

ICANN BOARD SUBMISSION NO. 2019.12.XX.XX

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 2019 renewal of the Registry Agreement (RA) with Public Interest Registry (PIR) for the .ORG and .INFO generic top-level domain (gTLD), (the .ORG Renewed RA). Specifically, the 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,' 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 did not vote on the .ORG Renewed RA. 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.²

The Board previously issued a Proposed Determination denying reconsideration 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.³

Pursuant to Article 4, Section 4.2(q) of the Bylaws, the Requestor submitted a rebuttal to the Proposed Determination. The Rebuttal reiterated the arguments in the Request, and did not present any new facts or evidence.⁴

¹ Request 19-3, § 3, at Pg 2

² *Id.*, § 8, at Pgs 8-9

³ https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1_b

⁴ Requestor's Rebuttal to ICANN Board's Proposed Determination on Request 19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-rebuttal-board-proposed-determination-19nov19-en.pdf>

The Requestor also made an oral telephonic presentation to the Board Accountability Mechanisms Committee (BAMC) on 25 November 2019,⁵ reiterating the arguments made in its Request and Rebuttal, and additionally suggesting that ICANN org may have been aware of the sale of PIR before 30 June 2019, but failed to consider the information in renewing the .ORG RA.⁶

The BAMC has carefully considered the merits of Request 19-3 and all relevant materials, and has recommended that the Board deny reconsideration because: (1) ICANN org's execution of the .ORG Renewed RA did not contradict ICANN's Bylaws, policies, or procedures; (2) ICANN Staff did not fail to consider material information or rely on false or inaccurate relevant information in executing the .ORG Renewed RA; (3) 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; and (4) neither the rebuttal nor the Requestor's oral presentation provides any additional argument or evidence to support reconsideration.

BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)

RECOMMENDATION:

The BAMC recommended that the Board adopt a proposed Final Determination, which explains that Request 19-3 is denied and that no further action is to be taken in response to the Request because: (1) ICANN org's execution of the .ORG Renewed RA did not contradict ICANN's Bylaws, policies, or procedures; (2) ICANN Staff did not fail to consider material information or rely on false or inaccurate relevant information in executing the Agreement; (3) 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 a formal vote by the Board.

PROPOSED RESOLUTION:

⁵ The BAMC's membership changed on 7 November 2019

⁶ Requestor's Presentation Materials for Oral Presentation to the BAMC, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-presentation-redacted-25nov19-en.pdf>

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, URS RPMs);⁷ the Requestor claims that ICANN org’s inclusion of the URS RPMs in the .ORG Renewed RA “run[s] contrary to ICANN’s bylaws.”⁸

Whereas, the Requestor also seeks reconsideration of an alleged Board inaction insofar as the ICANN Board did not vote on the .ORG Renewed RA; the Requestor claims that the Board’s failure to 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.⁹

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 19-3 is sufficiently stated and sent Request 19-3 to the Ombudsman for consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, 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.”¹⁰ 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.”¹¹

⁷ Request 19-3, § 3, at Pg 2

⁸ *Id.*, § 8, at Pg 5

⁹ *Id.*, § 8, at Pgs 8-9

¹⁰ 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>

¹¹ *Id.*, at Pg 6

Whereas, the Board issued a [Proposed Determination](#) denying reconsideration 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. (See <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.b>.)

Whereas, the Requestor submitted a rebuttal to the Board’s [Proposed Determination](#) and conducted an oral presentation to the BAMC.¹²

Whereas, the BAMC has carefully considered the merits of Request 19-3 and all relevant materials, including the Requestor’s rebuttal and oral presentation, and has recommended that the Board adopt a Final Determination denying reconsideration on that basis that ICANN org’s execution of the .ORG Renewed RA did not contradict ICANN’s Bylaws, policies, or procedures; that ICANN Staff did not fail to consider material information or rely on false or inaccurate relevant information in executing the Agreement; that 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 a formal vote by the Board.

Resolved (2019.12.12.XX), the Board adopts the [Final Determination on Reconsideration Request 19-3](#).

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PROPOSED RATIONALE:

1. Brief Summary and Recommendation

The full factual background is set forth in the [Final Determination on the Reconsideration Request 19-3](#), which is incorporated here.

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On 3 November 2019, the Board evaluated Request 19-3 and all relevant materials, and issued a [Proposed Determination](#) denying reconsideration because ICANN org’s execution of the .ORG Renewed RA was consistent with ICANN’s Bylaws, policies, and procedures and because the Board did not fail to consider material information or rely on false or inaccurate material

¹² The BAMC’s membership changed on 7 November 2019

information by allowing ICANN Staff to execute the .ORG Renewed RA without a formal vote by the Board. (See <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.b>.)

On 18 November 2019, the Requestor submitted a [rebuttal](#) to the [Proposed Determination](#) (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws.

On 25 November 2019, the Requestor made an oral telephonic presentation to the BAMC,¹³ reiterating the arguments made in its Request and Rebuttal, and additionally suggesting that ICANN Staff may have been aware of the sale of PIR before 30 June 2019, but failed to consider the information in renewing the .ORG Renewed RA.¹⁴

On 3 December 2019, the BAMC considered Request 19-3 and all relevant materials, including the Requestor's rebuttal and oral presentation, and recommended that the Board adopt a Final Recommendation deny reconsideration because: (1) ICANN org's execution of the .ORG Renewed RA did not contradict ICANN's Bylaws, policies, or procedures; (2) ICANN Staff did not fail to consider material information or rely on false or inaccurate relevant information in executing the Agreement; (3) 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 a formal vote by the Board. (See <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-bamc-action-proposed-final-determination-03dec19-en.pdf>.)

The Board has considered the BAMC's recommendation, as well as all relevant materials for Request 19-3, and concludes that Request 19-3 is denied and that no further action be taken in response to the Request for the reasons set forth in the [Final Determination](#).

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¹³ The BAMC's membership changed on 7 November 2019 See Proposed Determination on Request 19-3, at Pg 1 n 1

¹⁴ Requestor's Presentation Materials for Oral Presentation to the BAMC, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-presentation-redacted-25nov19-en.pdf>

2. Analysis and Rationale

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

The Requestor's claims concerning the merits of the URS are not supported and therefore do not warrant reconsideration. ICANN org carefully considered its renewal options for the .ORG 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). The Requestor also has not shown that it is unreasonable to employ URS in the .ORG Renewed RA. As discussed in detail in the [Final Determination](#), the URS was developed and adopted into the Base RA after extensive community input, including review by the Generic Names Supporting Organization (GNSO) Council. Specifically, the URS was recommended by the Implementation Recommendation Team (IRT) as a mandatory rights protection mechanism for all new gTLDs from the 2012 round of the New gTLD Program. The GNSO was asked to provide its view on whether certain proposed rights protection mechanisms (including the URS) were consistent with the GNSO's proposed policy on the introduction of new gTLDs and were the appropriate and effective option for achieving the GNSO's stated principles and objectives. The GNSO concluded that the URS was not inconsistent with any of its existing policy recommendations. The URS has not been adopted as a Consensus Policy and ICANN has no ability to make it mandatory for any TLDs other than those delegated as a result of the 2012 round of the New gTLD Program. As a result, when considering a similar challenge to migrating legacy gTLD RAs to the Base RA during the renewal process, the Board concluded that including the URS RPMs was not inconsistent with ICANN Bylaws or established policies or procedures.

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There is no support for the Requestor's assertion that the URS is "ill equipped" for issues likely to arise involving .ORG registrants. The Requestor also argues in its Rebuttal that "the URS was developed in response to a very specific situation and was not intended for more complicated cases." The Requestor has not shown that these "more complicated cases" are unique to .ORG registrants. They are not. The Requestor implies that URS is the sole RPM applicable to .ORG. But as discussed below, all registrars must employ the UDRP. The URS does not replace the UDRP; it supplements it. The Requestor has not shown that including the URS among the RPMs applicable to .ORG registrants contradicts any established ICANN policy or procedure.

For these reasons and the reasons set forth in the Final Determination, reconsideration is not warranted.

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

There is no evidence to support the Requestor's claim that the execution of the .ORG Renewed RA violated ICANN's Mission, Commitments, and Core Values, because it did not. As discussed in further detail in the Final Determination, which is incorporated herein, ICANN org's action was consistent with its Commitment to "ensure that those entities are most affected can assist in the policy development process." The Requestor asserts that "bilateral negotiations are not a sufficient substitute for multistakeholder policy development"¹⁵ and 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."¹⁶ The multistakeholder model is an important mechanism for ICANN's policy development. But no ICANN Bylaws provision, policy, or procedure requires that every "substantive change" to the .ORG RA or other new or legacy gTLD RAs must result from the multistakeholder policy development process. Such a requirement would eliminate ICANN's and the Registry Operators' ability to negotiate the terms of the RAs.

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Although all new gTLD registry operators must adopt the Base RA (but may request deviations from it), no consensus policy requires a legacy registry operator to adopt the Base RA. All RAs include a presumptive right of renewal clause. This clause provides a registry operator the right to renew the RA at its expiration, provided the registry operator is in good standing (*e.g.*, the registry operator does not have any uncured breaches), and subject to the terms of their presumptive renewal clauses.¹⁷ In the course of engaging with a legacy registry operator on renewing its RA, ICANN org prefers to and proposes that the registry operator adopts the Base RA that is used by new gTLDs as the starting point for the negotiations. The Base RA includes several enhancements that benefit the domain name ecosystem such as better safeguards in dealing with domain name infrastructure abuse, emergency backend support, as well as adoption

¹⁵ Request 19-3, § 8, at Pg 7

¹⁶ *Id.* § 6, at Pg 3

¹⁷ *See, e.g.*, ORG 2013 RA, Art 4, § 4 2, <https://www.icann.org/resources/unthemed-pages/org-agmt-html-2013-09-12-en>

of new bilaterally negotiated provisions that ICANN org and the gTLD Registries Stakeholder Group conduct from time to time for updates to the form agreement, and adoption of new services (e.g., RDAP) and procedures. Although ICANN org proposes the Base RA as a starting place for the renewal discussions, because of the registry operator's presumptive right of renewal, ICANN org is not in a position to mandate the new form as a condition of renewal. If a registry operator states a strong preference for maintaining its existing legacy agreement form, ICANN org would accommodate such a position, and has done so in at least one such instance.

Contrary to the Requestor's assertion, the inclusion of the URS RPMs in the .ORG Renewed RA does not contravene the GNSO's policy development process and is thus not a violation of ICANN'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.¹⁸

The Rights Protection Mechanisms Policy Development Process Working Group (RPM PDP Working Group) has not concluded its work. Once the RPM PDP Working Group concludes its inquiry and to the extent the GNSO makes a community recommendations on RPMs, the Board will take the recommendations 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 inclusion of the URS RPMs in the .ORG Renewed RA resulted from bilateral negotiations between PIR and ICANN organization. PIR was free to elect not to include the URS RPMs in the renewed agreement, but it did not do so. The Requestor presents no evidence demonstrating that the PIR objected to the inclusion of the URS RPMs in the .ORG Renewed RA. As such, there is no evidence that the voluntary inclusion of the URS RPMs into the .ORG Renewed RA in any way contravenes the work of the RPM PDP Working Group. The

¹⁸ Request 19-3, § 8, at Pgs 5-6

existence of the RPM PDP Working Group is not, in itself, grounds for reconsidering Staff's action.

The Board further concludes that ICANN org's decision to include the URS RPMs in the .ORG Renewed RA was consistent with its Commitment to seek public input and act for the public benefit, and its Core Value of seeking board participation. ICANN org sought broad participation, including public comment, and considered each of the comments submitted during the public comment period. ICANN Staff presented and discussed the public comments and "key issues raised in the public comment process and correspondence"—including the URS RPMs—with the Board before executing the .ORG Renewed RA. 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 Board—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. 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.

As discussed in further detail in the [Final Determination](#), which is incorporated herein, the Board considered all material information and did not rely on false or inaccurate information by allowing ICANN Staff to execute the .ORG Renewed RA without voting on it prior to execution. The Requestor provides no evidence to the contrary.

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D. The Rebuttal Does Not Raise Arguments or Facts that Support Reconsideration.

The Requestor makes four arguments in its Rebuttal. The Requestor also asserted during its oral presentation that ICANN Staff may have been aware of the sale of PIR before 30 June 2019, but

failed to consider the information in renewing the .ORG Renewed RA.¹⁹ None of these arguments support reconsideration. As discussed in further detail in the **Final Determination**, the Requestor's Rebuttal reiterates the arguments made in its Request that the Board addressed in the Proposed Determination. The Requestor's responses to the Proposed Determination rely on the assumption that legacy gTLDs should be treated differently than new gTLDs and should not migrate to the Base RA; Requestor still offers no evidence supporting this argument, and is incorrect, as demonstrated by the legacy gTLDs that have migrated to the Base RA over the past several years.

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With respect to the Requestor's claim that the sale of PIR to private equity firm Ethos Capital "invites additional scrutiny," the Board concludes that PIR's corporate structure is not relevant to Request 19-3. Request 19-3 concerns the 30 June 2019 renewal of the .ORG RA and must be evaluated in accordance with the grounds for reconsideration as set forth in ICANN's Bylaws. The recent acquisition of PIR, which was announced more than four months after the execution of the .ORG Renewed RA, did not impact ICANN Staff's determination that ICANN's Mission and Core Values were best served by migrating the .ORG RA to the Base RA. Request 19-3 is not the appropriate vehicle for challenging Ethos Capital's acquisition of PIR. The recently announced acquisition of PIR, the current .ORG registry operator, and the results of that transaction is something that ICANN organization will be evaluating as part of its normal process in such circumstances.

The Requestor's assertion that ICANN Staff and/or the Board failed to consider material information because it may have known about—but not considered—the contemplated sale of PIR prior to execution of the .ORG Renewed RA on 30 June 2019 does not support reconsideration because neither ICANN Staff or the Board were aware of the transaction before entering into the .ORG Renewed RA.

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

¹⁹ Requestor's Presentation Materials for Oral Presentation to the BAMC.
<https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-presentation-redacted-25nov19-en.pdf>

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: 5 December 2019
Email: amy.stathos@icann.org

REFERENCE MATERIALS – BOARD PAPER NO. 2019.12.12.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 a letter from the Requestor to the Board Accountability Mechanisms Committee (BAMC), dated 2 October 2019.

Attachment D is the Proposed Determination on Request 19-3, adopted by the Board on 3 November 2019.

Attachment E is the Requestor's Rebuttal to the Proposed Determination on Request 19-3, submitted on 18 November 2019.

Attachment F is Requestor's Presentation for Oral Presentation to the BAMC, submitted on 25 November 2019.

Attachment G is the BAMC's Recommendation on the Proposed Final Determination on Request 19-3, approved on 3 December 2019.

Attachment H is the Final Determination on Request 19-3.

Attachment I is the redline comparison of the Final Determination against the Proposed Determination on Request 19-3.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 5 December 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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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

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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

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.*

- (ii) ICANN org’s commitment to “ensure that those entities most affected can assist in the policy development process.”⁵
- (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.

⁵ *Id.*

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>.

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 .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

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.*

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) 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

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

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.

inclusion of URS), and outlined the rationale for the recommendation to renew the agreements as proposed.”²⁴

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

²⁴ 26 July 2019 Letter, at Pg. 2.

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.

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 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

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>.

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>.

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 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

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>.

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.

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

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

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*, at Pg. 2.

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.*

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 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

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 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.*

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 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

⁵⁶ 26 July 2019 Letter, at Pg. 2.

⁵⁷ *Id.*

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>.

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

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

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>.

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).

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

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

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.

⁷⁰ *Id.*

⁷¹ *Id.*, at Pg. 9.

⁷² *Id.*

⁷³ *Id.*, at Pg. 1.

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.

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(l) 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

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>.

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>.

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 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.’

⁷⁹ *Id.*, at Pg. 6.

⁸⁰ *Id.*, at Pg. 5.

⁸¹ *Id.*, at Pg. 4.

⁸² 2 October 2019 Letter.

⁸³ *Id.*

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

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

⁸⁴ Request 19-3, § 9, at Pg. 9.

⁸⁵ *Id.*

⁸⁶ *Id.*, § 8, at Pg. 9.

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 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-

⁸⁷ Bylaws, Art. 4 §§ 4.2(a) and (c).

⁸⁸ See note 1, *supra*.

⁸⁹ Bylaws, Art. 4 § 4.2(e).

⁹⁰ *Id.*

⁹¹ *Id.*

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 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.

⁹² Request 19-3, § 8, at Pg. 6.

⁹³ *Id.*

⁹⁴ Rationale for Board Resolution 2015.09.28.06.

⁹⁵ Request 19-3, § 8, at Pg. 6.

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.

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

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).

⁹⁷ *Id.* § 6, at Pgs. 3-4.

⁹⁸ Request 19-3, § 8, at Pg. 7.

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:

[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

⁹⁹ *Id.* § 6, at Pg. 3.

¹⁰⁰ Request 19-3, § 6, at Pg. 3.

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>.

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 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

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,”

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.

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

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>.

