

Exhibit A

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Process Panel

Namecheap, Inc.

Claimant,
- and -

Case Number: 01-20-0000-6787

Internet Corporation for Assigned Names
and Numbers (ICANN)

Respondent.

FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL

Independent Review Panel

Glenn P. Hendrix, Chair
Grant L. Kim
Christof Siefarth

December 23, 2022

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FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL

I. INTRODUCTION

1. This case arises from an Independent Review Process (“IRP”) initiated by Claimant Namecheap, Inc. (“Namecheap” or “Claimant”) against the Internet Corporation for Assigned Names and Numbers (“ICANN” or “Respondent”).¹ At issue is whether ICANN acted contrary to the ICANN Articles of Incorporation (“Articles”) and ICANN Bylaws (“Bylaws”) by approving new registry agreements in 2019, which removed the limits on maximum increases in the prices charged by the registry operators of the .ORG, .INFO, and .BIZ generic Top-Level Domains (“gTLDs”).

2. ICANN is responsible for overseeing the technical coordination of the Internet domain name system on behalf of the Internet community. ICANN enters into contracts with registry operators that operate specific gTLDs, such as .ORG, .INFO, and .BIZ. Registrars such as Namecheap purchase the non-exclusive rights to specific domain names from registry operators and sell them to end-users.

3. Thus, if an organization called “Noname” wanted to operate a website at “www.noname.org,” it could purchase the right to use that name from a registrar such as Namecheap, which would purchase the right to use that name from the registry operator for the .ORG gTLD, which is currently the Public Interest Registry, or “PIR.”

4. Before 1 July 2019, ICANN’s registry agreements with the operators of the .ORG, .INFO and .BIZ gTLDs capped price increases by registry operators at 10% per year.

5. When the registry agreements for .ORG, .INFO, and .BIZ expired on 30 June 2019, they were replaced with new registry agreements (the “2019 Registry Agreements”) that did not include this cap on price increases. As a result, the registry operators of the .ORG, .INFO, and .BIZ gTLDs were now able to increase prices by more than 10% annually. ICANN’s decision to remove the cap on price increases from the 2019 Registry Agreements is referred to as the “Price Cap Decision.”

¹ For convenient reference, the attached Appendix A sets forth all defined terms used in this Declaration.

6. IRP proceedings allow independent review of ICANN's actions that are alleged to violate the Articles or Bylaws.

7. Namecheap's IRP Request challenges "ICANN's decision to remove the provisions according to which the operators of .ORG, .INFO and .BIZ were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another."²

8. Namecheap's IRP Request seeks, *inter alia*, the following relief:

- i. A declaration that ICANN acted contrary to its Articles and Bylaws;
- ii. A declaration that, in order to comply with its Articles and Bylaws, ICANN must annul the Price Cap Decision;
- iii. A declaration that, in order to comply with its Articles and Bylaws, ICANN must ensure that .ORG remains dedicated to the non-profit sector by adopting measures such as requiring that .ORG be operated by a non-profit entity that charges registry fees that remain as low as feasible consistent with the maintenance of good quality service; and
- iv. A declaration that, in order to comply with its Articles and Bylaws, ICANN must ensure that price caps for legacy gTLDs can only be removed following policy development process that takes due account of the interests of the Internet users and with the involvement of the different stakeholders.³

9. This Declaration sets forth the Panel's decision on Namecheap's IRP Request.

II. THE PARTIES AND COUNSEL

10. Claimant Namecheap is an ICANN-accredited domain registrar and technology company founded in 2000, with its registered office at 4600 East Washington

² Namecheap Request for IRP ¶ 2.

³ *Id.* ¶ 58.

Street, Suite 305 Phoenix, AZ 85034, USA. It manages over 10 million domains and is one of the top web hosting providers in the world.⁴

11. Claimant is represented in this proceeding by:

Flip Petillion, Jan Janssen, and Diego Noesen of:

PETILLION
Guido Gezellestraat 126
B-1654 Huizingen
Belgium

12. Respondent ICANN is a non-profit public corporation organized under the laws of California, with its registered office at 1205 Waterfront Drive, Suite 300, Los Angeles, CA, USA 90094-2536.

13. Respondent is represented in this proceeding by:

Jeffrey A. LeVee, Eric P. Enson, Kelly M. Watne, and Nathan Gencarella of:

JONES DAY
555 South Flower Street, 50th Fl.
Los Angeles, CA 90071 USA

III. BACKGROUND FACTS

C. The Domain Name System and ICANN

14. The creation of the Domain Name System (“DNS”), as a hierarchical structure with top-level domains (TLDs) dates back to 1981.⁵ Prior to ICANN’s creation

⁴ Namecheap Pre-Hearing Brief ¶ 4.

⁵ Namecheap Pre-Hearing Brief ¶ 55-56. This summary of background facts is based primarily on the background descriptions in the Parties’ submissions, which appear to be undisputed.

in 1998, the only generic TLDs (“gTLDs,” as contrasted with ccTLDs, country code top-level domains) were .COM, .NET and .ORG.⁶

15. The DNS makes the Internet network easier to navigate and manage in at least two ways. First, domain names are easier for people to remember than the IP addresses assigned to each computer, which are a series of numbers. Second, the hierarchical structure of the DNS avoids the need for every computer on the network to maintain a current list of all IP addresses of every other computer. Instead, each computer needs only a list of the IP addresses of the computers (called root name servers) that coordinate communications for a particular TLD. For example, if a user wants to access the ICANN website at ICANN.org, the user’s computer communicates with the root name server for the .ORG TLD, which will then direct the query to the servers for the ICANN.org website.⁷

16. ICANN controls and manages the unique single root at the top of the DNA hierarchical structure, including the allocation of IP addresses and the delegation of TLDs into the root. Registry operators for a specific TLD (such as .ORG) must obtain a license from ICANN for their TLD servers to be accessible via the Internet. Thus, ICANN controls both what TLDs are recognized, and the terms and conditions under which registry operators may operate their TLDs on the Internet.⁸

C. The Original gTLDs and Three Rounds of Expansions

17. The three original gTLDs (.COM, .NET, and .ORG) were all managed by Verisign (then known as Network Solutions), and price controls were required by the National Telecommunications and Information Administration (“NTIA”).⁹

18. Following its creation on 30 September 1998, ICANN introduced additional gTLDs in three rounds. The first round, in 2000, included .BIZ, .INFO,

⁶ Namecheap Pre-Hearing Brief ¶ 61. The original gTLDs also included .EDU, .INT, .GOV, and .MIL, but Namecheap notes that they are subject to strict registration requirements and are thus not comparable to .COM, .NET, and .ORG.

⁷ Namecheap Pre-Hearing Brief ¶ 55-56.

⁸ Namecheap Pre-Hearing Brief ¶ 59-60.

⁹ ICANN Pre-Hearing Brief ¶ 23.

.NAME and .PRO.¹⁰ The Registry Agreements for the unsponsored TLDs introduced during this round all had price controls.¹¹

19. The second round of additional gTLDs took place in 2004 and was limited to sponsored TLDs without any price controls.¹²

20. The original three gTLDs and the gTLDs delegated during the first and second round expansions are collectively referred to as “legacy gTLDs.”¹³

21. The third round was by far the largest expansion, involving over a thousand new gTLDs. It became known as the “New gTLD Program.” It dates back to a policy development process to develop recommendations for the introduction of new gTLDs that ICANN’s Generic Names Support Organization (“GNSO”) began in 2005.¹⁴

22. The ICANN Board adopted the GNSO recommendations in June 2008, and the application window was officially launched in 2012. Applications were evaluated under ICANN’s New gTLD Applicant Guidebook.¹⁵

C. The Base Registry Agreement for New gTLDs

23. Successful applicants proceeded to contract with ICANN, executing a Base Registry Agreement applicable to all new gTLDs.¹⁶ The version of the Guidebook that included the draft Registry Agreement was opened for public comments in 2008 and, after several revisions, formed the basis for launching the New gTLD Program in 2012. Another public comment period occurred in February 2013.¹⁷

¹⁰ Namecheap Pre-Hearing Brief ¶ 87.

¹¹ ICANN Pre-Hearing Brief ¶ 24.

¹² Namecheap Pre-Hearing Brief ¶ 87. “Sponsored” gTLDs are specialized gTLDs with a sponsor who represented the community to which they are directed. “Unsponsored” gTLDs are intended for broader use and do not have a sponsor. ICANN Pre-Hearing Brief ¶ 24.

¹³ Namecheap Pre-Hearing Brief ¶ 61.

¹⁴ ICANN Pre-Hearing Brief ¶ 26.

¹⁵ *Id.*

¹⁶ ICANN Pre-Hearing Brief ¶ 27.

¹⁷ ICANN Pre-Hearing Brief ¶¶ 27, 29-31.

24. In June 2009, ICANN retained an economist, Professor Dennis W. Carlton, to evaluate various aspects of the New gTLD program, including assessing the need for price control provisions. Dr. Carlton concluded that price controls for new gTLDs were unlikely to generate significant consumer benefits.¹⁸

25. The new Base Registry Agreement for new gTLDs did not include price caps, but did include certain other pricing protections.¹⁹ This Base Registry Agreement has been adopted for over 1,200 gTLDs in the DNS, mostly without modifications.²⁰

C. The 2019 Renewal of the Registry Agreements for .ORG, .INFO, and .BIZ

26. In contrast to the new Base Registry Agreement for new gTLDs, the Registry Agreements for .ORG, .INFO, and .BIZ included price caps until they were removed in 2019.

27. For example, the 2013 Registry Agreements for .ORG, .INFO, and .BIZ limited the price charged to registrars for domain name registrations to US \$8.25 until the end of 2013, with a maximum price increase of 10% for each subsequent calendar year.²¹

28. The 2013 .ORG, .INFO, and .BIZ Registry Agreements expired in June 2019. According to ICANN, the renewal negotiations for .ORG, .INFO and .BIZ began in May 2018. ICANN negotiated with the following registry operators: Neustar for .BIZ, Afiliast for .INFO, and PIR for .ORG. The negotiations between ICANN staff and these registry operators were mostly conducted by telephone.²²

29. The agreement renewals were discussed during an ICANN staff meeting on 5 December 2018.²³ In January 2019, ICANN received a draft memo from Dr. Carlton

¹⁸ ICANN Pre-Hearing Brief ¶ 32.

¹⁹ ICANN Pre-Hearing Brief ¶ 34. The Base Registry Agreement is RM 183.

²⁰ ICANN Pre-Hearing Brief ¶ 36.

²¹ Section 7.3(a), 22 August 2013 Registry Agreements for .ORG, .INFO, and .BIZ (RM 18, RM 27, RM 28).

²² ICANN Pre-Hearing Brief ¶ 44 footnote 86.

²³ Namecheap, Pre-Hearing Brief ¶ 153.

“ Redacted - Privileged ”. On 16 January 2019, another staff meeting took place.²⁴ An ICANN Board workshop took place in Los Angeles between 25 and 28 January, 2019 during which ICANN staff briefed the ICANN Board about the 2019 Registry Agreements. There are no minutes of the meeting, but ICANN provided the following summary in July 2019:

During the course of renewal negotiations with the respective registry operators for .biz, .info and .org, the ICANN org provided a briefing and held a discussion with the ICANN Board at the Board’s workshop in Los Angeles (25-28 January 2019). The org presented the history of the price controls in various gTLD contracts, how the concepts of price control and price protection were considered by the community during the development of the Base gTLD Registry Agreement for the New gTLD Program, and rationale for why ICANN org recommended adopting the Base RA rather than maintaining the price controls.²⁵

“ICANN org” or “org” refers to the ICANN organization, meaning the staff, as distinguished from the ICANN Board. The Board did not intervene in ICANN org’s plans to adopt the Base Registry Agreement rather than maintain price controls.

30. In the spring of 2019, ICANN announced that it would renew the .ORG, .INFO and .BIZ Registry Agreements without price controls. ICANN received over four thousand public comments from non-profits, international organizations, government agencies, individuals, and private companies, although many of these were computer-generated using an online template created by the Internet Commerce Association.²⁶ Almost all commenters objected to the removal of price controls. The ICANN staff published a Report of Public Comment Proceeding for each gTLD summarizing the comments.²⁷

²⁴ Namecheap, Pre-Hearing Brief ¶ 156.

²⁵ Annex 92, Letter from Cyrus Namazi (ICANN) to Zak Muscovitch, (General Counsel Internet Commerce Association), 26 July 2019, <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>.

²⁶ ICANN Pre-Hearing Brief ¶ 51.

²⁷ ICANN Pre-Hearing Brief ¶¶ 51-52; Namecheap Pre-Hearing Brief ¶¶ 166-67.

31. On 1 May 2019, PIR's CEO, Jonathan Nevett, sent a letter to the ICANN Board stating that PIR (which, again, is the .ORG registry operator) "will not raise prices exorbitantly both because doing so would violate our values and because we are bound by the competitive market."²⁸

32. A Board workshop took place in Marrakesh during the "ICANN65" meeting in June 2019. The workshop was closed to the public and minutes were not recorded, but ICANN indicates that ICANN staff briefed the Board on the status of negotiations and the results of the public comment process, providing an analysis of public comments and "briefing papers" that outlined the rationale for renewing the Registry Agreements without price controls.²⁹

33. On 30 June 2019, ICANN renewed the .ORG, .INFO, and .BIZ Registry Agreements without price control provisions.³⁰

C. Namecheap's Reconsideration Request 19-2

34. On 12 July 2019, Namecheap requested reconsideration of the Price Cap Decision (Reconsideration Request 19-2), asserting that it was contrary to ICANN's Articles of Incorporation and Bylaws and based on an incomplete, non-transparent record.³¹ Namecheap's Request was limited to .ORG and .INFO.³²

35. On 27 August 2019, ICANN's Ombudsman accepted reconsideration of Request 19-2, while the Board Accountability Mechanisms Committee found that the Request was "sufficiently stated." The Ombudsman proceeded to substantively reevaluate Request 19-2 on 7 September 2019.³³

36. Namecheap and ICANN participated in an unsuccessful "Cooperative Engagement Process" on 18 November 2019.³⁴ On 21 November 2019, ICANN's Board

²⁸ Namecheap Pre-Hearing Brief ¶ 185.

²⁹ Namecheap Pre-Hearing Brief ¶¶ 179-80.

³⁰ Namecheap Pre-Hearing Brief ¶ 184; RM 18, 27, 28.

³¹ Namecheap Pre-Hearing Brief ¶ 189.

³² ICANN Pre-Hearing Brief ¶ 56.

³³ Annex 123, 124.

³⁴ Namecheap Pre-Hearing Brief ¶ 190.

denied Reconsideration Request 19-2.³⁵ On 25 February 2020, Namecheap initiated this IRP proceeding

IV. PROCEDURAL HISTORY OF THIS IRP

37. On 25 February 2020, Namecheap filed its IRP Request with the International Centre for Dispute Resolution (“ICDR”) of the American Arbitration Association, which administers IRP proceedings.

38. Additionally, on 25 February 2020, Claimant filed a request for the appointment of an emergency panelist and an order providing for interim measures of protection (the “Emergency Relief Request”). Claimant sought to require ICANN to: (1) stay all actions that further the change of control of the .ORG registry operator to a for-profit entity during the pendency of the IRP; and (2) take all actions that are necessary to prevent the .ORG registry operator from removing the price control provision.

39. ICANN responded to the Emergency Relief Request on 11 March 2020, rejecting Namecheap’s claims on the merits and also maintaining that Namecheap lacked standing because it had not suffered any harm as a result of ICANN’s conduct and thus was not a proper “Claimant” under the Bylaws.

40. On 20 March 2020, the Emergency Panelist, Gary L. Benton, issued a decision denying the Emergency Relief Request on the basis that “the balance of hardships with respect to the requested interim relief tips in favor of ICANN.”³⁶ The Emergency Panelist made no ruling on the merits, stating: “In determining that interim relief is not appropriate at this time with respect to elimination of the price controls or the pending change of control review, it should be made clear that this decision does not resolve the merits to be fully addressed by the IRP Panel.”³⁷

41. The Emergency Panelist denied ICANN’s request that the IPR proceeding be summarily dismissed for lack of standing, but expressly noted that his findings on

³⁵ Namecheap Pre-Hearing Brief ¶ 191.

³⁶ Decision on Request for Emergency Relief ¶ 131.

³⁷ *Id.* ¶ 130.

standing were limited to the Emergency Relief Request and were not binding on this IRP Panel.³⁸

42. ICANN responded to Claimant's IRP Request on 10 April 2020. In addition to denying that it violated its Articles or Bylaws, ICANN renewed its argument that Namecheap lacked standing

43. In its IRP Request, Namecheap requested the Panel be composed of three members pursuant to Article 6 of the ICDR Rules, with each Party appointing one panelist.³⁹ Thereafter, the two appointed panelists were to select (with the consultation of the Parties) a third panelist who would serve as the chair of the Panel.

44. On 29 April 2020, Namecheap and ICANN selected Christof Siefarth and Grant L. Kim, respectively, as their party appointed panelists. On 11 May 2020, the ICDR appointed both as the party selected panelists. Both panelists agreed upon Glenn P. Hendrix to serve as the chair. On 14 July 2020, the ICDR confirmed Mr. Hendrix as the chairperson of the Panel.

45. During the course of this proceeding, the Parties made various written submissions to the Panel. The more significant submissions are listed in Appendix B to this Declaration.

46. The Parties submitted the following witness statements and expert reports, in addition to fact exhibits and legal authorities:

- Affidavit of Mr Hillan Klein of 22 March 2022 for Claimant
- Affidavit of Mr Hillan Klein dated 8 February 2022 for Claimant;
- Affidavit of Mr Hillan Klein of 21 December 2020 for Claimant;
- Affidavit of Ms Maryna Zhuravlova of 16 December 2020 for Claimant;
- Expert Report of 20 December 2020 by Professor Frank Verboven and Dr. Gregor Langus, with appendices (Economic Expert Report I) for Claimant;

³⁸ Decision on Request for Emergency Relief ¶ 94.

³⁹ See Namecheap IRP Request ¶ 55-56.

- Expert Report of 25 November 2021 by Professor Frank Verboven and Dr. Gregor Langus, with appendices (Economic Expert Report II) for Claimant;
- Expert Report of 8 January 2022 by Dr. Gregor Langus and Professor Frank Verboven (Economic Expert Report III) together with Domains and Complementary Services Gross Profit by Year (2017-2021) for Claimant;
- Presentation of Dr. Langus and Professor Verboven of 31 March 2022, for Claimant;
- Expert Report by Jeffrey J. Neuman of 19 November 2021 (Regulatory Expert Report) for Claimant;
- Opening Statement by Jeffrey J. Neuman of 31 March 2022 for Claimant;
- Expert Report of Dennis W. Carlton dated 14 January 2022 for Respondent;
- Presentation of Dennis W. Carlton dated 31 March 2022 for Respondent;
- Witness Statement of J. Beckwith (“Becky”) Burr dated 14 January 2022 for Respondent;
- Witness Statement of Maarten Botterman dated 14 January 2022 for Respondent;
- Witness Statement of Russell Weinstein dated 14 January 2022 for Respondent;
- Declaration of Russell Weinstein dated 14 October 2021 for Respondent.

47. The Panel has issued the following Procedural Orders during the course of this proceeding:

- Procedural Order No. 1, issued on 27 August 2020, determining the place of arbitration, governing laws and procedures, outlining the status of the dispute, summarizing the Parties’ views on scheduling and various procedural matters, the Parties’ views on exchanges of information, confidentiality matters, pleadings and communications with the Panel, exhibits, and other matters;

- Procedural Order No. 2, issued on 27 August 2020 concerning a series of issues including the status conference of 25 September 2020, disclosure requests, the final merits hearing, pre-hearing and post-hearing briefs and witness statements and other matters;
- Procedural Order No. 3, issued on 3 December 2020, regarding the case management conference held on 2 December 2020;
- Procedural Order No. 4, issued on 17 December 2020, decided a series of issues raised by the Parties including but not limited to an extension of set deadlines;
- Procedural Order No. 5, issued on 24 December 2020, ruled on the Parties' Motions to Compel Disclosure;
- Procedural Order No. 6, issued on 12 February 2021, was a partial ruling on Respondent's Motion to Dismiss;
- Procedural Order No. 7, issued on 27 February 2021, ruled on Namecheap's objection to ICANN's ESI Protocol for search terms and ICANN staff interview inquiries;
- Procedural Order No. 8, issued on 10 March 2021, was a final ruling on Respondent's Motion to Dismiss which:
 - granted ICANN's motion to dismiss Namecheap's IRP request with respect to a possible change of control of PIR to a for-profit entity (a transaction that ultimately did not occur), including Namecheap's request for a declaration that "in order to comply with its Articles of Incorporation and Bylaws, ICANN must ensure that .ORG remains dedicated to the non-profit sector by adopting measures such as requiring that .ORG be operated by a non-profit entity";
 - denied ICANN's motion to dismiss Namecheap's IRP Request with respect to the price control issue.
- Procedural Order No. 9, issued on 10 March 2021, which granted in part and denied in part Claimant's Motion for Reconsideration regarding Procedural Order No. 6;

- Procedural Order No. 10, issued on 19 April 2021, as a revised case schedule;
- Procedural Order No. 11, issued on 20 August 2021, as a revised case schedule;
- Procedural Order No. 12, issued on 22 October 2021, granting relief on Namecheap's Motion to Compel and Motion for Sanctions;
- Procedural Order No. 13, issued on 2 November 2021, on Other Relief Sought by Namecheap's Motion to Compel and Motion for Sanctions;
- Procedural Order No. 14, on 2 November 2021, issued a revised case schedule with the following deadlines:

| Event | Prior Date | Revised Date |
|--|-------------------|---------------------|
| Claimant to identify fact and expert witnesses | 20 October 2021 | 30 November 2021 |
| Claimant to submit Pre-Hearing Brief, Witness statements, exhibits, legal authorities | 20 October 2021 | 30 November 2021 |
| Respondent to identify fact and expert witnesses | 15 November 2021 | 20 December 2021 |
| Respondent to submit Pre-Hearing Brief, Witness statements, exhibits, legal authorities | 3 December 2021 | 14 January 2022 |
| Parties to communicate to the Panel whether the Hearing should be remote or in person, and if in person, the venue | | 1 February 2022 |
| Claimant may seek leave for limited rebuttal | 24 December 2021 | 8 February 2022 |
| | 14 December 2021 | |

| Event | Prior Date | Revised Date |
|---|----------------------|---|
| Initial Pre-Hearing conference via Zoom | | 14 February 2022 (8:30 a.m., Pacific time) |
| Respondent may object to leave (if sought) for limited rebuttal by Claimant | 10 January, 2022 | 25 February 2022 |
| Final Pre-Hearing conference via Zoom | 17 January 2022 | 17 March 2022 (8:30 a.m., Pacific time) |
| Final Merits Hearing | 24 - 28 January 2022 | 28 March - 2 April 2022 |

- Procedural Order No. 15, issued on 7 January 2022, addressing Annex 67, Annex 78, Slack communications, Dennis Carlton communications, and Namecheap’s Request regarding ICANN witnesses;
- Procedural Order No. 16, issued on 4 February 2022, addressing disclosure issues in connection with Annex 78 and certain communications by Dr. Dennis Carlton;
- Procedural Order No. 17, issued on 22 February 2022, finding that:
 - Dr. Dennis Carlton’s Communications are subject to the work product doctrine and ordering ICANN to produce the report for an *in camera* review by the Panel;
 - denying Namecheap’s motion to subpoena certain ICANN witnesses to testify at the hearing; and
 - denying Namecheap’s Motion for an in-person hearing.
- Procedural Order No. 18, issued on 4 March 2022, concerning:

- the 25 February 2022 objections of Respondent to the 8 February 2022 request of Claimant for leave to submit rebuttal materials; and
- the results of the Panel's *in camera* review of the 2018 draft report of Dr. Dennis Carlton pursuant to the Panel's directions in Procedural Order No. 17.
- Procedural Order No. 19, issued on 17 March 2022, regarding the pre-hearing conference on the same date and the Panel's ruling on various issues regarding the conduct of the hearing.

48. The Parties participated in a case management conference on 15 December 2021 and a pre-hearing status conference on 14 February 2022.

49. The oral hearing was conducted via videoconference from 28 March to 1 April 2022. The hearing was transcribed by Mark McClure, Certified Shorthand Reporter in and for the State of California. After submitting post-hearing briefs, the Parties presented oral closing arguments at a videoconference hearing on 29 June 2022.

V. GOVERNING LAWS AND PROCEDURES

50. The Parties have agreed that this IRP proceeding is conducted in accordance with the ICANN Amended and Restated Articles of Incorporation filed with the California Secretary of State on 3 October 2016, and the Bylaws as amended on 28 November 2019.

51. This Independent Review is administered by the ICDR. The governing rules include the ICDR International Arbitration Rules, as amended and in effect as of 1 June 2014 ("ICDR Rules"), and the Interim Supplementary Procedures for ICANN Independent Review Process (the "IRP Procedures") adopted on 25 October 2018. Section 2 of the IRP Procedures states: "In the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR Rules, these Interim Supplementary Procedures will govern."

52. The Panel views this proceeding as an "international arbitration" within the meaning of the California International Arbitration and Conciliation Act ("CIACA"), given that the subject matter is "related to commercial interests in more

than one state.”⁴⁰ Given the global nature of the Internet, this dispute about the operation of the .ORG, .INFO and .BIZ gTLDs has worldwide implications. The Panel also observes that the Bylaws provide that Independent Review is intended to “[l]ead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.”⁴¹ Further, the IRP Procedures provide that IRPs shall be conducted in accordance with the ICDR Rules. Accordingly, this proceeding falls within the CIACA, to the extent that statute is not preempted by the Federal Arbitration Act.

53. The Parties have stipulated that the place of arbitration (seat) is Los Angeles, California, United States of America.

54. Article III of the ICANN Articles of Incorporation provides that ICANN “shall ... carry[] out its activities in conformity with relevant principles of international law and international conventions.”⁴²

VI. THE RELIEF SOUGHT

55. In its 30 November 2021 Pre-Hearing Brief, Claimant requested that the Panel make the following binding declarations:⁴³

- ICANN’s decision to remove the price caps in .ORG, .INFO and .BIZ must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparency, and without discrimination or arbitrariness;

⁴⁰ See Cal. Civ. Proc. Code § 1297.13(d).

⁴¹ ICANN Bylaws § 4.3(a)(viii).

⁴² See also ICANN Bylaws § 1.2(a) (ICANN “must ... carry [] out its activities in conformity with relevant principles of international law and international conventions”).

⁴³ Namecheap Pre-Hearing Brief ¶ 425. Namecheap requested the same declarations in its 8 February 2022 Rebuttal Brief (¶ 160) and incorporated those requests by reference into its 27 May 2022 Post-Hearing Brief (¶ 61). Those declarations include some new requests that Namecheap did not include in its 25 February 2020 IRP Request or its 12 July 2019 Reconsideration Request 19-2. ICANN has objected to those new requests, as discussed in Section IX below.

- Article II of the ICANN Articles of Incorporation;
 - Article III of the ICANN Articles of Incorporation;
 - Sections 1.2 (a)(i), (iv) and (vi) of ICANN's Bylaws;
 - Sections 1.2(b)(iii), (iv) and (vii) of ICANN's Bylaws;
 - Section 1.2 (c) of ICANN's Bylaws;
 - Section 2.1 juncto Section 3.6(a)-(c) of ICANN's Bylaws;
 - Section 3.1 of ICANN's Bylaws;
 - Section 3.6(c) of ICANN's Bylaws;
 - Section 7.6 of ICANN's Bylaws; and
 - Section 7.17 of ICANN's Bylaws.
- ICANN's stated objective and requirement that .ORG be operated by a non-profit entity that charges registry fees that remain as low as feasible consistent with the maintenance of good quality service is violated by ICANN's decision to remove price caps in .ORG and must therefore be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the ICANN Articles of Incorporation;
 - Article III of the ICANN Articles of Incorporation;
 - Section 1.2(a) of ICANN's Bylaws;
 - Section 1.1(a)(v) of ICANN's Bylaws;
 - Section 2.3 of ICANN's Bylaws;
 - Section 1.1(a)(i) juncto Article 3(1) of ICANN's Bylaws.

- ICANN's entering into registry agreements for .ORG, .INFO and .BIZ that do not contain price caps must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the ICANN Articles of Incorporation;
 - Article III of the ICANN Articles of Incorporation;
 - Section 1.2(a) of ICANN's Bylaws;
 - Section 1.2(a)(v) of ICANN's Bylaws;
 - Section 2.3 of ICANN's Bylaws because ICANN's actions and inactions are a failure to apply its standards, policies, procedures, or practices equitably;
 - Section 1.1(a)(i) juncto Article 3(1) of ICANN's Bylaws.
- ICANN's entering into the 2019 registry agreements for .ORG, .INFO and .BIZ without the cross-ownership restrictions that were in place for .ORG, .INFO and .BIZ at the date of the Board's adoption of the ICANN Board Resolution 2012.10.18.01 (sic) must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the ICANN Articles of Incorporation;
 - Article III of the ICANN Articles of Incorporation;
 - Section 1.2(a) of ICANN's Bylaws;
 - Section 1.2(a) (v) of ICANN's Bylaws;

- Section 2.3 of ICANN's Bylaws because ICANN's actions and inactions are a failure to apply its standards, policies, procedures, or practices equitably;
- Section 1.1(a)(i) juncto Section 3.1 of ICANN's Bylaws.
- ICANN's rejection of Namecheap's Reconsideration Request No. 19-2 must be annulled as inconsistent with and violative of Section 4.2(m) of ICANN's Bylaws;⁴⁴
- ICANN's actions and inactions to maintain the removal of price caps in .ORG, .INFO and .BIZ must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the ICANN Articles of Incorporation;
 - Article III of the ICANN Articles of Incorporation;
 - Section 1.2(a)(i), (iv) and (vi) of ICANN's Bylaws;
 - Section 1.2(b)(iii), (iv) and (vii) of ICANN's Bylaws;
 - Section 1.2(c) of ICANN's Bylaws;
 - Section 2.1 juncto Article 3(6)(a)-(c) of ICANN's Bylaws;
 - Section 3.1 of ICANN's Bylaws;
 - Section 3.6(c) of ICANN's Bylaws;
 - Section 7.6 of ICANN's Bylaws;
 - Section 7.17 of ICANN's Bylaws;

⁴⁴ As discussed below, the Panel holds that Price Cap Decision violated ICANN's Articles and Bylaws and thus deems the issue of the Board's decision not to reconsider the Price Cap Decision moot.

- Naming Namecheap as the prevailing party in this IRP proceeding;
- Awarding Namecheap its costs in this proceeding, including but not limited to its internal costs, legal advice and representation costs, costs of expert witnesses, and any other costs such as for document review and transportation, made or still to be made until the final resolution of this IRP; and
- Awarding such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follows its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.

56. ICANN requests that the Panel deny each of Namecheap's claims and requests for relief.⁴⁵

VII. ISSUES TO BE DECIDED

57. Namecheap's claims and ICANN's defenses present the following issues:

- **Issue 1:** Has Namecheap been "materially affected" by the dispute such that it has standing?
- **Issue 2:** Are Namecheap's claims regarding .BIZ, vertical integration, and the Feb06 policy time-barred?
- **Issue 3:** What standard applies to the Panel's review of actions by the ICANN organization and Board?
- **Issue 4:** Was the Price Cap Decision contrary to ICANN's obligation to apply policies and practices in a non-discriminatory manner?
- **Issue 5:** Did the ICANN organization act contrary to its transparency obligations in making the Price Cap Decision?

⁴⁵ ICANN Pre-Hearing Brief ¶ 179; ICANN Post-Hearing Brief ¶ 86.

- **Issue 6:** Was it contrary to the Articles of Incorporation and Bylaws for the ICANN organization (rather than the ICANN Board) to make the Price Cap Decision?
- **Issue 7:** Was the Price Cap Decision in connection with .ORG contrary to ICANN’s commitment to apply fairly its standards, policies, and processes?
- **Issue 8:** Was the Price Cap Decision contrary to ICANN’s obligation to act for the benefit of the Internet community as a whole?
- **Issue 9:** How should fees and costs be allocated in this proceeding?
- **Issue 10:** What is the scope of the Panel’s authority to award relief?
- **Issue 11:** What relief, if any, should be awarded here?

58. The following sections expand on these issues and set forth the Panel’s findings.

VIII. ISSUE 1: HAS NAMECHEAP BEEN “MATERIALLY AFFECTED” BY THE DISPUTE?

C. The Issue, Legal Framework, and Prior Rulings

59. A threshold issue is whether Namecheap qualifies as a “Claimant” under Section 4.3(b)(i) of the Bylaws, which states:

A “**Claimant**” is any legal or natural person, group, or entity including, but not limited to the EC (Empowered Community), a Supporting Organization (Supporting Organization), or an Advisory Committee (Advisory Committee) that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

60. “Disputes” are defined as: “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws,” which is

followed by a non-exclusive list of violations.⁴⁶ “Covered Actions” are defined as “any actions or failures to act by or within ICANN (Internet Corporation for Assigned Names and Numbers) committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”⁴⁷

61. Thus, to qualify as a “Claimant” for the purpose of this proceeding, Namecheap must show that it “has been materially affected” by a dispute concerning whether ICANN’s actions or failure to act violate the Articles or Bylaws, which means that Namecheap “must suffer an injury or harm that is directly and causally connected to the alleged violation.”

62. The mandatory nature of the “materially affected” requirement is reflected in Section 4.3(o)(i) of the Bylaws, which authorizes an IRP Panel to “[s]ummarily dismiss Disputes that are brought without standing....”

63. The Parties have used the term “standing” as a shorthand reference to the “materially affected” requirement reflected in Section 4.3(o)(i) of the Bylaws. While the Panel will also use the term “standing,” it bears emphasis that the concept of “standing” in this context is not necessarily the same as under the laws of the United States or other jurisdictions.

64. As noted above, the Emergency Panelist rejected ICANN’s argument that Namecheap lacks standing, while emphasizing that his decision was limited to the Emergency Relief Request only.⁴⁸ The Emergency Panelist stated:

As alleged as to the price control provisions, as a Registrar of the .ORG gTLD, Namecheap is exposed to the risk of increased pricing for registry services. This is a harm that is directly and casually [sic] related to the alleged violation that ICANN has not followed proper procedures and has improperly consented to the renewal of the Registry Agreement without price control provisions. It makes no difference that the harm is potential and monetary harm [has] not occurred to date. The evidentiary support is

⁴⁶ Bylaws § 4.3(b)(iii).

⁴⁷ Bylaws § 4.3(b)(ii). The IRP Procedures contain the same definitions of “Claimant,” “Dispute,” and “Covered Actions” in the Section 1 Definitions. Because the definitions are the same, the Panel focuses on the Bylaws rather than the IRP Procedures.

⁴⁸ Decision on Request for Emergency Relief ¶ 94.

implicit from the undisputed facts regarding the renewal of the .ORG Registry Agreement and Namecheap's status as a Registrar for the .ORG gTLD. It makes no difference that Namecheap is not a party or third-party beneficiary to the Agreement. Namecheap faces a harm that it was not exposed to with the price controls in place.⁴⁹

65. As also noted above, this Panel denied ICANN's request to dismiss this proceeding on the ground that Namecheap is not a proper "Claimant" under the Bylaws. The Panel emphasized, however, that its ruling was limited to the preliminary issue of whether Namecheap had made a sufficient *prima facie* showing of standing for the case to proceed:

ICANN's critiques go to the weight of Namecheap's evidence, but the Panel need not (and is not in a position to) make any findings as to whether Namecheap's factual allegations are well-founded or true. The Panel simply finds that they are sufficient to make out a *prima facie* case for standing such that the case may proceed.⁵⁰

66. The Panel based its finding that Namecheap had established a *prima facie* case for standing on the following points:

- The "has been materially affected" requirement of the Bylaws must be interpreted in view of the purposes of IRPs, which include ensuring that ICANN complies with its Articles and Bylaws, empowering the global Internet community and Claimants to enforce compliance with meaningful expert review, and ensuring that ICANN is accountable to the global Internet community.⁵¹
- While "has been" materially affected could be interpreted to mean that the harm must have already occurred, "[d]enying IRP review of significant ICANN actions that create a real risk of adverse impacts in the future that are the natural and expected consequence of an ICANN action or inaction would be contrary to the ... purposes of IRPs, as stated in the Bylaws."⁵²

⁴⁹ *Id.* ¶ 92.

⁵⁰ Procedural Order No. 8 ¶ 48.

⁵¹ *Id.* ¶ 40.

⁵² *Id.*

- The Bylaws expressly permit a Claimant to request “interim relief” which “may include prospective relief” to prevent “[a] harm for which there will be no adequate remedy in the absence of such relief.” Almost by definition, such prospective relief will be directed to future harm.⁵³
- The risk of future price increases that exceed the prior caps is the natural and expected consequence of removing such caps, since such increases would not be possible if the price control provisions were still in place.⁵⁴
- Given that an IRP request must be filed within 120 days after a Claimant becomes aware of the material effect of the challenged ICANN action, and in any event within 12 months from the date of that action, interpreting “materially affected” to require a showing of actual price increases would prevent review of the Price Cap Decision if registry operators waited over a year to increase prices. That would be inconsistent with the IRP purpose of ensuring independent review of significant ICANN decisions.⁵⁵
- All stakeholders, including ICANN, share an interest in prompt review of the Price Cap Decision, to clarify whether that decision remains in effect and to decrease the risk that it will be too late to unring the bell.⁵⁶
- ICANN disputed Namecheap’s evidence that the registry operators of .ORG, .INFO, and .BIZ have significant market power that creates a risk of large price increases, but that is an argument that goes to the weight of the evidence which is not appropriate for resolution on a summary motion to dismiss.⁵⁷

67. Both sides have now had a full opportunity to present evidence and arguments on standing, including in their written pre-hearing and post-hearing submissions, during the merits hearing from 28 March to 1 April, 2022, and during the

⁵³ Procedural Order No. 8 ¶ 41.

⁵⁴ Procedural Order No. 8 ¶ 44.

⁵⁵ *Id.* ¶ 42.

⁵⁶ *Id.* ¶ 43.

⁵⁷ *Id.* ¶ 48.

oral closing arguments on 29 June 2022. The key points of the Parties' submissions are highlighted below.

C. Namecheap's Position

68. Namecheap maintains that Procedural Order No. 8 correctly states the test for standing, and that it has met that test for the reasons set forth in that order. Namecheap argues that the test must be interpreted in view of the purposes of IRPs, which include ensuring that ICANN complies with its Articles of Incorporation and Bylaws, and empowering the global Internet community to enforce such compliance through meaningful, affordable and accessible expert review.

69. Namecheap asserts that standing should be determined as of the date the IRP is filed, but maintains that a current risk of future harm is relevant. Namecheap contends that a current risk of future harm may decrease the current enterprise value of a company, and that actual harm may not immediately materialize for multiple reasons, including that registry operators may have decided to postpone price increases until after this IRP is concluded in order to avoid creating evidence that might favor Namecheap.

70. Namecheap asserts that decisions of the U.S. Supreme Court on standing have no greater relevance than decisions of other jurisdictions, and cites decisions from Switzerland and the European Court of Justice. Subject to that caveat, Namecheap cites U.S. Supreme Court decisions to argue that standing may be supported by "procedural injury," as when "agencies undertake actions without affording the statutory procedures due to the plaintiff - for example, when an agency promulgates a rule without addressing substantive comments submitted by the plaintiff on that rule."⁵⁸

71. Namecheap contends that the key evidence on standing includes:

- evidence that .ORG and other legacy gTLDs have sufficient market power to create a risk of price increases in excess of 10% (the limit in the now-removed price control provisions);

⁵⁸ Namecheap's 26 January 2021 Response to ICANN's Motion to Dismiss ¶ 5, citing *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (RM 66); *Summers v. Earth Island Inst.*, 555 U.S. 488, 495-97 (2009) (RM 63); and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992) (RM 64).

- Redacted - Claimant Designated Confidential Information
- evidence that vertically integrated registrars that own (or are owned by) a registry operator may decide not to pass through all of a price increase to its customers, since the registrar's lower profits will be offset by higher profits at the registry operator level, thereby placing Namecheap, which is not vertically integrated in this manner, at a competitive disadvantage;
- evidence that price increases may lower demand for domain names and/or complementary services; and
- evidence that price increases may harm Namecheap's brand image, which is based on low prices for domain names.

C. ICANN'S Position

72. ICANN contends that the analysis of standing in Procedural Order No. 8 is incorrect and asks the Panel to reconsider. ICANN maintains that standing requires a showing of past harm that has already occurred, because the Bylaws use the term, "has been affected," in the present perfect tense. ICANN contends that a current risk of future harm is insufficient.

73. ICANN argues in the alternative that if future harm is sufficient, it must be limited to an "imminent risk of material harm that is directly and causally connected to the alleged violation of the Articles of Bylaws." ICANN also argues that Namecheap must show that such harm is "likely" to occur; the mere possibility does not suffice.

74. ICANN agrees with Namecheap that standing should be decided as of the date the IRP was filed, but argues that Namecheap's inability to show actual harm here, well after the Price Cap Decision, tends to show that Namecheap was not materially affected.

75. ICANN acknowledges that IRP procedures should be interpreted in view of the purposes of IRPs, but maintains that those purposes do not authorize this Panel to override the "plain meaning" of the Bylaws.

76. ICANN agrees with Namecheap that U.S. Supreme Court decisions on standing are not controlling, but states that they may be persuasive when they interpret “concrete injury,” which is somewhat analogous to the concept of “materially affected.” ICANN contends that U.S. Supreme Court decisions support its argument that any future harm must be “imminent” and likely to occur.

77. ICANN contends that Namecheap has failed to present any evidence that it has suffered harm that is directly connected with the removal of price caps from the registry agreements for the .ORG, .INFO, and .BIZ gTLDs. ICANN further contends that Namecheap has failed to present evidence that such harm is likely to occur in the imminent future.

78. ICANN argues that Namecheap cannot demonstrate that it has been “materially affected” by the Price Cap Decision because (a) the evidence shows that .ORG, .INFO, and .BIZ prices are unlikely to increase in the future to levels above those allowed by the prior price caps; and (b) even if prices increased above the previously permitted levels, the evidence shows that Namecheap would pass through those increases to customers and thus would not be materially harmed.

79. ICANN asserts that key evidence that .ORG, .INFO, and .BIZ prices are unlikely to increase above previously allowed levels includes:

- Registry operators of .ORG, .INFO, and .BIZ have not increased prices by more than 10% per year after the new registry agreements were signed in July 2019;
- Increasing competition from other TLDs makes it unlikely that .ORG, .INFO, and .BIZ prices will increase above the previously allowed levels, especially competition from .COM, the most popular TLD, which is still subject to price controls.
- Even if prices were increased by more than allowed under the prior price control provisions, Namecheap would likely pass through 100% of the price increases to its customers and would thus suffer no harm.

80. ICANN maintains that key evidence that Namecheap will pass through price increases to its customers includes the following:

- Namecheap has publicly stated that it will pass through price increases to customers;
- Dr. Carlton’s regression analysis shows that Namecheap has on average
Redacted - Claimant Designated Confidential Information
- Economic theory predicts that in a competitive market with conditions such as those in the DNS, registrars will fully pass on price increases, given that they all face the same price increases in view of ICANN’s prohibition on differential pricing to registrars;
- Because Namecheap’s competitors will be subject to the same price increases, such increases are unlikely to cause Namecheap to lose customers
- Namecheap has presented no evidence of any actual lost profits or customers due to price increases.

81. ICANN further contends that Namecheap has not demonstrated that price increases are likely to harm Namecheap in the context of vertically integrated competitors that serve as both registrars and as registry operators, especially in view of ICANN’s prohibition against discriminatory pricing by registry operators;

82. Finally, ICANN asserts that Namecheap has not demonstrated that price increases are likely to cause harm to Namecheap’s reputation or brand equity.

C. The IRP Panel’s Analysis and Decision

83. The Panel is not persuaded to reconsider its preliminary decision in Procedural Order No. 8 that Namecheap has standing under the “materially affected” test of the Bylaws. The Panel reaffirms that decision, while refining its reasoning in view of the additional arguments, legal authorities, and evidence presented.

1. Harm to Procedural Rights “Materially Affects” a Claimant with a “Concrete Interest” in those Rights

84. When Procedural Order No. 8 was issued, the Panel understood from the Parties that no prior IRP cases involved standing, except a single case where the matter

settled before any ruling on standing.⁵⁹ During oral closing arguments, however, ICANN’s counsel advised that standing was addressed in an IRP filed by the Gulf Cooperation Council (“GCC”), which had opposed an application for the new gTLD, “.PERSIANGULF.” ICANN explained that the GCC case involved an alleged violation of due process rights.

85. The Bylaws require this Panel to take into account prior IRP decisions involving the same or equivalent prior version of the Bylaws:

[A]ll IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, *as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue*, and norms of applicable law.⁶⁰

86. The GCC decision was issued on 19 October 2016, based on a version of the Bylaws in effect at that time that included a “materially affected” requirement similar to the clause at issue here.⁶¹ Thus, the analysis in GCC is pertinent here.

87. The GCC case arose from an application by Asia Green, a company founded by Iranian nationals, for approval of a new gTLD, “.PERSIANGULF.”⁶² Claimant GCC, an alliance of six Arab states, opposed the application on the ground that the proposed name refers to a place that is the subject of a historical naming dispute, and targets nearby countries who refer to that place as the “Arabian Gulf.”⁶³

⁵⁹ See Procedural Order No. 8 ¶ 23 and footnote 28.

⁶⁰ Bylaws § 4.3(v) (emphasis added).

⁶¹ RM-176, 19 October 2016 Partial Final Declaration in *Gulf Cooperation Council v. ICANN*, ICDR Case No. 01-14-002-1065, ¶ 42 (quoting the “materially affected” clause in effect at that time). As discussed below, the “materially affected” clause was revised after the GCC decision was issued, but that revision does not alter the relevance of that decision.

⁶² 19 October 2016 Partial Final Declaration in *Gulf Cooperation Council v. ICANN*, ICDR Case No. 01-14-002-1065 (RM-176, “GCC Partial Final Declaration”) ¶ 42 (quoting the “materially affected” clause in effect at that time). As discussed below, the “materially affected” clause was revised after the GCC decision was issued, but that revision does not lessen the relevance of that decision.

⁶³ GCC Partial Final Declaration ¶¶ 1-3, 6, 20.

88. The GCC and its member states used several mechanisms to oppose the .PERSIANGULF gTLD, including expressing concerns to the ICANN Government Advisory Committee (“GAC”), asking the GAC to issue an “Early Warning Notice” to the ICANN Board, invoking the “Independent Objector” process, and lodging a formal “Community Objection.”⁶⁴

89. In December 2014, the GCC filed an IRP request that challenged the ICANN Board’s September 2013 decision to continue to process the “.PERSIANGULF” application.⁶⁵

90. ICANN opposed the IRP request on several grounds, including that GCC had “failed to identify any legally recognizable harm” if .PERSIANGULF was registered. ICANN asserted that the contention that a .PERSIANGULF gTLD will create the false impression that the Gulf Arab nations accept the disputed name “Persian Gulf” is not a cognizable harm.⁶⁶ ICANN relied on the findings of the Independent Objector and Expert Panelist that GCC had not shown harm reaching the level of “material detriment.”

91. GCC replied that it had suffered injury or harm connected to ICANN’s alleged violation of the Articles or Bylaws because the Board’s decision to allow processing of the .PERSIANGULF application without fully considering GCC’s objections was a “denial of its due process rights” that caused harm “materially affecting” the GCC and its members.⁶⁷

92. The GCC panel first held that whether the Claimant has been “materially affected” by an ICANN Board action is a threshold question of standing, which “cannot and does not presuppose a successful request for IRP.” Rather, “as a standing question, this question precedes the core IRP question of whether the ICANN Board acted inconsistently with its Articles or Bylaws.”⁶⁸

⁶⁴ *Id.* ¶¶ 16-27.

⁶⁵ *Id.* ¶¶ 34-36, 50, 65.

⁶⁶ *Id.* ¶ 100.

⁶⁷ *Id.* ¶ 101.

⁶⁸ *Id.* ¶ 102.

93. The GCC panel then held that the “materially affected” test “cannot reasonably be interpreted as requiring an IRP panel to find proof of concrete and measurable injury or harm at the time an IRP request is filed.” Rather, “it must suffice for the IRP requestor, to meet the standing test, to allege reasonably credible injury or harm connected to the contested ICANN Board action.”⁶⁹

94. The GCC panel concluded that GCC had met this test “by describing the harm caused to its Gulf members’ due process rights, by definition, if the processing of the ‘.persiangulf’ gTLD application were to continue on the basis of a Board decision made without regard to the GCC’s objections.”⁷⁰

95. Thus, the GCC panel based standing not on a finding that approving .PERSIANGULF as a new gTLD would likely cause substantive harm to GCC, but rather on a finding that the Board’s alleged failure to fully consider GCC’s objections caused injury to GCC’s procedural rights. The GCC panel also held that proof of actual harm at the time the IRP request is filed is not essential; rather, it suffices to allege “reasonably credible injury or harm connected to the contested ICANN Board action.”⁷¹

96. The reasoning in the U.S. Supreme Court decisions cited by both ICANN and Namecheap support the conclusion that harm to procedural injury may confer standing.⁷²

97. Namecheap cited *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992) (RM-64), among other cases, to support its argument that “procedural injury” may confer standing.⁷³ ICANN also cited *Lujan*, but for the proposition that standing requires a showing of “actual or imminent” harm.⁷⁴

⁶⁹ *Id.* ¶ 105.

⁷⁰ *Id.* ¶ 105.

⁷¹ *Id.* ¶ 105.

⁷² The Panel agrees with ICANN and Namecheap that U.S. court decisions on standing are not binding in this IRP, but the rationale underlying those decisions may be persuasive to the extent they interpret concepts similar to the “materially affected” test in the ICANN Bylaws.

⁷³ Namecheap’s 26 January 2021 Response to ICANN’s Motion to Dismiss ¶ 16 (at 5).

⁷⁴ ICANN Post-Hearing Brief ¶ 24 and footnote 31.

98. The U.S. Supreme Court found no standing in *Lujan*, but recognized that harm to procedural rights may support standing in other cases.

There is this much truth to the assertion that “procedural rights” are “special.” The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

* * * *

We do not hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.⁷⁵

99. Thus, the U.S. Supreme Court held that harm to procedural rights may support standing if the procedures at issue are “designed to protect some threatened concrete interest” of the plaintiff that is the “ultimate basis” of standing. For example, a person living near a dam has standing to challenge a failure to obtain an environmental impact statement since that requirement is presumably intended to protect the interests of persons living nearby. In contrast, persons who live far from the dam may lack standing due to the lack of a concrete interest in the outcome of the dispute.

100. The Panel considers the *Lujan* test to strike a reasonable balance by allowing a person with a concrete interest in a procedural right to enforce that right, while not “opening the floodgates” to claims by persons who lack such an interest.

101. This case involves an IRP under the ICANN Bylaws, not a lawsuit against the U.S. government governed by the U.S. law of standing. Nevertheless, the Panel finds that similar policy concerns are implicated. Allowing anyone to bring an IRP

⁷⁵ RLA-7, *Lujan*, 504 U.S. at 572, footnotes 7 and 8.

based on ICANN's alleged violation of procedural obligations would open the floodgates to claims by persons who have only an abstract interest in the dispute.

102. Limiting claims to persons who have a concrete interest would not open the floodgates, but would promote the purposes of an IRP, which include: (1) ensuring that ICANN "complies with its Articles of Incorporation and Bylaws"; (2) empowering the global Internet community to enforce compliance; and (3) ensuring that ICANN is "accountable to the global Internet community and Claimants."⁷⁶

103. The IRP panel in the GCC case did not explicitly require a showing that the procedures at issue were designed to protect a "concrete interest" of the claimant. However, this is implied by (1) the GCC panel's holding that the claimant must allege "reasonably credible injury or harm *connected* to the contested ICANN Board action";⁷⁷ and (2) the Bylaws requirement that the claimant "must suffer an injury or harm that is directly and *causally connected* to the alleged violation."⁷⁸

104. "Causally connected" implies that the claimant has a real interest in the procedural rights at issue. Absent such an interest, it is hard to see how a claimant could allege "reasonably credible injury" that is "causally connected" to that violation. To borrow the dam analogy in the *Lujan* case, a person who lives far from a proposed dam has no concrete interest in ensuring that an environmental impact statement is prepared, so such a person would have difficulty in alleging reasonably credible injury that is connected with the failure to prepare such a statement. A person who lives far away could allege an abstract interest in ensuring that the government complies with the law. But to base standing on such an abstract interest would open the floodgates to suit by virtually anyone.

105. In sum, the Panel holds that harm to procedural rights confers standing under the "materially affected" test if the claimant has a "concrete interest" in the procedural rights and alleges "reasonably credible injury" that is "causally connected" to the claimed procedural violation.

⁷⁶ Bylaws § 4.3(a)(i), (ii), (iii).

⁷⁷ See GCC Partial Final Declaration ¶ 105 (emphasis added).

⁷⁸ Bylaws § 4.3(b)(i) (emphasis added).

2. Standing Is Established by Namecheap's Claimed Injury to Procedural Rights that It Has a Concrete Interest in Enforcing

106. Namecheap claims that ICANN's "decision-making process" violated ICANN's procedural obligations under the Articles and Bylaws for several reasons:

- "ICANN failed to remain open and transparent in its decisions leading to the removal of price caps in .org, .info and .biz";⁷⁹
- ICANN's Price Cap Decision improperly benefited individual registry operators "without granting the Internet community and those entities most affected with a useful and meaningful opportunity to assist in the policy development process."⁸⁰
- ICANN violated its commitment to remain accountable to the Internet community by removing price caps "in spite of – and without responding to – the concerns raised," including "an unprecedented number of public comments from an entire cross-section of the Internet community."⁸¹
- "No analysis" preceded the Price Cap Decision, and the ICANN Board "rubber-stamped that decision without any analysis of its own."⁸²

107. Namecheap's claim that ICANN made its Price Cap Decision in a non-transparent manner without adequately considering the Internet community's concerns is similar to GCC's claim that ICANN failed to fully consider its objections to the .PERSIANGULF gTLD. Both claims involve alleged harm to procedural rights.

108. The Panel finds that Namecheap has a sufficient concrete interest in ICANN's alleged violation of procedural rights to confer standing. As a registrar that pays a fee to registry operators for every domain name it obtains for customers, any price increase by registry operators will have a direct and immediate impact on Namecheap. Using the dam analogy, Namecheap is similar to a person who lives near

⁷⁹ Namecheap Request for IRP ¶15, heading V.A.

⁸⁰ *Id.* ¶ 41.

⁸¹ *Id.* ¶ 42.

⁸² *Id.* ¶ 43.

the dam, rather than a person who lives far away. Namecheap has a direct interest in the Price Cap Decision that is not merely academic or speculative.

109. Namecheap seeks to protect procedural rights that are similar to those in the dam hypothetical in *Lujan*. The purpose of an environmental impact statement is to ensure that decisions as to proposed projects are made after due consideration of the impact on the surrounding environment. Enforcing the procedural right to an environmental impact statement ensures that impact will be considered, but does not necessarily mean that the project will not be approved.

110. Similarly, Namecheap seeks to enforce ICANN's procedural obligation under its Articles and Bylaws to make significant decisions in an open and transparent manner, after considering concerns expressed by the Internet community. Enforcing that obligation ensures that those concerns will be considered, but does not necessarily mean that the Price Cap Decision was substantively erroneous.

3. Standing Is Also Established by the Current Risk of Future Harm Due to Price Increases

111. ICANN contends that the "has been materially affected" test requires Namecheap to prove that it has already suffered economic harm or is likely to suffer economic harm in the imminent future. ICANN argues that Namecheap cannot show such harm because .ORG and .INFO prices have not increased since the 2019 Registry Agreements were signed by more than allowed by the prior price caps. ICANN further contends that Namecheap cannot show that such increases are likely in the imminent future, or that, if they occurred, that such increases would likely harm Namecheap.

112. ICANN's argument that standing requires proof of past or imminent economic harm is inconsistent with the *GCC* test, which provides that standing may be established by a violation of procedural rights that the claimant has a concrete interest in enforcing, even if no economic harm has occurred or is likely to occur in the imminent future. The Panel thus rejects ICANN's argument on this point.

113. Further, the Panel reaffirms its prior ruling that an ICANN action creating a significant risk of future harm may establish standing under appropriate circumstances. As the Panel explained in Procedural Order No. 8:

A narrow reading of the standing requirement – requiring that injury or harm must have already occurred – would be at odds with ensuring that

ICANN complies with its Articles of Incorporation and Bylaws, empowering the global Internet community and claimants to enforce compliance with the Articles of Incorporation and Bylaws, and ensuring that ICANN is accountable to the global Internet community and claimants. As noted by Namecheap, ICANN's actions are forward-looking, and they generate their effects prospectively. Indeed, the Bylaws expressly permit a claimant to request “interim relief” which “may include prospective relief” to prevent “[a] harm for which there will be no adequate remedy in the absence of such relief.” Almost by definition, such prospective relief will be directed to future harm.⁸³

114. ICANN has not persuaded the Panel to reconsider the foregoing view.

115. ICANN emphasizes that the Bylaws define a Claimant as an entity that “has been materially affected,” which suggests that the ICANN action must have already had an impact on the Claimant.

116. The Panel agrees that there must have been some impact, but “materially affected” is a broad term that is not limited to actual economic harm. The removal of price control provisions from the 2019 Registry Agreements created a risk that prices may increase by more than 10% in the future. This is a new risk that has existed only since the price controls were removed. The fact that the price increases have not yet materialized does not mean that the risk does not exist.

117. As noted previously, delaying review of the Price Cap Decision until after prices are actually increased by more than 10% makes little sense.⁸⁴ Delay increases the risk that it may be too late to unring the bell. It is in the interest of all stakeholders, including ICANN, to resolve disputes about the Price Cap Decision promptly.

118. An October 2016 amendment to the Bylaws reinforces the conclusion that a current risk of harm due to future action may support standing. Before October 2016, the Bylaws excluded harm caused by third party actions, as highlighted below:

Pre-October 2016 Bylaws: “In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the

⁸³ Procedural Order No. 8 ¶ 41 (footnote omitted).

⁸⁴ *Id.* ¶ 43.

Board's alleged violation of the Bylaws or the Articles of Incorporation, *and not as a result of third parties acting in line with the Board's action.*"⁸⁵

119. The October 2016 amendment deleted the highlighted text so that the Bylaws now read as follows:

October 2016 Bylaws: "To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation."⁸⁶

120. The October 2016 deletion of the exclusion of third party acts makes clear that harm resulting from "third parties acting in line with the Board's action" may constitute harm that meets the "materially affected" test. Unlike harm resulting directly from Board action, harm resulting from "third parties acting in line with the Board's action" will likely lag the actual Board decision.

121. Here, the challenged ICANN action is the removal of price control provisions from the 2019 Registry Agreements, which have a term of ten years.⁸⁷ That action creates the new risk that registry operators may increase prices by more than previously allowed levels at some point during the ten-year term. Any harm from such increases would result from third parties "acting in line" with the Price Cap Decision.

