

**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).<sup>1</sup> 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.”<sup>2</sup>

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

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<sup>1</sup> Request 19-3, § 3, at Pg. 2.

<sup>2</sup> *Id.*, § 8, at Pg. 5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 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.”<sup>6</sup>

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.<sup>7</sup>

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.’”<sup>8</sup>

## **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.<sup>9</sup> 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.<sup>10</sup> 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.

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, § 8, at Pgs. 8-9.

<sup>8</sup> *Id.*, § 9, at Pg. 9.

<sup>9</sup> 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>.

<sup>10</sup> *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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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

ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG Renewed RA.<sup>15</sup> 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.<sup>16</sup>

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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>.

<sup>11</sup> 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>.

<sup>12</sup> *Id.*

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

<sup>14</sup> *Id.*

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

<sup>16</sup> *Id.*

ICANN org analyzed the public comments, including those addressing the proposed URS RPMs, in its Report of Public Comments.<sup>17</sup> 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 gTLD<sup>18</sup> RAs on various grounds.”<sup>19</sup> 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.”<sup>20</sup> ICANN org then noted that it would “consider the feedback from the community on this issue,”<sup>21</sup> including “the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”<sup>22</sup>

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.”<sup>23</sup>

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

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<sup>17</sup> *Id.*, at Pg. 9.

<sup>18</sup> 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.

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

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, at Pg. 1.

<sup>23</sup> 26 July 2019 Letter, at Pg. 2.

<sup>24</sup> *See id.*

vote on the .ORG Renewed RA prior to execution. The .ORG Renewed RA included the URS RPMs.<sup>25</sup>

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.”<sup>26</sup> 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.”<sup>27</sup>

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.<sup>28</sup> 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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<sup>25</sup> See ICANN org announcement: .ORG Registry Agreement, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

<sup>26</sup> 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>.

<sup>27</sup> *Id.*, at Pg. 6.

<sup>28</sup> 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.<sup>29</sup>

The Board adopted a Proposed Determination denying Request 19-3 on 3 November 2019.<sup>30</sup> 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.”<sup>31</sup>

On 25 November 2019, the Requestor made an oral telephonic presentation to the BAMC,<sup>32</sup> reiterating the arguments made in its Request and Rebuttal<sup>33</sup>, and additionally

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<sup>29</sup> *Id.*

<sup>30</sup> 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>.

<sup>31</sup> 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>.

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

<sup>33</sup> In addition to Requestor’s Rebuttal to ICANN Board’s Proposed Determination on Request 19-3 and Requestor’s Oral Presentation to the BAMC, Kathryn Kleiman also submitted a note to the ICANN Board dated 12 December 2019, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-e-mail-correspondence-kleiman-to-icann-board-12dec19-en.pdf>.

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.<sup>34</sup>

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

On 27 June 2006, ICANN posted for public comment proposed new RAs for the operation of .ORG, among others.<sup>37</sup> 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

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<sup>34</sup> 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>.

<sup>35</sup> 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>.

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

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

registry services.”<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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

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.<sup>44</sup> It was established in 2013 and aligns with the GNSO’s policy recommendations for new gTLDs.<sup>45</sup> The URS was developed and adopted into the Base RA after extensive community input, including review by the GNSO Council.<sup>46</sup> Specifically, the URS was

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<sup>38</sup> *Id.*

<sup>39</sup> See Revised .BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, <https://www.icann.org/news/announcement-2006-10-24-en>.

<sup>40</sup> .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>.

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

<sup>42</sup> GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, [https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm#\\_Toc43798015](https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm#_Toc43798015).

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

<sup>44</sup> 26 July 2019 Letter, at Pg. 1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, at Pg. 2.



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.<sup>47</sup> 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.<sup>48</sup> The GNSO concluded that the URS was not inconsistent with any of its existing policy recommendations.<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup> 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

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<sup>47</sup> See Rationale for Board Resolution 2015.09.28.06, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e>.

<sup>48</sup> *Id.*

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

<sup>50</sup> 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://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>.