¹⁰⁹ Request 19-3, § 8, at Pgs. 5-6.

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 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

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

¹¹¹ *Id.*

¹¹² 26 July 2019 Letter, at Pg. 2

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.”).

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, 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

¹¹⁵ 26 July 2019 Letter, at Pg. 2.

¹¹⁶ 26 July 2019 Letter, at Pg. 1.

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 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.

¹¹⁷ See Rationale for Board Resolution 2015.09.28.06.

¹¹⁸ Report of Public Comments, at Pg. 8.

¹¹⁹ *Id.*

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 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

¹²⁰ Request 19-3 § 8, at Pgs. 8-9.

¹²¹ *Id.*

¹²² *Id.*, § 8, at Pg. 8.

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).

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 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

¹²⁶ 26 July 2019 Letter, at Pg. 2.

¹²⁷ 2 October 2019 Letter, at Pg. 2.

¹²⁸ Request 19-3, § 8, at Pg. 8.

¹²⁹ *Id.*

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 .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

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.”).

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

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 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

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.

¹³⁵ See Bylaws, Art. 1, § 1.2(a)(v).

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.



Via Email:
reconsideration@icann.org

November 19, 2019

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

RE: Your Proposed Determination of Reconsideration Request 19-3

Dear ICANN Board:

We are writing to you in your role as the stewards and guardians of the Multistakeholder Model. You devote yourselves to ICANN's Mission of coordinating the allocation and assignment of names in the DNS through policies "*developed through a bottom-up consensus-based multistakeholder process* and designed to ensure the stable and secure operation of the Internet's unique names systems."¹ We respectfully submit that ICANN org's decisions in negotiating and executing the .ORG registry contract will cause serious harm to the nonprofit and noncommercial community of .ORG registrants and to the Multistakeholder Model. We ask for your oversight and intervention.

As you know, EFF submitted Reconsideration Request 19-3 on 21 September 2019. On November 3rd, as the Montreal meeting was starting, the Board shared its Proposed Determination of EFF's Request.

We respectfully ask the Board to a) meet with EFF and b) rescind and revise the Proposed Determination of Reconsideration Request 19-3 with respect to the Uniform Rapid Suspension Policy (URS) and the provision for unilateral creation of new rights protection mechanisms (RPMs) by the Public Interest Registry (PIR).

We do so for four reasons:

1. The GNSO did not extend the URS to legacy gTLDs, including .ORG, for good reasons, which ICANN org has not carefully considered;
2. Intruding on a policy determination currently pending in the GNSO's multistakeholder policy development process does not show respect for our

¹ Bylaws for ICANN, 18 June 2018, Section 1.1 Mission (emphasis added).

- Multistakeholder Model or for the work of dozens of volunteers over thousands of hours of analysis, debates, and decision-making;
3. While contracting authority has been delegated to ICANN org, it is you, the Board, who retains the power to decide whether efficiency of harmonized contracts outweighs the Multistakeholder Model (another ICANN Core Value and indeed a central plank of ICANN's Mission); and
 4. The proposed sale of PIR to a private equity firm removes the trusted Internet Society from its oversight position and heightens the need for you to spend more time and discussion on the .ORG contract renewal challenges.

In light of the difficult and timely questions before you, we renew EFF's request of 15 November 2019 for a meeting of the Board and an extension of our time to respond more formally to your Proposed Determination of Reconsideration Request 19-3.

* * *

I. The GNSO Did Not Extend the URS to Legacy gTLDs, Including .ORG, for Good Reasons, Which ICANN Org Has Not Carefully Considered.

In preparation for the roll-out of new gTLDs in the late 2000s, the GNSO dedicated itself to drafting rules for the New gTLD Applicant Guidebook, including new rules that would address concerns about trademark protections arising from the introduction of many new gTLDs at the same time. To this end, the Implementation Review Team and later the Special Trademarks Initiative (STI) Working Team (created by a special resolution of the GNSO Council with a balanced set of stakeholder volunteers) met to negotiate the trademark protection rules for new gTLDs.

When the STI team finished its work, its outcome included the URS, an ultra-fast, ultra-cheap suspension proceeding. The URS was proposed to the GNSO Council *expressly for new gTLDs* and adopted by the GNSO Council for that purpose:

Whereas, on 11 December 2009, the STI Review Team delivered its Report to the GNSO Council describing an alternative proposal **to address trademark concerns in the New gTLD Program that was supported by a consensus of its members;**

RESOLVED, that the GNSO appreciates the hard work and tremendous effort shown by each member of the STI review team in developing the STI alternative proposal on an expedited basis;

RESOLVED FURTHER, that the GNSO Council directs Staff to forward the recommendations to the Board in response to its 12 October 2009 letter ...to allow the ICANN community to comment on the STI recommendations prior to finalization of the model to be included in the Draft Applicant Guidebook.²

Overall, the URS was intended for ultra-fast, ultra-cheap, “slam-dunk” cases that could be dealt with quickly and easily—the types of cases that were expected to multiply with the introduction of new gTLDs. The URS was developed in response to a very specific situation and was not intended for more complicated cases, such as those involving noncommercial uses or fair use defenses.

Simply put, **the URS was not intended for .ORG registrants.**

*What cost-benefit analysis was made of the dangers to .ORG registrants from being thrown into URS proceedings, or the likelihood that a system ill-equipped for these cases would make erroneous decisions, increasing the risk of unjustified suspensions of .ORG registrations?*³

According to the Proposed Determination, ICANN staff had **no** obligation to demonstrate that it had considered this whatsoever⁴—which is exactly why the Multistakeholder Model is so important here. At no time has ICANN org shown any knowledge of the dangers of applying the URS to millions of legacy, noncommercial registrants. At no time has ICANN org refuted EFF’s concerns for itself and other .ORG registrants.

II. Intruding on a Policy Determination Currently Pending in the GNSO’s Multistakeholder Process Shows a Lack of Respect for the GNSO, its Working Groups, and the Volunteer Time Dedicated to Analyzing Complex Policy Issues.

By proposing and then executing a contract making the URS *mandatory* for all .ORG domains, ICANN org asserted its judgment that the URS *should* apply to .ORG. But

² <https://gnso.icann.org/en/council/resolutions> [emphasis added]

³ See Request 19-3, at p. 6.

⁴ Proposed Determination, at p. 17. The Proposed Determination also suggests that applying the URS to .ORG domains is reasonable based solely on the facts that (a) “ICANN community’s Implementation Recommendation Team has recommended making URS a mandatory RPM *for new gTLDs*” and (b) “the GNSO has concluded that the URS was not inconsistent with any of its *existing* policy recommendations.” *Id.* (first emphasis added). But the appropriateness of URS for new gTLDs does not establish its appropriateness for .ORG, nor does the fact that the GNSO has not yet definitively come out against it.

pending before the GNSO’s Rights Protections Mechanisms Policy Development Process Working Group *right now* is the question of whether we—the GNSO and ICANN—should extend the URS from new gTLDs to legacy gTLDs. As EFF wrote in its Reconsideration Request, this question has been directed by the GNSO Council to the *currently in-progress* RPM PDP Working Group as a charter question for that group.⁵

Further, *this very policy question is currently being discussed and debated by the RPM PDP Working Group. It was raised by the Working Group at ICANN66 in Montreal, and it will be discussed over the next few weeks as the Working Group considers URS-related proposals submitted by Working Group members.*⁶

What issue could be more squarely before the RPM WG and the GNSO Community as part of the Multistakeholder Model than whether the URS should be extended to the largest legacy gTLDs? By making its own judgment call without regard for the Working Group’s or the GNSO’s ultimate determinations, ICANN org signaled a disregard for those groups and their efforts.

III. ICANN Org Did Not Respect the Multistakeholder Model in Negotiating and Executing Parts of the Renewed .ORG Registry Agreement.

We respectfully submit that the efficiency of a common set of registry contracts does not outweigh the Multistakeholder Model and indeed the very mission ICANN of developing policy on an individualized basis through our “bottom-up consensus-based multistakeholder process.”

The Proposed Determination suggests that when the Board delegated its contract authority to ICANN org, ICANN org’s ability to negotiate any terms by bilateral negotiation was made sacred. But on the ark of efficiency, ICANN Org has sacrificed the Multistakeholder Model.

The Proposed Determination suggests that the Core Value of “efficiency” requires ICANN to prioritize harmonization among Registry Agreements over every concern EFF voiced about the RA and every other ICANN Core Value.⁷ It characterizes the goal of moving all registries to “the base registry agreement” created for new gTLDs as the driving force behind ICANN org’s decision. The Proposed Determination even asserts

⁵ See https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf.

⁶ See Proposal #31 on “the issue of whether the URS should become an ICANN Consensus Policy.” <https://community.icann.org/display/RARPMRIAGPWG/2019-11-03+ICANN66+Montreal+-+Review+of+all+Rights+Protection+Mechanisms+%28RPMs%29+in+all+gTLDs+PDP+WG>

⁷ Proposed Determination, at p. 20.

that the new .ORG contract “reflect[s] the Staff’s continuous efforts to ascertain and pursue the global public interest by migrating the legacy gTLDs to the Base RA.”⁸

We are dumbfounded by the characterization of ICANN org’s disregard of the Multistakeholder Model as operating in the “global public interest.” “Efficiency” alone cannot outweigh the Core Value of “open, transparent and bottom-up, multistakeholder policy development processes.” ICANN’s Mission of coordinating the allocation and assignment of names in the DNS through the policies “developed through a bottom-up consensus-based multistakeholder process” must supersede the slight convenience of harmonization among RAs.

We respectfully submit that it falls within the Board’s authority and responsibility to oversee ICANN org, particularly as to matters that involve:

- interacting with the ICANN community to ensure that ICANN is serving the global public interest within ICANN’s mission;
- considering policy recommendations arising out of Supporting Organizations, including participating in consultation processes if necessary; or
- exercising strategic oversight, including oversight of the development of the strategic plan.⁹

All of these areas are identified as “key roles” of the ICANN Board.¹⁰ Likewise, ICANN’s Delegation of Authority Guidelines note that while the ICANN CEO “oversees day-to-day operations,” the Board “exercises oversight over the CEO, and is responsible for the identification of the strategic direction that the operations will serve.”¹¹

In other words, the Board’s delegation of contracting authority is not an abdication of the Board’s role in the contracting process. **As members of the Board, you remain responsible for oversight of ICANN org’s exercise of its delegated authority, especially where issues arise that implicate the public interest and policy development processes.**

Critically, the Board’s oversight role in the case at hand includes ensuring that ICANN org neither intentionally nor inadvertently jettisons the Multistakeholder Model. We ask the Board to look closely at the issues we raise about the .ORG contract renewal—and remove the URS and “additional protections” provisions from the .ORG contract.

⁸ *Id.* at p. 24.

⁹ ICANN’s Delegation of Authority Guidelines, adopted 8 November 2016, at p. 1, <https://www.icann.org/en/system/files/files/delegation-of-authority-guidelines-08nov16-en.pdf>.

¹⁰ *Id.*

¹¹ *Id.* at p. 4.

IV. The Recent News that Internet Society Intends to Sell the Public Interest Registry to a Private Equity Firm Magnifies Concerns About the Agreement's Impact on .ORG Registrants.

During the .ORG RA renewal process, it was not public information that the Internet Society would soon announce a sale of PIR to private equity firm Ethos Capital. The proposed sale invites additional scrutiny to ensure appropriate stewardship and oversight of the .ORG TLD.

In the comments on the Registry Agreement that EFF and the Domain Name Rights Coalition filed in April 2019, we noted the text gives PIR a great deal of leeway in implementing new rights protection mechanisms without the input of the ICANN community:

Experience in the new gTLDs has shown this to be a dangerous proposition. So-called rights protection mechanisms are, at best, compromises between trademark holders' interest in enforcement and the broader public's right to register and use domain names as a vital avenue of free expression. **As such, they implicate public and private rights that may not line up with a single registry operator's priorities.**¹²

That risk of misalignment between a registry's interests and those of the public is particularly pronounced given the .ORG TLD's important place in the nonprofit sector. As we explained in our comments, trademark disputes must be treated differently for organizations that rely on legal protections for noncommercial use:

Because the .org TLD is used primarily by nonprofit organizations engaged in a variety of charitable, educational, religious, scientific, and public interest activities, their uses of a domain name are far more likely to be noncommercial, and thus outside any exclusive right of a trademark holder. Warning noncommercial users to avoid registering a domain name because of the possibility of trademark infringement is similar to warning residents of tropical climates to wear heavy coats because of the possibility of snowstorms. Both warnings, applied in the wrong context, would cause more harm than they prevent.¹³

ICANN should not give a registry wide berth to make decisions that might chill noncommercial speech without ensuring that the registry represents the voice and interests of the nonprofit sector. Indeed, when the Internet Society made its proposal to the ICANN board in 2002 to transfer management of .ORG to PIR, ISOC's then-president and CEO Lynn St. Amour particularly stressed ISOC's position of trust in the sector as well as its positioning to provide oversight to PIR:

¹² <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/2019q2/003200.html>.

¹³ *Id.*

We're proposing [to] set up a separate non-profit company called Public Interest Registry that will draw upon the resources of ISOC's extended global network to drive policy and management. [...]

We're the foremost noncommercial organization focused on the Internet. We have a strong tradition and long tradition of working in the public interest [...]

We have over 10,000 individual members [...] [and] over 137 organizational members, many noncommercial are included amongst them, spanning most of the noncommercial base.

PIR policies will be derived from ISOC principles [...]

We propose that the Public Interest Registry will be able to avail itself of the resources of the Internet Society, which provides an existing and globally extensive network of contacts with noncommercial Internet users. [...]

We actually believe that we can provide [support for the .ORG community] through ISOC's stable, responsible stewardship.¹⁴

In the days since the sale was announced, nonprofit leaders have begun to express their concerns about the sale. Electronic Privacy Information Center president and former PIR board chair Marc Rotenberg told a reporter he was "very disappointed" and reiterated that .ORG was built to serve the interests of nonprofit and noncommercial users.¹⁵

ICANN must carefully reexamine the .ORG Registry Agreement in light of this news. Without the oversight and participation of the nonprofit community, measures that give the registry authority to institute new RPMs or make other major policy changes invite management decisions that conflict with the needs of the .ORG community.

* * *

In light of the difficult and timely questions before you, we renew EFF's request for a meeting with the Board and an extension of our time to respond more formally to your Proposed Determination of Reconsideration Request 19-3 within two weeks thereafter.

¹⁴ <https://archive.icann.org/en/meetings/bucharest/captioning-evening-26jun02.htm#TheInternetSociety>.

¹⁵ <https://gizmodo.com/private-equity-ghouls-buy-non-profit-that-handles-org-1839860118>.

November 19, 2019

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Respectfully,

Cara Gagliano, Staff Attorney
Elliot Harmon, Activism Director
Electronic Frontier Foundation

Contact Information Redacted

Kathryn Kleiman, Professor
American University Washington College of Law
Member, Final Drafting Team of UDRP
Member, STI Review Team
Co-Chair, Review of All Rights Protection Mechanisms Policy Development Process
Working Group
(Opinions are my own)



**ELECTRONIC
FRONTIER
FOUNDATION**



**Presentation to Board
Accountability
Mechanisms Committee
on Reconsideration
Request 19-3**

25 November 2019

Who we are

- Mitch Stoltz, Senior Staff Attorney, Electronic Frontier Foundation Contact Information Redacted
- Cara Gagliano, Staff Attorney, Electronic Frontier Foundation Contact Information Redacted
- Elliot Harmon, Activism Director, Electronic Frontier Foundation Contact Information Redacted
- Kathryn Kleiman, Professor, American University Washington College of Law and Co-Founder, Domain Name Rights Coalition Contact Information Redacted

Background

- EFF and the Domain Name Rights Coalition submitted comments on the proposed .ORG Registry Agreement on 29 April 2019.
- EFF filed Request for Reconsideration 19-3 on 30 July 2019.
- The new .ORG contract includes the following *for the first time*:
 - The Uniform Rapid Suspension (URS) rules
 - Permission for the Public Interest Registry (PIR) to implement arbitrary “additional protections for the legal rights of third parties,” privately and without consultation with .ORG registrants or the ICANN community—*completely outside of any multistakeholder processes*.
- *These terms are harmful to the .ORG community*

ICANN Bylaws, Art. 4, Sec. 4.2(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.

**Ground #1: The execution of the
2019 .ORG RA contradicted
ICANN's Mission, Commitments,
and Core Values.**

- Art. 1, Sec. 1.1, Mission: “In this role, ICANN’s scope is to coordinate the development and implementation of policies . . . [t]hat are developed through a bottom-up consensus-based multistakeholder process”
- Art. 1, Sec. 1.2(a), Commitments: “ICANN commits to . . . [e]mploy open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process”

- Art. 1, Sec. 1.2(b), Core Values: “In performing its Mission, the following ‘Core Values’ should also guide the decisions and actions of ICANN: . . .
 - (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”

The URS is a multistakeholder policy not meant for .ORG domains

- The GNSO wrote and approved the URS *through multistakeholder policy development processes*—**solely for new gTLDs**.
- .ORG has been around for 34 years, has approximately 10 million registered domain names, and is the third most-used gTLD. Most .ORG registrants are renewals.
 - According to registrar name.com, “[b]ecause of its heritage built on trust, .ORG is the domain people most commonly associate with organizations, companies, groups, and individuals **dedicated to making the world a better place.**”
- The URS was not designed for complicated domain name disputes between commercial and noncommercial users.
- Faster response deadlines also pose special problems for noncommercial entities.
- The result: Applying the URS to .ORG makes abusive challenges to our domain names easier, e.g., by a bad actor seeking to usurp a well-known and trusted domain name.