122. The Panel finds that the risk of future economic harm is meaningful. While .ORG and .INFO price increases have not exceeded the prior limits since their removal in July 2019, this does not mean there is no risk of such increases during the remaining ten-year terms of the 2019 Registry Agreements.

123. Further, while competition from .COM and other gTLDs may limit .ORG and .INFO price increases to some extent, the testimony of both Namecheap and ICANN witnesses shows that .ORG, in particular, is a special gTLD that is not entirely

⁸⁵ Bylaws, as amended 11 February 2016, § 4.3(2) (RM 74) (emphasis added).

⁸⁶ Bylaws, as amended 1 October 2016, § 4.3(b)(i) (RER-10).

⁸⁷ 2019 Registry Agreement for .ORG, RM 29; 2019 Registry Agreement for .INFO, RM 30

fungible with .COM and other gTLDs. As discussed below, this creates a risk of future increases higher than would have been allowed under the prior price controls.⁸⁸

124. The Panel also finds that if prices increase by more than would have been allowed under the prior price controls, there is substantial evidence that such increases could harm Namecheap by decreasing its profit margins or causing it to lose customers.

125. Dr. Carlton opined that Namecheap would not be harmed because it would pass through 100% of price increases to its customers, without any loss in customers or profits. He asserted that (i) economic theory predicts 100% pass through due to intense competition between registrars; (ii) Namecheap publicly stated it would pass through price increases; (iii) Redacted - Claimant Designated Confidential Information ; and (iv) analysis of Namecheap data for all gTLDs during the same time period shows that Namecheap has, on average, Redacted - Claimant Designated Confidential Information .⁸⁹

126. In contrast, Namecheap's economics expert, Dr. Langus, opined that 100% pass-through was unlikely because (i) intense competition between registrars does not necessarily result in perfect pass-through;⁹⁰ (ii) Namecheap did not state that it would immediately pass through 100% of all price increases;⁹¹ (iii) because price controls were removed recently, the available data are not sufficient to conduct a reliable empirical analysis of the impact of that removal;⁹² and (iv) Dr. Carlton's empirical analysis is unreliable for several reasons, including Redacted - Claimant Designated Confidential Information .⁹³

127. Dr. Langus further opined that even if Namecheap passed through 100% of price increases to customers, Namecheap could be harmed for several reasons.

⁸⁸ The Panel focuses here on evidence that .ORG has market power, which is stronger than evidence related to .INFO. Evidence related to .INFO is discussed below in Section XI.D.

⁸⁹ Carlton Report ¶¶ 17-26 and Tables 1, 2; Carlton Presentation Slides 5, 6; Hearing Tr. Day V 12:6 to 14:11.

⁹⁰ EER-III ¶¶ 24-29.

⁹¹ *Id.* ¶¶ 39-40.

⁹² EER-II ¶ 79.

⁹³ EER-III ¶¶ 30-38; Hearing Tr. Day IV, 132:10 to 135:5.

128. First, Dr. Langus asserted that registry price increases could reduce overall demand for domain names, which would result in lost customers and profits.⁹⁴ He noted that companies often register multiple related domain names, for “defensive purposes” (*i.e.*, to protect against cybersquatters who register similar names) and also to make it easy for customers to find their website.⁹⁵ Large price increases may cause customers to abandon some of their multiple related domain names.

129. Second, Dr. Langus noted that Namecheap generates a substantial percentage of its profits from the sale of “complementary services” related to a domain name, such as email, storage space, and webpage templates and advice. Increased domain name registration prices could reduce demand for such services.⁹⁶

130. Third, Dr. Langus noted that competing registrars that are vertically integrated (such as GoDaddy, which acquired Neustar’s registry operations) would not need to pass through 100% of registry price increases, because the lower margins of the registrar would be offset by higher margins of the related registry operator.⁹⁷ If Namecheap matched the partial pass-through, it would face lower profit margins that would not be offset by the higher margins of a related company.⁹⁸ And if Namecheap passed through 100% of the price increases, its prices would be higher than the competing vertically integrated registry, which would be contrary to Namecheap’s brand image (“name cheap”) and could result in lost customers.

131. Dr. Langus stated that the ability of vertically integrated companies to manipulate prices in a way that harms competitors who are not vertically integrated is “a dominant theory of harm of antitrust enforcement agencies in vertical mergers” that is referred to as “input foreclosure.”⁹⁹ Dr. Langus testified that he did not know if this

⁹⁴ *Id.* ¶¶ 50-52.

⁹⁵ *Id.* ¶ 51; *see* EER-II, ¶¶ 119-22.

⁹⁶ EER-III ¶¶ 54-56.

⁹⁷ *Id.* ¶¶ 13, 41.

⁹⁸ *See* Hearing Tr. Day V 169:8 to 170:1 (vertically integrated companies such as GoDaddy can put pressure on Namecheap’s margins by not passing through all of a price increase).

⁹⁹ EER-I ¶ 89.

would actually occur, but economic theory predicts an incentive to do this, and the “theoretical prediction is robust.”¹⁰⁰

132. Dr. Carlton did not dispute that vertical integration creates the potential problem that “you might favor yourself over a rival that you compete with downstream.”¹⁰¹ He called this problem “a hot topic in antitrust and vertical mergers.”¹⁰² Dr. Carlton agreed that “there are limited circumstances when vertical integration can wind up harming competition.”¹⁰³ He also agreed that as a theoretical matter, “GoDaddy or other vertically integrated companies might choose to not pass it [price increases] all through because they can make it up elsewhere.”¹⁰⁴

133. Dr. Carlton stated, however, that he had seen no evidence that GoDaddy had actually manipulated prices in this manner.¹⁰⁵ He opined that GoDaddy was unlikely to do so because raising prices for a specific gTLD (such as .BIZ) might cause customers to shift to a different gTLD, meaning that “GoDaddy gets nothing.”¹⁰⁶

134. Both Dr. Langus and Dr. Carlton are well-credentialed, credible and articulate experts, and each made good points. For the purpose of the “materially affected” test, however, the Panel need not definitively resolve their conflicting views. Namecheap is not seeking to make a case for the recovery of damages. Rather, the critical issue, as stated in the GCC case, is whether Namecheap has alleged “reasonably credible injury or harm connected to” the contested ICANN action.¹⁰⁷

135. The Panel finds that Namecheap has presented sufficient evidence to support a “reasonably credible” claim that the removal of price controls creates a significant risk that price increases exceeding the prior limits will harm Namecheap. Even if Namecheap is able to pass through most increases, the risk remains that pass-

¹⁰⁰ Hearing Tr. Day V 170:2-14.

¹⁰¹ Hearing Tr. Day V 165:20-21.

¹⁰² Hearing Tr. Day V 165:17-18.

¹⁰³ Hearing Tr. Day V 166:12-14.

¹⁰⁴ Hearing Tr. Day V 166:12-14.

¹⁰⁵ Hearing Tr. Day V 90:15-22.

¹⁰⁶ Hearing Tr. Day V 167:22 to 169:1.

¹⁰⁷ GCC Partial Final Declaration ¶ 105.

through will be delayed or incomplete. That risk is especially acute in the context of a vertically integrated competitor that has both the ability and the incentive to pass through only a portion of price increases, forcing non-vertically integrated companies such as Namecheap to either reduce their margins or charge higher prices than the vertically integrated company.

136. Dr. Carlton agreed that incomplete pass-through by a vertically integrated competitor is a theoretical risk.¹⁰⁸ While he asserted that this was unlikely to occur, the Panel is not persuaded that the risk is insignificant. Accordingly, Namecheap has met the “materially affected” test by alleging “reasonably credible injury or harm connected to” the contested ICANN action.

4. Conclusion Regarding the Materially Affected Test

137. In sum, Namecheap has met the “materially affected test,” as interpreted in the GCC case, based on its claims that ICANN violated its procedural obligation to make decisions in an open and transparent manner, and Namecheap’s concrete interest as a registrar in enforcing that obligation. Namecheap has also presented reasonably credible evidence that it faces a meaningful risk of economic harm during the ten-year term of the 2019 Registry Agreements from price increases exceeding those allowed under the prior price control provisions.

IX. ISSUE 2: ARE NAMECHEAP’S CLAIMS REGARDING .BIZ, VERTICAL INTEGRATION, AND THE FEB06 POLICY TIME-BARRED?

C. The Issue and Legal Framework

138. Section 4 of the IRP Procedures sets a 120-day deadline to file an IRP:

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

¹⁰⁸ Hearing Tr. Day V 167:22.

139. ICANN asserts that the following Namecheap claims are untimely because Namecheap did not assert them within 120 days of becoming aware of the material effect of the action, as required by Section 4 of the IRP Procedures:

- Namecheap’s claim that ICANN’s Price Cap Decision regarding the .BIZ gTLD (the “**.BIZ Claim**”) violated ICANN’s Articles and Bylaws;¹⁰⁹
- Namecheap’s claim that ICANN “failed to apply fairly its policies and processes on vertical integration” (the “**Vertical Integration Claim**”);¹¹⁰ and
- Namecheap’s claim that ICANN “failed to apply fairly its policies and processes on the Feb06 Policy” (the “**Feb06 Policy Claim**”).¹¹¹

140. The following sections summarize ICANN’s timeliness objections and Namecheap’s response as to each of these claims, and then explain the Panel’s decision.

C. Timeliness of Namecheap’s .BIZ Claim

1. ICANN’S Position

141. ICANN’s timeliness objection to Namecheap’s .BIZ Claim focuses on the content of Reconsideration Request 19-2, which Namecheap filed on 12 July 2019.

142. ICANN states that Namecheap admitted in its Reconsideration Request 19-2 that it became aware on 1 July 2019 of the “material effect” of ICANN’s Price Cap Decision, which occurred on 30 June 2019, so the 120-day deadline to challenge that decision expired on 29 October 2019.¹¹²

143. ICANN contends that Namecheap missed that deadline as to its .BIZ claim, because Reconsideration Request 19-2 sought reconsideration of ICANN’s Price Cap Decision as to .ORG and .INFO only, and not as to .BIZ.¹¹³ ICANN further contends

¹⁰⁹ ICANN Pre-Hearing Brief ¶¶ 169-74.

¹¹⁰ ICANN Pre-Hearing Brief ¶¶ 155, 157.

¹¹¹ ICANN Pre-Hearing Brief ¶¶ 156-57.

¹¹² ICANN Pre-Hearing Brief ¶ 170.

¹¹³ ICANN Pre-Hearing Brief ¶ 170.

that Namecheap's "vague references" to "all legacy gTLDs" in Reconsideration Request 19-2 were not sufficient to put the .BIZ gTLD at issue.¹¹⁴

144. ICANN also notes that the ICANN Board's Proposed Determination on Reconsideration Request 19-2 was limited to .ORG and .INFO only, and that Namecheap did not object to that limitation in its rebuttal.¹¹⁵

2. Namecheap's Position

145. Namecheap does not dispute that it was required to challenge ICANN's Price Cap Decision regarding .BIZ by 29 October 2019. Namecheap contends, however, that it met this deadline because Reconsideration Request 19-2 put .BIZ at issue for several reasons.

146. First, Namecheap emphasizes that Reconsideration Request 19-2 "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in *all* legacy TLDs."¹¹⁶

147. Second, Namecheap notes that Becky Burr, a member of the ICANN Board of Directors, recused herself from the Board's decision on Reconsideration Request 19-2, on the ground that "*this addresses issues that were arised (sic) in connection with the extension of the BIZ contract* and I was at Neustar and advised Neustar."¹¹⁷ Namecheap argues that Ms. Burr's recusal effectively acknowledges that Reconsideration Request 19-2 put the .BIZ renewal agreement at issue.

148. Third, Namecheap contends that "ICANN's decisions regarding .ORG, .INFO and .BIZ were jointly taken" and resulted "in a single and non-severable decision." Namecheap argues that addressing .ORG and .INFO only would be "unworkable," because it might result in "disparate treatment," which could lead to a new IRP "on exactly the same issue."¹¹⁸

¹¹⁴ ICANN Pre-Hearing Brief ¶ 171.

¹¹⁵ ICANN Pre-Hearing Brief ¶ 172-73.

¹¹⁶ Namecheap Rebuttal Brief ¶ 151, quoting Reconsideration Request 19-2, Section 9 (emphasis added by Namecheap).

¹¹⁷ Namecheap Rebuttal Brief ¶ 153 (emphasis added by Namecheap).

¹¹⁸ Namecheap Rebuttal Brief ¶ 153 (emphasis added by Namecheap).

3. The IRP Panel's Analysis and Decision

149. Namecheap filed this IRP on 25 February 2020, which is more than 120 days after 1 July 2019, which is the date that Namecheap admittedly became aware of the material effect of ICANN's decisions to renew registry agreements for .ORG and .INFO without price controls.

150. ICANN has not asserted that this IRP is untimely as to .ORG and .INFO, apparently because it considers Namecheap's 12 July 2019 Reconsideration Request 19-2 to have tolled the 120-day deadline with respect to those domains.¹¹⁹ Thus, for purposes of this IRP, the Panel is proceeding with the understanding that a timely reconsideration request tolls the 120-day deadline (but without making an independent determination on that point).¹²⁰

151. Namecheap has not disputed that 1 July 2019 is also the date that it became aware of the material effect of ICANN's decision to renew the registry agreement for .BIZ. The critical issue then is whether Reconsideration Request 19-2 tolled the 120-day deadline by seeking reconsideration of ICANN's decision to renew the registry agreement for .BIZ without price controls, thereby meeting the 120-day deadline.

152. The Panel concludes that Namecheap's claim as to .BIZ is untimely because (a) Reconsideration Request 19-2 and related documents make it clear that Namecheap sought reconsideration of ICANN's decision regarding .ORG and .INFO only; and (b) Namecheap's other arguments are not persuasive, as discussed below.

a) Reconsideration Request 19-2 did not seek reconsideration of the ICANN decision regarding .BIZ

153. Under a header with the title, "Description of specific action you are seeking to have reconsidered," Section 3 of Reconsideration Request 19-2 states in full:

¹¹⁹ ICANN notes that Section 4 of the IRP Procedures required Namecheap to institute an "Accountability Mechanism" by 29 October 2019. The accountability mechanisms in the Bylaws include reconsideration (§ 4.2), as well as IRPs (§ 4.3).

¹²⁰ The Panel also notes that Namecheap initiated this IRP on 25 February 2020, which is within 120 days of the ICANN Board's denial of reconsideration on 29 November 2019.

On 30 June 2019, ICANN org *renewed the registry agreement for the .org and .info TLD without the historic price caps*, despite universal widespread public comment supporting maintain[ing] the price caps. The decision by ICANN org to unilaterally remove the price caps when renewing legacy TLDs with little (if any) evidence to support the decision goes against ICANN's Commitments and Core Values, and will result in harm to millions of internet users throughout the world. ICANN's announcement about this decision is at <https://www.icann.org/resources/agreement/org-2019-06-30-en> and <https://www.icann.org/resources/agreement/info-2019-06-30-en>.¹²¹

154. Namecheap's description of "the specific action you are seeking to have reconsidered" is clear and unambiguous. Namecheap sought reconsideration of ICANN's 30 June 2019 decision to "renew[] the registry agreement for the .org and .info TLD without the historic price caps." Namecheap provided hyperlinks to ICANN's public announcements of the renewal agreements for .ORG and .INFO. Namecheap did not request reconsideration of ICANN's decision to renew the .BIZ registry agreement without price controls; nor did it provide a hyperlink to the .BIZ renewal agreement.

155. Had Namecheap wanted to challenge the .BIZ renewal agreement, it should have referred to the .BIZ registry agreement.

156. As Namecheap has noted, Reconsideration Request 19-2 includes some general references to "legacy TLDs." For example, the second sentence of Section 3 refers to "[t]he decision by ICANN org to unilaterally remove the price caps when renewing legacy TLDs with little (if any) evidence to support the decision." But the second sentence of Section 3 must be read together with the preceding and following sentences, which refer to ICANN's decision regarding .ORG and .INFO. Section 3, when read as a whole, leaves no doubt that the only "specific action" that Namecheap challenged is ICANN's decision to renew the .ORG and .INFO registry agreements without price controls.

157. In Section 9 of Reconsideration Request 19-2, Namecheap asked ICANN to "reverse its decision and include (or maintain) price caps in all legacy TLDs."

¹²¹ Annex 8, Section 3 (emphasis added).

“Reverse its decision,” however, can only refer to the decision identified in Section 3, which is limited to .ORG and .INFO.

158. Namecheap’s request that ICANN “include (or maintain) price caps in all legacy TLDs” appears to be precatory in nature. Namecheap expressed the wish or desire that ICANN include or maintain price controls in all legacy TLDs, including other legacy TLDs such as .COM, for which price controls were still in effect.

159. Namecheap’s wish does not mean that it sought reconsideration of ICANN decisions regarding “all legacy TLDs.” In fact, Namecheap identified the decisions regarding .ORG and .INFO as the only decisions for which it sought reconsideration.

160. Thus, while Namecheap expressed the wish that ICANN “include (or maintain) price caps in all legacy TLDs,” it sought reconsideration only as to ICANN’s decisions regarding .ORG and .INFO.

161. The limited scope of Namecheap’s Reconsideration Request 19-2 is confirmed by the Proposed Determination that the ICANN Board issued on 3 November 2019. As ICANN has noted, the first sentence of the Proposed Determination stated:

The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization’s 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afiliis Limited (Afiliis) *for the .ORG and .INFO generic top-level domains (gTLDs)*, respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, *the .ORG/INFO Renewed RAs*), insofar as the renewals eliminated “the historic price caps” on domain name registration fees *for .ORG and .INFO*.¹²²

162. The Proposed Determination is explicitly limited to the decisions regarding the “.ORG/.INFO Renewed RAs.” Indeed, it refers to the “.ORG/.INFO Renewed RAs” over 30 times and concludes:

The Board has considered the merits of Request 19-2 and, based on the foregoing, concludes that ICANN org’s execution of the *.ORG/INFO*

¹²² Proposed Determination R-53 ¶ 1 (emphasis added).

Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN staff did not fail to consider material information in executing the Agreement.¹²³

163. In contrast, the Proposed Determination's only reference to the .BIZ registry agreement is a footnote stating the registry agreement was similar to the Base Registry Agreement.¹²⁴ That footnote contains no analysis of whether the decision to renew the .BIZ registry agreement without price controls was proper.

164. Namecheap did not object to the Proposed Determination by arguing that it failed to address renewal of the .BIZ registry agreement without price controls. On the contrary, Namecheap acknowledged that the Proposed Determination was limited to .ORG and .INFO.¹²⁵

The Requestor, Namecheap Inc., submits this Rebuttal to the ICANN Board's Proposed Determination on Reconsideration Request (RfR) 19-2 (the 'Recommendation'). The Recommendation concerns Requestor's request that the Board reverse ICANN org and the ICANN Board decision of 30 June 2019 *to renew the registry agreement for the .org and .info TLDs without the historic price caps (the 'Decision')*.

165. In sum, the content of Reconsideration Request 19-2, the Proposed Determination of the ICANN Board, and Namecheap's Rebuttal to Proposed Determination all point to the same conclusion: Namecheap sought reconsideration of the Price Cap Decision as to .ORG and .INFO only, and not as to .BIZ.

b) Namecheap's other arguments regarding its .BIZ Claim are unavailing

166. Namecheap's other arguments regarding .BIZ are not persuasive.

167. Namecheap contends that Ms. Burr's recusal from the Board's decision on Reconsideration Request 19-2 is effectively an admission that Namecheap sought

¹²³ Proposed Determination R-53 ¶ 22 (emphasis added).

¹²⁴ Proposed Determination R-53 ¶ 3, footnote 3.

¹²⁵ Annex 10 ¶ 1; Namecheap's Rebuttal to Reconsideration Request 19-2, 18 November 2019 (emphasis added).

reconsideration of the renewal of the .BIZ registry agreement without price caps. Namecheap cites the following statement by Ms. Burr: “Because this addresses issues that were arised (sic) in connection with the extension of the BIZ contract and I was at Neustar and advised Neustar, I’m going to recuse myself from 19-2.”¹²⁶

168. The Panel is not persuaded by this argument. As Ms. Burr explained, she served from 2012 to March 2019 as Deputy General Counsel and Chief Privacy Officer at Neustar, which was the registry operator for the .BIZ gTLD.¹²⁷ Ms. Burr supported Neustar’s 2013 renewal of the .BIZ registry agreement and had limited involvement with the 2019 renewal. Ms. Burr testified that even though Reconsideration Request 19-2 did not challenge the absence of price control provisions from the .BIZ Registry Agreement, she recused herself “in an abundance of caution” to avoid any “appearance of a conflict.”¹²⁸

169. The Panel finds Ms. Burr’s testimony to be credible. While Reconsideration Request 19-2 was limited to .ORG and .INFO, the renewal agreement for .BIZ presented a similar issue, which created the risk of an “appearance of a conflict,” in that Ms. Burr’s views on the .BIZ renewal agreement could be perceived as influencing her views regarding the .ORG and .INFO renewal agreements.

170. The Panel concludes that Ms. Burr’s recusal was a reasonable exercise of professional judgment and is not an “admission” that Reconsideration Request 19-2 sought reconsideration of the renewal agreement for .BIZ. That conclusion is consistent with the content of Reconsideration Request 19-2, which was directed only to .ORG and .INFO, as discussed above.

171. Namecheap also contends that “ICANN’s decisions regarding .ORG, .INFO and .BIZ were jointly taken,” and resulted “in a single and non-severable decision.” Namecheap makes the related argument that addressing .ORG and .INFO only would be “unworkable,” because ICANN “would need to ensure that its

¹²⁶ Namecheap Rebuttal Brief ¶ 153.

¹²⁷ Burr Statement ¶ 3.

¹²⁸ Burr Statement ¶ 32.

implementation of the decision does not result in disparate treatment,” which could result in a new IRP “on the same issue.”¹²⁹

172. The Panel is not persuaded that addressing the merits of Namecheap’s claims regarding .ORG and .INFO only is “unworkable.” While the .BIZ decision was made at the same time as .ORG and .INFO, it was a separate decision involving a separate registry agreement that followed negotiations with a different registry operator.

173. In sum, the Panel finds that Namecheap’s .BIZ claim is untimely because Namecheap did not file this IRP or initiate another “accountability mechanism” (such as reconsideration) within the 120-day deadline in Section 4 of the IRP Procedures. Accordingly, the Panel dismisses that claim, without addressing its merits.

C. Timeliness of Namecheap’s Claims Regarding Vertical Integration and the Feb06 Policy

1. The Panel’s Preliminary Views of 22 April 2022

174. After the merits hearing, on 22 April 2022, the Panel invited the Parties to comment on ICANN’s timeliness objection to Namecheap’s claims regarding vertical integration and the Feb06 Policy and expressed the following preliminary views:

The Panel notes that Namecheap listed the following issue: “Did ICANN respect its Board-approved processes when removing cross-ownership restrictions in .ORG, .INFO, and .BIZ?” ICANN has asserted that claims based on Vertical Integration (or cross-ownership restrictions) and the Feb06 Policy are barred. The Panel’s preliminary view is that (1) standalone claims that ICANN improperly removed cross-ownership restrictions or violated the Feb06 Policy are beyond the scope of this IRP as framed by Namecheap’s IRP Request and Reconsideration Request 19-2; but (2) cross-ownership restrictions and the Feb06 Policy may be relevant as a factual matter to standing and Namecheap’s claim that

¹²⁹ Namecheap Rebuttal Brief ¶ 153 (emphasis added by Namecheap).

ICANN improperly removed price caps The parties are invited to comment on this preliminary view.¹³⁰

2. ICANN'S Position

175. ICANN agreed that claims involving the removal of cross-ownership restrictions or Feb06 Policy violations are beyond the scope of this IRP because Namecheap did not initiate a timely Accountability Mechanism (such as a reconsideration request) regarding the underlying decisions, nor did it include any such claims in its IRP Request.¹³¹ ICANN disagreed, however, with the Panel's preliminary view that cross-ownership restrictions and the Feb06 Policy may be relevant to standing and Namecheap's claim that ICANN improperly removed price controls.

176. ICANN asserted that "arguments relating to the removal of cross-ownership restrictions and the Feb06 Policy are not properly before the Panel" because Namecheap did not challenge any alleged violations of these policies within one year of their adoption. ICANN also maintained that Namecheap's representative, Mr. Klein, "conceded that Namecheap is not challenging anything relating to vertical integration."¹³²

177. ICANN further argued that any violations related to vertical integration or the Feb06 Policy would not be relevant to standing because any resulting harm to Namecheap would be "proximately caused by the change in vertical integration policy itself or violations of ICANN's non-discrimination policy, not the removal of price control provisions."¹³³

¹³⁰ April 22 List, Issue 4. As discussed below, "vertical integration" or "cross-ownership" refers to a situation where a registry operator shares common ownership with a registrar, The Feb06 Policy refers to a policy regarding registration agreements developed by the Generic Names Supporting Organization (GNSO), which the ICANN Board approved, but which ICANN did not implement.

¹³¹ ICANN Post-Hearing Brief ¶ 37.

¹³² *Id.* ¶ 38.

¹³³ *Id.* ¶ 98.

3. Namecheap's Position

178. Namecheap replied to the Panel's preliminary views as follows:¹³⁴

Namecheap is not making a separate claim with respect to ICANN's failure to apply fairly its policies and processes on vertical integration and on the Feb06 Policy, but in connection to ICANN's opaque decision to renew the .ORG, .INFO and .BIZ RAs without price caps. These issues are relevant as a factual matter, in particular to Namecheap's claim that ICANN improperly removed the price caps. Indeed, ICANN failed to implement, apply and abide by these policies when it decided to remove the price caps.

4. The IRP Panel's Analysis and Decision

179. The Panel retains its preliminary views that vertical integration and the Feb06 Policy are beyond the scope of this IRP to the extent that Namecheap is presenting them as separate claims, but they may be considered in connection with the claims that Namecheap asserted in this IRP.

180. The Panel considers claims for relief to be distinct from arguments and allegations that support a claim. The test for asserting a new claim is more stringent than for presenting new arguments or allegations that support a claim that has already been asserted. In general, claims may be time-barred if they are not asserted by the applicable deadline. In contrast, if a claim has been timely asserted, new arguments and allegations that support that claim can be made during the course of an arbitration or other legal proceeding, absent undue tardiness or prejudice to the opposing party.

181. As discussed above, ICANN interprets Section 4 of the IRP Procedures as requiring a claimant to initiate an IRP or other Accountability Mechanism within 120 days of becoming aware of the material effect of the challenged ICANN action. Further, Article 9 of the ICDR Rules states: "Any party may amend or supplement its claim, counterclaim, setoff, or defense unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties, or any other circumstances."

¹³⁴ ICANN Post-Hearing Brief ¶ 98.

182. Under these principles, it is generally not proper to assert entirely new claims challenging distinct ICANN actions that were not part of an IRP Request or other Accountability Mechanism (such as reconsideration) filed within the 120-day deadline. In contrast, that deadline does not require a claimant to include every specific argument and allegation that supports the claims in its IRP Request or reconsideration request.¹³⁵

183. As discussed below, Namecheap has asserted both “claims” and “arguments” regarding vertical integration and the Feb06 Policy. The Panel finds that claims regarding vertical integration and the Feb06 Policy are beyond the scope of this IRP, but the Panel may consider Namecheap’s arguments to the extent that they support the claims made by Namecheap in its IRP Request and Reconsideration Request 19-2.

a) Namecheap’s vertical integration claims and arguments

184. Namecheap did not mention vertical integration or cross-ownership in its July 2019 Reconsideration Request 19-2 or its February 2020 IRP Request.

185. Namecheap first mentioned vertical integration in connection with ICANN’s motion to dismiss for lack of standing. Namecheap argued in its 26 January 2021 Response to that motion that price increases could harm Namecheap even if Namecheap passed them through to its customers. To support this point, Namecheap asserted:

If some of Namecheap’s rivals do not fully pass through the price increase, Namecheap would lose customers to those cheaper rivals. The point is all the stronger if rivals are *vertically integrated* with any of the TLD operators concerned.¹³⁶

¹³⁵ These general principles may, of course, be subject to exceptions in specific cases; the Panel expresses no view on the scope of any exceptions that do not involve the specific facts of this case.

¹³⁶ Namecheap’s 26 January 2021 Response to ICANN’s Motion to Dismiss ¶ 64 (emphasis added).

186. Namecheap cited the first Economic Expert Report of Professor Dr. Verboven and Dr. Langus, which noted that GoDaddy, the world’s largest registrar, had acquired the registry business of Neustar, the registry operator of .BIZ.¹³⁷

187. Drs. Verboven and Langus opined that the vertical integration of Neustar’s registry operations with GoDaddy’s registry business provided the merged firm with the ability to manipulate prices and other sale terms in a way that may increase Namecheap’s costs while not imposing a similar burden on the merged firm.¹³⁸ They referred to such manipulation as “input foreclosure,” which is “a dominant theory of harm of antitrust enforcement agencies in vertical mergers.”¹³⁹

188. Ten months later, in its Pre-Hearing Brief of 30 November 2021, Namecheap asserted a new claim for a declaration that “ICANN’s entering into the 2019 registry agreements for .ORG, .INFO and .BIZ without the cross-ownership restrictions that were in place for .ORG, .INFO and .BIZ at the date of the Board’s adoption of the ICANN Board Resolution 2012.10.18.01 must be annulled as inconsistent with and violative of” international law and multiple clauses of the ICANN Articles and Bylaws.¹⁴⁰

189. To support this new cross-ownership claim, Namecheap stated in its Pre-Hearing Brief that in October 2012, the ICANN Board approved a process for registry operators to remove cross-ownership restrictions from their registry agreements.¹⁴¹ Namecheap claimed that ICANN applied its vertical integration policy “unfairly” by removing cross-ownership restrictions from the 2019 Registry Agreements for .ORG, .INFO, and .BIZ, without following the approved process.¹⁴²

190. ICANN promptly objected to Namecheap’s claim that “ICANN failed to apply fairly its policies and processes on vertical integration.” ICANN argued that it

¹³⁷ EER-I ¶ 88.

¹³⁸ EER-I ¶¶ 89-93.

¹³⁹ EER-I ¶ 89.

¹⁴⁰ Namecheap Pre-Hearing Brief ¶ 425, fourth bullet point (at 133) (emphasis added).

¹⁴¹ Namecheap Pre-Hearing Brief ¶ 390.

¹⁴² Namecheap Pre-Hearing Brief, ¶¶ 390-93.

was “completely inappropriate and prejudicial” for Namecheap to introduce this new claim “just before the merits hearing and after two years of litigation.”¹⁴³

191. The Panel agrees with ICANN that Namecheap’s request for a declaration that ICANN unfairly removed cross-ownership restrictions from the 2019 Registry Agreements is an untimely new claim. Namecheap did not make any similar claim in its July 2019 Reconsideration Request 19-2 or its February 2020 IRP Request. Indeed, those requests did not even mention “cross-ownership” or “vertical integration.”

192. Namecheap asserts that it “is not making a separate claim with respect to ICANN’s failure to apply fairly its policies and processes on vertical integration,” and instead relies on vertical integration “as a factual matter” that is relevant to its “claim that ICANN improperly removed the price caps.”¹⁴⁴ Yet Namecheap requested the following declaration in its Pre-Hearing Brief:

That “ICANN’s entering into the 2019 registry agreements for .ORG, .INFO and .BIZ *without the cross-ownership restrictions* that were in place for .ORG, .INFO and .BIZ at the date of the Board’s adoption of the ICANN Board Resolution 2012.10.18.01 must be annulled as inconsistent with and violative of” international law and multiple clauses of the ICANN Articles and Bylaws.¹⁴⁵

193. This request solely concerns ICANN’s decision to enter into registry agreements that do not contain cross-ownership restrictions. Removal of cross-ownership restrictions is a significant decision that is distinct from the removal of price controls. Namecheap itself distinguished between removal of cross-ownership restrictions and removal of price controls in its separate requests for declaratory relief. Further, Namecheap bases its challenge of the removal of cross-ownership restrictions on an entirely separate policy, adopted by the ICANN Board in 2012, which focuses on cross-ownership, and not price controls.

¹⁴³ ICANN Pre-Hearing Brief ¶¶ 155, 157.

¹⁴⁴ Namecheap Post-Hearing Brief ¶ 12.

¹⁴⁵ Namecheap Pre-Hearing Brief ¶ 425, bullet points 1, 2, 4 (at 131-33) (emphasis added). Namecheap repeated these requests in its 8 February 2022 Rebuttal Brief (¶ 160) and incorporated them by references in its 27 May 2022 Post-Hearing Brief (¶ 61).

194. Thus, the Panel concludes that Namecheap’s claim that ICANN improperly removed cross-ownership restrictions from the 2019 registry agreements should be dismissed.

195. At the same time, the Panel finds that Namecheap’s arguments on vertical integration that relate to standing or support its claim that ICANN improperly removed price controls from the 2019 registry agreements may be considered. In the context of standing, Namecheap’s vertical integration argument is not an affirmative claim for relief. Rather, it is a factual response to ICANN’s standing defense. Vertical integration may also be relevant, as a factual matter, to Namecheap’s claim that price controls became more important once ICANN allowed vertical integration and that ICANN failed to consider this in entering into the 2019 Registry Agreements.

b) Namecheap’s Feb06 Policy claims and arguments

196. The Panel makes a similar ruling regarding the Feb06 Policy.

197. Namecheap did not mention the Feb06 Policy in its July 2019 Reconsideration Request 19-2, its 18 November 2019 Rebuttal to the Board’s Proposed Determination, or its 25 February 2020 IRP Request.

198. Namecheap first mentioned the Feb06 Policy in its Pre-Hearing Brief of 30 November 2021. Namecheap claimed that “ICANN failed to apply fairly its policies and processes on the Feb06 Policy.”¹⁴⁶ To support this claim, Namecheap alleged as follows:

- In December 2005, the GNSO started a policy development process that became known as the “Feb06 PDP,” which addressed (1) price control policies for registry services; and (b) objective measures for approving price increases.¹⁴⁷
- The GNSO recommended that there should be a policy guiding registry agreement renewals and that individual negotiations for fees paid to ICANN should be avoided.¹⁴⁸

¹⁴⁶ Namecheap Pre-Hearing Brief ¶124 (heading (iii)).

¹⁴⁷ *Id.* ¶ 75.

¹⁴⁸ *Id.* ¶ 78.

- In January 2008, the ICANN Board accepted the GNSO’s recommendation on “contractual conditions for existing gTLDs” and directed the ICANN staff “to implement the recommendations, as outlined in the Council Report to the Board on the PDF Feb-06.”¹⁴⁹
- The ICANN staff, however, did not implement the GNSO’s recommendations, including the 2019 renewal of the registry agreements for .ORG, .INFO, and .BIZ.¹⁵⁰
- “A fair application of the Feb 06 policy would have required that ICANN implement the GNSO recommendations and develop an open and transparent process for the renewal of existing RAs, considering the possibility for competitive rebids.” ICANN did not follow this procedure, however.¹⁵¹

199. Namecheap stated in its Post-Hearing Brief that it “is not making a separate claim with respect to ICANN’s failure to apply fairly its policies and processes on ... the Feb06 Policy,” and that Namecheap relies on the Feb06 Policy “as a factual matter” that is relevant to “Namecheap’s claim that ICANN improperly removed the price caps.”¹⁵²

200. Namecheap is correct that it has not asserted a claim for declaratory relief that refers specifically to the Feb06 Policy. Namecheap, however, seeks a declaration that ICANN’s entry into the 2019 Registry Agreements without price caps violated Article I(2)(a)(v) of the Bylaws, which requires ICANN to “make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory”¹⁵³

201. Namecheap’s argument that “fair application of the Feb 06 policy” required ICANN to “develop an open and transparent process for the renewal of

¹⁴⁹ *Id.* ¶ 79.

¹⁵⁰ *Id.* ¶¶ 80, 402.

¹⁵¹ Namecheap Pre-Hearing Brief ¶ 402.

¹⁵² ICANN Post-Hearing Brief ¶ 98.

¹⁵³ Namecheap Pre-Hearing Brief ¶¶ 222, 425 (third bullet point, at 132).

existing RAs”¹⁵⁴ suggests that it is not relying on that policy solely as factual background to ICANN’s removal of price caps from the 2019 Registry Agreements. Rather, Namecheap appears to be claiming that ICANN violated the Feb06 Policy by not developing an “open and transparent process” for renewing the 2019 Registry Agreements.

202. To the extent that Namecheap’s claim is based on alleged violation of the Feb06 Policy, the Panel dismisses that claim as untimely and beyond the scope of this IRP.

203. The Feb06 Policy was approved by the ICANN Board in 2008, so Namecheap certainly knew about that policy long before 2019, and the time to challenge the policy has long since passed.

204. At the same time, the Panel will consider Namecheap’s allegations regarding the Feb06 Policy, to the extent that they serve as factual background to Namecheap’s claim that ICANN acted improperly by not including price controls in the 2019 Registry Agreements.

X. ISSUE 3: WHAT STANDARD APPLIES TO THE PANEL’S REVIEW OF ACTIONS BY THE ICANN ORGANIZATION AND BOARD?

C. The Issue and Legal Framework

205. An important threshold issue is the standard for this Panel’s review of the ICANN actions challenged by Namecheap. The Parties agree that the issue is governed by Section 4.3(i) of the Bylaws, which is almost identical to Rule 11 of the IRP Procedures:

Each IRP PANEL shall conduct an objective, de novo examination of the Dispute.

- (i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

¹⁵⁴ *Id.* ¶ 402.

- (ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- (iii) For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment. . . .¹⁵⁵

206. “Covered actions” are defined as “any actions or failure to act by or within ICANN ... committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”¹⁵⁶

207. “Disputes” are defined as including “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws,” which is followed by a non-exclusive list of specific actions.¹⁵⁷

208. Thus, “objective, de novo examination” generally applies to challenged ICANN conduct, except for claims arising from “the Board’s exercise of its fiduciary duties.” As to such claims, “the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.”¹⁵⁸ The Parties dispute the scope of this “business judgment” exception.

209. The ICANN Bylaws were significantly amended in October 2016. IRP review was previously limited to actions of the ICANN Board only.¹⁵⁹ The October 2016 Amendments expanded review to actions of “individual Directors, Officers, or Staff

¹⁵⁵ Namecheap Pre-Hearing Brief ¶¶ 245-46 (citing Bylaws § 4.3(i) and IRP Procedures, Rule 11; ICANN Pre-Hearing Brief ¶¶ 58-60 (same)).

¹⁵⁶ Bylaws § 4.3(b)(ii); IRP Procedures, Rule 1.

¹⁵⁷ Bylaws § 4.3(b)(iii)(A); IRP Procedures, Rule 1. The definition includes two other types of claims that are not relevant here.

¹⁵⁸ October 2016 Bylaws (RER-10), § 4.3(b)(i).

¹⁵⁹ *See, e.g.*, February 2016 Bylaws (RM 74), § 3(1) (providing for independent review of “Board actions” alleged to be inconsistent with the Articles or Bylaws); § 3.4 (requiring IRP Panel to decide whether the ICANN Board acted consistently with the Articles and Bylaws).

members,” in addition to actions of the Board.¹⁶⁰ The October 2016 Amendments also changed the standard of review, which was previously defined by the following three-prong test:

The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?¹⁶¹

210. The October 2016 Amendments replaced this three-prong test with “objective, de novo examination of the Dispute,” subject to the “business judgment” exception discussed above.¹⁶²

211. The October 2016 Amendments bear on the relevance of prior IRP decisions that interpreted pre-October 2016 versions of the Bylaws. In fact, this IRP appears to be one of the first to address the standard of review under the business judgment exception adopted in October 2016.¹⁶³

¹⁶⁰ October 2016 Bylaws (RER-10), § 4.3(b)(ii) (defining “Covered Actions” subject to IRP review as actions or failures to act “committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute”); November 2019 Bylaws (RM 2), § 4.3(b)(ii) (same definition in the version of the Bylaws in effect when this IRP began).

¹⁶¹ February 2016 Bylaws (RM 74), § 3(4).

¹⁶² October 2016 Bylaws (RER-10), § 4.3(b)(i).

¹⁶³ The Panel in the *Afilias* case noted a “profound divergence” between the parties to that case as to the scope of the business judgment exception to de novo review. 20 May 2021 Final Decision in *Afilias Domains No. 3 Limited v. ICANN*, ICDR Case No. 01-18-0004-2702 (“*Afilias* Final Decision,” RM 190) ¶ 287. The Panel, however, resolved the claims without ruling on the precise scope of this exception. *See id.* ¶¶ 331-32, 348-49

C. Namecheap's Position

212. Namecheap asserts that objective, de novo review applies to all ICANN conduct at issue here, including that of the ICANN Board, for multiple reasons.

213. First, Namecheap argues that IRP decisions under pre-October 2016 versions of the Bylaws applied a non-deferential, de novo standard of review to Board action. For example, the first IRP held that “the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially.”¹⁶⁴ The Panel in the GCC case applied “a *de novo* standard of review, without a component of deference to the ICANN Board with regard to the consistency of the contested action with the Articles and Bylaws.”¹⁶⁵ Namecheap asserts that the October 2016 Amendments sought to increase ICANN's accountability, so they cannot have been intended to afford more deference to the ICANN Board.¹⁶⁶

214. Second, Namecheap contends that the business judgment exception does not apply because Namecheap's claims arise from the Board's violation of the Articles and Bylaws, and not from “the Board's exercise of its fiduciary duties.”¹⁶⁷ Namecheap argues that the business judgment rule applies only when a Board fulfills its “managerial responsibility towards the corporation,” and is intended to protect individual directors from personal liability for qualifying decisions by the Board.¹⁶⁸ Namecheaps asserts that this case does not involve personal liability of directors, and

¹⁶⁴ Namecheap Pre-Hearing Brief ¶ 256, citing 19 February 2010 Declaration in *ICM Registry LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08 (RM 3) ¶ 136. *See also* Namecheap Pre-Hearing Brief ¶ 257 and footnote 262 (citing numerous IRP decisions that applied the three-prong test in the pre-October 2016 Bylaws).

¹⁶⁵ Namecheap Pre-Hearing Brief ¶ 258, citing GCC Partial Final Declaration (RM-176) ¶ 93. The GCC Partial Final Declaration was issued on 19 October 2016, shortly after the 1 October 2016 Amendments went into effect, but applied the three-prong test in the pre-October 2016 Bylaws. *See id.* ¶ 92. ¶

¹⁶⁶ Namecheap Pre-Hearing Brief ¶ 258, citing 3 November 2014 Cross Community Working Group (CCWG) Charter (RM-84).

¹⁶⁷ Namecheap Pre-Hearing Brief ¶¶ 254, 259.

¹⁶⁸ Namecheap Post-Hearing Brief ¶ 18.

that deference to Board decisions can be limited by the corporation's governing documents, which is what the Bylaws do.¹⁶⁹

215. Third, Namecheap contends that the business judgment rule does not abrogate a corporation's duty of care to avoid causing injury to third parties.¹⁷⁰

216. Fourth, Namecheap contends that the business judgment rule does not apply when the Board breaches its fiduciary duties or fails to exercise them.¹⁷¹ Namecheap argues that the Board's interpretation of the ICANN Articles and Bylaws is not an exercise of fiduciary duties, and that deferring to ICANN's interpretation of the standard of review would improperly allow ICANN to become its own judge.¹⁷²

217. Fifth, Namecheap argues that inaction by the Board does not qualify as an exercise of fiduciary duties. Rather, the business judgment rule can only apply to formal decisions by the Board, made in accordance with all applicable requirements.¹⁷³

218. Namecheap also makes the alternative argument that even if the business judgment exception applies, the Panel may (and should here) replace the Board's judgment with its own if (and because) the Board's decision is "not within the realm of reasonable business judgment."¹⁷⁴

C. ICANN's Position

219. ICANN agrees that the Panel applies de novo review to the actions or inactions of individual ICANN directors, officers, or staff members.¹⁷⁵ ICANN contends, however, that the business judgment exception to de novo review is extremely broad. ICANN asserts that "[b]ecause the Board is obliged to exercise its fiduciary duties whenever it operates as the ICANN Board," the exception applies to

¹⁶⁹ Namecheap Post-Hearing Brief ¶¶ 19-20.

¹⁷⁰ Namecheap Post-Hearing Brief ¶ 21.

¹⁷¹ Namecheap Post-Hearing Brief ¶ 22.

¹⁷² Namecheap Post-Hearing Brief ¶ 21.

¹⁷³ Namecheap Post-Hearing Brief ¶¶ 24-15.

¹⁷⁴ Namecheap Pre-Hearing Brief ¶ 255.

¹⁷⁵ ICANN Pre-Hearing Brief ¶ 60.

both actions and inaction of the Board, “whether that be in Board meetings, workshops, or informational calls, claims related to Board conduct.”¹⁷⁶

220. ICANN maintains that the IRP decisions cited by Namecheap are irrelevant because they involved earlier versions of the Bylaws that did not include a business judgment exception.¹⁷⁷

221. ICANN also maintains that “[e]very United States jurisdiction, including California, recognizes the ‘business judgment rule,’ which provides a ‘judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.’”¹⁷⁸

222. According to ICANN: (1) the ICANN organization (not the ICANN Board) “took all relevant actions relating to the 2019 Registry Agreement,” so de novo review applies to the Price Cap Decision;¹⁷⁹ and (2) the only Board action relating to Namecheap’s claims was the Board’s denial of Namecheap’s Reconsideration Request 19-2.”¹⁸⁰

223. Since the denial of reconsideration is the only Board action that ICANN contends is subject to deferential, business judgment review,¹⁸¹ ICANN concedes that de novo review applies to the Price Cap Decision, which was made by the ICANN organization, and not by the Board.

C. The IRP Panel’s Analysis and Decision

224. Because ICANN concedes that de novo review applies to the Price Cap Decision, the Panel finds that it need not address all of the Parties’ arguments about the the business judgment exception. Rather, it is sufficient to address three issues: (1) whether the business judgment exception applies only to formal Board actions, such as Board resolutions, or also to informal conduct; (2) whether the exception applies to

¹⁷⁶ ICANN Post-Hearing Brief ¶ 41.

¹⁷⁷ ICANN Post-Hearing Brief ¶¶ 61-62.

¹⁷⁸ ICANN Pre-Hearing Brief ¶¶ 63 and footnote 126 (citing several California court decisions).

¹⁷⁹ ICANN Post-Hearing Brief ¶¶ 42, 44.

¹⁸⁰ ICANN Pre-Hearing Brief ¶ 63

¹⁸¹ ICANN Post-Hearing Brief ¶ 42-43.

the Board's interpretation of the Articles and Bylaws; and (3) whether the exception applies to the Board's denial of Reconsideration Request 19-2.

225. It is not clear whether ICANN contends that business judgment review applies to informal Board actions or inactions. On the one hand, ICANN suggests that such review applies to all actions or inactions of the Board, "whether that be in Board meetings, workshops, or informational calls."¹⁸² On the other hand, ICANN asserts that "the only Board action relating to Namecheap's claims was the Board's denial of Namecheap's Reconsideration Request 19-2."¹⁸³

226. The Panel concludes that the business judgment exception applies solely to formal Board actions such as resolutions, not informal actions or inactions. In order to "act," the Board must comply with procedural requirements for formal Board meetings and resolutions. Informal views expressed at a workshop do not qualify as Board "action." Further, while the Board may approve a formal resolution not to take action, the mere absence of Board action cannot be deemed a formal act of the Board. As noted by Namecheap, if the business judgment exception applied to a mere failure to act, it would arguably mean that every staff decision of which the Board is aware but does not object qualifies as a Board "action" subject to deferential review.

227. As to the second issue – whether the exception applies to the Board's interpretation of the Articles and Bylaws – the Panel holds that it does not. The meaning of the Articles and Bylaws is not a "business judgment" but rather a legal issue for the Panel to decide, without according deference to any interpretation of the Articles and Bylaws by the Board.

228. As to the third issue – whether the exception applies to the Board's denial of Reconsideration Request 19-2 – the Price Cap Decision violated ICANN's Articles and Bylaws for reasons discussed below. Thus, the issue of whether the Board violated the Articles or Bylaws in not reconsidering the Price Cap Decision is effectively moot and will not be addressed in this Declaration. Accordingly, there is no need to determine the appropriate standard of review in connection with that decision. Finally, the Panel notes the following in evaluating Namecheap's claims: (1) the Panel gives special weight to prior IPR decisions that interpret the same or an equivalent prior

¹⁸² ICANN Post-Hearing Brief ¶ 41.

¹⁸³ ICANN Post-Hearing Brief ¶ 42.

version of the Bylaws;¹⁸⁴ and (2) while the Bylaws and IRP Procedures do not explicitly address this issue, the Panel applies the generally recognized international arbitration principle that the claimant bears the burden of proving its claims. As the Panel stated in the *Afilias* IRP: “It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.”¹⁸⁵ It is also “generally accepted in practice in international arbitration” that the degree of proof needed to carry the burden is the “balance of probabilities,” meaning that it is “more likely than not” that the claimant is correct.¹⁸⁶

XI. ISSUE 4: WAS THE PRICE CAP DECISION CONTRARY TO ICANN’S OBLIGATION TO APPLY POLICIES AND PRACTICES IN A NON-DISCRIMINATORY AND EQUITABLE MANNER?

C. The Issue and Legal Framework

229. Namecheap claims that the Price Cap Decision was contrary to ICANN’s obligation to act in a non-discriminatory and equitable manner.¹⁸⁷ Namecheap relies on the following “Non-Discriminatory Treatment” clause of the Bylaws:

Section 2.3. NON-DISCRIMINATORY TREATMENT

ICANN ... shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.¹⁸⁸

230. Namecheap also relies on ICANN’s “Commitments” in the Bylaws, which require that ICANN:

¹⁸⁴ Bylaws § 4.3(v) (emphasis added).

¹⁸⁵ *Afilias* Final Decision (RM 190) ¶ 31. The Panel understands the *Afilias* Panel’s reference to proving defenses to be limited to affirmative defenses such as the statute of limitations. A respondent who contends that the claimant has failed to prove its claim may bear the burden of presenting evidence to support specific assertions, but the claimant bears the ultimate burden of proof, except as to affirmative defenses.

¹⁸⁶ *Afilias* Final Decision (RM 190) ¶ 32.

¹⁸⁷ Namecheap Pre-Hearing Brief ¶¶ 220, 404-416.

¹⁸⁸ Namecheap Pre-Hearing Brief ¶¶ 220, citing Bylaws, § 2.3.

Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties).¹⁸⁹

231. Namecheap further asserts that international law recognizes the principle of equal treatment and non-discrimination, which “requires that comparable situations are not treated differently unless differentiation is objectively justified.”¹⁹⁰

232. The Panel notes several general points about Sections 1.2(a)(v) and 2.3 of the Bylaws. First, Section 1.2(a)(v) is limited to “documented policies.” Section 2.3 is broader as it encompasses “practices, procedures, and standards” even if they do not rise to the level of “documented policies.”

233. Second, both clauses focus on the procedural issue of *how* the policy or practice is *applied*, and not its substantive merits. Even a completely unreasonable policy would not violate these clauses, as long as it were applied in an “equitable” and “consistent” manner. Conversely, applying a policy in a discriminatory and inconsistent manner would violate these clauses, even if the policy is substantively sound.

234. Third, these clauses recognize that “disparate treatment” is permissible if “justified” by “substantial and reasonable cause,” such as “the promotion of effective competition.”

235. Finally, the non-discrimination obligations of the Bylaws are more detailed and specific than the international legal authorities cited by Namecheap. The Panel finds that those international authorities do not add anything substantive, so it focuses on the non-discriminatory treatment obligations of the Bylaws.

C. Namecheap’s Position

236. Namecheap argues that ICANN applied its policies in a discriminatory manner by treating .ORG and .INFO differently than .COM and .NET.¹⁹¹ Namecheap notes that in 2019, the .COM and .NET registry agreements had price caps that the 2019

¹⁸⁹ Namecheap Pre-Hearing Brief ¶¶ 222, citing Bylaws, § 1.2(a)(v).

¹⁹⁰ Namecheap Pre-Hearing Brief ¶ 224 (footnote omitted).

¹⁹¹ Namecheap Pre-Hearing Brief ¶¶ 404-16; Namecheap Rebuttal ¶¶ 145-47.

Registry Agreements for .ORG and .INFO lack.¹⁹² Namecheap asserts that ICANN was required to include price caps in the 2019 Registry Agreements for .ORG and .INFO that are similar to .COM and .NET because the 2013 Registry Agreements for .ORG and .INFO required renewal terms to be similar to registry agreements of “reasonably comparable gTLDs.”¹⁹³

237. Namecheap contends that .ORG and .INFO are comparable to the .COM and .NET gTLDs for two reasons. First, the 2013 Registry Agreements for .ORG and .INFO specifically state that .COM, .ORG, .INFO, .BIZ, and .NET are “hereby deemed comparable.”¹⁹⁴ Second, Namecheap maintains that all of these gTLDs “are highly successful legacy gTLDs with a high level of DUMs and significant market power.”¹⁹⁵

238. In addition to citing the renewal clauses of the 2013 Registry Agreements, Namecheap asserts that “for over 20 years ICANN has recognized the need for price caps in major legacy gTLDs.”¹⁹⁶ Namecheap argues that ICANN failed to apply its policy or practice of imposing price controls on major legacy gTLDs in a consistent and equitable manner by removing price controls from .ORG, .INFO, and .BIZ.¹⁹⁷

239. Namecheap also notes that ICANN maintained price controls for .NAME in August 2021, even though that domain has a low level of DUMs relative to .ORG and

¹⁹² See 1 December 2012 .COM Registry Agreement § 7.3(d) (EER 122 at 13) (limiting .COM price increases to 7% per year); 24 June 2017 ICANN Board Resolution, RM 124 at 79-81 (approving .NET registry agreement that limited price increases to 10% per year).

¹⁹³ Namecheap Pre-Hearing Brief ¶¶ 405-07; see 2013 Registry Agreement for .ORG, § 4.2 (RM 18) (requiring renewal terms for .ORG to be similar to terms in “reasonably comparable gTLDs,” provided that “.com, .info, .net and .biz are hereby deemed comparable”); § 4.2 of 2013 Registry Agreements for .INFO and .BIZ. (RM 27, RM 28) (similar clauses).

¹⁹⁴ § 4.2 of 2013 Registry Agreements for .ORG, .INFO, and .BIZ (RM 18, 27, RM 28).

¹⁹⁵ Namecheap Pre-Hearing Brief ¶ 408. “DUMs” refers to “Domains Under Management.” Both Namecheap and ICANN have used the number of DUMs as a metric for the popularity and market power of a gTLD.

¹⁹⁶ Namecheap Rebuttal ¶ 146 (footnotes omitted), citing 24 June 2017 ICANN Board Resolution, RM 124 at 79-81, for ICANN’s 2017 reinstatement of .NET price controls.

¹⁹⁷ The Panel focuses on .ORG and .INFO because Namecheap failed to assert a timely challenge as to .BIZ. However, .BIZ remains relevant to whether ICANN consistently applied its policies and practices regarding legacy gTLDs.

.INFO.¹⁹⁸ Namecheap asserts that “the rationale for price caps in .ORG, .INFO and .BIZ is much stronger than the rationale for price caps in .NAME,” so ICANN’s maintenance of .NAME price caps means that “*a fortiori*, ICANN should maintain price caps in .ORG, .INFO and .BIZ.”¹⁹⁹

C. ICANN’s Position

240. ICANN argues that its Price Cap Decision did not violate its obligation to act in a non-discriminatory and equitable manner for several reasons.

241. First, while Section 4.2 of the 2013 Registry Agreements for .ORG and .INFO states that renewal terms shall be “similar” to those of “comparable” gTLDs such as .COM and .NET, the next sentence states:

*The preceding sentence, however, shall not apply to the terms of this Agreement regarding the price of Registry Services; standards for the consideration of proposed Registry Services, including the definitions of Security and Stability and the standards applied by ICANN in the consideration process; the terms or conditions for the renewal or termination of this Agreement; ICANN’s obligation to Registry Operator under Section 3.2(a), (b) and (c); the limitations on Consensus Policies or Temporary Specifications or Policies; or the definition of Registry Services, all of which shall remain unchanged.*²⁰⁰

242. ICANN asserts that the exclusion of “the price of Registry Services” means the .ORG and .INFO registry agreements need not have the same pricing terms as the registry agreements for .COM and .NET.²⁰¹

243. Second, ICANN contends that Namecheap was not a party to the 2013 Registry Agreements and thus “has no standing to assert any arguments related to those agreements....”²⁰² ICANN notes that those agreements state that they “shall not

²⁰⁰ ICANN Sur-Rebuttal ¶ 65, citing 2013 Registry Agreement for .ORG (RM 018 at 8) (emphasis added by ICANN).

²⁰¹ ICANN Sur-Rebuttal ¶ 65.

²⁰² ICANN Pre-Hearing Brief ¶ 144.

be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.”²⁰³ ICANN further contends that “Section 8.6 of the 2013 Registry Agreements confirms that parties mutually can agree to modify the agreements, and the 2019 Registry Agreements reflect the parties’ intent to do so.”²⁰⁴

244. Third, ICANN asserts that there are valid reasons for retaining price caps in the registry agreements for .COM, .NET, and .NAME, all of which are operated by Verisign. ICANN asserts that .COM is “still subject to oversight by DOC [the U.S. Department of Commerce],” which requires price controls.²⁰⁵ ICANN emphasizes that “[n]o other gTLD is subject to similar oversight by the U.S. government,” so “.COM is dissimilar to all other gTLDs in the DNS in critical respects.”²⁰⁶

245. As to .NET and .NAME, ICANN asserts that the registry agreements contain price controls because Verisign chose not to transition to the Base Registry Agreement, which lacks price controls. In contrast, the registry operators for .ORG and .INFO “requested to transition to the Base Registry Agreement.”²⁰⁷

246. Fourth, ICANN contends that the alleged market power of .ORG and .INFO does not justify retaining price controls because Namecheap has not demonstrated that they “are necessary to protect the Internet community from the abuse of market power – or even that these registries possess sufficient market power to exploit the lack of price control provisions....”²⁰⁸

247. Finally, ICANN argues that the principle of non-discrimination actually supports its decision to transition .ORG and .INFO to the Base Registry Agreement, which lacks price controls. ICANN emphasizes that all 1,200+ new gTLDs use the Base Registry Agreement.²⁰⁹ In addition, “many other legacy TLDs have already made the

²⁰³ ICANN Response to IRP Request ¶ 51, footnote 90 (citing § 8.7 of the 2013 Registry Agreements).

²⁰⁴ ICANN Pre-Hearing Brief ¶ 144.

²⁰⁵ ICANN Pre-Hearing Brief ¶ 144.

²⁰⁶ ICANN Pre-Hearing Brief ¶ 145.

²⁰⁷ ICANN Pre-Hearing Brief ¶ 146.

²⁰⁸ ICANN Sur-Rebuttal ¶ 61.

