in accordance with the ICANN [Privacy Policy](#), and agree to abide by the website [Terms of Service](#).


Signature

07/12/2019
Date

Richard Kirkendall
Print Name

Substantive Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2

This substantive evaluation of Request for Reconsideration (“RFR”) 19-2 by the ICANN Ombudsman is required under the Paragraph 4.2(l) of the current ICANN Bylaws (“Bylaws” (as amended July 22, 2017)).

Under ICANN Bylaws 4.2(c), a Requestor can bring a Request for Reconsideration concerning an action or inaction as follows:

Section 4.2. RECONSIDERATION...

(c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that 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.

Unpacking the above language, did an action (or inaction – in other words an action that could have been taken which was not taken) contradict or violate ICANN’s Mission or established policy (including the Bylaws and relevant California laws¹)? Or, was an action taken (or not taken) without consideration of material information, or was it the result of reliance on false or inaccurate relevant information? In providing the Board Accountability Mechanism Committee (“BAMC”) and the ICANN Board of Directors a “substantive evaluation” of a Request for Reconsideration, the Ombudsman must look at the substance of what is being requested in the Request, and of course at the actions (or inaction) for which the Requestor seeks Reconsideration.

¹ While laws of a state or country are not mentioned explicitly in Bylaws Section 4.2, the Mission of a California public benefit corporation includes implicitly abiding by the relevant laws: here those are the applicable corporate laws pertinent to the governance of the corporation. If an action or inaction clearly is in violation of California law, it is improper. Similarly, the word “Commitments” suggests the commitment ICANN makes to be law abiding, especially of the laws of the State wherein and whereby it was formed, where it is headquartered, and where much of its operation takes place.

Request for Reconsideration 19-2 was filed by Namecheap, Inc. (“Requestor”) on July 12th, 2019, seeking reconsideration of ICANN organization’s renewal of the Registry Agreements with Public Interest Registry (“PIR”) and Afilias Limited (“Afilias”) for the .org and .info top-level domains (TLDs), respectively (collectively, the .org/.info renewed Registry Agreements are “Renewal Registry Agreements”), insofar as the renewals eliminated “the historic price caps” on domain name registration fees for .org and .info. The Requestor claims that ICANN org’s “decision to ignore public comments to keep price caps in legacy TLDs is contrary to ICANN’s Commitments and Core Values, and ICANN should reverse this decision for the public good.”

The Renewal Registry Agreements (RA) (and their Addenda) that are at the heart of this Reconsideration Request can be found here:

<https://www.icann.org/resources/agreement/org-2019-06-30-en> and <https://www.icann.org/resources/agreement/info-2019-06-30-en>.

The history of these RAs (which is detailed on the public comments pages) may be helpful to explain why and how these negotiations came about. [<https://www.icann.org/public-comments/org-renewal-2019-03-18-en> and <https://www.icann.org/public-comments/info-renewal-2019-03-18-en>]

The Registries for these two historic and significant Top-Level Domains (TLDs) are Public Interest Registry (PIR) (for .org) and Afilias (for .info), (the former is a Pennsylvania non-profit corporation and the latter is a Pennsylvania corporation both are the “Registry Operators”). ICANN and the Registry Operators each bilaterally negotiated Registry Agreement renewals with ICANN org. ICANN and the Registry Operators “agreed to implement the incorporation of unique legacy-related terms of .org (and .info) through an ‘Addendum’ to the Registry Agreement.”

[<https://www.icann.org/resources/agreement/org-2019-06-30-en>]

The initial Registry Agreements for .org and .info were due to expire on June 30th, 2019. In anticipation of that nearing expiration date, ICANN and PIR, and ICANN and Afilias, bilaterally negotiated renewals of their respective Registry Agreements. The proposed renewals were based on ICANN’s current Base gTLD Registry Agreement.

The Addendum allowed the Registry Operator to renew with “unique terms” included via the Addendum. The reasons ICANN and the Registry Operators were willing to renew with unique terms may have to do with the historical nature of these TLDs, their size, and the fact that in the case of .org, a vast number of non-profits and public interest entities are registered thereunder (ICANN itself is icann.org). The .org TLD is currently the third largest TLD, with at present more than 10 million registrants, and .info is the fourth largest (with ~4.65 million registrants as of May 2019).²

² The TLDs .com and .net are the two largest according to the latest statistics on Statista. [<https://www.statista.com/statistics/262947/domain-numbers-of-the-ten-largest-top-level-domains/>]

It's no understatement to note that regarding the history of Internet domains, putting all TLDs in context over the past 30 odd years, the three TLDs .org, .info, and .biz, (plus .com and .net), comprise the most important, most recognized, and just *most* period.

Viewed separately or together, these TLDs are *the most significant* TLDs; thus, it is not surprising that ICANN would take time and care to treat them differently in terms of their renewals, and be willing to renew them on unique terms. The removal of price controls brings these renewals in line with the current Base gTLD Registry Agreements, creating potential conformity for all (or almost all) TLD agreement terms going forward.

When bilateral renewal negotiations were finished, ICANN org posted the proposed, bilaterally negotiated renewal of the unique .org Registry Agreements for public comment (from March 18th, 2019 through April 29th, 2019).

According to the Staff Report of Public Comment Proceeding ("Staff Report") which was posted on June 3rd, 2019, ICANN received 3,200+ submissions during the public comment period for .org alone. (The Staff Report is available at <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>).

The Staff Report notes this number of comments is comparable to a prior .org Registry Agreement renewal comment period in 2006, where over 2,000 comments were received. All of the present comments were submitted through an ICANN org public comment portal requiring human interaction; yet many of these comments seem clearly to be computer generated that is to say, they may be "comments" in some way, shape or form, but a vast number of comments are identical, with only the email address of the comment submitter changing. A brief search on the Internet identified one source of recurring comments to be: <https://www.internetcommerce.org/comment-org/> (Web page accessed Sept. 7th, 2019).

As far as comments go for ICANN, 3200+ appears to be quite a sizeable number. But, seeing as how the public comments can be filled out and submitted electronically, it is not unexpected that many of the comments are, in actuality, more akin to spam.

After the public comment period closed, ICANN Staff prepared the Staff Report, which was circulated to the ICANN Board, and then subsequently made available to the public at the beginning of June 2019. All Board Directors could access all of the public comments, as could *anyone* (they live online here: <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>). Given the significance of these Legacy TLDs, the Board was briefed about the negotiations in January 2019; subsequently (in June of 2019) the Board was briefed about the public comments and the decision taken by ICANN Staff and the President and CEO ("CEO") to go ahead with the renewals under the published terms.

Following consultation with the Board, ICANN published correspondence affirming that renewal of TLDs by the CEO and Staff continues to be a proper delegation of authority by the Board to the CEO and Staff.

[\[https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf\]](https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf)

What may not be understood by the Community is that ICANN's Board delegated such authority to negotiate and renew Registry Agreements to the CEO and Staff long ago, utilizing the executive authority resident in the Chief Executive and its powers:

Section 15.4. PRESIDENT

The President shall be the Chief Executive Officer (CEO) of ICANN in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio Director, and shall have all the same rights and privileges of any Director. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.

They call these powers "Executive" for a reason: the Staff and the officers under the CEO *execute* agreements, operations, etc. Indeed, the Board's delegation of authority to negotiate and enter into contracts is consistent with the Bylaws and the state laws of California, under and by which ICANN is formed as a corporation, as noted in Footnote 1 above (owing to Bylaws Section 4.2 inclusion of ICANN's "Mission" and "Commitments").

The most relevant Bylaw, however, is probably Bylaws Section 2.1:

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1).

The Board of Directors has specifically directed the CEO and Staff to negotiate and execute agreements especially Registry Agreements. This authority is periodically reaffirmed, as appears to have happened in June 2019. Indeed, *executing* Registry Agreements (and their renewals) are, to an extent, the *raison d'être* and life's blood of ICANN; it makes total sense that the Board gave and keeps giving this authority and power to the CEO and his Staff.

The Bylaws specifically authorize the CEO's power to enter into and execute contracts (including, of course, Registry Agreements). Per the Bylaws, Section 21.1:

CONTRACTS

The Board may authorize any Officer or Officers, agent or agents, to enter into any contract or execute or deliver any instrument in the name of and on behalf of ICANN, and such authority may be general or confined to specific instances.

Following the ICANN 65 Marrakech Policy Meeting in June 2019, the Registry Operators for the .org, .info and .biz TLDs executed their bilaterally negotiated Renewal Registry

Agreements with ICANN (on June 30th, 2019). The choice to include unique terms (or any terms, unique or not) properly belongs to the CEO and Staff, and all the included and proposed terms were bilaterally negotiated by Staff with the respective Registry Operators.

After investigation, it seems apparent to me that the CEO and Staff acted within the scope of the powers given them by the Board. The Board retained oversight, the Board was briefed on the negotiations for the renewals of the Registry Agreements for the Legacy TLDs, and the Board was well aware of the public comments related thereto. The Board could have directed the CEO and Staff *not* to renew under these terms had it thought that warranted. It decided not to do so.

The Board were well aware of the public comments, had been briefed on them by the CEO and Staff, and had been provided with the Staff Report summarizing them; they chose to let Staff go ahead and renew on the terms agreed to with the Registry Operators, and the renewal Registry Agreements were duly and timely executed. Nothing about this seems to me, based on my investigation and understanding of the relevant rules, laws and Bylaws, to be any kind of violation or dereliction of CEO and Staff's normal executive obligations and duties, or of the Mission, Core Values, or Commitments of ICANN.

Ultimately, my substantive evaluation of this Request is that the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws). I have more to say about all this in the "companion" Substantive Evaluation of Reconsideration Request 19-3 (see Annex 1), which relates to other terms of these same renewal Registry Agreements (and which I have submitted per the Bylaws on the same day as I submitted this Evaluation: September 7th, 2019).

What Requestor set forth and requests in Request for Reconsideration 19-2 does not merit a recommendation by me to the BAMC or the Board to take the action Requestor requests, or to take any action at all.



Via Email:
correspondence@icann.org
ombudsman@icann.org
herb.waye@icann.org

September 12 2019

Mr. Herb Waye
Ombudsman
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California
90094-2536, USA

Dear Mr. Waye:

Re: Your Response to Reconsideration Request 19-2

The position of Ombudsman has a crucial role within an organization and requires respect for stakeholders, sound judgment, and neutrality.

On or about September 7, 2019, in your position as ICANN Ombudsman, you issued a “Substantive Evaluation” of NameCheap, Inc.’s Request for Reconsideration wherein you made ill-informed and disparaging comments about members of the ICANN community.

On Page 3 of your “Substantive Evaluation” (“SE”) at Paragraph 6, you stated that “many of the [3200+] comments are, in actuality, more akin to spam”.

You also stated therein at Paragraph 5, that “many of these comments seem clearly to be computer generated—that is to say, they may be ‘comments’ in some way, shape or form, but a vast number of comments are identical, with only the email address of the comment submitter changing.” You further stated therein that “a brief search on the Internet identified one source of recurring comments to be: <https://www.internetcommerce.org/comment-org/> (Web page accessed Sept. 7th, 2019)”.

Your disparagement of public comments from concerned stakeholders, which were duly submitted through the ICANN comment portal, is deeply concerning, particularly for an Ombudsman. Furthermore, your misrepresentation of facts demonstrates a failure to reasonably inform yourself prior to reaching an ill-advised and incorrect conclusion.

There was an unprecedented groundswell of public opposition to the Proposed .org Renewal Registry Agreement as demonstrated by the 3,200 Comments which were properly submitted. Each of these comments expressed the genuine perspective of the person or organization that submitted the comment. Many of these Comments were from major non-profit organizations, community groups, small associations, religious organizations, environmental groups, academics, and individual registrants. One could reasonably conclude that these Comments are indicative of the tens of thousands of other individuals and organizations with similar concerns that either were not aware of the Comment Period or who did not take the time and trouble to submit a Comment.

You however, attempted to denigrate and dismiss the volume of Comments on the purported basis of many of them being “spam”. You attempted to justify your conclusion on the basis that many of the comments were, according to you, “computer generated” and were “identical, with only the email address of the comment submitter changing.” This is misleading.

As a way to facilitate engagement with ICANN by the millions of .org registrants who would be harmed by the terms of the .org renewal agreement drafted by ICANN staff, and who are largely unfamiliar with ICANN’s public comment procedure and who may be intimidated by what can only be construed as a user *un*-friendly procedure requiring individual email correspondence on complex policy matters, the Internet Commerce Association (“ICA”) established a web page which facilitated a user-friendly and simple way for concerned stakeholders to make their voice heard. Any interested person could use the user-friendly ICA form to send a Comment to ICANN. Hundreds and perhaps thousands of individuals on their own initiative used the comment form as an aid to participating in the ICANN comment process. The vast majority of Commenters who used the ICA web page facility had no affiliation with the ICA and were unknown to the ICA.

The form allowed Commenters to write their own original Comment, or to choose from a selection of possibly applicable comments, or to create a comment from a combination of both. This is something that ICANN itself should have done long ago, and indeed ICANN is currently seeking feedback from stakeholders about changing the current procedure for submitting comments. In the ICANN survey (See; <http://input.icann.org/app/survey/response.jsp>), ICANN asks in part, “Would you (or a group you directly contribute to) respond more often to Public Comments if the consultation included short and precise questions regarding the subject matter in a Survey Monkey or similar format?”

Accordingly, human interaction was present in each and every one of the Comments which were submitted via the ICA user-friendly form. Each person who used the form took the time and effort to submit the form and select the comments that they wished to make or used the form to submit their own comments. All followed the established procedures which do not exclude emails submitted through a user-friendly portal. Most of these Commenters were from outside of

the usual ICANN community of Commenters, as they learned of this important issue from their registrar, from the press, from blogs, from online forums, and from each other.

Furthermore, contrary to your claim that these Comments “only [included] the email address”, and did not otherwise identify the sender, each Comment submitted generally included the Commenter’s name and email address, both of which are normally transmitted by a sender’s own email application as with all correspondence and Comments submitted by email in the usual course. This was not “spam” as you alleged. "Spam" is unwelcome, unsolicited commercial messages sent from an unknown source. Contrary to your mischaracterization, these Comments expressed the genuine opinions of individuals from the community that ICANN purports to serve, and who took the trouble to share their viewpoints to better inform ICANN's decision-making process, only to find their views scorned and disregarded.

Rather than dismiss and effectively disenfranchise thousands of Commenters who duly expressed their views using this method, an Ombudsman should have embraced them and encouraged them. As you yourself admit, an Ombudsman’s job is to listen. You failed to listen or were otherwise determined not to listen. Instead, you dismissed and deprecated legitimate Comments from members of the public and that is a disappointing dereliction of duty for someone in your position. In our view, your mischaracterization of much of the Comments submitted by the public as “spam” ostensibly submitted by spammers, calls into question your ability to fairly and impartially carry out your primary function which is to encourage and respect stakeholders who express themselves to ICANN. Moreover, you failed to conduct any meaningful research prior to reaching your conclusions on the nature of the Comments, other than apparently by visiting a web page. You could have and should have made inquiries of the ICA which would have informed you of the actual nature of its facilitation efforts.

Under the circumstances, we think that it is incumbent upon you to apologize to the numerous people who submitted these Comments and to retract your ill-advised statements. The Ombudsman should seek ways to increase public participation, particularly from those who are underrepresented or unengaged in ICANN's policy development, rather than devaluing and dismissing their contributions to the policy development process.

Yours truly,
INTERNET COMMERCE ASSOCIATION



Per:
Zak Muscovitch
General Counsel, ICA

**PROPOSED DETERMINATION
OF THE ICANN BOARD OF DIRECTORS¹
RECONSIDERATION REQUEST 19-2
3 November 2019**

The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization’s 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afiliás Limited (Afiliás) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs), insofar as the renewals eliminated “the historic price caps” on domain name registration fees for .ORG and .INFO.² The Requestor claims that ICANN org’s “decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN’s Commitments and Core Values, and ICANN should reverse this decision for the public good.”³

Specifically, the Requestor claims that the .ORG/.INFO Renewed RAs are contrary to:

- (i) ICANN org’s commitment to “seek input from the public, for whose benefit ICANN in all events shall act.”⁴
- (ii) ICANN org’s Core Value of “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.”⁵
- (iii) ICANN org’s Public Comment Opportunities page, which states that “Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential

¹ The Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee. See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en>. Here, the majority of the BAMC members have recused themselves from voting on this matter due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2 so the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC.

² Request 19-2, § 3, at Pg. 2.

³ *Id.* § 8, at Pg. 3.

⁴ *Id.* § 8, at Pg. 4.

⁵ *Id.* § 8, at Pg. 4.

adoption,” and is “used to guide implementation work, reviews, and operational activities of the ICANN organization.”⁶

- (iv) ICANN org’s statements concerning its call for Public Comment that the “purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement.”⁷

The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.⁸

The Requestor “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs.”⁹

I. Brief Summary.

PIR is the registry operator for the .ORG TLD.¹⁰ ICANN org and PIR entered into an RA on 2 December 2002 for the continued operation of the .ORG gTLD, which was renewed in 2006 and 2013.¹¹ ICANN org and Afilias first entered into an RA on 11 May 2001 for the operation of the .INFO gTLD, which was renewed in 2006 and 2013.¹² Before the recent renewals, the RAs for .ORG and .INFO included price caps, which limited the initial prices and allowable price increases for registrations.¹³ Both RAs were scheduled to expire on 30 June 2019.

In anticipation of the 30 June 2019 expiration, ICANN org bilaterally negotiated renewals to the agreements with each registry operator. The proposed renewals were based on

⁶ *Id.* § 8, at Pg. 4.

⁷ *Id.*, § 8, at Pg. 4.

⁸ *Id.*, § 8, at Pg. 10.

⁹ *Id.*, § 9, at Pg. 12.

¹⁰ Public Comment Proceeding, Proposed Renewal of .ORG RA, 18 March 2019 (2019 .ORG RA Public Comment Proceeding), <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

¹¹ *Id.*

¹² Public Comment Proceeding, Proposed Renewal of .INFO RA, 18 March 2019 (2019 .INFO RA Public Comment Proceeding), <https://www.icann.org/public-comments/info-renewal-2019-03-18-en>.

¹³ 2002 .ORG RA, <https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en>; 2001 .INFO RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en>.

ICANN org’s base generic TLD Registry Agreement updated on 31 July 2017 (Base RA), modified to account for the specific nature of the .ORG and .INFO gTLDs.¹⁴ As a result, the proposed Renewed RAs’ terms were substantially similar to the terms of the Base RA.