The new .ORG Registry Agreement facilitates censorship

- Section 2.8 empowers PIR to “at its election, implement additional protections of the legal rights of third parties.” This allows PIR to impose restrictions and consequences on .ORG registrants based not only on their domain names but also on the content of their websites.
- PIR has previously contemplated harmful new content regulation mechanisms—absent multistakeholder deliberation—and faced public outcry.
- This term is especially troubling given the Internet Society’s (ISOC) 13 November 2019 announcement that it is selling PIR to private equity firm Ethos Capital.

The GNSO is actively engaged in evaluation of the URS

- In 2016, the GNSO Council chartered the RPM WG and asked it to determine **whether “any of the New gTLD RPMs (such as the URS)” should be applied to all gTLDs.**
- After months of study of the URS, including review of *every URS case*, the issue of its application to legacy gTLDs is now squarely before the RPM WG.
- Individual URS proposal #31 asks the very basic question of **“whether the URS should become an ICANN Consensus Policy”** and will be evaluated next month.

Yet ICANN Staff chose to impose the URS and unknown rights protection mechanisms on 10 million .ORG registrants via bilateral contractual negotiations—

- Overriding the GNSO's current policy development work as to .ORG;
- Dismissing public comments from EFF, the Noncommercial Stakeholders Group, and others raising serious substantive and procedural concerns; and
- Without studying or reflecting on the harms to the Multistakeholder Model or to .ORG registrants.

The Multistakeholder Model trumps efficiency

The Board's Proposed Determination posits: that “the Core Value of operating with efficiency” justified ICANN staff's decision to subject .ORG domains to new RPMs without regard for the Multistakeholder Model.

That cannot be true.

The Multistakeholder Model trumps efficiency

“The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities.”

“[I]n any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission.”

--Bylaws Article 1, Section 1.2(c)

The Multistakeholder Model trumps efficiency

A Core Value cannot override a Commitment, let alone a pillar of ICANN's mission.

The Core Value of efficiency does not outweigh the Core Value of multistakeholder policy development.



If ICANN Staff can unilaterally yank policy matters from the GNSO and active policy development processes, the volunteers who make the Multistakeholder Model work may as well stop wasting their time.

Ground #2: The ICANN Board and Staff did not consider material information before the .ORG RA was executed.



During the .ORG RA renewal process, it was not public information that the Internet Society would soon announce a sale of PIR to private equity firm Ethos Capital.

The proposed sale invites additional scrutiny of terms that increase PIR's power over .ORG registrants.

EFF



The screenshot shows the top portion of a webpage. At the top left is the EFF logo, which consists of the letters 'EFF' in a bold, red, sans-serif font. To the left of 'EFF' is the text 'ELECTRONIC FRONTIER FOUNDATION' stacked vertically in a smaller, black, sans-serif font. To the right of the logo is a navigation menu with the following items: 'About', 'Issues', 'Our Work', 'Take Action', 'Tools', 'Donate', and a magnifying glass icon. Below the navigation is the article title 'Nonprofit Community Stands Together to Protect .ORG' in a bold, black, sans-serif font. Underneath the title is the byline 'BY ELLIOT HARMON | NOVEMBER 22, 2019'. The main content area features a large graphic with a central white circle containing the text '.org' in a large, black, sans-serif font. The background of this graphic is a colorful, radial pattern of stripes in shades of red, orange, yellow, green, and brown. At the bottom of the screenshot, there is a small text snippet: 'EFF and 26 other organizations just sent a letter to the Internet Society (ISOC)'.

ELECTRONIC FRONTIER FOUNDATION

About Issues Our Work Take Action Tools Donate Q

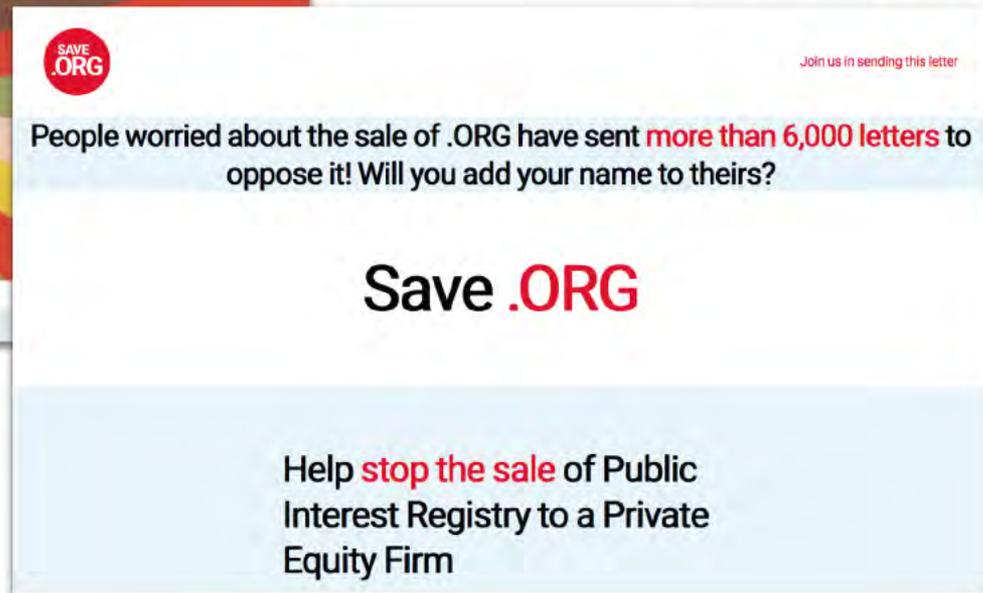
Nonprofit Community Stands Together to Protect .ORG

BY ELLIOT HARMON | NOVEMBER 22, 2019

EFF and 26 other organizations just sent a letter to the Internet Society (ISOC)

eff.org/dotorg

savedotorg.org



The screenshot shows a campaign page for 'Save .ORG'. At the top left is a red circular logo with the text 'SAVE .ORG' in white. To the right of the logo is the text 'Join us in sending this letter' in a small, red, sans-serif font. Below the logo and text is a light blue horizontal band containing the text 'People worried about the sale of .ORG have sent more than 6,000 letters to oppose it! Will you add your name to theirs?' in a black, sans-serif font. Below this band is a large white area with the text 'Save .ORG' in a large, bold, sans-serif font, where 'Save' is black and '.ORG' is red. At the bottom of the page is a light blue horizontal band containing the text 'Help stop the sale of Public Interest Registry to a Private Equity Firm' in a black, sans-serif font.

SAVE .ORG

Join us in sending this letter

People worried about the sale of .ORG have sent more than 6,000 letters to oppose it! Will you add your name to theirs?

Save .ORG

Help stop the sale of Public Interest Registry to a Private Equity Firm



American Alliance of Museums
American Society of Association Executives
Aspiration
Association of Junior Leagues International
Creative Commons
Crisis Text Line
Demand Progress Education Fund
DoSomething.org
Electronic Frontier Foundation
European Climate Foundation
Free Software Foundation
Girl Scouts of the USA
Independent Sector
Internet Archive

Meals on Wheels America
National Council of Nonprofits
National Human Services Assembly
NTEN
Palante Technology Cooperative
Public Knowledge
R Street Institute
TechSoup
VolunteerMatch
Volunteers of America
Wikimedia Foundation
YMCA of the USA
YWCA USA



“The 2019 .ORG Registry Agreement represents a significant departure from .ORG’s 34-year history. It gives the registry the power to make several policy decisions that would be detrimental to the .ORG community:

[...]

“The power to develop and implement Rights Protection Mechanisms unilaterally, without consulting the .ORG community. If such mechanisms are not carefully crafted in collaboration with the NGO community, they risk censoring completely legal nonprofit activities.”



PIR's management of .ORG has always been predicated on ISOC's oversight.

In light of the pending sale of PIR, measures that give the registry more authority to drive policy unilaterally require close scrutiny.



“We’re proposing [to] set up a separate non-profit company called Public Interest Registry that will draw upon the resources of ISOC’s extended global network to drive policy and management. [...]

“We’re the foremost noncommercial organization focused on the Internet. We have a strong tradition and long tradition of working in the public interest [...]

“We have over 10,000 individual members [...] [and] over 137 organizational members, many noncommercial are included amongst them, spanning most of the noncommercial base. PIR policies will be derived from ISOC principles [...]

“We propose that the Public Interest Registry will be able to avail itself of the resources of the Internet Society, which provides an existing and globally extensive network of contacts with noncommercial Internet users. [...]

“We actually believe that we can provide [support for the .ORG community] through ISOC’s stable, responsible stewardship.”

- ISOC President and CEO Lynn St. Amour, June 26, 2002

What we are asking

- EFF asks that ICANN pursue an amendment to the .ORG Registry Agreement 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.”

**[PROPOSED] FINAL DETERMINATION OF THE ICANN BOARD
RECONSIDERATION REQUEST 19-3
3 December 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).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

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.”³
- (ii) ICANN org’s commitment to “ensure that those entities most affected can assist in the policy development process.”⁴
- (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.”⁵

¹ Request 19-3, § 3, at Pg. 2.

² *Id.*, § 8, at Pg. 5.

³ *Id.*

⁴ *Id.*

⁵ Request 19-3, § 8, at Pg. 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.”⁶

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.⁷

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.’”⁸

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 2013.⁹ 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 .ORG gTLD.¹⁰ 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.

⁶ *Id.*

⁷ *Id.*, § 8, at Pgs. 8-9.

⁸ *Id.*, § 9, at Pg. 9.

⁹ 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>.

¹⁰ 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

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.¹¹ 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.¹² 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 renewal. ICANN org described the material differences between the proposed renewal and the then current .ORG RA. These differences included, in relevant part, 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.¹³

ICANN org explained that the change would “allow the .org renewal agreement to better conform with the [Base RA].”¹⁴

ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG Renewed RA.¹⁵ The comments predominantly related to three themes: (1) the proposed removal of limits on domain name registration fees; (2) inclusion of the URS RPMs; and (3) the RA renewal process.¹⁶

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>.

¹¹ 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>.

¹² *Id.*

¹³ <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

¹⁴ *Id.*

¹⁵ Report of Public Comments at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>.

¹⁶ *Id.*

ICANN org analyzed the public comments, including those addressing the proposed URS RPMs, in its Report of Public Comments.¹⁷ 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 gTLD¹⁸ RAs on various grounds.”¹⁹ 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.”²⁰ ICANN org then noted that it would “consider the feedback from the community on this issue,”²¹ including “the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”²²

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.”²³

Following consultation with the Board and with the Board’s support,²⁴ on 30 June 2019, ICANN org announced that it had executed the .ORG Renewed RA. The Board did not hold a

¹⁷ *Id.*, at Pg. 9.

¹⁸ 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.

¹⁹ Report of Public Comments at Pg. 6. ICANN org received some comments supporting the RPMs. *Id.*, at Pgs. 6-7.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*, at Pg. 1.

²³ 26 July 2019 Letter, at Pg. 2.

²⁴ *See id.*

vote on the .ORG Renewed RA prior to execution. The .ORG Renewed RA included the URS RPMs.²⁵

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.”²⁶ 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.”²⁷

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.²⁸ 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

²⁵ See ICANN org announcement: .ORG Registry Agreement, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

²⁶ 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>.

²⁷ *Id.*, at Pg. 6.

²⁸ 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>.

that the .ORG RA renewal process was not a policy matter and therefore not subject to multistakeholder input.²⁹

The Board adopted a Proposed Determination denying Request 19-3 on 3 November 2019.³⁰ On 18 November 2019, the Requestor submitted a rebuttal to the Board’s Proposed Determination. The Requestor argued that: (1) the Board “has not carefully considered” that the URS is not Consensus Policy and the Generic Names Supporting Organization (GNSO) did not “extend the URS to legacy gTLDs”; (2) including the URS RPMs in the .ORG Renewed RA “[i]ntrud[es] on a policy determination currently pending in the GNSO’s multistakeholder policy development process”; (3) the Board “retains the power to decide whether efficiency of harmonized contracts outweighs the Multistakeholder Model”; and (4) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed “heightens the need” for the Board to “spend more time and discussion on the .ORG contract renewal challenges.”³¹

On 25 November 2019, the Requestor made an oral telephonic presentation to the BAMC,³² reiterating the arguments made in its Request and Rebuttal, and additionally suggesting that ICANN Staff may have been aware of the sale of PIR before 30 June 2019, but failed to consider the information in renewing the .ORG Renewed RA.³³

²⁹ *Id.*

³⁰ Board Action on Proposed Determination on Request 19-3, <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.b>; Proposed Determination on Request 19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-board-proposed-determination-03nov19-en.pdf>.

³¹ Requestor’s Rebuttal to ICANN Board’s Proposed Determination on Request 19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-rebuttal-board-proposed-determination-19nov19-en.pdf>.

³² The BAMC’s membership changed on 7 November 2019. *See* Proposed Determination on Request 19-3, at Pg. 1 n.1.

³³ Requestor’s Presentation Materials for Oral Presentation to the BAMC, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-presentation-redacted-25nov19-en.pdf>.

The BAMC considered Request 19-3 and all relevant materials. Based on its extensive review of all relevant materials, the BAMC suggested that the Board adopt this Final Determination, which 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.

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).³⁴ The 2003 .ORG RA included limits on the prices that PIR could charge registrars for registry services.³⁵

On 27 June 2006, ICANN posted for public comment proposed new RAs for the operation of .ORG, among others.³⁶ 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.”³⁷ 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.³⁸ Following a public comment period for the revised

³⁴ 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>.

³⁵ *See* 2003 .ORG RA, Art. 3, § 3.14.5, <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>.

³⁶ 2006 Public Comment of .BIZ, .INFO, .ORG, <https://www.icann.org/news/announcement-3-2006-07-28-en>.

³⁷ *Id.*

³⁸ *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.³⁹

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.⁴⁰ In 2007, the GNSO concluded that “ICANN must implement a process that allows the introduction of new [gTLDs].”⁴¹ Accordingly, ICANN org established and implemented the New gTLD Program, “enabling the largest expansion of the [DNS].”⁴²

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.⁴³ It was established in 2013 and aligns with the GNSO’s policy recommendations for new gTLDs.⁴⁴ The URS was developed and adopted into the Base RA after extensive community input, including review by the GNSO Council.⁴⁵ Specifically, the URS was recommended by the Implementation Recommendation Team (IRT) as a mandatory rights protection mechanism for all new gTLDs from the 2012 round of the New gTLD Program.⁴⁶

³⁹ .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>.

⁴⁰ <https://newgtlds.icann.org/en/about/program>.

⁴¹ GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part0-08aug07.htm#_Toc43798015.

⁴² <https://newgtlds.icann.org/en/about/program>.

⁴³ 26 July 2019 Letter, at Pg. 1.

⁴⁴ *Id.*

⁴⁵ *Id.*, at Pg. 2.

⁴⁶ See Rationale for Board Resolution 2015.09.28.06, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e>.

The GNSO was asked to provide its view on whether certain proposed rights protection mechanisms (including the URS) were consistent with the GNSO's proposed policy on the introduction of new gTLDs and were the appropriate and effective option for achieving the GNSO's stated principles and objectives.⁴⁷ The GNSO concluded that the URS was not inconsistent with any of its existing policy recommendations.⁴⁸ That said, 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 that applied during the 2012 New gTLD round.⁴⁹

Since 2014, ICANN org has negotiated with legacy gTLD registry operators that choose to transition their agreements to the Base RA. Several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in agreement renewals.⁵⁰ The inclusion of the URS into these renewed RAs was the result of the bilateral negotiations between those registry operators and ICANN.

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].”⁵¹ Additionally, using the Base RA ensures that the Registry will use

⁴⁷ *Id.*

⁴⁸ *Id.*; see also <https://www.icann.org/news/announcement-2-2009-12-17-en>.

⁴⁹ See IRT Report, <https://archive.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>; Special Trademark Issues Review Team Recommendations, https://gnso.icann.org/sites/default/files/filefield_8000/sti-wt-recommendations-11dec09-en.pdf; <https://www.icann.org/news/announcement-2-2009-12-17-en>.

⁵⁰ *Id.*

⁵¹ 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>.

“uniform and automated processes, which will facilitate operation of the TLD,” and “includes safeguards in the form of public interest commitments in Specification 11.”⁵²

The Board has explained that transitioning legacy gTLDs to the Base RA “will provide consistency across all registries leading to a more predictable environment for end-users.”⁵³ 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.”⁵⁴ 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,”⁵⁵ another public benefit.