²⁰⁹ ICANN Pre-Hearing Brief ¶ 143.

transition to the Base Registry Agreement,” so “there are only a small handful of gTLDs in the entire DNS that do not use the Base Registry Agreement.”²¹⁰

248. ICANN contends that Namecheap makes the “illogical” argument that the principle of non-discrimination requires it to treat the .ORG and .INFO gTLDs differently than the over 1,200 new gTLDs and several legacy gTLDs that lack price controls. ICANN asserts that it is “the *absence* of a price control provision – not the preservation of it – that has resulted in ensuring consistency across nearly all registry operators,” which “was a clear motivation for aligning the 2019 Registry Agreements with the Base Registry Agreement.”²¹¹

249. Thus, ICANN effectively argues that it had a policy or practice of transitioning legacy gTLDs to the Base Registry Agreement, which it applied in a consistent and non-discriminatory manner.

C. The IRP Panel’s Analysis and Decision

250. The Panel holds that Namecheap has not met its burden of proving that ICANN violated its obligation to apply its policies and practices in a non-discriminatory and consistent manner by not including price caps in the 2019 Registry Agreements for .ORG and .INFO that are similar to the price caps for .COM, .NET, and .NAME.

251. As an initial matter, the Panel rejects Namecheap’s argument that the 2013 Registry Agreements for .ORG and .INFO required renewal terms to include price caps similar to those of .COM and .NET. As ICANN notes, Section 4.2 of the 2013 Registry Agreements excluded “the price of Registry Services” from the terms that should be similar.²¹²

252. As to Namecheap’s argument that .ORG and .INFO are comparable to .COM and .NET, the Panel agrees that they are similar in some respects, but finds that

²¹⁰ ICANN Pre-Hearing Brief ¶ 147.

²¹¹ ICANN Pre-Hearing Brief ¶ 143.

²¹² ICANN Sur-Rebuttal ¶ 65. § 4.2 also states that excluded terms (such as prices) “shall remain unchanged,” but Namecheap has not argued that required the renewal agreements to retain the 2013 price caps. As ICANN notes, it is questionable whether Namecheap can rely on the 2013 agreements, which state that they confer no rights on non-parties, and do not prohibit the parties from agreeing to amend their terms

the similarities are not so strong that ICANN's obligation to act in a non-discriminatory manner alone required it to retain price controls in the 2019 Registry Agreements.

253. As Namecheap notes, COM, .NET, and .ORG were the three original gTLDs. They continued to be the only gTLDs available to all users at the time ICANN was created in 1998.²¹³ Thus, .COM, .NET, and .ORG enjoyed a "first-mover" advantage and positive "network effects" that have enabled them to become the three largest, best-known and most trusted gTLDs.²¹⁴ As of December 2020, .COM had about 157 million DUMs, .NET had 13.6 million; and .ORG had 10.4 million.²¹⁵

254. As discussed below, Namecheap presented evidence that .ORG has significant market power that may be comparable to or even greater than that of .COM and .NET.²¹⁶ ICANN has disputed that point, but its own witnesses acknowledged that .ORG has some market power.²¹⁷

255. The evidence of similarity is weaker as to .INFO, which is not an original gTLD and has fewer DUMs. However, INFO still has a large number of DUMs (4.5 million in December 2020, compared to over 10 million for .ORG).²¹⁸ The .INFO gTLD was introduced in the limited, first round of expansion of gTLDs in 2001, and is considered a "legacy gTLD."²¹⁹ .INFO has a first-mover advantage compared to the new gTLDs introduced after October 2013, although that advantage is not as great as the three original gTLDs, which predated ICANN's creation in 1998.

256. Another similarity is that .ORG., .INFO, .BIZ, .COM, and .NET, were all subject to price controls until 2019. In 2002, the maximum price was \$6 per year, unless

²¹³ Namecheap Pre-Hearing Brief ¶ 61. .EDU, .INT, .GOV, and .MIL are also original gTLDs, but registration is restricted, so they are not available for general use. Namecheap Pre-Hearing Brief ¶ 61, footnote 41.

²¹⁴ EER-II ¶¶ 111, 115-18. Hearing Tr. Day V, 120: 17-23; Langus, Verboven Presentation Slide 4.

²¹⁵ EER-II ¶ 150 and footnote 119.

²¹⁶ See *infra* Section XII.D.

²¹⁷ See *id.*

²¹⁸ EER-II, ¶ 150 and footnote 119.

²¹⁹ Namecheap Pre-Hearing Brief ¶ 61.

ICANN approved an increase upon finding certain conditions were met.²²⁰ Later registry agreements limited price increases to 7% for .COM, and to 10% for .NET, .ORG, .INFO, and .BIZ.²²¹

257. As discussed in further detail below, ICANN had proposed to remove price controls from .NET, .ORG, .INFO, and .BIZ in 2005, but retained them in the face of strong public opposition.²²² Before 2019, ICANN had not removed price caps from any legacy gTLDs, with the exception of .PRO, a very small gTLD with far fewer DUMS than .ORG, .INFO, and .BIZ.²²³

258. ICANN argues that other legacy gTLDs had transitioned to the Base Registry Agreement before 2019, including .JOBS, .TEL, .TRAVEL, .MOBI, and .CAT.²²⁴ Yet those gTLDs were all “sponsored” gTLDs aimed at a specific community, rather than the general public.²²⁵ In view of that community purpose, ICANN never imposed price controls on sponsored gTLDs; instead, registration prices as well as restrictions on registration were left to the sponsoring organization.²²⁶ In contrast, all unsponsored legacy gTLDs (.COM, .NET, .ORG, .INFO, .BIZ, and .PRO) had price controls from the outset.²²⁷

259. Thus, while some sponsored legacy gTLDs transitioned to the Base Registry Agreement before 2019, price controls were not “removed” because those gTLDs never had them. Before 2019, price controls were not removed from any price-capped unsponsored legacy gTLD, except for the relatively insignificant .PRO in

²²⁰ Neumann Expert Report ¶¶ 36-38; 10 November 1999 ICANN-NSI Registry Agreement for .COM, .NET, and .ORG, § 20 and Appendix B; *see* RM 41 (1999 Registry Agreement without Appendix B).

²²¹ Neumann Expert Report ¶¶ 65, 79, 150.

²²² Neumann Expert Report ¶¶ 58-60, 73-80.

²²³ Namecheap Pre-Hearing Brief ¶¶ 103-08, 411.

²²⁴ ICANN Pre-Hearing Brief ¶ 147, citing 26 July 2019 Letter from Cyrus Namazi of ICANN to Zak Muscovitch of the Internet Commerce Association (RE-8).

²²⁵ Namecheap Pre-Hearing Brief ¶¶ 87-88; Neumann Expert Report ¶ 62.

²²⁶ Namecheap Pre-Hearing Brief ¶¶ 87-88; Neumann Expert Report ¶ 63.

²²⁷ Namecheap Pre-Hearing Brief ¶¶ 61, 87.

2015.²²⁸ Thus, the Panel agrees with Namecheap that for many years, ICANN had a policy or practice of imposing price controls on unsponsored legacy gTLDs.

260. While .ORG and .INFO are similar to .COM and .NET in the above respects, they also differ in significant respects. .COM not only has far more DUMs than other gTLDs (157 million compared to 13.6 million for .NET and 10.4 million for .ORG), it is still subject to regulation by the U.S. government, which has mandated price controls.²²⁹ There is no similar government mandate for .ORG and .INFO. The Panel finds that the government mandate provides “substantial and reasonable cause” for ICANN to treat .COM differently than .ORG and .INFO.

261. .NET presents a closer case, especially relative to .ORG. Both .NET and .ORG are original gTLDs with a large number of DUMs (13.6 million for .NET and 10.4 million for .ORG in December 2020). Further, as discussed below, the evidence suggests that .ORG may have more market power in its niche market than .NET because it is strongly associated with non-profit organizations that the public can trust.²³⁰

262. ICANN argues that removing price caps from .ORG and .INFO did not violate the non-discrimination principle because transitioning legacy gTLDs to the same Base Registry Agreement used by over 1,000 new gTLDs, which lacks price caps, ensures “consistency across nearly all registry operators.”²³¹

263. ICANN also argues that transitioning legacy gTLDs to the Base Registry Agreement is reasonable for the following reasons:

- The Base Registry Agreement was adopted after extensive public comments and after an expert economist, Dr. Dennis Carlton, concluded that the new gTLDs did not need price controls.²³²

²²⁸ In 2015, .PRO had 124,000 DUMs, or about 1% of the 10.6 million DUMs of .ORG. (Namecheap Pre-Hearing Brief ¶ 104.) ICANN received only a few public comments about the 2015 .PRO registry agreement, none of which opposed the removal of price controls. (Namecheap Pre-Hearing Brief ¶ 107.)

²²⁹ ICANN Pre-Hearing Brief ¶ 145.

²³⁰ EER-II ¶ 150.

²³¹ ICANN Pre-Hearing Brief ¶143.

²³² ICANN Pre-Hearing Brief ¶¶ 29-34.

- The Base Registry Agreement includes procedural safeguards regarding price increases (such as advance notice of increases and the ability to lock-in old prices for ten years), and adds other safeguards and enhancements not related to prices;²³³
- The “maturation of the domain name market” and introduction of consumer choice and competition through the New gTLD Program have removed any need for price controls.
- Transitioning to the same Base Registry Agreements increases “operational efficiencies for ICANN, registry operators, registrars, and registrants,” since the same standard terms apply.²³⁴

264. ICANN asserts that .NET and .NAME are still subject to price controls because Verisign – which is the registry operator of .COM, .NET, and .NAME – declined to transition to the Base Registry Agreement. In contrast, the registry operators of .ORG and .INFO were willing to transition to the Base Registry Agreement.²³⁵

265. Having considered the foregoing arguments and evidence, the Panel concludes that Namecheap has not met its burden of proving that ICANN applied its policies and practices in a discriminatory manner for the following reasons.

266. First, while the record shows that ICANN had a practice of imposing price controls on unsponsored legacy gTLDs for many years, it also shows that ICANN has sought to transition legacy gTLDs to the Base Registry Agreement without price caps, following the introduction of the first new gTLDs in October 2013. Russell Weinstein, ICANN’s Vice President, Global Domand Division Accounts and Services, explained ICANN’s preference for transitioning to the Base Registry Agreement as follows:

[A]fter the Base Registry Agreement was finalized, my team and I discussed transitioning to the Base Registry Agreement with the legacy gTLD registry operators when their registry agreements were up for renewal. Transitioning these agreements to the Base Registry Agreement was ICANN’s preference because it ensured consistency across all registry

²³³ ICANN Pre-Hearing Brief ¶¶ 34-35, 45.

²³⁴ ICANN Pre-Hearing Brief ¶¶ 44-45, 109.

²³⁵ ICANN Pre-Hearing Brief ¶ 146.

operators so that legacy gTLDs operated under the same agreement as all of the new gTLDs. Similarly, many of the legacy registry operators also preferred to transition to the Base Registry Agreement when their agreements were up for renewal.²³⁶

267. Consistent with this practice, the .JOBS, .CAT, and .PRO legacy gTLDs transitioned to the Base Registry Agreement in 2015; and the .TEL and .MOBI legacy gTLDs transitioned in 2016 and 2017.²³⁷ While .PRO is a small gTLD and the others are sponsored gTLDs that never had price controls, the fact remains that all these legacy gTLDs transitioned to the Base Registry Agreement before 2019. Further, the sponsored gTLD .ASIA transitioned to the Base Registry Agreement on 30 June 2019, which is the same date that .ORG, .INFO, and .BIZ adopted the Base Registry Agreement.²³⁸

268. .NET and .NAME appear to be the only legacy gTLDs that were up for renewal between 2014 and 2019 that did not adopt the Base Registry Agreement.²³⁹ Mr. Weinstein testified that ICANN preferred to transition all legacy gTLDs to the Base Registry Agreement, but was unable to do so for .NET and .NAME because “Verisign, the registry operator for .COM, .NET, and .NAME, ... chose not to transition to the Base Registry Agreement during the latest negotiations of its .NET and .NAME registry agreements.”²⁴⁰ Mr. Weinstein explained:

Renewal of the registry agreements, however, involve bilateral negotiations between ICANN and the respective registry operators. Certain registry operators have chosen not to transition to the Base Registry Agreement for various business reasons, despite ICANN’s

²³⁶ Weinstein Statement ¶ 11.

²³⁷ ICANN Pre-Hearing Brief ¶ 147, citing 26 July 2019 Letter from Cyrus Namazi of ICANN to Zak Muscovitch of the Internet Commerce Association (RE-8). Mr. Namazi’s letter notes that these legacy gTLDs transitioned to the Base Registry Agreement since 2014, but does not identify specific dates. The years noted above are based on the registry agreements on ICANN’s website.

²³⁸ .ASIA Registry Agreement of 30 June 2019, RM 116.

²³⁹ Some legacy gTLDs were not up for renewal during this period, such as .COM, which was renewed in 2012 for a ten-year term. .COM is also a special case, in view of the government-mandated price controls.

²⁴⁰ Weinstein Statement ¶ 12.

preference. As a result, there is a small handful of legacy gTLD operators that have not adopted the Base Registry Agreement.²⁴¹

269. In view of the above evidence, the Panel finds that after the new gTLDs were introduced, ICANN implemented a practice of transitioning legacy gTLDs to the Base Registry Agreement whenever possible.

270. Second, the Panel finds that ICANN applied its new practice in a non-discriminatory, consistent and equitable manner. The evidence shows that ICANN has encouraged all legacy gTLDs that were up for renewal since 2014 to transition to the Base Registry Agreement. Verisign's decision not to transition .NET and .NAME to the Base Registry Agreement does not change this ICANN practice.²⁴²

271. Third, the Panel finds that ICANN's obligation to apply policies and practices in a non-discriminatory manner does not prohibit ICANN from adopting a new policy, even if it conflicts with a prior policy, as long as the new policy is applied in a consistent and non-discriminatory manner. As noted above, the non-discrimination clauses of the Bylaws focus on how the policies are applied, not the substantive merits of the policy. The DNS is a continually evolving field that did not exist a few decades ago. The non-discrimination clauses do not, and should not, prevent ICANN from updating old policies or creating new policies in response to new developments, such as the New gTLD Program, as long as the new policy is consistently applied prospectively.

272. Here, Namecheap has not demonstrated that ICANN violated its obligation to apply policies and practices in a consistent and non-discriminatory manner by not including price controls in the 2019 Registry Agreements for .ORG and .INFO, since this was consistent with its practice of seeking to transition legacy gTLDs to the Base Registry Agreement.

273. Nevertheless, changing old policies and adopting new policies implicates other Bylaw obligations. As explained below, the Panel holds that ICANN acted

²⁴¹ Weinstein Statement ¶ 12.

²⁴² The record does not show the reasons for Verisign's decision, but the proposed removal of price controls for .COM and .NET in 2005 provoked a strong negative reaction, including a federal antitrust lawsuit. *See* Neumann Expert Report ¶ 73; *see* 28 November 2005 Complaint, *Coalition for ICANN Transparency Inc. v. Verisign, Inc. and ICANN*, N.D. Cal. Case No. 5:05-CV-04826 (RER-70). Verisign may have been wary of provoking a similar negative reaction.

contrary to its transparency obligations in making the Price Cap Decision. The Panel also holds that the Price Cap Decision should have been made by the Board, not by the ICANN org (ICANN staff).

XII. ISSUE 5: DID THE ICANN ORGANIZATION ACT CONTRARY TO ITS TRANSPARENCY OBLIGATIONS IN MAKING THE PRICE CAP DECISION?

C. The Issue and Legal Framework

274. Namecheap contends that ICANN violated its transparency obligations, as set forth in the ICANN Articles and Bylaws.²⁴³

275. Namecheap relies on Article III of the Articles of Incorporation, which states:

[ICANN shall] operate ... for the benefit of the Internet community as a whole, carrying out its activities ... through **open and transparent processes** that enable competition and open entry in Internet-related markets....²⁴⁴

276. Namecheap also relies on Section 1.2(a) of the Bylaws, which describes ICANN's "Commitments" as follows:

In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, **through open and transparent processes** that enable competition and open entry in Internet-related markets. Specifically, ICANN commits to do the following ...:

(iv) Employ **open, transparent and bottom-up, multistakeholder policy development processes** that are led by the private sector

²⁴³ Namecheap Pre-Hearing Brief ¶¶ 225-32.

²⁴⁴ Namecheap Pre-Hearing Brief ¶ 226 (citing Article IV of a draft version of the Articles of Incorporation, which is Article III in the current final version).

(including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. **These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process ...**²⁴⁵

277. Namecheap further cites Bylaws Section 3.1, titled “Open and Transparent,” which provides:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) **maintain responsive consultation procedures that provide detailed explanations of the basis for decisions** (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. **ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).**²⁴⁶

278. Notably, these transparency obligations apply regardless of whether a decision is made by the ICANN Board or ICANN org. In that regard, Section 3.1 of the Bylaws states that “ICANN *and its constituent bodies* shall operate to the maximum extent feasible in an open and transparent manner.”²⁴⁷ In the event of Board action, ICANN has additional transparency obligations beyond those set forth above that are discussed in Section XIII of this Declaration. The *Dot Registry* IRP panel observed that

²⁴⁵ Bylaws §1.2(a) (emphasis added).

²⁴⁶ Bylaws §3.1 (emphasis added).

²⁴⁷ *Id.* (emphasis added).

“[t]ransparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.”²⁴⁸ That panel also held that:

- “By their very terms, these obligations govern conduct not only by the Board, but by ‘ICANN’, which necessarily includes its staff.”²⁴⁹
- “It seems fair to say that transparency is one of the most important of ICANN’s core values binding on both the ICANN Board and the ICANN staff ...”²⁵⁰

279. This Panel agrees that transparency is one of ICANN’s critical core values. Section 1.2(b) of the Bylaws defines ICANN’s “Core Values” as including:

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decisionmaking 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;**²⁵¹

280. In addition to citing the Articles and Bylaws, Namecheap asserts that transparency has “obtained the position of a fundamental principle in international economic relations, especially in the regulatory and/or standard-setting role that ICANN occupies.”²⁵² The Panel finds that there is no need to consider international law because it does not add anything to the ICANN Articles and Bylaws, which provide greater specificity in this context than general concepts of international law. Thus, the Panel focuses on ICANN’s transparency obligations under its Articles and Bylaws.

²⁴⁸ *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-00015004, Declaration of the Independent Review Panel (29 July 2016), RM 175, ¶ 117.

²⁴⁹ *Id.* ¶ 121.

²⁵⁰ *Id.* ¶ 122.

²⁵¹ Bylaws § 1.2(b)(ii).

²⁵² Namecheap Pre-Hearing Brief ¶ 228 (footnote omitted).

C. Namecheap's Position

281. Namecheap maintains that ICANN's obligation to operate in an open and transparent manner includes:

- (i) seeking comments from stakeholders on the decision to renew the 2019 Registry Agreements without price controls and providing a detailed explanation to stakeholders of the basis for ICANN's decision, in light of such comments, and
- (ii) creating records in a manner that ensures that the attorney-client privilege and attorney work product doctrine do not prevent disclosure of significant information about the negotiation and decision-making process and reasons for the decision that is needed to evaluate whether ICANN complied with its obligations under its Articles of Incorporation and Bylaws.²⁵³

282. Namecheap argues that ICANN's obligation to operate "to the maximum extent feasible in an open and transparent manner" requires that ICANN "not organize itself to shield any policy or business decisions behind attorney-client privilege."²⁵⁴ In contending that "legal privilege may only be invoked scarcely," Namecheap cites Section 3.5(d) of ICANN's Bylaws for the proposition that "legal matters shall not be included in the minutes made publicly available, but only 'to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN.'"²⁵⁵ And for any such matters that the Board determines not to disclose, "the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure."²⁵⁶ Hence, argues Namecheap, "legal matters must be disclosed, unless disclosure would jeopardize the interests of ICANN," and "[h]ow disclosure would put the interests of ICANN at risk must be explained publicly."²⁵⁷

²⁵³ Namecheap's Post-Hearing Brief ¶ 42.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

C. ICANN's Position

283. ICANN agrees that transparency required it to obtain public comments on its proposed Price Cap Decision and to provide a detailed explanation of the reasons for its decision. ICANN explains this obligation as follows:

Public comment is a mechanism that gives the ICANN community and other stakeholders an opportunity to provide input and feedback on ICANN's work. Public comment contributes to both ICANN's transparency and accountability.²⁵⁸

284. ICANN makes several points that are discussed in the Analysis section below, but the primary thrust of its argument is that "[i]t is difficult to conceive of a more transparent process than the one ICANN engaged in here."²⁵⁹ In that regard, ICANN notes that "ICANN staff opened a public comment period through which anyone, including members of the Internet community, could provide comments on the proposed renewals; analyzed those comments internally, then published its analysis; and explained to the Internet community the next steps in the process. ICANN's public analysis even addressed specifically the absence of the price control provisions and why they would not be included in the .BIZ, .INFO and .ORG Registry Agreements."²⁶⁰

285. With regard to attorney-client privilege, ICANN argues that its "transparency obligations do not prohibit ICANN from obtaining privileged advice from its attorneys.... Given the complex legal issues that routinely arise in the ordinary course of ICANN's day-to-day operations, ICANN's ability to obtain privileged and confidential advice from counsel is critical to ICANN's ability to fulfill its mission."²⁶¹ ICANN also cites IRP precedent, the *Afiliat* case, for the proposition that ICANN's

²⁵⁸ ICANN Post-Hearing Brief ¶ 66. *See also* 29 June 2022 ICANN Closing Presentation, Slide 19 ("Public Comment is a mechanism to obtain unput and feedback from the Internet community and enhance transparency," which is "consistent with [ICANN's] ethos and general transparency obligations").

²⁵⁹ ICANN Pre-Hearing Brief ¶ 7.

²⁶⁰ *Id.*; *see also* 29 June 2022 ICANN Closing Presentation, Slide 20 ("ICANN is required to consider public comments and to explain its core rationale, which it did here").

²⁶¹ ICANN Post-Hearing Brief ¶ 68.

accountability and transparency commitments do not “somehow imply a waiver of its right to invoke privilege.”²⁶²

C. The IRP Panel’s Analysis and Decision

286. This Panel does not question ICANN’s good faith in this process. But notwithstanding ICANN’s arguments to the contrary, it is not difficult to “conceive of a more transparent process than the one ICANN engaged in here.”²⁶³ That process would have involved:

- (i) A more robust “responsive consultation procedure[] that provide[d] detailed explanations of the basis for” rejecting the comments noting the distinct differences between legacy TLDs (especially .ORG) and the new gTLDs that launched since 2012.
- (ii) Open discussion at the ICANN Board level regarding whether further analysis is needed of whether price caps are needed for .ORG and .INFO, especially in view of the following statement in a 2009 economic analysis by Dr. Dennis Carlton: “The fact that the existing major TLDs are currently subject to price caps further constrains the ability of new gTLD registry operators to charge non-competitive prices ... [T]he existence of the caps limits the prices that new gTLDs can charge by capping the price that the major registry operators can charge.”²⁶⁴
- (iii) As further discussed in the following Sections of this Declaration, a decision by the Board, rather than ICANN staff (or “ICANN org,” as the ICANN staff refer to themselves), regarding whether to renew the Registry Agreements at issue without price controls, thereby triggering the additional transparency obligations in the Bylaws for Board action.

287. Starting with the first point, ICANN did not adequately engage in a responsive consultation procedure that provided sufficiently detailed explanations of

²⁶² ICANN Post-Hearing Brief ¶ 68, citing *Afilias v. ICANN IRP*, Procedural Order No. 4 ¶ 42, Ex. R-18A.

²⁶³ ICANN Pre-Hearing Brief ¶ 7.

²⁶⁴ Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, RM 183, ¶ 20 (“Carlton 2009 Preliminary Analysis”).

the basis for rejecting public comments noting the distinct differences between legacy gTLDs (especially .ORG) and the newer gTLDs.

288. According to the Staff Reports of Public Comments that ICANN published for .ORG, .INFO, and .BIZ, ICANN received over four thousand comments in 2019 regarding the proposed removal of price controls.²⁶⁵ There were over three thousand comments regarding .ORG alone.²⁶⁶ In contrast, the prior renewal of the .ORG, .INFO and .BIZ RAs in 2013 (which did not implicate the price control provisions) elicited only one comment on the .ORG renewal and three comments on .INFO and .BIZ.²⁶⁷ While it appears that most of the 2019 comments were generated from a template created by a trade group (the Internet Commerce Association), many were not.

289. Virtually all the comments opposed the removal of price controls, especially for .ORG.²⁶⁸ As ICANN noted in its summary of public comments:

A primary concern voiced in the comments was with respect to the proposed removal of the price cap provisions.... Commenters provided a variety of reasons for concern about the price cap provision removal.²⁶⁹

290. As discussed below, ICANN provided a fairly detailed summary of the key concerns about removing price caps, but then failed to explain why ICANN

²⁶⁵ Staff Reports of Public Comment Proceedings for .ORG, .INFO, and .BIZ, 3 June 2019, Annexes 5-7. The Panel has ruled that Namecheap's claim regarding .BIZ is untimely, but includes some references to .BIZ because similar comments were submitted as to all three legacy gTLDs.

²⁶⁶ Staff Report of Public Comment Proceedings for .ORG, 3 June 2019, Annex 5 at 1.

²⁶⁷ Annex 108 (ICANN, Minutes – Special Meeting of the Board, 22 August 2013, <https://www.icann.org/resources/board-material/minutes-2013-08-22-en#2.b>: (“Akram clarified that ICANN only received three public comments on the .BIZ and .INFO proposed renewals and one comment on the .ORG renewal. Therefore, it is hard to support the suggestion that there is an overwhelming community issue about the proposed renewals that needs attention prior to voting.”)

²⁶⁸ Namecheap Pre-Hearing Brief ¶¶ 166-67.

²⁶⁹ Staff Reports of Public Comment Proceedings for .ORG, .INFO, and .BIZ, 3 June 2019, Annex 5 at 3; Annex 6 at 3; Annex 7 at 3.

decided to remove price caps despite those concerns. Instead, ICANN essentially repeated the explanation it gave *before* receiving the public comments.

1. Failure to Address Comments Regarding the Legacy gTLDs First Mover Advantage

291. When ICANN requested public comments in March 2019 about its proposed adoption of the Base Registry Agreement for .ORG, .INFO, and .BIZ without price controls, ICANN explained that “[t]his change will not only allow the .org renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.”²⁷⁰

292. Many of the public comments replied to ICANN’s explanation by asserting that legacy gTLDs are different and should not be treated the same as new gTLDs. As ICANN noted in its summary:

Many commenters indicated the existing pricing protections should remain in part because they believed legacy TLDs, and the .org TLD in particular, are unique and should be treated differently than new gTLDs. They expressed that the .org TLD, and legacy TLDs in general, are viewed as public trusts and should be protected and managed as such.²⁷¹

293. ICANN quoted specific comments that expressed this concern, such as:

The logic to run older top-level domains should be the same as those running new top level domain names is flawed. There is a long history of the legacy top level domains and how the contracts to the registries were awarded. With the new top level domains, companies risked their own money to introduce the new domains. The registries running .info & .org are merely stewards for what should be considered a resource to the web. As an early adopter of the .info domain and holder of some .info domain

²⁷⁰ 18 March 2019 Proposed Renewal of .ORG Registry Agreement, Annex 2 ¶ 4; see Annex 3 ¶ 4, Annex 4 at 4 (similar comments for .INFO and .BIZ).

²⁷¹ Staff Report of Public Comment Proceedings for .ORG, .3 June 2019, Annex 5 ¶ 3; see Annex 6 at 3 (same comment for .INFO, but refers to .INFO instead of .ORG in the last sentence); Annex 7 ¶ 3 (same comment for .BIZ, but refers to .BIZ instead of .ORG in the last sentence).

names dating backing to 2002, ICANN must come to the realization that price cap provisions in the current .info agreement must not change going forward.²⁷²

294. Similarly, the American Society of Association Executives (“ASAE”), representing over 7,400 trade and professional association executives, specifically addressed how the new gTLDs were different from .ORG and the other legacy domains, making transition to the Base Registry Agreement without price controls potentially problematic:

It’s true that registry operators that won the right to sponsor new gTLDs can charge whatever price they see fit, but they also paid millions of dollars in some cases to acquire all of the value in their sponsored domain names, whereas the service contractors managing legacy domain names most assuredly did not. This is a crucial difference that ICANN should take great care to enforce.²⁷³

295. As already discussed, .ORG was one of the three original TLDs—along with .COM and .NET—that existed even before ICANN was created.²⁷⁴ Thus, these three enjoyed a “first-mover” advantage, attracting many registrants before other gTLDs were introduced.²⁷⁵ The .INFO and .BIZ gTLDs were not established quite so early but were still launched during the first round of new gTLDs created by ICANN (in 2001).²⁷⁶

296. Prior efforts by ICANN to remove price controls for .NET, .ORG, .INFO, and .BIZ were met with considerable backlashes. In 2005, ICANN entered into a registry Agreement for .NET that required the registrar (VeriSign) to commit to a maximum price of \$4.25 for the first 18 months of the agreement, followed by the removal of all

²⁷² Staff Report of Public Comment Proceedings for .BIZ, 3 June 2019, Annex 6 ¶ 3.

²⁷³ 25 April 2019 Comments of ASAE re Proposed Renewal of .org Registry Agreement, Annex 111 ¶ 4.

²⁷⁴ Regulatory Expert Report ¶¶ 40-41.

²⁷⁵ EER-II ¶¶ 111, 115-18.

²⁷⁶ Namecheap Pre-Hearing Brief ¶ 61.

price controls for the remainder of the agreement.²⁷⁷ But ICANN reversed course in the face of opposition, reopened the Registry Agreement, and imposed a fixed price during the first 18 months of the agreement and an annual 10% cap on price increases thereafter.²⁷⁸

297. A backlash also occurred in 2006 when the Board sought to remove price controls for .ORG, .INFO, and .BIZ.²⁷⁹ The decision of the ICANN Board in Reconsideration Request 19-2 describes what happened:

In 2006, ICANN org considered removing price caps from several legacy gTLDs, including .INFO and .ORG. 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 .ORG and .INFO RAs to include price caps. Following a public comment period for the revised RAs (which included price caps), on 8 December 2006, the Board approved .ORG and .INFO RAs with price caps (as proposed and posted during the public comment period for the revised RAs).²⁸⁰

298. .COM is unique because price controls are mandated by the U.S. Department of Commerce ("USDOC"). Yet the Registry Agreement for .NET, which is not regulated by the USDOC, also continues to include price controls. The ICANN Board approved the 2011 and 2017 renewals of the .NET Registry Agreement, which retained the 10% annual cap on price increases.²⁸¹

299. ICANN argues that price control provisions remain in the .NET Registry Agreement due to the choice of its registry operator, Verisign, which happens to also

²⁷⁷ See ICANN, *Original 2005 .NET Registry Agreement of 1 July 2005*, § 7.3(a), archived at <http://www.icann.org/tlds/agreements/net/net-registry-agreement-01jul05.pdf> (RM 119).

²⁷⁸ Regulatory Expert Report ¶ 60.

²⁷⁹ Regulatory Expert Report ¶¶ 73-80.

²⁸⁰ Annex 11 ¶ 6.

²⁸¹ ICANN Board Resolutions 2011.06.24.21, 2017.06.24.22 (RER 129, RM 124).

operate .COM, which, as noted, is subject to USDOC price controls.²⁸² ICANN maintains that “[t]his distinction ... is fatal to Namecheap’s position.”²⁸³

300. Yet the fact remains that the ICANN Board affirmatively approved price controls for the .NET Registry Agreement and has never reconsidered that position. While Verisign has never triggered the issue of removing price controls, nor has ICANN. The ICANN Board also approved all renewals of the .ORG, .BIZ, and .INFO Registry Agreements with price controls, until the ones at issue here.²⁸⁴

301. ICANN’s stated rationale for removing price controls was to “conform with the base registry agreement” for new gTLDs with the “goal of treating the Registry Operator equitably with registry operators of new gTLDs.” But ICANN never addressed the comment that the registry operators of the legacy gTLDs are in a different position from the registry operators of new gTLDs. As asserted by ASAE, whereas the “registry operators that won the right to sponsor new gTLDs ... paid millions of dollars in some cases to acquire all of the value in their sponsored domain names, ... the service contractors managing legacy domain names most assuredly did not.”²⁸⁵ The removal of price controls with respect to .ORG is especially notable, as it now stands unique among the three original TLDs as not being subject to price controls.

302. ICANN observed in its summary of public comments that “many commenters ... believed legacy TLDs ... are unique and should be treated differently than new gTLDs.”²⁸⁶ While ICANN highlighted that concern, it did not address it. Instead, ICANN repeated its prior explanation that that it sought to treat Registry Operators of legacy gTLDs and new gTLDs “equitably,” without explaining why it had rejected the concern that legacy TLDs are “unique and should be treated differently

²⁸² ICANN’s Surrebuttal Brief ¶ 63.

²⁸³ *Id.*

²⁸⁴ Namecheap Pre-Hearing Brief ¶ 72

²⁸⁵ 25 April 2019 Comments of ASAE re Proposed Renewal of .org Registry Agreement, Annex 111 ¶ 4.

²⁸⁶ Staff Reports of Public Comment Proceedings for .ORG, .INFO, and .BIZ, 3 June 2019, Annex 5 ¶ 3, Annex 6 ¶ 3, Annex 7 ¶ 3.

than new gTLDs.” Indeed, ICANN’s post-comment “Analysis” was almost identical to its pre-comment explanation:²⁸⁷

| 18 March 2019 Proposed Renewal of .org RA (Annex 2) | 3 June 2019 Staff Report of Public Comments Proceeding (Annex 5) |
|---|---|
| This change [removing price controls] will not only allow the .org renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement. | Enacting this change [removing price controls] will not only allow the .org renewal agreement to conform to the Base gTLD Registry Agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base gTLD Registry Agreement. |

2. Failure to Address Comments Regarding .ORG’s Market Power and the Negative Impact of Removing Price Controls

303. ICANN’s summary of public comments also noted the concern that .ORG is “unique in that .org was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations,” and “organizations and individuals who have historically registered legacy domain names did so under the assumption that prices would not suddenly increase.”²⁸⁸ ICANN quoted the following letter from National Public Radio, the YMCA, C-SPAN, National Geographic Society, Oceana, the American Association of Retired Persons, the Conservation Fund, and the National Trust for Historic Preservation:

[T]he .org gTLD has assumed the reputation as the domain of choice for organisations dedicated to serving the public interest... We have come to rely on this reputation to help distinguish the online presence of our organizations from the online presence of organizations that are not

²⁸⁷ ICANN added some points to its post-comment analysis, but did not explain why it considered unsponsored, legacy gTLDs to be essentially the same as sponsored new gTLDs.

²⁸⁸ Staff Report of Public Comment Proceedings for .ORG, 3 June 2019, Annex 5 ¶ 3-4.

intended to serve the public interest. As nonprofit organizations, we also have come to rely on the certainty and predictability of reasonable domain name registration expenses when allocating our limited resources.²⁸⁹

304. The same letter observed:

ICANN has articulated no compelling policy basis for this proposed change [i.e. the removal of the price controls]. Instead, ICANN has represented that the intent is just to bring the .org Agreement into conformity with the base registry agreement used by ICANN with respect to other gTLDs not set aside for organizations that serve the public interest. This strikes us as conformity for its own sake. ICANN should not disregard the public interest in favor of administrative convenience.²⁹⁰

305. A related concern noted in ICANN's summary of public comments is that "without price controls, prices to renew domain names could become prohibitively expensive and the barrier to entry for small non-profits and organizations could be significantly raised, leading to a significant negative impact on the non-profit, charitable and small organizations who are registrants of the .org TLD."²⁹¹ Another concern is that .ORG "is inherently positioned as a monopoly, and because of the environment, consumers require regulatory pricing protections."²⁹² ICANN quoted the following comments to illustrate these concerns:

The org TLD is overwhelmingly used by non-profits and by removing the caps on the prices of org domains, ICANN will make it significantly more difficult for non-profits to do business on the internet or raise barriers to entry for new non-profits.²⁹³

Having one company able to control pricing for an entire TLD, and to have no restrictions, controls or guidelines on their ability to increase the

²⁸⁹ *Id.* Annex 5 ¶ 4 (quoting 29 April 2019 Letter to ICANN from NPR and other non-profit organizations).

²⁹⁰ 29 April 2019 Letter to ICANN from NPR and other non-profit organizations, Annex 111 ¶ 2.

²⁹¹ Staff Report of Public Comment Proceedings for .ORG, 3 June 2019, Annex 5 ¶ 4.

²⁹² *Id.*

²⁹³ *Id.*

pricing: is in my opinion creating a monopoly, with all that implies – definitely counter to the idea of a free market. Especially in the area of .org, which is traditionally – and branded – to be the domain for not-for-profits.²⁹⁴

306. Despite noting these concerns about the special market power of .ORG and the negative impact on non-profits of removing price controls, ICANN failed to provide a detailed explanation of why it nevertheless decided to remove price controls. Instead, ICANN merely stated that the .ORG price controls “were initially included years ago by the US government when the domain name market consisted only of a handful of top-level domains,” and that “[t]here are now over 1200 gTLDs, almost all of which do not include price controls.”²⁹⁵ ICANN did not address the special non-profit market served by .ORG.

307. There is, in fact, substantial evidence that .ORG has considerable market power among non-profit registrants.²⁹⁶ Namecheap’s economic expert, Dr. Langus, opined that .ORG has as much or more market power than .COM for several reasons: (i) .ORG enjoys a “first-mover advantage” as one of the original gTLDs; (ii) .ORG is associated with non-profit entities that the public can trust, which distinguishes it from other gTLDs, which are not good substitutes; and (iii) users are “locked-in” to .ORG due to the lack of good substitutes, and also because changing to a different gTLD involves high “switching costs.”²⁹⁷

308. As further evidence of the special role of the .ORG domain, Dr. Langus cited the largest registrar, GoDaddy:

A .org domain name helps you become a well-established brand of trust and integrity. One of the original top-level domains (TLDs), it became the choice for organizations dedicated to serving the public interest. Today,

²⁹⁴ *Id.* Annex 5 ¶ 4.

²⁹⁵ *Id.* Annex 5 ¶ 8. As discussed below, ICANN noted that the Base Registry Agreement includes other protections, such as the option to lock in prices for ten years, but did not address comments that questioned whether such protections were adequate.

²⁹⁶ The Panel focuses here on evidence that .ORG has market power, which is stronger than evidence related to .INFO. Evidence related to .INFO is discussed below in Section XI.D.

²⁹⁷ Hearing Tr. Day IV, 125:21 to 129:1, Day V, 100:24 to 101:23, 104:26-28; Langus Presentation, Slide 4; EER-II ¶¶ 111-29, 150-57.

.org domains are considered some of the most trusted on the internet and tailor-made for non-commercial entities like:

- Non-profits
- Foundations
- Cultural institutions
- Religious organizations

If you're operating one of these, people expect to find you in the .org community. However, commercial organizations can also benefit with a .org domain linked to the business' charitable arm while other domain names protect the brand.²⁹⁸

309. Dr. Langus testified that PIR advertises .ORG as "a powerful signal that your site serves a greater good – rather than just a bottom line." He added that "[o]ne would be hard-pressed to find a similar and credible characterization for another TLD, among more than a thousand that are available for registration."²⁹⁹ He also noted that ".NGO" (non-governmental organization) and .ONG (having the same meaning in various romance languages) are "[p]otentially semantically close," but are not viewed as good substitutes, given that they have attracted only about 4,000 registrants since PIR introduced them in 2014.³⁰⁰ .ORG, in contrast, is the third largest gTLD, with over 10 million registrants.³⁰¹

310. ICANN witnesses agreed that .ORG has a special advantage over other gTLDs. ICANN's expert, Dr. Carlton, stated that ".org had a first-move advantage."³⁰² He testified that he had not done a detailed study, but his "general understanding of .org is that because it was one of the early TLDs, a lot of not-for-profits use .org and they like using .org because it has the connotation of a not-for-profit."³⁰³

²⁹⁸ EER-II ¶ 151.

²⁹⁹ EER-II ¶ 152.

³⁰⁰ EER-II ¶ 153; *see also* Hearing Tr. Day V, 100:24 to 101:23.

³⁰¹ EER-II ¶ 150.

³⁰² Hearing Tr. Day V, 96:5.

³⁰³ Hearing Tr. Day V, 67:14-19.

311. ICANN's Board Chair, Maarten Botterman, acknowledged during the hearing that .ORG occupies a unique position within the DNS, stating:

One of the things with .org, as you rightly – and I know you know that – it's not a domain like .com, .net. It's just that the reputation that PIR has given it over the years that gives it added value for many nonprofits. [...] I do remember, my kids always had a hard time explaining at school what your father is doing. [...] But one of the things that they came back with is – they were at school in Belgium. If they would go to a .org site, then, at least, they could trust the information. And this was the perception that comes with it [...].³⁰⁴

312. Mr. Botterman also testified that PIR's attempt to launch a new closed domain for NGOs showed that "it's very difficult to launch new TLDs."³⁰⁵ This is consistent with Dr. Langus' comment that .NGO is not viewed as a good substitute for .ORG, as illustrated by its much lower number of registrants.

313. Namecheap also presented evidence that PIR has in fact exercised market power by increasing .ORG prices and profit margins substantially. For example, Dr. Langus presented a chart showing that .ORG prices increased from six dollars in 2008 to nearly ten dollars in 2016.³⁰⁶ Those increases were within the 10% annual cap that applied at that time, but "hit 9.7 percent a number of times, and a number of times it hit 7 percent, 6 and a half."³⁰⁷ The same chart showed that from 2008-16, .ORG prices rose more than .COM prices: both started at six dollars, but .ORG ended at nearly ten dollars, while .COM ended at less than eight dollars.³⁰⁸ Dr. Langus also presented a chart showing that .ORG prices increased from 2009 to 2016 even though PIR's related costs did not increase.³⁰⁹ The chart further showed that PIR's costs decreased from 2016 to 2021, but .ORG prices remained the same.³¹⁰ As a result, PIR's profit margins on

³⁰⁴ Hearing Tr. Day II, 176:5-9.

³⁰⁵ Hearing Tr. Day II, 176:12-18.

³⁰⁶ Langus Presentation Slide 5; EER-II, ¶ 158 and Figure 3.

³⁰⁷ Hearing Tr. Day V, 118:11-13.

³⁰⁸ Langus Presentation Slide 5; Hearing Tr. Day IV 129:4-19.

³⁰⁹ Langus Presentation Slide 6; EER-II ¶ 159 and Figure 4.

³¹⁰ Langus Presentation Slide 6; EER-II ¶ 159 and Figure 4; Hearing Tr. Day IV, 129:22 to 130:6.

.ORG increased continuously from 2009 to 2021, which Dr. Langus called a “reliable indicator of market power.”³¹¹

314. Dr. Carlton opined there was no need for price caps because .ORG prices had not increased since 2016; PIR had “committed to not raise [prices] unreasonably;” and PIR’s not-for-profit structure and conduct makes it “reasonable to believe ... that they are not going to raise price unreasonably.”³¹²

315. Nevertheless, Dr. Carlton agreed that Dr. Langus’ chart shows that .ORG margins have “increased over time,” and that “the price of .org is higher than the price of .com.”³¹³ He also agreed that “the fact that [PIR’s] costs have gone down and they’ve not passed them along ... means their margins have gone up.”³¹⁴ He further acknowledged that if .ORG were changed to a for-profit structure, it would be a “perfectly reasonable concern for people to investigate as to whether that’s going to affect price.”³¹⁵ Dr. Carlton stated that because .ORG’s costs had decreased, he “would have lowered prices” if he “were a cost regulator.”³¹⁶

316. Thus, Dr. Carlton did not dispute that .ORG has meaningful market power in view of its first-mover advantage and unique role in the non-profit community, or that price controls might be worth investigating in some circumstances. He maintained, however, that this was not necessary as to .ORG, especially in view of PIR’s not-for-profit status and its representation that it would not increase prices unreasonably.³¹⁷

³¹¹ Langus Presentation Slide 6; Hearing Tr. Day IV, 130:7-11; *see* Day V, 105:3-15.

³¹² Hearing Tr. Day V, 106:23 to 110:20.

³¹³ Hearing Tr. Day V, 115:21-24.

³¹⁴ Hearing Tr. Day V, 106:23 to 107:15.

³¹⁵ Hearing Tr. Day V, 106:23 to 107:15; *see* 111:12-15 (“if there were a proposal for .org to change its structure into a for-profit, I do think that would be grounds to investigate, and exactly how it would come out depends on what you think about it”).

³¹⁶ Hearing Tr. Day V, 108:21-24; *see* 111:12-15 (“if there were a proposal for .org to change its structure into a for-profit, I do think that would be grounds to investigate, and exactly how it would come out depends on what you think about it”).

³¹⁷ Hearing Tr. Day V, 106:23-108:20; 111:12-15; 112:1-6.

317. Dr. Langus replied that PIR's representation raised the following questions: "What is unreasonable?" and "How could registrants complain to PIR that it is violating its commitment?"³¹⁸ He also noted that the continuing .ORG price increases until 2016 shows that price caps "were effective in the past in constraining the exercise of market power" and that PIR's subsequent failure to reduce prices despite "significant cost reductions" shows that PIR is actually exercising market power.³¹⁹

318. In citing the foregoing evidence, this Panel is not making a factual finding that .ORG in fact possesses sufficient market power to warrant price controls. Rather, the Panel is focused on ICANN's failure to consider this issue or, if it was considered, to provide a "detailed explanation" as to why such market power—however strong (or not) it might be—did not warrant price controls. While ICANN noted the public comments about .ORG's unique reputation as the domain of choice for non-profit organizations, it did not address them.³²⁰ ICANN's stated rationale for the Price Cap Decision seems to simply assume that .ORG is fungible with other gTLDs.

3. Failure to Address Concerns Regarding Switching Costs

319. ICANN noted in its summary that "[c]ommenters also raised concerns about the burden and costs associated with moving their web presence to another TLD, which could potentially be capitalized on by the registry operator with higher renewal prices without a price cap."³²¹ ICANN quoted the following comment as an example:

While individual domains are typically inexpensive, the costs of switching between them for an organization can be exceptionally high. Moving from one TLD to another might require notifying clients, reprinting materials, updating databases, and reconfiguring services. Consequently as consumers are locked in, there either needs to be competition at the registry level, or some form of price constraint. Given the nature of the contracts, specifically presumptive renewal for the incumbent registry operators, registry prices are not subject to competition and do not face

³¹⁸ Hearing Tr. Day V, 102:9-10.

³¹⁹ Hearing Tr. Day V, 112:21 to 113:6, 114:12-17.

³²⁰ Annex 5 ¶ 4.

³²¹ Staff Report of Public Comment Proceedings for .ORG, 3 June 2019, Annex 5 ¶ 4.

the downward pricing pressure that every other provider of Internet infrastructure faces.³²²

320. The ASAE (American Society of Association Executives) expressed a similar concern in the comments cited above:

Stating that nonprofit organizations can easily switch from one domain name to another if they don't like the pricing structure ignores the reality that established nonprofits have a longstanding Internet presence built on a .org domain name - a name and online reputation that the organization (not the registry operator) has spent decades cultivating."³²³

321. Again, ICANN noted these comments, but did not address them. In deciding to renew the 2019 Registry Agreements without price controls, ICANN simply stated:

In alignment with the base registry agreement, the price cap provisions in the current .org agreement, which limited the price of registrations and allowable price increases for registrations, are removed from the .org renewal agreement. Protections for existing registrants will remain in place, in line with the base registry agreement. This change will not only allow the .org renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.³²⁴

322. Yet this rationale assumes a market in which registrants can easily switch from legacy gTLDs to new gTLDs. While this may in fact be the case, ICANN never addressed comments maintaining that the opposite was true.

³²² *Id.*

³²³ 25 April 2019 Comments from ASAE, Annex 111 ¶ PDF page 4.

³²⁴ Staff Reports of Public Comment Proceedings for .ORG, .INFO, and .BIZ, 3 June 2019, Annex 5 ¶ 3, Annex 6 ¶ 3, Annex 7 ¶ 3.

4. Failure to Address Concerns that the Base Registry Agreement's Price Protections are Not an Adequate Substitute for Price Controls

323. Another concern noted in ICANN's summary was that "the protections afforded to registrants in the Base gTLD Registry Agreement fall short of what they believe should be in place for the .org TLD and believed they should not be viewed as a viable replacement to the existing price cap provision." ICANN quoted the following comment of the Internet Commerce Association ("ICA") :

It can also be argued that existing .org registrants are somehow 'protected' because they can renew their .org domain name for ten years before being subjected to uncapped price hikes under the Proposed Renewal Agreement. The fact is however, that there is no requirement that registrants be expressly notified that they had better register for ten years in advance or be subject to unknown, indeterminate, and potentially game-changing renewal costs. As such, it is likely that millions of charities and non-profits will not take advantage of the ability to renew for ten years... [O]nce caps are removed, once the initial ten-year period has elapsed, every single registrant is subject to untold, indeterminate, and potentially substantial price hikes, meaning that this is nothing but a temporary reprieve. Lastly, the numerous prospective .org registrants who want to establish themselves in the most appropriate registry for a charity or non-profit at some point in the next ten years, could find themselves subject to capricious and expensive registration fees for .org domain names and as such receive no benefit whatsoever from the temporary reprieve.³²⁵

324. While ICANN noted this concern, it did not address it. Instead, ICANN stated that the Base Registry Agreement would "afford protections to existing registrants," such as the option to lock in prices for ten years.³²⁶ ICANN did not address the ICA's comment that these protections were inadequate.

³²⁵ Annex 5 ¶ 5.

³²⁶ Annex 5 ¶ 5.

325. ICANN maintains that the Bylaws merely require that it “explain its core rationale, which it did here.”³²⁷ Yet the term “core rationale” does not appear in the Bylaws. Rather, the Bylaws require that ICANN “maintain responsive consultation procedures that provide *detailed explanations* of the basis for decisions.”³²⁸ While this does not mean that ICANN must individually address each and every comment, the public comments discussed here raise significant issues and were properly singled out by ICANN in its summary of public comments. To borrow ICANN’s phrase, these comments go to the heart of the “core rationale” expressed by ICANN for removing price controls. They should have been addressed.

326. The Panel emphasizes that the various public comments regarding the need to retain price controls may or may not have been correct. Any finding as to the merit of these comments would exceed the scope, authority, and competence of this Panel. But the accuracy – or not – of the comments is not the issue. ICANN’s failure to consider the points made in the comments – or, if these points were considered, to articulate a basis for disregarding them – constitutes a failure to “engage in a responsive consultation procedure that provided detailed explanations of the basis for rejecting public comments.”³²⁹

5. Failure to Address Concerns about Need for Market Analysis and Misapplication of Dr. Carlton’s 2009 Economic Analysis

327. ICANN observed that commenters “questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections,” quoting the following comment of the Registrar Stakeholder Group (the “RrSG”):

The RrSG is concerned that ICANN has arbitrarily chosen to remove pricing restrictions that could negatively impact current and future registrants of .ORG, .BIZ, and/or .INFO domain names where there is no reasonable competition to influence reasonable pricing and **without engaging in appropriate market analysis**.³³⁰

³²⁷ ICANN’s Closing Presentation, Slide 26.

³²⁸ Bylaws, §3.1 (emphasis added).

³²⁹ Bylaws §3.1.

³³⁰ Staff Report of Public Comment Proceedings for .ORG, 3 June 2019, Annex 5 ¶ 5.

328. Despite noting this concern, ICANN's 3 June 2019 "Analysis of Comments" did not address whether it had conducted "an appropriate market analysis," or explain why such an analysis was unnecessary.³³¹

329. ICANN Board members also expressed concern about the need for an economic analysis at a 21 November 2019 meeting concerning Namecheap's request for reconsideration of the Price Cap Decision:

Board members also asked questions about matters related to pricing, including how public comments concerning the pricing provisions were considered. Matthew Shears commented on the suggestion made during the comment period that a study be undertaken about the effects of removing the existing price caps. He inquired whether there should be an economic study of how the market has evolved since 2009 prior to the Board taking action to understand better how removing the pricing restrictions would encourage competition or not. Members of ICANN org engaged the Board in a discussion about the history of the price cap provisions and the discussions and economic studies about pricing provisions that took place during the development of the New gTLD Program.³³²

330. The Board meeting minutes do not disclose the result of this discussion, but there is no evidence of any further economic analysis. The meeting minutes imply that the Board concluded that no further analysis was needed in view of a prior study that "took place during the development of the New gTLD Program." That implication is confirmed by the Board's 21 November 2019 decision denying Namecheap's request for reconsideration, which relied on a preliminary report that Dr. Dennis Carlton prepared in 2009 for the New gTLD Program. The ICANN Board stated:

There is no support for the Requestor's assertion that ICANN Staff's belief in this regard was based upon "conclusory statements not supported by evidence." [...] Among other things, ICANN org considered Dr. Carlton's

³³¹ See *id.* ¶ 8 (emphasis added).

³³² Minutes – Special Meeting of the ICANN Board on 21 November 2019, Annex 115, PDF pages 4-5.

2009 expert analysis of the Base RA, including his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.³³³

331. The referenced 2009 expert analysis was commissioned by ICANN in connection with the introduction of the new gTLDs that were ultimately approved by the ICANN Board on 20 June 2011. A footnote to the Board's decision specifies that ICANN org relied on Dr. Carlton's "Preliminary Analysis Regarding Price Caps for New gTLD Internet Registries" in deciding that price controls were no longer needed for .ORG, .BIZ, and .INFO.³³⁴

332. This Panel takes at face value the ICANN Board's statement that ICANN relied on Dr. Carlton's 2009 preliminary analysis. There is nothing in the record to contradict that statement.

333. Yet ICANN's reliance on Dr. Carlton's 2009 preliminary analysis raises the following issues:

- First, Dr. Carlton focused on price controls in the new gTLDs, *not* legacy TLDs, such as .ORG, .BIZ, and .INFO.³³⁵

³³³ Annex 11 (Final Determination of the ICANN Board of Directors Reconsideration Request 19-2 (21 Nov. 2019)); *see also* Hearing Tr. Day II, 143-145.

³³⁴ *Id.* at n. 94.

³³⁵ Professor Carlton's 2009 preliminary report states: "I have been asked by counsel for ICANN to address whether price caps that limit future increases in prices charged to registrars of these new gTLDs would be necessary to insure the potential competitive benefits of the new gTLDs." (RM 183, Dennis Carlton, Preliminary analysis of Dennis Carlton regarding price caps for New gTLD Internet registries, 4 March 2009, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.) (emphasis added). His 2009 final report provides: "I have been asked by ICANN to analyze from an economic perspective ICANN's anticipated introduction of new generic top level domain names (gTLDs), and to identify and address the benefits and costs associated with ICANN's proposal. [...] In conjunction with this analysis, I also address whether price caps that limit prices and future increases in prices charged by registries of these new gTLDs would be necessary to achieve the potential competitive benefits of the new gTLDs." (RM 23, <http://archive.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf>.) (emphasis added).

- Second, the report cited by the Board in its decision on Reconsideration Request 19-2 was merely preliminary. In his final report, Dr. Carlton bolstered his conclusion that price controls were not necessary for the registration, renewal and transfer of domain names in the new gTLDs with the following observation:

The fact that **the existing major TLDs are currently subject to price caps further constrains the ability of new gTLD registry operators to charge non-competitive prices.** [... T]he existence of the caps limits the prices that new gTLDs can charge by capping the price that the major registry operators can charge.³³⁶

- Finally, Dr. Carlton replied as follows to the concern that lack of price controls for new gTLDs could result in the elimination of price controls for legacy gTLDs:

THERE IS NO BASIS FOR DR. KENDE'S CONCERNS THAT ICANN'S PROPOSAL WILL LEAD TO THE REPEAL OF EXISTING PRICE CAPS

As noted above, Dr. Kende suggests that the absence of price caps for new TLDs could result in the elimination of price caps for .com, .net, .org, .info, .biz and others as a result of the "equitable treatment" clause in ICANN agreements. We understand from ICANN that there is no basis for this concern.

The language in this clause does not require identical treatment among all registries and recognizes that differences across ICANN contracts with different registries can be "justified by substantial and reasonable cause." ICANN's contracts with existing TLDs recognize that different practices may be appropriate for different registries and allow ICANN latitude to implement different procedures. **I am aware of no statement either by ICANN or the Commerce Department**

³³⁶ RM 23 ¶ 73 (emphasis added).

favoring the elimination of price caps specified in existing registry contracts.³³⁷

334. In short, Dr. Carlton’s final 2009 report cannot be read to justify removing price controls in legacy gTLDs, such as .ORG, .BIZ, and .INFO. If anything, he viewed the *continued* existence of price controls in major legacy gTLDs as helping justify the introduction of new gTLDs without price controls. Further, Dr. Carlton asserted that there was no basis for concern that the lack of price caps for new gTLDs would result in removal of price caps for .ORG, .INFO, and .BIZ, given that “equitable” treatment does not require “identical” treatment, and ICANN had not stated that it sought to eliminate price caps from legacy gTLDs.

335. In addressing Namecheap’s arguments regarding the 2009 Carlton report, ICANN states that “Dr. Carlton was not asked to opine on the appropriateness of price control provisions in legacy gTLD registry agreements, including the .ORG, .BIZ, and .INFO Registry Agreements, and even acknowledged that such provisions might not be appropriate.”³³⁸ But the point is not that Dr. Carlton’s 2009 report affirmatively calls for retaining price controls in legacy gTLDs, but rather that it cannot serve as a basis for removing such price controls. He specifically disclaimed any such purpose in his report. And yet 10 years later his report was used for precisely that purpose.³³⁹

336. In sum, the ICANN organization noted the public comment that an economic study should be conducted, but provided no responsive explanation. The ICANN Board apparently concluded that an economic study was not needed in view of

³³⁷ RM 24 ¶ 22 (emphasis added).

³³⁸ ICANN Pre-Hearing Brief ¶ 72 n. 259, citing RM 23, ¶ 73 (stating that “the appropriateness of these price caps may be debatable”).).

³³⁹ ICANN org also obtained a newer report prepared by Professor Carlton in 2019. (Annex 131 - Draft expert report of Dennis W. Carlton of 6 June 2019.) This report was a draft and never finalized. Nor was it provided to the ICANN Board. The 2019 report was provided only to members of ICANN’s legal department and Cyrus Namazi, who at the time was the Vice President of ICANN’s Global Domains Division. (Declaration of Amy Stathos, ¶ 3.)

Redacted - Privileged

the 2019 report was only a draft and was not subject to public scrutiny. To the contrary, it was shielded based on privilege, with even the ICANN Board unaware of its existence. (Hearing Tr. Day II, 171.) Following *in camera* review, the Panel ordered in Procedural Order No. 18 that ICANN produce the report.

Dr. Calton's 2009 report about the new gTLD program, but that study does not support removal of price controls from legacy gTLDs and actually leans in the other direction.

337. ICANN's failure to provide a "detailed explanation" of why it concluded that no economic study was needed highlights the underlying rationale for ICANN's obligation to make decision in an "open and transparent" manner. If ICANN had relied on Dr. Carlton's 2009 report at an earlier time, Namecheap and other members of the public could have explained why that reliance was misplaced.

338. For this and other reasons stated above, this Panel concludes that, contrary to its Bylaws, ICANN did not operate to the maximum extent feasible in an open and transparent manner.

