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:

__X___ **Board action/inaction**

__X___ **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/agreement/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)

X 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

X 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.

30 July 2019

Signature Date

Mitchell L. Stoltz

Print Name