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October 2, 2019

León Sánchez
Chair, Board Accountability Mechanisms Committee
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

RE: Ombudsman’s Evaluation of Request for Reconsideration 19-3

Dear Mr. Sánchez and Members of the Board Accountability Mechanisms Committee:

On behalf of Requestor the Electronic Frontier Foundation (“EFF”), I write to address certain errors in the ICANN Ombudsman’s September 7, 2019 “Substantive Evaluation” of EFF’s Request for Reconsideration. The Ombudsman’s Evaluation misstates EFF’s positions and reflects a fundamental misunderstanding of the issues. The Committee should disregard the Ombudsman’s Evaluation and recommend to the Board that EFF’s Request for Reconsideration be granted.

The Ombudsman first mischaracterizes EFF’s substantive opposition to the two contract provisions at issue.¹ EFF’s Request addresses several aspects of the proposed provisions that are inappropriate for the .org TLD, including the special difficulties that expedited dispute resolution mechanisms may pose for non-profit organizations, the likelihood of complex disputes involving noncommercial uses, and the lack of evidence that URS procedures are needed in the .org space. **The Ombudsman’s Evaluation does not acknowledge any of these points or the ICANN staff’s failure to respond to them.** Instead, it writes off EFF’s specific, practical concerns, claiming that EFF “believes that the vaunted .org TLD should be considered *sacred*, and because it has not in the past

¹ These are (1) the requirement that the Public Interest Registry (“PIR”) comply with Uniform Rapid Suspension (“URS”) rules; and (2) the explicit permission from ICANN for PIR to “at its election, implement additional protections of the legal rights of third parties” unilaterally and without further consultation with existing .org registrants or the ICANN community.

been subject to the same rules, it should not now (nor should it ever) be subject to the same rules as other TLDs.” That characterization is incorrect.

As for EFF’s procedural challenge, the Ombudsman’s response is logically incoherent and again fails to respond to the arguments EFF actually made. EFF’s Request argues that the ICANN staff’s decisions to apply URS rules to .org domains and to allow PIR to unilaterally implement other rights protection mechanisms (“RPMs”) were significant policy decisions and therefore should not have been the result of bilateral negotiations. Request at 3, 6. The policy-based nature of that decision is not reasonably subject to dispute. GNSO, one of the policy development and advisory organizations that make up the ICANN multistakeholder model, recognized as much when it initiated a Policy Development Process and tasked the RPM Working Group with exploring whether URS and other new rights protection mechanisms should apply to legacy gTLDs. https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf. And before the Working Group was convened, the General Counsel of ICANN confirmed that the topics to be reviewed were “properly within the scope of the ICANN policy process.” <https://gns0.icann.org/en/council/resolutions#201602>.

The Ombudsman purports to disagree with EFF that the .org renewal involved decisions on policy matters, which he defines as decisions “about setting the course for the future,” apparently based on his interpretation of a dictionary definition for the word “policy.” Evaluation at 4. His reasoning does not hold up to scrutiny.

First, the Ombudsman’s Evaluation focuses on the wrong decision, at too high a level of generality: the ICANN Board’s decision to delegate negotiation and execution of registry agreements to ICANN’s CEO and staff. Because the Board’s general practice is to delegate such tasks, the Ombudsman concludes that its decision to do so here was not a policy decision. Evaluation at 4. **But whether the delegation of contracting authority to ICANN staff was novel or routine has no bearing on whether the staff exercised that authority to intrude on policy matters inappropriate for resolution through “bilateral negotiations” between a registry operator and ICANN staff, as EFF argues.**

Second, even under the Ombudsman’s narrow definition of what constitutes a policy matter, the .org renewal plainly involved policy decisions made by ICANN staff and not approved by the Board or stakeholders. **In no sense does revising the .org registry agreement to add controversial provisions that materially affect the rights and protections afforded to .org registrants and that were the subject of thousands of public comments constitute “staying the course.”** Yet ICANN staff unilaterally decided to propose using the “Base Registry Agreement” developed for new gTLDs, including the URS requirement, for the renewed .org registry agreement. Furthermore, the Ombudsman acknowledges that the staff did so with the goal of “bring[ing], over time, the Legacy TLDs into conformity with all the newer TLDs.” Evaluation at 3. That

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is a paradigmatic example of “setting [a] course for the future,” and it encompasses decisions that GNSO working groups are actively deliberating over.

As EFF’s Request explains, ICANN’s conduct in reaching the new .org agreement was inconsistent with at least ICANN Commitment (iv) and ICANN Core Values (ii) and (vii), which collectively require ICANN to act in the public interest as ascertained through “open, transparent and bottom-up multistakeholder policy development processes.” To the extent the Ombudsman’s Evaluation addresses the application of these provisions at all, that assessment is unhelpful to the Committee. The Ombudsman admits to having only a “layman’s understanding” of the ICANN Bylaws and relies on a letter from an ICANN executive that itself misstates what the Bylaws instruct. Evaluation at 5. In particular, the passage quoted in the Evaluation elides material language from ICANN Core Value (iv), which instructs ICANN to “[i]ntroduc[e] and promot[e] competition in the registration of domain names *where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.*” The omitted language makes clear that ICANN staff’s unilateral determination that an action would be beneficial to competition is not sufficient to justify it under the Bylaws.

In sum, ICANN staff violated the Bylaws by making these important policy decisions on its own, without deference to the multistakeholder policy development process, without meaningfully responding to criticisms of its approach, and without determining whether its decision was in the public interest. And by allowing the staff to proceed this way unchecked, the Board likewise failed to fulfill its obligations under the Bylaws—responsibility for which the Board cannot simply abdicate. For these reasons, EFF respectfully asks the Board Accountability Mechanisms Committee to recommend that EFF’s Request for Reconsideration be granted.

Best regards,



Cara L. Gagliano
Electronic Frontier Foundation

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