In February 2016, the GNSO established a Rights Protection Mechanisms Policy Development Process Working Group (RPM PDP 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.”⁵⁶ The RPM PDP Working Group’s work is ongoing,⁵⁷ and currently no policy requires or prohibits registries from adopting URS.⁵⁸ The Board has directed ICANN org not to stop its work merely because it is the subject of policy development discussions.⁵⁹ Indeed, the Board recognized with approval “ICANN org’s

⁵² 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>.

⁵³ Rationale for Board Resolution 2015.09.28.06.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See GNSO Council Resolution 20160218-3, <https://gns0.icann.org/en/council/resolutions#20160218-3>; Charter for RPM PDP Working Group, https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf. The 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>.

⁵⁷ See <https://gns0.icann.org/en/group-activities/active/rpm>.

⁵⁸ 26 July 2019 Letter, at Pg. 2.

⁵⁹ *Id.*

practice to adhere to existing policies and procedures and to apply requirements from pending community recommendations only once they are adopted and implemented.”⁶⁰ The Board previously concluded

the URS has not been adopted as consensus policy and that ICANN therefore has no ability to impose the URS (or other new RPMs applicable to new gTLDs) on legacy TLDs. The existence of certain RPMs in the Renewed Registry Agreements, therefore, has no bearing on the GNSO policy development process to determine whether (or not) any of the new RPMs should be consensus policies applicable to all gTLDs.⁶¹

C. The 2019 .ORG RA Renewal.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.⁶² 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.”⁶³ 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.⁶⁴ 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.⁶⁵

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

⁶⁰ Rationale for Board Resolution 2019.03.14.02, <https://www.icann.org/resources/board-material/resolutions-2019-03-14-en#1.b.rationale>.

⁶¹ Board Action on Requests 15-19 and 15-20, <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.b>.

⁶² 2019 .ORG RA Public Comment Proceeding.

⁶³ *See id.*.

⁶⁴ 26 July 2019 Letter, at Pg. 2.

⁶⁵ *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.⁶⁶

ICANN org explained that the change would “allow the .org renewal agreement to better conform with the [Base RA].”⁶⁷ 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].”⁶⁸

The public comment period for the .ORG Renewed RA opened on 18 March 2019 and closed on 29 April 2019.⁶⁹ During that time, ICANN org received over 3,200 submissions.⁷⁰ 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.⁷¹

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].”⁷²

⁶⁶ 2019 .ORG RA Public Comment Proceeding.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Report of Public Comments at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>.

⁷¹ *Id.*

⁷² 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.⁷³ The NCSG noted that: (1) the RPMs were “expressly not added to . . . legacy gTLDs” in 2010; and (2) the RPM PDP 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.⁷⁴

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*.”⁷⁵

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.”⁷⁶ 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 [PDP] 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.⁷⁷

⁷³ Comment, NCSG, 18 March 2019, <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/attachments/20190430/b10daf64/NCSG.ORGRenewalComment.pdf>.

⁷⁴ *Id.*, at Pg. 1.

⁷⁵ *Id.* (emphasis in original).

⁷⁶ Report of Public Comments at Pg. 6. ICANN org received some comments supporting the RPMs. *Id.*, at Pgs. 6-7.

⁷⁷ *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.⁷⁸

ICANN org detailed its analysis of the public comments—including those concerning the proposed inclusion of RPMs—in its Report of Public Comments.⁷⁹ 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.⁸⁰

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.”⁸¹

ICANN org “review[ed] and consider[ed] all 3,200+ comments received,” in response to the proposed .ORG Renewed RA.⁸² ICANN Staff then briefed the ICANN Board on its analysis of the public comments during the Board’s workshop on 21-23 June 2019.⁸³ 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.⁸⁴ The Board did not vote on whether to execute the .ORG Renewed RA.

⁷⁸ *Id.*

⁷⁹ *Id.*, at Pg. 9.

⁸⁰ *Id.*

⁸¹ *Id.*, at Pg. 1.

⁸² 26 July 2019 Letter, at Pg. 2.

⁸³ *Id.*

⁸⁴ See ICANN org announcements: .ORG Registry Agreement, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

D. The Request for Reconsideration.

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.⁸⁵

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] 19-3.⁸⁶

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.⁸⁷

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.⁸⁸ 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

⁸⁵ <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-ombudsman-action-redacted-27aug19-en.pdf>.

⁸⁶ 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>.

⁸⁷ *Id.*, at Pg. 6.

⁸⁸ *Id.*, at Pg. 5.

governance, and not a “policy matter” about which the ICANN community would be entitled to greater input.⁸⁹

On 2 October 2019, the Requestor submitted a letter to the BAMC “to address certain errors” in the Ombudsman’s evaluation.⁹⁰ 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.⁹¹

The Board adopted a Proposed Determination denying Request 19-3 on 3 November 2019.⁹² On 18 November 2019, the Requestor submitted a rebuttal to the Board’s Proposed Determination. The Requestor argued that: (1) the Board “has not carefully considered” that the GNSO did not “extend the URS to legacy gTLDs”; (2) including the URS in the .ORG Renewed RA “[i]ntrud[es] on a policy determination currently pending in the GNSO’s multistakeholder policy development process”; (3) the Board “retains the power to decide whether efficiency of harmonized contracts outweighs the Multistakeholder Model”; and (4) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed “heightens the need” for the Board to “spend more time and discussion on the .ORG contract renewal challenges.”⁹³

⁸⁹ *Id.*, at Pg. 4.

⁹⁰ 2 October 2019 Letter.

⁹¹ *Id.*

⁹² Board Action on Proposed Determination on Request 19-3, <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.b>; Proposed Determination on Request 19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-board-proposed-determination-03nov19-en.pdf>.

⁹³ Requestor’s Rebuttal to ICANN Board’s Proposed Determination on Request 19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-rebuttal-board-proposed-determination-19nov19-en.pdf>.

On 25 November 2019, the Requestor made an oral telephonic presentation to the BAMC,⁹⁴ reiterating the arguments made in its Request and Rebuttal, and additionally suggesting that ICANN Staff may have been aware of the sale of PIR before 30 June 2019, but failed to consider it.⁹⁵

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.’⁹⁶

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.”⁹⁷ 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.”⁹⁸

III. Issues Presented.

The issues are as follows:

⁹⁴ See note 32, *supra*.

⁹⁵ Requestor’s Presentation Materials for Oral Presentation to the BAMC, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-presentation-redacted-25nov19-en.pdf>.

⁹⁶ Request 19-3, § 9, at Pg. 9.

⁹⁷ *Id.*

⁹⁸ *Id.*, § 8, at Pg. 9.

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.”⁹⁹

The Board now considers the Requestor’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 BAMC has reviewed the Request and all relevant materials and has recommended that the Board adopt this Final Determination. Denial of a Request for Reconsideration of ICANN Staff action and Board inaction is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.¹⁰⁰

⁹⁹ Bylaws, Art. 4 §§ 4.2(a) and (c).

¹⁰⁰ Bylaws, Art. 4 § 4.2(e).

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.”¹⁰¹ 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.”¹⁰² 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.”¹⁰³ 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.”¹⁰⁴ In its Rebuttal, the Requestor reiterates this point, arguing that the GNSO adopted the URS “expressly for new gTLDs,” and that ICANN org has not “shown any knowledge of the dangers of applying the URS to millions of legacy, noncommercial registrants.”¹⁰⁵

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

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Request 19-3, § 8, at Pg. 6.

¹⁰⁴ *Id.*

¹⁰⁵ Rebuttal, at Pgs. 2-3.

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. As discussed above, the IRT recommended that the URS as a mandatory rights protection mechanism for all new gTLDs from the 2012 round of the New gTLD Program. The GNSO was asked to provide its view on whether certain proposed rights protection mechanisms (which included the URS) were consistent with the GNSO's proposed policy on the introduction of New gTLDs and were the appropriate and effective option for achieving the GNSO's stated principles and objectives.¹⁰⁶ The GNSO concluded that the URS was not inconsistent with any of its *existing* policy recommendations.¹⁰⁷ The URS has not been adopted as a Consensus Policy and ICANN has no ability to make it mandatory for any TLDs other than those delegated as a result of the 2012 round of the New gTLD Program.¹⁰⁸ As a result, when considering a similar challenge to migrating legacy gTLD RAs to the Base RA during the renewal process, the Board concluded that including the URS RPMs was not inconsistent with ICANN Bylaws or established policies or procedures.¹⁰⁹

¹⁰⁶ Rationale for Board Resolution 2015.09.28.06.

¹⁰⁷ *Id.*; see also <https://www.icann.org/news/announcement-2-2009-12-17-en>.

¹⁰⁸ See IRT Report, <https://archive.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>; Special Trademark Issues Review Team Recommendations, https://gns0.icann.org/sites/default/files/filefield_8000/sti-wt-recommendations-11dec09-en.pdf; <https://www.icann.org/news/announcement-2-2009-12-17-en>.

¹⁰⁹ Board Governance Committee (BGC) Recommendation on Requests 15-19 & 15-20, at Pg. 6, <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf>, adopted by Board Resolution 2016.02.03.11, <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.b>. The BGC noted that although the Board determined that the URS was not inappropriate for legacy gTLDs, this conclusion was “not a move to make the URS mandatory for any legacy TLDs, and it would be inappropriate to do so.” *Id.* at Pg. 7.

There is 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.”¹¹⁰ The Requestor may prefer a different RPM mechanism, but its disagreement does not support reconsideration.

The Requestor also argues in its Rebuttal that “the URS was developed in response to a very specific situation and was not intended for more complicated cases.”¹¹¹ The Requestor has not shown that these “more complicated cases” are unique to .ORG registrants. They are not. The Requestor implies that URS is the *sole* RPM applicable to .ORG. But as discussed below, *all* registrars must employ the UDRP.¹¹² The URS does not replace the UDRP; it supplements it. The Requestor has not shown that including the URS among the RPMs applicable to .ORG registrants contradicts any established ICANN policy or procedure. Reconsideration is not warranted.

The Requestor asserts that the Ombudsman did not address this argument.¹¹³ 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

¹¹⁰ Request 19-3, § 8, at Pg. 6.

¹¹¹ Rebuttal, at Pg. 3.

¹¹² See § V.B.1, *infra*; see also UDRP, <https://www.icann.org/resources/pages/help/dndr/udrp-en>.

¹¹³ 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).

does so is neither material to the Board’s consideration of Request 19-3, nor sufficient support for reconsideration.

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 Mission, Commitments, and Core Values because ICANN Staff acted: (1) before the RPM PDP Working Group concluded its evaluation of all RPMs; and (2) in spite of the public comments opposing the inclusion of the URS RPMs.¹¹⁴ 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.”*
 - a. ICANN org’s bilateral negotiations with PIR were consistent with ICANN org’s Commitment.

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.”¹¹⁵ 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.”¹¹⁶

The multistakeholder model is an important mechanism for ICANN’s policy development. But no ICANN Bylaws provision, policy, or procedure requires that every “substantive change” to the .ORG RA or other new or legacy gTLD RAs must result from the

¹¹⁴ *Id.* § 6, at Pgs. 3-4.

¹¹⁵ Request 19-3, § 8, at Pg. 7.

¹¹⁶ *Id.* § 6, at Pg. 3.

multistakeholder policy development process. Such a requirement would eliminate ICANN's and the Registry Operators' ability to negotiate the terms of the RAs.

Although all new gTLD registry operators must adopt the Base RA (but may request deviations from it), no consensus policy requires a legacy registry operator to adopt the Base RA. All RAs include a presumptive right of renewal clause. This clause provides a registry operator the right to renew the RA at its expiration, provided the registry operator is in good standing (*e.g.*, the registry operator does not have any uncured breaches), and subject to the terms of their presumptive renewal clauses.¹¹⁷

In the course of engaging with a legacy registry operator on renewing its RA, ICANN org prefers to and proposes that the registry operator adopts the Base RA that is used by new gTLDs as the starting point for the negotiations. As discussed above, the Base RA includes several enhancements that benefit the domain name ecosystem such as better safeguards in dealing with domain name infrastructure abuse, emergency backend support, as well as adoption of new bilaterally negotiated provisions that ICANN org and the gTLD Registries Stakeholder Group conduct from time to time for updates to the form agreement, and adoption of new services (*e.g.*, RDAP) and procedures.

Although ICANN org proposes the Base RA as a starting place for the renewal discussions, because of the registry operator's presumptive right of renewal, ICANN org is not in a position to mandate the new form as a condition of renewal. If a registry operator states a strong preference for maintaining its existing legacy agreement form, ICANN org would accommodate such a position, and has done so in at least one such instance.

¹¹⁷ See, *e.g.*, .ORG 2013 RA, Art. 4, § 4.2, <https://www.icann.org/resources/unthemed-pages/org-agmt-html-2013-09-12-en>.

- b. Including the URS RPMs in the .ORG Renewed RA does not contravene the GNSO’s policy development process.

The Requestor asserts that ICANN org’s agreement with PIR to include the URS RPMs in the .ORG Renewed RA improperly “bypass[ed] the RPM [PDP] Working Group . . . , den[ying] EFF and other RPM [PDP] Working Group participants meaningful input into this change.”¹¹⁸ The Requestor asserts that taking this action via bilateral negotiations, rather than waiting for the results of the RPM PDP 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:

[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.¹¹⁹

The Requestor reiterates this argument in its Rebuttal, without making new points.¹²⁰

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.”¹²¹ 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

¹¹⁸ Request 19-3, § 6, at Pg. 3.

¹¹⁹ Request 19-3, § 8, at Pgs. 5-6.

¹²⁰ Rebuttal, at Pgs. 3-4.

¹²¹ Bylaws, Art. 1, § 1.2(b)(v).

implemented.”¹²² The RPM PDP Working Group has not concluded its work.¹²³ Once the RPM PDP Working Group concludes its inquiry and to the extent the GNSO makes a community recommendations on RPMs, the Board will take the recommendations 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.¹²⁴ 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.¹²⁵ The inclusion of the URS RPMs in the .ORG Renewed RA resulted from bilateral negotiations between PIR and ICANN organization. PIR was free to elect not to include the URS RPMs in the renewed agreement, but it did not do so. The Requestor presents no evidence demonstrating that the PIR objected to the inclusion of the URS RPMs in the .ORG Renewed RA. As such, there is no evidence that the voluntary inclusion of the URS RPMs into the .ORG Renewed RA in any way contravenes the work of the RPM PDP Working Group. The existence of the RPM PDP 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 potential future community recommendations, as the RPM PDP Working Group has not yet issued recommendations, supports ICANN org’s Core Value of

¹²² Rationale for Board Resolution 2019.03.14.02, <https://www.icann.org/resources/board-material/resolutions-2019-03-14-en#1.b.rationale>.

¹²³ See <https://community.icann.org/display/RARPMRIAGPWG/Review+of+all+Rights+Protection+Mechanisms+in+all+gTLDs+PDP+Home>; <https://gns0.icann.org/en/group-activities/active/rpm>.

¹²⁴ As noted above, the URS is not Consensus Policy for legacy gTLDs. It was developed to implement the 2007 new gTLD policy recommendations. Specifically, it grew from GNSO Policy Recommendation 3, that “Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.” <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>.

¹²⁵ This approach is consistent with the Board’s action on Requests 15-19 & 15-20, discussed in Section II.B, *supra*.

operating with efficiency.¹²⁶ The RPM PDP Working Group was charged with assessing “all RPMs in all gTLDs, . . . (including but not limited to the UDRP).”¹²⁷ 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.¹²⁸ 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 PDP Working Group’s ongoing analysis—which includes the UDRP—until the RPM PDP 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 PDP 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 PDP Working Group finishes its work.¹²⁹ 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.¹³⁰ 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.

For the above reasons, the Requestor has not demonstrated that the .ORG Renewed RA contravenes the RPM PDP Working Group’s ongoing work.

¹²⁶ Bylaws, Art. 1, § 1.2(b)(v).

¹²⁷ See GNSO Council Resolution 20160216-3, <https://gns0.icann.org/en/council/resolutions#20160218-3>; Charter for RPM PDP Working Group, https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf.

¹²⁸ Request 19-3, § 7, at Pg. 5.

¹²⁹ 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.

¹³⁰ See UDRP, <https://www.icann.org/resources/pages/help/dndr/udrp-en>.

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.”¹³¹

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.*”¹³²

At bottom, the Requestor believes that “the voice of registrants was excluded” from the RA renewal process.¹³³ The Requestor is incorrect. ICANN Staff reviewed and considered each of the more than 3,200 comments submitted during the public comment period.¹³⁴ ICANN Staff presented and discussed the public comments and “key issues raised in the public comment process and correspondence”—including the URS RPMs—with the Board before executing the .ORG Renewed RA.¹³⁵

¹³¹ Request 19-3, § 8, at Pgs. 5-6.

¹³² Request 19-3, § 6, at Pg. 4 (emphasis in original).

¹³³ *Id.*

¹³⁴ 26 July 2019 Letter, at Pg. 2

¹³⁵ 26 July 2019 Letter, at Pg. 2.

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.¹³⁶ 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 Board¹³⁷—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, 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

¹³⁶ 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.”).