From January 2019 to June 2019, ICANN Staff briefed and met with the Board several times regarding the proposed .ORG/.INFO Renewed RAs.¹⁵ On 18 March 2019, ICANN Staff published the proposed .ORG/.INFO Renewed RAs for public comment to obtain community input on the proposed renewals. ICANN Staff described the material differences between proposed renewals and the current .ORG and .INFO RAs. These differences included removal of limits on domain name registration fee increases that had been in prior .ORG and .INFO RAs. ICANN Staff explained that the change would “allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA],” while “tak[ing] into consideration the maturation of the domain name market and the goal of treating the Registry Operator[s] equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].”¹⁶

ICANN org received over 3,700 submissions in response to its call for public comments on the proposed .ORG and .INFO agreements.¹⁷ The comments predominantly related to three themes: (1) the proposed removal of price cap provisions; (2) inclusion of certain rights

¹⁴ See 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding. The RA for the operation of .BIZ was also set to expire on 30 June 2019; as a result of bilateral negotiations with the registry operator for .BIZ and after considering public comments, ICANN org and the registry operator for .BIZ entered into a Renewed RA for .BIZ that was based on (and therefore substantially similar to) the Base RA. See <https://www.icann.org/resources/agreement/biz-2019-06-30-en>.

¹⁵ Letter from Namazi to Muscovitch, 26 July 2019, at Pg. 2, <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>.

¹⁶ 2019 .ORG RA Public Comment Proceeding. New gTLDs are TLDs released as part of ICANN org’s New gTLD Program. See <https://newgtlds.icann.org/en/about/program>. Legacy gTLDs are gTLDs that existed before ICANN org’s New gTLD Program. .ORG and .INFO are legacy TLDs.

¹⁷ Report of Public Comments, .ORG, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>; Report of Public Comments, .INFO, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf>.

protection mechanisms (RPMs), including the Uniform Rapid Suspension (URS) rules; and (3) the RA renewal process.¹⁸

ICANN Staff analyzed the public comments, including those addressing the proposed removal of price cap provisions, in its Report of Public Comments.¹⁹ It concluded that removing the price cap provisions was “consistent with the Core Values of ICANN org as enumerated in the Bylaws,” insofar as removing the price cap provisions would “promote competition in the registration of domain names,” and enabled ICANN org to “depend upon market mechanisms to promote and sustain a competitive environment in the [Domain Name System (DNS)] market.”²⁰ ICANN org also noted that the Base RA protected existing registrants’ pricing by requiring the registry operator to: (1) give registrars six months’ advance notice of price changes; and (2) allow registrants to renew their domain name registrations for up to 10 years *before* those price changes take effect.²¹ ICANN Staff then noted that it would “consider the feedback from the community on this issue,”²² “and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”²³

Following consultation with the ICANN Board of Directors and with the Board’s support, on 30 June 2019, ICANN Staff announced that it had executed the .ORG/.INFO Renewed RAs. The .ORG/.INFO Renewed RAs did not include price caps.²⁴

¹⁸ Report of Public Comments, .INFO, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.

¹⁹ ICANN org received some comments supporting removal of the price cap provision because “ICANN org is not and should not be a price regulator,” and because the Base RA would provide certain protections to current registrants. Report of Public Comments, .ORG, at Pg. 6.

²⁰ *Id.*, at Pg. 8.

²¹ *Id.*

²² *Id.*

²³ *Id.*, at Pg. 1.

²⁴ See ICANN org announcements: .ORG Renewed RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>; .INFO Renewed RA, <https://www.icann.org/resources/agreement/info-2019-06-30-en>.

On 12 July 2019, the Requestor filed Request 19-2, seeking reconsideration of the .ORG/.INFO Renewed RAs.

The Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that “the CEO and Staff acted within the scope of the powers given them by the Board,”²⁵ and that “no rules or duties of corporate governance were violated (including the ICANN Bylaws).”²⁶

The Board has considered Request 19-2 and all relevant materials. Based on its extensive review of all relevant materials, the Board finds that reconsideration is not warranted because ICANN org’s execution of the .ORG/.INFO Renewed RAs was consistent with ICANN’s Bylaws, policies, and procedures, and ICANN Staff considered all material information prior to executing the .ORG/.INFO Renewed RAs.

II. Facts.

A. Historic .ORG and .INFO RAs.

On 2 December 2002, ICANN org and PIR entered into a RA for the continued operation of .ORG, which became effective in 2003.²⁷ ICANN org and Afilias first entered into a RA on 11 May 2001 for the operation of .INFO.²⁸ Both RAs included price caps.²⁹

In 2006, ICANN org considered removing price caps from several legacy gTLDs, including .INFO and .ORG.³⁰ However, after reviewing over 2,000 comments from over 1,000 commenters, many opposing removal of the price caps, and at the Board’s direction, ICANN org

²⁵ Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019, <https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en>.

²⁶ *Id.*

²⁷ 2019 .ORG RA Public Comment Proceeding; *see also* <https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en>; <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>.

²⁸ 2019 .INFO RA Public Comment Proceeding.

²⁹ 2002 .ORG RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>; 2001 .INFO RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en>.

³⁰ 2006 Public Comment of .BIZ, .INFO, .ORG, <https://www.icann.org/news/announcement-3-2006-07-28-en>.

renegotiated the .ORG and .INFO RAs to include price caps.³¹ Following a public comment period for the revised RAs (which included price caps), on 8 December 2006, the Board approved .ORG and .INFO RAs with price caps (as proposed and posted during the public comment period for the revised RAs).³²

B. The New gTLD Program and the Base RA.

In 2005, ICANN's Generic Names Supporting Organization (GNSO) undertook a policy development process to consider expanding the DNS by introducing new gTLDs.³³ In 2007, the GNSO concluded that "ICANN must implement a process that allows the introduction of new [gTLDs]."³⁴ Accordingly, ICANN org established and implemented the New gTLD Program, "enabling the largest expansion of the [DNS]."³⁵

In 2009, ICANN org commissioned Professor Dennis W. Carlton to analyze "whether price caps... would be necessary to insure the potential competitive benefits" of new gTLDs.³⁶ Carlton concluded that price caps were "unnecessary to insure competitive benefits of the proposed process for introducing new [gTLDs]," and also noted that "competition among suppliers to attract new customers in markets characterized by switching costs [such as the

³¹ See Revised .BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, <https://www.icann.org/news/announcement-2006-10-24-en>.

³² .ORG RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en>; .INFO RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en>.

³³ <https://newgtlds.icann.org/en/about/program>.

³⁴ 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.

³⁵ <https://newgtlds.icann.org/en/about/program>.

³⁶ Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 4, March 2009 <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>. Professor Carlton has been a Professor of Economics at the Booth School of Business of The University of Chicago, and Co-Editor of the Journal of Law and Economics, Competition Policy International since 1984. *Id.*, at ¶¶ 1-2. He also served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, United States Department of Justice from October 2006 through January 2008. *Id.*, at ¶ 3. In 2014, Professor Carlton was designated Economist of the Year by Global Competition Review. <https://www.chicagobooth.edu/faculty/directory/c/dennis-w-carlton>. Professor Carlton previously served as Professor of Economics at the Massachusetts Institute of Technology. Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 1.

market for gTLDs] limits or eliminates the suppliers' [*i.e.*, the registry operators'] incentive and ability to act opportunistically."³⁷ He explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."³⁸

Carlton performed his analysis during the Base RA development process.³⁹ That process included multiple rounds of public comment on the proposed Base RA, several months of negotiations, meetings with stakeholders and communities, and formal community feedback via a public comment forum.⁴⁰ The Base RA was established in 2013 and aligns with the GNSO's policy recommendations for new gTLDs.⁴¹ Since 2014, ICANN org has worked with legacy gTLD registry operators to transition the agreements for legacy gTLDs to the Base RA as well, and several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in renewal agreements.⁴² The Base RA does not contain price caps, but it "does contain requirements designed to protect registrants from a price perspective," including requirements that registry operators "provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals."⁴³ In addition, the registry operators must allow registrants

³⁷ *Id.*, at ¶ 12.

³⁸ *Id.*

³⁹ See New gTLD Program gTLD Applicant Guidebook, Version 2012-06-04, Preamble, available for download at <https://newgtlds.icann.org/en/applicants/agb>.

⁴⁰ <https://www.icann.org/public-comments/base-agreement-2013-04-29-en>; see also 26 July 2019 Letter, at Pg. 1.

⁴¹ 26 July 2019 Letter, at Pg. 1; see also GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015.

⁴² 26 July 2019 Letter, at Pg. 1.

⁴³ *Id.*

to renew for up to 10 years before implementing a price change, and subject to restrictions on discriminatory pricing.⁴⁴

Using the Base RA for renewed legacy gTLDs without price cap provisions “is consistent with the gTLDs launched via the new gTLD program and will reduce ICANN org’s role in domain pricing.”⁴⁵ This promotes ICANN’s Core Values of “introduc[ing] and promot[ing] competition in the registration of domain names and, where feasible and appropriate, depend[ing] upon market mechanisms to promote and sustain a competitive environment in the DNS market.”⁴⁶

The Base RA provides additional protections for the public benefit. For example, in 2015 the Board noted that the Base RA allows ICANN org to “designate an emergency interim registry operator of the registry for the TLD, which would mitigate the risks to the stability and security of the [DNS].”⁴⁷ Additionally, using the Base RA ensures that the Registry will use “uniform and automated processes, which will facilitate operation of the TLD,” and “includes safeguards in the form of public interest commitments in Specification 11.”⁴⁸

The Board has also explained that transitioning legacy gTLDs to the Base RA “will provide consistency across all registries leading to a more predictable environment for end-users.”⁴⁹ The Base RA’s requirement that the registry operator only use ICANN accredited

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*, at Pg. 2.

⁴⁷ Rationale for Board Resolution 2015.09.28.06 (renewal of .PRO RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e.rationale>; see also Rationale for Board Resolution 2015.09.28.04 (renewal of .CAT RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c.rationale>; Rationale for Board Resolution 2015.09.28.05 (renewal of .TRAVEL RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d.rationale>; 2019 .ORG RA, Art. 2, § 2.13, at Pg. 7, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>.

⁴⁸ Rationale for Board Resolution 2015.09.28.06; see also 2019 .ORG RA, Specification 11, at Pgs. 95-96, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>.

⁴⁹ Rationale for Board Resolution 2015.09.28.06.

registrars that are party to the 2013 Registrar Accreditation Agreement “will provide more benefits to registrars and registrants.”⁵⁰ Finally, the Board has noted that the Base RA “includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS,”⁵¹ another public benefit.

C. The 2019 .ORG and .INFO RA Renewals.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.⁵² Likewise, the .INFO RA with Afilias was renewed on 22 August 2013.⁵³

In anticipation of the 30 June 2019 expiration of the 2013 .ORG and .INFO RAs, ICANN org bilaterally negotiated renewals with each registry operator. The proposed renewals were based on ICANN org’s Base RA, modified “to account for the specific nature[s]” of each TLD and as a result of negotiations between ICANN and the registry operators.⁵⁴ On 18 March 2019, ICANN org published the proposed .ORG/.INFO RAs for public comment to obtain community input on the proposed renewals. ICANN org published redline versions of the proposed renewal agreements against the Base RA, and identified the material differences between proposed renewals and the Base RA. ICANN org explained that

[i]n alignment with the [Base RA], the price cap provisions in the current .ORG [and .INFO] agreement[s], which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG [and .INFO] renewal agreement[s]. Protections for existing registrants will remain in place, in line with the [Base RA]. This change will not only allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 2019 .ORG RA Public Comment Proceeding.

⁵³ 2019 .INFO RA Public Comment Proceeding.

⁵⁴ *See* 2019 .ORG RA Public Comment Proceeding ; 2019 .INFO RA Public Comment Proceeding.

equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].⁵⁵

The public comment period for the .ORG/.INFO Renewed RAs opened on 18 March 2019 and closed on 29 April 2019.⁵⁶ During that time, ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG agreement,⁵⁷ and over 500 submissions in response to its call for comments on the proposed .INFO agreement.⁵⁸ The comments predominantly related to three themes: (1) the proposed removal of the price cap provisions; (2) inclusion of the RPMs; and (3) the RA renewal process.⁵⁹

ICANN org detailed its analysis of the public comments concerning the .ORG/.INFO Renewed RAs—including those addressing the proposed removal of price cap provisions—in its Report of Public Comments.⁶⁰ ICANN org concluded that

[r]emoving the price cap provisions in the .ORG [and .INFO RAs] is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.⁶¹

ICANN org also noted that

the Base [RA] would also afford protections to existing registrants . . . [e]nacting this change will not only allow the .ORG renewal agreement to conform to the Base [RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry

⁵⁵ 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.

⁵⁶ 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.

⁵⁷ Report of Public Comments, .ORG, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>.

⁵⁸ Report of Public Comments, .INFO, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf>.

⁵⁹ *Id.*, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.

⁶⁰ Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

⁶¹ Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

operators of new gTLDs and other legacy gTLDs utilizing the Base [RA].⁶²

ICANN org explained that it would “consider the feedback from the community on this issue,”⁶³ and then ICANN org would “consider the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”⁶⁴

ICANN org reviewed and considered all of the comments submitted concerning the proposed .ORG/.INFO Renewed RAs,⁶⁵ then ICANN Staff briefed the ICANN Board on its analysis of the public comments during the Board workshop on 21-23 June 2019.⁶⁶ With support from the Board to proceed with execution of the proposed renewals and pursuant to the [ICANN Delegation of Authority Guidelines](#), on 30 June 2019, ICANN org executed the .ORG/.INFO Renewed RAs.⁶⁷

D. The Request for Reconsideration and Ombudsman Report.

The Requestor submitted Request 19-2 on 12 July 2019.

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 19-2 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.⁶⁸

After investigating, the Ombudsman concluded that “the CEO and Staff acted within the scope of the powers given them by the Board,”⁶⁹ and that “no rules or duties of corporate

⁶² Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

⁶³ Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

⁶⁴ Report of Public Comments, .ORG, at Pg. 1; Report of Public Comments, .INFO, at Pg. 1.

⁶⁵ 26 July 2019 Letter, at Pg. 2.

⁶⁶ 26 July 2019 Letter at Pg. 2.

⁶⁷ See ICANN org announcements: .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>; .INFO RA, <https://www.icann.org/resources/agreement/info-2019-06-30-en>.

⁶⁸ <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-ombudsman-action-redacted-27aug19-en.pdf>.

⁶⁹ Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019.

governance were violated (including the ICANN Bylaws).”⁷⁰ He determined that the “Board were well aware of the public comments” because ICANN Staff briefed the Board on the comments, and because the comments were publicly available, so Board members could have read each comment had they so desired.⁷¹ Additionally, the Ombudsman concluded that “the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws).”⁷²

E. Relief Requested.

The Requestor “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs.”⁷³

III. Issues Presented.

The issues are as follows:

1. Whether ICANN Staff’s decision not to include price caps in the .ORG/.INFO Renewed RA contradicts ICANN’s Mission, Commitments, Core Values, or established ICANN policies; and
2. Whether ICANN Staff failed to consider material information when it executed the .ORG/.INFO Renewed RAs.

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:

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*, at Pg. 5. On 12 September 2019, the Internet Commerce Association (ICA) wrote to the Ombudsman, asserting that the Ombudsman “made ill-informed and disparaging comments about members of the ICANN community” in the Ombudsman’s evaluation. 12 September 2019 letter from Z. Muskovitch to H. Waye, <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-letter-ica-to-icann-ombudsman-12sep19-en.pdf>. The ICA asked the Ombudsman to “apologize to the numerous people who submitted these Comments and to retract [his] ill-advised statements.” *Id.*, at Pg. 3.

⁷³ Request 19-2, § 9, at Pg. 12.

- (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.”⁷⁴

The Board now considers Request 19-2’s request for reconsideration of Staff action⁷⁵ on the grounds that the action was taken in contradiction of ICANN’s Bylaws and without consideration of material information. The Board has reviewed the Request and now makes this proposed determination. Denial of a Request for Reconsideration of ICANN Staff action is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁷⁶

V. Analysis and Rationale.

A. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org’s Commitments.

The Requestor claims that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org’s Commitment to “seek input from the public, for whose benefit ICANN in all events shall act.”⁷⁷

The Requestor acknowledges that “ICANN [org] requested public comment regarding the changes to the .ORG registry agreement.”⁷⁸ It asserts, however, that ICANN org “reject[ed] all

⁷⁴ Bylaws, Art. 4 §§ 4.2(a) and (c).

⁷⁵ The Requestor sought reconsideration of Board and Staff Action, and brought the Request on behalf of itself and “725 Namecheap customers and internet users.” *See* Request 19-2, § 2, at Pg. 2; *id.* § 10, at Pg. 12. Request 19-2 does not identify an action or inaction of the Board. Further, the Requestor’s claim on behalf of its customers is not sufficiently stated because it does not satisfy the requirement that the Requestor, not a third party, must have been adversely affected by the challenged action. Accordingly, the Board’s consideration is with respect to the Requestor’s challenge to Staff action.

⁷⁶ Bylaws, Art. 4 § 4.2(e).

⁷⁷ Request 19-2, § 8, at Pg. 4.

⁷⁸ *Id.* § 8, at Pg. 3.

of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence,” and as a result, “the public comment process is basically a sham.”⁷⁹ In sum, the Requestor claims that including price caps in the .ORG/.INFO Renewed RAs “ignore[d] the public benefit or almost unanimous feedback to the contrary.”⁸⁰

The Requestor does not dispute that ICANN org “review[ed] and consider[ed] all 3,200+ comments received,”⁸¹ and acknowledged that the removal of the price caps was “[a] primary concern voiced in the comments.”⁸² ICANN Staff presented and discussed the “key issues raised in the public comment process and correspondence,” including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.⁸³ Further, as the Ombudsman noted, the Board was “well aware of the public comments.”⁸⁴

The Reports of Public Comment were the result of ICANN Staff’s extensive analysis of the comments; consistent with ICANN Staff’s ordinary process for preparing the Report of Public Comment, ICANN Staff identified the main themes in the comments and summarized them, providing exemplary excerpts for each of those themes.⁸⁵ Neither the Bylaws, nor any ICANN policy or procedure, requires ICANN Staff to discuss each position stated in each comment. By the same token, there is no threshold number of comments about a topic that, if reached, requires ICANN Staff to address that topic in the Report of Public Comments. Even a single comment on a theme may merit inclusion in the report, under certain circumstances;

⁷⁹ *Id.* § 8, at Pgs. 10, 12.

⁸⁰ *Id.* § 8, at Pg. 12.

⁸¹ 26 July 2019 Letter at Pg. 2.

⁸² Report of Public Comments, .ORG, at Pg. 3; Report of Public Comments, .INFO, at Pg. 3.

⁸³ 26 July 2019 Letter, at Pg. 2.

⁸⁴ Ombudsman Evaluation of Request 19-2, at Pg. 5.