<sup>51</sup> *Id.*

security of the [DNS].”<sup>52</sup> 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.”<sup>53</sup>

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.”<sup>54</sup> 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.”<sup>55</sup> 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,”<sup>56</sup> 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.”<sup>57</sup> The RPM PDP Working Group’s work is ongoing,<sup>58</sup> and currently no policy requires or prohibits registries from adopting

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<sup>52</sup> 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>.

<sup>53</sup> 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>.

<sup>54</sup> Rationale for Board Resolution 2015.09.28.06.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 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](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>.

<sup>58</sup> See <https://gns0.icann.org/en/group-activities/active/rpm>.

URS.<sup>59</sup> The Board has directed ICANN org not to stop its work merely because it is the subject of policy development discussions.<sup>60</sup> 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.”<sup>61</sup> 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.<sup>62</sup>

C. The 2019 .ORG RA Renewal.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.<sup>63</sup> 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.”<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup>

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<sup>59</sup> 26 July 2019 Letter, at Pg. 2.

<sup>60</sup> *Id.*

<sup>61</sup> Rationale for Board Resolution 2019.03.14.02, <https://www.icann.org/resources/board-material/resolutions-2019-03-14-en#1.b.rationale>.

<sup>62</sup> Board Action on Requests 15-19 and 15-20, <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.b>.

<sup>63</sup> 2019 .ORG RA Public Comment Proceeding.

<sup>64</sup> *See id.*

<sup>65</sup> 26 July 2019 Letter, at Pg. 2.

<sup>66</sup> *Id.*

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.<sup>67</sup>

ICANN org explained that the change would “allow the .org renewal agreement to better conform with the [Base RA].”<sup>68</sup> 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].”<sup>69</sup>

The public comment period for the .ORG Renewed RA opened on 18 March 2019 and closed on 29 April 2019.<sup>70</sup> During that time, ICANN org received over 3,200 submissions.<sup>71</sup> 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.<sup>72</sup>

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

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<sup>67</sup> 2019 .ORG RA Public Comment Proceeding.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Report of Public Comments at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>.

<sup>72</sup> *Id.*

TLD,” and that “any new RPMs for .org must be developed by the ICANN community, not imposed unilaterally by [PIR].”<sup>73</sup>

ICANN’s Non-Commercial Stakeholder Group (NCSG) also submitted a comment opposing, among other things, inclusion of the RPMs in the .org Renewed RA.<sup>74</sup> 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.<sup>75</sup>

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*.”<sup>76</sup>

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.”<sup>77</sup> 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

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<sup>73</sup> The full text of Requestor’s Comment is available at <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/2019q2/003200.html>.

<sup>74</sup> Comment, NCSG, 18 March 2019, <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/attachments/20190430/b10daf64/NCSG.ORGRenewalComment.pdf>.

<sup>75</sup> *Id.*, at Pg. 1.

<sup>76</sup> *Id.* (emphasis in original).

<sup>77</sup> Report of Public Comments at Pg. 6. ICANN org received some comments supporting the RPMs. *Id.*, at Pgs. 6-7.

substantive policy for gTLDs by adopting elements of the [Base RA] into amended and renewed [RAs] for legacy gTLDs.<sup>78</sup>

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.<sup>79</sup>

ICANN org detailed its analysis of the public comments—including those concerning the proposed inclusion of RPMs—in its Report of Public Comments.<sup>80</sup> 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.<sup>81</sup>

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.”<sup>82</sup>

ICANN org “review[ed] and consider[ed] all 3,200+ comments received,” in response to the proposed .ORG Renewed RA.<sup>83</sup> ICANN Staff then briefed the ICANN Board on its analysis of the public comments during the Board’s workshop on 21-23 June 2019.<sup>84</sup> With support from the Board to proceed with execution of the proposed renewals and pursuant to the [ICANN](#)

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<sup>78</sup> *Id.*, at Pg. 6.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*, at Pg. 9.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*, at Pg. 1.

<sup>83</sup> 26 July 2019 Letter, at Pg. 2.

<sup>84</sup> *Id.*

[Delegation of Authority Guidelines](#), on 30 June 2019, ICANN org executed the .ORG Renewed RA.<sup>85</sup> The Board did not vote on whether to execute the .ORG Renewed RA.

