

I do not support the rejection of reconsideration request 19.3

While it has long been ICANN Org's practice to allow bilateral agreements to include contractual conditions that were neither defined nor prohibited by consensus policy, and even though there is no current PDP derived policy on URS inclusion as a contractual condition, I believe that the fact that there is an ongoing PDP process makes this an area that requires reconsideration.

While I was part of the consensus on the draft response, the rebuttal contained arguments that persuaded me. Specifically I was convinced that the ORG's practice of acting with a degree of freedom in contract negotiations in the absence of existing relevant policy should not be used while a policy process on the subject is ongoing. As the URS was being considered as part of a GNSO PDP at the time the contract was agreed, I think this is inconsistent with the Articles and Bylaws mandate of Bottom Up Multistakeholder Policy development and Public Interest determination, and should not have been included in the contract.

While it can still be argued that a bilateral agreement is not limited when it comes to policy that is not yet made, ICANN's ability to enforce such a contractual condition for legacy registrants may come into question. If a policy is not yet determined but is in the policy development process, I question whether ICANN can enforce it without risking a challenge on Bylaws considerations in every instance. I also question the effect on the policy development process that may occur in such an event.

The reconsideration request includes a discussion on the harm that might be caused to existing civil society organizations. I do not yet have a clear understanding of the effect of the URS on existing legacy registrations especially with regard to the Public Interest question about harm to registrants and registrations by civil society organizations and NGOs that are threatened by political, social, cultural, or other conditions. Since the EFF arguments includes such issues, I think we need to wait for the conclusion of the PDP to determine the public interest issues before enforcing the URS in contracts negotiated after the start of the RPM PDP on 9 March 2016..

I do not believe that the whole contract needs to be struck or renegotiated because of this issue; it should be enough to strike clause 2(b) from Specification 7.

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