¹³⁷ 26 July 2019 Letter, at Pg. 2.

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.”¹³⁸

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.¹³⁹

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 registration for up to 10 years *before* any increases take effect.¹⁴⁰ ICANN Staff also noted that migrating .ORG to the Base RA protects other stakeholders by providing “additional safeguards

¹³⁸ 26 July 2019 Letter, at Pg. 1.

¹³⁹ See Rationale for Board Resolution 2015.09.28.06.

¹⁴⁰ Report of Public Comments, at Pg. 8.

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.”¹⁴¹ 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.¹⁴² 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.”¹⁴³

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.¹⁴⁴ Likewise, the Requestor identifies relevant information—*i.e.*, ICANN org’s summary of the public comments, which the Requestor asserts

¹⁴¹ *Id.*

¹⁴² Request 19-3 § 8, at Pgs. 8-9.

¹⁴³ *Id.*

¹⁴⁴ *Id.*, § 8, at Pg. 8.

“mischaracteriz[ed]” the “full nature and scope of the comments”—that was allegedly inaccurate.¹⁴⁵

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.”¹⁴⁶ On 8 November 2016, the Board delegated its authority to negotiate and execute contracts to ICANN’s CEO or his designee.¹⁴⁷ 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].”¹⁴⁸

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.¹⁴⁹ The BAMC 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

¹⁴⁵ *Id.*, § 8, at Pgs. 8-9.

¹⁴⁶ Bylaws, Art. 21, § 21.1. *See also* Ombudsman’s Evaluation of Request 19-3, at Pg. 4.

¹⁴⁷ *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).

¹⁴⁸ 26 July 2019 Letter, at Pg. 2.

¹⁴⁹ 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.

The Requestor argues on Rebuttal that the Board should determine that “the efficiency of a common set of registry contracts does not outweigh the Multistakeholder Model.”¹⁵⁰ This amounts to a disagreement with the ICANN Staff's determination, made with the Board's support, that ICANN's Mission and Core Values were best served by proceeding with the Base RA. This disagreement does not, in itself, support reconsideration. For the reasons set forth above, the .ORG Renewed RA did not contradict ICANN Bylaws, policies, or procedures. Reconsideration is not warranted on this ground.

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.¹⁵¹ 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.”¹⁵²

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.”¹⁵³ The Requestor offers no basis for its claim that summaries of the public comment proceeding did not paint an accurate picture of the

¹⁵⁰ Rebuttal, at Pg. 4.

¹⁵¹ Request 19-3, § 8, at Pg. 8.

¹⁵² *Id.*

¹⁵³ Report of Public Comments, at Pg. 6.

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.¹⁵⁴ The Report of Public Comment acknowledged that commenters opposed the inclusion of URS RPMs in the .ORG Renewed RA.¹⁵⁵ 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.¹⁵⁶

3. *ICANN Staff And The Board Were Not Aware Of The Sale Of PIR When They Considered The .ORG Renewed RA.*

During its 25 November 2019 presentation to the BAMC, the Requestor asserted that ICANN Staff and/or the Board failed to consider material information because it may have known about—but not considered—the contemplated sale of PIR prior to execution of the .ORG Renewed RA on 30 June 2019. This argument does not support reconsideration because it rests on the false presumption that ICANN Staff or the Board were aware of the transaction before entering into the .ORG Renewed RA. They were not.¹⁵⁷

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.

¹⁵⁴ 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.”).

¹⁵⁵ *Id.*, at Pg. 6.

¹⁵⁶ <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/>.

¹⁵⁷ See Section V.E, *infra*.

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.”¹⁵⁸

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 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.¹⁵⁹ Therefore, this request does not support reconsideration.

¹⁵⁸ 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.

¹⁵⁹ See Bylaws, Art. 1, § 1.2(a)(v).

E. The Parent Company of the .ORG Registry Operator Is Not Relevant to the Reconsideration Request and Does Not Support Reconsideration.

The Requestor argues that the sale of PIR to private equity firm Ethos Capital “invites additional scrutiny.”¹⁶⁰ However, PIR’s corporate structure is not relevant to Request 19-3, which concerns the 30 June 2019 renewal of the .ORG RA and must be evaluated in accordance with the grounds for reconsideration as set forth in ICANN’s Bylaws. The Ethos Capital acquisition of PIR, which was announced more than four months after the execution of the .ORG Renewed RA, did not impact ICANN Staff’s determination that ICANN’s Mission and Core Values were best served by migrating the .ORG RA to the Base RA.¹⁶¹

In sum, Request 19-3 is not the appropriate vehicle for challenging Ethos Capital’s acquisition of PIR.

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 and the BAMC’s recommendation that the Board adopt this Final Determination, the Board concludes that ICANN org’s execution of the .ORG Renewed RA did not contradict ICANN’s Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information or rely on false or inaccurate relevant information in executing the Agreement. Accordingly, the Board denies Request 19-3.

¹⁶⁰ Rebuttal, at Pg. 6.

¹⁶¹ See Section II.C, *supra*. Neither ICANN Staff nor PIR were aware that Ethos Capital would acquire PIR when the parties finalized the .ORG Renewed RA. See <http://domainincite.com/24988-i-attempt-to-answer-icas-questions-about-the-terrible-blunder-org-acquisition>.

While the Board has denied Request 19-3, the Board acknowledges that many members of the .ORG community have voiced substantial concerns regarding the terms of the .ORG Renewed RA; concerns which the members of the .ORG community feel were ignored by PIR. The .ORG community is in the best position to engage PIR in that important discussion. The Board notes that it is within any registry's right to propose contract amendments for evaluation by the org.

Further, the Board acknowledges (and the Requestor points out in its Rebuttal) the recently announced acquisition of PIR, the current .ORG registry operator, and the results of that transaction is something that ICANN organization will be evaluating as part of its normal process in such circumstances.

**FINAL DETERMINATION OF THE ICANN BOARD
RECONSIDERATION REQUEST 19-3
12 December 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).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

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.”³
- (ii) ICANN org’s commitment to “ensure that those entities most affected can assist in the policy development process.”⁴
- (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.”⁵

¹ Request 19-3, § 3, at Pg. 2.

² *Id.*, § 8, at Pg. 5.

³ *Id.*

⁴ *Id.*

⁵ Request 19-3, § 8, at Pg. 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.”⁶

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.⁷

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.’”⁸

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 2013.⁹ 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 .ORG gTLD.¹⁰ 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.

⁶ *Id.*

⁷ *Id.*, § 8, at Pgs. 8-9.

⁸ *Id.*, § 9, at Pg. 9.

⁹ 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>.

¹⁰ *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

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.¹¹ 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.¹² 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 renewal. ICANN org described the material differences between the proposed renewal and the then current .ORG RA. These differences included, in relevant part, 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.¹³

ICANN org explained that the change would “allow the .org renewal agreement to better conform with the [Base RA].”¹⁴

ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG Renewed RA.¹⁵ The comments predominantly related to three themes: (1) the proposed removal of limits on domain name registration fees; (2) inclusion of the URS RPMs; and (3) the RA renewal process.¹⁶

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>.

¹¹ 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>.

¹² *Id.*

¹³ <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

¹⁴ *Id.*

¹⁵ Report of Public Comments at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>.

¹⁶ *Id.*

ICANN org analyzed the public comments, including those addressing the proposed URS RPMs, in its Report of Public Comments.¹⁷ 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 gTLD¹⁸ RAs on various grounds.”¹⁹ 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.”²⁰ ICANN org then noted that it would “consider the feedback from the community on this issue,”²¹ including “the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”²²

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.”²³

Following consultation with the Board and with the Board’s support,²⁴ on 30 June 2019, ICANN org announced that it had executed the .ORG Renewed RA. The Board did not hold a

¹⁷ *Id.*, at Pg. 9.

¹⁸ 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.

¹⁹ Report of Public Comments at Pg. 6. ICANN org received some comments supporting the RPMs. *Id.*, at Pgs. 6-7.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*, at Pg. 1.

²³ 26 July 2019 Letter, at Pg. 2.

²⁴ *See id.*

vote on the .ORG Renewed RA prior to execution. The .ORG Renewed RA included the URS RPMs.²⁵

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.”²⁶ 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.”²⁷

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.²⁸ 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

²⁵ See ICANN org announcement: .ORG Registry Agreement, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

²⁶ 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>.

²⁷ *Id.*, at Pg. 6.

²⁸ 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>.

that the .ORG RA renewal process was not a policy matter and therefore not subject to multistakeholder input.²⁹

The Board adopted a Proposed Determination denying Request 19-3 on 3 November 2019.³⁰ On 18 November 2019, the Requestor submitted a rebuttal to the Board’s Proposed Determination. The Requestor argued that: (1) the Board “has not carefully considered” that the URS is not Consensus Policy and the Generic Names Supporting Organization (GNSO) did not “extend the URS to legacy gTLDs”; (2) including the URS RPMs in the .ORG Renewed RA “[i]ntrud[es] on a policy determination currently pending in the GNSO’s multistakeholder policy development process”; (3) the Board “retains the power to decide whether efficiency of harmonized contracts outweighs the Multistakeholder Model”; and (4) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed “heightens the need” for the Board to “spend more time and discussion on the .ORG contract renewal challenges.”³¹

On 25 November 2019, the Requestor made an oral telephonic presentation to the BAMC,³² reiterating the arguments made in its Request and Rebuttal, and additionally suggesting that ICANN Staff may have been aware of the sale of PIR before 30 June 2019, but failed to consider the information in renewing the .ORG Renewed RA.³³

²⁹ *Id.*

³⁰ Board Action on Proposed Determination on Request 19-3, <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.b>; Proposed Determination on Request 19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-board-proposed-determination-03nov19-en.pdf>.

³¹ Requestor’s Rebuttal to ICANN Board’s Proposed Determination on Request 19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-rebuttal-board-proposed-determination-19nov19-en.pdf>.

³² The BAMC’s membership changed on 7 November 2019. *See* Proposed Determination on Request 19-3, at Pg. 1 n.1.

³³ Requestor’s Presentation Materials for Oral Presentation to the BAMC, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-presentation-redacted-25nov19-en.pdf>.

The BAMC considered Request 19-3 and all relevant materials. Based on its extensive review of all relevant materials, the BAMC suggested that the Board adopt this Final Determination, which 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, and that ICANN Staff did not fail to consider material information or rely on false or inaccurate relevant information in executing the Agreement. 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 a formal vote by the Board. Accordingly, the Board denies Request 19-3.

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).³⁴ The 2003 .ORG RA included limits on the prices that PIR could charge registrars for registry services.³⁵

On 27 June 2006, ICANN posted for public comment proposed new RAs for the operation of .ORG, among others.³⁶ 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.”³⁷ 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

³⁴ 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>.

³⁵ *See* 2003 .ORG RA, Art. 3, § 3.14.5, <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>.

³⁶ 2006 Public Comment of .BIZ, .INFO, .ORG, <https://www.icann.org/news/announcement-3-2006-07-28-en>.

³⁷ *Id.*

renegotiated the RA to include price caps.³⁸ Following a public comment period for the revised 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.³⁹

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.⁴⁰ In 2007, the GNSO concluded that “ICANN must implement a process that allows the introduction of new [gTLDs].”⁴¹ Accordingly, ICANN org established and implemented the New gTLD Program, “enabling the largest expansion of the [DNS].”⁴²

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.⁴³ It was established in 2013 and aligns with the GNSO’s policy recommendations for new gTLDs.⁴⁴ The URS was developed and adopted into the Base RA after extensive community input, including review by the GNSO Council.⁴⁵ Specifically, the URS was recommended by the Implementation Recommendation Team (IRT) as a mandatory rights

³⁸ See Revised .BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, <https://www.icann.org/news/announcement-2006-10-24-en>.

³⁹ .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>.

⁴⁰ <https://newgtlds.icann.org/en/about/program>.

⁴¹ 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.

⁴² <https://newgtlds.icann.org/en/about/program>.

⁴³ 26 July 2019 Letter, at Pg. 1.

⁴⁴ *Id.*

⁴⁵ *Id.*, at Pg. 2.

protection mechanism for all new gTLDs from the 2012 round of the New gTLD Program.⁴⁶

The GNSO was asked to provide its view on whether certain proposed rights protection mechanisms (including the URS) were consistent with the GNSO's proposed policy on the introduction of new gTLDs and were the appropriate and effective option for achieving the GNSO's stated principles and objectives.⁴⁷ The GNSO concluded that the URS was not inconsistent with any of its existing policy recommendations.⁴⁸ That said, 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 that applied during the 2012 New gTLD round.⁴⁹

Since 2014, ICANN org has negotiated with legacy gTLD registry operators that choose to transition their agreements to the Base RA. Several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in agreement renewals.⁵⁰ The inclusion of the URS into these renewed RAs was the result of the bilateral negotiations between those registry operators and ICANN.

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].”⁵¹ Additionally, using the Base RA ensures that the Registry will use

⁴⁶ See Rationale for Board Resolution 2015.09.28.06, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e>.

⁴⁷ *Id.*

⁴⁸ *Id.*; see also <https://www.icann.org/news/announcement-2-2009-12-17-en>.

⁴⁹ See IRT Report, <https://archive.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>; Special Trademark Issues Review Team Recommendations, https://gns0.icann.org/sites/default/files/filefield_8000/sti-wt-recommendations-11dec09-en.pdf; <https://www.icann.org/news/announcement-2-2009-12-17-en>.

⁵⁰ *Id.*

⁵¹ 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->

“uniform and automated processes, which will facilitate operation of the TLD,” and “includes safeguards in the form of public interest commitments in Specification 11.”⁵²

The Board has explained that transitioning legacy gTLDs to the Base RA “will provide consistency across all registries leading to a more predictable environment for end-users.”⁵³ 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.”⁵⁴ 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,”⁵⁵ another public benefit.

In February 2016, the GNSO established a Rights Protection Mechanisms Policy Development Process Working Group (RPM PDP 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.”⁵⁶ The RPM PDP Working Group’s work is ongoing,⁵⁷ and currently no policy requires or prohibits registries from adopting URS.⁵⁸ The Board has directed ICANN org not to stop its work merely because it is the subject

[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>.

⁵² 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>.

⁵³ Rationale for Board Resolution 2015.09.28.06.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See GNSO Council Resolution 20160218-3, <https://gns0.icann.org/en/council/resolutions#20160218-3>; Charter for RPM PDP Working Group, https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf. The 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>.

⁵⁷ See <https://gns0.icann.org/en/group-activities/active/rpm>.

⁵⁸ 26 July 2019 Letter, at Pg. 2.

of policy development discussions.⁵⁹ 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.”⁶⁰ The Board previously concluded

the URS has not been adopted as consensus policy and that ICANN therefore has no ability to impose the URS (or other new RPMs applicable to new gTLDs) on legacy TLDs. The existence of certain RPMs in the Renewed Registry Agreements, therefore, has no bearing on the GNSO policy development process to determine whether (or not) any of the new RPMs should be consensus policies applicable to all gTLDs.⁶¹

C. The 2019 .ORG RA Renewal.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.⁶² 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.”⁶³ 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.⁶⁴ 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.⁶⁵

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

⁵⁹ *Id.*

⁶⁰ Rationale for Board Resolution 2019.03.14.02, <https://www.icann.org/resources/board-material/resolutions-2019-03-14-en#1.b.rationale>.

⁶¹ Board Action on Requests 15-19 and 15-20, <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.b>.

⁶² 2019 .ORG RA Public Comment Proceeding.

⁶³ *See id.*

⁶⁴ 26 July 2019 Letter, at Pg. 2.

⁶⁵ *Id.*

version of the proposed renewal agreement against the Base RA and identified the material 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.⁶⁶

ICANN org explained that the change would “allow the .org renewal agreement to better conform with the [Base RA].”⁶⁷ 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].”⁶⁸

The public comment period for the .ORG Renewed RA opened on 18 March 2019 and closed on 29 April 2019.⁶⁹ During that time, ICANN org received over 3,200 submissions.⁷⁰ 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.⁷¹

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].”⁷²

⁶⁶ 2019 .ORG RA Public Comment Proceeding.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Report of Public Comments at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>.

⁷¹ *Id.*

⁷² 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.⁷³ The NCSG noted that: (1) the RPMs were “expressly not added to . . . legacy gTLDs” in 2010; and (2) the RPM PDP 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.⁷⁴

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*.”⁷⁵

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.”⁷⁶ 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 [PDP] 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.⁷⁷

⁷³ Comment, NCSG, 18 March 2019, <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/attachments/20190430/b10daf64/NCSG.ORGRenewalComment.pdf>.

⁷⁴ *Id.*, at Pg. 1.

⁷⁵ *Id.* (emphasis in original).

⁷⁶ Report of Public Comments at Pg. 6. ICANN org received some comments supporting the RPMs. *Id.*, at Pgs. 6-7.

⁷⁷ *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.⁷⁸

ICANN org detailed its analysis of the public comments—including those concerning the proposed inclusion of RPMs—in its Report of Public Comments.⁷⁹ 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.⁸⁰

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.”⁸¹

ICANN org “review[ed] and consider[ed] all 3,200+ comments received,” in response to the proposed .ORG Renewed RA.⁸² ICANN Staff then briefed the ICANN Board on its analysis of the public comments during the Board’s workshop on 21-23 June 2019.⁸³ 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.⁸⁴ The Board did not vote on whether to execute the .ORG Renewed RA.

