

## 4.2 Reconsideration Process Enhancement

### INTRODUCTION

The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, whereby the ICANN Board of Directors is obliged to reconsider a recent decision, action or inaction by ICANN's Board or staff (currently provided for in Article IV, Section 2 of ICANN's Bylaws). Key reforms proposed include:

- Expanding the scope of permissible requests to include Board or staff actions or inactions that contradict ICANN's Mission, Commitments or Core Values
- Extending the time for filing a Request for Reconsideration from 15 to 30 days
- Narrowing the grounds for summary dismissal
- Requiring the ICANN Board of Directors to make determinations on all requests after receiving a recommendation from the Board Governance Committee (rather than a committee handling staff issues)
- Tasking ICANN's Ombudsman with initial substantive evaluation of the requests to aid the Board Governance Committee in its recommendation
- Providing requesters an opportunity to rebut the Board Governance Committee's recommendation before a final decision by the entire Board
- Providing enhanced transparency requirements and firm deadlines in issuing determinations.

### STANDING

The CCWG-Accountability proposes that the Bylaws be amended to clarify that any person or entity materially affected by an action or inaction of ICANN's Board or staff that is in contradiction of ICANN's Mission or Core Values would have standing to file a Reconsideration Request. This would widen the scope of the current Reconsideration Process beyond policies and is intended to address the impact of existing Bylaws paragraph 2 in significantly reducing the rights purportedly granted in paragraph 1 of the Reconsideration Request process.

#### **ICANN's Bylaws could be revised (added text in red below):**

- a. ICANN shall have in place a process by which any person or entity materially affected by an action or inaction of ICANN may request review or reconsideration by the Board.
- b. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been materially affected by:
  - i. One or more ICANN Board or staff actions or inactions that contradict established ICANN policies, its Mission, Commitments or Core Values; or

- ii. One or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of **relevant** information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- iii. One or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate **relevant** information.

In their letter dated 15 April 2015, the CWG-Stewardship indicated “ any appeal mechanism developed by the CCWG-Accountability should not cover ccTLD delegation / re-delegation issues as these are expected to be developed by the ccTLD community through the appropriate processes.” As requested by the CWG-Stewardship, decisions regarding ccTLD delegations or re-delegations would be excluded from the new enhanced Request for Reconsideration process, until relevant appeal mechanisms have been developed by the ccTLD community, in coordination with other interested parties.

In case of including the global number resources policy in its scope, further considerations should be made of its implications. The bottom up policy development process and its forum for the number resources is outside ICANN, even though the ICANN Board approves its global policies, and the same mechanisms applicable to the names-related policies may not be appropriate.

## GOALS

The CCWG-Accountability proposals aim to:

- ❑ Broaden the types of decisions which can be re-examined to include Board/staff action/inaction against ICANN's Mission, Commitments or Core Values (as stated in Bylaws / Articles).
- ❑ Provide more transparency in the dismissal process.
- ❑ Provide the Board with the reasonable ability to dismiss frivolous requests, comment but not on the grounds that the request is vexatious or querulous, which is too subjective.
- ❑ Propose to amend Paragraph 9 on BGC summary dismissal as follows:

The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous; (iii) it is duplicative of a previously decided request ~~querulous or vexatious~~; or (iii) the requestor had notice and opportunity to, but did not participate in, the public comment period relating to the contested action, if applicable ~~(iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable~~. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.

## COMPOSITION

The CCWG-Accountability considers there is a need to rely less on the ICANN legal department (which has a legal obligation to protect ICANN) to guide the Board Governance Committee (BGC) on its recommendations, and more on Board member engagement in the overall decision-making process.

Requests should no longer go to ICANN's lawyers (in-house or external) for the first substantive evaluation. Instead, the Requests should go to ICANN's Ombudsman who would make the initial recommendation to the BGC. The Ombudsman may have more objectivity in considering for fairness to the community in looking at these requests.

All final determinations of Reconsideration Requests are to be made by the entire Board (not only requests about Board actions as is the current practice).

Amend Paragraph 3:

- a. The Board has designated the Board Governance Committee to review and make a recommendation with respect to any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
  - Evaluate requests for review or reconsideration;
  - Summarily dismiss insufficient requests;
  - Evaluate requests for urgent consideration;
  - Conduct whatever factual investigation is deemed appropriate;
  - Request additional written submissions from the affected party, or from other parties;
  - Make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
  - Make a recommendation to the Board of Directors on the merits of the request, as necessary.

Paragraph 15 would be deleted since the Board will make all final decisions regarding requests related to staff action or inaction.

## DECISION-MAKING

The requestor shall be provided a rebuttal opportunity with respect to the BGC's final recommendation (although requesters can't raise new issues in a rebuttal) before the full Board finally decides.

The pendency of the request of reconsideration would not automatically suspend the operation of the original board decision. In the normal course, the board decision would be implemented while the request was pending. In exceptional circumstances, upon the recommendation of the Ombudsman, the Board Governance Committee could vote to suspend the previously-approved Board action pending the determination of the request for reconsideration.

The process should be subject to hard deadlines, including final determinations of the Board shall be issued within 120 days from the request.

Transparency improvements are needed regarding the information that goes into the Board's decision-making process and the rationale for why decisions are ultimately taken (subject to legitimate and documented confidentiality requirements including concerns about legal privilege). Recordings and transcripts should be posted of the substantive Board discussions at the option of the requester.

The CCWG-Accountability proposes to amend reconsideration rules as follows:

- [Need to build in time for Ombudsman to review and advise BGC.]

The Board Governance Committee shall make a final ~~determination or~~ a recommendation to the Board with respect to a Reconsideration Request within 30 days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final ~~determination or~~ recommendation. In any event, the BGC's final recommendation to the Board shall be made within 90 days of receipt of the Request. The final recommendation shall be promptly posted on ICANN's website and shall address each of the arguments raised in the Request. The Requestor may file a rebuttal to the recommendation of the BGC within 15 days of receipt of it, which shall also be promptly posted to ICANN's website and provided to the entire Board for its evaluation.

- The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes and transcripts of the Board meeting at which action is taken (subject to legitimate and documented confidentiality requirements including concerns about legal privilege). The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. In any event, the Board's final decision shall be made within 120 days of receipt of the Request. The final recommendation shall be promptly posted on ICANN's website and shall address each of the arguments raised in the request. The Board's decision on the recommendation is final.

## **ACCESSIBILITY**

The CCWG-Accountability proposes to extend the time deadline for filing a Reconsideration Request from 15 to 30 days from when the decision was made publicly available.

Amend paragraph 5 as follows:

1. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within-30 days after:
  - a) For requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale; or
  - b) For requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
  - c) For requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

## **DUE PROCESS**

ICANN's Document and Information Disclosure Policy (DIDP) should be improved to accommodate the legitimate need for requesters to obtain internal ICANN documents that are relevant to their requests.

The Board shall ensure that the costs of the reconsideration process are not sufficiently excessive as to deter meritorious petitions. Counsel shall be provided at ICANN's expense to parties that lack the resources to provide their own counsel.

All briefing materials supplied to the Board should be provided to the Requester so that they may know the arguments against them and have an opportunity to respond (subject to legitimate and documented confidentiality requirements including concerns about legal privilege).

Final decisions should be issued within a hard deadline of 120 days. [Redundant?]

Requesters should be provided more time to learn of action/inaction and to file the request. [Redundant?]

Transparency improvements throughout the process are called for, including more complete documentation and prompt publication of submissions and decisions including their rationale.