⁸⁵ *See* Report of Public Comments, .ORG, at Pg. 3 (“This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor.”); Report of Public Comments, .INFO, at Pg. 3 (same).

likewise, a multitude of comments on a theme may merit little or no consideration in the report, under other circumstances.⁸⁶

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a “sham” or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff’s careful consideration of the public comments—as reflected in its Report of Public Comments and discussion with the Board,⁸⁷ demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

Further, the Report of Public Comments demonstrates ICANN Staff’s belief that it was acting for the public benefit by “promot[ing] competition in the registration of domain names,” providing the same “protections to existing registrants” afforded to registrants of other TLDs, and treating “the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base [RA].”⁸⁸ There is no support for the Requestor’s assertion that ICANN Staff’s belief in this regard was based upon “conclusory statements not supported by evidence.”⁸⁹ ICANN org considered Professor Carlton’s 2009 expert analysis of the Base RA, and specifically his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.⁹⁰

⁸⁶ The Board acknowledges the ICA’s disagreement with the Ombudsman’s characterization of certain comments as “spam” and “computer generated.” 12 September 2019 Letter, at Pgs. 1-2. ICANN Staff acknowledged both the volume of comments submitted concerning the proposed .ORG/.INFO Renewed RAs and the issues they raised—including the removal of price cap provisions—without discounting the comments based on their apparent source. *See* Report of Public Comments, .ORG; Report of Public Comments, .INFO. Accordingly, the ICA’s arguments do not change the Board’s determination that reconsideration is not warranted here.

⁸⁷ 26 July 2019 Letter, at Pg. 2.

⁸⁸ Report of Public Comments, .ORG, at Pg. 8.

⁸⁹ Request 19-2, § 8, at Pg. 12.

⁹⁰ Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.

Finally, ICANN Staff was aware of the Board’s 2015 statements (made in the course of approving the migration of another legacy gTLD, .PRO, to the Base RA) that the Base RA as a whole benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end-users.⁹¹

In sum, the Requestor’s conclusory assertion that ICANN org did not act for the public benefit is unsupported and does not support reconsideration.

B. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org’s Core Values.

The Requestor asserts that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org’s Core Value of

[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.⁹²

Contrary to the Requestor’s argument, ICANN org *did* seek broad, informed participation through the public comment process for the .ORG/.INFO Renewed RAs. As noted above, ICANN org considered the responses and other factors, including its commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,”⁹³ and its Core Values of “depending on market mechanisms to promote and sustain a competitive environment in the DNS market” where “feasible and appropriate,” and “[i]ntroducing and promoting competition in

⁹¹ See Rationale for Board Resolution 2015.09.28.06.

⁹² Request 19-2, § 8, at Pg. 4.

⁹³ Bylaws, Art. 1, § 1.2(a)(v); *see also* 26 July 2019 Letter, at Pg. 1.

the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.”⁹⁴

Moreover, the public comment process is but one of several channels for ICANN’s multistakeholder community to voice opinions. Members of the community may also voice their opinions in public meetings and through the final recommendations of supporting organizations, advisory committees, and direct correspondence with ICANN org. Accordingly, the multistakeholder community provides input to ICANN org in many ways, and ICANN org considers this input to ensure that all views have been taken into account during a decision-making process.

However, ICANN org’s Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN’s various communication channels. Here, ICANN org ultimately determined that ICANN’s Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same “protections to existing registrants” that are afforded to registrants of other TLDs, and treat registry operators equitably.⁹⁵ Further, the Base RA, which is incorporated in the .ORG/.INFO Renewed RA, “was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment.”⁹⁶

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org’s transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by

⁹⁴ Bylaws, Art. 1, § 1.2(b)(iii), (iv); *see also* 26 July 2019 Letter, at Pg. 2.

⁹⁵ Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

⁹⁶ 26 July 2019 Letter, at Pg. 1.

migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org’s Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

The Requestor asserts that reconsideration is warranted because omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org’s statement on its Public Comment Opportunities page that “Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption,” and is “used to guide implementation work, reviews, and operational activities of the ICANN organization.”⁹⁷ The Requestor asserts that omitting the price caps is inconsistent with ICANN org’s statement that the “purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement.”⁹⁸

Ultimately, ICANN org’s decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to “obtain community input” or “use[]” the public comment “to guide implementation work” of ICANN org.⁹⁹ To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board’s support, to pursue, the global public interest.

Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).¹⁰⁰ ICANN org’s general description of the purpose of the public comment process is

⁹⁷ Request 19-2, § 8, at Pg. 4.

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ Bylaws, Art. 4 § 4.2(c). The challenged action must adversely affect the Requestor as well. *Id.*

not a Commitment, Core Value, established policy, nor part of ICANN org’s Mission.

Accordingly, even if ICANN org’s decision to execute the .ORG/.INFO Renewed RAs without price caps contradicted these statements—and it did not, as explained in Section V.A above — this inconsistency could not form the basis of a Reconsideration Request.

D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

The Requestor asserts that ICANN org’s analysis of the proposed removal of price caps “ignores significant information that is contrary to its sweeping conclusions.”¹⁰¹ Specifically, the Requestor asserts that ICANN org’s analysis ignores that:

1. .ORG “is the 3rd largest” TLD, and “additional analysis is needed to determine whether this market share can result in uncompetitive practices,”¹⁰²
2. .ORG “was established in 1985,” “is universally known, associated with nonprofit use, and has an excellent reputation,”¹⁰³
3. It can be “a cumbersome and costly process” for an established entity to change domain name, and “often” leads to “negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill).”¹⁰⁴
4. “TLDs are not interchangeable, as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not useable by nonprofits . . . or targeted to certain uses . . . and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .ORG.”¹⁰⁵
5. Although some new gTLDs are targeted to nonprofits, “there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .ORG).”¹⁰⁶

¹⁰¹ Request 19-2, § 8, at Pg. 10.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*, at Pg. 10-11.

¹⁰⁵ *Id.*, at Pg. 11.

¹⁰⁶ *Id.*

6. “There are some concerns [that] higher levels of abuse exists in new gTLD domains ICANN’s own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs.”¹⁰⁷
7. “[I]t is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name.”¹⁰⁸

The Report of Public Comments for the .ORG Renewed RA makes clear that ICANN org *did* consider some of these concerns. Specifically, with respect to Item 1, ICANN Staff noted that commenters “questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections.”¹⁰⁹ With respect to Item 2, ICANN Staff acknowledged that commentators noted that “.ORG was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations.”¹¹⁰ With respect to Items 3, 4, 5, and 7, ICANN Staff acknowledged “concerns about the burden and costs associated with moving [a] web presence to another TLD,” along with comments characterizing .ORG as “the most appropriate registry for a charity or non-profit.”¹¹¹ Accordingly, the Requestor’s argument that the information about these six “concerns” was not considered or was ignored is incorrect and therefore does not support reconsideration.

With respect the Requestor’s assertion that “ICANN’s own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs,”¹¹² the Requestor mischaracterizes the cited ICANN report. As the Requestor notes, the 2019 Domain Abuse Activity Reporting (DAAR) report concluded that 48.11% of the “domains identified as security threats . . . were in legacy

¹⁰⁷ *Id.* citing <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>.

¹⁰⁸ *Id.*, at Pg. 11-12.

¹⁰⁹ Report of Public Comments, .ORG, at Pg. 5.

¹¹⁰ *Id.*, at Pgs. 3-4.

¹¹¹ *Id.*, at Pgs. 4-5.

¹¹² *Id.*, citing 31 January 2019 DAAR Report, <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>.

[TLDs],” and the remaining 51.89% of the domains identified as threats were in new gTLDs.¹¹³ Further, the Report indicates that about 12% of TLD domain names are hosted on new gTLDs.¹¹⁴ However, the Report also notes that 88% of the new gTLD domains identified as security threats were concentrated in only 25 new gTLDs, out of over 340 new gTLDs.¹¹⁵ The Report further noted that 98% of the domains identified as security threats were hosted by “the 50 most-exploited new [TLDs].”¹¹⁶ Accordingly, even if ICANN Staff did not consider the 2019 DAAR Report, the Requestor has not shown that the information contained in it was material to the inclusion of price caps in the .ORG/.INFO Renewed RAs. Moreover, the cited portions of the DAAR Report relate to security threats, not domain name registration fees. This argument does not support reconsideration.

E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/.INFO Renewed RAs.

The Requestor asserts that it has been adversely affected by the challenged conduct because, “[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor’s] domain name registration business,” insofar as the .ORG/.INFO Renewed RAs create an “uncertainty of price increases.”¹¹⁷ That the Requestor could not quantify the actual financial impact on the Requestor of removing the price caps at the time it submitted Request 19-2 was not material to our preliminary procedural evaluation, because the Requestor asserted that the financial uncertainty *itself* is the harm. Accordingly, the Board Accountability Mechanisms Committee (BAMC) concluded that Request 19-2 was sufficiently

¹¹³ 31 January 2019 DAAR Report, Executive Summary.

¹¹⁴ *Id.*, at Pg. 5.

¹¹⁵ *Id.*, at Pg. 6. Similarly, four legacy TLDs hosted more than 94% of the legacy TLD domains identified as security threats. *Id.*

¹¹⁶ *Id.*, at Pg. 6.

¹¹⁷ Request 19-2, § 6, at Pg. 2; *see also id.* § 10, at Pg. 13.

stated.¹¹⁸ However, the BAMC’s conclusion that the Requestor sufficiently asserted that it was materially harmed was not a determination that the Requestor was in fact materially harmed or, if so, that removing the .ORG/.INFO Renewed RAs caused that harm.

The Board now concludes that the Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. As noted above, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.¹¹⁹ Professor Carlton explained that “a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically.”¹²⁰

The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that “additional analysis is needed to determine whether” the removal of price caps in the .ORG RA “can result in uncompetitive practices.”¹²¹ This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton’s expert report—indicates that such harm is not expected. Accordingly, reconsideration is not warranted.

¹¹⁸ See Ombudsman Action on Request 19-2, at Pg. 2.

¹¹⁹ Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.

¹²⁰ *Id.*

¹²¹ Request 19-2, § 8, at Pg. 10.

VI. Proposed Determination.

The Board has considered the merits of Request 19-2 and, based on the foregoing, concludes that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board proposes denying Request 19-2.

Because the BAMC did not have a quorum to consider Request 19-2, the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC. Accordingly, the issuance of this Proposed Determination triggers Requestor's right to file a rebuttal consistent with Article 4, Section 4.2(q) of the Bylaws.

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ICANN BOARD SUBMISSION NO. 2019.11.03.1b

TITLE: **Consideration of Reconsideration Request 19-3**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

Electronic Frontier Foundation (Requestor), seeks reconsideration of ICANN organization’s renewal of the Registry Agreement (RA) with Public Interest Registry (PIR) for the .ORG generic top-level domain (gTLD) (the .ORG Renewed RA). Specifically, Requestor challenges the .ORG Renewed RA insofar as the renewal permits PIR to, “at its election, implement additional protections of the legal rights of third parties,¹ unilaterally and without further consultation with existing .ORG registrants or the ICANN community” and applies the Uniform Rapid Suspension (URS) rules to .ORG registrants (collectively, the URS Rights Protection Mechanisms or URS RPMs).¹ The Requestor also seeks reconsideration of Board inaction, insofar as the ICANN Board of Directors did not vote on the .ORG Renewed RA. The Requestor claims that ICANN org’s inclusion of the RPMs in the .ORG Renewed RA “run[s] contrary to ICANN’s bylaws.”² The Requestor also claims that the Board’s inaction (i.e., that the Board did not vote on the .ORG Renewed RA) was based on the Board’s consideration of inaccurate relevant information and the Board’s failure to consider material information.³ The Requestor asks ICANN org to “pursue an amendment to its agreement with PIR for the operation of the .ORG gTLD to eliminate . . . [t]he second sentence of Section 2.8: ‘Registry Operator may, at its election, implement additional protections of the legal rights of third parties’ [and] Clause 2(b) of Specification 7: ‘the [URS] adopted by ICANN . . . including the implementation of determinations issued by URS examiners.’”⁴

Under the Bylaws, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. Bylaws, Art. 4, § 4.2(e). However, the BAMC is

¹ Request 19-3, § 3, at Pg 2

² *Id.*, § 8, at Pg 5

³ *Id.*, § 8, at Pgs 8-9

⁴ *Id.*, § 9, at Pg 9

empowered to act only upon consideration by a quorum of the Committee.⁵ The majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-3 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-3. Therefore, the Board is being asked to consider Request 19-3 and issue the Proposed Determination, attached as Attachment D to the Reference Materials, in lieu of a Recommendation by the BAMC.

The Bylaws entitle a Requestor to a rebuttal to the BAMC's recommendation within 15 days of receipt of the recommendation. Here, given the BAMC recusal circumstances, the issuance of the Board's Proposed Determination will trigger the rebuttal timeline. Accordingly, the Board will be asked to consider Request 19-3 a second time soon after the rebuttal deadline passes, and to issue a final determination after consideration of a rebuttal, if any.

PROPOSED RESOLUTION:

Whereas, Electronic Frontier Foundation (Requestor) filed a reconsideration request (Request 19-3) challenging ICANN organization's renewal of the Registry Agreement (RA) with Public Interest Registry (PIR) for the .ORG generic top-level domain (gTLD) (the .ORG Renewed RA), insofar as the renewal permits PIR to, "at its election, implement additional protections of the legal rights of third parties, unilaterally and without further consultation with existing .ORG registrants or the ICANN community" and applies the Uniform Rapid Suspension (URS) rules to .ORG registrants (collectively, the URS Rights Protection Mechanisms or URS RPMs).⁶ the Requestor also seeks reconsideration of an alleged Board inaction, insofar as the ICANN Board of Directors did not vote on the .ORG Renewed RA.

Whereas, the Requestor claims that ICANN org's inclusion of the RPMs in the .ORG Renewed RA "run[s] contrary to ICANN's bylaws."⁷ The Requestor also claims that the Board's inaction (i.e., that the Board did not vote on the .ORG Renewed RA) was based on the Board's

⁵ See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en>

⁶ Request 19-3, § 3, at Pg 2

⁷ *Id.*, § 8, at Pg 5

consideration of inaccurate relevant information and the Board’s failure to consider material information.⁸

Whereas, pursuant to Article 4, Section 4.2(l), the Ombudsman accepted Request 19-3 for consideration, and, after investigating, concluded that the selection of terms to include in RAs is “ICANN org’s choice to make as directed by the Board—and as such, the actions of the Staff, acting with the authority vested in the CEO by the Bylaws and the Board, do not merit any kind of recommendation from me to the BAMC or the Board under [Request] 19-3.”⁹ The Ombudsman further concluded that “[i]n action or inaction, the Board did nothing improper in deciding to stay the course, so far as I can see. It heard the Community, it read the public comments (at the very least the comprehensive Staff Report summary), and in the end, it decided that the renewal terms for the Legacy gTLDs (including .org) were acceptable.”¹⁰

Whereas, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests and make recommendations to the Board on the merits of those Requests. (*See* Bylaws, Art. 4, § 4.2(e).) However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.¹¹

Whereas, the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-3 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-3. Therefore, the Board is considering Request 19-3 in lieu of a Recommendation by the BAMC.

Whereas, the Board has carefully considered the merits of Request 19-3 and all relevant materials and concludes that reconsideration is not warranted because ICANN org’s execution of the .ORG Renewed RA was consistent with ICANN’s Bylaws, policies, and procedures. Further, the Board did not fail to consider material information or rely on false or inaccurate

⁸ *Id.*, § 8, at Pgs 8-9

⁹ Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-3, at Pg 3, 7 September 2019, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf>

¹⁰ *Id.*, at Pg 6

¹¹ *See* BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en>

material information by allowing ICANN Staff to execute the .ORG Renewed RA without voting on it prior to execution. Accordingly, the Board proposes denying Request 19-3.

Resolved (2019.11.03.XX), the Board adopts the [Proposed Determination on Reconsideration Request. 19-3](#).

Commented [A1]: Hyperlink to Proposed Determination

PROPOSED RATIONALE:

The Board is taking this action today pursuant to Article 4, Section 4.2 of the ICANN Bylaws. Under Section 4.2 of the Bylaws, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. *See* Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.¹² The majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-3 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-3. Therefore, the Board has considered and issues the [Proposed Determination](#) in lieu of a Recommendation by the BAMC.

Commented [A2]: Hyperlink

The Board has carefully considered the merits of Request 19-3 and all relevant materials. For the reasons set forth in the Proposed Determination, which are incorporated here, the Board concludes that reconsideration is not warranted because ICANN org's execution of the .ORG Renewed RA was consistent with ICANN's Bylaws, policies, and procedures. Further, the Board did not fail to consider material information or rely on false or inaccurate material information by allowing ICANN Staff to execute the .ORG Renewed RA without voting on it prior to execution. Accordingly, the Board proposes denying Request 19-3.

Pursuant to Article 4, Section 4.2(q), the Requestor has 15 days from the receipt of the Board's Proposed Determination on Request 19-3 to submit a rebuttal. Following the rebuttal period, the Board will issue a final determination on Request 19-3 in accordance with Article 4, Section 4.2(r) of the Bylaws.

¹² *See id*

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy Stathos, Deputy General Counsel
Date Noted: 26 October 2019
Email: amy.stathos@icann.org

REFERENCE MATERIALS – BOARD PAPER NO. 2019.11.03.XX

TITLE: **Consideration of Reconsideration Request 19-3**

Documents

The following attachments are relevant to the Board’s consideration of Reconsideration Request 19-3.

Attachment A is Reconsideration Request 19-3, submitted on 30 July 2019.

Attachment B is the Ombudsman’s Evaluation of Request 19-3, issued 7 September 2019.

Attachment C is the Letter from the Requestor Electronic Frontier Foundation to the Board Accountability Mechanisms Committee, dated 2 October 2019.

Attachment D is the Proposed Determination on Reconsideration Request 19-3.

Attachment E is the Counsel Memo on Reconsideration Request 19-3.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 26 October 2019

Email: amy.stathos@icann.org

Reconsideration Request Form

Version as of 21 September 2018

ICANN's Board Accountability Mechanisms Committee (BAMC) is responsible for receiving requests for reconsideration (Reconsideration Request) from any person or entity that has been adversely affected by the following:

- (a) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (b) 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
- (c) 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.

The person or entity submitting such a Reconsideration Request is referred to as the Requestor.

Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please refer to [Article 4, Section 4.2 of the ICANN Bylaws](#) and the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

This form is provided to assist a Requestor in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requestors may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12-point font. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requestor Information

Name: Electronic Frontier Foundation

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

On 30 June 2019, ICANN staff entered into a new contract with Public Interest Registry (PIR) for the operation of the .org top-level domain (TLD). That contract contained several provisions that have never before been applied to the .org TLD in its 34-year history: 1) the Uniform Rapid Suspension (URS) rules, which provide for “a lower-cost, faster path” to suspension of domain name registrations based on evidence of bad faith use of a trademark; and 2) explicit permission from ICANN for PIR to “at its election, implement additional protections of the legal rights of third parties” unilaterally and without further consultation with existing .org registrants or the ICANN community. Both sets of contractual provisions are particularly dangerous for the many .org registrants who are engaged in an array of noncommercial work, including criticism of governments and corporations. These provisions were developed specifically for the rollout of new generic top-level domains that began in 2012; not for legacy gTLDs such as .org.