6. Failure to Maintain a Non-Privileged Record of ICANN's Internal Decision-Making Process

339. ICANN's failure to provide an open and transparent explanation of its reasons for rejecting public comments opposing the removal of price controls was exacerbated by ICANN's assertion of attorney-client privilege with respect to most of the documents evidencing ICANN's deliberations.

340. Mr. Weinstein, the ICANN staff member who was most involved in the Price Cap decision, testified that:

- There were internal discussions about the need for a formal Board resolution on the renewal of a registry agreement, but those discussions included counsel and were therefore privileged;³⁴⁰
- When ICANN "dug in the price cap issue and some other issues further in the process, we did make a formal recommendation in writing. I think they were in the form of the papers and materials we provided to the board," but "it was done in the context of preparing a board information paper, which are privileged documents" because "[w]e do that in conjunction with the legal team";³⁴¹

³⁴⁰ Hearing Tr. Day III, 100.

³⁴¹ Hearing Tr. Day III, 106-107.

- ICANN staff consulted with counsel to get competition advice and
Redacted - Privileged ;³⁴²
- The email Mr. Weinstein received from his supervisor and non-legal staff member Cyrus Namazi confirming that ICANN could proceed as planned with the renewal of the Base RA without price caps was not produced as he believed that this document was “under privilege because it was consulting with counsel”;³⁴³
- Mr. Weinstein assured himself that the “all clear” to proceed without price caps was made after exercising sufficient due diligence and care, but “all these conversations were in the presence and with guidance from counsel so I believe those are privileged”;³⁴⁴
- When Mr. Weinstein sent summary emails confirming the content of negotiations between ICANN and the registry operators via telephone or in person, he made sure to include “the lawyers on it,” making the documents allegedly privileged.³⁴⁵

341. Namecheap claims that ICANN violated its transparency obligations by asserting privilege so broadly that there is virtually no non-privileged record of the process by which ICANN made its Price Cap Decision.

342. ICANN contends that it did not violate its transparency obligations for the following reasons:

- Transparency did not require ICANN to maintain a non-privileged record of its decision-making process;³⁴⁶

³⁴² Hearing Tr. Day III, 116 & 134

³⁴³ Hearing Tr. Day III, 44.

³⁴⁴ Hearing Tr. Day III, 46.

³⁴⁵ Hearing Tr. Day III, 143-144.

³⁴⁶ 29 June 2022 ICANN Closing Presentation, Slide 24.

- Requiring ICANN to maintain a non-privileged record of the reasons for its Price Cap Decision would make “no sense,” given that ICANN negotiates thousands of Registry Agreements;³⁴⁷
- ICANN “maintained a non-privileged record of the core reasons underlying its decision,” which was sufficient to meet its transparency obligations;³⁴⁸ and
- It “was not feasible to maintain a more extensive non-privileged record” because “legal issues were integrally tied to ICANN organization’s considerations.”³⁴⁹

343. ICANN asserts that its “transparency obligations do not require maintaining a non-privileged record of ICANN organization decisions.”³⁵⁰ ICANN adds that its “transparency obligations do not prohibit ICANN from obtaining privileged advice from its attorneys,” which is “critical to ICANN’s ability to fulfill its mission.”³⁵¹

344. At issue is whether transparency requires ICANN to provide not only a detailed *external* explanation to the public of the reasons for its decision on important policy matters, but also to create and maintain a non-privileged *internal* record of its deliberations that is sufficiently detailed to assess the reasons for the decision and to evaluate whether ICANN gave sufficient consideration to concerns expressed by the public.

345. The Panel declines to rule on this issue for the following reasons: (a) a ruling on this issue is not essential to the Panel’s decision on transparency, given that the Panel has already found that ICANN violated its obligation to provide a detailed public explanation of the reasons for the Price Cap Decision; (b) this question is more appropriately resolved in an IRP proceeding in which the issue is critical to the

³⁴⁷ 29 June 2022 ICANN Closing Presentation, Slide 24.

³⁴⁸ 29 June 2022 ICANN Closing Presentation, Slide 25.

³⁴⁹ 29 June 2022 ICANN Closing Presentation, Slide 25.

³⁵⁰ 29 June 2022 ICANN Closing Presentation, Slide 24.

³⁵¹ ICANN Post-Hearing Brief ¶ 68.

outcome;³⁵² and (c) the Parties' briefs do not address whether a detailed *external* explanation obviates any need for ICANN to maintain a non-privileged *internal* record of its decision-making process.

346. The case for requiring an internal non-privileged record of ICANN's deliberations might be found in the following Articles and Bylaws:

- First, as discussed above, the Articles and Bylaws require ICANN to operate, "to the maximum extent feasible," for the benefit of the Internet community as a whole through "open and transparent processes."³⁵³ Maintaining a non-privileged record of the reasons for decisions on important matters facilitates operating in an "open and transparent manner." Without such a record, it is difficult to determine whether ICANN sufficiently considered concerns from the Internet community and had a reasoned basis for rejecting those concerns.
- Second, the Bylaws require ICANN to "maintain responsive consultative procedures that provide *detailed explanations of the basis for decisions* (including how comments have influenced the development of policy considerations)," and to "implement procedures for the *documentation and public disclosure of the rationale for decisions* made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above)." ³⁵⁴ Thus, in addition to providing detailed explanations of the basis for decisions, ICANN has the obligation to document and disclose the reasons for its Price Cap Decision, "including how comments have influenced the development" of that decision.
- Third, the purpose of IRPs, as defined in the Bylaws, include ensuring that ICANN "complies with its Articles of Incorporation and Bylaws," providing "meaningful" independent review, ensuring that ICANN is "accountable" to the global Internet community, and securing the "transparent, efficient,

³⁵² For example, this might arise in a case in which ICANN provided a detailed *public* explanation of the reasons for its decision, but there was no non-privileged *internal* record (or "paper trail") of ICANN's deliberations.

³⁵³ Articles of Incorporation Article III; Bylaws § 1.2(a).

³⁵⁴ Bylaws § 1.2(a)(iv), § 3.1.

consistent, coherent, and just resolution of Disputes.³⁵⁵ “Meaningful” independent review would be facilitated by a contemporaneous record of the decision-making process (a “paper trail,” so to speak), so that an IRP panel can independently review the reasons for ICANN’s decision.

- Fourth, as Namecheap has noted, the Bylaws allow ICANN to exclude “legal matters” from the publicly available minutes of Board meetings, but only if the Board determines that exclusion is “necessary or appropriate to protect the interests of ICANN,” and the Board “describe[s] in general terms in the relevant minutes the reason for such nondisclosure.”³⁵⁶ In other words, ICANN may carve out privileged legal matters from public Board minutes, but must publish minutes of non-privileged matters and explains the carve-out. While that obligation refers to Board minutes, a similar obligation arguably applies to a written recommendation from the ICANN staff to the Board on an important matter such as the Price Cap Decision. Privileged legal matters may be put in a separate section so the rest of the memorandum can be produced after carving out the privileged section.

347. As noted above, this Panel need not render a decision on whether these provisions obligate ICANN to create a non-privileged record of its *internal* deliberations, as opposed to merely providing detailed *external* explanations for its decision, given that ICANN did not provide a sufficient external explanation here. The Panel unanimously agrees, however, that: (a) creating such an internal record would at least be *advisable* (even if not required); and (b) that ICANN appears to be overusing the attorney-client privilege to shield its internal communications and deliberations. The following paragraphs elaborate on these points.

348. This is not the first IRP Panel to express concerns regarding ICANN’s use of the attorney-client privilege to shield ICANN deliberations from disclosure. The IRP panel in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14- 0001-5004, RM 175 (“*Dot Registry*”) considered whether the ICANN Board, acting through the Board Governance Committee (“BGC”), had violated transparency by failing to publish information about

³⁵⁵ Bylaws § 4.3(i), (ii), (iii), (vii).

³⁵⁶ Bylaws § 3.5(d).

a staff recommendation that the Board deny reconsideration of the staff's denial of Dot Registry's applications for new gTLDs.³⁵⁷

349. The *Dot Registry* panel observed that ICANN is "free to assert attorney-client and litigation workproduct privileges in this proceeding, just as it is free to waive those privileges," but "is not free ... to disregard mandatory obligations under the Bylaws."³⁵⁸ The panel noted that the Bylaws entitled the Board Governance Committee to ask the ICANN staff for its views, but required staff comments to "be made publicly available on the Website." The panel further noted that "[n]one of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus subject to the shield of privilege) in reaching its conclusions."³⁵⁹

350. The *Dot Registry* panel concluded that by using the privilege to "shield[] from public disclosure all real evidence of an independent deliberative process at the BGC (other than the pro forma meeting minutes), the BGC put itself in contravention of Bylaws 1V.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public."³⁶⁰ Further, the BGC's invocation of privilege left the panel "highly uncertain" as to whether the BGC had "exercised due diligence and care in having a reasonable amount of facts in front of them," and had "exercised independent judgment in taking the decision."³⁶¹

351. This Panel cited *Dot Registry* in Procedural Order No. 13, holding that Namecheap had not overcome ICANN's prima facie showing that documents were "shielded from disclosure by the attorney-client privilege," but warned that not disclosing these documents "potentially narrows the scope of the evidence for ICANN to rebut claims that it violated its Articles of Incorporation and Bylaws."³⁶² The Panel explained:

³⁵⁷ *Dot Registry* RM 175, ¶¶ 9-11, 19-25, 149.

³⁵⁸ *Dot Registry* RM 175, ¶ 149.

³⁵⁹ *Dot Registry* RM 175, ¶ 149.

³⁶⁰ *Dot Registry* RM 175, ¶ 150.

³⁶¹ *Dot Registry* RM 175, ¶ 150.

³⁶² Procedural Order No. 13 ¶ 37.

The possible implications of using the privilege to shield information considered by the ICANN Board Governance Committee were discussed in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14- 0001-5004, Declaration of the Independent Review Panel, ¶¶ 149-50 (29 July 2016). ICANN expressed confidence during the 19 October hearing that the non-privileged evidence of ICANN’s deliberations will be sufficient to show that ICANN did not violate its Articles of Incorporation or Bylaws, and the Panel expresses no view on whether the concerns noted in the *Dot Registry* Declaration apply here. The Panel simply highlights the issue so that both Parties may address it in their submissions.³⁶³

352. ICANN argues that *Dot Registry* is inapposite because it involved a Bylaws provision that explicitly required staff comments to the BGC to “be made publicly available.” This Panel agrees that *Dot Registry* is not directly on point. Nevertheless, as in *Dot Registry*, ICANN’s invocation of privilege leaves the Panel “highly uncertain” whether the decisionmakers at ICANN had “exercised due diligence and care in having a reasonable amount of facts in front of them” in making the decision at issue.

353. ICANN argues that the panel in the *Afilias* IRP “found that ICANN’s accountability and transparency commitments *do not* ‘somehow imply a waiver of its right to invoke privilege.’”³⁶⁴ ICANN relies, however, on a preliminary procedural order that was limited to whether ICANN should be required to produce documents that ICANN argued were privileged, as well as the adequacy of ICANN’s privilege log.³⁶⁵ That preliminary issue is separate and independent from the merits issue of whether ICANN complied with the Articles and Bylaws. Indeed, the IRP panel later declared that ICANN had violated its Articles and Bylaws in several respects.³⁶⁶ This Panel similarly ruled in Procedural Order No. 13 that ICANN need not produce

³⁶³ Procedural Order No. 13 n. 3.

³⁶⁴ ICANN Post-Hearing Brief ¶ 68, citing *Afilias v. ICANN* IRP, Procedural Order No. 4 ¶ 42, Ex. R-18A (emphasis in original). ICANN also cites IRP Procedures, Rule 8, RE-1, which allows ICANN to withhold from production in IRPs documents “subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law.”

³⁶⁵ *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Procedural Order No. 4 ¶¶ 38-80, R-18A.

³⁶⁶ *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Final Decision (Corrected Version of 15 July 2021) ¶ 413, RM 190.

documents for which Namecheap had not rebutted ICANN's prima facie showing of privilege.³⁶⁷ That preliminary issue is separate and independent from whether ICANN should maintain a non-privileged record of its internal deliberations.

354. ICANN argues that requiring a non-privileged record of its decision-making process would "make no sense," given that ICANN has negotiated over 2,000 Registry Agreements.³⁶⁸ Yet the issue is not whether ICANN must create a non-privileged record of decisions on every matter, no matter how routine or insignificant. Rather, the issue is whether ICANN must (or at least should) maintain such a record for decisions on "policy" for which the Articles and Bylaws require ICANN to provide "detailed explanations of the basis for decisions" (including how comments have influenced the development of policy considerations)," and to document and publicly disclose "the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above)."³⁶⁹

355. ICANN recognized that the Price Cap Decision was of sufficient import to require "responsive consultative procedures" by requesting public comments and then publishing its analysis of those comments.³⁷⁰ Internal ICANN documents confirm that ICANN understood that this was a controversial subject that would likely engender strong public opposition. For example, on 1 March 2019, Russell Weinstein, the ICANN employee responsible for negotiating the 2019 Registry Agreements, referred to the "potential hot topic of the removal of price caps," as a reason to delay the request for public comments on the proposed .INFO Registry Agreement until after a March 2019 Board meeting.³⁷¹ Similarly, an ICANN employee provided the following internal

³⁶⁷ Procedural Order No. 13 ¶ 37.

³⁶⁸ 29 June 2022 ICANN Closing Presentation, Slide 24.

³⁶⁹ Bylaws § 1.2(a)(iv), § 3.1; *see also* Articles of Incorporation, Article III. As discussed in Issue 6 below, the Price Cap Decision involved policy matters that should have been decided by the ICANN Board rather than the ICANN staff. Moreover, the obligation to document and provide detailed explanations of the rationale for policy decisions applies not only to decisions by the Board, but also to decisions by ICANN's "constituent bodies." Bylaws § 3.1.

³⁷⁰ Annexes 2-4 and Annexes 5-7.

³⁷¹ 1 March 2019 Email from Russell Weinstein to David Payne, Annex 72 at ICANN-NC-015268. ICANN had designated that email as "Highly Confidential - Outside Attorneys' Eyes Only." The Panel finds that email does not warrant a "Confidential" designation, let alone a "Highly Confidential" designation. The same comment applies to the ICANN documents cited in the next two footnotes, Annexes 106 and 107.

comment on an initial draft of ICANN's request for public comments on the proposed removal of price caps: "I took a stab at drafting this, but due to the sensitive nature of the subject, I would like to review this together to further fine tune."³⁷² Another ICANN employee suggested a "simpler statement," noting that the draft description "gets a lot of attention to being carefully explained, which makes it stand out."³⁷³ Thus, ICANN not only knew that removal of price caps was a "hot" and "sensitive" topic, it sought to downplay its significance with a "simpler" explanation.

356. Moreover, ICANN created numerous documents regarding its Price Cap Decision, including a memorandum from ICANN staff to the Board that explained the reasons for that decision.³⁷⁴ Yet ICANN produced almost none of those documents, asserting that they are privileged. Thus, the issue is not whether ICANN should have created more documents, but rather whether the documents that it created should have prepared in a manner that left a non-privileged record that is sufficient to allow meaningful independent review.

357. ICANN contends that it created "a non-privileged record of the core reasons underlying its decision."³⁷⁵ ICANN relies on the Staff Reports of Public Comment Proceedings that it published in June 2019, which ICANN describes as providing "a summary and analysis of the public comments, as well as a detailed explanation to the Internet community as to why ICANN organization nevertheless saw value in transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement in response to public comments...."³⁷⁶

358. Yet the June 2019 Staff Reports merely summarized concerns about the Price Cap Decision without explaining why it rejected them. Thus, ICANN's reports do not contain the "detailed explanation" required by its transparency obligations.

³⁷² Draft of Proposed Renewal of .INFO Registry Agreement, Annex 106 at ICANN-NC-016379; *see* Namecheap Pre-Hearing Brief ¶ 51 (explaining the related metadata).

³⁷³ Draft of Proposed Renewal of .INFO Registry Agreement, Annex 107 at ICANN-NC-013288; *see* Namecheap Pre-Hearing Brief ¶ 51 (explaining the related metadata).

³⁷⁴ Hearing Tr. Day III, 106-107 (Weinstein testimony).

³⁷⁵ 29 June 2022 ICANN Closing Presentation, Slide 25.

³⁷⁶ ICANN Post-Hearing Brief ¶¶ 63, 66, citing 26 July 2019 Letter from Cyrus Namazi Zak Muscovitch of the Internet Commerce Association, RE-8.

359. ICANN also relies on a letter that ICANN posted on its website after it implemented the Price Cap Decision.³⁷⁷ That letter includes some further information, but still does not explain why ICANN rejected many of the public concerns, such as the special nature of legacy gTLDs in general and of .ORG in particular.

360. The internal ICANN documents submitted in this IRP do not shed further light on why ICANN rejected the concerns that ICANN ignored in its public reports. Indeed, ICANN produced virtually no internal documents regarding the reasons for the Price Cap decision, claiming that such documents were privileged. Neither ICANN's public disclosures nor its internal documents provide a non-privileged record of ICANN's decision-making process that is sufficient to document and disclose the rationale for the Price Cap Decision, including a "detailed explanation" of why ICANN rejected the concerns expressed in the public comments.

361. ICANN asserts that it "was not feasible to maintain a more extensive non-privileged record" because "legal issues were integrally tied to ICANN organization's considerations."³⁷⁸ ICANN argues that "[p]rotecting privilege is critical to ICANN's ability to fulfill its mission."³⁷⁹

362. The Panel agrees that ICANN is entitled to obtain privileged and confidential advice from counsel, and it takes ICANN's concerns about privilege seriously. It appears unlikely, however, that maintaining a non-privileged record of important policy decisions with detailed explanations would impair ICANN's "ability to fulfill its mission" for several reasons.

363. First, there does not appear to be any irreconcilable conflict between transparency and privilege, given that the Price Cap Decision is a policy matter that is driven primarily by business and economic consideration, rather than legal issues. Thus, the expert reports of both sides focused on business and economic issues regarding whether the .ORG and .INFO legacy gTLDs have sufficient market power to warrant continued imposition of price controls. Public comments also focused on non-legal issues, such as whether .ORG serves a special non-profit market, and whether

³⁷⁷ ICANN Post-Hearing Brief ¶ 65, citing Annexes 5-7.

³⁷⁸ 29 June 2022 ICANN Closing Presentation, Slide 25.

³⁷⁹ ICANN Post-Hearing Brief ¶ 68.

unsponsored legacy gTLDs such as .ORG and .INFO are fungible with sponsored new gTLDs, as reflected in the public comments.

364. Second, while the Price Cap Decision may raise some privileged legal issues, it appears unlikely that such issues are so “integrally tied” to non-privileged business and economic issues that the two cannot be separated. Legal issues mentioned at the hearing include whether the Price Cap Decision required a decision by the Board, and whether the decision was consistent with competition law.³⁸⁰ The Panel agrees that these issues potentially implicate privilege concerns.³⁸¹ However, these are discrete legal issues that could have been separated from ICANN’s consideration of non-privileged matters, such as the special nature of legacy gTLDs in general, and of .ORG in particular. Indeed, Mr. Weinstein agreed that renewal of the 2019 Registry Agreements was “primarily a business decision” with some legal aspects, and that it is “theoretically possible” to separate legal issues from business issues.³⁸² In fact, ICANN prepared and published a non-privileged analysis of public comments that briefly explained the Price Cap Decision. While that explanation was too cursory to meet ICANN’s obligation to provide “detailed explanations,” ICANN could and should have published a more detailed explanation. ICANN could also have created a non-privileged internal record of the reasons for its decisions that was similar to its published explanation.

365. The record also suggests that ICANN’s reliance on privilege was overly aggressive. For example, Mr. Weinstein’s testimony suggests that ICANN considers summaries of negotiations with registry operators to be privileged if they are sent to

³⁸⁰ See Hearing Tr. Day III, 106-07, 112 (Weinstein testimony).

³⁸¹ The Panel says “potentially” because whether a communication is privileged depends on the specific facts. The Panel expresses no view on whether specific communications are or are not privileged.

³⁸² Hearing Tr. Day III, 107, 111. Mr. Weinstein testified that ICANN generally combined the two for the sake of “efficiency.” Thus, his general practice is to provide the Board with a single privileged memorandum regarding renewal of Registry Agreements, without separating non-privileged analysis of business considerations from privileged legal matters. (Hearing Tr. Day III, 109-10.) It does not seem that the burden of separating privileged from non-privileged matters in this memorandum would have been significant. Mr. Weinstein also prepares an email summary of renewal negotiations with registry operators that he (questionably, in the view of the Panel) considers to be privileged because it is copied to ICANN’s legal team. (Hearing Tr. Day III, 143-44.)

counsel, even though the content of such third party discussions would ordinarily not be privileged.³⁸³

366. Furthermore, after conducting an *in camera* review of Dr. Carlton's 2019 report, which ICANN had refused to produce based on privilege, the Panel concluded that "there is nothing from the face of the report to indicate that it was prepared in response to a request from ICANN's legal counsel, and nothing in the content of the report to suggest that it was prepared for the purpose of assisting ICANN's counsel to provide legal advice to ICANN."³⁸⁴ The Panel further held that "the report does not reveal any legal strategy or privileged mental impressions of counsel."³⁸⁵

367. In fact, Dr. Carlton's 2019 report is limited to economic analysis similar to the analysis in the expert reports that Dr. Carlton submitted in this arbitration. Dr. Carlton did not analyze any legal issues, nor did he refer to any mental impressions of ICANN's counsel. That is not surprising, given that Dr. Carlton is an economist and not a lawyer.

368. Notwithstanding the Panel's conclusions regarding the 2019 Carlton report, the Panel is not going so far as to find that ICANN generally abused the privilege, as requested by Namecheap. California's privilege laws, which apply here,³⁸⁶ did not allow the Panel to conduct *in camera* review of documents that ICANN asserted were shielded by the attorney-client privilege.³⁸⁷ The *in camera* review of the 2019 Carlton report was based on a finding that ICANN waived the attorney-client privilege as to that document by designating Dr. Carlton as an expert witness, coupled with a

³⁸³ Hearing Tr. Day III, 143-44. The Panel says "suggests" because Mr. Weinstein is not a lawyer, and the decision to withhold documents as privileged is ordinarily made by counsel. The Panel is not aware of specific evidence that ICANN withheld any email summaries of renewal negotiations based on Mr. Weinstein's expansive interpretation of privilege. Nevertheless, Mr. Weinstein's testimony raises concerns.

³⁸⁴ Procedural Order No. 1, ¶ 23.

³⁸⁵ *Id.* ¶ 28.

³⁸⁶ Procedural Order No. 16 ¶¶ 6, 10; see also *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Procedural Order No. 4 ¶ 33 (12 June 2020).

³⁸⁷ See discussion at Procedural Order No. 15 ¶ 26.

narrow exception under California law allowing *in camera* review in certain situations involving work product privilege designations.³⁸⁸

369. ICANN has not waived privilege as to other documents, such as its memorandum that explained ICANN’s recommendation to the ICANN Board that .ORG and .INFO transition to the Base Registry Agreement without price controls. Thus, the Panel has not reviewed other documents and is not in a position to make an overall assessment as to the privilege assertions by ICANN.

370. Nevertheless, ICANN’s assertion of privilege as to the 2019 Carlton report raises doubt as to ICANN’s argument that legal issues were so “integrally tied” to ICANN’s Price Cap Decision that it would not have been feasible for ICANN to create a non-privileged record of its detailed rationale. That doubt is confirmed by the nature of the legal issues that ICANN has identified, such as competition law and whether ICANN needed to obtain Board approval of the Price Cap Decision. Those issues are discrete and should not be difficult to separate from non-privileged business and economic considerations.

371. ICANN’s broad assertion of privilege means that ICANN has little to fall back on to show that it “maintain[ed] responsive consultation procedures that provide detailed explanations of the basis for decisions.”³⁸⁹ As already discussed, both ICANN’s public reports and its internal documents are insufficient. Thus, this Panel finds itself in the same position as the *Dot Registry* IRP Panel, holding that “ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges.”³⁹⁰ ICANN “is not free, however, to disregard mandatory obligations under the Bylaws.”³⁹¹ While ICANN’s assertion of attorney-client privilege does not in itself constitute a violation of the Articles of Incorporation and Bylaws, it does factor into the Panel’s finding that ICANN’s failed to show that it engaged in a responsive consultation procedure that provided detailed explanations of the basis for rejecting public comments.

³⁸⁸ See Procedural Order No. 16 ¶ 10; Procedural Order No. 17 ¶¶ 15-21.

³⁸⁹ Bylaws, §3.1 (emphasis added).

³⁹⁰ *Dot Registry* ¶ 149.

³⁹¹ *Id.*

372. In sum, this Panel finds that ICANN breached its transparency obligation to provide a detailed external explanation to the public of its Price Cap Decision, including the reasons that ICANN rejected the concerns that it highlighted in its summary of public comments. That finding makes it unnecessary to decide whether transparency also required ICANN to maintain a detailed non-privileged record (in effect, a “paper trail”) of its internal deliberations. The Parties have not addressed whether a detailed external explanation removes any need for a non-privileged record of internal deliberations. Having already found that ICANN breached its transparency obligations with regard to the lack of a detailed public explanation, the Panel does not need to address whether an internal record is also required. In that regard, even if ICANN’s broad assertion of privilege does not rise to a violation of its transparency obligations, the Panel is concerned by the absence of an internal record of its deliberative process for the Price Cap Decision and believes that it would *at least* be advisable (and perhaps required) for ICANN to create such a record for future decisions on policy matters.

XIII. ISSUE 6: WAS IT CONTRARY TO THE ARTICLES AND BYLAWS FOR THE ICANN ORGANIZATION (RATHER THAN THE ICANN BOARD) TO MAKE THE PRICE CAP DECISION?

C. The Issue and Legal Framework

373. Namecheap claims that the ICANN Board improperly held “secret” meetings regarding removing price controls for .ORG, .INFO, and .BIZ, which is a decision that should have been made by the ICANN Board in a duly noticed meeting, rather than by ICANN org.

374. Namecheap points to Section 2.1 of ICANN’s Bylaws, which provides that “[e]xcept as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.”³⁹²

375. Namecheap also relies on the following Section 3.6(a) of the Bylaws:³⁹³

³⁹² Namecheap Pre-Hearing Brief ¶ 31, citing Bylaws § 2.1.

³⁹³ Namecheap Pre-Hearing Brief ¶¶ 32, 301, 304, citing Bylaws § 3.6(a).

With respect to any **policies** that are being considered by the Board for adoption **that substantially affect the operation of the Internet or third parties**, including the imposition of any fees or charges, ICANN shall:

- (i) provide public notice** on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
- (ii) provide a reasonable opportunity for parties to comment** on the adoption of the proposed policies, to see the comments of others, and to reply to those comments (such comment period to be aligned with ICANN's public comment practices), **prior to any action by the Board**; and
- (iii) in those cases where the policy action affects public policy concerns**, to request the opinion of the Governmental Advisory Committee ("GAC" or "Governmental Advisory Committee") and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.³⁹⁴

376. ICANN maintains that the Price Cap Decision was properly made by the ICANN staff, rather than by the ICANN Board, so the Bylaws requirements for formal Board action do not apply. ICANN does not dispute that it did not meet the requirements for formal Board action if they apply.

377. Thus, the key issue is whether the Price Cap Decision should have been made by the ICANN Board. If so, ICANN did not comply with the requirements for Board action, such as a formal Board meeting with advance notice and minutes. If not, those requirements do not apply.

³⁹⁴ Bylaws § 3.6(a).

C. Namecheap's Position

378. Namecheap argues that “[i]t is only after the Board approves a policy that the policy will be implemented and must be implemented.”³⁹⁵ In addition to citing Section 2.1 of ICANN’s Bylaws, Namecheap states that:

By carrying a resolution, the ICANN Board can delegate authorities and give specific instructions to ICANN’s staff, e.g., to execute renewal agreements for legacy gTLDs on ICANN’s behalf. Until the execution of the 2019 RAs for .ORG, .INFO and .BIZ, ICANN has always proceeded that way. *E.g.*, On 22 August 2013, the ICANN Board passed the following resolutions for the renewal of the .ORG, .INFO and .BIZ RAs in 2013:

Resolved (2013.08.22.10), the proposed renewal .INFO Registry Agreement is approved, and the President, Generic Domains Division and the General Counsel are authorized to take such actions as appropriate to implement the agreement;

Resolved (2013.08.22.11), the proposed renewal .ORG Registry Agreement is approved, and the President, Generic Domains Division and the General Counsel are authorized to take such actions as appropriate to implement the .ORG Registry Agreement;

Resolved (2013.08.22.12), the proposed renewal .BIZ Registry Agreement is approved, and the President, Generic Domains Division and the General Counsel are authorized to take such actions as appropriate to implement the .BIZ Registry Agreement.

The Board passed similar resolutions for .PRO, .CAT, and .TRAVEL in 2015, for .TEL in 2016, and for .MOBI and .NET in 2017.

In contrast with these resolutions, there is no record showing the approval and delegation of authority for the execution of the 2019 RAs for .ORG, .INFO and .BIZ. Consequently, these RAs have been executed without the necessary direction of the ICANN Board.

³⁹⁵ Namecheap Closing Presentation Slide 17.

As a result, ICANN has committed an *ultra vires* act under Californian law, thereby violating Article III of its Articles of Incorporation. In addition, ICANN violated Article 2(1) of its Bylaws.³⁹⁶

C. ICANN's Position

379. ICANN agrees that the Board did not make the Price Cap Decision, stating that “although the Board received briefings during workshops regarding the background relating to the draft 2019 .BIZ, .INFO, and .ORG Registry Agreements, the results of the public comments, and ICANN’s intended course of action pursuant to the Board’s oversight role, the receipt of those briefings did not result in the Board passing any resolutions regarding the 2019 Registry Agreements.”³⁹⁷

380. But ICANN further argues that “the Board did not, and did not need to, delegate some type of special authority to ICANN organization relating to ICANN’s decision to transition .BIZ, .INFO and .ORG to the Base Registry Agreement. Such particularized authority was not needed because the Bylaws expressly provide that “[t]he President shall be the Chief Executive Officer (CEO) of ICANN in charge of all of its activities and business.”³⁹⁸

381. ICANN also relies on “Delegation of Authority Guidelines” approved by the Board on 8 November 2016, which provide that ICANN’s President and CEO have the responsibility of “[l]ead[ing] and oversee[ing] ICANN’s day-to-day operations,” and that the President and CEO and senior management have the role of “[p]erform[ing] operational work in accordance with the strategic direction of the Board.”³⁹⁹

382. ICANN argues that “day-to-day operations” include entering into “contract negotiations, not just with registry operators but with registrars and numerous other third parties.”⁴⁰⁰

³⁹⁶ Namecheap Pre-Hearing Brief ¶¶ 321-25 (footnotes omitted).

³⁹⁷ ICANN Post-Hearing Brief ¶ 50.

³⁹⁸ *Id.* ¶ 51 (quoting ICANN Bylaws, Art. 15, § 15.4).

³⁹⁹ *Id.* ¶ 52 (quoting ICANN’s Delegation of Authority Guidelines (8 Nov. 2016), Ex. R-37).

⁴⁰⁰ ICANN Pre-Hearing Brief ¶ 89 (footnote omitted).

383. ICANN also maintains that the “policy development process is a defined process in which one, or multiple, ICANN supporting organizations or constituencies from the ICANN community ask the ICANN Board to approve new policies developed by the community through ICANN’s bottom-up, multistakeholder processes.”⁴⁰¹ ICANN’s Board chair, Maarten Botterman, testified that transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement was not part of ICANN’s policy development process work.⁴⁰² Another ICANN Board member testified as follows:

Q. And particularly, you mentioned policy issue by the board. So where would you put the line?

A. Well, the ICANN bylaws are very specific about the role of the board with respect to policy. And the board cannot delegate under the bylaws, it cannot delegate policy -- its policy responsibility, which is not policy development, but it is the looking at receiving policy recommendations from the community, evaluating those recommendations to ensure that they are consistent with ICANN’s mission and within ICANN’s remit, and rejecting those policies only if a super-majority concludes that the community development -- developed policies are not in the global public interest. Once the board has approved the policy, the board will then direct the organization to implement those policies, and the organization is responsible for implementation, subject to oversight of the board.”⁴⁰³

Thus, ICANN defines the “policy development process” as a term of art, with its own acronym, “PDP.” According to ICANN, only those “policies” that are developed by the Internet community with a request from “ICANN supporting organizations or constituencies” require Board action.

C. The IRP’s Panel’s Analysis and Decision

384. The Panel agrees that “policy development process” and “PDP” do in fact seem to be terms of art but finds nothing in the Bylaws that *limits* Board consideration to policies that were developed through the formal policy development process that is

⁴⁰¹ *Id.* ¶ 55.

⁴⁰² Hearing Tr. Day II, 150:23–151:1.

⁴⁰³ Hearing Tr. Day II, 62:6–63:2.

initiated by a request from “one, or multiple, ICANN supporting organizations or constituencies.” To the contrary, ICANN’s Bylaws broadly provide that “[e]xcept as otherwise provided in the Articles of Incorporation or these Bylaws, **the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.**”⁴⁰⁴

385. ICANN org can *implement* policies set by the Board without further Board action. However, ICANN org’s responsibility under the 2016 Delegation of Authority Guidelines for “[l]ead[ing] and oversee[ing] ICANN’s day-to-day operations” and “[p]erform[ing] operational work in accordance with the strategic direction of the Board”⁴⁰⁵ does not extend to *establishing* new policy that substantially affects the operation of the Internet.

386. In fact, the Delegation of Authority Guidelines define the role of the CEO and Senior Management as “[i]mplement[ing] the decisions of the Board, *including implementation of policies approved by the Board and review [of] recommendations approved by the Board.*”⁴⁰⁶ The Guidelines thus make clear that ICANN org’s role is to implement policies *approved by the Board*. They do not authorize ICANN org to create or implement new policies that the Board has not approved.

387. The Panel finds that of the removal of price controls for .ORG, .INFO, and .BIZ was not a routine matter of “day-to-day operations,” as ICANN has asserted. The Price Cap Decision was a policy matter that required Board action. As noted above, Section 3.6(a) of the Bylaws requires the Board to provide advance notice and an opportunity to comment on “any **policies** that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including *the imposition of any fees or charges.*”⁴⁰⁷ The Price Cap Decision “substantially affects the operation of the Internet or third parties” and involves the “imposition of ... fees or charges” by allowing registry operators to increase domain name registration fees by more than the historic price cap of 10% per year.

⁴⁰⁴ Bylaws §2.1 (emphasis added).

⁴⁰⁵ *Id.* ¶ 52 (quoting ICANN’s Delegation of Authority Guidelines (8 Nov. 2016), Ex. R-37).

⁴⁰⁶ Delegation of Authority Guidelines at 2-3, Ex. R-37 (emphasis added).

⁴⁰⁷ Bylaws § 3.6(a) (emphasis added).

388. An argument could be made that Section 3.6(a) does not apply here because it refers to policies that “are being considered for adoption by the Board,” and the Board did not formally approve the Price Cap Decision. Yet this interpretation would allow ICANN org to make *any* policy decision, including with respect to policies that substantially affect the operation of the Internet, without any consideration by the Board. Indeed, the Board could abdicate policymaking responsibilities in favor of ICANN org through the simple expedient of doing nothing (or, as here, considering such policies developed by ICANN org only in non-public workshops, thereby circumventing the transparency and process provisions in the Bylaws). This would be inconsistent with the provision in the Bylaws that “[e]xcept as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.”⁴⁰⁸

389. Furthermore, Namecheap has presented unrebutted evidence that until ICANN adopted the Registry Agreements for .ORG, .INFO, and .BIZ in 2019, the Board had formally approved all renewals of Registry Agreements for legacy gTLDs, such as .ORG, .INFO, and .BIZ.⁴⁰⁹ Examples include:⁴¹⁰

| Year | Legacy gTLD | Board Resolutions and Minutes |
|------|---------------------|--|
| 2013 | .INFO, .ORG, .BIZ | Resolutions 2013.08.22.10, 2013.08.22.11, 2013.08.22.12 (RM 178, 179) |
| 2015 | .CAT, .TRAVEL, .PRO | Resolutions 2015.09.28.04, 2015.09.28.05, 2015.09.28.06, (RM 180, 181) |
| 2016 | .TEL | Resolution 2016.11.08.07 (RM 115) |
| 2017 | .MOBI, .NET | Resolutions 2017.03.16.04, 2017.06.24.22 (RM 112, 124) |

⁴⁰⁸ Bylaws § 2.1 (emphasis added).

⁴⁰⁹ Namecheap Pre-Hearing Brief ¶¶ 321-25.

⁴¹⁰ Namecheap has focused on renewal of Registry Agreements for legacy gTLDs from 2013, apparently because that corresponds to the launch of the New gTLD Program. The record suggests, however, that before 2013, ICANN’s practice was to request and obtain Board approval of Registry Agreements for legacy gTLDs.

390. ICANN asserts that the Board has approved Registry Agreements for “very few of the over 1,200 gTLDs in the DNS and does not engage in this practice as a matter of course....”⁴¹¹ But ICANN has not cited a single Registry Agreement for a *legacy* gTLD that was executed before 2019 and that was not approved by the Board. ICANN appears to be relying exclusively on Registry Agreements for *new* gTLDs, which do not establish a precedent for *legacy* gTLDs.

391. An ICANN Board member suggested at the hearing that ICANN org was acting in accordance with established policy in renewing the Registry without price controls. Specifically, she stated that ICANN had an existing “no price caps” policy that was developed at the time it created the new gTLDs in 2011:

Q. I understand that for the purpose of whether the board acts, you have to draw a bright line, but the world is not all black and white. There are things in between.

A. Sure. I think that’s a really good question.

In this case, the board had acted in the context of the new gTLD program and it had made a determination that the community-developed policy that said “no price caps” was the correct -- that was -- that served the global public interest, and that was a -- that policy was adopted. So, in many ways, the consideration about sort of the public policy issues with respect to price caps in registries other than .com had been resolved. The other issue, of course, is that in between 2001, when the Legacy contracts were negotiated, and 2006, when they were repeated, 1,200 new, additional, competing top-level domains -- generic top-level domains had been added by the time this came up.

...

The new gTLD program addressed it and 1,200 new competing top-level domains had been introduced. And to be clear, I mean, I think this point may have been a little obscure. In fact, the board had been briefed all along on the value of moving contracts into -- onto the new gTLD Base contract and, in fact, in 2013 -- I know this from being on the other side of this -- org and the board, presumably, very much wanted those Legacy TLDs to move onto the Base contract in 2013. The decision not to do that in 2013 was taken by the Legacy

⁴¹¹ ICANN Pre-Hearing Brief ¶ 91; ICANN Rebuttal ¶ 34.

registry operators, not by ICANN board or org, and ICANN board or org had -- ICANN board had long been of the view that there was significant value to moving the Legacy contracts onto the new gTLD Base Agreement.⁴¹²

392. Yet, as already discussed, this “no price caps” policy was limited to the new gTLDs launched in 2012, and the economic analysis underlying that policy was premised, at least in part, on continuing price controls with respect to legacy gTLDs, such as .ORG, .INFO, and .BIZ. The policy development process that culminated in the New gTLD Program and a Base Registry Agreement without price controls did not encompass the legacy TLDs at issue here. The Board adopted a policy approving use of the Base Registry Agreement for New gTLDs. It did not adopt a similar policy for legacy gTLDs.

393. Prior to 2019, the only legacy gTLD previously subject to price controls that was transitioned to the Base Registry Agreement was .PRO, an unsponsored, very small gTLD. The renewal attracted almost no public comment.⁴¹³ But the .PRO renewal occurred pursuant to Board action. ICANN org did not make the decision.⁴¹⁴ The ICANN Board provided a rationale for the resolution, including a summary of the concerns or issues raised by the community, the materials reviewed by the Board, the factors that the Board found to be significant, and the positive or negative community impacts of the Board’s resolutions.⁴¹⁵ Although the Board’s resolution included some discussion of the advantages of the Base Registry Agreement--stating, for example, that “[t]ransition to the new gTLD Registry Agreement will provide consistency across all registries leading to a more predictable environment for end-users” – the Board did not

⁴¹² Hearing Tr. Day II, 67:16–70:10.

⁴¹³ RM 131, ICANN, *Public Comments Report re Proposed Renewal of .PRO Unsponsored Registry Agreement*, 18 August 2015, <https://itp.cdn.icann.org/en/files/registry-agreement/reissued-report-comments-pro-renewal-18aug15-en.pdf>.

⁴¹⁴ ICANN, *Approved Board Resolution 2015.09.28.06*, 28 September 2015, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e> (RM 132).

⁴¹⁵ *Id.*

purport to decide that *all* legacy gTLDs should transition to the Base Registry Agreement.⁴¹⁶ Rather, the Board’s decision was singularly focused on the .PRO gTLD.

394. ICANN’s action transitioning a legacy gTLD, especially one of the three original gTLDs (.ORG), pursuant to staff action without a Board resolution was unprecedented. Prior to 30 June 2019 (when ICANN renewed the .ORG, .BIZ, and .INFO RAs without price controls), ICANN’s practice was as follows:

- New gTLD Registry Agreements could be entered into or approved by ICANN org without Board action (although some were approved at the Board level).⁴¹⁷ These Registry Agreements utilized the Base Registry Agreement template and did not include price controls.
- While .PRO, a gTLD that was previously subject to price controls, was transitioned to the Base Registry Agreement, this occurred only pursuant to Board action.⁴¹⁸ ICANN org did not make the decision.⁴¹⁹

⁴¹⁶ As previously noted, while other legacy gTLDs transitioned to the Base Registry Agreement before 2019 – including .JOBS, .TEL, .TRAVEL, .MOBI, and .CAT – these were “sponsored” gTLDs aimed at a specific community, rather than the general public. As a result, they were never subject to price controls.

⁴¹⁷ For example, the Board considered the application for the .PERSIANGULF gTLD at issue in the GCC IRP, presumably because GCC objected to that application. *See* GCC Partial Final Declaration ¶¶ 34-36. That case, however, involved whether the new gTLD should be approved despite objections, not the terms of a registry agreement. The Parties have not cited any Board approvals of registry agreements for New gTLDs, which are based on the Base Registry Agreement that the Board has already approved.

⁴¹⁸ ICANN, *Approved Board Resolution 2015.09.28.06*, 28 September 2015, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e> (RM 132).

⁴¹⁹ Even with the Board making the decision, ten of the fourteen commenters “objected to ICANN’s method of renewing legacy TLD Registry Agreements,” with “several” expressing the view that “[i]mposing URS [Uniform Rapid Suspension System] on an incumbent gTLD via the contracting process is an unacceptable staff intervention into the policymaking process. Approval of this draft contract would constitute top-down, staff-driven policymaking in direct violation of ICANN’s stated commitment to the bottom-up, private sector led policy development process.” (RM 131.) Although these comments related to the imposition of URS, rather than price controls, the concern about “an unacceptable staff intervention into the policymaking process” is similar to the concern that Namecheap has raised in this IRP. That concern applies with greater force to the Price Cap Decision, given that the decision was made by the ICANN org, and not by the Board.

395. Even if, as ICANN contends, “policy development process” is a term of art involving only policies developed by the Internet community through ICANN’s bottom-up, multistakeholder processes, no such policy development was required to *continue* the practice of transitioning legacy gTLDs to the Base Registry Agreement without price controls only pursuant to Board action. To the contrary, to the extent ICANN intended to allow ICANN org (not the Board) to transition legacy gTLDs to the Base Registry Agreement without price controls, it should have followed the policy development process to implement this change.

396. Indeed, ICANN staff seem to have been working under the assumption that the Board, not ICANN org, would make the Price Cap Decision – or at least they were uncertain on that point. For example:

- On 25 September 2018, as ICANN staff was preparing for the next ICANN Board meeting, Russell Weinstein responded to a colleague’s request for “subjects you would like the Board to discuss” by stating: “For Discussion: Price Caps in legacy gTLD renewals.”⁴²⁰ When shown this note at the hearing, Mr. Weinstein testified that he believed that “price caps in Legacy gTLD renewals” was “an important discussion for the board to have and for the board to be aware of.”⁴²¹
- While ICANN’s notes of another meeting on 5 December 2018 are almost entirely redacted, the unredacted fragment suggests that ICANN staff envisioned that the ICANN Board would issue a resolution on the renewal of the .ORG, .INFO and .BIZ Registry Agreements:
 - Resolution in works.
[Redacted]

⁴²⁰ Annex 64. ICANN designated Annex 64 and a number of the other documents discussed herein as “Confidential” or “Highly Confidential.” The Panel sees nothing that warrants that designation in the portions it refers to.

⁴²¹ Hearing Tr. Day III, 55:7-15.

- Biz info and org want to move to base agreements (without price caps)⁴²²
- On 6 January 2019, Mr. Weinstein provided a status update to Cyrus Namazi on the “renewals in progress,” stating:

Biz/Info/Org – pretty much waiting on price caps; [Redacted – Privileged] (...) I am still a bit unclear on what we want the board to do in January and if/or how some economic analysis is needed.⁴²³

- A timeline for “.ORG Public Comment” created by Mr. Weinstein’s team in January or February 2019 included the following dates for the following Board-related tasks:⁴²⁴

| | |
|-----------------------------------|----------------|
| 5. Draft Board Paper | May 13, 2019 |
| 6. Request to Add to Board Agenda | <i>[blank]</i> |
| 7. Board Paper Complete and Sent | May 27, 2019 |
| 8. Board Review | May 27, 2019 |
| 9. Board Approval | June 10, 2019 |

- A draft of the Staff Report of Public Comment Proceedings on 14 May 2019 states the following:

As a next step, ICANN org intends to further consider the proposed renewal of the .org Registry Agreement taking into account the comments received in the comment forum.

⁴²² Annexes 67 and 67bis ¶ 7 (ICANN-NC-015289_A).

⁴²³ Annex 69.

⁴²⁴ Annex 82; see Hearing Tr. Day III, 122:8 to 123:16. The above chart is a summary of key points of the Annex 82 timeline that omits some items.

Thereafter, the proposed renewal of the .org Registry Agreement will be considered by ICANN's Board of Directors.⁴²⁵

Mr. Weinstein commented on this paragraph: "I think we just say the Board will consider not org."⁴²⁶

397. Mr. Weinstein testified that the timeline showing Board review and approval in May and June 2019 was a contingency plan in case it was decided that formal Board approval was needed.⁴²⁷ However, Mr. Weinstein's testimony makes clear that he not only sought the Board's approval of the Price Cap Decision, he believed that he had received that approval. Specifically, on 12 February 2019, Mr. Weinstein sent an email to Neustar, the registry operator of .BIZ, stating that in the September/October 2018, ICANN and Neustar were "closely aligned" on the renewal Registry Agreement, with "just a few items to close," but that ICANN org "needed to brief the Board primarily regarding the issue of price caps which are currently in place but not part of the Base RA."⁴²⁸ Mr. Weinstein stated that the Board briefing was deferred until the January 2019 Board workshop, and that following that workshop, "we received the 'all clear' we were looking for regarding price caps" (don't need to carry them over from the current agreements), and can resume to close out the negotiations....⁴²⁹

398. While Mr. Weinstein testified that the Board did not approve the Price Cap Decision at a formal Board meeting, his 12 February email and related testimony shows that he believed that the Board had given at least informal approval and that such approval was critical to moving the Registry Agreement forward.

399. The Feb06 Policy reinforces the conclusion that removing price caps from the 2019 Registry Agreements raised significant policy issues. As discussed above, the ICANN Board accepted the GNSO's recommendations in January 2008 regarding the Feb06 Policy.⁴³⁰ Those recommendations included that "[t]here should be a policy

⁴²⁵ Annex 109 ¶ 1 (Bates No. ICANN-NC-016487).

⁴²⁶ *Id.*

⁴²⁷ Hearing Tr. Day III, 124:12 to 125:13.

⁴²⁸ 12 February 2019 Email from Russell Weinstein to Raymond Zylstra, Annex 70.

⁴²⁹ *Id.*

⁴³⁰ See *supra*, Section IX.C.4(b); 23 January 2006 Special Board Meeting Minutes (RM 105).

guiding registry agreement renewal.”⁴³¹ While ICANN did not implement that recommendation, the Board’s agreement to develop a “policy” for registry agreement renewal suggests that general renewal practices – such as whether legacy gTLDs should continue to have price caps – rise to the level of policy.⁴³²

400. ICANN argues that “it would be nearly impossible for the Board to complete its other tasks if it were somehow required to intervene in every contract ICANN enters,” given that there are over 1,200 gTLDs in the DNS that must be periodically negotiated and renewed, as well as a large number of other ICANN contracts with various third parties.⁴³³ To be clear, the Board need not intervene in every contract or even most contracts.

401. But the decision to change course properly rests with the Board, not ICANN org, where, as here: (i) *the Board* previously attempted to remove price controls from legacy gTLD Registry Agreements, (ii) *the Board* subsequently reversed itself following a public outcry and reimposed these price controls, (iii) *the Board* then decided to remove price controls from *new* gTLD agreements (following a policy development process that encompassed only new gTLDs, *not* legacy gTLDs), and (iv) in each subsequent renewal of legacy gTLD RAs, *the Board* decided whether to include price controls.

402. ICANN also argues that “this Panel cannot “replace the Board’s reasonable judgment with its own” in this IRP.⁴³⁴ This Panel is not replacing the Board’s judgment. As emphasized by ICANN in this proceeding, the Board’s actions are not at issue here. As stated by ICANN:

⁴³¹ See *supra*, Section IX.C.4(b); 4 October 2007 GNSO Council Report to Board, Polices for Contractual Conditions Existing Registries PDF Feb 06 (RER 89).

⁴³² The Panel relies here on the Feb06 Policy not as a basis for a separate claim, but rather as a fact that supports Namecheap’s timely claim that the Price Cap Decision involved matters of policy.

⁴³³ ICANN Post-Hearing Brief ¶ 57.

⁴³⁴ *Id.*

- There is no “evidence indicating that the Board, rather than the organization, made the ultimate decision to enter into the 2019 Registry Agreements or otherwise to not include the price control provisions at issue in this IRP.”⁴³⁵
- “[T]he Board did not ... delegate some type of special authority to ICANN organization relating to ICANN’s decision to transition .BIZ, .INFO and .ORG to the Base Registry Agreement.”⁴³⁶
- “No decision was made or required whether to “approve” ICANN organization’s recommendation; the Board simply did not intervene in the process.”⁴³⁷

Thus, the ICANN’s Board’s judgment is not at issue, and this Panel is not replacing the Board’s reasonable judgment with its own.

403. ICANN also argues that:

To the extent Namecheap intends to argue that the Board should have considered the matter at a Board meeting and should have issued a Board resolution (notwithstanding that the delegation of authority to negotiate contracts was well within the Board’s reasonable business judgment), Namecheap’s argument suffers from a critical flaw. The ICANN Board was kept fully informed of ICANN staff’s work regarding the renewals, including its analysis of the public comments and its rationale for transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement. Based on those briefings in January and June 2019, the ICANN Board supported ICANN staff’s decision. Thus, there is no reason to believe that a Board resolution would have yielded a different result.⁴³⁸

⁴³⁵ *Id.* ¶ 51.

⁴³⁶ *Id.*

⁴³⁷ ICANN Closing Presentation Slide 37.

⁴³⁸ ICANN Pre-Hearing Brief ¶ 104.

404. It is possible that formal consideration by the Board would have yielded the same result. Indeed, the Board affirmed the Price Cap Decision in its ruling on Reconsideration Request 19-2. But the end result of ICANN's decision-making process is not at issue here. This Panel is not issuing a declaration that price controls should have been retained. This declaration is focused solely on the process underlying the Price Cap Decision, not its merits. At issue is whether the Price Cap Decision involved matters of policy that the Board should have decided at a formal Board meeting, after providing the advance notice and opportunity to comment required by the Bylaws. If, as the Panel has concluded, the answer is "Yes," then ICANN failed to comply with the procedural requirements of the Bylaws, regardless of whether following those requirements would have resulted in a different result.

405. A Board resolution after an official Board meeting, with advance notice and opportunity to comment, would have resulted from a more transparent process than the one followed here. As previously discussed, there is virtually no record of ICANN's deliberations. ICANN seeks to deflect this point as follows:

Namecheap complains that there are few "deliberative documents" regarding the renewal negotiations. Many of the "deliberations," however, occurred in telephonic or in-person staff meetings and not via email, or involved ICANN's internal and external legal counsel and thus are privileged.... Additionally, the basis for the decision is reflected in the publicly available Staff Report of Public Comment Proceedings that ICANN published for the respective gTLDs at the conclusion of the public comment period (as discussed more fully below), and in public correspondence.⁴³⁹

Yet the Staff Report of Public Comment Proceedings mostly just catalogs the public comments without providing the substance of ICANN's deliberations, if any, regarding the points made in those comments.⁴⁴⁰ Beyond the Staff Report, the only justification

⁴³⁹ ICANN Pre-Hearing Brief at 24, n. 88.

⁴⁴⁰ Annex 5 (ICANN, Staff Report of Public Comment Proceeding, Proposed Renewal of .ORG Registry Agreement, 3 June 2019); Annex 6 (ICANN, Staff Report of Public Comment Proceeding, Proposed Renewal of .INFO Registry Agreement, 3 June 2019); Annex 7 (ICANN, Staff Report of Public Comment Proceeding, Proposed Renewal of .BIZ Registry Agreement, 3 June 2019).

ICANN provided to the Internet community were two paragraphs that did not address some of the more significant points made in the comments.

406. Accordingly, this Panel concludes that the decision to remove price controls should have been made by the ICANN Board, rather than ICANN org and that Sections 2.1 and 3.6(a) of ICANN's Bylaws were violated. That conclusion means that ICANN also violated related provisions of the Bylaws for formal Board action, such as the requirements that advance notice be given of the Board meeting and that minutes of the Board meeting be posted on the ICANN website.⁴⁴¹

XIV. ISSUE 7: WAS THE PRICE CAP DECISION IN CONNECTION WITH .ORG CONTRARY TO ICANN'S COMMITMENT TO APPLY FAIRLY ITS STANDARDS, POLICIES, AND PROCESSES?

C. The Issue and Legal Framework

407. Namecheap contends that ICANN failed to apply fairly its standards, policies and processes in connection with the .ORG renewal.⁴⁴² Namecheap relies on Sections 1.2(a)(v) and 2.3 of the Bylaws, which are the same clauses relied upon for its "discriminatory treatment" claim discussed in Issue 4 above. Those clauses state:

Section 1.2(a) COMMITMENTS

ICANN commits to do the following ...

- (v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties).

⁴⁴¹ Bylaws §§ 3.4 and 3.5.

⁴⁴² Namecheap Pre-Hearing Brief ¶¶ 394-99. Namecheap also claims that ICANN failed to apply fairly its policies and processes concerning cross-ownership and the Feb06 Policy. Namecheap Pre-Hearing Brief ¶¶ 390-93, 400-02. The Panel does not address those claims because Namecheap did not timely assert them, as discussed in Issue 2 above.

Section 2.3. NON-DISCRIMINATORY TREATMENT

ICANN ... shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.⁴⁴³

C. Namecheap's Position

408. The .ORG policies and procedures that Namecheap cites involve criteria for selecting the registry operator of .ORG that ICANN published in 2002 (the "2002 Criteria").⁴⁴⁴ One of the 2002 Criteria was "[t]he type, quality, and cost of the registry services proposed," which was explained as follows:⁴⁴⁵

In view of the noncommercial character of many present and future .org registrants, affordability is important. A significant consideration will be the price at which the proposal commits to provide initial and renewal registrations and other registry services. The registry fee charged to accredited registrars should be as low as feasible consistent with the maintenance of good-quality service.

409. Namecheap notes that in May 2019, PIR (the .ORG registry operator) reaffirmed that PIR "will not raise prices exorbitantly both because doing so would violate our values and because we are bound by the competitive market."⁴⁴⁶

410. Namecheap also asserts that in February 2020, ICANN "reaffirmed that the commitments made in response to the selection criteria are still valid."⁴⁴⁷ Namecheap relies on a comment made in connection with negative public reaction to

⁴⁴³ Bylaws §§ 1.2(a)(v), 2.3.

⁴⁴⁴ Namecheap Pre-Hearing Brief ¶¶ 394-98.

⁴⁴⁵ Namecheap Pre-Hearing Brief ¶ 395, quoting Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals, posted 20 May 2002 (".ORG Criteria"), #7 (RM 11).

⁴⁴⁶ Namecheap Pre-Hearing Brief ¶ 397, quoting 1 May 2019 Letter from PIR to ICANN Board (Annex 113). Namecheap quotes the first part of this sentence only (ending at "violate our values"), omitting the second part ("and because we are bound by the competitive market"). The Panel quotes the entire sentence for completeness.

⁴⁴⁷ Namecheap Pre-Hearing Brief ¶ 396.

the proposed sale of PIR, the .ORG registry operator, to Ethos Capital, a private equity fund that proposed to convert PIR into a for-profit corporation. The Chair of the ICANN Board, Maarten Botterman, sent a letter to ISOC, the owner of PIR, which stated:

When ISOC applied for and was awarded the right to manage .ORG in 2002, ISOC made commitments to the Internet community on how it would differentiate and uphold the unique purpose of the .ORG TLD. *ICANN awarded the management of the .ORG registry with the belief that ISOC was uniquely positioned to live up to these commitments for the long run.* These commitments have been maintained since that 2002 award, and ICANN has heard loud and clear that the community of .ORG registrants is concerned that these commitments already have been abandoned or will be abandoned if the transfer to Ethos Capital is completed.⁴⁴⁸

411. Namecheap further asserts that ICANN reconfirmed its 2002 statement that the .ORG registry fee “should be as low as feasible consistent with the maintenance of good-quality service” by denying approval in April 2020 to the proposed sale of PIR to Ethos Capital.⁴⁴⁹

412. Based on the above points, Namecheap asserts that until 2019, ICANN ensured that the selection criterion requiring the registry fee to be “as low as feasible consistent with the maintenance of good-quality service” was met by including price controls in the .ORG Registry Agreement.⁴⁵⁰ Namecheap maintains that the lack of price caps in the 2019 Registry Agreement for .ORG was “inconsistent with the standards and

⁴⁴⁸ Namecheap Pre-Hearing Brief ¶ 396, quoting 13 February 2020 Letter from Maarten Botterman, Chair, ICANN Board of Directors to Gonzalo Camarillo, Chair, ISOC Board of Trustees, at 2 (Annex 117). ISOC (the Internet Society) is a not-for-profit corporation that created PIR for the purpose of operating .ORG “for the benefit of [its] end user consumers and the Internet as a whole.” Approved Board Resolutions, Special Meeting of the ICANN Board, 30 April 2020, “Background” section of “Rationale for Resolutions” (Annex 129, PDF page 5).

⁴⁴⁹ Namecheap Rebuttal ¶ 149, citing Approved Board Resolutions, Special Meeting of the ICANN Board, 30 April 2020 (Annex 129); and ICANN Minutes Special Meeting of the ICANN Board, 30 April 2020 (Annex 130).

