

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.