It has been reported that the ICANN Board was informed of the renewal but did not hold a vote on it. <http://domainincite.com/24523-icann-explains-how-org-pricing-decision-was-made>

The new contract can be found at <https://www.icann.org/resources/announcement/org-2019-06-30-en>

4. Date of action/inaction:

30 June 2019

5. On what date did you become aware of the action or that action would not be taken?

1 July 2019

6. Describe how you believe you are materially and adversely affected by the action or inaction:

EFF is a donor-supported nonprofit organization that has used the domain name eff.org since 1990, eight years before the founding of ICANN. EFF's website is visited by tens of thousands of unique visitors every day. As part of its mission to promote rights and freedoms in the digital world, and to fight censorship, EFF participates in the GNSO Working Group for Review of All Rights Protection Mechanisms in All gTLDs ("RPM Working Group"). That working group was chartered to review "all the RPMs that were developed for the 2012 New gTLD Program," including URS. <https://community.icann.org/display/RARPMRIAGPWG/Review+of+all+Rights+Protection+Mechanisms+in+all+gTLDs+PDP+Home> Its review is ongoing.

The inclusion of URS and permission for arbitrary "additional protections for the legal rights of third parties" in the renewed .org Registry Agreement adversely affects EFF in two ways.

First, the application of these terms to the .org TLD is a significant alteration of the governing policies of one of the oldest and most-used TLDs. Such a shift should be initiated, if at all, through the multistakeholder policy development process, not in bilateral negotiations between a registry operator and ICANN staff. Moreover, the RPM Working Group was chartered to evaluate changes of exactly this sort. Its charter includes this question:

Should any of the New gTLD Program RPMs (such as the URS), like the UDRP, be Consensus Policies applicable to all gTLDs, and if so what are the transitional issues that would have to be dealt with as a consequence? https://gnso.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf

In bypassing the RPM Working Group and applying these policy provisions to the .org TLD through private contractual negotiations, ICANN has denied EFF and other RPM Working Group participants meaningful input into this change. As noted by Milton Mueller, a founder of the Internet Governance Project:

"It appears that ICANN's contracting process provides ICANN and its contracting parties a way to completely bypass ICANN's policy development process. As such, it undermines the whole purpose of having ICANN in the first place." <https://www.internetgovernance.org/2019/07/04/the-real-problem-with-the-new-org-contract/>

Offering an opportunity for public comment on the renewal of this contract did not alleviate this harm to the multistakeholder process. EFF, along with the Domain Name Rights Coalition, submitted a comment opposing the inclusion of URS and unilateral “additional” RPMs. <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/2019q2/003200.html> The Non-Commercial Stakeholder Group, which represents hundreds of noncommercial entities who use .org TLDs, also opposed these changes. <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/2019q2/003207.html>

ICANN staff offered no response to these concerns raised in the public comments – or the thousands of other comments – and made *no changes to the proposed .org registry agreement*. ICANN staff stated only that changes were included in the renewed agreement “via bilateral negotiations between the applicable Registry Operator and ICANN org,” thus making the voluminous and substantive input of the community irrelevant. <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>

We note that the ICANN Board did not hold a vote on this action. <http://domainincite.com/24523-icann-explains-how-org-pricing-decision-was-made>. In proceeding with the originally-proposed contract language without responding to public comments, without addressing deep and legitimate concerns, and avoiding the accountability provided by a Board vote, ICANN staff made clear that nonprofit entities with a longstanding presence in the .org TLD have no voice with respect to major changes in that TLD’s governing policies and that the GNSO’s multistakeholder process can be disregarded at will. We seek review of that staff determination.

Second, the inclusion of URS and explicit permission for “additional” rights protection mechanisms puts EFF at greater risk of losing the domain name it has used for 29 years, based on policies it and the GNSO did not choose to extend to .org. We note that ultra-fast processing of URS disputes was never intended for the more complicated problems of noncommercial and commercial domain name conflicts. We note also that the faster response time of the URS poses a special problem for noncommercial entities. Should such a URS challenge be made against EFF at a busy period or during winter or summer holidays, EFF could see its domain name suspended just as critical messages are being posted and critical information is being shared, including litigation-related communications.

Tens of thousands of unique visitors come to EFF.org each day for valuable information and to share issues and concerns over digital rights, and many more communicate with EFF attorneys, activists, and engineers by email. EFF also conducts activism campaigns through other .org domain names, including reclaiminvention.org, trollingeffects.org, noglobalwarrants.org, and privacyforall.org. Applying URS to the .org TLD makes abusive challenges to our domain names easier, e.g., by a bad actor seeking to usurp a well-known and trusted domain name.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

These changes also harm the millions of nonprofit organizations that use .org domain names. URS includes fewer procedural safeguards than does the Uniform Dispute Resolution Process (UDRP), the longstanding mechanism for addressing trademark-related conflicts over domain names. These include the accelerated timeframe for resolution, as already noted, and much less time for review by arbitrators. This is because the URS was not intended to be used for the more complicated problems of noncommercial and commercial domain conflicts, which often involve defenses of fair use and other accommodations for freedom of expression.

Some might respond that .org registrants should simply change to a different TLD, but such change is often extremely difficult and costly for longstanding .org users. A group like EFF, or Amnesty International, will have spent decades building value in their existing domain names and would incur enormous costs in switching. As described in Namecheap Inc.'s pending Reconsideration Request, "changing domains for an established entity can be a cumbersome and costly process, often with negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc.)." <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-request-redacted-12jul19-en.pdf> As Namecheap points out, the paucity of registrations in .ngo, .ong, and equivalents in non-Latin scripts, is evidence that nonprofit organizations will not readily switch to domains other than .org.

8. Detail of Board or Staff Action/Inaction – Required Information

The Electronic Frontier Foundation submits this Reconsideration Request because ICANN's inclusion of URS and a clause giving *carte blanche* to PIR to impose additional regulatory requirements on registrants—potentially including regulation of Internet content—is both substantively and procedurally improper.

A. The Basis For This Request

The actions described in this Request run contrary to ICANN's bylaws. Commitment 4(a) states that ICANN will "seek input from the public, for whose benefit ICANN in all events shall act." Commitment 4(c) states that ICANN will "ensure that those entities most affected can assist in the policy development process."

The bylaws also include the following Core Values:

(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;
[...]

(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture[.]
<https://www.icann.org/resources/pages/governance/bylaws-en/#article1>

B. Including URS and “Additional” Measures in the .org Agreement Was Improper

Substantively, URS is not appropriate for the .org domain. The development of URS was a response to concerns that the roll-out of hundreds of new gTLDs would prompt an epidemic of cybersquatting and other bad-faith registrations of trademarked names. This concern is not present in legacy TLDs. The .org domain has existed since 1985 and has over ten million registered names. ICANN staff shared no evidence that the UDRP, the longstanding consensus policy addressing bad-faith registrations, is insufficient to protect the legitimate interests of trademark holders in .org.

Further, we see no evidence that ICANN staff made any attempt to evaluate the impact of the ultra-fast timelines of the URS on noncommercial organizations in .org – organizations who often have very limited staff and budget for technical operations. Likewise, where was the evaluation by ICANN staff of the impact of adding more substantial cases to the dockets of URS dispute resolution providers? Examiners of URS cases are compensated at far lower rates than UDRP Panelists because their cases of commercial conflict are supposed to be simple and easy. Are URS Panelists ready and able to hear the more complicated cases of noncommercial and commercial domain name disputes that will arise in .org? What cost-benefit analysis was made of the dangers to .org registrants from being thrown into URS proceedings, or the likelihood of a system ill-equipped for these cases to make erroneous decisions, increasing the risk of unjustified suspensions of .org registrations?

Procedurally, it was improper for ICANN staff to initiate changes to significant policies affecting millions of existing registrants when such changes did not come about through the multistakeholder policy development process. This is especially problematic when the GNSO has a policy development process relating to the very same policies currently underway. As the Noncommercial Stakeholder Group

wrote in its own comments submitted to ICANN on this issue:

Applying the URS system and other new gTLD RPMs to legacy TLDs not only turns the previous multistakeholder process of policy making [which applied URS solely to New gTLDs] on its head but, more importantly, it undermines the current ongoing community discussions regarding the future of the URS. At the moment, the GNSO's Rights Protections Mechanisms Policy Development Policy Working Group is deliberating over an extensive set of charter questions, including whether the URS and other RPMs should be adopted as ICANN Consensus Policy applicable to all gTLDs (including legacy gTLDs), remain as a policy approved by the ICANN Community only for New gTLDs, or even whether to eliminate the URS entirely. Debates around whether the URS should be applied to legacy TLDs have been an extremely contentious issue and there is currently no decision to apply it to legacy gTLDs.

Accordingly, the decision to include the URS and other RPMs in .org's registry agreement essentially runs roughshod over the multistakeholder process and subverts the Community's deliberations. It makes the applicability of these RPMs to this large legacy TLD a fait accompli and a decision by ICANN Staff, rather than by the RPMs WG, the GNSO Council and the ICANN Board. We respectfully submit that this is completely inappropriate, and deeply undermines the Community's role in policy development at ICANN. <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/2019q2/003207.html>

The only rationale given by ICANN staff for the inclusion of URS in the new agreement is that "inclusion of the URS was agreed to via bilateral negotiations between [PIR] and ICANN org," and that "ICANN org has not moved to make the URS mandatory for any legacy gTLD." <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf> However, bilateral negotiations are not a sufficient substitute for multistakeholder policy development. Moreover, the latter statement is facially incorrect, as the new agreement does in fact make URS mandatory for the .org TLD. If this statement is meant to suggest that ICANN staff would have eliminated the URS requirement if PIR had asked, it is immaterial. ICANN staff proposed to apply the "Base Registry Agreement" developed for new gTLDs, including the URS requirement, with the stated goal of putting new and legacy gTLDs under the same form of registry agreement. Staff cannot avoid accountability for that decision by claiming that the requirement *could* have been eliminated in the course of non-public negotiations with PIR, but was not. Either way, the voice of registrants was excluded.

C. The Breadth of Opposition to this Proposal May Have Been Misrepresented to the ICANN Board

ICANN received more than 3200 public comments on this action, of which all but a handful were opposed to the proposed new agreement. We believe that the full breadth, depth and extent of these comments (itself a highly unusual and unprecedented response to a public comment on a contract renewal) were misrepresented to the ICANN Board. We are under the impression that the Board was told that nearly all of the comments were filed by “domainers” (investors in domain names). Putting aside that domainers are a legitimate and well-informed group of stakeholders, the allegation is untrue. As Namecheap shared in its Reconsideration Request, many more comments came from .org registrants:

1. “725 comments were submitted by Namecheap customers (20% of all comments);”

2. “450 comments were from nonprofits (13%)” which included charity groups (20), education groups (47), library orgs (6), media groups (4), medical organizations (7), support for the disabled groups (4), and groups working to prevent suicide, provide resources for sick or disabled children, and food, shelter and education for orphans;

And we add:

3. Serious and substantive recommendations were filed by organizations that for decades have represented, supported and spoken for large numbers of .org registrants in the ICANN policy making processes: EFF, the Domain Name Rights Coalition, and the Noncommercial Stakeholders Group.

We are concerned that the serious substantive and procedural concerns raised by these hundreds of organizations and commenters did not reach the attention and knowledge of the ICANN Board. We have reason to believe that the ICANN Board was misled in a mischaracterization of the comments and an overview of the Community input, which downplayed and minimized the dangers and frustrations raised by commenters, and how proceeding with the new agreement would undermine the multistakeholder process.

We note that the ICANN Board has neither shared nor published any of the normal evaluations and discussions we would expect following an outpouring of more than 3200 comments. Further, in concluding the new agreement with PIR without any significant changes, ICANN staff made little mention of the strong sense of frustration, confusion, and betrayal that the Community expressed in these comments.

Accordingly, we believe that the full nature and scope of the comments was not submitted to the Board, and accordingly, the Board could not act on them

effectively. We ask that as part of this Petition for Reconsideration, the full record of this proceeding be examined by the Board, including a full and fair assessment and characterization of the submitted comments, and a full and fair summary by staff of their discussions with Community members on deep concerns with these issues, including EFF.

9. What are you asking ICANN to do now?

ICANN should pursue an amendment to its agreement with PIR for the operation of the .org TLD to eliminate the following clauses:

- The second sentence of Section 2.8: “Registry Operator may, at its election, implement additional protections of the legal rights of third parties.”
- Clause 2(b) of Specification 7: “the Uniform Rapid Suspension system (‘URS’) adopted by ICANN . . . including the implementation of determinations issued by URS examiners.”

We ask the ICANN Board to look farther and deeper than ICANN staff – beyond whatever a registry might want (in its own interest) and beyond what ICANN staff might want (in efficiencies of having a common contract across registries) to what 10 million largely noncommercial domain names registrants might want and need – and the protections of the prior .org registry agreement for their often-controversial human rights work and at times unpopular speech on behalf of minority religious, ethnic and political communities.

We do not address the issue of price cap removal here, but urge the ICANN Board to carefully consider Namecheap’s pending Reconsideration Request, which comprehensively addresses this important issue.

10. Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.

As described above, these changes to the .org agreement put EFF and many of its members at greater risk of losing their domain names. EFF and many of its members are forced to expend resources to guard against URS proceedings, which have response deadlines much shorter than UDRP proceedings. We are also forced to expend resources to respond to any additional “Rights Protection Mechanisms” that can be established by PIR at any time, including removing or altering any of our website content that could be deemed to be in violation. This latter concern is not speculative, as PIR has previously endeavored to create a private enforcement process for accusations of copyright infringement in the content of a website, wielding the power of domain name suspension or forced transfer to enforce a regulation of Internet content. PIR “paused” but did not withdraw this proposal. <https://pir.org/systemic-copyright-infringement-alternative->

dispute-resolution-policy-scdrp/.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.

Yes, as described above, all current registrants in .org, especially nonprofit organizations that have used their .org domain names for many years, will suffer the same substantive and procedural harms if these provisions in the .org agreement are allowed to stand.

12. Are you bringing this Reconsideration Request on an urgent basis pursuant to Article 4, Section 4.2(s) of the Bylaws?

Yes

No

12a. If yes, please explain why the matter is urgent for reconsideration.

13. Do you have any documents you want to provide to ICANN?

No.

By submitting my personal data, I agree that my personal data will be processed in accordance with the ICANN [Privacy Policy](#), and agree to abide by the website [Terms of Service](#).



Signature

30 July 2019
Date

Mitchell L. Stoltz

Print Name

Substantive Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-3

This substantive evaluation of Request for Reconsideration (“RFR”) 19-3 by the ICANN Ombudsman, is required under the Paragraph 4.2(l) of the current ICANN Bylaws (“Bylaws”(as amended July 22nd, 2017)); it is submitted on September 7th, 2019, and refers to the renewal of one of the Registry Agreements (for the .org Top Level Domain) that comprise the subject matter of Request for Reconsideration 19-2 (See Annex 1).

This evaluation is a “companion” evaluation with the Ombudsman’s evaluation of RFR 19-2, and I will try to keep the recital of facts and relevant rules to a minimum in the interest of brevity (and avoiding redundancy). This Request, 19-3, is made by the Electronic Frontier Foundation (“EFF”), based on its utilization of the .org TLD for its eff.org domain (and using this for 39 years as a donor-supported not-for-profit entity).

Under ICANN Bylaws 4.2(c), a Requestor can bring a Request for Reconsideration concerning an action or inaction as follows:

Section 4.2. RECONSIDERATION...

(c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that 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.

In providing the Board Accountability Mechanism Committee (“BAMC”) and the ICANN Board of Directors (“Board”) a substantive evaluation of a Request for Reconsideration, the Ombudsman looks first at what is being requested, and then at the action and/or inaction for which the Requestor seeks Reconsideration.

Request for Reconsideration 19-3 was filed by the EFF (“Requestor”) on July 30th, 2019. Being filed some 18 days after RFR 19-2, there are new facts to consider, and Requestor also adds the separate claim of *inaction* by the ICANN Board in a) not holding a vote approving or disapproving of the renewal of the Registry Agreement for .org; and b) more generally, inaction by the Board in not stopping ICANN Staff from including “new” terms

therein (new, at least, for Legacy TLDs such as .org). This complicates my evaluation, requiring me to strive for more nuance here than in my RFR 19-2 evaluation.

Requestor first alleges (tracking Request 19-2) that the ICANN CEO (“CEO”) and ICANN Staff (the “Staff”) failed to listen to or heed the public comments relating to the renewal of the Registry Agreement with the .org Top Level Domain, which is known as a “Legacy” Top Level Domain (“TLD”), and then took improper action in renewing this agreement (based on the current version thereof, modified by its Addendum) with the Registry Operator of “.org”. The sole Registry Agreement (per its Addendum including the new terms not previously applied to Legacy TLDs) forming the basis for this RFR is here:

<https://www.icann.org/resources/agreement/org-2019-06-30-en>

The Registry for this historic and significant .org TLD is the Public Interest Registry (“PIR”); PIR is a Pennsylvania non-profit corporation (a “Registry Operator”). Over the course of 2019, ICANN and PIR bilaterally negotiated a Registry Agreement renewal. ICANN and PIR agreed to the incorporation of new terms for the TLD .org via an Addendum to the Base gTLD Registry Agreement; the Base gTLD Registry Agreement is now the standard for new TLDs, and since these renewals, is becoming a standard for Legacy TLDs as well, with .com and .net slated for renewal over the course of the coming years.

The Addendum enabled the Registry Operator to renew under terms that had not previously applied to Legacy TLDs before: specifically the negotiated terms include the Uniform Rapid Suspension (URS) rules originally developed for new gTLDs, and the option for PIR to add additional protective measures ostensibly to protect the legal rights of third-parties. Requestor EFF is well-known for protecting and defending rights in what is called *cyberspace* and it is actively involved in Internet policy and governance. Requestor alleges in RFR 19-3 that the renewal Registry Agreement for .org contains

(S)everal provisions that have never before been applied to the .org TLD in its 34-year history: 1) the Uniform Rapid Suspension (URS) rules, which provide for “a lower-cost, faster path” to suspension of domain name registrations based on evidence of bad faith use of a trademark; and 2) explicit permission from ICANN for PIR to “at its election, implement additional protections of the legal rights of third parties” unilaterally and without further consultation with existing .org registrants or the ICANN community.