⁴⁵⁰ Namecheap Pre-Hearing Brief ¶ 398.

processes that ICANN put in place for the operation of .ORG, contrary to ICANN's obligation "to apply these standards, policies, and processes fairly."⁴⁵¹

C. ICANN's Position

413. According to ICANN, Namecheap's claim fails for several reasons. First, ICANN maintains that the statements about keeping .ORG prices low in the 2002 Criteria was merely a "recommendation" to the ICANN Board about selection criteria that were included in a Request for Proposal ("RFP") that "ICANN issued in 2002 soliciting applications for the next registry operator of the .ORG TLD."⁴⁵² ICANN asserts that recommendation and RFP "*never was and never* became an ICANN 'policy.'"⁴⁵³ ICANN also asserts that its statement about low .ORG prices "never formed part of ICANN's standard or processes, and therefore cannot form the basis for an IRP."⁴⁵⁴

414. Second, ICANN asserts that the 2002 Criteria related solely to the criteria for selecting the .ORG registry operator, and did not concern whether the .ORG Registry Agreement should contain price controls.⁴⁵⁵

415. Third, ICANN asserts that the ICANN Board made clear that its "paramount concern" was "demonstrated technical ability" to operate such a domain name with such a large number of DUMs, and not the registry fees to be charged.⁴⁵⁶ ICANN cites Minutes of a 14 March 2002 Board Meeting that noted that one of the points "supported by the majority of the Board" was "the crucial importance of demonstrated technical ability, without unduly restricting the pool off applicants."⁴⁵⁷

416. Fourth, ICANN argues that price controls are not necessary to constrain .ORG pricing "in a market saturated with over 1,2000 other gTLDs," especially "when

⁴⁵¹ Namecheap Pre-Hearing Brief ¶ 399.

⁴⁵² ICANN Pre-Hearing Brief ¶ 148.

⁴⁵³ ICANN Pre-Hearing Brief ¶ 150 (emphasis in original).

⁴⁵⁴ ICANN Rebuttal ¶ 67.

⁴⁵⁵ ICANN Pre-Hearing Brief ¶ 150.

⁴⁵⁶ ICANN Pre-Hearing Brief ¶ 150.

⁴⁵⁷ ICANN Pre-Hearing Brief ¶ 150 and footnote 248, citing Minutes of 14 March 2002 Regular Meeting of ICANN Board, comments on ".org Reassignment" (RM 10, PDF page 44).

the dominant registry, .COM, is still subject to a price control provision imposed by DOC.”⁴⁵⁸

417. Finally, ICANN emphasizes that PIR has not raised .ORG prices in six years, despite being able to do so by 10% per year under the 2013 Registry Agreement and being able to raise prices with no cap under the 2019 Registry Agreement.⁴⁵⁹ ICANN also emphasized that PIR “publicly committed not to unreasonably increase prices” in a 1 May 2019 blog post, after public comments on the proposed 2019 Registry Agreement had closed.⁴⁶⁰

C. The IRP Panel’s Analysis and Decision

418. The Panel concludes that ICANN’s statement about low .ORG prices in the 2002 Criteria constitutes a policy, standard, or process that is subject to ICANN’s obligation to act in an equitable and non-discriminatory manner. ICANN included the 2002 Criteria in the Request for Proposals for a new .ORG registry operator, which ICANN issued on 20 May 2002.⁴⁶¹ The 2002 Criteria stated that a “significant consideration will be the price at which the proposal commits to provide initial and renewal registrations,” and that the “registry fee charged to accredited registrars should be as low as feasible consistent with the maintenance of good-quality service.”⁴⁶² That statement is a “standard” or “process” that ICANN was required to apply in a non-discriminatory manner in assessing proposals to serve as the next .ORG registry operator.

419. Nevertheless, the Panel finds that the 2002 Criteria simply served the purpose of selecting the next .ORG registry operator in 2002; they did not establish a standard, process, or policy that required ICANN to include price controls in all later registry agreements. The 2002 Criteria stated that the applicant’s commitments about

⁴⁵⁸ ICANN Pre-Hearing Brief ¶ 151.

⁴⁵⁹ ICANN Pre-Hearing Brief ¶ 151.

⁴⁶⁰ ICANN Pre-Hearing Brief ¶ 151, citing 1 May 2019 PIR blog post, “An Open Letter to the .ORG Community.”

⁴⁶¹ .ORG Reassignment: Request for Proposal Materials, posed 20 May 2002 (RM 11, PDF pages 2) (including link to the Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals, posted 20 May 2002).

⁴⁶² Namecheap Pre-Hearing Brief ¶ 395, quoting Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals, posted 20 May 2002 (“.ORG Criteria”), #7 (RM 11).

prices were an “important consideration” in assessing proposals, but did not require commitments to be implemented in a specific manner. Thus, they did not prohibit ICANN from choosing an applicant whom ICANN believed was committed to keeping prices “as low as feasible consistent with the maintenance of good-quality service,” without including price controls in the registry agreement.

420. Further, the linchpin of ICANN’s non-discrimination obligation is not “*singling out any particular party* for discriminatory treatment (i.e., making an unjustified prejudicial distinction *between or among different parties*).”⁴⁶³ Thus, if ICANN rejected one applicant because it was not sufficiently committed to low prices but accepted another that also lacked that commitment, that could violate ICANN’s obligation to apply its standards and processes in a consistent and equitable manner. Here, however, PIR is the only party at issue. ICANN did not apply the 2002 Criteria in an inconsistent manner that unfairly favored PIR over another party.

421. Namecheap seeks to convert the 2002 Criteria into a general policy to maintain low prices through price caps by citing statements and actions of ICANN and PIR in 2019 and 2020. But when ICANN rejected the sale of PIR in 2020, ICANN had already approved the 2019 Registry Agreements for .ORG, .INFO, and .BIZ, even though they lacked price caps. When viewed in the context of ICANN’s approval of the 2019 Registry Agreements, those statements suggest that ICANN believed that PIR would honor its commitments, even if the price caps were removed.

422. As discussed above, ICANN did for many years have a practice of including price controls in the registry agreements for unsponsored legacy gTLDs, but ICANN’s non-discrimination obligations did not prohibit it from changing that practice in response to new developments, as long as it applied its new practice consistently.

423. In sum, Namecheap is mixing apples and oranges. The 2002 Criteria concern selection of the .ORG registry operator, not the inclusion of price caps in registry agreements. ICANN’s non-discrimination obligation concerns not unfairly singling out a particular party for treatment that is different from other parties. It does not apply when, as here, only one party is at issue.

⁴⁶³ Bylaws § 1.2(a)(v) (emphasis added); see Bylaws § 2.3. (ICANN shall not “*single out any particular party* for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition”) (emphasis added).

XV. ISSUE 8: WAS THE PRICE CAP DECISION CONTRARY TO ICANN'S OBLIGATION TO ACT FOR THE BENEFIT OF THE INTERNET COMMUNITY AS A WHOLE?

A. The Issue and Legal Framework

424. Namecheap claims that the Price Cap Decision violated ICANN's obligation to promote the global public interest for the benefit of the Internet community as a whole. Namecheap relies primarily on Section 1.2(b)(ii) of the Bylaws, which states that ICANN's "Core Values" include:

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decisionmaking 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;⁴⁶⁴

425. Namecheap also cites Articles of Incorporation II and III, which state:

Articles of Incorporation II: ... [ICANN shall] pursue charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by carrying out the mission set forth in the bylaws of the Corporation ("Bylaws"). Such global public interest may be determined from time to time. Any determination of such global public interest shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process.

Articles of Incorporation III: [ICANN shall] operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. To this

⁴⁶⁴ Namecheap Pre-Hearing Brief ¶ 358, citing Bylaws § 1.2(b)(ii).

effect, the Corporation shall cooperate as appropriate with relevant international organizations.⁴⁶⁵

426. The above clauses appear to focus primarily on procedural rather than substantive issues. Section 1.2(b)(ii) of the Bylaws and Article II of the Articles of Incorporation both refer to a “bottom-up multistakeholder community *process*” to “ascertain” and “determine” the global public interest. Similarly, Article III refers to using “open and transparent *processes* that enable competition and open entry in Internet-related markets,” for “the benefit of the Internet community as a whole.”

427. While these clauses focus primarily on process, they arguably impose substantive obligations as well. Article II states that ICANN shall “promote” the “global public interest.” Article III states that ICANN shall operate “for the benefit of the Internet community as a whole.”

428. The Parties have not addressed whether the “global public interest” clauses of the Articles and Bylaws impose substantive obligations, in addition to procedural obligations. Nor have the Parties discussed any prior IRP decisions that shed light on the test for determining whether ICANN complied with any substantive obligation to promote the “global public interest” and to operate “for the benefit of the Internet community as a whole.” The Panel will focus on procedural rather than substantive obligations for the reasons sets forth below.

B. Namecheap’s Position

429. Namecheap makes both procedural and substantive arguments about ICANN’s global public interest obligations. As to procedure, Namecheap argues that:

- ICANN “did not care” about how removing price caps from .ORG, .INFO, and .BIZ would affect the interests of the Internet community.⁴⁶⁶

⁴⁶⁵ Namecheap Pre-Hearing Brief ¶ 357.

⁴⁶⁶ Namecheap Pre-Hearing Brief ¶ 360.

- ICANN received an “overwhelming” number of public comments that strongly opposed the removal of price controls, but ignored those comments instead of “addressing the genuine concerns of the Internet community.”⁴⁶⁷
- The California Attorney General recognized the concern that ICANN is no longer responsive to the needs of its stakeholders.⁴⁶⁸

430. As to substance, Namecheap argues that the removal of price caps is contrary to the global public interest for multiple reasons, including:

- ICANN’s own studies show that legacy gTLDs have “attributes of monopoly power” and that there was no basis to remove price controls.⁴⁶⁹
- The U.S. Department of Justice and Department of Commerce have both supported price controls on legacy gTLDs.⁴⁷⁰
- “Independent experts” confirm that .ORG and .INFO have market power, which calls for maintaining price caps.⁴⁷¹

C. ICANN’s Position

431. ICANN focuses on substance, arguing that the global public interest does not require price caps because (1) Namecheap relies on obsolete studies and statements that pre-date the new gTLD program; and (2) maintaining price controls is not justified in the current competitive landscape.⁴⁷² In addition, ICANN emphasizes that its “core values” include “depending on market mechanisms to promote and sustain a competitive environment in the DNS,” where “feasible and appropriate.”⁴⁷³

⁴⁶⁷ Namecheap Pre-Hearing Brief ¶ 376.

⁴⁶⁸ Namecheap Pre-Hearing Brief ¶ 377.

⁴⁶⁹ Namecheap Pre-Hearing Brief ¶ 357.

⁴⁷⁰ Namecheap Pre-Hearing Brief ¶¶ 370-75.

⁴⁷¹ Namecheap Pre-Hearing Brief ¶¶ 378-84.

⁴⁷² ICANN Pre-Hearing Brief ¶¶ 131-42.

⁴⁷³ ICANN Sur-Rebuttal ¶ 57, citing Bylaws, § 1.29B0(iii).

432. ICANN does not discuss process in the sections of its briefs that specifically address Namecheap's "global public interest" claim.⁴⁷⁴ In other sections, however, ICANN argues that it solicited and considered a large number of public comments before making its Price Cap Decision.⁴⁷⁵

D. The IRP Panel's Analysis and Decision

433. As to ICANN's procedural obligation to consider the global public interest through a "bottom-up, multistakeholder" process, the Panel finds that this obligation largely overlaps with ICANN's obligation to act in an "open and transparent" manner. As discussed above, transparency includes soliciting comments from the Internet community, considering those comments, and explaining why ICANN accepted or rejected the primary comments.

434. The Panel has concluded that ICANN violated its transparency obligations, for the reasons set forth above. The Panel finds that Namecheap's procedural arguments related to the global public interest do not materially add to its transparency arguments. Therefore, the Panel incorporates its prior analysis of transparency and will not repeat it here.

435. As to whether ICANN has violated any substantive obligations related to the "global public interest" – or, indeed, whether the "global public interest" requirement imposes any substantive (as opposed to procedural) obligations on ICANN's part – the Panel does not consider it to be necessary or appropriate to reach this issue for several reasons.

436. First, the Panel's rulings that ICANN acted contrary to its transparency obligations and that the Price Cap Decision should have been made by the Board mean that the ICANN Board will need to consider that decision further. Accordingly, it is not necessary to decide now whether ICANN also acted contrary to any substantive obligations related to the global public interest.

437. Second, the ICANN Board's further consideration of the Price Cap Decision will likely involve obtaining further feedback from the Internet community and conducting additional analysis. As a result of that further consideration and

⁴⁷⁴ See ICANN Pre-Hearing Brief ¶¶ 131-42.

⁴⁷⁵ ICANN Pre-Hearing Brief ¶¶ 112-21; ICANN Sur-Rebuttal ¶¶ 52-55.

analysis, ICANN may receive new information that bears on the Price Cap Decision. Ruling now on whether the Price Cap Decision complies with any substantive obligations, without the benefit of any such additional information or analysis, would be premature.

438. Third, the record is not developed on this issue. Neither Namecheap nor ICANN addressed this issue or cited any prior IRP decisions that discuss the standard for assessing ICANN's compliance with any substantive obligation. While global public interest is a concept used in some fields of international law,⁴⁷⁶ the parties have not sought to employ those concepts in this case, perhaps because they would not translate well to the present context.

439. In short, the Panel deems it inappropriate to opine on an issue that is not necessary to its decision and that could have significant implications for other IRP proceedings, especially in the absence of detailed briefing by the Parties.

XVI. ISSUE 9: HOW SHOULD FEES AND COSTS BE ALLOCATED IN THIS PROCEEDING?

C. The Issue and Legal Framework

440. Namecheap has requested an award of "its costs in this proceeding, including but not limited to its internal costs, legal advice and representation costs, costs of expert witnesses, and any other costs such as for document review and transportation, made or still be made until the final resolution of this IRP."⁴⁷⁷ ICANN has not requested an award of its costs, but opposes Namecheap's request.

441. Article 34 of the ICDR Rules states that the "arbitral tribunal shall fix the costs of the arbitration," which are defined to include the reasonable legal and other costs incurred by the parties, as well as the fees and expenses of the arbitrators and of the ICDR.

⁴⁷⁶ See, e.g., Yann Aguila & Marie-Cécile de Bellis, *On the Concept of a Global Public Interest: Some Reflections*, 52 ENV'T POL'Y & L. 13 (2022) (discussing global public interest in the context of global environmental challenges); ANDREAS KULICK, *GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW* (2014) (discussing global public interest in the context of international investment law).

⁴⁷⁷ Namecheap Pre-Hearing Brief ¶¶ 362-69.

442. Article 34 further states that the tribunal may “allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case.”

443. Nevertheless, the discretion to allocate costs is limited by Section 4.3(r) of the Bylaws, which states:

ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

444. Similarly, Section 13 of the IRP Procedures states:

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

445. The “Community IRP” and Section 4.3(e)(ii) exceptions noted above do not apply here. A Community IRP must be filed by the “Empowered Community,” which is a special non-profit association.⁴⁷⁸

⁴⁷⁸ See Bylaws §§ 4.3(d), 6.1(a).

446. Section 4.3(e) of the Bylaws entitles ICANN to an award of costs if the Claimant does not engage in a “Cooperative Engagement Process” and ICANN prevails. That does not apply here because Namecheap engaged in a Cooperative Engagement Process and ICANN has not prevailed.

447. Because these two exceptions do not apply, this IRP is governed by the general rule that ICANN “shall bear all administrative costs” and “each party to an IRP proceeding shall bear its own legal expenses,” except that “the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party’s Claim or defense as frivolous or abusive.”

C. Namecheap’s Position

448. Namecheap has requested an award of fees and costs but has provided no supporting analysis.

449. In its Post-Hearing Brief, Namecheap requested “the opportunity to specify in a further submission its costs of this IRP that Namecheap asks the Panel to order ICANN to pay to Namecheap.”⁴⁷⁹ That request, however, goes to the amount of costs, not whether costs should be awarded in the first place.

C. ICANN’s Position

450. ICANN has asked the Panel to deny all relief sought by Namecheap, but has not specifically addressed allocation of costs.

C. The IRP Panel’s Analysis and Decision

451. Namecheap has prevailed on some, but not all of its claims. The Panel finds that neither party has asserted “frivolous or abusive” claims or defenses. Counsel for both Parties advocated zealously and effectively for their respective clients while conducting themselves in a professional manner. Accordingly, the Panel applies the general rules that ICANN shall bear all administrative costs paid to the ICDR (including arbitrator fees), and that each party should bear its own legal and expert witness fees and expenses.

⁴⁷⁹ See Bylaws §§ 4.3(d), 6.1(a).

452. ICDR records indicate that the administrative costs of the ICDR include (a) \$ 13,835.00 in administrative fees paid to the ICDR; and (b) \$ 841,895.76 in fees and expenses of the IRP Panel members and the Emergency Panelist. ICANN has already paid most of those costs, but Namecheap has paid \$58,750.00. ICANN shall bear all administrative costs and shall reimburse Namecheap for the \$58,750.00 that Namecheap has paid.

XVII. ISSUE 10: WHAT IS THE SCOPE OF THE PANEL'S AUTHORITY TO AWARD RELIEF?

C. The Issue and Legal Framework

453. An important issue is the scope of this Panel's authority to award relief. The Bylaws define this authority as follows:

- o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:
 - (i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;
 - (ii) Request additional written submissions from the Claimant or from other parties;
 - (iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;
 - (iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;
 - (v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

- (vi) Determine the timing for each IRP proceeding; and
- (vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).⁴⁸⁰

454. “Covered Action” is defined as “any actions or failure to act by or with ICANN ... committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”⁴⁸¹ “Disputes” involve “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws.”⁴⁸²

455. Thus, Section 4.3(o)(iii) of the Bylaws authorizes an IRP Panel to declare whether a challenged action or inaction by ICANN (whether by the Board, Staff, or officers or directors) violated the Articles or Bylaws.

456. The Parties agree that this Panel may “declare” whether the challenged ICANN conduct violates the Articles and Bylaws. The Parties dispute whether the Panel also has the authority to issue a binding order that nullifies the ICANN’s conduct and requires ICANN to take specific remedial action.

457. The Parties’ dispute about the scope of the Panel’s authority to declare relief implicates Section 4.3(x) of the Bylaws, which states:

- (x) The IRP is intended as a final, binding arbitration process.
 - (i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.
 - (ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN without a *de novo* review of the decision

⁴⁸⁰ Bylaws § 4.3(o).

⁴⁸¹ Bylaws § 4.3(b)(ii).

⁴⁸² Bylaws § 4.3(b)(ii).

of the IRP Panel or en banc Standing Panel, as applicable, with respect to factual findings or conclusions of law.

- (iii) ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.
 - (A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.
 - (B) If an IRP Panel decision in a Community IRP is in favor of the EC, the Board shall comply within 30 days of such IRP Panel decision.
 - (C) If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC may seek enforcement in a court of competent jurisdiction. In the case of the EC, the EC Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.
- (iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN agrees; provided that

such a non-binding IRP decision is not intended to be and shall not be enforceable.⁴⁸³

458. Section 4.3(x) states that the Panel’s decision is “binding” and “final,” but also states that the ICANN Board “shall affirm or reject compliance with the decision on the public record based on an expressed rationale,” and if the decision is rejected, the Claimant “may seek enforcement in a court of competent jurisdiction.” The Panel discusses these seemingly inconsistent statements in its analysis below.

C. Namecheap’s Position

459. Namecheap contends that this Panel not only has authority to declare that ICANN has violated the Articles and Bylaws, but also “has broad inherent discretion to fashion relief,” by “order[ing] affirmative declaratory relief” that “requir[es] ICANN to put an end to this violation by adopting the Panel’s decision.”⁴⁸⁴

460. The specific relief that Namecheap requests is a declaration that the Price Cap decision “must be annulled as inconsistent with and violative of” the Articles and Bylaws, as well as with international law.⁴⁸⁵

461. Namecheap asserts that “[t]he Panel is fully empowered under the Bylaws to resolve disputes by ordering remedies that ensure ICANN complies with its Articles of Incorporation and Bylaws.”⁴⁸⁶ Namecheap cites the “Purposes of the IRP” in the Bylaws, which include “**Ensure** that ICANN ... **complies** with its Articles of Incorporation and Bylaws”; “**Ensure** that ICANN ... is **accountable** to the global Internet community and Claimants”; “**Lead to binding, final resolutions** consistent with international arbitration norms that are enforceable in any court with proper jurisdiction”; and “Provide a mechanism for the **resolution** of Disputes, as an

⁴⁸³ Bylaws § 4.3(x). It should be noted that the “Standing Panel” has not been constituted, so references to the Standing Panel are effectively inoperative.

⁴⁸⁴ Namecheap Pre-Hearing Brief ¶ 266.

⁴⁸⁵ Namecheap Pre-Hearing Brief ¶ 425.

⁴⁸⁶ Namecheap Pre-Hearing Brief ¶ 261.

alternative to legal action in the civil courts of the United States or other jurisdictions.”⁴⁸⁷

462. Namecheap also emphasizes that Bylaws Section 4.3(x) states that IRP Panel decisions are “binding final decisions” and that “ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.”⁴⁸⁸

463. Namecheap notes that the Bylaws were amended in October 2016 to strengthen the IRP accountability mechanism. Those amendments included adding the “Purposes of the IRP” quoted above, as well as the explicit statement that IRP decisions are final and binding.⁴⁸⁹

464. Namecheap argues that the October 2016 Amendments were adopted in response to ICANN’s “absurd reasoning,” which it had invoked in prior IRPs, that an IRP Panel “has the authority to declare that ICANN has violated its Articles of Incorporation and Bylaws, but that ICANN retains the discretion to maintain the violation.”⁴⁹⁰ Namecheap cites a 2015 IRP decision which held that the Panel could “recommend” that ICANN take action, but lacked authority “to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision.”⁴⁹¹

C. ICANN’s Position

465. ICANN contends that the Bylaws authorize this Panel to only (1) “declare” that ICANN action violates the Articles and Bylaws; and (2) “recommend” that ICANN take specific actions. ICANN asserts that the Panel has no authority to order ICANN to take specific actions.⁴⁹²

⁴⁸⁷ Namecheap Pre-Hearing Brief ¶ 262, quoting Bylaws § 4.3(a) (emphasis added by Namecheap).

⁴⁸⁸ Namecheap Pre-Hearing Brief ¶ 263, quoting Bylaws § 4.3(x).

⁴⁸⁹ Namecheap Post-Hearing Brief ¶ 34.

⁴⁹⁰ Namecheap Rebuttal Brief ¶ 103.

⁴⁹¹ Namecheap Rebuttal Brief ¶ 103 footnote 101, citing 9 October 2015 Final Declaration in *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505 (RM 4) ¶ 149.

⁴⁹² ICANN Pre-Hearing Brief ¶ 176.

466. ICANN argues that Namecheap's request for a declaration that the Price Cap Decision "must be annulled" is a "disguised" order that ICANN reinstate price caps, which this Panel has no authority to grant.⁴⁹³

467. ICANN contends that the express terms of the Bylaws preclude Namecheap's request for an order requiring ICANN to reinstate price caps.⁴⁹⁴

468. ICANN asserts that Namecheap has presented no evidence that a declaration that ICANN has violated the Bylaws is not sufficient to achieve the general purposes of an IRP, as stated in the Bylaws.⁴⁹⁵ ICANN cites prior IRPs where the ICANN Board considered and then took action to implement the Panel's decision.⁴⁹⁶

469. ICANN further asserts that October 2016 Bylaws amendments actually support ICANN, because they did not expand the scope of relief a Panel may grant.⁴⁹⁷

470. Finally, ICANN states that the Panel in the *Afilias* IRP rejected a similar attempt to obtain an order requiring ICANN to take specific remedial action.⁴⁹⁸

C. The IRP Panel's Analysis and Decision

471. The Panel agrees with Namecheap that the power to declare that a respondent has violated the law typically goes hand-in-hand with the power to order specific action to remedy that violation.

472. IRPs, however, are special, *sui generis* proceedings created and governed by the Bylaws and IRP Procedures. Section 4.3 draws a clear distinction between the Panel's power to "declare" and its power to "recommend." An IRP Panel may "declare"

⁴⁹³ ICANN Pre-Hearing Brief ¶ 177.

⁴⁹⁴ ICANN Sur-Rebuttal ¶¶ 80-81.

⁴⁹⁵ ICANN Sur-Rebuttal ¶ 82.

⁴⁹⁶ ICANN Sur-Rebuttal ¶ 82; ICANN Post-Hearing Brief ¶¶ 83-84, discussing ICANN's implementation of the 10 July 2017 Final Declaration in *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-0000-7056 (RM 177); and the 9 July 2015 Final Declaration in *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001-83 (RM 165).

⁴⁹⁷ ICANN Post-Hearing Brief ¶ 46.

⁴⁹⁸ ICANN Sur-Rebuttal ¶ 85, citing *Afilias v. ICANN IRP*, Corrected Final Decision ¶¶ 361-364, Ex. R-43.

that ICANN action violates the Articles and Bylaws, but can only “recommend” that ICANN take specific action.⁴⁹⁹

473. The Bylaws have distinguished between the power to “declare” and the power to “recommend” ever since provision was made for IRPs the Bylaws in December 2002.⁵⁰⁰

474. As Namecheap has noted, the Bylaws were amended in October 2016 to strengthen the IRP process; however, those amendments did not change the longstanding distinction between the power to “declare” and the power to “recommend.” In particular, they did not authorize IRP Panels to “order” (as opposed to merely recommend) that ICANN take specific action.⁵⁰¹

475. The October 2016 Amendments added the “Purposes of the IRP,” which include ensuring that ICANN complies with the Articles and Bylaws.⁵⁰² But those amendments did not expand panel authority to “recommend” remedial action to include the power to “order” such action.

476. The October 2016 Amendments added the statement that ICANN “intends, agrees, and consents to be bound by all IRP Panel decisions...”⁵⁰³ Yet those amendments also added the statement that the ICANN Board “shall affirm or reject compliance with the decision on the public record based on an expressed rationale.”⁵⁰⁴

477. Reconciling these two statements is difficult. How can ICANN “consent to be bound by all IRP Panel decisions,” but retain the power to “reject compliance with the decision”?

⁴⁹⁹ Bylaws § 4.3(o)(iii), (iv).

⁵⁰⁰ 15 December 2002 Bylaws § 3(8) (Independent Review Panel shall have the authority to “b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”)

⁵⁰¹ See October 2016 Bylaws § 4.3(o)(iii), (iv).

⁵⁰² See October 2016 Bylaws § 4.3(a)(i).

⁵⁰³ See October 2016 Bylaws § 4.3(x)(iii).

⁵⁰⁴ See October 2016 Bylaws § 4.3(x)(iv).

478. The Panel's role is to interpret the Bylaws as written, not to rewrite the text. Faced with two contradictory statements, the Panel applies the principle that when interpreting an unclear document, a more specific clause overrides a more general clause. The statement that the Board shall "affirm or reject compliance with the decision" is more specific than ICANN's general acceptance of the binding nature of an IRP decision. Thus, the more specific statement controls.

479. Of course the option to reject compliance does not mean the ICANN Board should choose that option, especially since the Bylaws authorize the Claimant "to enforce compliance in a court of competent jurisdiction."

480. Finally, the Panel notes that prior IRP panels that have declared that ICANN violated the Articles or Bylaws have only recommended remedial action and have declined to order ICANN to take specific actions.

481. For example, the panel in the *Afilias* IRP – which was decided under a post-October 2016 version of the Bylaws – declared that ICANN violated its Articles and Bylaws, but was "firmly of the view that it is for the Respondent [ICANN] to pronounce in the first instance" on the propriety of a contract under which Verisign agreed to fund a bid by NDC for the new gTLD, ".WEB."⁵⁰⁵ The *Afilias* panel accepted ICANN's argument that "it would be improper for the Panel to dictate what would be the consequence of NDC's violation of the New gTLD Program Rules, assuming a violation is found."⁵⁰⁶

482. In sum, substantial logic supports Namecheap's argument that the power to declare a violation should be accompanied by the power to order remedial action; however, that is not what the Bylaws say. Accordingly, the Panel will only declare whether ICANN violated the Articles or Bylaws, and will limit itself to recommending (not ordering) remedial action to the extent a violation is found.

XVIII. ISSUE 11: WHAT RELIEF SHOULD BE AWARDED HERE?

⁵⁰⁵ *Afilias* Final Decision (RM 190) ¶¶ 361-62.

⁵⁰⁶ *Afilias* Final Decision (RM 190) ¶ 363.

C. The Issue and Legal Framework

483. As explained in Issue 10 above, the Panel's authority is limited to "declaring" that the challenged ICANN action or inaction violates the Articles or Bylaws, and "recommending" that ICANN take specific action. Thus, there are two issues (1) what declarations should the Panel make about any violations of the Articles and Bylaws; and (2) what recommendations should the Panel make about remedial action in view of any violations.

C. Namecheap's Position

484. As also discussed above, Namecheap seeks a declaration that ICANN has violated its Articles and Bylaws in multiple respects, as well as a declaration that the Price Cap Decision "must be annulled as inconsistent with and violative of" the Articles and Bylaws. The Panel agrees with ICANN that a declaration that the Price Cap Decision "must be annulled" is effectively an order that ICANN take specific action to nullify that decision. The Panel lacks authority to make such an order. At most, the Panel can only "recommend" that ICANN take specific action to nullify the Price Cap Decision.

C. ICANN's Position

485. ICANN concedes that the Panel has the power to declare that ICANN action violates the Articles and Bylaws, as well as the power to recommend that ICANN take specific action. ICANN does not take a specific position as to the recommendations the Panel should make, in the event the Panel finds a violation of the Articles and Bylaws.

C. The IRP Panel's Analysis and Decision

1. Declarations Regarding Non-Compliance with Articles and Bylaws

486. It is undisputed that Section 4.3(o) of the Bylaws authorizes the Panel to declare that the challenged ICANN action or inaction violated the Articles of Incorporation or Bylaws. In view of the violations found above, the Panel issues the following declarations:

- (a) The Panel declares that ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Article III of the Articles of Incorporation and Sections 1.2(a), 1.2(b), and 3.1 of the Bylaws because ICANN did not act in an open and transparent manner;
- (b) The Panel declares that ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Sections 2.1, 3.4, 3.5, and 3.6(a) of the Bylaws because it involved a policy decision to be made by the ICANN Board, and the ICANN Board did not approve this decision or comply with the procedural requirements for formal Board action;
- (c) The Panel declares that ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Articles II and III of the Articles of Incorporation and Section 1.2(b)(ii) of the Bylaws because ICANN did not comply with the procedural requirements for ensuring that ICANN promotes the global public interest and acts for the benefit of the Internet community as a whole.

487. The Panel rejects Namecheap's request to declare that ICANN violated the Articles and Bylaws on other grounds, for the reasons set forth in this Declaration.

2. Recommendations Regarding Violations of the Articles and Bylaws

488. As an initial matter, the Panel finds that making recommendations about what steps ICANN should take in view of the above violations is appropriate for several reasons.

489. First, the violations that the Panel has found are procedural rather than substantive in nature. Thus, ICANN may be able to remedy those violations by following the proper procedures, although the Panel recognizes that remedying the violations related to ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price controls is complicated by the fact that ICANN and the registry operators have already signed those agreements, which have ten year terms. Thus, any revisions to the 2019 Registry Agreements may require further negotiations between ICANN and the applicable registry operators.

490. Furthermore, providing recommendations is consistent with the purposes of an IRP, which include (a) ensuring that ICANN “complies with its Articles of Incorporation and Bylaws”; (b) reducing Disputes by creating precedents to guide ICANN and the global Internet community; and (c) securing “the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.”⁵⁰⁷

491. Providing recommendations will help to ensure that ICANN complies with its Articles and Bylaws going forward and provide guidance on future actions that may assist in reducing future Disputes. It will also promote the transparent, efficient, and coherent resolution of the Disputes raised by this IRP.

492. While providing recommendations is consistent with the purpose of the independent review process, the Panel notes that it has no expertise or experience regarding the internal operations of ICANN, or with the diverse stakeholders in the global Internet community, aside from information presented in this proceeding. Thus, the Panel’s recommendations are directed at identifying issues and measures that ICANN should consider and analyze further, in consultation with the Internet community.

493. The Panel’s overall recommendation is that the ICANN Board analyze and discuss what steps to take to remedy both the specific violations found by the Panel, and to improve its overall decisionmaking process to ensure that similar violations do not occur in the future.

494. With regard to the 2019 Registry Agreements for .ORG and .INFO, the fundamental issue is that ICANN does not appear to have given sufficient consideration to the strong public opposition to removal of price controls, especially as to .ORG. While ICANN may have discussed and considered this issue internally, ICANN’s public explanation of its decision did not specifically explain why it concluded that price caps were no longer needed, or take into account any market power that .ORG may have in its particular niche of the domain market.

495. ICANN’s lack of a detailed public explanation was exacerbated by its assertion of the attorney-client privilege as to almost all of its internal documents. The result is that there is virtually no documentary record of ICANN’s internal deliberations or why ICANN decided that price controls were no longer needed. As discussed above,

⁵⁰⁷ Bylaws § 4.3(b)(ii).

the Panel has decided not to address the precise extent of any obligation to maintain a non-privileged record, but has serious concerns on this subject.

496. In addition, while the Board discussed the Price Cap Decision at an informal workshop, there is no record of those discussions, and the Board did not make any formal decisions until after the 2019 Registry Agreement had already been signed and Namecheap submitted Reconsideration Request 19-2.

497. To remedy these violations and address these concerns, the Panel recommends that the ICANN Board consider taking the following actions.

498. First, decisions as to how to implement the Panel's rulings in this IRP should be made by the ICANN Board. The ICANN staff may of course assist with the decisionmaking process, but the Board should make the ultimate decisions. This is consistent with Section 4.3(x)(ii), which states that the Board shall consider its response to IRP Panel decisions at the Board's next meeting, if feasible, and shall accept or reject compliance with the decision on the public record based on an expressed rationale.

499. Second, given that the violations and concerns are procedural in nature, the ICANN Board should consider creating and implementing a process to conduct further analysis of whether including price caps in the Registry Agreements for .ORG and .INFO is in the global public interest. That process should encourage participation of diverse stakeholders and directly and fully consider and respond to the primary concerns raised. The process should be conducted in an open and transparent manner that avoids the violations found by the Panel.

500. Third, as discussed above, the Panel finds that the evidence that price controls should be retained is much stronger for .ORG than for .INFO, given that .ORG is an original gTLD with a much larger number of DUMs, and serves a special market focused on not-for-profit organizations. Thus, while the ICANN Board should consider what remedial measures to take as to both .ORG and .INFO, the measures for .ORG may be stronger and more extensive than for .INFO.

501. Fourth, the Panel recommends that the Board consider whether to retain an expert consultant to conduct a study on issues raised by the Price Cap Decision, such as whether .ORG and .INFO have sufficient market power that price caps may be desirable. ICANN has already done considerable work on this subject, although that work does not include a formal study of the extent of market power of .ORG and

.INFO. In particular, ICANN submitted reports and testimony from an expert economist and also obtained a draft opinion from the same expert before making the Price Cap Decision, although that opinion was provided to only two ICANN employees. The Panel's view is that those reports are not complete as they do not analyze a number of points that Namecheap made about .ORG's special market power. Nevertheless, the expert reports provide a foundation for additional analysis. If the Board decides not to conduct further expert analysis, it should explain the reasons for that decision.

502. Fifth, if the Board concludes that some form of price controls for .ORG and/or .INFO are in the global public interest, the Panel recommends that ICANN seek to amend the 2019 Registry Agreements to include appropriate price controls. The registry operator of .ORG has publicly represented that it will not raise prices unreasonably, so it presumably would be willing to agree to some form of price controls. The registry operator for .INFO may also be willing to agree to price controls, given that prices do not appear to have increased by more than what would have been allowed under the prior price control provisions.

503. Sixth, the ICANN Board may wish to consider approaching the registry operators for .ORG and .INFO about agreeing to some form of price controls, even before evaluating whether price caps are needed and taking the other measures noted above. If the registry operators are willing to agree to amend their registry agreement, that may moot the need to implement the other measures above.

504. Seventh, the Panel recommends that the Board consider revisions to ICANN's decisionmaking process to reduce the risk of similar procedural violations in the future. For example, the Board could adopt guidelines for determining what decisions involve policy matters for the Board to decide, or what are the issues on which public comments should be obtained.

XIX. CONCLUSION

505. For the foregoing reasons, the Independent Review Process Panel hereby declares, in accordance with Section 4.3(o)(iii) of the Bylaws, that:

- a. ICANN's action with respect to the Price Cap Decision was inconsistent with Sections 1.2(a), 1.2(b), 2.1, 3.1, 3.4, 3.5, and 3.6(a) of the Bylaws and Article III of the Articles of Incorporation.

- b. Pursuant to Section 4.3(o)(iii) of the Bylaws, the IRP Panel makes the recommendations set forth in Section XIII.D.2 of this Declaration.
- c. Each party shall bear its own legal and expert witness fees and expenses, except that the administrative costs of the ICDR, totaling \$13,825.00 and the IRP Panel members' along with the Emergency Panelist's fees and expenses, totaling \$ 841,894.76 shall be borne entirely by ICANN. Therefore, ICANN shall reimburse Namecheap the sum of \$58,750.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Namecheap.

506. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute the Declaration of this IRP Panel.

As at Los Angeles, California, USA
December 23, 2022



Glenn P. Hendrix
Chair



Grant L. Kim



Christof Siefarth

APPENDIX A

Table of Abbreviations

| Abbreviation | Meaning |
|--------------------------------------|---|
| 1999 Registry Agreement | November 1999 Registry Agreement between ICANN and NSI for .COM, .NET, and .ORG, which was the original ICANN Registry Agreement (RM 41) |
| 2002 Selection Criteria | Criteria for selecting new registry operator for .ORG, posted 20 May 2002 as “Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals” (RM 11) |
| 2013 Registry Agreements | The registry agreements for .ORG, .INFO, and .BIZ that ICANN entered into on 22 August 2013 (RM 18, 27, 28) |
| 2019 Registry Agreements | The registry agreements for .ORG, .INFO, and .BIZ that ICANN entered into on 30 June 2019 (RM 29, 30, 31) |
| <i>Afilias</i> Final Decision | 20 May 2021 Final Decision in <i>Afilias Domains No. 3 Limited v. ICANN</i> , ICDR Case No. 01-18-0004-2702 (RM 190) |
| Annex ## | Factual exhibits submitted by Namecheap in this IRP, which are numbered sequentially |
| April 22 List | The issues that the Panel identified on 22 April 2022, so the Parties could address them in their post-hearing briefs |
| Articles | ICANN’s Articles of Incorporation; unless otherwise noted, this is the version approved by the ICANN Board on 9 August 2016 and filed with the California Secretary of State on 3 October 2016 (RM 001) |
| Base Registry Agreement (or Base RA) | Standard registry agreements for New gTLDs (see RE-7) |
| .BIZ Claim | Namecheap’s claim that ICANN’s Price Cap Decision regarding the .BIZ gTLD violated ICANN’s AOI and Bylaws |

| Abbreviation | Meaning |
|--|---|
| Bylaws | ICANN’s Bylaws; unless noted otherwise, this is the version of 28 November 2019, which was in effect when this IRP was filed and on which both Parties have relied (RM 002) |
| Burr WS | Witness Statement of J. Beckwith Burr (14 January 2022) |
| Carlton 2009 Preliminary Report | Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, 4 March 2009 (RM 183) |
| Carlton Presentation | Presentation slides that Dr. Carlton referred to during his testimony on March 31, 2022 |
| Carlton Report | Expert Report of Dennis Carlton (14 January 2022) |
| Carlton Reply Report | Reply Expert Report of Dennis Carlton (14 March 2022) |
| ccTLD | country code Top Level Domain (such as .US or .EU) |
| CIACA | California International Arbitration and Conciliation Act |
| Decision on Request for Emergency Relief | Decision on Request for Emergency Relief, issued in this IRP on 20 March 2020 by Emergency Panelist Gary L. Benton |
| Delegation of Authority Guidelines | Guidelines adopted by the ICANN Board on 8 November 2016, which describe the general roles of the ICANN Board and CEO, and the delegation of authority from the Board to the CEO and key ICANN staff (R-37) |
| DNS | Domain Name System |
| DOC | U.S. Department of Commerce |
| EER-### | Exhibit cited in the Economic Expert Reports with the indicated number (such as EER-122) |

| Abbreviation | Meaning |
|-------------------------------------|---|
| EER-I (Economic Expert Report I) | Expert Report of 20 December 2020 by Professor Dr. Frank Verboven and Dr. Gregor Langus |
| EER-II (Economic Expert Report II) | Expert Report of 25 November 2021 by Professor Dr. Frank Verboven and Dr. Gregor Langus |
| EER-III (Economic Expert Report II) | Expert Report of 8 January 2022 by Professor Dr. Frank Verboven and Dr. Gregor Langus |
| Emergency Panelist | Gary L. Benton, appointed in this IRP to decide Namecheap's Emergency Request |
| Emergency Relief Request | Namecheap's 25 February 2020 Request for Emergency Arbitrator and Interim Measures of Protection |
| Feb06 PDP | The policy development process concerning conditions for registry agreements for gTLDs, which the GNSO kicked off on 6 February 2006 (<i>see</i> RER 80, 81; Namecheap Pre-Hearing Brief, ¶¶ 74-80; Neumann Expert Report, ¶¶ 81-91) |
| Feb06 Policy | GNSO policy recommendations regarding contractual conditions for gTLDs, accepted by the ICANN Board on 23 January 2008 (RER 89, RM 103) |
| Feb06 Policy Claim | Namecheap's claim that ICANN failed to apply fairly its policies and processes regarding the Feb06 Policy |
| GCC Partial Final Declaration | 19 October 2016 Partial Final Declaration in <i>Gulf Cooperation Council v. ICANN</i> , ICDR Case No. 01-14-002-1065 (RM 176) |
| GNSO | Generic Names Supporting Organization |
| GoDaddy | GoDaddy, Inc. (largest registry; acquired Neustar's registry operations in 2020) |
| gTLD | Generic Top Level Domain (such as .COM, .ORG, .INFO, or .BIZ) |
| Hearing Tr. | Transcript of Merits Hearing, cited by the volume, page, and line number. For example, Hearing Tr. V, 67:14-19 refers to Volume V of the Hearing Transcript, page 67, lines 14-19. |

| Abbreviation | Meaning |
|-------------------------------|---|
| ICANN | Respondent Internet Corporation for Assigned Names and Numbers |
| ICANN org | ICANN organization or staff (in contrast to the ICANN Board) |
| ICANN Post-Hearing Brief | ICANN's 27 May 2022 Post-Hearing Brief |
| ICANN Pre-Hearing Brief | ICANN's 14 January 2022 Pre-Hearing Brief on the Merits |
| ICANN Response to IRP Request | ICANN's 10 April 2020 Response to Namecheap's Request for Independent Review Process |
| ICANN Sur-Rebuttal | ICANN's 14 March 2022 Sur-Rebuttal Brief on the Merits |
| ICDR | International Centre for Dispute Resolution |
| ICDR Rules | International Arbitration Rules of the International Centre for Dispute Resolution (1 June 2014) |
| IRP | Independent Review Process |
| IRP Procedures | Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (25 October 2018, RE-1) |
| Langus Presentation | The presentation slides that Dr. Langus explained during his testimony on March 31, 2022 |
| Legacy gTLDs | The original gTLDs (such as .COM and .ORG), plus gTLDs introduced in the first and second round expansions (such as .BIZ and .INFO) |
| Merits Hearing | The evidentiary hearing held by videoconference from 28 March to 1 April 2022 |
| Namecheap | Claimant Namecheap, Inc. |

| Abbreviation | Meaning |
|--|---|
| Namecheap IRP Request | Namecheap's 25 February 2020 Request for Independent Review Process |
| Namecheap Post-Hearing Brief | Namecheap's 27 May 2022 Post-Hearing Brief |
| Namecheap Pre-Hearing Brief | Namecheap's 30 November 2021 Pre-Hearing Brief on the Merits |
| Namecheap Rebuttal | Namecheap's 8 February 2022 Rebuttal Brief |
| Namecheap's Rebuttal to Proposed Determination | Namecheap's 18 November 2019 Rebuttal to Proposed Determination re Reconsideration Request 19-2 (Annex 10) |
| Neuman Expert Report (or RER) | 19 November 2021 Regulatory Expert Report of Jeffrey J. Neuman |
| Neustar | Neustar, Inc. (registry operator of .BIZ in 2019; sold its registry operations to Go-Daddy in 2020) |
| New gTLDs | New gTLDs created as a result of the New gTLD Program |
| New gTLD Program | The program for the large, third round expansion of gTLDs, which reflected the GNSO Policy adopted by ICANN in 2008, and first took applications in 2012 (ICANN Pre-Hearing Brief, ¶¶ 26-28; Namecheap Pre-Hearing Brief, ¶¶ 89-91) |
| New gTLD Guidebook | gTLD Applicant Guidebook for New gTLD Program (RE-6) |
| NSI | Network Solutions, Inc., the original registrar for .COM, .NET, and .ORG |
| NTIA | National Telecommunications and Information Administration (agency of U.S. Department of Commerce that created plan to manage the Internet) |

| Abbreviation | Meaning |
|---------------------------------|---|
| October 2016 Amendments | Significant amendments to the Bylaws effective 1 October 2016. RER 10 is the October 2016 version of the Bylaws; the changes can be seen by comparing to the prior version of 11 February 2016 (RM 74). |
| Panel | The Panel appointed to decide this IRP |
| Parties | Claimant Namecheap and Respondent ICANN |
| PIR | Public Interest Registry (currently registry operator of .ORG) |
| Price Cap Decision | ICANN's 30 June 2019 decisions to renew the 2019 Registry Agreements for .ORG, .INFO, and .BIZ, without including price caps. This term refers to the renewal for all three gTLDs, unless specifically limited to some gTLDs only |
| Proposed Determination | Proposed Determination of the ICANN Board of Directors regarding Reconsideration Request 19-2 (R-53) |
| R-## | Exhibit of Respondent ICANN, numbered sequentially |
| RE-## | Exhibit in support of Respondent ICANN's Opposition to Namecheap's Emergency Request, numbered sequentially |
| Reconsideration Request 19-2 | Reconsideration Request that Namecheap filed with ICANN on 12 July 2019 (Annex 8) |
| Registrar | Entity that sells the right to use specific domain names to end-users (such as Namecheap and Go-Daddy) |
| Registry Operator (or Registry) | Entity responsible for the technical operation of specific gTLDs (such as Verisign, PIR, Afilias, and Neustar) |
| RER (or Neumann Report) | 19 November 2021 Regulatory Expert Report of Jeffrey J. Neuman |
| RER ## | Document cited in the Regulatory Expert Report of Jeffrey J. Neuman, numbered sequentially |
| RFP | Request for Proposals (used for ICANN's 2002 RFP for a new registry operator for .ORG to replace NSI) |

| Abbreviation | Meaning |
|-----------------------------|---|
| RLA-## | Respondent's Legal Authority, numbered sequentially |
| RM ## | Reference Material (term used by Namecheap to cite legal authorities and other documents submitted in this IRP, which are sequentially numbered) |
| Supplemental List of Issues | The list of issues that the Panel provided to the Parties on 20 June 2022, so the Parties could address them in the oral closing arguments on 29 June 2022. |
| TLD | Top Level Domain that appears at the end of an Internet address, including both gTLDs (such as .COM or .ORG) and ccTLDs (such as .US or .EU) |
| Vertical Integration Claim | Namecheap's claim that ICANN failed to apply fairly its policies and processes regarding vertical integration of registry operators and registries |
| Weinstein Statement | 13 January 2022 Witness Statement of Russell Weinstein |

APPENDIX B**List of the Parties' Primary Written Submissions**

- Namecheap's Request for Independent Review Process, 25 February 2020
- Namecheap's Request for Emergency Arbitrator and Interim Relief, 25 February 2020
- ICANN's Response to Namecheap's Request for Emergency Arbitrator and Interim Relief, 11 March 2020
- ICANN's Response to Namecheap's Request for Independent Review Process, 10 April 2020
- Namecheap's Request for the Production of Documents, 18 August 2020;
- ICANN's Request for the Production of Documents, 28 August 2020;
- ICANN's Responses to Namecheap's Request for the Production of Documents, 8 September 2020;
- Namecheap's Response to ICANN'S Request for the Production of Documents, 18 September 2020;
- Namecheap's Motion to Compel, 4 November 2020;
- ICANN's Motion to Compel Production of Documents from Claimant, 4 November 2020;
- Namecheap's Response Motion to Compel, 24 November 2020;
- ICANN's Opposition to Namecheap's Motion to Compel, 24 November 2020;
- Namecheap's Prima Facie Showing of Standing, 21 December 2020;
- ICANN's Motion to Dismiss, 13 January 2021;
- Namecheap's Response to ICANN's Motion to Dismiss, 26 January 2021;
- Namecheap's Objection to ICANN's ESI Protocol, 29 January 2021;

- ICANN's Response to Namecheap's Objection to ICANN's ESI Protocol, 5 February 2021;
- Namecheap's Reply supporting Namecheap's Objection to ICANN's ESI Protocol, 12 February 2021;
- ICANN's Sur-Reply in response to Namecheap's Reply, 18 February 2021;
- Namecheap's Motion for Reconsideration regarding Procedural Order No. 6, 19 February 2021;
- Namecheap's Motion to Compel and Motion for Sanctions, 29 September 2021;
- ICANN's Response to Namecheap's Motion to Compel and Motion for Sanctions, 14 October 2021.
- Namecheap Pre-Hearing brief on the Merits, 30 November 2021;
- Respondent filed a Pre-Hearing brief on the Merits, 14 January 2021;
- Namecheap' Brief on the Need to Subpoena Designated Witnesses and Motion for an In-Person Hearing, 26 January 2022;
- ICANN's Brief in Opposition to the Subpoenaing of Additional Witnesses and Claimant's Motion for an in-person hearing, 7 February 2022;
- Namecheap's Limited Rebuttal to ICANN's Pre-Hearing brief on the merits, 8 February 2022;
- ICANN's Sur-Reply Rebuttal Brief on the Merits, 14 March 2022;
- Namecheap's Post-Hearing Brief, 27 May 2022;
- ICANN's Post-Hearing Brief, 27 May 2022;
- Namecheap's Closing Statement in the form of a presentation on 29 June 2022 as a response to ICANN's Post-Hearing brief and to the Panel's Supplemental List of Issues;

- ICANN's Closing presentation on 29 June 2022 as a response to Namecheap's Post-Hearing brief and to the Panel's Supplemental List of Issues.

Exhibit B

[العربية \(/ar/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en\)](#)

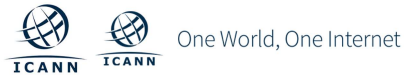
[中文 \(/zh/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en\)](#)

English

[Français \(/fr/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en\)](#)

[Русский \(/ru/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en\)](#)

[Español \(/es/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en\)](#)



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Bylaws FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation - ICANN

Date

17 November 2023

As amended 17 November 2023

[ARTICLE 1 MISSION, COMMITMENTS AND CORE VALUES \(/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article1\)](/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article1)

[ARTICLE 2 POWERS \(/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article2\)](/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article2)

[ARTICLE 3 TRANSPARENCY \(/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article3\)](/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article3)

[ARTICLE 4 ACCOUNTABILITY AND REVIEW \(/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article4\)](/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article4)

[ARTICLE 5 OMBUDSMAN \(/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article5\)](/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article5)

[ARTICLE 6 EMPOWERED COMMUNITY \(/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article6\)](/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article6)

[ARTICLE 7 BOARD OF DIRECTORS \(/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article7\)](/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article7)

[ARTICLE 8 NOMINATING COMMITTEE \(/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article8\)](/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article8)

[ARTICLE 9 ADDRESS SUPPORTING ORGANIZATION \(/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article9\)](/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article9)

[ARTICLE 10 COUNTRY-CODE NAMES SUPPORTING ORGANIZATION \(/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article10\)](/en/governance/documents/bylaws-for-internet-corporation-for-assigned-names-and-numbers-a-california-nonprofit-public-benefit-corporation-icann-17-11-2023-en#article10)

disclose trade secrets, or (v) would present a material risk of negative impact to the security, stability or resiliency of the Internet. In the case of any redaction, ICANN will provide the Requestor a written rationale for such redaction. If a Requestor believes that a redaction was improper, the Requestor may use an appropriate accountability mechanism to challenge the scope of ICANN's redaction.

(s) If the Requestor believes that the Board action or inaction for which a Reconsideration Request is submitted is so urgent that the timing requirements of the process set forth in this Section 4.2 are too long, the Requestor may apply to the Board Accountability Mechanisms Committee for urgent consideration. Any request for urgent consideration must be made within two business days (as calculated by local time at the location of ICANN's principal office) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.

(t) The Board Accountability Mechanisms Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Accountability Mechanisms Committee agrees to consider the matter with urgency, it will cause notice to be provided to the Requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Accountability Mechanisms Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Reconsideration Request, or as soon thereafter as feasible. If the Board Accountability Mechanisms Committee does not agree to consider the matter with urgency, the Requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.

(u) The Board Accountability Mechanisms Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:

- (i) the number and general nature of Reconsideration Requests received, including an identification if the Reconsideration Requests were acted upon, summarily dismissed, or remain pending;
- (ii) for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any Reconsideration Request pending for more than ninety (90) days;
- (iii) an explanation of any other mechanisms available to ensure that ICANN is accountable to persons materially affected by its decisions; and
- (iv) whether or not, in the Board Accountability Mechanisms Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

(a) In addition to the reconsideration process described in Section 4.2, ICANN shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant (as defined in Section 4.3(b)(i)) to be within the scope of the Independent Review Process ("**IRP**"). The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):

- (i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.
- (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).
- (iii) Ensure that ICANN is accountable to the global Internet community and Claimants.
- (iv) Address claims that ICANN has failed to enforce its rights under the IANA Naming Function Contract (as defined in Section 16.3(a)).
- (v) Provide a mechanism by which direct customers of the IANA naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.
- (vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.
- (vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.
- (viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.
- (ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.

(b) The scope of the IRP is defined with reference to the following terms:

(i) A "**Claimant**" is any legal or natural person, group, or entity including, but not limited to the EC, a Supporting Organization, or an Advisory Committee that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

(A)The EC is deemed to be materially affected by all Covered Actions. ICANN shall not assert any defenses of standing or capacity against the EC in any forum.

(B)ICANN shall not object to the standing of the EC, a Supporting Organization, or an Advisory Committee to participate in an IRP, to compel an IRP, or to enforce an IRP decision on the basis that it is not a legal person with capacity to sue. No special pleading of a Claimant's capacity or of the legal existence of a person that is a Claimant shall be required in the IRP proceedings. No Claimant shall be allowed to proceed if the IRP Panel (as defined in Section 4.3(g)) concludes based on evidence submitted to it that the Claimant does not fairly or adequately represent the interests of those on whose behalf the Claimant purports to act.

(ii) "**Covered Actions**" are defined as any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.

(iii) "**Disputes**" are defined as:

(A)Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

(1) exceeded the scope of the Mission;

(2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or

(5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws.

(B)Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN's contractual rights with respect to the IANA Naming Function Contract, and

(C)Claims regarding PTI service complaints by direct customers of the IANA naming functions that are not resolved through mediation.

(c) Notwithstanding any other provision in this Section 4.3, the IRP's scope shall exclude all of the following:

- (i) EC challenges to the result(s) of a PDP, unless the Supporting Organization(s) that approved the PDP supports the EC bringing such a challenge;
- (ii) Claims relating to ccTLD delegations and re-delegations;
- (iii) Claims relating to Internet numbering resources, and
- (iv) Claims relating to protocol parameters.

(d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "**Claim**") with the IRP Provider (described in Section 4.3(m) below). For the EC to commence an IRP ("**Community IRP**"), the EC shall first comply with the procedures set forth in Section 4.2 of Annex D.

(e) Cooperative Engagement Process

- (i) Except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, prior to the filing of a Claim, the parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process ("**CEP**") for the purpose of attempting to resolve and/or narrow the Dispute. CEPs shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time.
- (ii) The CEP is voluntary. However, except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, if the Claimant does not participate in good faith in the CEP and ICANN is the prevailing party in the IRP, the IRP Panel shall award to ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.
- (iii) Either party may terminate the CEP efforts if that party: (A) concludes in good faith that further efforts are unlikely to produce agreement; or (B) requests the inclusion of an independent dispute resolution facilitator ("**IRP Mediator**") after at least one CEP meeting.
- (iv) Unless all parties agree on the selection of a particular IRP Mediator, any IRP Mediator appointed shall be selected from the members of the Standing Panel (described in Section 4.3(j) below) by its Chair, but such IRP Mediator shall not thereafter be eligible to serve as a panelist presiding over an IRP on the matter.

(f) ICANN hereby waives any defenses that may be afforded under Section 5141 of the California Corporations Code ("**CCC**") against any Claimant, and shall not object to the standing of any such Claimant to participate in or to compel an IRP, or to enforce an IRP decision on the basis that such Claimant may not otherwise be able to assert that a Covered Action is *ultra vires*.

(g) Upon the filing of a Claim, an Independent Review Process Panel ("**IRP Panel**", described in Section 4.3(k) below) shall be selected in accordance with the Rules of Procedure (as defined in Section 4.3(n)(i)). Following the selection of an IRP Panel, that IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN's written response ("**Response**") in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law. If no Response is timely filed by ICANN, the IRP Panel may accept the Claim as unopposed and proceed to evaluate and decide the Claim pursuant to the procedures set forth in these Bylaws.

(h) After a Claim is referred to an IRP Panel, the parties are urged to participate in conciliation discussions for the purpose of attempting to narrow the issues that are to be addressed by the IRP Panel.

(i) Each IRP Panel shall conduct an objective, de novo examination of the Dispute.

(i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

(ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

(iii) For Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

(iv) With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN's obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.

(v) For avoidance of doubt, IRPs initiated through the mechanism contemplated at Section 4.3(a)(iv) above, shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.

(j) Standing Panel

(i) There shall be an omnibus standing panel of at least seven members (the "**Standing Panel**") each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS and ICANN's Mission, work, policies, practices, and procedures. Members of the Standing Panel shall receive at a minimum, training provided by ICANN on the workings and management of the Internet's unique identifiers and other appropriate training as recommended by the IRP Implementation Oversight Team (described in Section 4.3(n)(i)).

(ii) ICANN shall, in consultation with the Supporting Organizations and Advisory Committees, initiate a four-step process to establish the Standing Panel to ensure the availability of a number of IRP panelists that is sufficient to allow for the timely resolution of Disputes consistent with the Purposes of the IRP.

(A) ICANN, in consultation with the Supporting Organizations and Advisory Committees, shall initiate a tender process for an organization to provide administrative support for the IRP Provider (as defined in Section 4.3(m)), beginning by consulting the "**IRP Implementation Oversight Team**" (described in Section 4.3(n)(i)) on a draft tender document.

(B) ICANN shall issue a call for expressions of interest from potential panelists, and work with the Supporting Organizations and Advisory Committees and the Board to identify and solicit applications from well-qualified candidates, and to conduct an initial review and vetting of applications.

(C) The Supporting Organizations and Advisory Committees shall nominate a slate of proposed panel members from the well-qualified candidates identified per the process set forth in Section 4.3(j)(ii)(B).