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.<sup>86</sup>

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.<sup>87</sup>

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.<sup>88</sup>

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.<sup>89</sup> He also determined

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<sup>85</sup> See ICANN org announcements: .ORG Registry Agreement, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

<sup>86</sup> <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-ombudsman-action-redacted-27aug19-en.pdf>.

<sup>87</sup> 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>.

<sup>88</sup> *Id.*, at Pg. 6.

<sup>89</sup> *Id.*, at Pg. 5.

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.<sup>90</sup>

On 2 October 2019, the Requestor submitted a letter to the BAMC “to address certain errors” in the Ombudsman’s evaluation.<sup>91</sup> 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.<sup>92</sup>

The Board adopted a Proposed Determination denying Request 19-3 on 3 November 2019.<sup>93</sup> 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.”<sup>94</sup>

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<sup>90</sup> *Id.*, at Pg. 4.

<sup>91</sup> 2 October 2019 Letter.

<sup>92</sup> *Id.*

<sup>93</sup> 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>.

<sup>94</sup> 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,<sup>95</sup> 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.<sup>96</sup>

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.’<sup>97</sup>

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.”<sup>98</sup> 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.”<sup>99</sup>

**III. Issues Presented.**

The issues are as follows:

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<sup>95</sup> See note 32, *supra*.

<sup>96</sup> 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>.

<sup>97</sup> Request 19-3, § 9, at Pg. 9.

<sup>98</sup> *Id.*

<sup>99</sup> *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.”<sup>100</sup>

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.<sup>101</sup>

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<sup>100</sup> Bylaws, Art. 4 §§ 4.2(a) and (c).

<sup>101</sup> 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.”<sup>102</sup> 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.”<sup>103</sup> 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.”<sup>104</sup> 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.”<sup>105</sup> 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.”<sup>106</sup>

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

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Request 19-3, § 8, at Pg. 6.

<sup>105</sup> *Id.*

<sup>106</sup> 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.<sup>107</sup> The GNSO concluded that the URS was not inconsistent with any of its *existing* policy recommendations.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup>

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<sup>107</sup> Rationale for Board Resolution 2015.09.28.06.

<sup>108</sup> *Id.*; see also <https://www.icann.org/news/announcement-2-2009-12-17-en>.

<sup>109</sup> 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://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>.

<sup>110</sup> 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.”<sup>111</sup> 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.”<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> 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

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<sup>111</sup> Request 19-3, § 8, at Pg. 6.

<sup>112</sup> Rebuttal, at Pg. 3.

<sup>113</sup> See § V.B.1, *infra*; see also UDRP, <https://www.icann.org/resources/pages/help/dndr/udrp-en>.

<sup>114</sup> 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.<sup>115</sup> 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.”<sup>116</sup> 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.”<sup>117</sup>

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

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<sup>115</sup> *Id.* § 6, at Pgs. 3-4.

<sup>116</sup> Request 19-3, § 8, at Pg. 7.

<sup>117</sup> *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.<sup>118</sup>

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.

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<sup>118</sup> 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.”<sup>119</sup> 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.<sup>120</sup>

The Requestor reiterates this argument in its Rebuttal, without making new points.<sup>121</sup>

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.”<sup>122</sup> 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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<sup>119</sup> Request 19-3, § 6, at Pg. 3.

<sup>120</sup> Request 19-3, § 8, at Pgs. 5-6.

<sup>121</sup> Rebuttal, at Pgs. 3-4.

<sup>122</sup> Bylaws, Art. 1, § 1.2(b)(v).



implemented.”<sup>123</sup> The RPM PDP Working Group has not concluded its work.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> 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

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<sup>123</sup> Rationale for Board Resolution 2019.03.14.02, <https://www.icann.org/resources/board-material/resolutions-2019-03-14-en#1.b.rationale>.

<sup>124</sup> 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>.

<sup>125</sup> 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>.

<sup>126</sup> This approach is consistent with the Board’s action on Requests 15-19 & 15-20, discussed in Section II.B, *supra*.

operating with efficiency.<sup>127</sup> The RPM PDP Working Group was charged with assessing “all RPMs in all gTLDs, . . . (including but not limited to the UDRP).”<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup> 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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<sup>127</sup> Bylaws, Art. 1, § 1.2(b)(v).