[<https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-request-redacted-30jul19-en.pdf>]

These allegations seem true to me. And insofar as Requestor’s first claim of improper Staff action mimics that of Namecheap’s in RFR 19-2 (which focuses on the suspension of price controls for .org and other Legacy TLDs), namely that Staff failed to listen or heed the public comments about the .org TLD renewal and then went ahead and executed the renewal with PIR with unique and newly-applied terms (here putting the focus on the URS

and “additional protections” option), my conclusion concerning Staff action is, not surprisingly, bound to be the same: ICANN’s Staff have the authority, both from the Bylaws and by delegation by and direction from the Board (and per relevant California and US corporate laws) to negotiate and execute contracts.

Insofar as the challenged CEO and Staff *actions* are concerned, regarding the bilateral negotiation of the terms, the allegation is that public comments were disregarded after these agreed-upon terms were posted for comment, and that Staff ultimately forged ahead with the renewal of the Registry Agreement with PIR for .org (including both unique terms removing price controls *and* newly-applied URS and “protective” terms) without heeding the comments; as was the case in the similarly-veined RFR 19-2, there appear to me to be no violations whatsoever of relevant rules, Bylaws, laws, or policies. The Chief Executive and his Staff did what they are charged with doing by the Bylaws and by the Board they executed a Renewal Registry Agreement.

ICANN’s Staff acted “by the book” with regard to its duly delegated executive authority: they negotiated terms with the Registry Operator, they solicited public comments, they summarized those comments for the benefit of the Board and the Community. Having done so, and having kept the Board informed and “up to speed” every step of the way, ICANN org ultimately executed the renewal of the Registry Agreement for .org TLD with PIR.

To carry forward the metaphor: my conclusion is that Staff acted totally “by the book” though the Requestor here (and the requestor in RFR 19-2) both believe that there should be a different “book” by which Staff and the CEO *should have acted* when it came to these particular legacy TLDs. Requestor believes that the vaunted .org TLD should be considered *sacred*, and because it has not in the past been subject to the same rules, it should not now (nor should it ever) be subject to the same rules as other TLDs.

ICANN Staff’s actions, which amount to trying to bring, over time, the Legacy TLDs into conformity with all the newer TLDs, rankles the Requestor and many a public commenter. But this endeavor is, under the overarching ICANN structure (the rules and Bylaws and the laws and the Core Values), ICANN org’s choice to make as directed by the Board and as such, the actions of the Staff, acting with the authority vested in the CEO by the Bylaws and the Board, do not merit any kind of recommendation from me to the BAMC or the Board under RFR 19-3.

That now concluded as with RFR 19-2 but with different terms being reconsidered I now turn to Requestor’s claim of *inaction* by the Board.

I can see how Requestor and others in the Community might think or believe the Board *should have acted* (differently). As the current Ombuds, I am charged with being the eyes and ears of the Community. I must look at the matter through the lens of what the Requestor is asking and calling out. The Ombuds is charged with being the watchful eyes of the ICANN Community. The Ombuds is also charged with being the alert “ears” of the Community with *listening* with making individuals, whether Requestors or complainants or those just dropping by for an informal chat, feel *heard*.

Perhaps the gist of Requestor’s Board inaction complaint is that the renewal of .org (and by extension .info and .biz the Legacy TLDs that renewed on June 30th, 2019) should not be left to the Staff and the Executives, but is a “policy” matter, upon which the Board should have acted (by holding a vote to ratify the Legacy renewals, or, when informed of the unique and newly-applied terms of renewal by Staff, of stopping these renewals, or demanding new or different terms for Legacy renewal). The Board, Requestors allege, did not *listen* to the Community, via the public comments, or to the extent they listened, they listened only to Staff (and the Staff Report), and not to the Community writ large in essence, Requestor contends that the Board did not *hear* the Community. The contention is that the Board was not properly informed deaf to the pleas of the Community, the Board sat silent and did nothing; thus, Requestor argues that the Board abdicated its responsibilities under the Bylaws and Core Values.

Requestor maintains that the decision of what the renewal terms should be for .org, is a “policy matter”: I do not agree.

policy¹ | 'pāləsē | noun (plural **policies**)

a course or principle of action adopted or proposed by a government, party, business, or individual: *the administration's controversial economic policies* | *it is not company policy to dispense with our older workers.*

- *archaic* prudent or expedient conduct or action: *a course of policy and wisdom.*

ORIGIN late Middle English: from Old French *policie* ‘civil administration’, via Latin from Greek *politeia* ‘citizenship’, from *politēs* ‘citizen’, from *polis* ‘city’.

Policy matters are about setting the course for the future. Here, the Board chose to *stay the course*. The consistent and longstanding Board “policy” is and has been to retain oversight, but to delegate the tasks of negotiating and entering into contracts, *especially* Registry Agreements (and their renewals) to the CEO and Staff, who decide what the terms of those agreements will be. Ultimately, the Board gets to decide if it wants to have a formal meeting on a matter like Legacy renewals, and it could add this topic to the agenda of a future meeting; it could hold a vote on it. To date, it has chosen not to.

The most relevant Bylaw is Section 2.1 (as it was in RFR 19-2, but I cite it again here):

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1).

The Board of Directors *directed* the CEO and his Staff to negotiate and execute Registry Agreements. The Board could have directed the CEO and Staff not to renew under these

terms. It did not do so. But it did not make this choice based on a lack of information, or without hearing the public comments. It retained its oversight over the CEO and Staff.

The Board, I find, was well aware of the public comments: the Directors were briefed on these public comments, they were provided, in advance of publication, with the Staff Report summarizing them all. They could access the public comments for themselves, if they so desired. Nothing about this seems to me, based on my investigation, and my admittedly layman's understanding of the relevant rules, core values, Bylaws and laws, to be any kind of violation or dereliction of the Board's obligations or duties thereunder.

I noted earlier that there were some new facts that occurred between RFR 19-2 (filed on July 12th, 2019) and this RFR (filed on July 30th, 2019) mainly, they are found in the letter from an ICANN Senior VP to the General Counsel of the Internet Commerce Association, dated July 26th, 2019, which has been posted here:

<https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>.

This July 26th letter notes:

ICANN's core values, as enumerated in the Bylaws approved by the ICANN community, instruct ICANN to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.

What Requestor contends is that the core value to introduce and promote competition is in tension with core values of fairness and transparency, and that the reliance on "market mechanisms" should be outweighed by the (speculative and potential) harm these market mechanisms and ICANN's reliance on them might do to the ten million plus registrants of .org. They further contend, the Board, having delegated to the Executive, did not heed the past, and rather than accepting the decision made by the CEO and Staff, should have intervened.

This July 26th letter goes on to detail the briefings the Board received in Los Angeles while Legacy renewal negotiations between ICANN Staff and the relevant Registry Operators were ongoing, and then it sets forth the fact that Staff shared the Staff Report with the Board prior to posting it publicly, and discussed its contents with the Board.

[<https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>]

The Staff Report can be accessed online here:

(<https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>).

The Board was briefed once again, in Marrakech, after the Staff Report was posted on June 3rd, 2019. One could read the ICANN SVP Namazi to Muscovitch letter, as it seems Requestor did, and think (and then assert in this RFR): *Look at all this consultation and oversight between the Staff and the Board and yet the Board took no action! How can this be?*

Requestor, however, fails to account for the fact that, in taking no *formal* action, in *staying the course* set by Staff and CEO, the Board, in effect, did act – it stuck with its “policy choice” of delegation and oversight – directing the CEO and Staff to decide what contracts (Registry Agreements) to enter into, with whom, and on what terms (some unique and newly-applied, as here with the .org Legacy TLD).

The letter of July 26th, 2019 continues towards what is by now a familiar conclusion:

Following the discussion with the ICANN Board in Marrakech, and consistent with the Board’s support, ICANN President and CEO made the decision to continue with renewal agreements as proposed, using the Base gTLD Registry Agreement. These agreements were effective on 30 June 2019.

The Board was informed about this, it offered its support, its oversight, its direction, and then it allowed the ship to sail on, continuing on the course duly and properly set by the CEO and President. One may not like the course, but the chain of command was proper and the rules and Bylaws properly followed.

In action or inaction, the Board did nothing improper in deciding to stay the course, so far as I can see. It heard the Community, it read the public comments (at the very least the comprehensive Staff Report summary), and in the end, it decided that the renewal terms for the Legacy TLDs (including .org) were acceptable, be they the election by the Registry Operator of URS and other protective measures, or to remove price caps (see my companion Substantive Evaluation of RFR 19-2). The Board could have acted otherwise (and it could yet...), and there will be options available to it in the future, including when the other major Legacy TLDs of .net and .com come up for renewal.

So, in the end, my substantive evaluation is as follows: just as the Staff *action* relating to Legacy renewals is a corporate governance matter, with the relevant rules and Bylaws properly adhered to, so, too, it turns out, is the Board’s *choice* (as of now) to delegate the authority to renew TLDs to the CEO and Staff – to *direct* Staff to renew and *execute* agreements including the renewals of the Registry Agreements for the Legacy TLDs including .org. It may seem like the Board took no action. The standing Board “policy” is *delegation* when it comes to agreements including Registry Agreements and renewals thereof, and there is nothing improper about that choice or *direction*. What Requestor asks for in Request for Reconsideration 19-3, namely the changing of the terms of the .org Renewal Registry Agreement (and Addendum) to be amended to remove the URS and other optional protective measures, does not merit that recommendation by me here. The Staff choice to include these bilaterally negotiated terms, some unique, some newly-applied as to Legacy TLDs, and the Board choice to not say or do anything *publicly* about that Staff

choice and execution thus the renewal of these Legacy TLDs, appears to me quite proper under the rules, Core Values, relevant laws and Bylaws.



Via Email:
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correspondence@icann.org

October 2, 2019

León Sánchez
Chair, Board Accountability Mechanisms Committee
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

RE: Ombudsman’s Evaluation of Request for Reconsideration 19-3

Dear Mr. Sánchez and Members of the Board Accountability Mechanisms Committee:

On behalf of Requestor the Electronic Frontier Foundation (“EFF”), I write to address certain errors in the ICANN Ombudsman’s September 7, 2019 “Substantive Evaluation” of EFF’s Request for Reconsideration. The Ombudsman’s Evaluation misstates EFF’s positions and reflects a fundamental misunderstanding of the issues. The Committee should disregard the Ombudsman’s Evaluation and recommend to the Board that EFF’s Request for Reconsideration be granted.

The Ombudsman first mischaracterizes EFF’s substantive opposition to the two contract provisions at issue.¹ EFF’s Request addresses several aspects of the proposed provisions that are inappropriate for the .org TLD, including the special difficulties that expedited dispute resolution mechanisms may pose for non-profit organizations, the likelihood of complex disputes involving noncommercial uses, and the lack of evidence that URS procedures are needed in the .org space. **The Ombudsman’s Evaluation does not acknowledge any of these points or the ICANN staff’s failure to respond to them.** Instead, it writes off EFF’s specific, practical concerns, claiming that EFF “believes that the vaunted .org TLD should be considered *sacred*, and because it has not in the past

¹ These are (1) the requirement that the Public Interest Registry (“PIR”) comply with Uniform Rapid Suspension (“URS”) rules; and (2) the explicit permission from ICANN for PIR to “at its election, implement additional protections of the legal rights of third parties” unilaterally and without further consultation with existing .org registrants or the ICANN community.

been subject to the same rules, it should not now (nor should it ever) be subject to the same rules as other TLDs.” That characterization is incorrect.

As for EFF’s procedural challenge, the Ombudsman’s response is logically incoherent and again fails to respond to the arguments EFF actually made. EFF’s Request argues that the ICANN staff’s decisions to apply URS rules to .org domains and to allow PIR to unilaterally implement other rights protection mechanisms (“RPMs”) were significant policy decisions and therefore should not have been the result of bilateral negotiations. Request at 3, 6. The policy-based nature of that decision is not reasonably subject to dispute. GNSO, one of the policy development and advisory organizations that make up the ICANN multistakeholder model, recognized as much when it initiated a Policy Development Process and tasked the RPM Working Group with exploring whether URS and other new rights protection mechanisms should apply to legacy gTLDs. https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf. And before the Working Group was convened, the General Counsel of ICANN confirmed that the topics to be reviewed were “properly within the scope of the ICANN policy process.” <https://gns0.icann.org/en/council/resolutions#201602>.

The Ombudsman purports to disagree with EFF that the .org renewal involved decisions on policy matters, which he defines as decisions “about setting the course for the future,” apparently based on his interpretation of a dictionary definition for the word “policy.” Evaluation at 4. His reasoning does not hold up to scrutiny.

First, the Ombudsman’s Evaluation focuses on the wrong decision, at too high a level of generality: the ICANN Board’s decision to delegate negotiation and execution of registry agreements to ICANN’s CEO and staff. Because the Board’s general practice is to delegate such tasks, the Ombudsman concludes that its decision to do so here was not a policy decision. Evaluation at 4. **But whether the delegation of contracting authority to ICANN staff was novel or routine has no bearing on whether the staff exercised that authority to intrude on policy matters inappropriate for resolution through “bilateral negotiations” between a registry operator and ICANN staff, as EFF argues.**

Second, even under the Ombudsman’s narrow definition of what constitutes a policy matter, the .org renewal plainly involved policy decisions made by ICANN staff and not approved by the Board or stakeholders. **In no sense does revising the .org registry agreement to add controversial provisions that materially affect the rights and protections afforded to .org registrants and that were the subject of thousands of public comments constitute “staying the course.”** Yet ICANN staff unilaterally decided to propose using the “Base Registry Agreement” developed for new gTLDs, including the URS requirement, for the renewed .org registry agreement. Furthermore, the Ombudsman acknowledges that the staff did so with the goal of “bring[ing], over time, the Legacy TLDs into conformity with all the newer TLDs.” Evaluation at 3. That

Mr. León Sánchez
October 2, 2019
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is a paradigmatic example of “setting [a] course for the future,” and it encompasses decisions that GNSO working groups are actively deliberating over.

As EFF’s Request explains, ICANN’s conduct in reaching the new .org agreement was inconsistent with at least ICANN Commitment (iv) and ICANN Core Values (ii) and (vii), which collectively require ICANN to act in the public interest as ascertained through “open, transparent and bottom-up multistakeholder policy development processes.” To the extent the Ombudsman’s Evaluation addresses the application of these provisions at all, that assessment is unhelpful to the Committee. The Ombudsman admits to having only a “layman’s understanding” of the ICANN Bylaws and relies on a letter from an ICANN executive that itself misstates what the Bylaws instruct. Evaluation at 5. In particular, the passage quoted in the Evaluation elides material language from ICANN Core Value (iv), which instructs ICANN to “[i]ntroduc[e] and promot[e] competition in the registration of domain names *where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.*” The omitted language makes clear that ICANN staff’s unilateral determination that an action would be beneficial to competition is not sufficient to justify it under the Bylaws.

In sum, ICANN staff violated the Bylaws by making these important policy decisions on its own, without deference to the multistakeholder policy development process, without meaningfully responding to criticisms of its approach, and without determining whether its decision was in the public interest. And by allowing the staff to proceed this way unchecked, the Board likewise failed to fulfill its obligations under the Bylaws—responsibility for which the Board cannot simply abdicate. For these reasons, EFF respectfully asks the Board Accountability Mechanisms Committee to recommend that EFF’s Request for Reconsideration be granted.

Best regards,



Cara L. Gagliano
Electronic Frontier Foundation

Cc: Cherine Chalaby, Chairman of the Board of Directors
(cherine.chalaby@icann.org, board@icann.org)

**PROPOSED DETERMINATION
OF THE ICANN BOARD OF DIRECTORS¹
RECONSIDERATION REQUEST 19-3
3 November 2019**

The Requestor, Electronic Frontier Foundation (EFF), seeks reconsideration of ICANN organization’s renewal of the Registry Agreement (RA) with Public Interest Registry (PIR) for the .ORG generic top-level domain (gTLD) (the .ORG Renewed RA), insofar as the renewal permits PIR to, “‘at its election, implement additional protections of the legal rights of third parties,’ unilaterally and without further consultation with existing .ORG registrants or the ICANN community” and applies the Uniform Rapid Suspension (URS) rules to .ORG registrants (collectively, the URS Rights Protection Mechanisms or URS RPMs).² The Requestor also seeks reconsideration of Board inaction, insofar as the ICANN Board of Directors did not vote on the .ORG Renewed RA. The Requestor claims that ICANN org’s inclusion of the RPMs in the .ORG Renewed RA “run[s] contrary to ICANN’s bylaws.”³

Specifically, the Requestor claims that including the URS RPMs in the .ORG Renewed RA is contrary to:

- (i) ICANN org’s commitment to “seek input from the public, for whose benefit ICANN in all events shall act.”⁴
- (ii) ICANN org’s commitment to “ensure that those entities most affected can assist in the policy development process.”⁵

¹ The Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the committee. See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en>. The majority of the BAMC members recused themselves from voting on related Reconsideration Request 19-2 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2, and given the related nature of this Reconsideration Request the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC.

² Request 19-3, § 3, at Pg. 2.

³ *Id.*, § 8, at Pg. 5.

⁴ *Id.*

⁵ *Id.*

- (iii) ICANN org’s Core Value of “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.”⁶
- (iv) ICANN org’s Core Value of “[s]triving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture.”⁷

The Requestor also claims that the Board’s inaction (i.e., that the Board did not vote on the .ORG Renewed RA) was based on the Board’s consideration of inaccurate relevant information and the Board’s failure to consider material information.⁸

The Requestor asks ICANN org to “pursue an amendment to its agreement with PIR for the operation of the .ORG gTLD to eliminate . . . [t]he second sentence of Section 2.8: ‘Registry Operator may, at its election, implement additional protections of the legal rights of third parties’ [and] Clause 2(b) of Specification 7: ‘the [URS] adopted by ICANN . . . including the implementation of determinations issued by URS examiners.’”⁹

I. Brief Summary.

PIR has been the registry operator for .ORG since December 2002, pursuant to an RA with ICANN, which was renewed in 2006, and 2013.¹⁰ The RA was scheduled to expire on 30 June 2019.

In anticipation of the 30 June 2019 expiration, ICANN org bilaterally negotiated a renewal to the agreement with PIR. The proposed renewal was based on ICANN org’s base gTLD RA updated on 31 July 2017 (Base RA), modified to account for the specific nature of the

⁶ Request 19-3, § 8, at Pg. 6.

⁷ *Id.*

⁸ *Id.*, § 8, at Pgs. 8-9.

⁹ *Id.*, § 9, at Pg. 9.

¹⁰ Public Comment Proceeding, Proposed Renewal of .ORG RA, 18 March 2019 (2019 .ORG RA Public Comment Proceeding), <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

.ORG gTLD.¹¹ As a result, the proposed Renewed RA’s terms were substantially similar to the terms of the Base RA. The proposal included the URS RPMs.