(D) Final selection shall be subject to Board confirmation, which shall not be unreasonably withheld.

(iii) Appointments to the Standing Panel shall be made for a fixed term of five years with no removal except for specified cause in the nature of corruption, misuse of position, fraud or criminal activity. The recall process shall be developed by the IRP Implementation Oversight Team.

(iv) Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region (as defined in Section 7.5).

(k) IRP Panel

(i) A three-member IRP Panel shall be selected from the Standing Panel to hear a specific Dispute.

(ii) The Claimant and ICANN shall each select one panelist from the Standing Panel, and the two panelists selected by the parties will select the third panelist from the Standing Panel. In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and ICANN shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist. In the event that no Standing Panel is in place when an IRP Panel must be convened and the two party-selected panelists cannot agree on the third panelist, the IRP Provider's rules shall apply to selection of the third panelist.

(iii) Assignment from the Standing Panel to IRP Panels shall take into consideration the Standing Panel members' individual experience and expertise in issues related to highly technical, civil society, business, diplomatic, and regulatory skills as needed by each specific proceeding, and such requests from the parties for any particular expertise.

(iv) Upon request of an IRP Panel, the IRP Panel shall have access to independent skilled technical experts at the expense of ICANN, although all substantive interactions between the IRP Panel and such experts shall be conducted on the record, except when public disclosure could materially and unduly harm participants, such as by exposing trade secrets or violating rights of personal privacy.

(v) IRP Panel decisions shall be made by a simple majority of the IRP Panel.

(l) All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for Claimants if needed.

(m) IRP Provider

(i) All IRP proceedings shall be administered by a well-respected international dispute resolution provider ("**IRP Provider**"). The IRP Provider shall receive and distribute IRP Claims, Responses, and all other submissions arising from an IRP at the direction of the IRP Panel, and shall function independently from ICANN.

(n) Rules of Procedure

(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("**Rules of Procedure**") that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

(ii) The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN, and take effect upon approval by the Board, such approval not to be unreasonably withheld.

(iii) The Standing Panel may recommend amendments to such Rules of Procedure as it deems appropriate to fulfill the Purposes of the IRP, however no such amendment shall be effective without approval by the Board after publication and a period of public comment that complies with the designated practice for public comment periods within ICANN.

(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements:

(A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute;

(B) Issues relating to joinder, intervention, and consolidation of Claims;

(C) Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN's Response;

(D) Availability and limitations on discovery methods;

(E) Whether hearings shall be permitted, and if so what form and structure such hearings would take;

(F) Procedures if ICANN elects not to respond to an IRP; and

(G) The standards and rules governing appeals from IRP Panel decisions, including which IRP Panel decisions may be appealed.

(o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

- (i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;
- (ii) Request additional written submissions from the Claimant or from other parties;
- (iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;
- (iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;
- (v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;
- (vi) Determine the timing for each IRP proceeding; and
- (vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

(p) A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision until such time as the opinion of the IRP Panel is considered as described in Section 4.3(o)(iv), in order to maintain the *status quo*. A single member of the Standing Panel ("**Emergency Panelist**") shall be selected to adjudicate requests for interim relief. In the event that no Standing Panel is in place when an Emergency Panelist must be selected, the IRP Provider's rules shall apply to the selection of the Emergency Panelist. Interim relief may only be provided if the Emergency Panelist determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.

(q) Conflicts of Interest

(i) Standing Panel members must be independent of ICANN and its Supporting Organizations and Advisory Committees, and so must adhere to the following criteria:

(A) Upon consideration for the Standing Panel and on an ongoing basis, Panelists shall have an affirmative obligation to disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding.

(B) Additional independence requirements to be developed by the IRP Implementation Oversight Team, including term limits and restrictions on post-term appointment to other ICANN positions.

(ii) The IRP Provider shall disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding.

(r) ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

(s) An IRP Panel should complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure. The preceding sentence does not provide the basis for a Covered Action.

(t) Each IRP Panel shall make its decision based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its decision shall specifically designate the prevailing party as to each part of a Claim.

(u) All IRP Panel proceedings shall be conducted on the record, and documents filed in connection with IRP Panel proceedings shall be posted on the Website, except for settlement negotiation or other proceedings that could materially and unduly harm participants if conducted publicly. The Rules of Procedure, and all Claims, petitions, and decisions shall promptly be posted on the Website when they become available. Each IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets, but only if such confidentiality does not materially interfere with the transparency of the IRP proceeding.

(v) Subject to this Section 4.3, all IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.

(w) Subject to any limitations established through the Rules of Procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc within sixty (60) days of issuance of such decision.

(x) The IRP is intended as a final, binding arbitration process.

(i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.

(ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN without a *de novo* review of the decision of the IRP Panel or en banc Standing Panel, as applicable, with respect to factual findings or conclusions of law.

(iii) ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.

(A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.

(B) If an IRP Panel decision in a Community IRP is in favor of the EC, the Board shall comply within 30 days of such IRP Panel decision.

(C) If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC may seek enforcement in a court of competent jurisdiction. In the case of the EC, the EC Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.

(y) ICANN shall seek to establish means by which community, non-profit Claimants and other Claimants that would otherwise be excluded from utilizing the IRP process may meaningfully participate in and have access to the IRP process.

Section 4.4. PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS

(a) The Board shall cause a periodic review of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee (as defined in Section 8.1) by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization, council or committee has a continuing purpose in the ICANN structure, (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness and (iii) whether that organization, council or committee is accountable to its constituencies, stakeholder groups, organizations and other stakeholders.

Exhibit C

[العربية\(/ar/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en\)](#)

[中文\(/zh/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en\)](#)

English

[Français\(/fr/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en\)](#)

[Русский\(/ru/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en\)](#)

[Español\(/es/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en\)](#)



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Minutes | Regular Meeting of the ICANN Board | 21 January 2023

A Regular Meeting of the ICANN Board of Directors was held on 21 January 2023 in Los Angeles, California, at 16:00 local time.

Tripti Sinha, Chair, promptly called the meeting to order.

In addition to the Chair, the following Directors participated in all or part of the meeting: Alan Barrett, Becky Burr, Maarten Botterman, Chris Chapman, Edmon Chung, Sally Costerton (Sr. Advisor to President and SVP, Global Stakeholder Engagement & Interim President and CEO), Sarah Deutsch, Avri Doria, Danko Jevtović (Vice Chair), Christian Kaufmann, Patricio Poblete, Sajid Rahman, León Sánchez, Katrina Sataki, and Matthew Shears.

The following Board Liaisons participated in all or part of the meeting: Harald Alvestrand (IETF Liaison), Manal Ismail (GAC Liaison), James Galvin (SSAC Liaison), and Wes Hardaker (RSSAC Liaison).

Secretary: John Jeffrey (General Counsel and Secretary).

The following ICANN org Executives and Staff participated in all or part of the meeting: Michelle Bright (Board Content Coordination Director), Sally Newell Cohen (SVP, Global Communications and Language Services), John Crain (SVP, Chief Technology Officer), Samantha Eisner (Deputy General Counsel), Jamie Hedlund (SVP, Contractual Compliance & U.S. Government Engagement), Aaron Jimenez (Senior Board Operations Specialist), Elizabeth Le (Associate General Counsel), Lisa Saulino (Board Operations Specialist), Ashwin Rangan (SVP, Engineering and Chief Information Officer), Amy Stathos (Deputy General Counsel), Theresa Swinehart (SVP, Global Domains & Strategy), and Gina Villavicencio (SVP, Global Human Resources).

1. Consent Agenda

The Chair opened the meeting and introduced the Consent Agenda. Maarten Botterman moved and Alan Barrett seconded. The Chair called for a vote and the Board took the following action:

Jump To:

[1. Consent Agenda \(/en/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en#section1\)](#)

[a. Appointment of Root Server Operator Organization Representative to the RSSAC \(/en/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en#section1.a\)](#)

[b. Appointment of Root Server System Advisory Committee \(RSSAC\) Chair \(/en/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en#section1.b\)](#)

[c. Revisions to the ICANN Documentary Information Disclosure Policy \(/en/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en#section1.c\)](#)

a. Appointment of Root Server Operator Organization Representative to the RSSAC

Whereas, the ICANN Bylaws call for the establishment of the Root Server System Advisory Committee (RSSAC) with the role to advise the ICANN community and ICANN Board of Directors on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System.

Whereas, the ICANN Bylaws call for the ICANN Board of Directors to appoint one RSSAC member from each root server operator organization, based on recommendations from the RSSAC Chair.

Whereas, the RSSAC Chair has recommended to the ICANN Board of Directors the appointment of a representative from Internet Systems Consortium to the RSSAC.

Resolved (2023.01.21.01), the ICANN Board of Directors appoints Jeff Osborn to the RSSAC through 31 December 2024.

Rationale for Resolution 2023.01.21.01

In May 2013, the root server operator organizations agreed to an initial membership of representatives for the RSSAC, each nominating an individual. The ICANN Board of Directors approved the initial membership of the RSSAC in July 2013 with staggered terms. The representative from Internet Systems Consortium, Fred Baker, resigned from RSSAC on 31 December 2022.

Today, the Board is taking action pursuant to Article 12, Section 12.2 (c)(ii) of the ICANN Bylaws to appoint members to the RSSAC.

The appointment of the RSSAC members is not anticipated to have any fiscal impact on the ICANN organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the RSSAC.

This resolution is an organizational administrative function for which no public comment is required. The appointment of the RSSAC members contributes to the public interest and the commitment of the ICANN organization to strengthen the security, stability, and resiliency of the DNS in the public interest and in accordance with ICANN's mission.

b. Appointment of Root Server System Advisory Committee (RSSAC) Chair

Whereas, the ICANN Bylaws call for the establishment of the Root Server System Advisory Committee (RSSAC) with the role to advise the ICANN community and ICANN Board of Directors on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System.

Whereas, the ICANN Bylaws call for the RSSAC to be led by a chair that would be appointed by the ICANN Board of Directors.

Whereas, the RSSAC went through a 30-day nomination period for the RSSAC chair election process.

Whereas, Jeff Osborn achieved the majority of the votes in the election that concluded on 16 December 2022.

Whereas, the RSSAC has recommended to the ICANN Board of Directors the appointment of Jeff Osborn as the RSSAC chair.

Resolved (2023.01.21.02), the ICANN Board of Directors appoints Jeff Osborn as the RSSAC chair through 31 December 2024.

Rationale for Resolution 2023.01.21.02

The ICANN Bylaws require the Board to appoint the chair of the RSSAC. The Board relies on recommendations from the RSSAC in making that appointment. The term of the outgoing RSSAC chair Fred Baker expired on 31 December 2022.

The appointment of the RSSAC chair is not anticipated to have any fiscal impact on the ICANN organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the RSSAC.

This resolution is an organizational administrative function for which no public comment is required. The appointment of the RSSAC chair contributes to the commitment of the ICANN organization to strengthen the security, stability, and resiliency of the DNS in the public interest and in accordance with ICANN's mission.

c. Revisions to the ICANN Documentary Information Disclosure Policy

Whereas, ICANN organization maintains the ICANN Documentary Information Disclosure Policy (DIDP) through which members of the public can request that ICANN's documentary information, that has not already been made public as a matter of course, be made publicly available.

Whereas, in June 2018, as part of the Cross Community Working Group on Enhancing ICANN Accountability's Work Stream 2 (WS2) effort, a group of consensus-based recommendations on accountability enhancements were issued and included, among other categories, recommendations on transparency. (WS2 Final Report, Recommendations 8.)

Whereas, the Board approved the WS2 recommendations contained in the WS2 Final Report in 2019 and directed ICANN org to commence implementation as soon as it is feasible within the parameters of the annual budget and operating plan and the WS2 Implementation Assessment Report.

Whereas, the WS2 recommendations included 21 recommendations relating to the DIDP, as set forth in Recommendations 8.1.1 through 8.1.21. Recommendations 8.1.13, 8.1.19, and 8.1.20 also referenced potential new roles for the Office of the Ombudsman or the Complaints Office relating to the DIDP.

Whereas, to fulfill the DIDP-related Board-approved WS2 recommendations, ICANN org prepared a proposed revised DIDP and published it for public comment. ICANN org also sought community input on the Board-approved WS2 recommendation on the potential expansion of the Office of the Ombudsman or Complaints Office related to the DIDP.

Whereas, ICANN org considered the community feedback received on the proposed revised DIDP and, where appropriate, incorporated the input into the "Revised ICANN Documentary Information Disclosure Policy".

Whereas, the Board Accountability Mechanisms Committee (BAMC) considered the proposed revisions to the DIDP in light of the WS2 Recommendations and the public comment on the proposed updates, including comments received on the potential DIDP-related role of the Office of Ombudsman or Complaints Office within the DIDP Process.

Whereas, the BAMC recommended that the Board approve the updates to the DIDP as set forth in the document titled "Revised ICANN Documentary Information Disclosure Policy" as part of the org's implementation of the DIDP-related Board-approved WS2 recommendations.

Resolved (2023.01.21.03), the Board approves the revised DIDP as set forth in the document titled **"ICANN Documentary Information Disclosure Policy (As amended 21 January 2023) (/resources/pages/didp-2023-01-24-en)"**.

Rationale for Resolution 2023.01.21.03

The ICANN Documentary Information Disclosure Policy (DIDP) allows members of the public to request that ICANN's documentary information, which ICANN organization has not already made public as a matter of course, be made publicly available. ICANN org, as a matter of course and as part of its commitment to transparency, already makes a large amount of information publicly available. The DIDP describes the types of information that the public can expect to be available and establishes the ability for members of the public to request ICANN to publish additional documents within its possession, custody, or control. The DIDP obligates ICANN org to respond to those requests for documentary information, and ICANN org makes all DIDP Requests and Responses publicly available.

The DIDP was initially developed after community consultation in 2009 and was updated in 2012, again after community consultation. As part of the Cross-Community Working Group on Enhancing ICANN Accountability Work Stream 2 (WS2) effort, a group of consensus-based recommendations were issued regarding, among other categories, transparency. (WS2 Final Report, Recommendation 8.) In November 2019, the ICANN Board approved the consensus recommendations contained in the WS2 Final Report and directed org to start implementing them within the parameters of the annual budget and operating plan and the WS2 Implementation Assessment Report.

The Board-approved WS2 recommendation on transparency, Recommendation 8, included 21 recommendations relating to the DIDP. (See WS2 Final Report, Recommendations 8.1.1 – 8.1.21.) Three of the 21 recommendations on the DIDP, Recommendations 8.1.13, 8.1.19, and 8.1.20, referenced potential new roles for the Office of the Ombudsman or Complaints Office relating to the DIDP.

To fulfill the WS2 recommendations relating to the DIDP, ICANN org revised the DIDP and updated the process document for responding to DIDP requests to align with the DIDP revisions. ICANN org consulted the community through the public comment process on the proposed revised DIDP as well as the potential Office of the Ombudsman or the Complaints Office involvement in the DIDP process. ICANN org utilized the criteria set forth in WS2's Recommendation 5.11 as it relates to the potential expansion of the Office of the Ombudsman beyond the fairness-based complaints that are already within the Ombudsman's responsibilities.

ICANN org considered the community feedback on the proposed revised DIDP and agreed with the commenters on the importance of DIDP. Many of the comments received had already been addressed by the proposed revised DIDP. (See Public Comment Summary Report, Attachment C to the Reference Materials.) Some comments objected to the already Board-approved DIDP-related WS2 recommendations, rather than the proposed implementation of those recommendations. ICANN org is not in a position to incorporate suggested changes to the DIDP that diverge from or

change the Board-approved WS2 recommendations, which before they were submitted for Board approval, were approved by the chartering organizations for the WS2 effort and subject to Public Comment.

With respect to the WS2 recommendation regarding the potential expansion of the Office of the Ombudsman or Complaints Office relating to the DIDP, the DIDP does not need to be further revised to include the Office of the Ombudsman and/or Complaints Office for requestors to avail themselves of these review mechanisms, as they are already available to all requestors. Community inputs received on expansion of the Office of the Ombudsman role beyond its fairness determinations did not support the WS2's potential expansion.

Notwithstanding the foregoing, the following language has been added to the revised DIDP to specifically highlight the availability of Office of the Ombudsman if a requestor is not satisfied with a DIDP response:

To the extent a requestor chooses to seek review of a response to a request pursuant to the DIDP, a requestor may seek any of the accountability mechanisms afforded under the Bylaws to the extent applicable, such as the Reconsideration Request process in accordance with Bylaws, Article 4, Section 4.2, or the Independent Review Process in accordance with Bylaws, Article 4, Section 4.3, or Ombudsman process if a requestor believes that the response was unfair in accordance with Bylaws, Article 5.

The BAMC considered the proposed revised DIDP and recommended that the Board approve the revised DIDP is as set forth in the document titled "**ICANN Documentary Information Disclosure Policy (As amended 21 January 2023) (/resources/pages/didp-2023-01-24-en)**".

The Board is taking this action today as part of the implementation of the approved WS2 recommendations. Action on Board-approved WS2 recommendations is anticipated in Article 27, Section 27.1 of the ICANN Bylaws, and taking this action is consistent with ICANN's Mission. This action also serves the public interest in reinforcing ICANN's commitment to transparency.

There will be no direct fiscal impact or adverse ramifications on ICANN's strategic and operating plans from the proposed changes to the charters.

There are no security, stability or resiliency issues relating to the domain name system as the result of this action.

As required by the ICANN Bylaws, the revisions to the DIDP were already the subject of public comment as discussed above.

d. Revisions to the Board Code of Conduct

Whereas, the Board Governance Committee's (BGC) scope of responsibilities includes oversight of the Board of Directors' Code of Conduct (Code), which involves periodic reviews of the Code, and making recommendations for changes to the Code to the Board as necessary.

Whereas, the BGC recently recommended and reviewed suggested changes to the Code to clarify the Code as it relates to Board member's conduct when acting in their own capacity while serving on the ICANN Board.

Whereas, the BGC recommended that the Board approve revisions to the Code to add clarity.

Resolved (2023.01.21.04), the Board adopts the revised **Board of Directors' Code of Conduct (/resources/pages/governance/code-of-conduct-en)**.

Rationale for Resolution 2023.01.21.04

Adopting the revised Board of Directors' Code of Conduct (Code) is consistent with ICANN's mission and commitments to ensuring legitimacy and sustainability of the ICANN multistakeholder model by ensuring that the Board members are operating at the highest ethical standards.

The Board Governance Committee has recommended that the Code be revised to enhance the clarity of the Code as it relates to Board members acting in their own capacity while serving on the ICANN Board.

This decision is squarely within the public interest as it is expected to positively impact the manner in which the ICANN Board operates with the public.

The adoption of the revised Code is not expected to have a fiscal impact on ICANN organization.

This decision should not have any negative impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

All members of the Board voted in favor of Resolutions 2023.01.21.01, 2023.01.21.02, 2023.01.21.03, and 2023.01.21.04. The Resolutions carried.

2. Main Agenda

a. Approval of Minutes

The Chair introduced the agenda item. Matthew Shears moved and Danko Jevtović seconded. The Chair called for a vote and the Board took the following action:

Resolved (2023.01.21.05), the Board approves the minutes of the 13 July 2022 Special Meeting of the ICANN Board, the 27 July 2022 Special Meeting of the ICANN Board, the 22 September 2022 Regular Meeting of the ICANN Board, the 22 September 2022 Organizational Meeting of the ICANN Board, the 16 November 2022 Special Meeting of the ICANN Board, the 14 December 2022 Special Meeting of the ICANN Board, and the 21 December 2022 Special Meeting of the ICANN Board.

All members of the Board voted in favor of Resolution 2023.01.21.05. The Resolution carried.

b. Consideration of the Namecheap, Inc. v. ICANN (.BIZ, .INFO, .ORG) Independent Review Process Final Declaration

The Chair introduced the agenda item and noted that the Board discussed the matter in the previous Board session. Board members Harald Alvestrand, Sarah Deutsch, James Galvin, and Wes Hardaker noted during the Board's prior discussion of this matter that they would be recusing themselves from consideration of the matter out of an abundance of caution to avoid any actual or potential conflicts of interest or the appearance of a conflict of interest. In addition, Sarah explained during the meeting that she would be abstaining from voting on the matter for the same reasons. Becky Burr moved and León Sánchez seconded. The Chair called for a vote and the Board took the following action:

Whereas, the Final Declaration in the Namecheap, Inc. v. ICANN Independent Review Process regarding .BIZ, .INFO, and .ORG (Namecheap IRP) was issued on 26 December 2022.

Whereas, among other things, the IRP Panel found that "Namecheap has prevailed on some, but not all of its claims," declared that ICANN violated its Articles of Incorporation and/or Bylaws in the manner set forth in the Final Declaration, and declared that ICANN shall reimburse Namecheap the sum of US\$58,750 for its share of the IRP costs in accordance with the Bylaws. (Final Declaration at ¶¶ 451, 452, 486, 505.)

Whereas, the IRP Panel made an "overall recommendation [...] that the ICANN Board analyze and discuss what steps to take to remedy both the specific violations found by the Panel, and to improve its overall decision making process to ensure that similar violations do not occur in the future," and made certain further recommendations as set forth in the Final Declaration. (Final Declaration at ¶¶ 493, 497-504.)

Whereas, in accordance with Article 4, Section 4.3(x) of the applicable version of the Bylaws, the Board has considered the Final Declaration.

Resolved (2023.01.21.06), the Board acknowledges that the IRP Panel declared the following: (i) Namecheap prevailed on certain of its claims in the Namecheap, Inc. v. ICANN Independent Review Process; (ii) ICANN violated its Articles of Incorporation and/or Bylaws in the manner set forth in the Final Declaration; and (iii) ICANN shall reimburse Namecheap the sum of US\$58,750. [1\(/en/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en#foot1\)](#)

Resolved (2023.01.21.07), the Board directs the Interim President and CEO, or her designee(s), to take all steps necessary to reimburse Namecheap in the amount of US\$58,750.

Resolved (2023.01.21.08), further consideration is needed regarding the IRP Panel's non-binding recommendations set forth in the Final Declaration.

Resolved (2023.01.21.09), the Board asks the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel's Final Declaration and recommendations, and to provide the Board with its recommendation(s) regarding next steps for the Board to consider.

Fifteen Board Directors voted in favor of Resolutions 2023.01.21.06, 2023.01.21.07, 2021.01.21.08, and 2021.01.21.09. Sarah Deutsch abstained from voting. The Resolutions carried.

Rationale for Resolutions 2023.01.21.06 – 2023.01.21.09

The 2013 .BIZ, .INFO, and .ORG Registry Agreements (2013 Registry Agreements) were all due to expire in June 2019. In anticipation of the expiration of these agreements, ICANN staff entered into separate negotiations with the respective registry operators to renew the agreements. As with all legacy registry agreements, ICANN's preference was to transition the 2013 Registry Agreements to the "Base Registry Agreement," given its additional protections for registrars and registrants and increased operational efficiencies for ICANN, registry operators, registrars, and registrants. The .BIZ, .INFO, and .ORG registry operators were also interested in moving to and requested to transition to the Base Registry Agreement. The Base Registry Agreement does not contain price control provisions, whereas the 2013 Registry Agreements previously contained such provisions. After conducting its due diligence and briefing the Board regarding the rationale for transitioning .BIZ, .INFO, and .ORG to the Base Registry Agreement, ICANN staff proceeded to renew the Registry Agreements in June 2019 (2019 Registry Agreements) on the Base Registry Agreement as proposed.

Namecheap, Inc. (an ICANN accredited registrar) initiated an Independent Review Process (IRP) in February 2020, challenging the lack of price control provisions in the 2019 Registry Agreements, and ICANN organization's consideration of Public Interest Registry's (PIR's) request for indirect change of control (Change of Control Request). With respect to Namecheap's claims regarding the lack of price control provisions, Namecheap asserted that: (a) ICANN was not transparent in its decision-making process regarding not including price control provisions in the 2019 Registry Agreements; (b) the lack of price control provisions resulted in disparate treatment of .BIZ, .INFO, and .ORG, as compared to similar legacy TLDs such as .COM and .NET; and (c) the lack of price control provisions in the 2019 Registry Agreements violated the renewal clause (Section 4.2) of the 2013 Registry Agreements for .BIZ, .INFO, and .ORG. With respect to Namecheap's claims regarding PIR's Change of Control Request, the Panel dismissed those claims when it granted certain portions of ICANN's motion to dismiss in February 2021.

The final IRP hearing took place from 28 March 2022 to 1 April 2022, and the IRP Panel issued its Final Declaration on 26 December 2022.

In the Final Declaration, the IRP Panel indicated that Namecheap had "prevailed on some, but not all of its claims." (Final Declaration at ¶ 451.) In particular, the Panel agreed with ICANN that Namecheap failed to prove its claim that the removal of the price controls amounted to discriminatory treatment under the Bylaws, because price controls continue to exist in the Registry Agreements for .COM, .NET, and .NAME. The Panel further agreed with ICANN that several of Namecheap's claims were untimely, including all claims involving the .BIZ Registry Agreement renewal, the claim that ICANN should not have allowed registries and registrars to vertically integrate, and the claim that ICANN violated a policy from February 2006 relating to the renewal of legacy Registry Agreements.

Namecheap prevailed on its specific claims regarding the lack of price control provisions in the 2019 Registry Agreements for .INFO and .ORG, with the Panel finding three violations of the Articles of Incorporations and/or Bylaws. Specifically, the Panel declared that:

- "ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Article III of the Articles of Incorporation and Sections 1.2(a), 1.2(b), and 3.1 of the Bylaws because ICANN did not act in an open and transparent manner;"
- "ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Sections 2.1, 3.4, 3.5, and 3.6(a) of the Bylaws because it involved a policy decision to be made by the ICANN Board, and the ICANN Board did not approve this decision or comply with the procedural requirements for formal Board action;" and
- "ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Articles II and III of the Articles of Incorporation and Section 1.2(b)(ii) of the Bylaws because ICANN did not comply with the procedural requirements for ensuring that ICANN promotes the global public interest and acts for the benefit of the Internet community as a whole."

The Panel denied Namecheap's request for cost shifting of legal fees. The Panel found that "neither party has asserted 'frivolous or abusive' claims or defenses." "Accordingly, the Panel applies the general rule that ICANN shall bear all administrative costs paid to the ICDR (including arbitrator fees), and that each party should bear its own legal and expert witness fees and expenses." (Final Declaration at ¶ 451.) The Panel ordered ICANN to reimburse Namecheap the sum of US\$58,750.00, the amount that Namecheap paid in IRP costs before ICANN had had the chance to reimburse Namecheap.[2/\(en/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en#foot2\)](#) (Final Declaration at ¶ 452.)

In light of its declarations and its view that the noted violations "are procedural rather than substantive in nature," "[t]he Panel's overall recommendation is that the ICANN Board analyze and discuss what steps to take to remedy both the specific violations found by the Panel, and to improve its overall decision making process to ensure that similar violations do not occur in the future." (Final Declaration at ¶ 493.) The Panel also recommended the following (Final Declaration at ¶¶ 497-504):

- "[D]ecisions as to how to implement the Panel's rulings in this IRP should be made by the ICANN Board";
- "[T]he ICANN Board should consider creating and implementing a process to conduct further analysis of whether including price caps in the Registry Agreements for .ORG and .INFO is in the global public interest" that encourages participation of diverse stakeholders and "should be conducted in an open and transparent manner that avoids the violations found by the Panel";
- "[W]hile the ICANN Board should consider what remedial measures to take as to both .ORG and .INFO, the measures for .ORG may be stronger and more extensive than for .INFO" in light of the Panel's finding "that the evidence that price controls should be retained is much stronger for .ORG than for .INFO";

- "[T]he Board consider whether to retain an expert consultant to conduct a study on issues raised by the Price Cap Decision, such as whether .ORG and .INFO have sufficient market power that price caps may be desirable" and should explain the reasons for not conducting further expert analysis if that decision is made";
- "[I]f the Board concludes that some form of price controls for .ORG and/or .INFO are in the global public interest, the Panel recommends that ICANN seek to amend the 2019 Registry Agreements to include appropriate price controls";
- "[T]he ICANN Board may wish to consider approaching the registry operators for .ORG and .INFO about agreeing to some form of price controls, even before evaluating whether price caps are needed and taking the other measures noted above"; and
- The "Board consider revisions to ICANN's decision making process to reduce the risk of similar procedural violations in the future," such as "adopt[ing] guidelines for determining what decisions involve policy matters for the Board to decide, or what are the issues on which public comments should be obtained."

The Panel also noted: "While providing recommendations is consistent with the purpose of the independent review process, the Panel notes that it has no expertise or experience regarding the internal operations of ICANN, or with the diverse stakeholders in the global Internet community, aside from information presented in this proceeding. Thus, the Panel's recommendations are directed at identifying issues and measures that ICANN should consider and analyze further, in consultation with the Internet community." (Final Declaration at ¶ 492.)

The Board appreciates that the parties participated in good faith in the IRP, and acknowledges that a neutral third-party Panel determined that Namecheap prevailed on certain of its claims, declared that ICANN violated its Articles of Incorporation and/or Bylaws in the manner set forth in the Final Declaration, and declared that ICANN should reimburse Namecheap for its share of the IRP costs as set forth in the Final Declaration. The Board is therefore adopting this resolution so as to not delay the reimbursement of Namecheap for these costs, while the Board continues to consider the Panel's recommendations and/or next steps relating to this matter.

The Board recognizes the importance of this decision and wants to make clear that it takes the results of all ICANN accountability mechanisms very seriously, which is why the Panel's recommendations are being referred to the Board Accountability Mechanisms Committee (BAMC) for thorough consideration and formulating its recommendation(s) to the Board on next steps.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially and adversely affected by a Board or organization action or inaction may challenge that action or inaction.

Taking this decision is expected to have a direct financial impact on ICANN in the amount the Panel declared ICANN should reimburse the prevailing party, which was anticipated under the current budget. Further review and analysis of the Panel's recommendations will not have any

direct impact on the security, stability, or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

The Chair called the meeting to a close.

Published on 17 February 2023

Footnotes

[1 (/en/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en#note1)] ICANN already agreed, pursuant to the Bylaws, that it would pay for the administrative costs of maintaining an IRP, including panelist fees.

[2 (/en/board-activities-and-meetings/materials/minutes-regular-meeting-of-the-icann-board-21-01-2023-en#note2)] ICANN had already agreed, pursuant to the Bylaws, that it would pay for the administrative costs of maintaining an IRP, including panelist fees.

Related Documents

[Agenda | Regular Meeting of the ICANN Board | 21 January 2023 \(/en/board-activities-and-meetings/materials/agenda-regular-meeting-of-the-icann-board-21-01-2023-en\)](/en/board-activities-and-meetings/materials/agenda-regular-meeting-of-the-icann-board-21-01-2023-en)

[Approved Resolutions | Regular Meeting of the ICANN Board | 21 January 2023 \(/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-21-01-2023-en\)](/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-21-01-2023-en)

[Preliminary Report | Regular Meeting of the ICANN Board | 21 January 2023 \(/en/board-activities-and-meetings/materials/preliminary-report-regular-meeting-of-the-icann-board-21-01-2023-en\)](/en/board-activities-and-meetings/materials/preliminary-report-regular-meeting-of-the-icann-board-21-01-2023-en)

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Exhibit D

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Minutes | Meeting of the Board Accountability Mechanisms Committee (BAMC) | 2 June 2023

BAMC Attendees: Alan Barrett, Becky Burr, Edmon Chung, Sarah Deutsch, Patricio Poblete, León Sánchez (Chair), and Katrina Sasaki

ICANN organization Attendees: Franco Carrasco (Board Operations Specialist), Casandra Furey (Associate General Counsel), John Jeffrey (General Counsel and Secretary), Elizabeth Le (Associate General Counsel), and Amy Stathos (Deputy General Counsel)

The following is a summary of discussions, actions taken, and actions identified:

- 1. Discussion re Namecheap Independent Review Process (IRP) Final Declaration** – The Committee Chair conducted a conflicts of interest check. Edmon Chung noted that the back-end provider for dotAsia provides back-end registry services for .INFO and .ORG, but he did not recuse himself from consideration of the matter. Sarah Deutsch noted that she is a Board member of Electronic Frontier Foundation (EFF) and, while she has had no interaction with EFF regarding this matter, she will abstain from consideration of the matter. The BAMC agreed that there are no conflicts of interest concerns with respect to Sarah's participation in the BAMC's discussions on the matter. The BAMC received a briefing from ICANN org regarding potential next steps in the evaluation of the Namecheap IRP Panel's Final Declaration and recommendations. Following

discussion, the Committee agreed to recommend that the Board approve taking the initial step of directing the Interim President and CEO, or her designee(s), to retain an economist to provide input regarding the current domain name system (DNS) marketplace with respect to the market power of .INFO and .ORG.

- Action: ICANN org to prepare relevant Board materials.

2. **Proposed Updates to Committee Charter** – The Committee considered and approved a recommendation to the Board to approve updates to the Committee's charter to align with current practices, including receiving reports on status of litigation and accountability mechanisms matters.

- Action: ICANN org to prepare relevant Board materials.

3. **Litigation Update** – The Committee received a litigation update.

4. **AOB** – The Committee discussed and agreed on next steps in the evaluation of nomination of the slate for Standing Panelists that the Board received from the Independent Review Process Community Representatives Group. The BAMC requested ICANN org to prepare a draft document reflecting the BAMC's discussion.

- Action: ICANN org to prepare draft document requested by the BAMC.

Published on 4 July 2023

Related Documents

[Agenda | Meeting of the Board Accountability Mechanisms Committee \(BAMC\) | 2 June 2023 \(/en/board-activities-and-meetings/materials/agenda-meeting-of-the-board-accountability-mechanisms-committee-bamc-02-06-2023-en\)](/en/board-activities-and-meetings/materials/agenda-meeting-of-the-board-accountability-mechanisms-committee-bamc-02-06-2023-en)

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Exhibit E



Prepared for:
ICANN

Economic Analysis of Whether .info and .org Possess Market Power

Prepared by:
Gregory K. Leonard, Vice President
Charles River Associates
601 12th Street
Oakland, CA

Date: February 14, 2024

Disclaimer

The conclusions set forth herein are based on independent research and publicly available material. The views expressed herein are the views and opinions of the author and do not reflect or represent the views of Charles River Associates. Any opinion expressed herein shall not amount to any form of guarantee that the author or Charles River Associates has determined or predicted future events or circumstances and no such reliance may be inferred or implied. The author and Charles River Associates accept no duty of care or liability of any kind whatsoever to any party, and no responsibility for damages, if any, suffered by any party as a result of decisions made, or not made, or actions taken, or not taken, based on this report.

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1. Qualifications

I am an economist and Vice President at Charles River Associates (CRA). I received a Bachelor of Science in Applied Mathematics-Economics from Brown University in 1985 and a Ph.D. in Economics from the Massachusetts Institute of Technology in 1989. After receiving my Ph.D., I became an assistant professor at Columbia University. I subsequently moved into economic consulting and worked at several economic consulting firms prior to joining CRA.

My specialties within economics are applied microeconomics, the study of the behavior of consumers and firms, and econometrics, the application of statistical methods to economics data. I have published more than sixty articles in scholarly and professional publications. Many of these articles address issues in industrial organization, antitrust economics, and econometrics.

I served as the Vice Chair for Economics of the Board of Editors of the American Bar Association's *Antitrust Law Journal* from 2018 to 2023 and am currently a Senior Editor for that publication. I have also served as a referee for numerous economics and other professional journals. I have given invited lectures on antitrust issues at the Federal Trade Commission (FTC), the United States Department of Justice (DOJ), the Directorate General for Competition of the European Commission, the Fair Trade Commission of Japan, and China's Supreme People's Court and antitrust agency. I have been retained by the DOJ to consult on antitrust matters. In 2007, I served as a consultant to, and testified before, the Antitrust Modernization Commission, which was tasked by Congress and the President of the United States to make recommendations for revising U.S. antitrust laws.

2. Summary of Conclusions

The registry agreements that were entered into between ICANN and the registry operators of .info (Identity Digital¹) and .org (Public Interest Registry (PIR)) in June 2019 did not contain the price control provision that had been present in the predecessor registry agreements. I have been asked by ICANN to provide input regarding the current domain name system (DNS) marketplace as it relates to the market power of .info and .org.²

My conclusions are as follows, with supporting analysis and discussion contained in the text of this report.

- In a market economy, prices are the mechanism through which the market achieves an efficient allocation of resources. Regulatory price controls interfere with this basic

¹ Identity Digital was formed by combining operations of Donuts Inc. and Afilias, Inc. (which itself had been acquired by Donuts Inc. in 2020 and had operated .info prior to the acquisition). PR Newswire, "Donuts Inc. and Afilias, Inc. Rebrand to Identity Digital," June 22, 2022, available at <https://www.prnewswire.com/news-releases/donuts-inc-and-afilias-inc-rebrand-to-identity-digital-301572401.html>. In this report, I use "Identity Digital" to refer to the pre-acquisition Afilias, Inc. as well as the post-combination entity.

² In the course of my analysis, I reviewed the materials and information listed in Appendix B to this report. Among those materials were the public comments ICANN received in 2019 in response to the proposed new registry agreements for .org and .info. See <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-org-registry-agreement-18-03-2019>; <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-info-registry-agreement-18-03-2019>. This report addresses the economics-related concerns that were expressed by commenters.

market mechanism and lead to a misallocation unless the regulator is highly informed and nimble, which has historically rarely been the case. A regulator setting the wrong price is not harmless—rather, the wrong price can lead to a decrease in economic efficiency and innovation. For these reasons, price controls are disfavored in market economies except in narrow circumstances where a firm has substantial and durable “market power”—the ability to charge a price significantly above the competitive level for an extended period of time.

- Currently, we have four years of historical experience of Identity Digital and PIR setting wholesale registration prices for .info and .org, respectively, without being subject to the price control provision. During that time, contrary to what would have been expected had the price control provision been constraining the wholesale registration prices of .info and .org, we did not see those prices increase significantly. Rather, the .org price has not increased at all and the .info price has not increased more than the price control provision would have allowed, had it been in place. In the absence of the price control provision, the wholesale registration prices for .info and .org were almost certainly constrained during the last four years by competitive market forces and other factors. Thus, the historical experience is consistent with .info and .org not having substantial and durable market power.
- Additional evidence demonstrates that .info and .org do not have substantial and durable market power.
 - First, .info and .org face competition from other TLDs. Indeed, the extent of this competition has increased over time as additional TLDs have been introduced and gained an increasing share of registrations. At the same time that other TLDs’ shares of registrations have been growing, the number of registrations, as well as the share of registrations, on .info and .org has fallen over time.
 - Second, the wholesale registration prices for .info and .org have been in line both with inflation as well as the registration prices of other TLDs.
 - Third, under the existing .info and .org registry agreements, a registrant through a registrar has the option of locking the current registration price for a period of ten years. This provision protects against any attempt to increase the prices of .info and .org excessively in the future.
 - Fourth, PIR is a not-for-profit entity. According to its public statements, PIR views its role as serving the public interest online and “stewardship” of the “.ORG community.” It would be contrary to PIR’s stated goals to increase its registration price excessively by exploiting any market power it possessed.
 - Fifth, market factors would constrain .org or .info from engaging in opportunism, such as by increasing renewal prices targeting existing registrants that are “locked in” by switching costs to .org or .info.
- The foregoing factors mean that registrars as well as registrants are protected from excessive wholesale price increases. However, in addition registrars have the incentive and ability to pass on wholesale price increases to retail prices without losing many customers. This provides further protection to registrars from any adverse impact.
- There is no reason to believe that the lack of substantial and durable market power for .org and .info will change in the future.

3. Background on the Domain Name System

An Internet domain name such as “crai.com” consists of a “top level domain name” (TLD), in this case “.com,” and a “second level domain name” (SLD), in this case, “crai”.

ICANN is responsible for coordinating the Internet’s DNS. Originally, seven TLDs were created, including .com and .org.³ These seven TLDs existed prior to ICANN’s creation. In 2001 and 2002, ICANN authorized seven new TLDs, including .info.⁴ Subsequently, ICANN has authorized over 1,200 further TLDs.⁵ Also, in addition to “generic” TLDs (gTLDs), such as .org, there are “country code” TLDs (ccTLDs), such as .us and .uk.

Most gTLDs are administered by a registry operator pursuant to contract with ICANN. For example, PIR is the registry operator of .org and Identity Digital is the registry operator of .info. An entity (such as a company or individual) wishing to register a given domain name, known as a registrant, works with a registrar, or a reseller that is in partnership with a registrar, that serves as an intermediary between the registrant and the registry operator of the TLD. The registry operator charges the registrar or reseller a “wholesale price” for the registration and the registrar or reseller in turn charges the registrant a “retail price.”

ICANN has entered into registry agreements with the registry operators of most gTLDs⁶ that specify the operators’ obligations as TLD administrators. The 2013 registry agreements for .info and .org each contained a price control provision that prohibited the registry operator from increasing its registration price in a calendar year by more than 10% of the previous calendar year’s registration price.⁷ This price control provision was not included in the registry agreements that PIR and Identity Digital entered in June 2019. Thus, since June 2019, .org and .info have not been subject to the price control provision.

Verisign, the registry operator of .com, agreed with the U.S. Department of Commerce to be bound by a price control provision, which remains in place currently.⁸ ICANN did not play a role in the negotiation of the Verisign price control provision.

³ ICANN, “Top-Level Domains (gTLDs)”, last accessed November 9, 2023, available at <https://archive.icann.org/en/tlds/>.

⁴ Id.

⁵ ICANN, “Registry Listings,” last accessed November 9, 2023, available at <https://www.icann.org/resources/pages/listing-2012-02-25-en>.

⁶ ICANN does not have registry agreements with the operators of ccTLDs.

⁷ .info Registry Agreement (August 22, 2013), Section 7.3(a); .org Registry Agreement (August 22, 2013), Section 7.3(a).

⁸ Under the most recent version of this provision, Verisign is limited to the following: in each of the last four years of every six-year period, it may increase price by up to 7% over the previous year’s highest price. See Amendment to Financial Assistance Award, U.S. Department of Commerce and Verisign, October 26, 2018, available at https://www.ntia.gov/files/ntia/publications/amendment_35.pdf. The Department of Commerce agreed to provide Verisign more pricing flexibility than previously “[i]n recognition that ccTLDs, new gTLDs, and the use of social media have created a more dynamic DNS marketplace.” Id.

4. In Market Economies Like the U.S., Price Controls Generally Are Disfavored by Policy-Makers

In a market economy, production and consumption decisions are made in a decentralized fashion by individual economic agents, e.g., companies and consumers. Prices play an important role in the decision-making of these agents. For example, a consumer decides how much of various products to buy depending on the products' prices. A company decides to invest in improving the quality of its product if the additional price it could charge given higher quality exceeds the cost of the quality improvement.

Prices accumulate and incorporate market information about consumer demand and producers' costs so that they signal the value of resources and give economic agents the incentive to put resources to their highest value use. As a result, prices promote the efficient allocation of resources. This is the great achievement of markets.

Price regulation, in contrast, involves a central authority, often a government body, setting a price outside of the market mechanism. To the extent that the regulated price differs from the price that would have been set by the market, the regulated price will distort the incentives to economic agents and thus distort the allocation of resources. In the absence of certain narrow circumstances to be discussed below, this distorted allocation will be inefficient.

An extreme example of price regulation is a centrally planned economy. In such an economy, government bureaucrats typically set both prices and production quantities. While bureaucrats may attempt to incorporate information on the value of various resources in various end uses, their information is often incomplete, they typically have only a limited understanding of the industries they regulate, and they face problems of coordination among different sectors of the economy and among themselves (when different bureaucrats set prices for different industries). The result is that centrally planned economies have typically been woefully inefficient, sometimes with disastrous consequences.⁹

While markets have far outperformed central planning, there are certain circumstances under which markets may fail to produce an efficient allocation of resources. One example is monopoly. A monopolist is a supplier able to charge a price that exceeds the competitive (efficient) level. In the abstract, government price regulation may have the scope to increase efficiency by forcing the monopolist to charge a price closer to the efficient level. However, just as is the case for a central planner, determining the efficient price is not straightforward for a price regulator given informational constraints. Setting the price too low will generally lead the monopolist to underinvest in innovation, which creates a new inefficiency. Setting it too high will fail to correct the price-related inefficiency. The difficulties involved with price regulation is one reason, for example, that the U.S. Department of Justice and Federal Trade Commission generally decline to use price controls as a remedy for mergers deemed likely to lessen competition. Instead, these agencies require structural remedies, such as that the merged firm divest certain assets to a competitor. ICANN notably has made its own "structural" changes to competition in the TLD space by authorizing the entry of numerous new gTLDs.

Fortunately, even if left unregulated, monopoly status often is not long-lasting because the monopoly prices and resulting profits attract firms that seek to compete with the monopolist for those profits. The competition from new entrants drives prices down toward the efficient

⁹ See, e.g., John R. Moroney and C. A. K. Lovell, "The Relative Efficiencies of Market and Planned Economies," *Southern Economic Journal*, 1997, pp. 1084-1093; Israel Kirzner, "Economic Planning and the Knowledge Problem," *Cato Journal*, Vol. 4, No. 2, 1984, pp. 407-418. For example, China's efforts to centrally plan agricultural output during the "Great Leap Forward" led to the deaths of millions by starvation because the associated disincentives led farmers to cut back farm production.

level. Again, prices serve as a valuable signal and incentive—in this case, the monopoly prices induce entry that eliminates the inefficiency. Because of the tendency for monopoly to be eroded by market forces, price regulation has been used only sparingly in the United States in recent times. The exceptions have been when a firm has market power that is both substantial and expected to be long-lived. Examples are when a monopoly has been conferred by the government, such as in the case of certain public utilities, or when there exist economies of scale or barriers to entry are so substantial that only one firm can exist profitably (a so-called “natural monopoly”).¹⁰ As discussed below, .info and .org do not come close to fitting within these exceptions.

5. Four Years of .info and .org Operating Unconstrained By the Price Control Provision Demonstrates That They Do Not Have Substantial and Durable Market Power

Given the general disfavor with which price controls are viewed, an important economic question to consider is whether there is a substantial danger that, absent any price controls, prices would increase excessively.

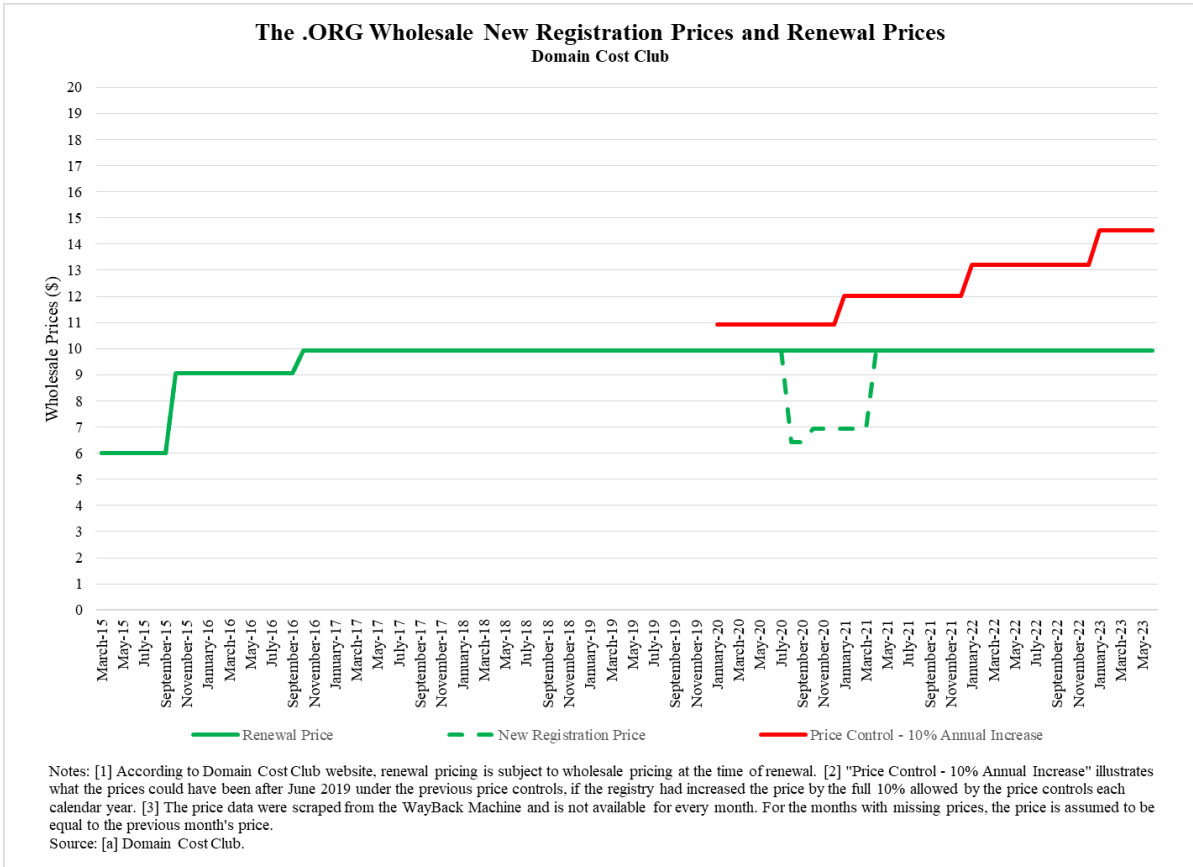
We now have over four years of historical experience, from June 2019 to June 2023 (the last period for which I have data), during which the operators of .info and .org have been unconstrained by the pricing provision. Two points can be made about this historical experience. First, if .info and .org had substantial and durable market power that was held in check by the price control provision, one would have expected to see sharp increases in their wholesale registration prices to registrars immediately after the price controls were lifted in June 2019. However, that did not occur. Indeed, the wholesale registration price of .org has not increased at all, and the wholesale registration price of .info has not increased by more than would have been allowed had the price control provision remained in place. Second, because the price control provision was no longer in place, it must have been competitive market forces or other factors that constrained the prices of .info and .org during the last four years. The overall conclusion is that .info and .org do not have substantial and durable market power.

¹⁰ In the more distant past in the US, government entities price-regulated certain industries, such as airlines, trucking and railroads. However, those regulations were eliminated through bipartisan legislation in the 1970s and 1980s and it is generally agreed that deregulation has improved economic outcomes. See, e.g., Clifford Winston “U.S. Industry Adjustment to Economic Deregulation,” *Journal of Economic Perspectives*, Vol. 12, No. 3, 1998, pp. 89-110.

5.1. History of .org Registration Pricing

I have gathered registration price data for the period between March 2015 and June 2023.¹¹ Currently, the wholesale price to registrars is the same for both new registrations and renewals on .org. That price has remained constant since late-2016, see Figure 1.¹²

Figure 1



In Figure 1, I also depict with a red line the maximum price that could have been charged on .org after June 2019 had the price control provision remained in place. The actual .org price was well below the red line throughout the period. The fact that the .org price remained below the levels that the price control provision would have allowed instead of increasing

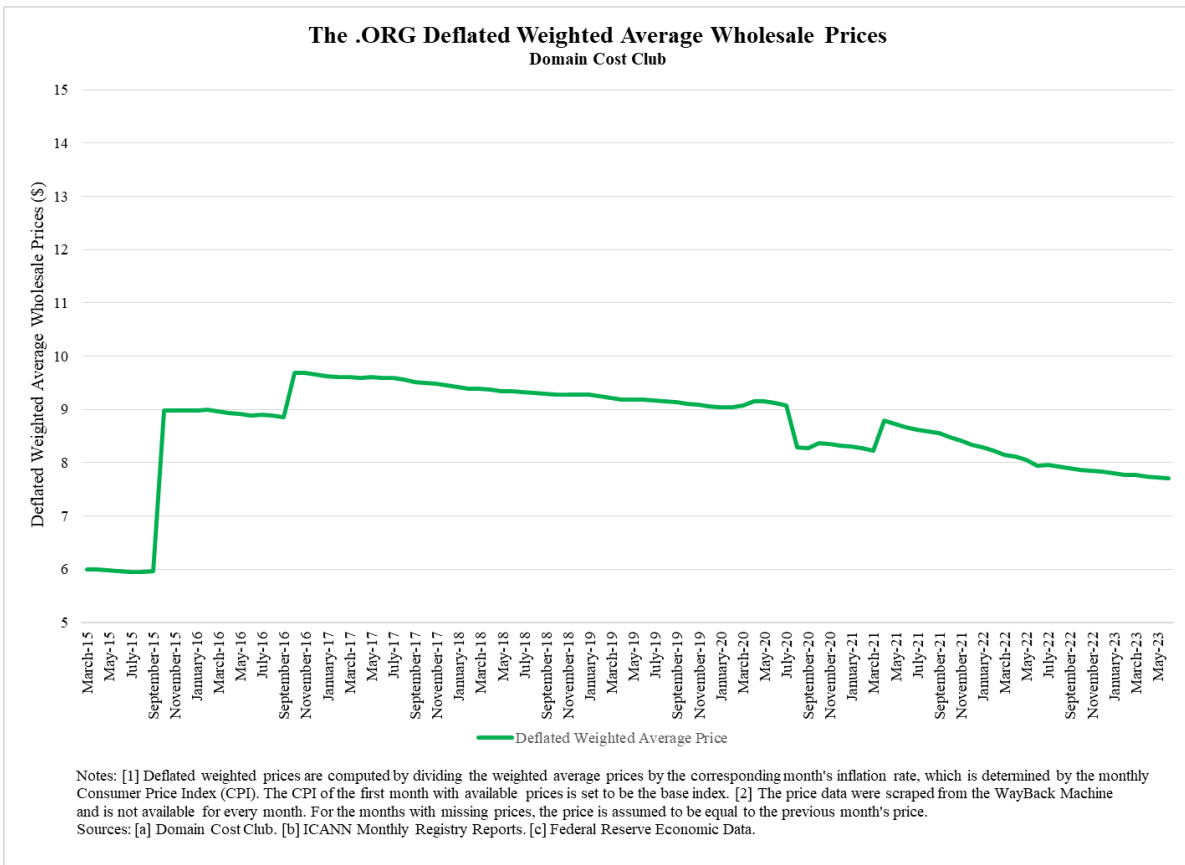
¹¹ The price data were obtained from the Domain Cost Club using the WayBack Machine at https://web.archive.org/web/20230000000000*/domaincostclub.com/pricing.dhtml. Domain Cost Club is a registrar that gives its customers the option to pay an annual membership fee for access to discounts on domain pricing. Domain Cost Club sells domains to its Club Members "at-cost," i.e., at the wholesale price charged by the registry.

¹² For a brief period starting in the middle of 2020, a discounted price was charged for new registrations on .org while the renewal price remained the same. During this period, I calculated a weighted average of the two prices and used that weighted average in Figure 1. The weights for the new registration and renewal prices in calculating this weighted average are the percentages of all registration transactions that are new registrations and renewals, respectively.

significantly above those levels means: (1) the price control provision would have been superfluous for .org had it been in place after June 2019, (2) market forces (rather than the price control provision) or its own goals as a not-for-profit entity (see below) served to constrain .org pricing, and (3) .org did not have substantial and durable market power that the price control provision was constraining.

I have also compared the (lack of) changes in the .org price to changes in the general price level as represented by the Consumer Price Index (CPI). The CPI-deflated .org price has decreased over the long-term, see Figure 2, meaning that the .org price has decreased relative to the general price level.

Figure 2

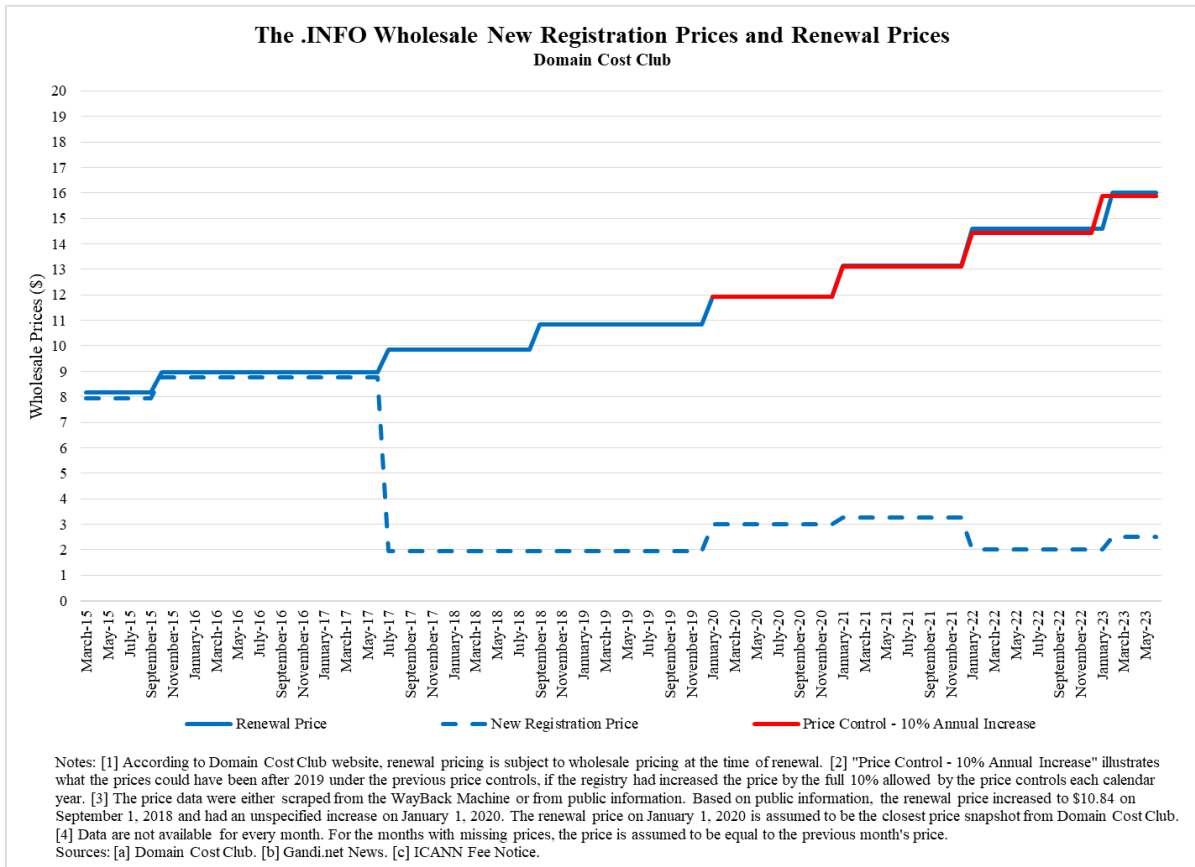


5.2. History of .info Registration Pricing

Figure 3 below shows the price history for .info. Essentially the same wholesale price was charged to registrars for new and renewal registrations on .info from the beginning of the period for which I have data until June 2017, at which point the .info pricing strategy changed, with a discounted price charged for new registrations.¹³

¹³ In Section 6.3 below, I further discuss the .info strategy of offering different prices for new registrations and renewals. The strategy is common among TLD registry operators.