⁷⁸ *Id.*

⁷⁹ *Id.*, at Pg. 9.

⁸⁰ *Id.*

⁸¹ *Id.*, at Pg. 1.

⁸² 26 July 2019 Letter, at Pg. 2.

⁸³ *Id.*

⁸⁴ See ICANN org announcements: .ORG Registry Agreement, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

D. The Request for Reconsideration.

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.⁸⁵

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] 19-3.⁸⁶

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.⁸⁷

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.⁸⁸ 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

⁸⁵ <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-ombudsman-action-redacted-27aug19-en.pdf>

⁸⁶ 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>.

⁸⁷ *Id.*, at Pg. 6.

⁸⁸ *Id.*, at Pg. 5.

governance, and not a “policy matter” about which the ICANN community would be entitled to greater input.⁸⁹

On 2 October 2019, the Requestor submitted a letter to the BAMC “to address certain errors” in the Ombudsman’s evaluation.⁹⁰ 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.⁹¹

The Board adopted a Proposed Determination denying Request 19-3 on 3 November 2019.⁹² On 18 November 2019, the Requestor submitted a rebuttal to the Board’s Proposed Determination. The Requestor argued that: (1) the Board “has not carefully considered” that the GNSO did not “extend the URS to legacy gTLDs”; (2) including the URS in the .ORG Renewed RA “[i]ntrud[es] on a policy determination currently pending in the GNSO’s multistakeholder policy development process”; (3) the Board “retains the power to decide whether efficiency of harmonized contracts outweighs the Multistakeholder Model”; and (4) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed “heightens the need” for the Board to “spend more time and discussion on the .ORG contract renewal challenges.”⁹³

On 25 November 2019, the Requestor made an oral telephonic presentation to the BAMC,⁹⁴ reiterating the arguments made in its Request and Rebuttal, and additionally

⁸⁹ *Id.*, at Pg. 4.

⁹⁰ 2 October 2019 Letter.

⁹¹ *Id.*

⁹² Board Action on Proposed Determination on Request 19-3, <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.b>; Proposed Determination on Request 19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-board-proposed-determination-03nov19-en.pdf>.

⁹³ Requestor’s Rebuttal to ICANN Board’s Proposed Determination on Request 19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-rebuttal-board-proposed-determination-19nov19-en.pdf>.

⁹⁴ See note 32, *supra*.

suggesting that ICANN Staff may have been aware of the sale of PIR before 30 June 2019, but failed to consider it.⁹⁵

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.’⁹⁶

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.”⁹⁷ 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.”⁹⁸

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

⁹⁵ Requestor’s Presentation Materials for Oral Presentation to the BAMC, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-presentation-redacted-25nov19-en.pdf>.

⁹⁶ Request 19-3, § 9, at Pg. 9.

⁹⁷ *Id.*

⁹⁸ *Id.*, § 8, at Pg. 9.

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.”⁹⁹

The Board now considers the Requestor’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 BAMC has reviewed the Request and all relevant materials and has recommended that the Board adopt this Final Determination. Denial of a Request for Reconsideration of ICANN Staff action and Board inaction is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.¹⁰⁰

V. Analysis and Rationale.

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

⁹⁹ Bylaws, Art. 4 §§ 4.2(a) and (c).

¹⁰⁰ Bylaws, Art. 4 § 4.2(e).

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.”¹⁰¹ 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.”¹⁰² 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.”¹⁰³ 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.”¹⁰⁴ In its Rebuttal, the Requestor reiterates this point, arguing that the GNSO adopted the URS “expressly for new gTLDs,” and that ICANN org has not “shown any knowledge of the dangers of applying the URS to millions of legacy, noncommercial registrants.”¹⁰⁵

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 Registry and the public comments, including the Requestor’s opposition to incorporating the

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Request 19-3, § 8, at Pg. 6.

¹⁰⁴ *Id.*

¹⁰⁵ Rebuttal, at Pgs. 2-3.

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. As discussed above, the IRT recommended that the URS as a mandatory rights protection mechanism for all new gTLDs from the 2012 round of the New gTLD Program. The GNSO was asked to provide its view on whether certain proposed rights protection mechanisms (which included the URS) were consistent with the GNSO's proposed policy on the introduction of New gTLDs and were the appropriate and effective option for achieving the GNSO's stated principles and objectives.¹⁰⁶ The GNSO concluded that the URS was not inconsistent with any of its *existing* policy recommendations.¹⁰⁷ The URS has not been adopted as a Consensus Policy and ICANN has no ability to make it mandatory for any TLDs other than those delegated as a result of the 2012 round of the New gTLD Program.¹⁰⁸ As a result, when considering a similar challenge to migrating legacy gTLD RAs to the Base RA during the renewal process, the Board concluded that including the URS RPMs was not inconsistent with ICANN Bylaws or established policies or procedures.¹⁰⁹

There is 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

¹⁰⁶ Rationale for Board Resolution 2015.09.28.06.

¹⁰⁷ *Id.*; see also <https://www.icann.org/news/announcement-2-2009-12-17-en>.

¹⁰⁸ See IRT Report, <https://archive.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>; Special Trademark Issues Review Team Recommendations, https://gns0.icann.org/sites/default/files/filefield_8000/sti-wt-recommendations-11dec09-en.pdf; <https://www.icann.org/news/announcement-2-2009-12-17-en>.

¹⁰⁹ Board Governance Committee (BGC) Recommendation on Requests 15-19 & 15-20, at Pg. 6, <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf>, adopted by Board Resolution 2016.02.03.11, <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.b>. The BGC noted that although the Board determined that the URS was not inappropriate for legacy gTLDs, this conclusion was “not a move to make the URS mandatory for any legacy TLDs, and it would be inappropriate to do so.” *Id.* at Pg. 7.

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.”¹¹⁰ The Requestor may prefer a different RPM mechanism, but its disagreement does not support reconsideration.

The Requestor also argues in its Rebuttal that “the URS was developed in response to a very specific situation and was not intended for more complicated cases.”¹¹¹ The Requestor has not shown that these “more complicated cases” are unique to .ORG registrants. They are not. The Requestor implies that URS is the *sole* RPM applicable to .ORG. But as discussed below, *all* registrars must employ the UDRP.¹¹² The URS does not replace the UDRP; it supplements it. The Requestor has not shown that including the URS among the RPMs applicable to .ORG registrants contradicts any established ICANN policy or procedure. Reconsideration is not warranted.

The Requestor asserts that the Ombudsman did not address this argument.¹¹³ 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.

¹¹⁰ Request 19-3, § 8, at Pg. 6.

¹¹¹ Rebuttal, at Pg. 3.

¹¹² See § V.B.1, *infra*; see also UDRP, <https://www.icann.org/resources/pages/help/dndr/udrp-en>.

¹¹³ 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 Mission, Commitments, and Core Values because ICANN Staff acted: (1) before the RPM PDP Working Group concluded its evaluation of all RPMs; and (2) in spite of the public comments opposing the inclusion of the URS RPMs.¹¹⁴ 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.”*
 - a. ICANN org’s bilateral negotiations with PIR were consistent with ICANN org’s Commitment.

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.”¹¹⁵ 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.”¹¹⁶

The multistakeholder model is an important mechanism for ICANN’s policy development. But no ICANN Bylaws provision, policy, or procedure requires that every “substantive change” to the .ORG RA or other new or legacy gTLD RAs must result from the multistakeholder policy development process. Such a requirement would eliminate ICANN’s and the Registry Operators’ ability to negotiate the terms of the RAs.

¹¹⁴ *Id.* § 6, at Pgs. 3-4.

¹¹⁵ Request 19-3, § 8, at Pg. 7.

¹¹⁶ *Id.* § 6, at Pg. 3.

Although all new gTLD registry operators must adopt the Base RA (but may request deviations from it), no consensus policy requires a legacy registry operator to adopt the Base RA. All RAs include a presumptive right of renewal clause. This clause provides a registry operator the right to renew the RA at its expiration, provided the registry operator is in good standing (*e.g.*, the registry operator does not have any uncured breaches), and subject to the terms of their presumptive renewal clauses.¹¹⁷

In the course of engaging with a legacy registry operator on renewing its RA, ICANN org prefers to and proposes that the registry operator adopts the Base RA that is used by new gTLDs as the starting point for the negotiations. As discussed above, the Base RA includes several enhancements that benefit the domain name ecosystem such as better safeguards in dealing with domain name infrastructure abuse, emergency backend support, as well as adoption of new bilaterally negotiated provisions that ICANN org and the gTLD Registries Stakeholder Group conduct from time to time for updates to the form agreement, and adoption of new services (*e.g.*, RDAP) and procedures.

Although ICANN org proposes the Base RA as a starting place for the renewal discussions, because of the registry operator's presumptive right of renewal, ICANN org is not in a position to mandate the new form as a condition of renewal. If a registry operator states a strong preference for maintaining its existing legacy agreement form, ICANN org would accommodate such a position, and has done so in at least one such instance.

- b. Including the URS RPMs in the .ORG Renewed RA does not contravene the GNSO's policy development process.

¹¹⁷ See, *e.g.*, .ORG 2013 RA, Art. 4, § 4.2, <https://www.icann.org/resources/unthemed-pages/org-agmt-html-2013-09-12-en>.

The Requestor asserts that ICANN org’s agreement with PIR to include the URS RPMs in the .ORG Renewed RA improperly “bypass[ed] the RPM [PDP] Working Group . . . , den[ying] EFF and other RPM [PDP] Working Group participants meaningful input into this change.”¹¹⁸ The Requestor asserts that taking this action via bilateral negotiations, rather than waiting for the results of the RPM PDP 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:

[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.¹¹⁹

The Requestor reiterates this argument in its Rebuttal, without making new points.¹²⁰

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.”¹²¹ 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

¹¹⁸ Request 19-3, § 6, at Pg. 3.

¹¹⁹ Request 19-3, § 8, at Pgs. 5-6.

¹²⁰ Rebuttal, at Pgs. 3-4.

¹²¹ Bylaws, Art. 1, § 1.2(b)(v).

implemented.”¹²² The RPM PDP Working Group has not concluded its work.¹²³ Once the RPM PDP Working Group concludes its inquiry and to the extent the GNSO makes a community recommendations on RPMs, the Board will take the recommendations 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.¹²⁴ 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.¹²⁵ The inclusion of the URS RPMs in the .ORG Renewed RA resulted from bilateral negotiations between PIR and ICANN organization. PIR was free to elect not to include the URS RPMs in the renewed agreement, but it did not do so. The Requestor presents no evidence demonstrating that the PIR objected to the inclusion of the URS RPMs in the .ORG Renewed RA. As such, there is no evidence that the voluntary inclusion of the URS RPMs into the .ORG Renewed RA in any way contravenes the work of the RPM PDP Working Group. The existence of the RPM PDP 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 potential future community recommendations, as the RPM PDP Working Group has not yet issued recommendations, supports ICANN org’s Core Value of

¹²² Rationale for Board Resolution 2019.03.14.02, <https://www.icann.org/resources/board-material/resolutions-2019-03-14-en#1.b.rationale>.

¹²³ See <https://community.icann.org/display/RARPMRIAGPWG/Review+of+all+Rights+Protection+Mechanisms+in+all+gTLDs+PDP+Home>; <https://gns0.icann.org/en/group-activities/active/rpm>.

¹²⁴ As noted above, the URS is not Consensus Policy for legacy gTLDs. It was developed to implement the 2007 new gTLD policy recommendations. Specifically, it grew from GNSO Policy Recommendation 3, that “Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.” <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>.

¹²⁵ This approach is consistent with the Board’s action on Requests 15-19 & 15-20, discussed in Section II.B, *supra*.

operating with efficiency.¹²⁶ The RPM PDP Working Group was charged with assessing “all RPMs in all gTLDs, . . . (including but not limited to the UDRP).”¹²⁷ 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.¹²⁸ 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 PDP Working Group’s ongoing analysis—which includes the UDRP—until the RPM PDP 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 PDP 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 PDP Working Group finishes its work.¹²⁹ 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.¹³⁰ 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.

For the above reasons, the Requestor has not demonstrated that the .ORG Renewed RA contravenes the RPM PDP Working Group’s ongoing work.

¹²⁶ Bylaws, Art. 1, § 1.2(b)(v).

¹²⁷ See GNSO Council Resolution 20160216-3, <https://gns0.icann.org/en/council/resolutions#20160218-3>; Charter for RPM PDP Working Group, https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf.

¹²⁸ Request 19-3, § 7, at Pg. 5.

¹²⁹ 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.

¹³⁰ See UDRP, <https://www.icann.org/resources/pages/help/dndr/udrp-en>.

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.”¹³¹

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.*”¹³²

At bottom, the Requestor believes that “the voice of registrants was excluded” from the RA renewal process.¹³³ The Requestor is incorrect. ICANN Staff reviewed and considered each of the more than 3,200 comments submitted during the public comment period.¹³⁴ ICANN Staff presented and discussed the public comments and “key issues raised in the public comment process and correspondence”—including the URS RPMs—with the Board before executing the .ORG Renewed RA.¹³⁵

¹³¹ Request 19-3, § 8, at Pgs. 5-6.

¹³² Request 19-3, § 6, at Pg. 4 (emphasis in original).

¹³³ *Id.*

¹³⁴ 26 July 2019 Letter, at Pg. 2

¹³⁵ 26 July 2019 Letter, at Pg. 2.

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.¹³⁶ 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 Board¹³⁷—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, 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

¹³⁶ 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.”).

¹³⁷ 26 July 2019 Letter, at Pg. 2.

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.”¹³⁸

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.¹³⁹

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 registration for up to 10 years *before* any increases take effect.¹⁴⁰ ICANN Staff also noted that migrating .ORG to the Base RA protects other stakeholders by providing “additional safeguards

¹³⁸ 26 July 2019 Letter, at Pg. 1.

¹³⁹ See Rationale for Board Resolution 2015.09.28.06.

¹⁴⁰ Report of Public Comments, at Pg. 8.

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.”¹⁴¹ 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.¹⁴² 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.”¹⁴³

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.¹⁴⁴ Likewise, the Requestor identifies relevant information—*i.e.*, ICANN org’s summary of the public comments, which the Requestor asserts

¹⁴¹ *Id.*

¹⁴² Request 19-3 § 8, at Pgs. 8-9.

¹⁴³ *Id.*

¹⁴⁴ *Id.*, § 8, at Pg. 8.

“mischaracteriz[ed]” the “full nature and scope of the comments”—that was allegedly inaccurate.¹⁴⁵

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.”¹⁴⁶ On 8 November 2016, the Board delegated its authority to negotiate and execute contracts to ICANN’s CEO or his designee.¹⁴⁷ 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].”¹⁴⁸

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.¹⁴⁹ The BAMC 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 process and the terms of the .ORG Renewed RA were consistent with ICANN’s Bylaws and established policies and procedures.

¹⁴⁵ *Id.*, § 8, at Pgs. 8-9.

¹⁴⁶ Bylaws, Art. 21, § 21.1. *See also* Ombudsman’s Evaluation of Request 19-3, at Pg. 4.

¹⁴⁷ *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).

¹⁴⁸ 26 July 2019 Letter, at Pg. 2.

¹⁴⁹ 2 October 2019 Letter, at Pg. 2.

The Requestor argues on Rebuttal that the Board should determine that “the efficiency of a common set of registry contracts does not outweigh the Multistakeholder Model.”¹⁵⁰ This amounts to a disagreement with the ICANN Staff’s determination, made with the Board’s support, that ICANN’s Mission and Core Values were best served by proceeding with the Base RA. This disagreement does not, in itself, support reconsideration. For the reasons set forth above, the .ORG Renewed RA did not contradict ICANN Bylaws, policies, or procedures. Reconsideration is not warranted on this ground.

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.¹⁵¹ 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.”¹⁵²

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.”¹⁵³ 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

¹⁵⁰ Rebuttal, at Pg. 4.

¹⁵¹ Request 19-3, § 8, at Pg. 8.

¹⁵² *Id.*

¹⁵³ Report of Public Comments, at Pg. 6.

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.¹⁵⁴ The Report of Public Comment acknowledged that commenters opposed the inclusion of URS RPMs in the .ORG Renewed RA.¹⁵⁵ 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.¹⁵⁶

3. *ICANN Staff And The Board Were Not Aware Of The Sale Of PIR When They Considered The .ORG Renewed RA.*

During its 25 November 2019 presentation to the BAMC, the Requestor asserted that ICANN Staff and/or the Board failed to consider material information because it may have known about—but not considered—the contemplated sale of PIR prior to execution of the .ORG Renewed RA on 30 June 2019. This argument does not support reconsideration because it rests on the false presumption that ICANN Staff or the Board were aware of the transaction before entering into the .ORG Renewed RA. They were not.¹⁵⁷

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.

¹⁵⁴ 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.”).