During the Board’s Los Angeles workshop (25-28 January 2019), ICANN Staff provided a briefing to and held a discussion of the renewal negotiations with the Board.¹² With “the Board’s support, ICANN org’s President and CEO decided” to complete the renewal negotiations using the Base RA, which included the URS RPMs.¹³ After completing negotiations with PIR, on 18 March 2019, ICANN org published the proposed .ORG Renewed RA for public comment to obtain community input on the proposed renewals. ICANN org described the material differences between proposed renewal and the current .ORG RA. These differences included that

the .org renewal agreement will be subject to the [URS RPMs] set forth in section 2 of Specification 7, including the [URS] system . . . [PIR] is also authorized to develop additional rights protection mechanisms.¹⁴

ICANN org explained that the change would “allow the .org renewal agreement to better conform with the [Base RA].”¹⁵

ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG agreement.¹⁶ The comments predominantly related to three themes: (1)

¹¹ See 2019 .ORG RA Public Comment Proceeding. The RAs for the operation of .INFO and .BIZ were also set to expire on 30 June 2019, and the RA for the operation of .ASIA was set to expire on 25 March 2020; as a result of bilateral negotiations with the registry operators for .BIZ, .INFO, and .ASIA, and after considering public comments, ICANN entered into Renewed RAs for .BIZ, .INFO, and .ASIA that were based on (and therefore substantially similar to) the Base RA. See <https://www.icann.org/resources/agreement/biz-2019-06-30-en>; <https://www.icann.org/resources/agreement/info-2019-06-30-en>; <https://www.icann.org/resources/agreement/asia-2019-06-30-en>.

¹² Letter from Cyrus K. Namazi to Zak Muscovitch, 26 July 2019, at Pg. 2 <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>.

¹³ *Id.*

¹⁴ <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

¹⁵ *Id.*

¹⁶ Report of Public Comments at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>.

the proposed removal of limits on domain name registration fees; (2) inclusion of the URS RPMs; and (3) the RA renewal process.¹⁷

ICANN org analyzed the public comments, including those addressing the proposed URS RPM provisions, in its Report of Public Comments.¹⁸ It acknowledged that “[c]ommenters including registrants and organizations who advocate on behalf of registrants expressed concern over the addition of [URS] RPMs, including [URS] into legacy gTLD¹⁹ RAs on various grounds.”²⁰ ICANN org concluded that “inclusion of the URS was agreed to via bilateral negotiations between the applicable registry operator and ICANN org,” and that “ICANN org has not moved to make the URS mandatory for any legacy gTLD.”²¹ ICANN org then noted that it would “consider the feedback from the community on this issue,”²² including “the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”²³

In June 2019, ICANN org provided briefing papers concerning the public comments to the Board in advance of its June 2019 workshop in Marrakech, which “summarized the key issues raised in the public comment process and correspondence (removal of price controls and inclusion of URS), and outlined the rationale for the recommendation to renew the agreements as proposed.”²⁴

¹⁷ *Id.*

¹⁸ *Id.*, at Pg. 9.

¹⁹ New gTLDs are gTLDs released as part of ICANN org’s New gTLD Program. *See* <https://newgtlds.icann.org/en/about/program>. Legacy gTLDs are gTLDs that predate ICANN org’s New gTLD Program. .ORG is a legacy gTLD.

²⁰ Report of Public Comments at Pg. 6. ICANN org received some comments supporting the RPMs. *Id.*, at Pgs. 6-7.

²¹ *Id.*

²² *Id.*

²³ *Id.*, at Pg. 1.

²⁴ 26 July 2019 Letter, at Pg. 2.

Following consultation with the Board and with the Board’s support,²⁵ on 30 June 2019, ICANN org announced that it had executed the .ORG Renewed RA. The Board did not hold a vote on the .ORG Renewed RA prior to execution. The .ORG Renewed RA included the URS RPMs.²⁶

On 30 July 2019, the Requestor submitted Request 19-3, seeking reconsideration of the .ORG Renewed RA.

The Ombudsman accepted Request 19-3 for consideration and, after investigating, concluded that the selection of terms to include in RAs is “ICANN org’s choice to make as directed by the Board—and as such, the actions of the Staff, acting with the authority vested in the CEO by the Bylaws and the Board, do not merit any kind of recommendation from me to the BAMC or the Board under [Request] 19-3.”²⁷ He further concluded that “[i]n action or inaction, the Board did nothing improper in deciding to stay the course, so far as I can see. It heard the Community, it read the public comments (at the very least the comprehensive Staff Report summary), and in the end, it decided that the renewal terms for the Legacy gTLDs (including .org) were acceptable.”²⁸

On 2 October 2019, the Requestor submitted a letter to ICANN’s Board Accountability Mechanisms Committee (BAMC) “to address certain errors” in the Ombudsman’s evaluation.²⁹

EFF asserted that the Ombudsman’s evaluation mischaracterized and did not address certain of

²⁵ *See id.*

²⁶ *See* ICANN org announcement: .ORG Registry Agreement, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

²⁷ Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-3, at Pg. 3, 7 September 2019, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf>.

²⁸ *Id.*, at Pg. 6.

²⁹ 2 October 2019 letter from C. Gagliano to L. Sanchez, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-gagliano-to-icann-bamc-02oct19-en.pdf>.

EFF's arguments, and that the Ombudsman was incorrect when it concluded that the .ORG RA renewal process was not a policy matter and therefore not subject to multistakeholder input.³⁰

The Board has considered Request 19-3 and all relevant materials. Based on its extensive review of all relevant materials, the Board finds that reconsideration is not warranted because ICANN org's execution of the .ORG Renewed RA was consistent with ICANN's Bylaws, policies, and procedures. Further, the Board did not fail to consider material information or rely on false or inaccurate material information by allowing ICANN Staff to execute the .ORG Renewed RA without voting on it prior to execution.

II. Facts.

A. Historic .ORG RA.

On 2 December 2002, ICANN org and PIR entered into a RA for the continued operation of .ORG, which became effective in 2003 (the 2003 .ORG RA).³¹ The 2003 .ORG RA included limits on the prices that PIR could charge registrars for registry services.³²

On 27 June 2006, ICANN posted for public comment proposed new RAs for the operation of .ORG, among others.³³ Key terms for the proposed agreement, and differences from the 2003 .ORG RA, included "the lifting of price controls formerly imposed on the pricing of registry services."³⁴ However, after reviewing over 2,000 comments from over 1,000 commenters, many opposing removal of the price caps, and at the Board's direction, ICANN org renegotiated the RA to include price caps.³⁵ Following a public comment period for the revised

³⁰ *Id.*

³¹ 2019 .ORG RA Public Comment Proceeding; *see also* <https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en>; <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>.

³² *See* 2003 .ORG RA, Art. 3, § 3.14.5, <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>.

³³ 2006 Public Comment of .BIZ, .INFO, .ORG, <https://www.icann.org/news/announcement-3-2006-07-28-en>.

³⁴ *Id.*

³⁵ *See* Revised .BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, <https://www.icann.org/news/announcement-2006-10-24-en>.

RA (which included price caps), on 8 December 2006, the Board approved the RA with price caps as proposed and posted for another round of public comment.³⁶

B. The New gTLD Program and the Base RA.

In 2005, ICANN’s Generic Names Supporting Organization (GNSO) undertook a policy development process to consider expanding the Domain Name System (DNS) by introducing new gTLDs.³⁷ In 2007, the GNSO concluded that “ICANN must implement a process that allows the introduction of new [gTLDs].”³⁸ Accordingly, ICANN org established and implemented the New gTLD Program, “enabling the largest expansion of the [DNS].”³⁹

To support the new gTLDs created through the 2012 New gTLD Program, ICANN org worked with the ICANN community to develop the Base RA—a template RA that would form the basis for all RAs executed in the course of the New gTLD Program. The Base RA was developed through the bottom-up multistakeholder process, including multiple rounds of public comment.⁴⁰ It was established in 2013 and aligns with the GNSO’s policy recommendations for new gTLDs.⁴¹ Since 2014, ICANN org has worked with legacy gTLD registry operators to transition the agreements for legacy gTLDs to the Base RA. Several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in agreement renewals.⁴² The URS was developed and adopted into the Base RA after extensive community input, including review by the GNSO Council.⁴³

³⁶ .ORG RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en>; .info RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en>.

³⁷ <https://newgtlds.icann.org/en/about/program>.

³⁸ GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm#_Toc43798015.

³⁹ <https://newgtlds.icann.org/en/about/program>.

⁴⁰ 26 July 2019 Letter, at Pg. 1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*, at Pg. 2.

The Base RA provides additional protections for the public benefit. For example, the Board has noted that the Base RA allows ICANN org to “designate an emergency interim registry operator of the registry for the TLD, which would mitigate the risks to the stability and security of the [DNS].”⁴⁴ Additionally, using the Base RA ensures that the Registry will use “uniform and automated processes, which will facilitate operation of the TLD,” and “includes safeguards in the form of public interest commitments in Specification 11.”⁴⁵

The Board has also explained that transitioning legacy gTLDs to the Base RA “will provide consistency across all registries leading to a more predictable environment for end-users.”⁴⁶ The Base RA’s requirement that the registry operator only use ICANN accredited registrars that are party to the 2013 Registrar Accreditation Agreement “will provide more benefits to registrars and registrants.”⁴⁷ Finally, the Board has noted that the Base RA “includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS,”⁴⁸ another public benefit.

In February 2016, the GNSO established a Rights Protection Mechanisms Policy Development Process Working Group (RPM Working Group) to “review all RPMs in all gTLDs, to review and determine whether modifications to the existing RPMs (including but not limited to the UDRP) are needed and, if so, what they should be.”⁴⁹ The RPM Working Group’s work

⁴⁴ Rationale for Board Resolution 2019.09.28.06 (renewal of .PRO RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e.rationale>; see also Rationale for Board Resolution 2015.09.28.04 (renewal of .CAT RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c.rationale>; Rationale for Board Resolution 2015.09.28.05 (renewal of .TRAVEL RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d.rationale>; 2019 .ORG Registry Agreement, Art. 2, § 2.13, at Pg. 7, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>.

⁴⁵ Rationale for Board Resolution 2015.09.28.06; see also 2019 .ORG Registry Agreement, Specification 11, at Pgs. 95-96, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>.

⁴⁶ Rationale for Board Resolution 2015.09.28.06.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See GNSO Council Resolution 20160216-3, <https://gns0.icann.org/en/council/resolutions#20160218-3>; Charter for RPM Working Group, https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf. The

is ongoing,⁵⁰ and currently no policy requires or prohibits registries from adopting URS.⁵¹ The Board has directed ICANN org not to stop its work on a matter merely because it is the subject of policy development discussions.⁵² Indeed, the Board recognized with approval “ICANN org’s practice to adhere to existing policies and procedures and to apply requirements from pending community recommendations only once they are adopted and implemented.”⁵³

C. The 2019 .ORG RA Renewal.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.⁵⁴ In anticipation of the 2013 .ORG RA’s 30 June 2019 expiration, ICANN org bilaterally negotiated a renewal to the agreement with PIR. The proposed renewal was based on ICANN org’s Base RA, modified “to account for the specific nature of the .ORG TLD.”⁵⁵ During the Board’s Los Angeles workshop (25-28 January 2019), ICANN org provided a briefing to and held a discussion of the renewal negotiations with the Board.⁵⁶ With the Board’s support, ICANN’s President and CEO decided to complete the renewal negotiations using the Base RA, which included the URS RPMs.⁵⁷

On 18 March 2019, ICANN org published the proposed .ORG Renewed RA for public comment to obtain community input on the proposed renewal. ICANN org published a redline version of the proposed renewal agreement against the Base RA and identified the material

Uniform Dispute Resolution Process (UDRP) is a Rights Protection Mechanism for addressing claims that domain names infringe on Trademarks. Prior .ORG RAs have included the UDRP; in the .ORG Renewed Registry Agreement (and other agreements that adopt the terms of the Base RA), the URS supplements the UDRP. See <https://www.icann.org/resources/pages/help/dndr/udrp-en>; <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

⁵⁰ See <https://gns0.icann.org/en/group-activities/active/rpm>.

⁵¹ 26 July 2019 Letter, at Pg. 2.

⁵² *Id.*

⁵³ Rationale for Board Resolution 2019.03.14.02, <https://www.icann.org/resources/board-material/resolutions-2019-03-14-en#1.b.rationale>.

⁵⁴ 2019 .ORG RA Public Comment Proceeding.

⁵⁵ See *id.*.

⁵⁶ 26 July 2019 Letter, at Pg. 2.

⁵⁷ *Id.*

differences between the proposed renewal and the Base RA. ICANN org explained that, consistent with the terms of the Base RA,

the .org renewal agreement will be subject to the [RPMs] set forth in section 2 of Specification 7, including the [URS] system [PIR] is also authorized to develop additional rights protection mechanisms.⁵⁸

ICANN org explained that the change would “allow the .org renewal agreement to better conform with the [Base RA].”⁵⁹ ICANN org also noted that “the registry agreements of several [other] ‘legacy’ gTLDs, namely, .tel, .mobi, .jobs, .travel, .cat and .pro have been reviewed based on the [Base RA].”⁶⁰

The public comment period for the .ORG Renewed RA opened on 18 March 2019 and closed on 29 April 2019.⁶¹ During that time, ICANN org received over 3,200 submissions.⁶² The comments predominantly related to three themes: (1) the proposed removal of the price cap provisions, (2) inclusion of the RPMs, and (3) the registry agreement renewal process.⁶³

The Requestor submitted a comment, jointly with the Domain Name Rights Coalition, asserting, among other things, that the URS would be “unnecessary and harmful in the .org TLD,” and that “any new RPMs for .org must be developed by the ICANN community, not imposed unilaterally by [PIR].”⁶⁴

⁵⁸ 2019 .ORG RA Public Comment Proceeding.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Report of Public Comments at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>.

⁶³ *Id.*

⁶⁴ The full text of Requestor’s Comment is available at <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/2019q2/003200.html>.

ICANN’s Non-Commercial Stakeholder Group (NCSG) also submitted a comment opposing, among other things, inclusion of the RPMs in the .org Renewed RA.⁶⁵ The NCSG noted that: (1) the RPMs were “expressly not added to . . . legacy gTLDs” in 2010; and (2) the RPM Working Group

is deliberating over an extensive set of charter questions, including whether the URS and other RPMs should be adopted as ICANN Consensus Policy applicable to all gTLDs (including legacy gTLDs), remain as a policy approved by the ICANN Community only for New gTLDs, or even whether to eliminate the URS entirely.⁶⁶

Accordingly, the NCSG asserted that including the URS in the .ORG Renewed RA “not only turns the previous multistakeholder process of policy making on its head but, more importantly, it undermines the current *ongoing community discussions regarding the future of the URS*.”⁶⁷

On 3 June 2019, in its Report of Public Comments, ICANN org recognized that “[c]ommenters including registrants and organizations who advocate on behalf of registrants expressed concern over the [proposed] addition of RPMs, including [URS] into legacy gTLD registry agreements on various grounds.”⁶⁸ ICANN org noted that these concerns included

that RPMs are not consensus policy for legacy gTLDs, and they believed that incorporating RPMs into legacy gTLD [RAs] should be halted until the RPM working group completes its review of the RPMs and comes to its final recommendations. These commenters also expressed the concern that ICANN org is setting substantive policy for gTLDs by adopting elements of the [Base RA] into amended and renewed [RAs] for legacy gTLDs.⁶⁹

⁶⁵ Comment, NCSG, 18 March 2019, <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/attachments/20190430/b10daf64/NCSG.ORGRenewalComment.pdf>.

⁶⁶ *Id.*, at Pg. 1.

⁶⁷ *Id.* (emphasis in original).

⁶⁸ Report of Public Comments at Pg. 6. ICANN org received some comments supporting the RPMs. *Id.*, at Pgs. 6-7.

⁶⁹ *Id.*, at Pg. 6.

The Report of Public Comments also included the following excerpt of the Requestor’s comment:

Procedurally, it is inappropriate for the ICANN organization to impose these mechanisms on .org, a legacy TLD that dates from the earliest days of the [DNS]. Such a move must come, if at all, from the ICANN community after an evidence-based discussion. ICANN staff have presented no evidence of any need for Trademark Claims and URS in the .org TLD.⁷⁰

ICANN org detailed its analysis of the public comments—including those concerning the proposed inclusion of RPMs—in its Report of Public Comments.⁷¹ ICANN org concluded that

inclusion of the URS was agreed to via bilateral negotiations between the applicable registry operator and ICANN org. ICANN org has not moved to make the URS mandatory for any legacy gTLD. Additionally, there is nothing restricting registry operators from imposing additional RPMs in other ways.⁷²

ICANN org explained that it would consider “the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”⁷³

ICANN org “review[ed] and consider[ed] all 3,200+ comments received,” in response to the proposed .ORG Renewed RA.⁷⁴ ICANN Staff then briefed the ICANN Board on its analysis of the public comments during the Board’s workshop on 21-23 June 2019.⁷⁵ With support from the Board to proceed with execution of the proposed renewals and pursuant to the [ICANN Delegation of Authority Guidelines](#), on 30 June 2019, ICANN org executed the .ORG Renewed RA.⁷⁶ The Board did not vote on whether to execute the .ORG Renewed RA.

⁷⁰ *Id.*

⁷¹ *Id.*, at Pg. 9.

⁷² *Id.*

⁷³ *Id.*, at Pg. 1.

⁷⁴ 26 July 2019 Letter, at Pg. 2.

⁷⁵ *Id.*

⁷⁶ See ICANN org announcements: .ORG Registry Agreement, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

D. The Request for Reconsideration and Ombudsman Report.

The Requestor submitted Request 19-3 on 30 July 2019.

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 19-3 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.⁷⁷

After investigating, the Ombudsman concluded that the selection of terms to include in RAs is

ICANN org’s choice to make as directed by the Board—and as such, the actions of the Staff, acting with the authority vested in the CEO by the Bylaws and the Board, do not merit any kind of recommendation from me to the BAMC or the Board under [Request] 19-3.⁷⁸

He further concluded that

[i]n action or inaction, the Board did nothing improper in deciding to stay the course, so far as I can see. It heard the Community, it read the public comments (at the very least the comprehensive Staff Report summary), and in the end, it decided that the renewal terms for the Legacy TLDs (including .org) were acceptable.⁷⁹

The Ombudsman explained that the Board was “well aware of the public comments” because ICANN Staff briefed them on the comments, and because the comments were publicly available, so Board members could have read each comment had they so desired.⁸⁰ He also determined that the delegation of power to negotiate and execute contracts, and the selection of terms to include in those contracts—including the .ORG Renewed RA—was a matter of corporate

⁷⁷ <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-ombudsman-action-redacted-27aug19-en.pdf>.

⁷⁸ Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-3, at Pg. 3, 7 September 2019, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf>.

⁷⁹ *Id.*, at Pg. 6.