Figure 3

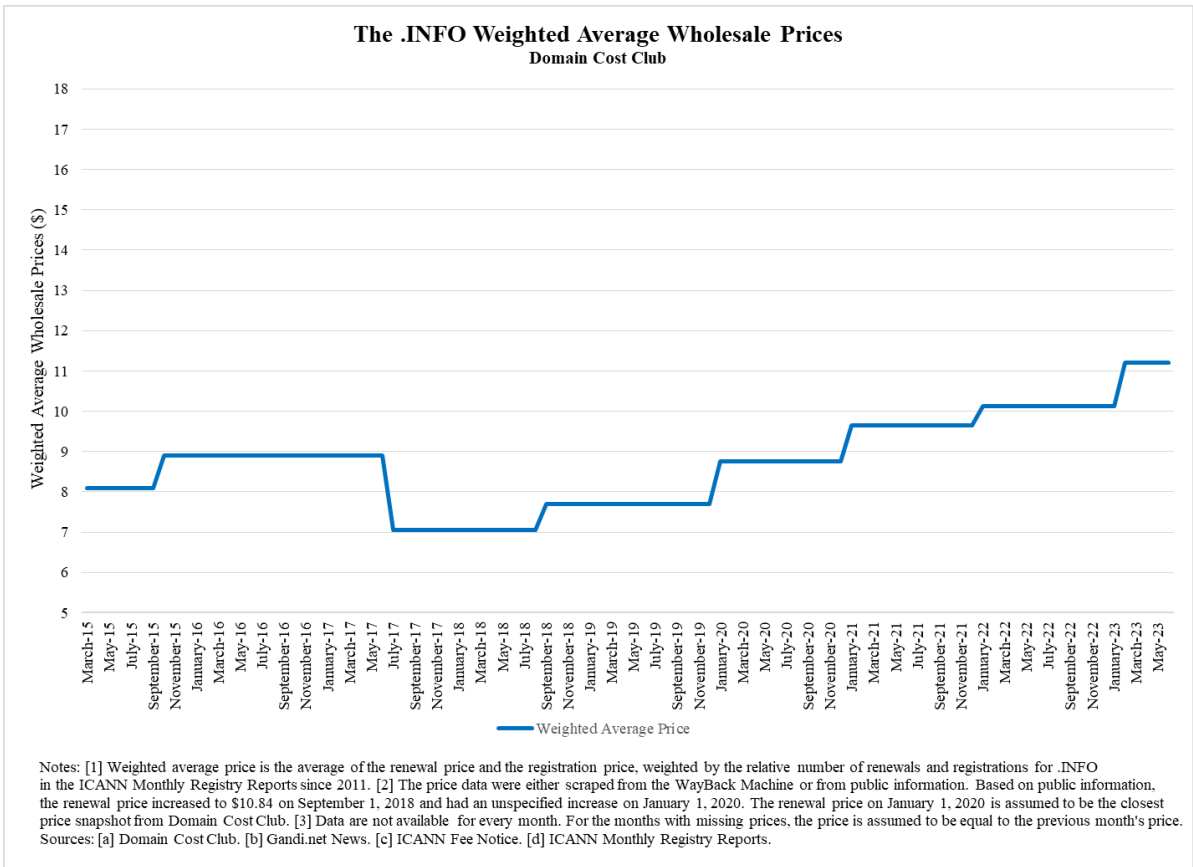


In Figure 3, I depict with a red line the maximum price that Identity Digital could have charged for renewals after June 2019 had the price control provision remained in place. The blue line representing the actual prices approximately coincides with the red line. The fact the renewal price for .info did not increase by more than the price control provision would have allowed, had it remained in place, means that market forces (rather than the price control provision) served to constrain the .info pricing, and .info did not have substantial and durable market power that the price control provision was constraining.

For the purposes of analyzing price trends and making comparisons with other TLDs, it is useful to calculate a weighted average of the new registration and renewal .info prices.¹⁴ The resulting weighted average price for .info is presented in Figure 4.

¹⁴ As described above for .org, I use the percentage of registrations that are new and renewal registrations, respectively, as the weights for the new and renewal .info prices.

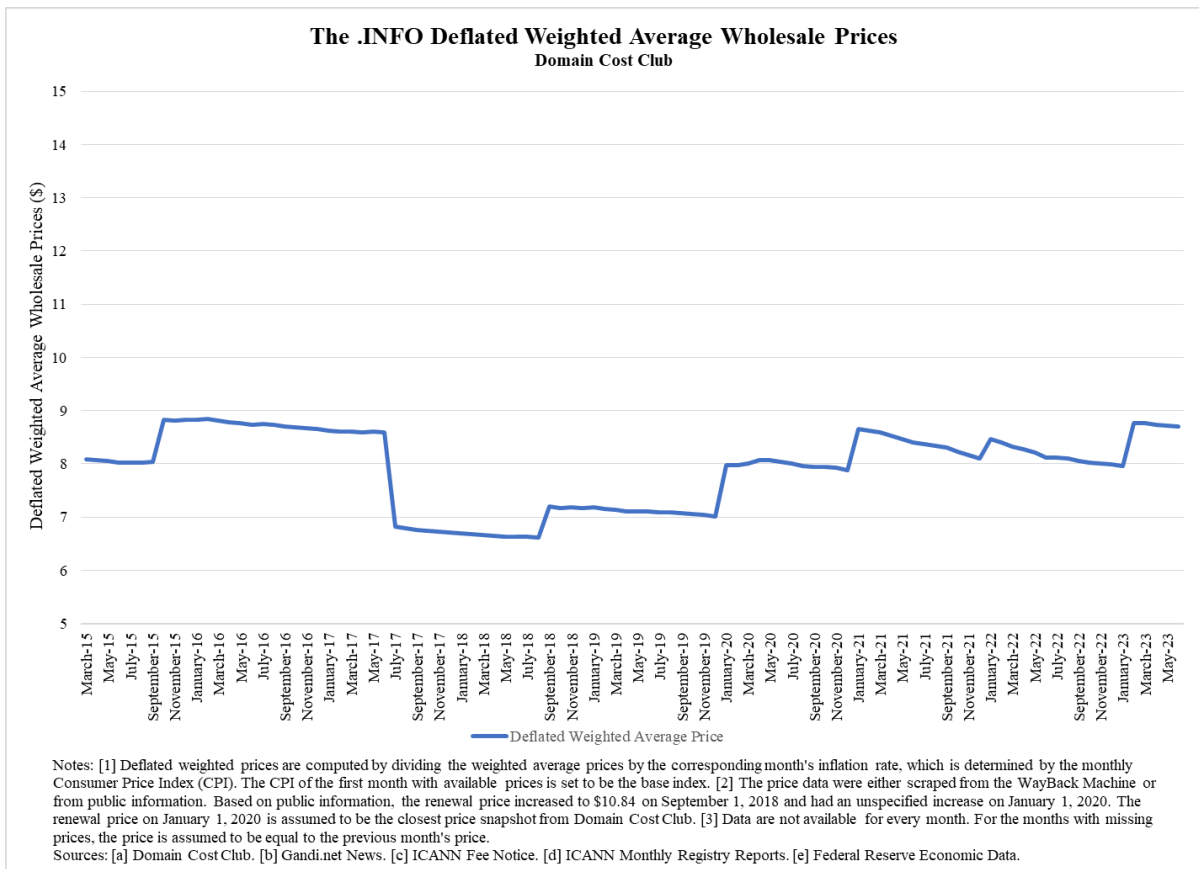
Figure 4



When the new registration pricing strategy for .info was first adopted in mid-2017, the .info weighted average price declined because the price for new subscriptions was substantially discounted from the price for renewals. Thereafter, while increasing steadily, until the latter part of 2020 the .info weighted average price remained below its level prior to the change in .info pricing strategy.

Another way to assess the economic reasonableness of the .info price trend is to ask how the change in the .info weighted average price compared to inflation. Figure 5 below presents the .info weighted average price after deflating by the CPI. In June 2023, the deflated weighted average .info price was approximately the same as it was in 2016 prior to the change in pricing strategy. In other words, the .info price change between 2016 and June 2023 was largely in line with inflation over the long term.

Figure 5



In conclusion, historical experience demonstrates that market and other forces have constrained the wholesale prices of .info and .org charged to registrars, even in the absence of the price control provision. These prices have not increased by amounts greater than the price control provision would have allowed after that provision was lifted, which is what one would have expected if .org and .info had substantial and durable market power that was being constrained by the provision. Indeed, the prices have declined in real terms (.org) or approximately been consistent with increases in general price levels (.info).

6. Competitive Market Forces and Other Factors Constrain the Prices of .org and .info

As noted above, the exception to the disfavoring of price controls in a market economy is when the firm in question has substantial and durable market power. However, .org and .info do not have such substantial and durable market power. Rather, they face competitive forces that constrain their pricing.

6.1. .org Faces Competition from Other TLDs

6.1.1. Registrants Have Many Alternatives to .org, and Increasingly Have Chosen Those Alternatives

A firm has no market power when customers have good substitutes, or alternatives, to which they could turn if the firm attempted to increase its price above the competitive level. In the case of .org, alternative TLDs exist to which registrants could turn if the .org price were to increase above the competitive level. Indeed, as .org's registry operator PIR recognized in a public statement, ".ORG is constrained by the competitive market; we cannot dramatically increase prices for .ORG, as we recognize and understand that both our .ORG end users and our .ORG registrars would turn away from .ORG."¹⁵

Currently, a registrant has over 1500 TLDs (including both gTLDs and ccTLDs) from which it can choose. For only approximately 3% of registrations does the registrant choose .org, see Table 1A below.¹⁶ Thus, the vast majority of registrants choose a TLD other than .org. A firm cannot have market power when its customers have many substitute products to which they could turn. Indeed, antitrust scholars and practitioners recognize that a firm with a share below 50% is unlikely to have substantial market power.¹⁷

Alternatives to .org include TLDs such as .com, .net, and .info. .com, in particular, has the largest share of registrations among all TLDs (see Table 1A) and, as noted above, is subject to a price control provision that it negotiated with the US Department of Commerce. That .com is a viable substitute for .org is demonstrated by the fact that one firm may choose .org while a competing firm chooses .com. For example, while online learning platforms Coursera and EdX use the .org TLD, other online learning platforms like Skillshare and Udemy use the .com TLD.¹⁸ Given that competing firms make different choices of TLD, those different choices must themselves be substitutes for those firms.

¹⁵ PIR, "An Open Letter to the .ORG Community," May 1, 2019, available at <https://thenew.org/an-open-letter-to-the-org-community/>.

¹⁶ Table 1A is based on data obtained from DomainTools. DomainTools provides domain counts for both gTLDs and ccTLDs. Another source for registration counts is provided by ICANN monthly registration reports. However, these reports include only gTLDs, not ccTLDs, and thus overstate shares of gTLDs. .org's share of only gTLD registrations calculated based on the ICANN monthly registration reports is 5%, see Table 1B. Total registrations include new registrations, renewals, and continuing registrations. Shares of new and renewal registrations for gTLDs, based on the ICANN monthly registration reports, are broken out separately in Table 1B.

¹⁷ See Federal Trade Commission, "Monopolization Defined," available at <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> ("Courts look at the firm's market share, but typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50 percent of the sales of a particular product or service within a certain geographic area. Some courts have required much higher percentages.").

¹⁸ See [coursera.org](https://www.coursera.org), [edx.org](https://www.edx.org), [skillshare.com](https://www.skillshare.com), and [udemy.com](https://www.udemy.com), respectively.

Table 1A

TLD Shares (Including Both gTLDs and ccTLDs)*DomainTools - 2016, 2023*

| February 2016 Snapshot | | | December 2023 Snapshot | | |
|------------------------|------|---------------|------------------------|------|---------------|
| Rank | TLD | Share | Rank | TLD | Share |
| 1 | com | 42.0% | 1 | com | 45.9% |
| 2 | tk | 8.9% | 2 | de | 4.8% |
| 3 | net | 5.3% | 3 | net | 3.8% |
| 4 | de | 4.8% | 4 | org | 3.1% |
| 5 | org | 3.7% | 5 | uk | 2.9% |
| 6 | uk | 3.1% | 6 | cn | 2.3% |
| 7 | cn | 2.9% | 7 | nl | 1.7% |
| 8 | info | 1.8% | 8 | ru | 1.5% |
| 9 | ru | 1.6% | 9 | br | 1.3% |
| 10 | nl | 1.5% | 10 | tk | 1.2% |
| 11 | eu | 1.3% | 11 | fr | 1.2% |
| 12 | br | 1.0% | 12 | au | 1.2% |
| 13 | fr | 1.0% | 13 | info | 1.1% |
| 14 | au | 0.9% | 14 | eu | 1.1% |
| 15 | it | 0.8% | 15 | co | 1.0% |
| all others | | 19.3% | all others | | 26.0% |
| Total | | 100.0% | Total | | 100.0% |

Notes:

- [1] Shares are calculated based on DomainTools' estimated count of all Domains for each TLD. See <https://research.domaintools.com/statistics/tld-counts/>.
- [2] December 2023 data was gathered on December 8, 2023. February 2016 data was gathered with the Wayback Machine using the February 12, 2016 snapshot.

Source:

- [a] DomainTools.

Table 1B

| 2023 TLD Shares (ccTLDs Not Included) | | | | | | | | |
|--|-------------------|---------------|-------------------------|-------------------|---------------|------------------------------------|-------------------|---------------|
| ICANN Registry Reports - Total Domains, Added Domains, and Added or Renewed Domains by TLD | | | | | | | | |
| Sum of Monthly Total Domains | | | Sum of Monthly Net Adds | | | Sum of Monthly Net Adds & Renewals | | |
| Rank | TLD | Share | Rank | TLD | Share | Rank | TLD | Share |
| 1 | com | 72.6% | 1 | com | 60.1% | 1 | com | 70.7% |
| 2 | net | 5.9% | 2 | xyz | 4.0% | 2 | net | 5.9% |
| 3 | org | 5.0% | 3 | net | 3.6% | 3 | org | 5.3% |
| 4 | xyz | 1.8% | 4 | online | 3.2% | 4 | info | 1.9% |
| 5 | info | 1.8% | 5 | top | 3.1% | 5 | xyz | 1.7% |
| 6 | online | 1.1% | 6 | org | 3.0% | 6 | online | 1.4% |
| 7 | top | 1.0% | 7 | shop | 2.2% | 7 | top | 1.2% |
| 8 | shop | 0.8% | 8 | site | 1.8% | 8 | shop | 0.9% |
| 9 | biz | 0.6% | 9 | store | 1.7% | 9 | site | 0.7% |
| 10 | site | 0.6% | 10 | info | 1.7% | 10 | store | 0.7% |
| 11 | icu | 0.3% | 11 | biz | 0.3% | 11 | biz | 0.6% |
| 12 | link | 0.1% | 12 | icu | 0.3% | 12 | link | 0.1% |
| 13 | bio | 0.0% | 13 | link | 0.2% | 13 | icu | 0.1% |
| 14 | google | 0.0% | 14 | bio | 0.1% | 14 | bio | 0.0% |
| -- | -- | -- | 15 | google | 0.0% | 15 | google | 0.0% |
| | all others | 8.5% | | all others | 14.7% | | all others | 8.9% |
| | Total | 100.0% | | Total | 100.0% | | Total | 100.0% |

Notes:

[1] Values are sums for all contract lengths and available months in 2023. ICANN Monthly Registry Report data is available January through June in 2023.

[2] Selected TLDs are those in the top 10 for the indicated value, or those identified as "similarly ranked" to .INFO or .ORG using the DomCop data, ICANN data, and Namecheap's listed alternatives. See Appendix A.

Sources:

[a] ICANN Monthly Registry Reports.

[b] Appendix A.

While over time .org has acquired a semantic meaning associated with non-commercial organizations, some .org registrants are in fact commercial entities and some non-commercial organizations choose to use other TLDs. For example, for-profit companies Craigslist, Coursera, and EdX use the .org TLD¹⁹, while non-profit organizations National Christian Foundation, The Merck Patient Assistance Program, and Navigate Affordable Housing use the .com TLD.²⁰ To these entities, despite any non-commercial semantic meaning attached to .org, other TLDs are viable substitutes. Given that PIR charges the same wholesale price for any registration, the existence of "marginal" registrants willing to switch to other TLDs limits PIR's ability to extract a higher price from "inframarginal" registrants who highly value the .org semantic meaning.

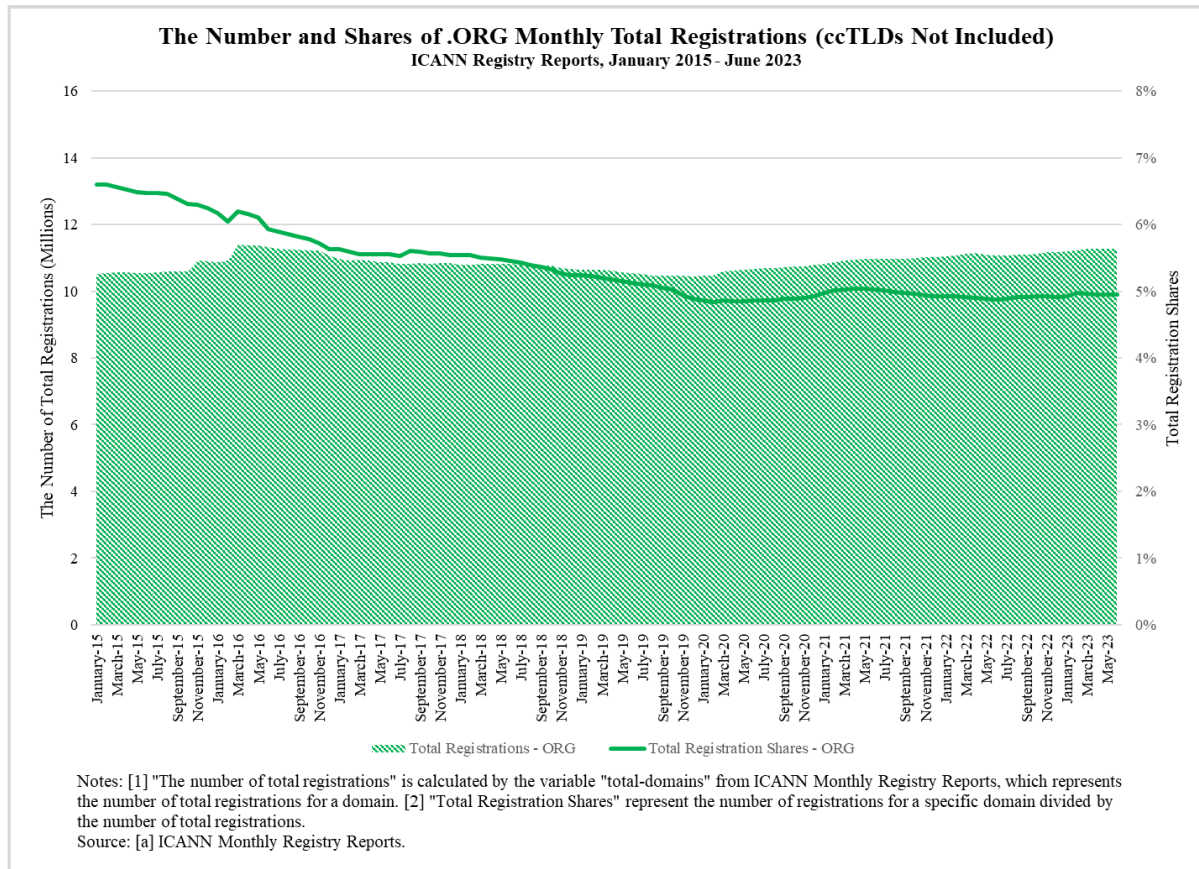
The number of total registrations on .org declined for a time as new TLDs were introduced and gained share, before increasing starting in 2020, see Figure 6. Because total registrations were growing over this same period, .org's share of total gTLD registrations (based on the ICANN monthly registration reports) declined until 2020 and then stabilized, see Figure 6. Similarly, .org's share of total domains decreased between 2016 and 2023, see

¹⁹ See craigslist.org, coursera.org, and edx.org, respectively.

²⁰ See ncfiving.com, merckhelps.com, and navigatehousing.com, respectively.

Table 1A. The long-term erosion in .org registrations and share of registrations over the 2015-2023 period demonstrates the increase in competition from other TLDs. The recent stabilization in .org's share may well be due to PIR's decision to hold the .org price constant while the prices of many other TLDs have increased (see, e.g., Figure 7 below), making .org relatively more attractive than other TLDs.

Figure 6



6.1.2. PIR is a Not-For-Profit Entity

PIR is a not-for-profit entity. In contrast to a for-profit entity, PIR considers its goals to be the public interest, rather than profit maximization. In particular, PIR explained that "[w]e are different. We are mission based and not every decision is a financial one; we are not just driven by the 'bottom line.'"²¹ PIR views its role as one of "stewardship" and takes into consideration effects of its policies on the ".ORG Community."²² In its 2022 Annual Report, PIR stated that because it is "entrusted by millions to operate in the public interest," it

²¹ PIR, "An Open Letter to the .ORG Community," May 1, 2019, available at <https://thenew.org/an-open-letter-to-the-org-community/>.

²² Id.

“thoughtfully consider[s] the impact of [its] actions” and that it will not compromise its mission “for the sake of expediency, popularity, or profits.”²³

In May 2019, PIR publicly stated that “[r]est assured, we will not raise prices unreasonably. In fact, we currently have no specific plans for any price increases for .ORG.” In fact, PIR has not increased price since then, despite the substantial inflation that has occurred.

Given its public statements and actions, PIR’s status as a not-for-profit entity mitigates concerns that it would exercise any market power it might have to increase prices excessively.

6.1.3. The Price History for .org Supports the Conclusion That .org Does Not Have Substantial and Durable Market Power

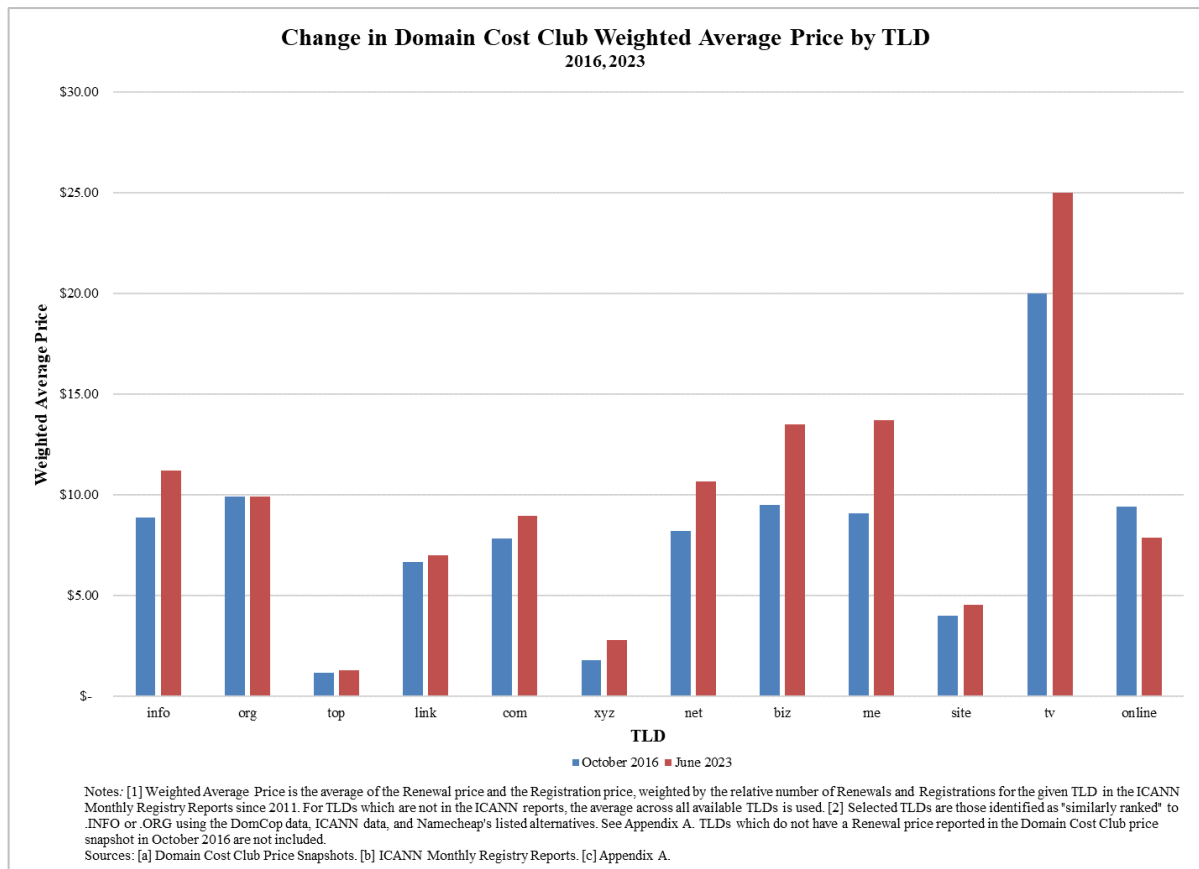
As noted above, the registration price for .org did not increase after June 2019 despite the lifting of the price control provision, which is inconsistent with what one would expect if .org had substantial market power and sought to exercise it. In fact, as also noted above, the .org price has been constant in recent years and thus has not even kept pace with inflation.

It is also useful to compare the .org price to that of other TLDs. In Figure 7, I display the October 2016 and June 2023 prices for a number of TLDs.²⁴ It is apparent that between 2016 and 2023, the .org price declined relative to many other TLDs for which either there is no claim of market power or, in the case of .com, has been continuously subject to a price control provision. Moreover, the absolute level of the .org price in 2023 is well within the range of these other TLDs.

²³ PIR, “Annual Report,” 2002, p. 4.

²⁴ The TLDs in Figure 7 were chosen using the methodology described in Appendix A. The October 2016 date was chosen because among the dates for which Domain Cost Club data are available, it is closest in time to, but prior to, the date when the .info pricing strategy changed.

Figure 7



Overall, the price history of .org supports the conclusion that .org has no substantial and durable market power.

6.1.4. The Price Lock Provision in the .org Registry Agreement Protects Against Any Exercise of Market Power by PIR

Even if one were concerned about .org having substantial and durable market power, there is another provision in the .org registry agreement that serves to protect from any exercise of that market power. Specifically, the registry agreement allows registrars, on behalf of their registrant customers, to register or renew .org domain names for up to a 10-year total registration term, at the then-current price (the "price lock" provision). Although registrars are not obligated to offer 10-year registrations, registrants can transfer their domain names to any accredited registrar that does. Thus, .org registrants can protect themselves against any excessive .org price increases charged by registrars by locking in the existing registration price. This further mitigates any concerns about potential .org market power.

6.2. .info Faces Competition From Other TLDs

.info does not possess substantial and durable market power because, as with .org, registrants have alternative TLDs to which they could turn if the .info registration price were set above the competitive level.

6.2.1. Registrants Have Many Alternatives to .info, and Increasingly Have Chosen Those Alternatives

No prospective registrant is limited to choosing .info as the TLD, but instead has over 1500 TLDs from which it can choose. The large majority of registrants choose TLDs other than .info. Currently, .info's share of domains is about 1.1% (see Table 1A above). A number of alternative TLDs, including .com, .net, .org, and .uk, have greater shares of total registrations than .info.

While some TLDs, such as .shop, have “semantic” meanings or interpretations that imply the nature of entities with SLDs on that TLD, .info does not have a single clear semantic meaning. Consistent with the lack of a single clear semantic meaning, a variety of different types of SLDs use the .info TLD. For example, new.mta.info is the website for New York's MTA (Metropolitan Transportation Authority) where riders can find schedules and plan their trips; javascript.info provides tutorials for learning JavaScript; and worlddata.info provides statistics on the geographies, populations, climates, and economies of countries around the world. Moreover, reviewing the advice that registrars such as GoDaddy and Namecheap provide to prospective registrants regarding TLD choice²⁵, there is no indication that the industry views .info as providing any substantial semantic or other type of benefit over other TLDs that registrants could choose.

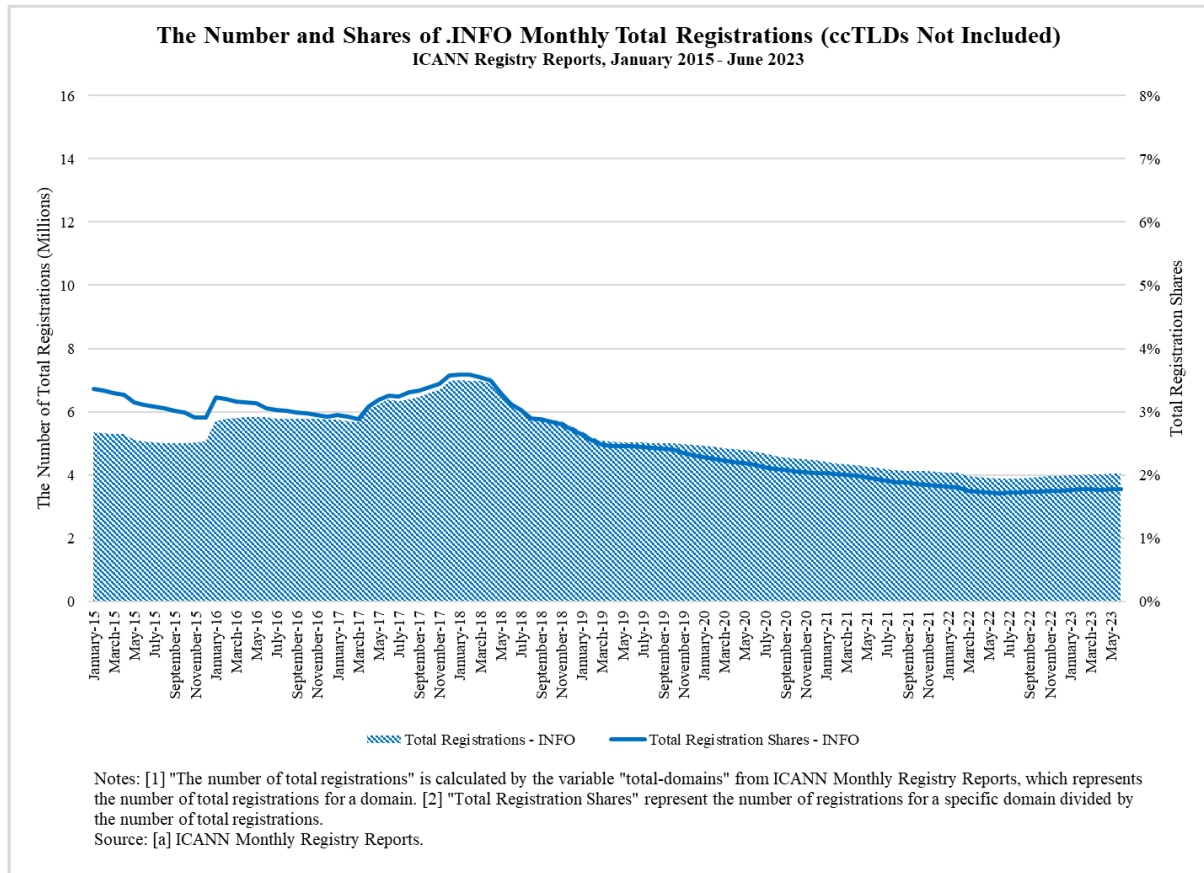
TLDs such as .com, .org, .biz, .net, .online, .site, and .xyz, as well as ccTLDs such as .uk and .io, are viable alternatives to .info for many registrants.²⁶ As a further indication of the alternatives to the .info TLD, it is useful to look at similar organizations where one uses the .info TLD and the another uses an alternative. Utilizing some examples from above, other transit websites for Minneapolis and the San Francisco Bay Area are metrotransit.org and caltrain.com, respectively. Additionally, javascripttutorial.net and learnjavascript.online provide tutorials for learning JavaScript. As a separate example, humanitarianresponse.info is the archived website for the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), which has since been switched to their current website of response.reliefweb.int.

Not only does .info have a relatively low share of registrations currently, but also its share of total registrations, its share of gTLD registrations, and even its absolute number of registrations—has been declining over time as more TLDs have been introduced, see Table 1A and Figure 8.

²⁵ Namecheap's website states, “Although the .info domain extension was originally intended for informative websites, its use soon broadened to include many other uses. It can be used freely as an alternative to .com and the remaining registered gTLDs.” Namecheap's website also lists “.info domain alternative[s]” such as .com, .net, and .io. See “Why choose a .INFO domain?,” last accessed November 10, 2023, available at <https://www.namecheap.com/domains/registration/gtld/info/>. When searching GoDaddy's website for a particular .info SLD, if the desired SLD is taken, GoDaddy suggests alternative domains such as .online and .site, depending on the search term. See GoDaddy's search feature available at godaddy.com.

²⁶ It is not necessary for a lack of market power that every registrant have a viable alternative, as long as the registry operator cannot tailor the prices it offers to different registrants (which is the case here aside from differentiating between new and renewal registrations). The registry operator will be constrained by the marginal registrants—those registrants who would switch to an alternative in the event of a price increase.

Figure 8



The fact that .info has experienced a decline in its share and number of registrations is consistent with increased competition from other TLDs.

6.2.2. .info's Price History Supports the Conclusion That .info Does Not Have Substantial and Durable Market Power

The .info pricing history is also consistent with .info facing competition from other TLDs. As noted above, the .info weighted average price increases were in line with inflation over the long-term and were of smaller magnitude after the price control provision was lifted in June 2019 than one would have expected if .info had substantial and durable market power that the provision had constrained from being exercised.

In addition, the change in the .info weighted average price between October 2016 (prior to the change in .info pricing strategy) and June 2023 was in line with the price changes of other TLDs for which either there is no claim of market power or, in the case of .com, is subject to a price control provision, see Figure 7 above. Moreover, the absolute level of the .info weighted average price in June 2023 is within the range of these other TLDs.

These facts further support the conclusion that .info does not have substantial and durable market power, but rather that .info faces competition from other TLDs.

6.2.3. The Price Lock Provision in the .info Registry Agreement Protects Against Any Exercise of Market Power by .info

The price lock provision is an option available in .info as well. Therefore, if .info were to seek an excessive price increase, .info registrants could avoid any increase charged by registrars by opting to lock their prices at the pre-existing level. Again, this mitigates any concern about .info market power.

6.3. Concerns That Existing Registrants Would Be Targeted for Opportunistic Price Increases Are Unwarranted

A potential concern is that, while new registrants have many choices of TLDs, a renewing registrant is “locked in” to the TLD for which it already has a SLD due to costs of switching TLDs and thus is susceptible to opportunistic price increases by the registry operator and passed through by the registrar. That is, the registry operator could increase the renewal price without losing existing registrants because switching costs would prevent registrants from moving to another TLD to avoid the price increase. For a number of reasons, this potential concern is unwarranted.

As an initial matter, as noted above, the prices for a renewal and a new registration have been the same on .org since removal of the price control provision, in June 2019. Thus, .org has not attempted to engage in any opportunistic pricing to date. Moreover, there is no indication that .org has any plans to change its pricing structure in the future.²⁷

On .info, the price for a new registration is less than the price for a renewal. However, this pricing strategy does not appear to be an opportunistic price increase targeted at renewing registrations. Rather, it represents an attempt to generate additional registrations by offering a discounted “initial price.” Offering low introductory pricing is, of course, a common strategy in many industries. It is also common among TLDs. For example, .xyz, .team, and .site are just a few of the TLDs that use this strategy. The .info new registration price (currently \$2.50) is (1) lower than the registration prices of other TLDs that charge the same price for new registrations and renewals (e.g., .org is \$9.93 and .com is \$8.97) and (2) comparable to the prices for new registrations at other TLDs that charge different prices for new registrations and renewals (e.g., .xyz’s current new registration price is \$1.99 (the renewal price is \$9.15), .team’s new registration price is \$2.50 (the renewal price is \$23), and .site’s new registration price is \$2.59 (the renewal price is \$20).

In any event, concerns about reputation would deter any such opportunism or attempt to exploit switching costs. If .org or .info attempted to exploit registrant switching costs by imposing an excessive increase in the wholesale renewal price, they would gain a reputation for opportunistic behavior. This would cause new registrants to choose other TLDs that did not engage in opportunism. Thus, in considering whether to increase the renewal price excessively, .org and .info would have to consider not only existing renewals, but also the adverse effects such an action would have on the number of future new registrations (and the subsequent renewals associated with those future new registrations). Thus, even if some existing registrants would be deterred from changing TLDs due to switching costs, they are protected by new registrants who are free to choose any TLD and would be wary of TLDs with reputations for opportunism.

Moreover, the price lock provisions in the .info and .org registry agreements allow a registrant to enjoy a renewal for multiple years at existing prices. This provides an existing registrant with a further shield against opportunism on the part of .org or .info. If .org or .info were to attempt to increase the renewal prices, not only would they likely lose substantial amounts of new registrants to other TLDs from the resulting reputation loss, but they would also cause

²⁷ Moreover, as noted above, PIR has publicly stated that it will not seek excessive price increases.

existing renewing registrants to invoke the option to freeze the renewal price. Thus, an attempt by .org or .info to exploit switching costs to extract higher renewal prices from existing registrants would be a lose-lose proposition.

Finally, some existing .org and .info registrants do not in fact face significant costs to switch to another TLD and thus are not subject to opportunism in the first place.²⁸ Which existing registrants would have significant switching costs and which would not is not easily discernable and thus .org and .info would have difficulty identifying existing registrants that they could target for price increases.²⁹ Targeting is further hampered because .org and .info do not transact directly with registrants; rather they charge wholesale prices to third party registrars who then transact with registrants. Given their inability to impose targeted price increases, .org and .info can only increase the renewal price across the board. But, in that case, they would lose those existing registrants without significant switching costs, making the price increase a risky strategy even before considering the reputation effects discussed above.

In sum, concerns that .org or .info might attempt to exploit switching costs of existing registrants to increase renewal prices are not warranted.

6.4. Concerns That Registrars Would Be Injured By the Absence of the Price Control Provision Are Unwarranted

As noted above, a registry operator sets the wholesale registration price, while a registrar sets the downstream retail registration price paid by a registrant. The competitive and other constraints described above that protect registrants from anticompetitive increases in the wholesale prices of .org and .info similarly protect registrars.

In addition, the impact on a registrar of any wholesale price increase for a given TLD is likely to be minimal. First, a registrar has the incentive to pass on the wholesale price increase by increasing the retail price that it charges registrants for that TLD. By doing so, the registrar will maintain the spread that it earns over the wholesale price for each registration. Given that the registrar industry has numerous participants, is highly competitive, faces no significant impediments to changing retail prices, and all registrars would be subject to the same wholesale price increase, an economist would expect a wholesale price increase to be passed on to the retail price at a rate near 100%.³⁰

Moreover, the registrar is unlikely to lose many registrants as a result of passing on a wholesale price increase for a given TLD. Given that all registrars (that partner with the registry operator of the TLD) face the same wholesale price increase for that TLD and have a similar incentive to pass it on, registrants would not be able to avoid a retail price increase by switching registrars. They could avoid the retail price increase by switching TLDs (or, as noted above, exercising the option to lock in pricing at current levels for a 10 year period); but, as long as their existing registrar had a partnership with the new TLD, the registrar could retain the registrant's business on the new TLD.

²⁸ See, e.g., RockContent, "Top-level Domain: What it is and How to choose one," December 12, 2021, available at <https://rockcontent.com/blog/top-level-domain> ("...yes, you can change your website's top-level domain if you're running WordPress. It's also reasonably painless.")

²⁹ See J. Hausman, G. Leonard, and C. Velluro, "Market Definition Under Price Discrimination," *Antitrust Law Journal*, 1996 for a discussion of limits on a firm's ability to practice "price discrimination."

³⁰ Consistent with this expectation, in the arbitration between Namecheap and ICANN, ICANN's expert economist, Dr. Dennis Carlton, found pass on rates of near 100%. See Expert Report of Dennis W. Carlton, Ph.D., January 14, 2022, pp. 11-15; Reply Report of Dennis W. Carlton, Ph.D., March 14, 2022, pp. 4-28.

7. There Exists Little Reason for Concern That Competitive Conditions Will Change in the Future

Another potential concern is that, while the price control provision would have been superfluous for .org and .info in recent times, it might become relevant in the future. In evaluating this argument, it is useful to consider the factors that might cause the registration prices of .org and .info to increase in the future and whether the price control provision would be an economically appropriate response to such factors.

The first reason why the price of a product might increase is if the product's supplier faces an increase in the product's marginal cost. In such a case, the market's use of prices as signals and incentives to achieve economic efficiency would argue against using price controls. If the marginal cost of registration were to increase, the economically efficient outcome, entirely consistent with competition, is for a switch of buyer resources from registration to some other use. An increase in the price of registration provides buyers with the incentive to make this switch. Similarly, if the marginal cost of registration were to increase, it is economically efficient for registries to seek alternative lower cost means of "production." Again, an increase in the registration price provides incentives to the registry to seek such alternatives. The price control provision (which places a cap on price increases regardless of the reason for those price increases) would interfere with the efficient market responses to a marginal cost increase.

A second reason that the price of a product might increase is if the supplier increases the quality of the product. Again, use of price controls to cap price increases in this context generally will have economically adverse consequences. As noted above, prices serve as signals and incentives. A supplier will invest in product improvement only if the (expected) return on the investment—in terms of higher price or greater sales—exceeds the (expected) cost of investment. If there is a price control provision that would limit the amount the supplier could increase its price after a quality increase, that could cause the supplier to forego the investment opportunity. Because a higher quality product benefits users, that outcome will typically be economically inefficient. Innovation—even by a monopolist—tends to benefit both customers and the supplier. Price controls are counter-productive if they prevent price increases at the expense of quality improvements. This is why price controls that are superfluous are not harmless.

Prevention of malicious activities is one area where some registry operators have sought to improve product quality. Internet watchdog The Spamhaus Project provides rankings for the "TLDs with the worst reputations for spam operations" by tracking which domains are registered to professional spammers and malware operators, indicating there is differentiation among TLDs in this area.³¹ The Spamhaus Project also notes that even the "worst" TLDs "could, if they tried, 'keep clean.'" However, registry operators differ in resource constraints, infrastructure quality, effort, and technical knowhow, and thus differ in the extent to which they have been able to prevent malicious activities.³²

³¹ Spamhaus, "Understanding top-level domain (TLD) abuse helps illuminate and predict domain threat trends," March 23, 2023, available at <https://www.spamhaus.com/resource-center/understanding-top-level-domain-tld-abuse-helps-illuminate-and-predict-domain-threat-trends/>.

³² *Id.*

Third, a product's price may increase if there is a lessening of the competition that it faces, i.e., an increase in the supplier's market power.³³ However, there is no indication that .info and .org will face less competition in the future. In fact, the trend over an extended period of time is that .org and .info have faced increasing competition as new gTLDs and ccTLDs have been introduced and gained share of registrations. There is no reason to think that this trend will reverse in a way that would result in .org and .info gaining substantial and durable market power. Even if some current TLDs decline in competitive significance, ICANN can always allow additional new TLDs to enter, and in fact I understand that ICANN is in the process of preparing for another round of gTLD expansion. Moreover, there is little question that the strong competition from .com will continue to exist.

8. Conclusion

Because they interfere with the market mechanism that otherwise promotes economic efficiency, price controls are disfavored in market economies except in narrow circumstances where a firm has substantial market power with little hope that competition will arise in the foreseeable future. That is not the case for .info and .org.

In the four years since June 2019 without the price control provision in place, the registration prices of .info and .org have not increased by more than the price control provision would have allowed, as would have been expected if .org and .info had substantial market power. Rather, the historical experience without the price control provision demonstrates that other factors, such as market competition and PIR's not-for-profit status, have served to constrain the prices of .info and .org.

.info and .org have always faced competition from the largest gTLD, .com, and they have seen an increase in competition from other TLDs that have been introduced over time. Both .info and .org have a small share of registrations, and that share has declined over time as the number of alternative TLDs has grown.

There is little reason to believe this situation will change in the future as there is no sign that competition will dissipate, and I understand that ICANN is in the process of preparing for another round of gTLD expansion.³⁴ In any event, the ten-year price lock option protects against any excessive price increases on .org or .info.

The foregoing factors protect registrars as well as registrants from excessive wholesale price increases. However, in addition registrars have the incentive and ability to pass on wholesale price increases to retail prices without losing many customers. This provides further protection to registrars from any adverse impact of excessive wholesale price increases.

³³ These are the most important, but there can be other reasons that prices change. However, these reasons for price increases also would not warrant price controls. For example, when a firm faces uncertainty about demand, it may change price (or its pricing strategy) after obtaining new information about demand. This reason for changing prices is also entirely consistent with economic efficiency.

³⁴ ICANN, "The New Generic Top-Level Domains Program: Next Round," last accessed January 19, 2024, available at <https://newgtlds.icann.org/en/next-round>.

Appendix A

.INFO, .ORG, and Similarly Ranked Domains

| TLD | Reason for Inclusion |
|--------|---|
| au | Close in Rank to INFO (DomCop) |
| bio | Close in Rank to INFO and ORG (DomCop) |
| biz | Close in Rank to INFO and ORG (ICANN) |
| ca | Close in Rank to INFO (DomCop) |
| co | Close in Rank to INFO (DomCop) |
| com | Close in Rank to INFO and ORG (DomCop & ICANN), and a named alternative on Namecheap.com |
| cz | Close in Rank to INFO (DomCop) |
| de | Close in Rank to ORG (DomCop) |
| es | Close in Rank to INFO (DomCop) |
| fr | Close in Rank to ORG (DomCop) |
| google | Close in Rank to INFO (DomCop) |
| icu | Close in Rank to INFO and ORG (ICANN) |
| info | -- |
| io | Close in Rank to INFO (DomCop), and a named alternative on Namecheap.com |
| link | Close in Rank to INFO and ORG (DomCop) |
| me | Close in Rank to INFO (DomCop) |
| net | Close in Rank to INFO and ORG (DomCop & ICANN), and a named alternative on Namecheap.com |
| online | Close in Rank to INFO and ORG (ICANN) |
| org | -- |
| pl | Close in Rank to INFO (DomCop) |
| ru | Close in Rank to ORG (DomCop) |
| site | Close in Rank to INFO (ICANN) |
| top | Close in Rank to INFO and ORG (ICANN) |
| uk | Close in Rank to ORG (DomCop), and a named alternative on Namecheap.com |
| us | Close in Rank to INFO (DomCop) |
| to | Close in Rank to INFO (DomCop) |
| tv | Close in Rank to INFO (DomCop) |
| xyz | Close in Rank to INFO and ORG (DomCop & ICANN) |

Notes:

- [1] TLDs are selected based on the DomCop rankings by frequency of domain names in the top 5,000, the ICANN Registry Reports by average monthly total domains registered, and TLDs stated to be an "alternative" to .INFO on Namecheap's website.
- [2] When using the DomCop data, TLDs are ranked based on the number of domains in the top 5,000. DomCop relies on the Open PageRank initiative to rank websites (or associated domains) according to the number and quality of websites that provide a link to the website.

Sources:

- [a] DomCop Domain Data.
- [b] ICANN Monthly Registry Reports.
- [c] ICANN Registry Listing Dates.
- [d] IANA Root Zone Database.
- [e] "Register your .INFO domain," Namecheap, available at <https://www.namecheap.com/domains/registration/gtld/info/>, last accessed 11/9/2023.

Appendix A

.INFO and Similarly Ranked Domains TLDs Selected Based on Top Domain Traffic and Average Total Monthly Domains

| DomCop Top 5000 (Including ccTLDs) | | DomCop Top 5000 (Excluding ccTLDs) | | ICANN Registry Reports (Jan 2011 to June 2023) | | ICANN Registry Reports (June 2019 to June 2023) | |
|---------------------------------------|------------------|---------------------------------------|------------------|---|-------------------------|--|-------------------------|
| Rank | (Domains) | Rank | (Domains) | Rank | (Avg Monthly Domains) | Rank | (Avg Monthly Domains) |
| 12 | ca (33); to (33) | -- | -- | -- | -- | -- | -- |
| 14 | co (30) | 1 | com (2,999) | 1 | com (133,036,899) | 1 | com (158,150,288) |
| 15 | es (22); io (22) | 2 | org (472) | 2 | net (14,711,584) | 2 | net (13,658,599) |
| 17 | me (20) | 3 | net (128) | 3 | org (10,813,486) | 3 | org (10,886,763) |
| 18 | info (19) | 4 | info (19) | 4 | info (5,166,984) | 4 | info (4,354,417) |
| 19 | us (17) | 5 | link (12) | 5 | xyz (3,208,250) | 5 | xyz (3,730,893) |
| 20 | tv (16) | 6 | bio (7); xyz (7) | 6 | top (2,402,762) | 6 | icu (2,510,829) |
| 21 | au (15); cz (15) | 8 | google (5) | 7 | biz (2,058,268) | 7 | top (2,454,647) |
| 23 | pl (13) | -- | -- | 8 | icu (1,295,452) | 8 | online (1,937,822) |
| -- | -- | -- | -- | 9 | online (1,256,116) | 9 | site (1,519,961) |

Notes:

- [1] ccTLDs, are omitted from groups (except for DomCop Top 5000 - Including ccTLDs) prior to creating the ranking. US Government TLDs (.GOV, .MIL, and .INT), as well as .EDU are omitted from all rankings.
- [2] When using the DomCop data, TLDs are ranked based on the number of domains in the top 5,000. DomCop relies on the Open PageRank initiative to rank websites (or associated domains) according to the number and quality of websites that provide a link to the website.
- [3] When using the ICANN Registry Reports, TLDs which have no domains during or after June 2019 are omitted prior to creating the ranking. 'Average Monthly Domains' is the average of Total Domains for each month. Missing TLD-Months are treated as 0 if they fall between a TLD's first and last month of data, and are ignored if they fall outside a TLD's first and last month of data.

Sources:

- [a] DomCop Domain Data.
- [b] ICANN Monthly Registry Reports.
- [c] ICANN Registry Listing Dates.
- [d] IANA Root Zone Database.

Appendix A

.ORG and Similarly Ranked Domains TLDs Selected Based on Top Domain Traffic and Average Total Monthly Domains

| DomCop Top 5000 (Including ccTLDs) TLD(s) | | DomCop Top 5000 (Excluding ccTLDs) TLD(s) | | ICANN Registry Reports (Jan 2011 to June 2023) TLD(s) | | ICANN Registry Reports (June 2019 to June 2023) TLD(s) | |
|---|------------------|---|------------------|---|-------------------------|--|-------------------------|
| Rank | (Domains) | Rank | (Domains) | Rank | (Avg Monthly Domains) | Rank | (Avg Monthly Domains) |
| -- | -- | -- | -- | -- | -- | -- | -- |
| -- | -- | -- | -- | -- | -- | -- | -- |
| -- | -- | -- | -- | 1 | com (133,036,899) | 1 | com (158,150,288) |
| 1 | com (2,999) | 1 | com (2,999) | 2 | net (14,711,584) | 2 | net (13,658,599) |
| 2 | org (472) | 2 | org (472) | 3 | org (10,813,486) | 3 | org (10,886,763) |
| 3 | fr (175) | 3 | net (128) | 4 | info (5,166,984) | 4 | info (4,354,417) |
| 4 | net (128) | 4 | info (19) | 5 | xyz (3,208,250) | 5 | xyz (3,730,893) |
| 5 | de (104) | 5 | link (12) | 6 | top (2,402,762) | 6 | icu (2,510,829) |
| 6 | ru (68) | 6 | bio (7); xyz (7) | 7 | biz (2,058,268) | 7 | top (2,454,647) |
| 7 | uk (62) | -- | -- | 8 | icu (1,295,452) | 8 | online (1,937,822) |

Notes:

- [1] ccTLDs, are omitted from groups (except for DomCop Top 5000 - Including ccTLDs) prior to creating the ranking. US Government TLDs (.GOV, .MIL, and .INT), as well as .EDU are omitted from all rankings.
- [2] When using the DomCop data, TLDs are ranked based on the number of domains in the top 5,000. DomCop relies on the Open PageRank initiative to rank websites (or associated domains) according to the number and quality of websites that provide a link to the website.
- [3] When using the ICANN Registry Reports, TLDs which have no domains during or after June 2019 are omitted prior to creating the ranking. 'Average Monthly Domains' is the average of Total Domains for each month. Missing TLD-Months are treated as 0 if they fall between a TLD's first and last month of data, and are ignored if they fall outside a TLD's first and last month of data.

Sources:

- [a] DomCop Domain Data.
- [b] ICANN Monthly Registry Reports.
- [c] ICANN Registry Listing Dates.
- [d] IANA Root Zone Database.

Appendix B

Materials Considered

Reports, Briefs, and Testimony

Claimant and ICANN's Post-Hearing Briefs on the Merits, and other materials relating to ICANN IRP, available at <https://www.icann.org/resources/pages/irp-namecheap-v-icann-2020-03-03-en>.

Expert report by Dr. Gregor Langus and Prof. Dr. Frank Verboven, February 8, 2022.

Expert Report of Dennis W. Carlton, Ph.D., January 14, 2022 (including accompanying workpapers).

Expert report of Professor Dr. Frank Verboven and Dr. Gregor Langus, December 20, 2020.

Expert report of Professor Dr. Frank Verboven and Dr. Gregor Langus, November 25, 2021.

Reply Report of Dennis W. Carlton, Ph.D., March 14, 2022 (including accompanying workpapers).

Transcripts of Independent Review Hearing Proceedings, ICDR CASE NO. 01-20-0000-6787, March 31 - April 1, 2022 (including accompanying slides of Dr. Langus, Dr. Verboven, and Dr. Carlton).

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Appendix B

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Exhibit F

9 May 2024

(sent originally on 15 April 2024 with a different subject line that ICANN requested to be changed)

ICANN

Attn: Board, Ms. Amy Stathos, Mr. John Jeffrey
12025 Waterfront Drive, Suite 3000
Los Angeles, CA 90094-2536, USA

By email: independentreview@icann.org

Dear Members of the ICANN Board,
Dear Ms. Stathos and Mr. Jeffrey,

Re: Namecheap's comments to the economic expert opinion prepared by Gregory K. Leonard

We refer to the letter from the Chair of the BAMC to Namecheap, Inc. (Namecheap) of 5 March 2024, communicating an economic expert opinion, apparently prepared on 14 February 2024 by Gregory K. Leonard from Charles River Associates for ICANN (hereinafter the 'Leonard Opinion').

A first review of the Leonard Opinion shows that there are several reasons why ICANN should not rely on it in its decision-making, as the Leonard Opinion:

- does not comply with the IRP Panel's recommendation;
- lacks transparency;
- is biased and not analytical;
- does not use appropriate methodology to reach an informed decision;

- ignores important market developments;
- ignores likely reasons why the registry operators for .ORG and .INFO seem to have refrained temporarily from exercising their market power;
- downplays future risks;
- was made without a duty of care; and
- contrary to previous reports commissioned with Charles River Associates, is not sanctioned by Charles River Associates.

1. The Leonard Opinion fails to comply with the IRP Panel's recommendation

In ¶500 of its Declaration, the IRP Panel found that:

'the evidence that price controls should be retained is much stronger for .ORG than for .INFO, given that .ORG is an original gTLD with a much larger number of DUMs, and serves a special market focused on not-for-profit organizations. Thus, while the ICANN Board should consider what remedial measures to take as to both .ORG and .INFO, the measures for .ORG may be stronger and more extensive than for .INFO.'

In ¶501 of its Declaration, the IRP Panel recommended that:

'the Board consider whether to retain an expert consultant to conduct a study on issues raised by the Price Cap Decision, such as whether .ORG and .INFO have sufficient market power that price caps may be desirable. ICANN has already done considerable work on this subject, although that work does not include a formal study of the extent of market power of .ORG and .INFO. In particular, ICANN submitted reports and testimony from an expert economist and also obtained a draft opinion from the same expert before making the Price Cap Decision, although that opinion was provided to only two ICANN employees. The Panel's view is that those reports are not complete as they do not analyze a number of points that Namecheap made about .ORG's special market power.'

The Leonard Opinion is not a formal and detailed study of the extent of market power of .ORG and .INFO and fails to address a number of points that Namecheap made about .ORG's special market power. For instance, the following points that Namecheap made about .ORG's special market power remain unaddressed:

- .ORG and .COM are both part of the original gTLDs that predate ICANN, in relation to which their respective registries hold considerable market power that they may exercise;

- The same characteristics that justify regulation of .COM are present in .ORG; on top of that, .ORG has a specific meaning and value to non-profit registrants with no good alternative independently owned TLDs available to such registrants;
- The Leonard Opinion ignores the fact that many registrants view new gTLDs as complementary, rather than substitutable to legacy gTLDs; the opinion overplays the availability and value of substitutes;
- The Leonard Opinion ignores indications that PIR has been exercising market power in relation to .ORG prior to ICANN's decision to remove the price controls and just like the draft opinion by Carlton, the Leonard Opinion fails to examine whether price caps should have been maintained, tightened, or relaxed;
- Just like the draft opinion by Carlton, the Leonard Opinion does not contain a proper cost-benefit analysis regarding the decision to remove price caps;
- Just like the draft opinion by Carlton, the Leonard Opinion contains not a single piece of evidence that the absence of price caps creates benefits, while recognizing the potential for the registries of .ORG and .INFO to exploit registrant switching costs by imposing an excessive increase in the wholesale renewal price;¹
- While not contesting that .ORG may hold more market power than .COM, ICANN's expert agreed that .COM should remain regulated;
- .ORG's non-profit status does not prevent PIR from exercising its market power in relation to .ORG ;
- The Leonard Opinion ignores the risk that PIR could increase the prices for .ORG steeply in the future;
- The Leonard Opinion ignores Namecheap's criticism that the long-term registration and renewal option offers no adequate protection and fails to appropriately consider that uncontested evidence showing that only a tiny fraction of registrations is made for long periods (around 0.5% for 5-year registrations and renewals and 0.17% c.q. 0.13% for 10-year registrations c.q. 9-year renewals) despite upward price trends.²

In addition, the IRP Panel ruled that ICANN failed to address comments/concerns regarding:

- The legacy gTLDs first mover advantage (IRP Declaration, ¶¶291-302);
- .ORG's market power and the negative impact of removing price controls (IRP Declaration, ¶¶303-318);
- Switching costs (IRP Declaration, ¶¶319-322);
- The inadequacy of the base registry agreement's price protections as a substitute for price caps (IRP Declaration, ¶¶323-326);
- The need for appropriate market analysis (¶¶327-338).

¹ While the Leonard Opinion opines that concerns that existing registrants would be targeted for opportunistic price increases are unwarranted, his opinion is based entirely on speculation for which Leonard sought support in an out-of-context quote from an anonymous blogpost.

² Langus Report, para. 161, footnote 141.

If ICANN were to rely on the Leonard Opinion, ICANN would continue ignoring the arguments and concerns regarding (i) the legacy gTLDs first mover advantage, (ii) the inadequacy of the base registry agreement's price protections as a substitute for price caps, and (iii) the need for appropriate market analysis. The Leonard Opinion does not address these issues. While the Leonard Opinion discusses .ORG's market power and switching costs, this discussion does not present a substitute for an appropriate analysis. Without any explanation, the Leonard Opinion contradicts testimony that was provided by ICANN's own expert and fact witnesses, who acknowledged the existence of market power and switching costs. The Leonard Opinion ignores this evidence and replaces it by a superficial and non-transparent opinion, which, on top of that, is based on a flawed methodology and exhibits lack of care (*infra*).

