

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.