¹⁵⁵ *Id.*, at Pg. 6.

¹⁵⁶ <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/>.

¹⁵⁷ See Section V.E, *infra*.

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.”¹⁵⁸

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 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.¹⁵⁹ Therefore, this request does not support reconsideration.

¹⁵⁸ 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.

¹⁵⁹ See Bylaws, Art. 1, § 1.2(a)(v).

E. The Parent Company of the .ORG Registry Operator Is Not Relevant to the Reconsideration Request and Does Not Support Reconsideration.

The Requestor argues that the sale of PIR to private equity firm Ethos Capital “invites additional scrutiny.”¹⁶⁰ However, PIR’s corporate structure is not relevant to Request 19-3, which concerns the 30 June 2019 renewal of the .ORG RA and must be evaluated in accordance with the grounds for reconsideration as set forth in ICANN’s Bylaws. The Ethos Capital acquisition of PIR, which was announced more than four months after the execution of the .ORG Renewed RA, did not impact ICANN Staff’s determination that ICANN’s Mission and Core Values were best served by migrating the .ORG RA to the Base RA.¹⁶¹

In sum, Request 19-3 is not the appropriate vehicle for challenging Ethos Capital’s acquisition of PIR.

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 and the BAMC’s recommendation that the Board adopt this Final Determination, the Board concludes that ICANN org’s execution of the .ORG Renewed RA was consistent with ICANN’s Bylaws, policies, and procedures, and that ICANN Staff did not fail to consider material information or rely on false or inaccurate relevant information in executing the Agreement. Further, the Board did not fail to consider material information or rely on false or inaccurate material information

¹⁶⁰ Rebuttal, at Pg. 6.

¹⁶¹ See Section II.C, *supra*. Neither ICANN Staff nor PIR were aware that Ethos Capital would acquire PIR when the parties finalized the .ORG Renewed RA. See <http://domainincite.com/24988-i-attempt-to-answer-icas-questions-about-the-terrible-blunder-org-acquisition>.

by allowing ICANN Staff to execute the .ORG Renewed RA without a formal vote by the Board. Accordingly, the Board denies Request 19-3.

While the Board has denied Request 19-3, the Board acknowledges that many members of the .ORG community have voiced substantial concerns regarding the terms of the .ORG Renewed RA; concerns which the members of the .ORG community feel were ignored by PIR. The .ORG community is in the best position to engage PIR in that important discussion. The Board notes that it is within any registry's right to propose contract amendments for evaluation by the org.

Further, the Board acknowledges (and the Requestor points out in its Rebuttal) the recently announced acquisition of PIR, the current .ORG registry operator, and the results of that transaction is something that ICANN organization will be evaluating as part of its normal process in such circumstances.

FINAL DETERMINATION OF THE ICANN BOARD
RECONSIDERATION REQUEST 19-3
12 December 2019

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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
- (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

² Request 19-3, § 3, at Pg 2

³ *Id.*, § 8, at Pg 5

⁴ *Id.*

⁵ *Id.*

⁶ Request 19-3, § 8, at Pg 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

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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 .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.

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>

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

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 renewal. ICANN org described the material differences between the proposed renewal and the then current .ORG RA. These differences included in relevant part, that

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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 Renewed RA.¹⁶ The comments predominantly related to three themes: (1) the proposed removal of limits on domain name registration fees; (2) inclusion of the URS RPMs; and (3) the RA renewal process.¹⁷

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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>

¹⁷ *Id.*

ICANN org analyzed the public comments, including those addressing the proposed URS RPMs, 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

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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

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

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-

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²¹ *Id.*

²² *Id.*

²³ *Id.*, at Pg 1

²⁴ 26 July 2019 Letter, at Pg 2

²⁵ *See id.*

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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

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

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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>

that the .ORG RA renewal process was not a policy matter and therefore not subject to multistakeholder input.³⁰

The Board adopted a Proposed Determination denying Request 19-3 on 3 November 2019.³¹ On 18 November 2019, the Requestor submitted a rebuttal to the Board’s Proposed Determination. The Requestor argued that: (1) the Board “has not carefully considered” that the URS is not Consensus Policy and the Generic Names Supporting Organization (GNSO) did not “extend the URS to legacy gTLDs”; (2) including the URS RPMs in the .ORG Renewed RA “[i]ntrud[es] on a policy determination currently pending in the GNSO’s multistakeholder policy development process”; (3) the Board “retains the power to decide whether efficiency of harmonized contracts outweighs the Multistakeholder Model”; and (4) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed “heightens the need” for the Board to “spend more time and discussion on the .ORG contract renewal challenges.”³²

On 25 November 2019, the Requestor made an oral telephonic presentation to the BAMC,³³ reiterating the arguments made in its Request and Rebuttal, and additionally suggesting that ICANN Staff may have been aware of the sale of PIR before 30 June 2019, but failed to consider the information in renewing the .ORG Renewed RA.³⁴

³⁰ *Id.*

³¹ Board Action on Proposed Determination on Request 19-3, https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1_b_Proposed_Determination_on_Request_19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-board-proposed-determination-03nov19-en.pdf>

³² Requestor’s Rebuttal to ICANN Board’s Proposed Determination on Request 19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-rebuttal-board-proposed-determination-19nov19-en.pdf>

³³ The BAMC’s membership changed on 7 November 2019. *See* Proposed Determination on Request 19-3, at Pg. 1 n 1.

³⁴ Requestor’s Presentation Materials for Oral Presentation to the BAMC, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-presentation-redacted-25nov19-en.pdf>

The BAMC considered Request 19-3 and all relevant materials. Based on its extensive review of all relevant materials, the BAMC suggested that the Board adopt this Final Determination, which 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, and that ICANN Staff did not fail to consider material information or rely on false or inaccurate relevant information in executing the Agreement. 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 a formal vote by the Board. Accordingly, the Board denies Request 19-3.

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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).³⁵ The 2003 .ORG RA included limits on the prices that PIR could charge registrars for registry services.³⁶

On 27 June 2006, ICANN posted for public comment proposed new RAs for the operation of .ORG, among others.³⁷ 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."³⁸ 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

³⁵ 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>

³⁶ See 2003 .ORG RA, Art 3, § 3.14.5, <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>

³⁷ 2006 Public Comment of BIZ, INFO, .ORG, <https://www.icann.org/news/announcement-3-2006-07-28-en>

³⁸ *Id*

renegotiated the RA to include price caps.³⁹ Following a public comment period for the revised 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.⁴⁰

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.⁴¹ In 2007, the GNSO concluded that “ICANN must implement a process that allows the introduction of new [gTLDs].”⁴² Accordingly, ICANN org established and implemented the New gTLD Program, “enabling the largest expansion of the [DNS].”⁴³

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.⁴⁴ It was established in 2013 and aligns with the GNSO’s policy recommendations for new gTLDs.⁴⁵ The URS was developed and adopted into the Base RA after extensive community input, including review by the GNSO Council.⁴⁶ Specifically, the URS was recommended by the Implementation Recommendation Team (IRT) as a mandatory rights

³⁹ See Revised BIZ, INFO and ORG Registry Agreements Posted for Public Comment,

<https://www.icann.org/news/announcement-2006-10-24-en>

⁴⁰ 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>

⁴¹ <https://newgtlds.icann.org/en/about/program>

⁴² GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007,

https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015

⁴³ <https://newgtlds.icann.org/en/about/program>

⁴⁴ 26 July 2019 Letter, at Pg. 1

⁴⁵ *Id.*

⁴⁶ *Id.*, at Pg. 2

protection mechanism for all new gTLDs from the 2012 round of the New gTLD Program.⁴⁷
The GNSO was asked to provide its view on whether certain proposed rights protection mechanisms (including the URS) were consistent with the GNSO's proposed policy on the introduction of new gTLDs and were the appropriate and effective option for achieving the GNSO's stated principles and objectives.⁴⁸ The GNSO concluded that the URS was not inconsistent with any of its existing policy recommendations.⁴⁹ That said, 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 that applied during the 2012 New gTLD round.⁵⁰

Since 2014, ICANN org has negotiated with legacy gTLD registry operators that choose to transition their agreements to the Base RA. Several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in agreement renewals.⁵¹
The inclusion of the URS into these renewed RAs was the result of the bilateral negotiations between those registry operators and ICANN.

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].”⁵³ Additionally, using the Base RA ensures that the Registry will use

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⁴⁷ See Rationale for Board Resolution 2015 09 28 06, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1 e>

⁴⁸ *Id.*

⁴⁹ *Id.*; see also <https://www.icann.org/news/announcement-2-2009-12-17-en>

⁵⁰ See IRT Report, <https://archive.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf> Special Trademark Issues Review Team Recommendations, https://gns0.icann.org/sites/default/files/filefield_8000/sti-wt-recommendations-11dec09-en.pdf, <https://www.icann.org/news/announcement-2-2009-12-17-en>

⁵¹ *Id.*

⁵³ 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->

“uniform and automated processes, which will facilitate operation of the TLD,” and “includes safeguards in the form of public interest commitments in Specification 11.”⁵⁴

The Board has explained that transitioning legacy gTLDs to the Base RA “will provide consistency across all registries leading to a more predictable environment for end-users.”⁵⁵ 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.”⁵⁶ 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,”⁵⁷ another public benefit.

In February 2016, the GNSO established a Rights Protection Mechanisms Policy Development Process Working Group (RPM PDP 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.”⁵⁸ The RPM PDP Working Group’s work is ongoing,⁵⁹ and currently no policy requires or prohibits registries from adopting URS.⁶⁰ The Board has directed ICANN org not to stop its work merely because it is the subject

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[material/resolutions-2015-09-28-en#1 d rationale](https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf) 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>

⁵⁴ 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>

⁵⁵ Rationale for Board Resolution 2015 09 28 06

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See GNSO Council Resolution [20160218-3](https://gns0.icann.org/en/council/resolutions#20160218-3), <https://gns0.icann.org/en/council/resolutions#20160218-3> Charter for RPM PDP Working Group, https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf The 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>

⁵⁹ See <https://gns0.icann.org/en/group-activities/active/rpm>

⁶⁰ 26 July 2019 Letter, at Pg 2

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of policy development discussions.⁶¹ 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.”⁶² The Board previously concluded

the URS has not been adopted as consensus policy and that ICANN therefore has no ability to impose the URS (or other new RPMs applicable to new gTLDs) on legacy TLDs. The existence of certain RPMs in the Renewed Registry Agreements, therefore, has no bearing on the GNSO policy development process to determine whether (or not) any of the new RPMs should be consensus policies applicable to all gTLDs.⁶³

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C. The 2019 .ORG RA Renewal.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.⁶⁴ 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.”⁶⁵ 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.⁶⁶ 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.⁶⁷

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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

⁶¹ *Id.*

⁶² Rationale for Board Resolution 2019 03 14 02, <https://www.icann.org/resources/board-material/resolutions-2019-03-14-en#1 b rationale>

⁶³ Board Action on Requests 15-19 and 15-20, <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2 b>

⁶⁴ 2019 .ORG RA Public Comment Proceeding

⁶⁵ *See id.*

⁶⁶ 26 July 2019 Letter, at Pg 2

⁶⁷ *Id.*

version of the proposed renewal agreement against the Base RA and identified the material 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.⁶⁸

ICANN org explained that the change would “allow the .org renewal agreement to better conform with the [Base RA].”⁶⁹ 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].”⁷⁰

The public comment period for the .ORG Renewed RA opened on 18 March 2019 and closed on 29 April 2019.⁷¹ During that time, ICANN org received over 3,200 submissions.⁷² 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.⁷³

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].”⁷⁴

⁶⁸ 2019 ORG RA Public Comment Proceeding

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Report of Public Comments at Pg 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>

⁷³ *Id.*

⁷⁴ 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.⁷⁵ The NCSG noted that: (1) the RPMs were “expressly not added to . . . legacy gTLDs” in 2010; and (2) the RPM PDP 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.⁷⁶

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*.”⁷⁷

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.”⁷⁸ 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 PDP 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.⁷⁹

⁷⁵ Comment, NCSG, 18 March 2019, https://mm.icann.org/pipermail/comments-org-renewal-18mar19/attachments/20190430/b10daf64/NCSG_ORGRenewalComment.pdf

⁷⁶ *Id.*, at Pg 1

⁷⁷ *Id.* (emphasis in original)

⁷⁸ Report of Public Comments at Pg 6 ICANN org received some comments supporting the RPMs *Id.*, at Pgs 6-

⁷⁹ *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.⁸⁰

ICANN org detailed its analysis of the public comments—including those concerning the proposed inclusion of RPMs—in its Report of Public Comments.⁸¹ 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.⁸²

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.”⁸³

ICANN org “review[ed] and consider[ed] all 3,200+ comments received,” in response to the proposed .ORG Renewed RA.⁸⁴ ICANN Staff then briefed the ICANN Board on its analysis of the public comments during the Board’s workshop on 21-23 June 2019.⁸⁵ 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.⁸⁶ The Board did not vote on whether to execute the .ORG Renewed RA.

⁸⁰ *Id.*

⁸¹ *Id.*, at Pg 9

⁸² *Id.*

⁸³ *Id.*, at Pg 1

⁸⁴ 26 July 2019 Letter, at Pg 2

⁸⁵ *Id.*

⁸⁶ See ICANN org announcements: ORG Registry Agreement, <https://www.icann.org/resources/agreement/org-2019-06-30-en>

D. The Request for Reconsideration.

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

Pursuant to Article 4, Section 4.2(l) of the Bylaws, ICANN org transmitted Request 19-3 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.⁸⁷

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] 19-3.⁸⁸

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.⁸⁹

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.⁹⁰ 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

⁸⁷ <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-ombudsman-action-redacted-27aug19-en.pdf>

⁸⁸ 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>

⁸⁹ *Id.*, at Pg 6

⁹⁰ *Id.*, at Pg 5

governance, and not a “policy matter” about which the ICANN community would be entitled to greater input.⁹¹

On 2 October 2019, the Requestor submitted a letter to the BAMC “to address certain errors” in the Ombudsman’s evaluation.⁹² 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.⁹³

The Board adopted a Proposed Determination denying Request 19-3 on 3 November 2019.⁹⁴ On 18 November 2019, the Requestor submitted a rebuttal to the Board’s Proposed Determination. The Requestor argued that: (1) the Board “has not carefully considered” that the GNSO did not “extend the URS to legacy gTLDs”; (2) including the URS in the .ORG Renewed RA “[i]ntrud[es] on a policy determination currently pending in the GNSO’s multistakeholder policy development process”; (3) the Board “retains the power to decide whether efficiency of harmonized contracts outweighs the Multistakeholder Model”; and (4) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed “heightens the need” for the Board to “spend more time and discussion on the .ORG contract renewal challenges.”⁹⁵

On 25 November 2019, the Requestor made an oral telephonic presentation to the BAMC,⁹⁶ reiterating the arguments made in its Request and Rebuttal, and additionally

⁹¹ *Id.*, at Pg 4

⁹² 2 October 2019 Letter

⁹³ *Id.*

⁹⁴ Board Action on Proposed Determination on Request 19-3, https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1_b_Proposed_Determination_on_Request_19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-board-proposed-determination-03nov19-en.pdf>

⁹⁵ Requestor’s Rebuttal to ICANN Board’s Proposed Determination on Request 19-3, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-rebuttal-board-proposed-determination-19nov19-en.pdf>

⁹⁶ See note 32, *supra*

suggesting that ICANN Staff may have been aware of the sale of PIR before 30 June 2019, but failed to consider it.⁹⁷

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.’⁹⁸

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.”⁹⁹ 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.”¹⁰⁰

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

⁹⁷ Requestor’s Presentation Materials for Oral Presentation to the BAMC, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-requestor-presentation-redacted-25nov19-en.pdf>

⁹⁸ Request 19-3, § 9, at Pg 9

⁹⁹ *Id.*

¹⁰⁰ *Id.*, § 8, at Pg 9

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."¹⁰¹

The Board now considers ~~the Requestor'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 ~~BAMC~~ has reviewed the Request and ~~all relevant materials and has recommended that the Board adopt this Final Determination~~, Denial of a Request for Reconsideration of ICANN Staff action and Board inaction is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.¹⁰³

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V. Analysis and Rationale.