⁸⁰ *Id.*, at Pg. 5.

governance, and not a “policy matter” about which the ICANN community would be entitled to greater input.⁸¹

On 2 October 2019, the Requestor submitted a letter to the BAMC “to address certain errors” in the Ombudsman’s evaluation.⁸² The Requestor asserted that the Ombudsman’s evaluation mischaracterized and did not address certain of the Requestor’s arguments, and that the Ombudsman was incorrect when it concluded that the .ORG RA renewal process was not a policy matter and therefore not subject to multistakeholder input.⁸³

E. Relief Requested.

The Requestor asks ICANN org to “pursue an amendment to its agreement with PIR for the operation of .ORG to eliminate the following clauses:

1. The second sentence of Section 2.8: ‘Registry Operator may, at its election, implement additional protections of the legal rights of third parties.’
2. Clause 2(b) of Specification 7: ‘the [URS] adopted by ICANN . . . including the implementation of determinations issued by URS examiners.’”⁸⁴

The Requestor also asks “the ICANN Board to look farther and deeper than ICANN staff . . . to what 10 million largely noncommercial domain names registrants might want and need.”⁸⁵ To do so, the Requestor asks the Board to “examine[]” the “full record of this proceeding . . . including a full and fair assessment and characterization of the submitted comments, and a full and fair summary by staff of their discussions with Community members on deep concerns with these issues, including EFF.”⁸⁶

⁸¹ *Id.*, at Pg. 4.

⁸² 2 October 2019 Letter.

⁸³ *Id.*

⁸⁴ Request 19-3, § 9, at Pg. 9.

⁸⁵ *Id.*

⁸⁶ *Id.*, § 8, at Pg. 9.

III. Issues Presented.

The issues are as follows:

1. Whether ICANN Staff's decision to include RPMs in the .ORG Renewed RA contradicts ICANN's Mission, Commitments, Core Values, or established ICANN policies; and
2. Whether the Board failed to consider material information or relied on inaccurate relevant information when it allowed ICANN Staff to execute the .ORG Renewed RA without holding a Board vote on the matter.

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."⁸⁷

The Board now considers Request 19-3's request for reconsideration of Staff action and Board inaction on the grounds that the action was taken in contradiction of ICANN's Bylaws, and the inaction occurred in reliance on false or inaccurate relevant information, or without considering material information. The Board has reviewed the Request and now issues a proposed determination.⁸⁸ Denial of a Request for Reconsideration of ICANN Staff action and

⁸⁷ Bylaws, Art. 4 §§ 4.2(a) and (c).

⁸⁸ See note 1, *supra*.

Board inaction is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁸⁹

V. Analysis and Rationale.

A. The Requestor's Arguments Concerning the Merits of the URS Do Not Support Reconsideration.

The Requestor states that “ICANN staff shared no evidence that the UDRP, the longstanding consensus policy addressing bad-faith registrations, is insufficient to protect the legitimate interests of trademark holders in .org.”⁹⁰ Further, the Requestor “see[s] no evidence that ICANN staff made any attempt to evaluate the impact of the ultra-fast timelines of the URS on noncommercial organizations in .org” or “of adding more substantive cases to the dockets of URS dispute resolution providers.”⁹¹ The Requestor argues that “[s]ubstantively, URS is not appropriate for the .org domain” because URS was developed in response to concerns that “the roll-out of hundreds of new [gTLDs] would prompt an epidemic of cybersquatting and other bad-faith registrations of trademarked names,” concerns that are “not present in legacy TLDs.”⁹² Ultimately, the Requestor complains that the URS is “ill equipped” to handle “the more complicated cases of noncommercial and commercial domain name disputes that will arise in .org.”⁹³

As an initial matter, no Commitment, Core Value, established policy, or procedure requires ICANN org to publish the “evidence” the Requestor demands in some effort to prove that ICANN org considered the Requestor’s arguments against applying the URS. Nonetheless, the Board has confirmed that ICANN org carefully considered its renewal options for the .ORG

⁸⁹ Bylaws, Art. 4 § 4.2(e).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Request 19-3, § 8, at Pg. 6.

⁹³ *Id.*

Registry and the public comments, including the Requestor’s opposition to incorporating the URS, before deciding to proceed with migrating the .ORG Registry to the Base RA (and employing the URS). Moreover, the Requestor has not shown that it is unreasonable to employ URS in the .ORG Renewed RA. Although it has not been adopted as a Consensus Policy, ICANN community’s Implementation Recommendation Team has recommended making URS a mandatory RPM for new gTLDs, and the GNSO has concluded that the URS was not inconsistent with any of its *existing* policy recommendations.⁹⁴ There is thus no support – and the Requestor offers none – for the Requestor’s assertion that the URS is “ill equipped” for issues likely to arise involving .ORG registrants. Instead, the Requestor merely *asks* whether “URS Panelists [are] ready and able to hear the more complicated cases of noncommercial and commercial domain name disputes that will arise in .org.”⁹⁵ The Requestor may prefer a different RPM mechanism, but its disagreement does not support reconsideration.

The Requestor asserts that the Ombudsman did not address this argument.⁹⁶ Because the Requestor has not identified any violations of ICANN Bylaws or established policies and procedures requiring the Ombudsman to address this argument, whether (or not) the Ombudsman does so is neither material to the Board’s consideration of Request 19-3, nor sufficient support for reconsideration.

⁹⁴ Rationale for Board Resolution 2015.09.28.06.

⁹⁵ Request 19-3, § 8, at Pg. 6.

⁹⁶ 2 October 2019 letter at Pg. 1 (asserting that the Ombudsman did not “acknowledge” Requestor’s arguments concerning “the special difficulties that expedited dispute resolution may pose for non-profit organizations, the likelihood of complex disputes involving noncommercial uses, and the lack of evidence that URS procedures are needed in the .org space”). This argument not only fails in its lack of connection to a Bylaws provision, policy, or procedure violation, it underscores the fact that the Requestor has not been harmed by this purported wrong because all of the problems the Requestor identifies are speculative. For example, URS “may pose” difficulties, there is a “likelihood” that future disputes will be complex, the uncertainty of whether the URS rules “are needed.” *See id.* Reconsideration is available for entities that *have been* adversely affected; the speculative nature of these purported harms thus undermines Requestor’s claims. *See* Bylaws, Art. 4, § 4.2(c).

B. ICANN org’s Execution of the .ORG Renewed RA Was Consistent With ICANN’s Bylaws.

The Requestor next asserts that including the RPMs in the .ORG Renewed RA contradicts ICANN’s Commitments and Core Values because ICANN Staff acted: (1) before the RPM Working Group concluded its evaluation of all RPMs; and (2) in spite of the public comments opposing the inclusion of the URS RPMs.⁹⁷ The Board considers these arguments in turn below, and concludes that ICANN org’s inclusion of the RPMs in the .ORG Renewed RA was not inconsistent with the Bylaws.

1. *ICANN org’s action was consistent with its Commitment to “ensure that those entities most affected can assist in the policy development process.”*

Citing ICANN org’s statement that “inclusion of the URS was agreed to via bilateral negotiations between [PIR] and ICANN org,” the Requestor asserts that “bilateral negotiations are not a sufficient substitute for multistakeholder policy development.”⁹⁸ The Requestor argues that substantive changes to the .ORG RA “should be initiated, if at all, through the multistakeholder policy development process, not bilateral negotiations between a registry operator and ICANN staff.”⁹⁹

The Requestor asserts that ICANN org’s decision to include the RPM in the .ORG Renewed RA improperly “bypass[ed] the RPM Working Group . . . , den[ying] EFF and other RPM Working Group participants meaningful input into this change.”¹⁰⁰ The Requestor asserts that taking this action via bilateral negotiation, rather than waiting for the results of the RPM Working Group, contradicts ICANN org’s Commitment to “ensure that those entities most affected can assist in the policy development process” and its Core Value of:

⁹⁷ *Id.* § 6, at Pgs. 3-4.

⁹⁸ Request 19-3, § 8, at Pg. 7.

⁹⁹ *Id.* § 6, at Pg. 3.

¹⁰⁰ Request 19-3, § 6, at Pg. 3.

[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.¹⁰¹

However, another of ICANN’s Core Values is “[o]perating with efficiency and excellence . . . and, where practicable and not inconsistent with ICANN’s other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community.”¹⁰² It would be inefficient and impractical if ICANN org were prevented from taking any action that could touch on a topic that is the subject of discussion via the policy development process. For this reason, “[i]t is ICANN org’s practice to adhere to existing policies and procedures and to apply requirements from pending community recommendations only once they are adopted and implemented.”¹⁰³ Once the RPM Working Group concludes its inquiry and to the extent the GNSO makes a community recommendations on RPMs, the Board will take the recommendation under consideration. ICANN org will then follow any Board directives and comply with any new policy set by or procedure adopted by the Board in light of those recommendations. Consistent with this approach, ICANN Staff adhered to its standard existing practice by negotiating with PIR to renew the RA pursuant to the Base RA, which includes the URS. The existence of the RPM Working Group is not, in itself, grounds for reconsidering Staff’s action.

ICANN org’s practice of following *existing* policies and procedures rather than speculating on the future based on community recommendations (or potential future community recommendations, as is the case here—the RPM Working Group has not yet issued

¹⁰¹ Request 19-3, § 8, at Pgs. 5-6.

¹⁰² Bylaws, Art. 1, § 1.2(b)(v).

¹⁰³ Rationale for Board Resolution 2019.03.14.02, <https://www.icann.org/resources/board-material/resolutions-2019-03-14-en#1.b.rationale>.

recommendations) supports ICANN org’s Core Value of operating with efficiency.¹⁰⁴ The RPM Working Group was charged with assessing “all RPMs in all gTLDs, . . . (including but not limited to the UDRP).”¹⁰⁵ As explained above, the 2013 .ORG RA incorporated the UDRP, and the Requestor asserts that the current .ORG Renewed RA should likewise employ *only* the UDRP.¹⁰⁶ But under the Requestor’s own theory, ICANN org should not execute any RAs that contain *any* RPMs that are the subject of the RPM Working Group’s ongoing analysis—which includes the UDRP—until the RPM Working Group completes its work. If the Board endorsed this theory, it would produce an unworkable result: ICANN org would have to either forego executing *all* RAs (for all contain some form of RPMs) while the RPM Working Group completes its analysis, or the organization would be forced to *remove* the RPMs from all RAs it has already executed until the RPM Working Group finishes its work.¹⁰⁷ Removing the UDRP from RAs—or executing RAs *without* the UDRP—would also be inconsistent with the UDRP consensus policy, which requires that *all* registrars follow the UDRP.¹⁰⁸ ICANN org’s failure to comply with a consensus policy would likely violate the Bylaws and/or established policies or procedures. In any case, ICANN org’s operations would not only be inefficient, they would come to a near halt. The Requestor’s argument produces untenable results and does not support reconsideration.

¹⁰⁴ Bylaws, Art. 1, § 1.2(b)(v).

¹⁰⁵ See GNSO Council Resolution 20160216-3, <https://gns0.icann.org/en/council/resolutions#20160218-3>; Charter for RPM Working Group, https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf.

¹⁰⁶ Request 19-3, § 7, at Pg. 5.

¹⁰⁷ The Board further notes that the Board has previously considered application of URS to Legacy gTLDs and concluded that, although the URS “has not been adopted as a consensus policy and ICANN has no ability to make it mandatory for any TLDs other than new gTLD applicants who applied during the 2012 New gTLD round,” including the URS in Legacy gTLD RAs was “not inconsistent with any GNSO existing policy recommendations.” Rationale for Board Resolution 2015.09.28.06.

¹⁰⁸ See UDRP, <https://www.icann.org/resources/pages/help/dndr/udrp-en>.

For the above reasons, the Requestor has not demonstrated that the RPM Working Group's ongoing analysis justifies reconsideration of the .ORG Renewed RA.

2. *ICANN org's Action Was Consistent With Its Commitment To Seek Public Input From The Public And Act For The Public Benefit, And Its Core Value Of Seeking Broad Participation.*

The Requestor asserts that ICANN org's decision to include the RPMs in the .ORG Renewed RA despite public comments opposing the URS RPMs is contrary to ICANN's Commitments to "seek input from the public, for whose benefit ICANN in all events shall act" and to "ensure that those entities most affected can assist in the policy development process," and its Core Value of "[s]triving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture."¹⁰⁹

The Requestor concedes that ICANN org sought broad participation, including public comment, when it notes that ICANN org "[o]ffer[ed] an opportunity for public comment on the renewal of this contract," but claims that the public comment proceeding was not faithful to "the multistakeholder process" because "ICANN staff offered no response to th[e] concerns raised in the public comments . . . and made *no changes to the proposed .org registry agreement.*"¹¹⁰

At bottom, the Requestor believes that "the voice of registrants was excluded" from the RA renewal process.¹¹¹ The Requestor is incorrect. ICANN Staff reviewed and considered each of the more than 3,200 comments submitted during the public comment period.¹¹² ICANN Staff presented and discussed the public comments and "key issues raised in the public comment

¹⁰⁹ Request 19-3, § 8, at Pgs. 5-6.

¹¹⁰ Request 19-3, § 6, at Pg. 4 (emphasis in original).

¹¹¹ *Id.*

¹¹² 26 July 2019 Letter, at Pg. 2

process and correspondence”—including the RPMs—with the Board before executing the .ORG Renewed RA.¹¹³

The Report of Public Comment was the result of ICANN Staff’s extensive analysis of the comments; consistent with ICANN Staff’s ordinary process for preparing the Report of Public Comment, ICANN Staff identified the main themes in the comments and summarized them, providing exemplary excerpts for each of those themes.¹¹⁴ Neither the Bylaws, nor any ICANN policy or procedure, requires ICANN Staff to discuss each position stated in each comment. By the same token, there is no threshold number of comments about a topic necessary before ICANN Staff discusses that topic in the Report of Public Comments; even a single comment on a theme may merit inclusion in the report, under certain circumstances.

That ICANN org ultimately decided to include the URS RPMs in the bilaterally negotiated Renewed .ORG RA despite public comments opposing this approach does not “exclude[]” the voice of registrants from the RA renewal process or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff’s careful consideration of the public comments—in its Report of Public Comments and discussion with the Board¹¹⁵—demonstrate the exact opposite, namely that the propriety of the URS RPMs and the other aspects of the Base RA for .ORG were carefully considered.

Moreover, the public comment process is but one of several channels for ICANN’s multistakeholder community to voice opinions. Members of the community may also voice their opinions in public meetings and through the final recommendations of supporting organizations,

¹¹³ 26 July 2019 Letter, at Pg. 2.

¹¹⁴ See Report of Public Comments, at Pg. 3 (“This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor.”).

¹¹⁵ 26 July 2019 Letter, at Pg. 2.

advisory committees, and direct correspondence with ICANN org or the ICANN Board.

Accordingly, the multistakeholder community provides input to ICANN org in many ways, and ICANN org considers this input to ensure that all views have been taken into account during a decision-making process.

However, ICANN org's Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN's various communication channels. Here, ICANN org ultimately determined that ICANN's Mission was best served by bringing the .ORG RA into conformity with other legacy and new gTLDs that now use the Base RA. Further, the Base RA, which is incorporated in the .ORG Renewed RA, "was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment."¹¹⁶

Finally, ICANN Staff was aware of the Board's 2015 statements (made in the course of approving the migration of another legacy gTLD, .PRO, to the Base RA) that the Base RA as a whole benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end-users.¹¹⁷

Accordingly, it is clear that ICANN Staff believed that it *was* acting for the public benefit and balancing the interests of different stakeholders by migrating the .ORG gTLD to the Base RA. The Report of Public Comments explained that using the Base RA ensures that ICANN org treats "the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base [RA]," and provides new protections for existing registrants including requiring advance notice to registrars of price increases and enabling registrants to renew

¹¹⁶ 26 July 2019 Letter, at Pg. 1.

¹¹⁷ See Rationale for Board Resolution 2015.09.28.06.

registration for up to 10 years *before* any increases take effect.¹¹⁸ ICANN Staff also noted that migrating .ORG to the Base RA protects other stakeholders by providing “additional safeguards and security requirements which are more robust than what exists in legacy agreements, . . . [and] lay[ing] the framework for consistency for registries, registrars, and registrants, and provides for operational efficiencies for ICANN org.”¹¹⁹ The record demonstrates that ICANN org carefully considered and acted for the public benefit by proceeding with the .ORG Renewed RA as submitted for public comment.

The Requestor has not demonstrated that ICANN Staff failed to seek or support broad participation, ascertain the global public interest, or act for the public benefit. To the contrary, ICANN org’s transparent processes reflect the Staff’s continuous efforts to ascertain and pursue the global public interest by migrating the legacy gTLDs to the Base RA.

C. The Board Considered All Material Information And Did Not Rely On False Or Inaccurate Relevant Information.

The Requestor asserts that the Board’s inaction (i.e., that the Board did not vote on the .ORG Renewed RA) was based on the Board’s consideration of inaccurate relevant information and failure to consider material information.¹²⁰ The Requestor asserts that ICANN org “mischaracteriz[ed]” the “full nature and scope of the comments” to the Board, and as a result, the “Board could not act on [the concerns raised in the comments] effectively.”¹²¹

In support, the Requestor identifies material information—i.e., the “serious substantive and procedural concerns raised by . . . hundreds of organizations and commenters” that it believes was not considered by the Board.¹²² Likewise, the Requestor identifies relevant

¹¹⁸ Report of Public Comments, at Pg. 8.

¹¹⁹ *Id.*

¹²⁰ Request 19-3 § 8, at Pgs. 8-9.

¹²¹ *Id.*

¹²² *Id.*, § 8, at Pg. 8.

information—i.e., ICANN org’s summary of the public comments, which the Requestor asserts “mischaracteriz[ed]” the “full nature and scope of the comments”—that was allegedly inaccurate.¹²³

1. *The Board Delegated Its Contracting Authority To ICANN Org’s CEO.*

As the Ombudsman noted in his evaluation, the Board has authority to “authorize any Officer . . . to enter into any contract . . . in the name of and on behalf of ICANN, and such authority may be general or confined to specific instances.”¹²⁴ On 8 November 2016, the Board delegated its authority to negotiate and execute contracts to ICANN’s CEO or his designee.¹²⁵ Based on the Board’s understanding that executing the .ORG Renewed RA fell within that delegation of authority, in June 2019 the Board allowed the CEO to “ma[k]e the decision to continue with renewal agreements as proposed, using the Base [RA].”¹²⁶

In response to the Ombudsman’s conclusion that the Board delegated to ICANN Staff the authority to execute RAs (including the .ORG Renewed RA), the Requestor argues that ICANN Staff “exercised th[e] authority [delegated by the Board] to intrude on policy matters inappropriate for resolution through ‘bilateral negotiations’ between a registry operator and ICANN staff,” and that executing the RA was not “staying the course,” as the Ombudsman concluded.¹²⁷ The Board concludes that the renewal fell within the Board’s delegation of authority to ICANN’s CEO or his designee, and that, for the reasons stated above, the renewal

¹²³ *Id.*, § 8, at Pgs. 8-9.