<sup>128</sup> 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](https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf).

<sup>129</sup> Request 19-3, § 7, at Pg. 5.

<sup>130</sup> 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.

<sup>131</sup> 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.”<sup>132</sup>

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.*”<sup>133</sup>

At bottom, the Requestor believes that “the voice of registrants was excluded” from the RA renewal process.<sup>134</sup> The Requestor is incorrect. ICANN Staff reviewed and considered each of the more than 3,200 comments submitted during the public comment period.<sup>135</sup> 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.<sup>136</sup>

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<sup>132</sup> Request 19-3, § 8, at Pgs. 5-6.

<sup>133</sup> Request 19-3, § 6, at Pg. 4 (emphasis in original).

<sup>134</sup> *Id.*

<sup>135</sup> 26 July 2019 Letter, at Pg. 2

<sup>136</sup> 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.<sup>137</sup> 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 Board<sup>138</sup>—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

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<sup>137</sup> 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.”).

<sup>138</sup> 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.”<sup>139</sup>

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.<sup>140</sup>

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.<sup>141</sup> ICANN Staff also noted that migrating .ORG to the Base RA protects other stakeholders by providing “additional safeguards

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<sup>139</sup> 26 July 2019 Letter, at Pg. 1.

<sup>140</sup> See Rationale for Board Resolution 2015.09.28.06.

<sup>141</sup> 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.”<sup>142</sup> 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.<sup>143</sup> 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.”<sup>144</sup>

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.<sup>145</sup> Likewise, the Requestor identifies relevant information—*i.e.*, ICANN org’s summary of the public comments, which the Requestor asserts

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<sup>142</sup> *Id.*

<sup>143</sup> Request 19-3 § 8, at Pgs. 8-9.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*, § 8, at Pg. 8.

“mischaracteriz[ed]” the “full nature and scope of the comments”—that was allegedly inaccurate.<sup>146</sup>

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.”<sup>147</sup> On 8 November 2016, the Board delegated its authority to negotiate and execute contracts to ICANN’s CEO or his designee.<sup>148</sup> 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].”<sup>149</sup>

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.<sup>150</sup> 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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<sup>146</sup> *Id.*, § 8, at Pgs. 8-9.

<sup>147</sup> Bylaws, Art. 21, § 21.1. *See also* Ombudsman’s Evaluation of Request 19-3, at Pg. 4.

<sup>148</sup> *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).

<sup>149</sup> 26 July 2019 Letter, at Pg. 2.

<sup>150</sup> 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.”<sup>151</sup> 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.<sup>152</sup> 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.”<sup>153</sup>

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.”<sup>154</sup> 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

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<sup>151</sup> Rebuttal, at Pg. 4.

<sup>152</sup> Request 19-3, § 8, at Pg. 8.

<sup>153</sup> *Id.*

<sup>154</sup> 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.<sup>155</sup> The Report of Public Comment acknowledged that commenters opposed the inclusion of URS RPMs in the .ORG Renewed RA.<sup>156</sup> 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.<sup>157</sup>

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 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.<sup>158</sup> In order to state a proper reconsideration request, the Requestor would have to show that the ICANN Staff action was taken without consideration of material information available “for the Board’s or Staff’s consideration at the time of action or refusal to act.”<sup>159</sup> Since neither the Board nor ICANN Staff were aware of the PIR acquisition when the decision to renew the .ORG RA was made, there was no material information not considered, and therefore this is not a proper basis for reconsideration.

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<sup>155</sup> 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.”).

<sup>156</sup> *Id.*, at Pg. 6.

<sup>157</sup> <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/>.

<sup>158</sup> See Section V.E, *infra*.

<sup>159</sup> See Bylaws, Article 4, Section 4.2(c)(ii).

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.”<sup>160</sup>

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

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<sup>160</sup> 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.

domain name registrants—for discriminatory treatment.<sup>161</sup> Therefore, this request does not support reconsideration.

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.”<sup>162</sup> 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.<sup>163</sup>

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

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<sup>161</sup> See Bylaws, Art. 1, § 1.2(a)(v).

<sup>162</sup> Rebuttal, at Pg. 6.

<sup>163</sup> 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>.

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.

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.