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

¹⁰¹ Bylaws, Art 4 §§ 4 2(a) and (c)

¹⁰³ Bylaws, Art 4 § 4 2(e)

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.”¹⁰⁴ 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.”¹⁰⁵ 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.”¹⁰⁶ 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.”¹⁰⁷ In its Rebuttal, the Requestor reiterates this point, arguing that the GNSO adopted the URS “expressly for new gTLDs,” and that ICANN org has not “shown any knowledge of the dangers of applying the URS to millions of legacy, noncommercial registrants.”¹⁰⁸

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 Registry and the public comments, including the Requestor’s opposition to incorporating the

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Request 19-3, § 8, at Pg 6

¹⁰⁷ *Id.*

¹⁰⁸ Rebuttal, at Pgs 2-3

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. As discussed above, the IRT recommended that the URS as a mandatory rights protection mechanism for all new gTLDs from the 2012 round of the New gTLD Program. The GNSO was asked to provide its view on whether certain proposed rights protection mechanisms (which included the URS) were consistent with the GNSO's proposed policy on the introduction of New gTLDs and were the appropriate and effective option for achieving the GNSO's stated principles and objectives.¹⁰⁹ The GNSO concluded that the URS was not inconsistent with any of its existing policy recommendations.¹¹⁰ The URS has not been adopted as a Consensus Policy and ICANN has no ability to make it mandatory for any TLDs other than those delegated as a result of the 2012 round of the New gTLD Program.¹¹¹ As a result, when considering a similar challenge to migrating legacy gTLD RAs to the Base RA during the renewal process, the Board concluded that including the URS RPMs was not inconsistent with ICANN Bylaws or established policies or procedures.¹¹²

There is 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

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¹⁰⁹ Rationale for Board Resolution 2015 09 28 06

¹¹⁰ *Id.* see also <https://www.icann.org/news/announcement-2-2009-12-17-en>

¹¹¹ See IRT Report, <https://archive.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf> Special Trademark Issues Review Team Recommendations, https://gns0.icann.org/sites/default/files/filefield_8000/sti-wt-recommendations-11dec09-en.pdf, <https://www.icann.org/news/announcement-2-2009-12-17-en>

¹¹² Board Governance Committee (BGC) Recommendation on Requests 15-19 & 15-20, at Pg. 6, <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf>, adopted by Board Resolution 2016 02 03 11, <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2b>. The BGC noted that although the Board determined that the URS was not inappropriate for legacy gTLDs, this conclusion was “not a move to make the URS mandatory for any legacy TLDs, and it would be inappropriate to do so” *Id.* at Pg. 7.

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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.”¹¹³ The Requestor may prefer a different RPM mechanism, but its disagreement does not support reconsideration.

The Requestor also argues in its Rebuttal that “the URS was developed in response to a very specific situation and was not intended for more complicated cases.”¹¹⁴ The Requestor has not shown that these “more complicated cases” are unique to .ORG registrants. They are not. The Requestor implies that URS is the *sole* RPM applicable to .ORG. But as discussed below, all registrars must employ the UDRP.¹¹⁵ The URS does not replace the UDRP; it supplements it. The Requestor has not shown that including the URS among the RPMs applicable to .ORG registrants contradicts any established ICANN policy or procedure. Reconsideration is not warranted.

The Requestor asserts that the Ombudsman did not address this argument.¹¹⁶ 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.

¹¹³ Request 19-3, § 8, at Pg 6

¹¹⁴ Rebuttal, at Pg 3

¹¹⁵ See § V B 1, *infra*; see also UDRP, <https://www.icann.org/resources/pages/help/dndr/udrp-en>

¹¹⁶ 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 Mission, Commitments, and Core Values because ICANN Staff acted: (1) before the RPM PDP Working Group concluded its evaluation of all RPMs; and (2) in spite of the public comments opposing the inclusion of the URS RPMs.¹¹⁷ 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."*
 - a. ICANN org's bilateral negotiations with PIR were consistent with ICANN org's Commitment.

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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."¹¹⁸ 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."¹¹⁹

The multistakeholder model is an important mechanism for ICANN's policy development. But no ICANN Bylaws provision, policy, or procedure requires that every "substantive change" to the .ORG RA or other new or legacy gTLD RAs must result from the multistakeholder policy development process. Such a requirement would eliminate ICANN's and the Registry Operators' ability to negotiate the terms of the RAs.

¹¹⁷ *Id.* § 6, at Pgs 3-4

¹¹⁸ Request 19-3, § 8, at Pg 7

¹¹⁹ *Id.* § 6, at Pg 3

Although all new gTLD registry operators must adopt the Base RA (but may request deviations from it), no consensus policy requires a legacy registry operator to adopt the Base RA. All RAs include a presumptive right of renewal clause. This clause provides a registry operator the right to renew the RA at its expiration, provided the registry operator is in good standing (e.g., the registry operator does not have any uncured breaches), and subject to the terms of their presumptive renewal clauses.¹²⁰

In the course of engaging with a legacy registry operator on renewing its RA, ICANN org prefers to and proposes that the registry operator adopts the Base RA that is used by new gTLDs as the starting point for the negotiations. As discussed above, the Base RA includes several enhancements that benefit the domain name ecosystem such as better safeguards in dealing with domain name infrastructure abuse, emergency backend support, as well as adoption of new bilaterally negotiated provisions that ICANN org and the gTLD Registries Stakeholder Group conduct from time to time for updates to the form agreement, and adoption of new services (e.g., RDAP) and procedures.

Although ICANN org proposes the Base RA as a starting place for the renewal discussions, because of the registry operator's presumptive right of renewal, ICANN org is not in a position to mandate the new form as a condition of renewal. If a registry operator states a strong preference for maintaining its existing legacy agreement form, ICANN org would accommodate such a position, and has done so in at least one such instance.

b. Including the URS RPMs in the .ORG Renewed RA does not contravene the GNSO's policy development process.

¹²⁰ See, e.g., .ORG 2013 RA, Art. 4, § 4.2, <https://www.icann.org/resources/unthemed-pages/org-agmt-html-2013-09-12-en>

The Requestor asserts that ICANN org’s agreement with PIR, to include the URS RPMs, in the .ORG Renewed RA improperly “bypass[ed] the RPM [PDP] Working Group . . . , den[ying] EFF and other RPM [PDP] Working Group participants meaningful input into this change.”¹²¹ The Requestor asserts that taking this action via bilateral negotiations, rather than waiting for the results of the RPM PDP 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:

[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.¹²²

The Requestor reiterates this argument in its Rebuttal, without making new points.¹²³

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.”¹²⁴ 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

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¹²¹ Request 19-3, § 6, at Pg 3

¹²² Request 19-3, § 8, at Pgs 5-6

¹²³ Rebuttal, at Pgs 3-4

¹²⁴ Bylaws, Art 1, § 1 2(b)(v)

implemented.”¹²⁵ The RPM PDP Working Group has not concluded its work.¹²⁶ Once the RPM PDP Working Group concludes its inquiry and to the extent the GNSO makes a community recommendations on RPMs, the Board will take the recommendations 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.¹²⁷ 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.¹²⁸ The inclusion of the URS RPMs in the .ORG Renewed RA resulted from bilateral negotiations between PIR and ICANN organization. PIR was free to elect not to include the URS RPMs in the renewed agreement, but it did not do so. The Requestor presents no evidence demonstrating that the PIR objected to the inclusion of the URS RPMs in the .ORG Renewed RA. As such, there is no evidence that the voluntary inclusion of the URS RPMs into the .ORG Renewed RA in any way contravenes the work of the RPM PDP Working Group. The existence of the RPM PDP Working Group is not, in itself, grounds for reconsidering Staff’s action.

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ICANN org’s practice of following *existing* policies and procedures rather than speculating on the future based on potential future community recommendations, as the RPM PDP Working Group has not yet issued recommendations, supports ICANN org’s Core Value of

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¹²⁵ Rationale for Board Resolution 2019 03 14 02, https://www.icann.org/resources/board-material/resolutions-2019-03-14-en#1b_rationale

¹²⁶ See <https://community.icann.org/display/RARPMRIAGPWG/Review+of+all+Rights+Protection+Mechanisms+in+all+gTLDs+PDP+Home> <https://enso.icann.org/en/group-activities/active/rpm>

¹²⁷ As noted above, the URS is not Consensus Policy for legacy gTLDs. It was developed to implement the 2007 new gTLD policy recommendations. Specifically, it grew from GNSO Policy Recommendation 3, that “Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.” <https://enso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>

¹²⁸ This approach is consistent with the Board’s action on Requests 15-19 & 15-20, discussed in Section II B, *supra*

operating with efficiency.¹²⁹ The RPM PDP Working Group was charged with assessing “all RPMs in all gTLDs, . . . (including but not limited to the UDRP).”¹³⁰ 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.¹³¹ 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 PDP Working Group’s ongoing analysis—which includes the UDRP—until the RPM PDP 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 PDP 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 PDP Working Group finishes its work.¹³² 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.¹³³ 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.

For the above reasons, the Requestor has not demonstrated that the .ORG Renewed RA contravenes the RPM PDP Working Group’s ongoing work.

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¹²⁹ Bylaws, Art 1, § 1 2(b)(v)

¹³⁰ See GNSO Council Resolution 20160216-3, <https://enso.icann.org/en/council/resolutions#20160218-3>; Charter for RPM PDP Working Group, https://enso.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf

¹³¹ Request 19-3, § 7, at Pg 5

¹³² 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

¹³³ See UDRP, <https://www.icann.org/resources/pages/help/dndr/udrp-en>

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."¹³⁴

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*."¹³⁵

At bottom, the Requestor believes that "the voice of registrants was excluded" from the RA renewal process.¹³⁶ The Requestor is incorrect. ICANN Staff reviewed and considered each of the more than 3,200 comments submitted during the public comment period.¹³⁷ ICANN Staff presented and discussed the public comments and "key issues raised in the public comment process and correspondence"—including the [URS RPMs](#)—with the Board before executing the .ORG Renewed RA.¹³⁸

¹³⁴ Request 19-3, § 8, at Pgs 5-6

¹³⁵ Request 19-3, § 6, at Pg 4 (emphasis in original)

¹³⁶ *Id.*

¹³⁷ 26 July 2019 Letter, at Pg 2

¹³⁸ 26 July 2019 Letter, at Pg 2.

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.¹³⁹ 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 Board¹⁴⁰—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, 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

¹³⁹ 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.”)

¹⁴⁰ 26 July 2019 Letter, at Pg 2

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."¹⁴¹

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.¹⁴²

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 registration for up to 10 years *before* any increases take effect.¹⁴³ ICANN Staff also noted that migrating .ORG to the Base RA protects other stakeholders by providing "additional safeguards

¹⁴¹ 26 July 2019 Letter, at Pg 1

¹⁴² See Rationale for Board Resolution 2015 09 28 06

¹⁴³ Report of Public Comments, at Pg 8

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.”¹⁴⁴ 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.¹⁴⁵ 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.”¹⁴⁶

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.¹⁴⁷ Likewise, the Requestor identifies relevant information—*i.e.*, ICANN org’s summary of the public comments, which the Requestor asserts

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¹⁴⁴ *Id.*

¹⁴⁵ Request 19-3 § 8, at Pgs 8-9

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*, § 8, at Pg 8

“mischaracteriz[ed]” the “full nature and scope of the comments”—that was allegedly inaccurate.¹⁴⁸

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.”¹⁴⁹ On 8 November 2016, the Board delegated its authority to negotiate and execute contracts to ICANN’s CEO or his designee.¹⁵⁰ 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].”¹⁵¹

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.¹⁵² The BAMC 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 process and the terms of the .ORG Renewed RA were consistent with ICANN’s Bylaws and established policies and procedures.

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¹⁴⁸ *Id.*, § 8, at Pgs 8-9

¹⁴⁹ Bylaws, Art 21, § 21.1 See also Ombudsman’s Evaluation of Request 19-3, at Pg 4

¹⁵⁰ 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)

¹⁵¹ 26 July 2019 Letter, at Pg 2

¹⁵² 2 October 2019 Letter, at Pg 2

The Requestor argues on Rebuttal that the Board should determine that “the efficiency of a common set of registry contracts does not outweigh the Multistakeholder Model.”¹⁵³ This amounts to a disagreement with the ICANN Staff’s determination, made with the Board’s support, that ICANN’s Mission and Core Values were best served by proceeding with the Base RA. This disagreement does not, in itself, support reconsideration. For the reasons set forth above, the .ORG Renewed RA did not contradict ICANN Bylaws, policies, or procedures. Reconsideration is not warranted on this ground.

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.¹⁵⁴ 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.”¹⁵⁵

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.”¹⁵⁶ 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

¹⁵³ [Rebuttal, at Pg 4](#)

¹⁵⁴ Request 19-3, § 8, at Pg 8

¹⁵⁵ *Id.*

¹⁵⁶ Report of Public Comments, at Pg 6

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.¹⁵⁷ The Report of Public Comment acknowledged that commenters opposed the inclusion of URS RPMs in the .ORG Renewed RA.¹⁵⁸ 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.¹⁵⁹

3. *ICANN Staff And The Board Were Not Aware Of The Sale Of PIR When They Considered The .ORG Renewed RA.*

During its 25 November 2019 presentation to the BAMC, the Requestor asserted that ICANN Staff and/or the Board failed to consider material information because it may have known about—but not considered—the contemplated sale of PIR prior to execution of the .ORG Renewed RA on 30 June 2019. This argument does not support reconsideration because it rests on the false presumption that ICANN Staff or the Board were aware of the transaction before entering into the .ORG Renewed RA. They were not.¹⁶⁰

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.

¹⁵⁷ 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”)

¹⁵⁸ *Id.*, at Pg 6

¹⁵⁹ <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/>

¹⁶⁰ See Section V E, *infra*

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.”¹⁶¹

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 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.¹⁶² Therefore, this request does not support reconsideration.

¹⁶¹ 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.

¹⁶² See Bylaws, Art 1, § 1 2(a)(v)

E. The Parent Company of the .ORG Registry Operator Is Not Relevant to the Reconsideration Request and Does Not Support Reconsideration.

The Requestor argues that the sale of PIR to private equity firm Ethos Capital “invites additional scrutiny.”¹⁶³ However, PIR’s corporate structure is not relevant to Request 19-3, which concerns the 30 June 2019 renewal of the .ORG RA and must be evaluated in accordance with the grounds for reconsideration as set forth in ICANN’s Bylaws. The Ethos Capital acquisition of PIR, which was announced more than four months after the execution of the .ORG Renewed RA, did not impact ICANN Staff’s determination that ICANN’s Mission and Core Values were best served by migrating the .ORG RA to the Base RA.¹⁶⁴

In sum, Request 19-3 is not the appropriate vehicle for challenging Ethos Capital’s acquisition of PIR.

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 and the BAMC’s recommendation that the Board adopt this Final Determination, the Board concludes that ICANN org’s execution of the .ORG Renewed RA was consistent with ICANN’s Bylaws, policies, and procedures, and that ICANN Staff did not fail to consider material information or rely on false or inaccurate relevant information in executing the Agreement. Further, the Board did not fail to consider material information or rely on false or inaccurate material information

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¹⁶³ Rebuttal at Pg 6

¹⁶⁴ See Section II C. supra. Neither ICANN Staff nor PIR were aware that Ethos Capital would acquire PIR when the parties finalized the .ORG Renewed RA. See <http://domainincite.com/24988-1-attempt-to-answer-icas-questions-about-the-terrible-blunder-org-acquisition>

by allowing ICANN Staff to execute the .ORG Renewed RA without a formal vote by the Board.
Accordingly, the Board denies Request 19-3.

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While the Board has denied Request 19-3, the Board acknowledges that many members of the .ORG community have voiced substantial concerns regarding the terms of the .ORG Renewed RA: concerns which the members of the .ORG community feel were ignored by PIR. The .ORG community is in the best position to engage PIR in that important discussion. The Board notes that it is within any registry's right to propose contract amendments for evaluation by the org.

Further, the Board acknowledges (and the Requestor points out in its Rebuttal) the recently announced acquisition of PIR, the current .ORG registry operator, and the results of that transaction is something that ICANN organization will be evaluating as part of its normal process in such circumstances.

Deleted: 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(g) of the Bylaws.

Resolved (2019.12.12.Cxx), specific items within this resolution shall remain confidential as an "action relating to personnel or employment matters", pursuant to Article III, section 5.2 of the ICANN Bylaws.

PROPOSED PUBLIC RESOLUTION:

Whereas, each Board member has confirmed that he/she does not have a conflict of interest with respect to establishing the amount of payment to the President and CEO for the first half of FY20 at-risk compensation component.

Whereas, the Compensation Committee recommended that the Board approve payment to the President and CEO for the first half of his FY20 SR2 at-risk compensation.

Resolved (2019.12.12.xx), the Board hereby approves a payment to the President and CEO for his annual at-risk compensation component for the first half of FY20.

PROPOSED RATIONALE:

When the President and CEO was hired, he was offered a base salary, plus an at-risk component of his compensation package. This same structure exists today. Consistent with all personnel with the ICANN organization, the President and CEO is to be evaluated against specific goals, which the President and CEO sets in coordination with the Compensation Committee and the Board.

The President and CEO provided to the Compensation Committee his self-assessment of his mid-year achievements towards his FY20 goals. After reviewing, the Compensation Committee discussed and agreed with the President and CEO's self-assessment.

Following discussion, the Compensation Committee recommended that the Board approve payment to the President and CEO for his at-risk compensation for the first half of FY20. The Board agrees with the Compensation Committee's recommendation.

Taking this decision is in furtherance of ICANN's Mission and is in the public interest in that it helps ensure that President and CEO is sufficiently compensated in line with his performance in furtherance of the Mission, and which reflects that his goals are consistent with ICANN's Strategic and Operating plans.

While the decision to pay the President and CEO his at risk compensation for the first half of FY20 will have a fiscal impact on ICANN, it is an impact that was contemplated in the FY20 budget. This decision will not have an 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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