¹²⁴ Bylaws, Art. 21, § 21.1. *See also* Ombudsman’s Evaluation of Request 19-3, at Pg. 4.

¹²⁵ *See* Board Resolution 2016.11.08.06 (adopting ICANN Delegation of Authority Guidelines), <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#1.f>; Delegation of Authority Guidelines, <https://www.icann.org/en/system/files/files/delegation-of-authority-guidelines-08nov16-en.pdf>. *Cf.* New gTLD Program Applicant Guidebook, Module 5, at Pg. 5-3 (formal approval of the Registry Agreement generally does not require additional Board review unless the Board requests review of an application).

¹²⁶ 26 July 2019 Letter, at Pg. 2.

¹²⁷ 2 October 2019 Letter, at Pg. 2.

process and the terms of the .ORG Renewed RA were consistent with ICANN’s Bylaws and established policies and procedures.

2. *The Board Did Not Fail To Consider Material Information or Rely on Inaccurate Relevant Information.*

The Requestor asserts that the Report of Public Comments does not capture the “full breadth, depth and extent” of the opposition to the URS provisions in the .ORG Renewed RA.¹²⁸ Specifically, the Requestor states that “the Board was told that nearly all of the comments were filed by ‘domainers’ (investors in domain names),” and that the summary of comments that the Board received “downplayed and minimized the dangers and frustrations raised by commenters, and how proceeding with the new agreement would undermine the multistakeholder process.”¹²⁹

Contrary to the Requestor’s assertion, the Report of Public Comment plainly states that the commenters that opposed the addition of RPMs in the .ORG RA included “registrants and organizations who advocate on behalf of registrants.”¹³⁰ The Requestor offers no basis for its claim that summaries of the public comment proceeding did not paint an accurate picture of the issues raised by the commenters, other than the fact that the Board did not direct ICANN Staff to renegotiate the .ORG Renewed RA. This outcome, in itself, does not demonstrate that the Board failed to consider material information or relied on inaccurate relevant information.

As the Board explained above, the Report of Public Comment properly identified and summarized the main themes in the comments, providing exemplary excerpts for each of those themes without individually discussing each position stated in each comment.¹³¹ The Report of Public Comment acknowledged that commenters opposed the inclusion of URS RPMs in the

¹²⁸ Request 19-3, § 8, at Pg. 8.

¹²⁹ *Id.*

¹³⁰ Report of Public Comments, at Pg. 6.

¹³¹ *See Id.*, at Pg. 3 (“This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor.”).

.ORG Renewed RA.¹³² ICANN Staff even quoted the Requestor’s comment in the Report as representative of the comments criticizing the addition of the RPMs.

Further, all public comments were available for the Board’s review.¹³³

The Requestor’s arguments do not support reconsideration.

D. The Requestor’s Suggestion That The Board Needs to Consider Additional Materials In Relation To The .ORG Registry Renewal Process Does Not Support Reconsideration.

The Requestor asks the Board to “look further and deeper than ICANN [S]taff – beyond whatever a registry might want (in its own interest) and beyond what ICANN [S]taff might want” to “examine[.]” the “full record of this proceeding . . . including a full and fair assessment and characterization of the submitted comments.”¹³⁴

To the extent that the Requestor is asking the Board to read each comment submitted in the Public Comment proceeding, the Board notes that neither the Bylaws nor any established ICANN policy or proceeding requires the Board to do so. To the extent the Requestor is asking ICANN Staff to prepare a new Report of Public Comments, the Board concludes that such relief is not warranted because, for the reasons provided above, the Requestor has not shown that the Report of Public Comments (or any other information provided to the Board concerning the public comment proceeding) was inaccurate or omitted material information.

Further, the Requestor’s request that the Board “look . . . beyond whatever a registry might want . . . and beyond what ICANN [S]taff might want” is based on the incorrect

¹³² *Id.*, at Pg. 6.

¹³³ <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/>.

¹³⁴ Request 19-3, § 8, at Pg. 9; *id.* § 9, at Pg. 9. The Requestor also asks the Board to review “a full and fair summary by staff of their discussions with Community members on deep concerns with these issues, including EFF.” *Id.* § 8, at Pg. 9. ICANN Staff provided to the Board the Report of Public Comments, which summarized the concerns raised in comments submitted during the Public Comment Proceeding. It is not ICANN org’s practice to discuss issues raised in Public Comment Proceedings with Community members, and the Requestor has not identified or even asserted that there exists any material information provided in “discussions” with ICANN Staff that was not captured in the public comments. For all of these reasons, this request does not support reconsideration.

assumption that ICANN Staff executed the .ORG Renewed RA based on its own self-interest, or with special consideration to the interests of registry operators. This is incorrect. As shown above, ICANN Staff acted consistent with ICANN’s Bylaws and established policies and procedures, without singling out any particular party—not itself, not a registry operator, and not domain name registrants—for discriminatory treatment.¹³⁵ Therefore, this request does not support reconsideration.

For all of the reasons discussed above, none of these requests justify reconsideration of ICANN org’s execution of the .ORG Renewed RA.

VI. Proposed Determination.

The Board has considered the merits of Request 19-3 and, based on the foregoing, the Board concludes that ICANN org’s execution of the .ORG Renewed RA did not contradict ICANN’s Bylaws, policies, or procedures, and that the Board did not fail to consider material information or rely on false or inaccurate relevant information by allowing ICANN Staff to execute the .ORG Renewed RA without voting on it prior to execution. Accordingly, the Board proposes denying Request 19-3.

Because the BAMC did not have a quorum to consider Request 19-3, the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC. Accordingly, the issuance of this Proposed Determination triggers the Requestor’s right to file a rebuttal consistent with Article 4, Section 4.2(q) of the Bylaws.

¹³⁵ See Bylaws, Art. 1, § 1.2(a)(v).

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ICANN BOARD SUBMISSION NO. 2019.11.03.1c

TITLE: **Independent Review Process Implementation Oversight Team Recomposition**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

The Board is being asked to approve an updated composition for the IRP Implementation Oversight Team (IRP-IOT). This is a group, specified in the ICANN Bylaws, as responsible for, among other things, updating the IRP Supplementary Procedures for Board approval, and developing rules for the Cooperative Engagement Process.¹

The Bylaws specify that an IRP-IOT shall be “established in consultation with the Supporting Organizations [SOs] and Advisory Committees [ACs]” and “comprised of members of the global Internet community.”² The IRP-IOT was initially formed during WS1 of the Cross Community Working Group on ICANN Accountability as a group envisioned to include seven volunteers of experts in IRPs, arbitration or other alternative dispute resolution mechanisms. After the post-transition Bylaws went into effect, while there were no formal efforts to add members to the IRP-IOT, additional people joined. To date, while the community wiki page for the IRP-IOT lists a membership of 26, there are only five to six regular participants.³ Over the past year, the IRP-IOT has had significant trouble reaching a quorum of five participants at regularly scheduled meetings. As a result, the Board Accountability Mechanisms Committee (BAMC), in its oversight role of ICANN’s accountability mechanisms, has undertaken to repopulate the IRP-IOT with members who have the substantive qualifications and time availability to help the IRP-IOT conclude its work in a timely fashion.

Specifically, the BAMC sought volunteers who have the necessary legal or judicial skills and experience in IRPs, arbitrations, or other alternate dispute resolution mechanisms, as well as

¹ Per the Bylaws, the IRP-IOT is also charged with making recommendations of trainings for the Standing Panel and developing the recall process for Standing Panel members. *See* Bylaws, Art. 4, § 4.3(j)(i) and 4.3(j)(iii) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

² ICANN Bylaws, Art. 4, § 4.3(n) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

³ *See* <https://community.icann.org/display/IRPIOTI/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home>.

specific familiarity with ICANN’s accountability mechanisms. In terms of time commitment, the BAMC asked for volunteers who have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as sufficient availability to contribute to the work online.⁴

Following community consultation and a call for expressions of interest, attached as Attachment A for the Board’s consideration is the list of candidates that the BAMC has determined meets the substantive and time requirements for IRP-IOT membership. While the BAMC is still waiting for additional information on some candidates as well as a few confirmations of interest, the overall composition will remain in the anticipated level. The BAMC recommends that ICANN org’s legal department continues its participation as a member of the IRP-IOT insofar as ICANN legal brings a practical and important view of how the proposals out of the IRP align in practice as well as potential implications on the ICANN Bylaws and resourcing issues. As the ICANN Board has responsibility to make sure that the IRP, envisioned as the “constitutional court” of ICANN, operates properly under the Bylaws, the BAMC also recommends that two ICANN Board members are formally identified as members of the IRP-IOT and actively participate in this work. The BAMC notes that other members of the reconstituted IRP-IOT have been, or anticipate to be, involved as claimants against ICANN in IRPs, and the BAMC notes that their experience is also extremely valuable when finalizing the procedures and other aspects of an IRP that is fit for purpose.

BOARD ACCOUNTABILITY MECHANISMS COMMITTEE RECOMMENDATION

The BAMC recommended that the Board affirm the work of the BAMC in recomposing the IRP-IOT.

PROPOSED RESOLUTION:

Whereas, the Independent Review Process (IRP) is an accountability mechanism established by the ICANN Bylaws that allows for third party review of ICANN Board or staff actions (or

⁴ See Letter from León Sanchez, Chair of the BAMC Chair, to the SO and AC leadership, dated 16 June 2019 (<https://www.icann.org/en/system/files/correspondence/sanchez-to-siddiqui-et-al-26jun19-en.pdf>).

inactions) alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws.

Whereas, the Bylaws specify that IRP Implementation Oversight Team (IRP-IOT) is responsible for, among other things, updating the IRP supplementary rules of procedure for Board consideration and approval, and developing rules for the Cooperative Engagement Process.

Whereas, the Bylaws further specify that an IRP-IOT shall be “established in consultation with the Supporting Organizations [SOs] and Advisory Committees [ACs]” and that the IRP-IOT shall be “comprised of members of the global Internet community.” (*See* Bylaws, Art. 4, § 4.3(n).)

Whereas, the IRP-IOT was formed during CCWG-Accountability Work Stream 1 (WS1) as a group envisioned to include seven volunteers of experts in IRPs, arbitration or alternative dispute resolution mechanisms.

Whereas, the IRP-IOT had difficulties in achieving active participation or quorum with its current membership at regularly scheduled meetings.

Whereas, the Board Accountability Mechanisms Committee (BAMC), in its oversight role of ICANN’s accountability mechanisms, has undertaken to repopulate the IRP-IOT with members who have the substantive qualifications and time availability to help the IOT conclude its work in a timely fashion.

Whereas, at the request of the BAMC, ICANN organization issued a Call for Expressions of Interest and conducted community outreach seeking new volunteers to join the IRP-IOT.

Whereas, the BAMC specified that volunteers should have the necessary legal or judicial skills and experience in IRPs, arbitrations, or other alternate dispute resolution mechanisms, specific familiarity with ICANN’s accountability mechanisms, the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, and sufficient availability to contribute to the work online.

Whereas, the BAMC has confirmed with the current members of the IRP-IOT who have actively participated in the IRP-IOT since January 2018 that they would like to continue serving on the

IRP-IOT and that they have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as sufficient availability to contribute to the work online.

[Resolved \(2019.11.03.xx\), The Board delegates BAMC the authority to select the members according to the documentation submitted to the Board and continuing to follow appropriate consultation requirement for future changes to the composition of the IOT.](#)

Resolved (2019.11.03.XX), the Board acknowledges the work of the BAMC in recomposing the IRP-IOT and directs the BAMC to provide regular updates to the Board on the status of the work of the recomposed IRP-IOT.

Resolved (2019.11.03.XX), the Board thanks the SOs and ACs in their work in consulting with the BAMC on the recomposition of the IRP-IOT and hopes that the SOs and ACs will remain engaged with the effort. The Board further thanks all candidates who submitted expressions of interest to join the IRP-IOT. The Board further thanks all members of the IRP-IOT for their efforts to date.

PROPOSED RATIONALE:

The Independent Review Process (IRP) is an accountability mechanism provided by the ICANN Bylaws that allows for third party review of ICANN Board or staff actions (or inactions) alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws. Per the Bylaws, an IRP Implementation Oversight Team (IRP-IOT) is responsible for, among other things, updating the IRP Supplementary Procedures for Board approval, and developing rules for the Cooperative Engagement Process (CEP). The Board is taking this action today because it is committed to ensuring that the work of the IRP-IOT is completed in a timely and efficient manner to bring the IRP in line with the updated Bylaws.

The IRP-IOT's scope of work involves drafting the Updated Supplementary Procedures for Board consideration and approval, developing rules for the CEP, making recommendations of trainings for the IRP standing panel, and developing the rules governing appeals from IRP panel

decisions.⁵ The current IRP-IOT was formed in late 2015 within CCWG-ACCT WS1 as a group envisioned to include seven volunteers of experts in the IRPs, arbitration or alternative dispute resolution mechanisms, as well as participants from ICANN’s legal department.⁶ Over the past several years, the IRP-IOT has experienced difficulties in achieving active participation and quorum from the current membership at regularly scheduled meetings.

The participation level of the IRP-IOT needs to improve dramatically in order to complete the remaining work in the estimated time frame. The Board Accountability Mechanisms Committee (BAMC) as the Board Committee with oversight responsibility of ICANN’s accountability mechanisms, identified that as part of re-composing the IRP-IOT and supporting the important role that the IRP has within ICANN’s overall accountability, it is important to focus on bringing the correct mix of skills to the group to complete the work. The BAMC identified those as specific legal or judicial skills and experience in disputes such as IRPs, arbitrations, or other alternate dispute resolution mechanisms, as well as specific familiarity with ICANN’s accountability mechanisms. In terms of time commitment, the BAMC asked for volunteers who have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as sufficient availability to contribute to the work online.

Pursuant to the Bylaws requirement that an IRP-IOT be “established in consultation with the Supporting Organizations [SOs] and Advisory Committees [ACs]”, the process to recompose the IRP-IOT was done in consultation with the SOs and ACs. The BAMC and ICANN org conducted several community outreach efforts, including an issuance of a Call for Expressions of Interest through the Community Leadership Digest in April 2019 and a letter from the BAMC Chair to the SO/AC leadership in which the BAMC Chair asked for the help of the SO/AC leadership in the recomposition process. ([See Letter from León Sanchez to SO/AC leadership dated 26 June 2019](#)). The BAMC encouraged the SO/ACs, if interested, to use their own selection processes to provide inputs to the BAMC on candidates. If invited, representatives of ICANN org were available for discussion on the issue.

⁵ See Bylaws, Art. 4, § 4.3(j)(i) and 4.3(j)(iii) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

⁶ See <https://community.icann.org/display/IRPIOTI>.

Following community outreach and a Call for Expressions of Interest, the BAMC then considered whether each of the volunteers that responded to the call for expressions of interest satisfied the substantive qualifications and time requirements sufficient to serve on the IRP-IOT. Some of the volunteers were presented to the BAMC with endorsement from the Generic Names Supporting Organization Council.

With respect to those IRP-IOT members that have actively participated in the IRP-IOT since January 2018, the BAMC, through ICANN org, sought confirmation from each as to whether they wished to continue serving on the IRP-IOT and that they have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as sufficient availability to contribute to the work online. The full composition from the BAMC also continues the participation from ICANN org's legal department, which brings a practical and important view of how the proposals out of the IRP align in practice as well as potential implications on the ICANN Bylaws and resourcing issues. As the ICANN Board has responsibility to make sure that the IRP, envisioned as the "constitutional court" of ICANN, operates properly under the Bylaws, the BAMC also recommends that two ICANN Board members are formally identified as members of the IRP-IOT and actively participate in this work. The Board notes that other members of the re-constituted IRP-IOT have been, or anticipate to be, involved as claimants against ICANN in IRPs, and the Board notes that their experience is also extremely valuable when finalizing the procedures and other aspects of an IRP that is fit for purpose. The Board further notes that the BAMC may add new members to the IRP-IOT as appropriate should the need to do so arise, and provided that the new members meet the substantive and time requirements for IRP-IOT membership. The Board affirms the BAMC's work in recomposing the IRP-IOT and directs the BAMC to provide regular updates to the Board on the status of the work of the recomposed IRP-IOT.

The BAMC has also recommended that the recomposed IRP-IOT include a leadership refresh as part of reinvigorating and renewing the cadence of the work of the IRP-IOT. The Board agrees with BAMC's recommendation and thanks the IRP-IOT leadership for the work to date.

The Board thanks the SOs and ACs for their work in identifying additional members the IRP-IOT and hopes that the SOs and ACs will remain engaged with the effort. The Board further

thanks all candidates who submitted expressions of interest to join the IRP-IOT. The Board further thanks all members of the IRP-IOT for their efforts to date.

This action is within ICANN's Mission and is in the public interest as part implementing and achieving the enhanced outcomes of the IRP in accordance with the recommendations of the community. This action is also within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request third party review of that action or inaction by the Board.

Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Samantha Eisner, Deputy General Counsel and Elizabeth Le, Associate
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ICANN BOARD PAPER NO. 2019-11-03-2a

TITLE: OMBUDSMAN FY19 AT-RISK COMPENSATION

PROPOSED ACTION: For Board Consideration and Approval

EXECUTIVE SUMMARY:

In accordance with its charter, the Compensation Committee is responsible for evaluating and recommending a percentage of the Ombudsman's annual at-risk compensation component to the Board for approval. The Compensation Committee has agreed an amount to recommend for the Ombudsman's FY19 at-risk component and the Board is now being asked to approve the Compensation Committee's recommendation.

Confidential Employment Matter

PROPOSED PUBLIC RESOLUTION:

Whereas, the Compensation Committee recommended that the Board approve payment to the Ombudsman of his FY19 at-risk compensation.

Resolved (2019.11.03.xx), the Board hereby approves a payment to the Ombudsman of his FY19 at-risk compensation component.

Resolved (2019.11.03.Cxx), this action by the Board shall remain confidential as an “action relating to personnel or employment matters”, pursuant to Article 3, section 3.5b of the ICANN Bylaws.

PROPOSED RATIONALE:

Annually the Ombudsman has an opportunity to earn a portion of his compensation based on specific performance goals set by the Board, through the Compensation Committee. This not only provides incentive for the Ombudsman to perform above and beyond his regular duties, but also leads to regular touch points between the Ombudsman and Board members during the year to help ensure that the Ombudsman is achieving his goals and serving the needs of the ICANN community.

Evaluation of the Ombudsman’s objectives results from both the Ombudsman self-assessment, as well as review by the Compensation Committee, which lead to a recommendation to the Board with which the Board agrees.

Evaluating the Ombudsman’s annual performance objectives is in furtherance of the goals and mission of ICANN and helps increase the Ombudsman’s service to the ICANN community, which is in the public interest.

While there is a fiscal impact from the results of the scoring, that impact was already accounted for in the FY19 budget. This action will have no impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel
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