Hence, the Leonard Opinion fails to properly examine the issues raised by the Price Cap Decision, such as whether the registries of .ORG and .INFO hold a sufficient market power that would make price caps desirable.

2. The Leonard Opinion lacks transparency

In contrast with previous economic reports commissioned by ICANN, the Leonard Opinion does not reveal the questions that ICANN asked it to examine. Instead, the Leonard Opinion starts by presenting his conclusions. By presenting conclusions without the underlying questions, ICANN is not operating in an open and transparent manner. Without knowing the underlying questions, the Leonard Report is not appropriately assessable by a party that is not privy to the proceedings and the 'conclusions' risk being interpreted outside its relevant context. Without knowing the questions that were asked, it is impossible for any third party to assess the assumptions on which the 'conclusions' are based.

3. The Leonard Opinion is biased and not analytical

In addition to their lack of an identified and valid basis, the conclusions in the Leonard Opinion are heavily unbalanced. They are presented as absolute truths with no room for nuance or doubt, which is irreconcilable with the scientific method one would expect from an independent economist. This approach is in sharp contrast with previous reports made by Charles River Associates, where it recognized the limitations of its arguments and encouraged ICANN to move slowly, '[r]ecognizing that it is difficult to pull back once regulations have been pulled back'.

4. The Leonard Opinion does not use appropriate methodology that would allow the ICANN Board to reach an informed decision

The IRP Panel recommended that ICANN retain an expert consultant to conduct a formal study on the extent of market power of .ORG and .INFO. ICANN's own expert, Dr. Carlton, testified that (i) to perform such a study, a very detailed analysis of the market would be needed to evaluate market power³, (ii) when one is trying to evaluate substitution possibilities, one can estimate demand curves and look at cross-elasticities of demand⁴, and (iii) that while he had not done a detailed study of which TLDs can be considered close substitutes for registrants that typically register their domain in .ORG, such as nonprofits, he was tempted to study that.⁵

The Leonard Opinion does not contain a formal study on the extent of market power of .ORG and .INFO. There is no detailed analysis of the market, no estimate of demand curves or analysis of cross-elasticities of demand, and no proper analysis of available close substitutes. Instead, the Leonard Opinion merely offers a number of conclusions, based on anecdotal data. There is no discussion of the questions to be examined, and no explanation about the methodology to be used for analyzing the extent of market power for .ORG and .INFO. The Leonard Opinion clearly does not qualify as the detailed study that Dr. Carlton was tempted to engage in.

In addition, the Leonard Opinion did not consider a counterfactual in which price caps would be getting tighter because of decreasing costs.

5. The Leonard Opinion ignores important market developments

The Leonard Opinion maintains that .ORG and .INFO face competition from other TLDs and that 'a registrant has over 1500 TLDs (including both gTLDs and ccTLDs) from which it can chose'. While there are indeed over 1.500 TLDs, there are much fewer viable alternatives to .INFO and there may be none for .ORG for many registrants, given the special semantic meaning of this TLD. Moreover, there are much fewer than 1.500 independent TLD operators, whereas important consolidation of registries has taken place in recent years. E.g., Identity Digital, the registry operator of .INFO, operates a portfolio of 275 gTLDs⁶ and it offers back-end services to many more, including .ORG. Many TLDs, including all .BRAND

³ Transcripts Day V, p. 61.

⁴ Transcripts Day V, pp. 61, 65, 68, 69, 71-72

⁵ Transcripts Day V, pp. 67, 69.

⁶ <https://www.identity.digital/tld-portfolio> (accessed 2 April 2024).

TLDs, are not available for general registration. Even if an alternative TLD existed for registrants, it may be operated by the same registry. For instance, all TLDs that are semantically similar to .ORG are operated by PIR. TLDs that are operated by the same registry offer no competitive alternative and, as shown by Langus, many registrants view registrations in other TLDs as complements rather than alternatives.

Based solely on a handful of anecdotal data points and completely ignoring the consolidation of registries that has taken place in recent years, Leonard concludes that there are multiple TLDs that would effectively constrain the registries for .INFO and .ORG in their potential attempts to exercise market power in relation to these TLDs.

In 2006, the ICANN Board recognized the need to examine *'whether the domain registration market is one market or whether each TLD functions as a separate market'*, and relatedly *'whether registrations in different TLDs are substitutable'*.⁷ There are no signs that ICANN ever commissioned or engaged in such study. Yet, the Leonard report seems to treat the DNS space as one single market, where all TLDs are substitutable. The available evidence – with special purpose TLDs having eligibility requirements and special semantic meanings – shows that this is not true.

6. The Leonard Opinion ignores likely reasons why .ORG and .INFO seem to have refrained temporarily from exercising their market power

The Leonard Report emphasizes that, in recent years .ORG and .INFO have not been raising prices above the previous price caps. However, the Leonard Report fails to comprehensively examine the likely reasons as to why .ORG and .INFO seem to have refrained temporarily from exercising their market power.

As Namecheap explained, and as Dr. Carlton acknowledged, there is a psychological effect of price caps.⁸ When an economic regulator, such as ICANN, has the possibility to revise, reinstate or strengthen price caps, a registry operator may refrain from raising prices during the pendency of proceedings. Dr. Carlton acknowledged that PIR may not have raised prices from 2016 onwards and during the pendency of the proceedings initiated by Namecheap for

⁷ ICANN, *Minutes of the Special Meeting of the Board of 18 October 2006*, <https://www.icann.org/resources/board-material/minutes-2006-10-18-en>.

⁸ Transcripts Day V, p. 120, where Dr. Carlton acknowledged the .ORG operator may have been scared to raise prices.

this reason.⁹ This psychological effect may have been even more intense following the Board's resolution regarding an economic study following the IRP Declaration. The operators of .ORG and .INFO knew that their behavior would be under heightened scrutiny. Not raising price caps during this period of heightened scrutiny would be a small price to pay for having a removal of the price caps in combination with a presumptive renewal clause in the contract.

The Leonard Opinion fails to address this.

7. The Leonard Opinion downplays future risks

As Dr. Langus testified, a steep price increase in any given year is plausible.¹⁰ The fact that .ORG did not raise prices between 2016 and 2019 (or even today) and that .INFO has been continuing to adjust its prices in line with the price caps, does not tell anything about the ability and the risk that .ORG and .INFO might raise prices above 10% in any given year in the foreseeable future.¹¹ This risk has only increased for at least two reasons:

First, the Leonard Opinion submits that .ORG did not increase its registration price after June 2019. In recent years, the price would not have kept pace with inflation, according to Leonard. The fact that .ORG has not been raising prices while under scrutiny, only increases the risk that .ORG will carry out steep price increases in any given year to raise its margins once it is no longer under scrutiny as it has been doing consistently before deregulation. A similar dynamic is likely for .INFO which, according to Leonard, raised prices to a smaller magnitude, compared to the exceptionally high inflation rate in recent years, after the price control provision was lifted.

Second, Identity Digital is now the registry operator of .INFO and the back-end registry operator of .ORG. Identity Digital is owned by Ethos Capital, *i.e.*, the company that attempted to acquire .ORG shortly after the lifting of the price caps. While ICANN ultimately disapproved the acquisition of .ORG by Ethos Capital, Ethos Capital appears to have found a way to work around it. As the back-end registry operator of .ORG, it has the potential to increase prices for its back-end registry services to .ORG. It cannot be excluded that .ORG, Identity Digital, and Ethos Capital have agreed to a deal which has the effects of their desired acquisition, but circumventing ICANN's oversight on the change of control. The Leonard Opinion ignores this risk, which ICANN should have investigated.

⁹ Transcripts Day V, pp. 119-120.

¹⁰ See Transcripts Day V, p. 114.

¹¹ See Transcripts Day V, pp. 131-132.

8. The Leonard Opinion was made without a duty of care

The Leonard Opinion contains an important disclaimer stating:

*'Any opinion expressed herein shall not amount to any form of guarantee that the author or Charles River Associates has determined or predicted future events or circumstances and no such reliance may be inferred or implied. The author and Charles River Associates accept **no duty of care** or liability of any kind whatsoever to any party, and no responsibility for damages, if any, suffered by any party as a result of decisions made, or not made, or actions taken, or not taken, based on this report.'*

In other words, the Leonard Opinion acknowledges that it did not exercise a duty of care in making the report.

The lack of any duty of care is also apparent when examining the sources referred to in the Leonard Opinion. In making the argument that some existing .ORG and .INFO registrants would not face significant costs to switch to another TLD, Leonard refers to an anonymous blogpost on RockContent. RockContent presents itself as a platform where businesses can hire writers, editors, content strategists, designers, illustrators, and animators to create content for their brand.¹² The blogpost referred to in the Leonard Report mentions the following author: 'Rock Content Writer, Content writer, Human crafted content'. Because of the anonymity and the purpose of RockContent, no valid conclusions can be drawn from the blogpost to which Leonard refers.

Moreover, the blogpost simply acknowledges the possibility to change a website's top-level domain. It does not acknowledge the absence of switching costs. The opposite is true, as the blogpost mentions in bold that it is '*a good idea to set up a URL redirect from your old domain to your new one*'. In other words, it is recommended that the registrant keeps their previous domain for an unspecified amount of time, potentially forever, thereby acknowledging the observation that TLDs are often viewed as complements rather than substitutes.

Hence, the Leonard Opinion was made without due care and failed to rebut the existence of significant switching costs, as established by Prof. Dr. Verboven and Dr. Langus.¹³

¹² <https://rockcontent.com>.

¹³ Verboven and Langus Report II, paras. 124-131; Langus Report III, paras. 135-140.

9. The Leonard Opinion was not sanctioned by Charles River Associates

Finally, the Leonard Opinion has not been signed and, contrary to a previous report commissioned by ICANN, was not sanctioned by Charles River Associates. In a disclaimer, the Leonard Opinion states:

'The views expressed herein are the views and opinions of the author and do not reflect or represent the views of Charles River Associates.'

In view of the lack of adequate methodology, the disregard of relevant evidence, and the failure to exercise due care, it is not surprising that Charles River Associates elected not to be associated with the Leonard Opinion. The Leonard Opinion must be taken for what it is: an unsubstantiated opinion by a single individual made without any duty of care.

*

In view of the above, ICANN should ignore the 'findings' of the Leonard Opinion, hire a competent and independent expert to make a proper formal study on the market power of .ORG and .INFO as recommended by the Panel, and reinstate price caps in the .ORG, .INFO and possibly .BIZ TLDs. A decision by the Board, in accordance with ¶503 of the IRP Declaration, to reinstate the price caps and install appropriate price control provisions with the registry operators, may moot the need to commission a formal economic study.

This letter is sent without prejudice and reserving all rights.

Yours sincerely,


Flip Petillion


Jan Janssen*

Exhibit G

[العربية\(/ar/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en\)](#)

[中文\(/zh/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en\)](#)

English

[Français\(/fr/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en\)](#)

[Русский\(/ru/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en\)](#)

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Board Activities and Meetings

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Approved Resolutions | Regular Meeting of the ICANN Board | 10 November 2024

1. Main Agenda

a. Further Consideration of Namecheap, Inc. v. ICANN (.BIZ, .INFO, .ORG) Independent Review Process Final Declaration

Whereas, on 21 January 2023, the Board considered the Final Declaration in the Namecheap, Inc. v. ICANN Independent Review Process (Namecheap IRP) and passed a resolution: (i) acknowledging the IRP Panel's declarations; (ii) directing ICANN organization to reimburse Namecheap the amount designated by the Panel; and (iii) determining that further consideration was needed regarding the IRP Panel's non-binding recommendations set forth in the Final Declaration.

Whereas, on 11 June 2023, in accordance with the Board Accountability Mechanisms Committee's (BAMC) recommendation, the Board: (a) directed ICANN org to retain an economist to provide input regarding the current domain name system (DNS) marketplace as it relates to the market power of .INFO and .ORG; and (b) asked the BAMC, following its consideration of the economist's input, to provide the Board with its findings and recommendations as to next steps.

Jump To:

[1. Main Agenda \(/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#section1\)](#)

[a. Further Consideration of Namecheap, Inc. v. ICANN \(.BIZ, .INFO, .ORG\) Independent Review Process Final Declaration \(/en/board-activities-and-meetings/materials/a](#)

Whereas, ICANN retained an economist to provide an economic report regarding the current DNS marketplace as it relates to the market power of .INFO and .ORG (**Economic Report (/files/files/economic-analysis-info-org-14feb24-en.pdf)**), which was issued in February 2024.

Whereas, the BAMC provided Namecheap with an opportunity to submit a written response to the findings in the Economic Report, which Namecheap provided in April 2024 (**Namecheap Letter (/files/correspondence/namecheap-to-icann-board-15apr24-en.pdf)**).

Whereas, pursuant to the BAMC's direction, ICANN asked the economist to provide a supplemental report addressing the comments raised in the Namecheap Letter, which the economist provided in August 2024 (**Supplemental Report (/files/files/irp-namecheap-economist-supplemental-report-31aug24-en.pdf)**).

Whereas, the BAMC has reviewed, considered and evaluated materials relevant to this matter including, but not limited to, the Namecheap IRP Panel's Final Declaration and recommendations, the Economic Report, the Namecheap Letter, and the Supplemental Report, and has recommended that the Board determine that the 2019 .INFO and .ORG Registry Agreements be maintained without price control provisions.

Whereas, the BAMC has further recommended that the Board direct the Interim President and CEO, or her designee(s), to consider whether further clarity regarding ICANN's decision-making and public comment processes would be beneficial, recognizing that there are Bylaws provisions and ICANN procedures already in place that provide guidance regarding the roles of the Board and ICANN org as well as regarding the public comment process.

Resolved (2024.11.10.01), the Board hereby: (a) determines that the 2019 .INFO and .ORG Registry Agreements be maintained without price control provisions; and (b) directs the Interim President and CEO, or her designee(s), to consider whether further clarity regarding ICANN's decision-making and public comment processes would be

[pproved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#section1.a\)](#)

[b. Renewal of .XXX Registry Agreement \(/en/board-activities-and-](#)

beneficial, recognizing that there are Bylaws provisions and ICANN procedures already in place that provide guidance regarding the roles of the Board and ICANN org as well as regarding the public comment process.

Rationale for Resolution 2024.11.10.01

After careful review of the Final Declaration in the Namecheap, Inc. v. ICANN Independent Review Process (Namecheap IRP), the Namecheap IRP Panel's recommendations, the Economic Report, the Namecheap Letter, the Supplemental Report, the public comments received in 2019 regarding the 2019 .INFO and .ORG Registry Agreements, the Board Accountability Mechanisms Committee's (BAMC) analysis and recommendations, as well as other relevant information, the Board has determined that the 2019 .INFO and .ORG Registry Agreements will be maintained without price control provisions. The Board also notes the Namecheap IRP Panel's recommendation that ICANN consider whether further clarity with respect to ICANN's decision-making and public comment processes might be useful, and the Board is directing the Interim President and CEO, or her designee(s), to consider whether further clarity regarding ICANN's decision-making and public comment processes would be beneficial, recognizing that there are Bylaws provisions and ICANN procedures already in place that provide guidance regarding the roles of the Board and ICANN org as well as regarding the public comment process.

Background Information

Namecheap, Inc. (an ICANN accredited registrar) initiated an IRP in February 2020, challenging, among other things, the lack of price control provisions in the 2019 .BIZ, .INFO, and .ORG Registry Agreements. The IRP Panel issued its Final Declaration on 26 December 2022.

[IRP Panel's Final Declaration:](#)

In terms of requested relief, Namecheap had urged the IRP Panel to reimpose price controls in the 2019 Registry Agreements for .BIZ, .INFO, and .ORG. The Panel did not grant the requested relief, noting that such an "order" is not within an IRP panel's remit.

The IRP Panel determined that Namecheap had "prevailed on some, but not all of its claims." (Final Decl., ¶ 451.) The Panel determined that: (i) Namecheap failed to prove that the removal of the price controls amounted to discriminatory treatment under the Bylaws; and (ii) several of Namecheap's claims were untimely, including all claims involving .BIZ.

The Panel also concluded that Namecheap prevailed on certain claims regarding the lack of price control provisions in the 2019 Registry Agreements for .INFO and .ORG, finding that: (i) ICANN did not reach its renewal decisions regarding the .INFO and .ORG Registry Agreements in an open and transparent manner; (ii) ICANN's renewal of these legacy agreements involved a policy decision to be made by the ICANN Board rather than the ICANN organization; and (iii) ICANN did not comply with the procedural requirements for ensuring that it promotes the global public interest and acts for the benefit of the Internet community as a whole.

IRP Panel's Recommendations:

In light of its declarations and its view that the noted violations "are procedural rather than substantive in nature," "[t]he Panel's overall recommendation is that the ICANN Board analyze and discuss what steps to take to remedy both the specific violations found by the Panel, and to improve its overall decisionmaking process to ensure that similar violations do not occur in the future." (Final Decl., ¶ 493.) The Panel also recommended that the Board consider taking the following actions: (1) decisions as to how to implement the Panel's declarations should be made by the Board; (2) consider implementing a process to conduct further analysis as to whether including price control provisions in the .INFO and .ORG Registry Agreements is in the global public interest that encourages participation of diverse stakeholders in an open and transparent manner; (3) consider remedial measures as to both .INFO and .ORG, but

- "[D]irect[ed] the Interim President and CEO, or her designee(s), to retain an economist to provide input regarding the current domain name system (DNS) marketplace with respect to the market power of .INFO and .ORG;" and
- "[A]sk[ed] the BAMC, following its receipt and consideration of the economist's input, to provide the Board with its findings and recommendations as to next steps."

Pursuant to the Board's 11 June 2023 resolution, ICANN retained Gregory K. Leonard, Ph.D., an economist with Charles River Associates, a globally recognized economic consulting firm, to provide input regarding the current DNS marketplace with respect to the market power of .INFO and .ORG. Dr. Leonard prepared a report addressing the issues identified in the Board's resolution (**[Economic Report \(/files/files/economic-analysis-info-org-14feb24-en.pdf\)](#)**) (summarized below), which was provided to the BAMC. At its **[22 February 2024 meeting \(/en/board-activities-and-meetings/materials/minutes-meeting-of-the-board-accountability-mechanisms-committee-bamc-22-02-2024-en\)](#)**, the BAMC decided that it would be prudent to provide Namecheap with an opportunity to submit a response to the findings in the Economic Report. ICANN posted the Economic Report and the BAMC sent a **[letter \(/files/correspondence/sanchez-to-namecheap-05mar24-en.pdf\)](#)** to Namecheap, providing a link to the Economic Report and an opportunity for Namecheap to submit a written response to the Economic Report. Namecheap submitted a letter response on 15 April 2024 (**[Namecheap Letter \(/files/correspondence/namecheap-to-icann-board-15apr24-en.pdf\)](#)**), reiterating many of the same arguments that Namecheap raised in its IRP with regard to price control provisions and critiquing certain aspects and conclusions of the Economic Report (summarized below). In light of ICANN's transparency obligations and in an effort to address the IRP Panel's recommendations, the BAMC directed ICANN org to ask Dr. Leonard to provide a supplemental written response addressing the comments raised in the Namecheap Letter. On 31 August 2024, Dr. Leonard issued a written supplemental report responding to the Namecheap Letter (**[Supplemental Report \(/files/files/irp-namecheap-economist-supplemental-report-31aug24-en.pdf\)](#)**) (summarized below).

Overview of the Economic Report

In accordance with the Board's 11 June 2023 Resolution, ICANN retained Dr. Leonard "to provide input regarding the current domain name system (DNS) marketplace as it relates to the market power of .INFO and .ORG." Dr. Leonard provided his **Economic Report (/files/files/economic-analysis-info-org-14feb24-en.pdf)** on 14 February 2024, entitled "Economic Analysis of Whether .info and .org Possess Market Power." Based on his extensive review and analysis of the DNS marketplace, market economies, the history of .INFO and .ORG registration pricing, and competitive market forces and other factors within the DNS marketplace, Dr. Leonard reached the following conclusions in his Economic Report:

- Dr. Leonard explained that, for the various reasons detailed in the Economic Report, "price controls are disfavored in market economies except in narrow circumstances where a firm has substantial and durable 'market power'—the ability to charge a price significantly above the competitive level for an extended period of time."
- After evaluating four years of registration pricing for .INFO and .ORG following the 2019 Registry Agreement renewals, Dr. Leonard found that "[d]uring that time, contrary to what would have been expected had the price control provision been constraining the wholesale registration prices of .info and .org, we did not see those prices increase significantly. Rather, the .org price has not increased at all and the .info price has not increased more than the price control provision would have allowed, had it been in place. In the absence of the price control provision, the wholesale registration prices for .info and .org were almost certainly constrained during the last four years by competitive market forces and other factors. Thus, the historical experience is consistent with .info and .org not having substantial and durable market power."
- Dr. Leonard further concluded that .INFO and .ORG have faced increasing competition from other TLDs over time, and that other TLDs have been growing in terms of registrations while registrations in .INFO and .ORG have fallen over time.

Dr. Leonard also found that "the wholesale registration prices for .info and .org have been in line both with inflation as well as the registration prices of other TLDs," and that "market factors would constrain .org or .info from engaging in opportunism, such as by increasing renewal prices." All of which further indicated to Dr. Leonard that .INFO and .ORG do not possess substantial and durable market power.

- Dr. Leonard opined that, because PIR is a not-for-profit entity, it "would be contrary to PIR's stated goals to increase its registration price excessively by exploiting any market power it possessed."
- Dr. Leonard further noted that the above-mentioned factors (as explained in the Economic Report) "mean that registrars as well as registrants are protected from excessive wholesale price increases." Dr. Leonard went on to explain that "in addition[,] registrars have incentive and ability to pass on wholesale price increases to retail prices without losing many customers. This provides further protection to registrars from any adverse impact."
- Dr. Leonard further concluded that there is "no reason to believe that the lack of substantial and durable market power for .org and .info will change in the future."

Overview of Namecheap's 15 April 2024 Letter Responding to the Economic Report

Namecheap submitted a letter on 15 April 2024 in response to the Economic Report (**[Namecheap Letter \(/files/correspondence/namecheap-to-icann-board-15apr24-en.pdf\)](/files/correspondence/namecheap-to-icann-board-15apr24-en.pdf)**). The Namecheap Letter reiterates many of the same arguments that Namecheap raised in its IRP regarding price controls as well as lodges several specific critiques regarding certain aspects and conclusions of the Economic Report, including but not limited to the following:

- Namecheap alleged that the Economic Report failed to comply with the IRP Panel's recommendation because it "is not a formal and detailed study of the extent of market power of .ORG and .INFO and fails to address a number of points that

Namecheap made about .ORG's special market power."

- Namecheap alleged that the Economic Report lacked transparency because it purportedly did "not reveal the questions that ICANN asked [Dr. Leonard] to examine" and Namecheap asserted that the Economic Study is "biased" and "not analytical."
- Namecheap alleged that the Economic Report is flawed because there was "no detailed analysis of the market, no estimate of demand curves or analysis of cross-elasticities of demand, and no proper analysis of available close substitutes." Namecheap also claimed that Dr. Leonard ignored the likely reason why the .ORG and .INFO registry operators have not increased prices (namely, according to Namecheap, the operators are allegedly waiting until these proceedings are over to raise prices) and that Dr. Leonard "downplay[ed] future risks" of price increases. Namecheap also claimed that Dr. Leonard did not consider risks from "consolidation" of the TLDs operated by PIR and "consolidation" of Identity Digital's operation of .INFO and provision of back-end registry services for .ORG and other TLDs.
- Namecheap also alleged, based on a legal disclaimer in the Economic Report, that the Economic Report was made without a "duty of care" and that Dr. Leonard's employer, Charles River Associates, did not "sanction" the Economic Report.

Overview of the Economist's Supplemental Report

At the BAMC's direction, ICANN asked Dr. Leonard to provide a supplemental written response addressing the comments raised in the Namecheap Letter (**[Supplemental Report \(/files/files/irp-namecheap-economist-supplemental-report-31aug24-en.pdf\)](#)**). Dr. Leonard reviewed the Namecheap Letter and issued his Supplemental Report on 31 August 2024 "to assist the ICANN Board of Directors in its consideration of the relevant issues by addressing the Namecheap Letter and providing additional discussion of the analyses [he] performed and the reasons why [he] reached the

conclusion that .info and .org do not have substantial and durable market power." As explained in more detail in the Economic Report and the Supplemental Report, in Dr. Leonard's Supplemental Report:

- Dr. Leonard explained that, contrary to Namecheap's claims, the Economic Report clearly discloses Dr. Leonard's assignment from ICANN and that the Economic Report "is transparent in the manner that is customary for such economics reports."
- In terms of Namecheap's claim that estimating demand curves and evaluating cross-elasticities of demand is the only method for analyzing market power, Dr. Leonard explained that this is incorrect. In fact, given the unavailability of complete and reliable pricing data, such a demand estimation is not possible here. Rather, Dr. Leonard "determined that several of the other methods for assessing market power were the most likely to be informative." Specifically, Dr. Leonard: (i) evaluated historical pricing in .INFO and .ORG after the price caps were removed, which is a "standard tool ... for assessing market power"; (ii) compared changes in .INFO and .ORG wholesale prices to inflation and changes in the prices of other TLDs as a "benchmark analysis"; (iii) "examined trends in the level and share of .info's and .org's registrations in the wake of the introduction of many new gTLDs," which is a "natural experiment" that is useful for assessing market power; and (iv) reviewed "qualitative evidence regarding customer substitution" of TLDs and "several factors that are idiosyncratic to the TLD marketplace and relevant to market power" in reaching his conclusion that .INFO and .ORG do not have sustainable and durable market power.
- Despite Namecheap's claims, Dr. Leonard stated that he did consider future risks of price increases, but he concluded that growing competition is likely to lessen that risk, and he did consider the "unique characteristics of .org," namely that it has acquired a semantic meaning associated with not-for-profit entities and is a legacy gTLD, but noted that if these characteristics equated to market power Dr. Leonard would have observed it in his market power analysis, which he did not.

- With respect to the "consolidation" concerns raised by Namecheap, Dr. Leonard did not find them problematic. The other TLDs operated by PIR have an extremely small share of domain name registrations (approximately 0.02%), and "PIR did not increase the registration fees of these other TLDs after acquiring them in 2020." Moreover, according to Dr. Leonard, there is nothing economically troubling about Identity Digital operating .INFO and providing back-end services for .ORG and other TLDs because "the wholesale registration price for a TLD is set by the registry operator, not the back-end operator, and the registry operators have the incentive to compete with each other for business."
- Finally, the Supplemental Report addressed the "non-economic issues" raised in the Namecheap Letter. According to Dr. Leonard, Namecheap misunderstood the legal disclaimer contained in the Economic Report, which is standard for reports like this and does not mean that Dr. Leonard did not exercise a "duty of care" in preparing, or that Charles River Associates did not "sanction," the Economic Report. Likewise, Dr. Leonard stated that his "conclusions were not pre-determined by any 'bias,'" but were "based on evidence" he reviewed. Dr. Leonard also remarked that whether the Economic Report complies with the IRP Panel's recommendation is a legal question, but he noted that he "was asked to assess the market power of .info and .org, which would appear to be a relevant question."

BAMC Consideration and Board Decision

Pursuant to the Board's directive in **Resolution 2023.06.11.07 (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-11-06-2023-en#section2.a)**, the BAMC, and then the Board, considered materials relevant to this matter including, but not limited to, the Namecheap IRP Final Declaration, the Economic Report, the Namecheap Letter, and the Supplemental Report.

After careful review of and discussion regarding the economist's input and supporting information regarding the current DNS marketplace and the .INFO and .ORG gTLDs in particular, as well as the points raised in the Namecheap Letter and in the public

comments received in 2019 regarding the 2019 .INFO and .ORG Registry Agreements, both the BAMC and the Board have concluded that the 2019 .INFO and .ORG Registry Agreements should be maintained without price control provisions.

The BAMC noted and the Board notes here Dr. Leonard's expert input that "price controls are disfavored in market economies except in narrow circumstances where a firm has substantial and durable 'market power'—the ability to charge a price significantly above the competitive level for an extended period of time." The BAMC noted and the Board now notes that Dr. Leonard conducted multiple methods of analysis to reach his conclusion that .INFO and .ORG "do not have sustainable and durable market power," meaning .INFO and .ORG do not possess the ability to charge a wholesale price significantly above the competitive level for an extended period of time.

In particular, Dr. Leonard evaluated historical pricing in .INFO and .ORG after the execution of the 2019 Registry Agreements without price control provisions, which Dr. Leonard stated is a "standard tool ... for assessing market power." In this analysis, Dr. Leonard found that "the .org price has not increased at all and the .info price has not increased more than the price control provision would have allowed, had it been in place." The BAMC and Board agree with Dr. Leonard that this likely means that competition, rather than the price control provisions, has historically restrained pricing in .INFO and .ORG.²([/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot2](#)) The Board also notes that Dr. Leonard found it significant that the .ORG registry operator, PIR, is a non-profit organization that has publicly vowed to not significantly increase .ORG registry prices. Dr. Leonard also compared changes in .INFO and .ORG wholesale prices to inflation and changes in the prices of other TLDs as a "benchmark analysis." Based on this analysis, Dr. Leonard found that "the wholesale registration prices for .info and .org have been in line both with inflation as well as the registration prices of other TLDs." Dr. Leonard also "examined trends in the level and share of .info's and .org's registrations in the wake of the introduction of many new gTLDs," which, according to Dr. Leonard, is a "natural experiment" that is useful for assessing market power. On this front, Dr. Leonard found that "the number of registrations, as well as the share of registrations,

on .info and .org has fallen over time." Dr. Leonard also reviewed "qualitative evidence regarding customer substitution" of TLDs and "several factors that are idiosyncratic to the TLD marketplace and relevant to market power." Specifically, Dr. Leonard viewed increasing competition in the DNS from ccTLDs and new gTLDs, registrants' ability to lock in existing gTLD registration prices for up to ten years, and the fact that PIR is a non-profit entity as significant curbs on any exercise of market power in .INFO or .ORG. The results of these various methods of analysis form the basis for Dr. Leonard's conclusion that .INFO and .ORG "do not have sustainable and durable market power."

In addition, Dr. Leonard provided further information, via his Supplemental Report, addressing the critiques raised in the Namecheap Letter and explaining that Namecheap's allegations did not alter the conclusions that Dr. Leonard has reached or the appropriateness of the methods Dr. Leonard used to reach those conclusions. For example, Dr. Leonard's Supplemental Report explained that "estimating demand curves and evaluating cross-elasticities of demand" is not the only method for analyzing market power, as Namecheap claims. Rather, Dr. Leonard "determined that several of the other methods for assessing market power [as described in the Economic Report and the Supplemental Report] were the most likely to be informative," given the data available and the question that was posed. Dr. Leonard further explained that his Economic Report was transparent in describing the assignment from ICANN, that he was not biased towards a particular conclusion, that he considered future risks of price increases and the "unique characteristics of .org," that the "consolidation" claims raised by Namecheap were not economically troubling, and that he exercised a duty of care in drafting the Economic Report, despite Namecheap's claims to the contrary. The BAMC and the Board appreciate Namecheap's comments and Dr. Leonard's responses thereto. In the BAMC's and the Board's view, Dr. Leonard presented a thorough, exacting and independent market power analysis that the BAMC and Board are justified in relying upon in reaching its decision to maintain the 2019 .INFO and .ORG Registry Agreements without price control provisions.

Furthermore, the BAMC and the Board agree with Dr. Leonard that competition in the DNS has increased over the years and will likely continue to increase. That is, today, registrants now have the option of registering domain names in numerous ccTLDs and in over 1,200 new gTLDs, which were added to the DNS resulting from the 2012 Round of the New gTLD Program, in addition to legacy gTLDs such as .INFO and .ORG. And the DNS will continue to expand and gTLD competition will continue to increase with the upcoming Next Round of the New gTLD Program.

Also important to the BAMC's and the Board's consideration, as stated earlier, is Dr. Leonard's conclusion that, in market economies, price regulation is the exception not the norm because there are significant costs and risks associated with price regulation (or, in this case, price controls through contractual terms).³[3 \(/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot3\)](#) One of the concerns is that ICANN could set the wrong price control level, which could negatively impact registry and registrar incentives and flexibility in offering their products and services.⁴[4 \(/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot4\)](#) These risks are compounded by the fact that ICANN is not a price regulator⁵[5 \(/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot5\)](#) and does not possess the institutional capacity, resources, or expertise to act as a price regulator or to affirmatively set prices in the DNS.⁶[6 \(/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot6\)](#)

Finally, the BAMC and the Board agree with Dr. Leonard's point that, even if one were concerned about .INFO and .ORG market power, the "price lock" provisions in the .INFO and .ORG Registry Agreements serve to protect from exercise of that market power. Specifically, the .INFO and .ORG Registry Agreements allow registrars, on behalf of their registrant customers, to register or renew .INFO and .ORG domain names for up to a 10-year total registration term, at the then-current price. Thus, registrants can protect themselves against any excessive price increases charged by registrars by locking in the existing registration price, which further mitigates any

concerns about potential market power. Likewise, Dr. Leonard noted that registrars are also somewhat insulated from registry price increases because they are incentivized to pass price increases on to registrants.

While it is true that, when ICANN posted the 2019 .INFO and .ORG Registry Agreements for public comment, there were numerous comments expressing concerns that registry prices in the .INFO and .ORG gTLDs would exceed the levels permitted by the previous price controls, that has not come to pass this many years later, as Dr. Leonard has confirmed. In addition, Dr. Leonard reviewed the 2019 public comments and concluded that his findings regarding .INFO's and .ORG's lack of market power addressed the economics-related concerns about potential excessive future price increases voiced in those comments.

Based upon the Board's consideration of the IRP Panel's findings and recommendations, the Economic Report and the Supplemental Report, Namecheap's comments on the Economic Report, the public comments received in 2019 regarding the 2019 .INFO and .ORG Registry Agreements, the BAMC's analysis and recommendations, and other relevant information, the Board has determined that the 2019 .INFO and .ORG Registry Agreements should be maintained without price control provisions.

Furthermore, with the actions, analysis and decisions leading up to and contained in this Resolution and Rationale, ICANN has considered each of the IRP Panel's recommendations. Namely, the Board, with this and prior Resolutions on this matter, is the one making the decision as to how to implement the Panel's declarations, which addresses Panel Recommendation No. 1. By retaining an economist to provide a thorough report regarding the current DNS marketplace as it relates to the market power of .INFO and .ORG, as well as considering Namecheap's comments on the Economic Report, and with the Board providing this comprehensive rationale for its decision in an open and transparent manner, ICANN has addressed Panel Recommendation Nos. 2 through 6. And with respect to Panel Recommendation No. 7, the Board notes the Panel's recommendation regarding whether further clarity with respect to ICANN's decision-making and public comment processes might be useful,

and directs ICANN org to consider whether further clarity regarding ICANN's decision-making and public comment processes would be beneficial, recognizing that there are Bylaws provisions and ICANN procedures already in place that provide guidance regarding the roles of the Board and ICANN org as well as regarding the public comment process.

These actions and decisions are within ICANN's Mission and are in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially and adversely affected by a Board or organization action or inaction may challenge that action or inaction.

Taking this decision is not expected to have any immediate direct financial impact on ICANN. This action will not have any direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

b. Renewal of .XXX Registry Agreement

Whereas, the Registry Operator for the .XXX generic top-level domain (gTLD), ICM Registry LLC, has a Registry Agreement (RA) with ICANN that is set to expire on 30 November 2024.

Whereas, ICANN commenced a public comment period from 18 March 2024 through 29 April 2024 on the proposed .XXX RA renewal, which includes modified provisions that are consistent with the current base gTLD registry agreement (Base RA).

Whereas, the proposed .XXX RA renewal, among other things, is on the Base RA without sponsorship, constitutes the second transition of a sponsored community gTLD to a non-sponsored gTLD, and contains existing registry operator commitments and obligations in the form of voluntary Public Interest Commitments (PICs), consistent with gTLD registry agreements from the 2012 Round using the current Base RA.

Whereas, the public comment period on the proposed .XXX RA renewal closed on 29 April 2024, with ICANN receiving nine comments. A summary and analysis of the comments were provided to the Board.

Whereas, the Board has considered all public comments and relevant inputs to ICANN that are related to this matter and determined that no revisions to the proposed .XXX RA renewal are necessary.

Resolved (2024.11.10.02), the Board approves the .XXX RA renewal and authorizes the Interim President and CEO, or her designee(s), to take such actions as appropriate to finalize and execute the agreement.

Rationale for Resolution 2024.11.10.02

Why is the Board addressing the issue now?

ICANN and ICM Registry LLC (ICM) entered into the current .XXX Registry Agreement (RA) for the operation of the .XXX gTLD on 31 March 2011, with an initial term of ten years that was extended to 30 November 2024. The proposed .XXX RA renewal was posted for public comment between 18 March 2024 and 29 April 2024. At this time, the Board is approving the proposed .XXX RA renewal for the continued operation of the .XXX gTLD.

What is the proposal being considered?

ICANN org and ICM have been discussing the path forward for the renewal of the .XXX RA for approximately four years. Since the beginning of these bilateral negotiations, ICM requested to remove the .XXX gTLD sponsorship and to align the .XXX RA with the RAs of the similar-concept .ADULT, .PORN, and .SEX gTLDs. The proposed .XXX RA renewal uses the Base RA without sponsorship and includes the following:

- Obligations from the two recent Global Amendments to the Base RA: those to combat DNS Abuse⁷([/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot7](#)) and employ the Registration Data Access Protocol to provide Registration Data Directory Services.⁸([/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot8](#))
- An expanded set of voluntary commitments that continue to include a blend of the existing .XXX voluntary commitments, similar to those in the .ADULT, .PORN, and .SEX RAs, and terms that reflect obligations from the current .XXX RA.
- Base RA provisions that benefit multiple stakeholders, including: code of conduct obligations; requirements for use of registrars and registry-registrar agreements; and provisions enabling ICANN to incorporate future global amendments to the Base RA into the .XXX RA without the need for additional or separate processes.

The Sponsorship Charter contained in the current .XXX RA in Appendix S is not being carried over in the .XXX RA renewal. However, key registry operator commitments and obligations originating from the .XXX sponsorship are carried over into the .XXX RA renewal in the form of voluntary Public Interest Commitments (PICs). When .XXX was first introduced, the sponsorship provided a means of developing policies and best practices to operate .XXX in a responsible manner. During the 2012 round of the New gTLD Program, these policies and best practices were proposed by ICM in its applications for the .ADULT, .PORN, and .SEX gTLDs and were incorporated into those RAs, without sponsorship, as voluntary PICs. The proposed .XXX RA renewal emulates the RAs of these other adult-themed gTLDs (.ADULT, .PORN, and .SEX).

The proposed .XXX RA renewal also includes an addendum that, consistent with other legacy gTLDs that have adopted the Base RA, modifies terms in the Base RA that are inapplicable due to the nature of the gTLD as a legacy (versus a new) gTLD. Such modifications include removing references to the initial delegation of the gTLD, entry into the root zone, statements made in the gTLD application, launch of the gTLD, pass-through fees related to the trademark clearinghouse, and the continued operations instrument provisions as they are not applicable to a legacy gTLD that has been in operation for over a decade.

Which stakeholders or others were consulted?

ICANN org engaged in bilateral negotiations with the Registry Operator to agree to the terms to be included in the proposed .XXX RA renewal that was posted for public comment. ICANN conducted a public comment period on the proposed .XXX RA renewal from 18 March 2024 through 29 April 2024. The summary and analysis report was published⁹([/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot9](#)) for the community on 13 September 2024, following briefing and consultation with the ICANN Board.

What concerns or issues were raised by the community?

The Public Comment proceeding¹⁰([/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot10](#)) opened on 18 March 2024 and closed on 29 April 2024. ICANN received a total of nine comments on the proposed renewal of the .XXX RA. All comments received about .XXX moving to the Base RA were supportive of the approach, however, there was a divergence in opinion when it came to the question of removing the sponsorship. ICANN received five comments against removal of the sponsorship, two comments in favor of removing the sponsorship, and two comments that were neutral towards removal of the sponsorship.

Of note, the Governmental Advisory Committee (GAC) did not issue a public comment or mention the .XXX RA renewal in either its ICANN79 or ICANN80 Communiqués. Three of the public comments expressing opposition to the sponsor removal (from the At-Large Advisory Committee (ALAC), the Business Constituency (BC), and Michael Palage), utilize similar arguments and phrasing, including repeating some misconceptions and inaccurate assumptions.

Two former ALAC Vice-Chairs, Evan Leibovitch and Carlton Samuels, who each served as Vice-Chair during the initial delegation of the .XXX gTLD, submitted a comment in favor of the sponsor removal and noted their disagreement with the comment prepared and submitted by the ALAC.

Key concerns or issues raised by the community

1. *Comments opposing sponsor removal – regarding the "first mover" advantage:* A few commenters pointed out that the .XXX gTLD was applied for and approved in a special round for sponsored gTLDs, based on the existence of a community the gTLD served, the inclusion of a sponsoring organization that represented the community served and committed to use the gTLD for that community, and restrictions to ensure registrants belonged to that community. In the view of some commenters, the .XXX gTLD (in exchange for these commitments) has benefitted by being approved earlier and paying a much lower application fee than those of gTLDs from the 2012 Round of the New gTLD Program. Some commenters believe that participation in the sponsored gTLD round gave the registry a conditionally based economic and timing advantage, and that the Registry Operator should not be allowed to remove those restrictions and conditions placed upon .XXX because of the first mover advantage they received.
2. *Comments opposing sponsor removal – regarding the perceived removal of registry operator commitments and obligations:* Some commenters focused on registrant eligibility restrictions. These commenters asserted their belief that the sponsorship commitments bind the registry to additional registrant validation processes that help prevent distribution of child sexual abuse material (CSAM),

abuse, and other harmful activities from occurring in the .XXX gTLD, and that these obligations should not be removed from the RA. Based on ICANN's analysis, these particular concerns are either overstated or based on inaccurate assumptions and misconceptions, which are explained in further detail in the comment summary report [11 \(/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot11\)](#) and the Reference Materials.

3. *Comments expressing support for the voluntary Public Interest Commitments to remain in the .XXX RA and assurances that the agreement is enforceable by ICANN.* Three commenters noted the various benefits, such as consumer protection benefits, that they believed the voluntary commitments provided. These commenters explicitly expressed their desire for those commitments to remain in the .XXX RA and for those commitments to be complied with and enforced.
4. *Suggestions from two commenters to include new obligations and commitments for the .XXX gTLD alone.* For example, one commenter suggested that .XXX would benefit from (and ICANN should appoint) a separate, approved independent auditor to monitor and evaluate ICM's compliance with its prevailing baseline policies for .XXX, and that the .XXX RA include a new obligation for ICM to publish a quarterly report on anti-abuse metrics.
5. *Comments from a few commenters voiced their support for the proposed renewal and sponsorship removal.* Some commenters noted that the evolution of the .XXX RA and its harmonization with other gTLDs on the Base RA is reasonable and positive, and shared that the benefits of doing so include reducing public confusion regarding policy differences between gTLDs and improving uniformity of application for would-be registrants and the general public.
6. *Commenters' misconceptions about existing obligations and commitments:* As mentioned earlier, ICANN received comments from Mr. Palage, the BC, and ALAC that were each similar in nature. The focus of their concern appears to be centered around their belief that certain "commitments" made by ICM are being removed in the proposed .XXX RA renewal, specifically registrant restrictions,

enhanced registrant verification, and enhanced abuse reporting. These commenters contended that changes to the commitments made by ICM in Appendix S to the current .XXX RA should have been made via the Registry Services Evaluation Policy (RSEP) process or, at a minimum, have been supported by a rationale.

The original public comment summary report was updated on 18 October to more fully address this specific point raised in the public comments. The report states:

The registrant verification practices and contract for labeling and monitoring noted in the comments refer to the Start-up Plan for .XXX (Appendix S, Part 4.1). Those practices are noted and connected to the .XXX TLD start-up and launch plans. If changes were made to the noted practices, such changes might have warranted submission of an RSEP request by ICM. The issue of whether or not an RSEP request should have been submitted by ICM if or when it changed its implementation of its Startup Plan does not directly impact the consideration of the proposed .XXX RA renewal.

What significant materials did the Board Review?

As part of its deliberations, the Board reviewed various materials, including but not limited to, the following materials and documents:

- **[Current .XXX Registry Agreement \(/en/registry-agreements/xxx/xxx-registry-agreement-31-3-2011-en\)](/en/registry-agreements/xxx/xxx-registry-agreement-31-3-2011-en), **[Amendments \(/en/registry-agreements/details/xxx#amendments\)](/en/registry-agreements/details/xxx#amendments)**, and **[Appendices \(/en/registry-agreements/details/xxx#appendices\)](/en/registry-agreements/details/xxx#appendices)****
- **[Public Comment Proceeding \(/en/public-comment/proceeding/proposed-renewal-of-the-registry-agreement-for-the-xxx-top-level-domain-tld-18-03-2024\)](/en/public-comment/proceeding/proposed-renewal-of-the-registry-agreement-for-the-xxx-top-level-domain-tld-18-03-2024)**

- Clean proposed **.XXX renewal agreement** (<https://itp.cdn.icann.org/en/files/registry-agreement/cleandraftxxxrenewalra-18-03-2024-en.pdf>) and **addendum** (<https://itp.cdn.icann.org/en/files/registry-agreement/cleandraftxxxrenewaladdendum-18-03-2024-en.pdf>)
- Letters from GoDaddy: **rationale letter** (</files/correspondence/bezsonoff-to-weinstein-02feb24-en.pdf>) and **response to public comments letter** (</files/correspondence/bezsonoff-to-weinstein-30may24-en.pdf>)
- Letter from the **International Foundation for Online Responsibility (IFFOR)** (</files/correspondence/iffor-board-directors-to-icann-18oct23-en.pdf>) and **IFFOR posted Questions & Answers** (<https://iffor.org/iffor-response-to-queries-following-icann-public-comment-period-us/>)
- **Summary and analysis of public comments** (<https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-xxx-top-level-domain-tld2-13-09-2024-en.pdf>)

What factors has the Board found to be significant?

The Board carefully considered the public comments received for the proposed .XXX RA renewal, along with the summary and analysis of those comments. The Board also considered the terms agreed to by the Registry Operator as part of the bilateral negotiations with ICANN org.

The Board notes that in 2014, ICANN and ICM agreed to Amendment No. 2 to the current .XXX RA, wherein obligations and formats from several of the technical specifications of the Base RA were incorporated into the .XXX RA, including Data Escrow, WHOIS, and Zone File Access. In 2017, ICANN and ICM agreed to Amendment No. 4, which further aligned parts of the .XXX RA with the Base RA. This amendment added Public Interest Commitments (PICs), both those mandated in all gTLDs subject

to the Base RA, as well as voluntary commitments from ICM. Amendment No. 4 also introduced a premise where the fees owed from the Registry Operator to ICANN could be adjusted from \$2.00 per transaction down to the Base RA level of \$0.25 per transaction over the course of several years with each adjustment contingent on a successful audit by ICANN. The Board notes that current fees owed by the Registry Operator for .XXX have reached alignment with the fees set forth in the Base RA. The effort to migrate .XXX from its legacy RA to the Base RA has been ongoing for nearly eight years as an initiative of ICM and in line with ICANN's general practice of transitioning legacy RAs to the Base RA, where appropriate. In 2017, when ICANN and ICM agreed to amend the .XXX RA, many features of the Base RA were incorporated into the .XXX RA. With this renewal, the Board notes that it is a logical next step to complete the transition using the proposed .XXX RA renewal that was posted for public comment as the way forward.

The Board also acknowledges and recognizes the benefits of aligning the .XXX RA with the Base RA, which: provides additional safeguards and security and stability requirements compared to legacy agreements; contains standardized technical and reporting obligations for registry operators; provides for operational efficiencies for ICANN org; establishes consistency for end users; and allows for the automatic adoption of any future approved global amendments (such as the recent Registration Data Access Protocol (RDAP) global amendment and DNS Abuse global amendment).

The Board acknowledges that over a decade has passed since the .XXX gTLD was delegated and launched. With the introduction of more than a thousand new gTLDs, the TLD marketplace has evolved. Pornography exists on the Internet in many namespaces. The issues of Child Sexual Abuse Material (CSAM) and other forms and types of abuse, including Domain Name System (DNS) abuse, are also not unique to the .XXX gTLD. The Board acknowledges that ICM applied for .XXX during the period of time where sponsored applications were accepted in the early 2000s. However, the fact that ICM succeeded in an earlier round of expansion of gTLDs does not mean that it is inappropriate to consider whether there can be changes to its RA.

The Board notes that the .XXX gTLD was not delegated until 2011, six years after .MOBI was delegated in 2005 and only two years before the first new gTLDs were delegated. The marketplace has evolved significantly over the past 13 years since .XXX was delegated, with the introduction of more than 1,000 new gTLDs, including adult-oriented gTLDs such as .PORN, .ADULT, and .SEX, among other developments. The Board acknowledges that as ICANN looks to evolve and improve upon legacy gTLD RAs in the renewal process, there is also past precedent for removing a legacy gTLD sponsorship. ICANN considered the request from the legacy .MOBI gTLD registry operator and the Board approved a resolution¹² ([/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot12](#)) for the legacy .MOBI RA to take on the Base RA and remove its sponsorship in its most recent renewal. Other legacy, sponsored gTLDs such as .AERO and .COOP requested to retain the sponsorship, or, like .CAT, .TEL, and .TRAVEL, opted to convert to community gTLDs during their RA renewal. Only the registry operators of .MOBI and .XXX have made the request to remove the sponsorship. ICANN org did not receive any comments or objections to the removal of .MOBI's sponsorship.

The Board notes that when .XXX was first introduced, the .XXX sponsorship provided a means of developing policies and best practices to operate .XXX in a responsible manner. During the 2012 Round of the New gTLD Program, these policies and best practices were proposed by ICM in its applications for the .ADULT, .PORN, and .SEX gTLDs and were incorporated into those RAs without sponsorship as voluntary PICs.

The Board also notes that the current .XXX sponsor, the International Foundation for Online Responsibility (IFFOR), expressed its opinion that the policies that are in place (and will remain in place in the .XXX RA renewal) have been "extremely effective" and that it is not necessary to maintain a sponsorship with regard to .XXX in order to ensure the effectiveness of those policies:

"We feel that the Baseline Policies that were developed by IFFOR at the creation of the .XXX registry and which remain in force have been extremely effective."¹³ ([/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot13](#))

"Those [IFFOR Ombudsman] reviews have revealed how effective the policies have been, and continue to be, in preventing abuse within the .XXX namespace. We understand that ICM Registry plans to incorporate those policies within a revised .XXX Registry Agreement. The continued use of those policies and practices, we believe, will produce similar results going forward, and does not require IFFOR to serve as the Sponsoring Organization to ensure they are effective."¹⁴ ([/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot14](#))

The Board acknowledges each of the comments that raised concerns about the removal of the .XXX sponsorship, and notes that the concerns raised within these comments tie the prevention of child sexual abuse material, abuse, and other harmful activities to registrant eligibility requirements. While the registrant eligibility requirements noted by commenters are not maintained within the proposed .XXX RA renewal, key commitments and protections that were included in the current .XXX RA in order to protect against abuse still remain in the proposed .XXX RA renewal as voluntary PICs. Based upon the comments submitted,¹⁵ ([/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#foot15](#)) the Board finds that many of the arguments and comments made against removing the sponsorship are based on inaccuracies and were provided without evidence to support the allegations and concerns raised.

The Board notes that the .XXX RA renewal emulates RAs of other adult-themed gTLDs (.ADULT, .PORN, and .SEX). These three adult-themed gTLDs are similar in concept to the .XXX gTLD, yet are operated as gTLDs on the Base RA and include voluntary PICs with similar obligations and commitments as those contained in the best-practice policies developed for the .XXX gTLD that are designed to combat CSAM. In addition,

all four of these adult-themed gTLDs are operated by registry operators that are under GoDaddy Registry's ownership. While .ADULT, .PORN, and .SEX contain similar voluntary commitments as .XXX, a key difference from .XXX is that they do not include a requirement to be a member of an adult-themed community to register a name. Considering the history and evolution of .XXX, the changes seen in the marketplace and introduction of thousands of new gTLDs, and input provided by the Registry Operator, IFFOR (the .XXX sponsor), and the sponsored gTLD community, the Board concludes it is practical to evolve the .XXX RA to model these examples. In addition to emulating the other adult-themed, non-sponsored gTLDs, the proposed .XXX RA renewal retains key protections and registry operator commitments from the current .XXX RA by including the existing PICs and obligations and provisions currently contained in the .XXX RA and Sponsorship Appendix S.

Based on the above, the Board believes that proceeding to execute the .XXX renewal RA as proposed for public comment does not raise potential significant security, stability, and competition issues.

The Board notes that the current .XXX RA calls for presumptive renewal of the agreement at its expiration so long as certain requirements are met. The .XXX RA renewal is subject to the negotiation of renewal terms reasonably acceptable to ICANN and the Registry Operator. The renewal terms approved by the Board are the result of the bilateral negotiations called for in the current .XXX RA, which was shared with the community for transparency and input, and transitioning to the form of the Base RA would not violate established Generic Names Supporting Organization (GNSO) policy.

Are there positive or negative community impacts?

The Board's approval of the proposed .XXX RA renewal offers positive technical and operational benefits. As mentioned above, the Board recognizes the benefits of aligning the .XXX RA with the Base RA, which provides additional safeguards and security and stability requirements compared to legacy agreements, contains standardized technical and reporting obligations for registry operators, provides for

operational efficiencies for ICANN, establishes consistency for end users, and allows for the automatic adoption of any future approved global amendments (such as the recent RDAP global amendment and DNS Abuse global amendment).

For instance, the proposed .XXX RA renewal provides that, in the event that any of the emergency thresholds for registry functions is reached, the Registry Operator agrees that ICANN may designate an emergency interim registry operator of the registry for the gTLD, which would mitigate the risks to the stability and security of the DNS. Furthermore, technical onboarding of the Registry Operator to comply with the provisions in the Base RA will allow the registry to use uniform and automated processes, which will facilitate operation of the gTLD. There will also be positive impacts on registrars and registrants. The transition to the Base RA will provide consistency across registries leading to a more predictable environment for end-users. The fact that the proposed .XXX RA renewal mandates the use of accredited registrars that are subject to the current 2013 Registrar Accreditation Agreement also provides numerous benefits to registrars and registrants.

Are there fiscal impacts or ramifications on ICANN Org (strategic plan, operating plan, budget); the community; and/or the public?

There is no significant fiscal impact to ICANN expected from the .XXX RA renewal.

Are there any security, stability or resiliency issues relating to the DNS?

The .XXX RA renewal is not expected to create any security, stability, or resiliency issues related to the DNS. Using the Base RA to renew the .XXX RA helps establish certain benefits including standardization in the industry, end-user benefits, and a more future-proof agreement. The technical and operational consistency provided for in the obligations within the Base RA leads to a more consistent experience for Internet users, registrants, registrars, ICANN, and the industry as a whole as well as more equitable treatment of registry operators. Additional safeguards included in the Base RA benefit end-users and the broader industry. These safeguards include the registry operator code of conduct requirements, the requirement for equitable

treatment of registrars, and provisions for Emergency Back-end Registry Operators, among others. Lastly, the .XXX RA renewal using the Base RA is now able to automatically adopt any approved global amendments, such as the recent RDAP and DNS Abuse global amendments, thus better aligning the .XXX RA with overall contract evolution.

Is this decision in the public interest and within ICANN's mission?

This decision is in the public interest and within ICANN's mission.

In the context of the New gTLD Program: Next Round, the Board raised concerns about the inclusion of PICs/registry voluntary commitments (RVCs) that could have the effect of restricting content in gTLDs in the Next Round RAs. This concern was raised given the limited scope of ICANN's Mission as set forth in the ICANN Bylaws, Article 1, Section 1.1. In light of this concern, the Board directed ICANN org to facilitate a community consultation to ensure that the framework for implementing these recommendations in the Next Round is consistent with the ICANN Bylaws.

The Board acknowledges that parallels have been drawn between the discussions concerning RVCs in the Next Round RAs and the terms in the .XXX RA renewal. ICANN org noted this in the public comment on the proposed .XXX RA renewal and the matter has been considered at great length. The .XXX RA renewal published for public comment retains voluntary PICs that are in the current .XXX RA and carries over pre-existing terms that are in the current .XXX RA (in the form of voluntary PICs in the .XXX RA renewal).

The Board notes that the voluntary PICs in the proposed .XXX RA renewal are not new commitments, but rather reflect restrictions and obligations that are already in effect for .XXX in some form and that are already subject to ICANN Contractual Compliance oversight and enforcement. Commenters shared that they want these commitments to be retained in the .XXX RA renewal. Retaining these terms in the .XXX RA renewal

agreement is consistent with gTLDs from the 2012 round of the New gTLD Program using the Base RA and emulates the other adult-themed gTLDs from the 2012 round (ADULT, .PORN, and .SEX).

c. ICANN Risk Appetite Statement

Whereas, the ICANN Board previously recognized the benefit of and need for a Risk Management Framework to guide the ICANN organization in managing risks it faces.

Whereas, ICANN's Risk Management Framework includes a Risk Appetite Statement.

Whereas, risk management involves the identification of vulnerabilities to the organization and therefore it would not be prudent to publish the Risk Appetite Statement in its full form.

Whereas, in 2020, ICANN adopted a Risk Appetite Statement and posted a **Summary of the Risk Appetite (/files/files/summary-risk-appetite-statement-22dec20-en.pdf)** on the ICANN website.

Whereas, the Board Risk Committee has spent numerous meetings and had many discussions about revisions to the ICANN Risk Appetite Statement and recommended that the Board adopt the proposed Revised ICANN Risk Appetite Statement.

Resolved (2024.11.10.03), the Board approves the Revised ICANN Risk Appetite Statement and directs the Interim President and CEO, or her designee(s), to publish a summary of it.

Rationale for Resolution 2024.11.10.03

This ICANN Risk Appetite Statement articulates the level of risk that ICANN is willing to take and retain on a broad level to deliver its mission. Specifically, the ICANN Risk Appetite Statement:

- Communicates to staff that they need to pursue objectives within acceptable risk limits.
- Provides input for prioritization for planning and budgeting.
- Assists the Board by offering a clear framework on acceptable risk levels.
- Encourages a culture of proactive risk management rather than risk aversion, ensuring that risk management is shared across all ICANN staff.
- Demonstrates ICANN's commitment to responsible and proactive risk management, enhancing the organization's reputation with stakeholders.

As part of the Target Operating Model for a mature Risk Management Framework, ICANN strives for a comprehensive Risk Appetite Statement.

The Risk Appetite Statement specifies the level of risk ICANN is willing to take and retain, thereby demonstrating ICANN's risk appetite that can then be used to guide the operations of ICANN.

ICANN's Risk Appetite Statement, in conformance with standard industry practice, is a high-level articulation of the risks faced by ICANN. The intention is to provide a concise overview that is accessible to all. However, risks often involve vulnerabilities or threats to the organization, and it would be imprudent for any organization to publicly provide specific details of such risks.

The initial Risk Appetite Statement approved in 2020 was developed by the organization's Risk Management function in collaboration with representatives of every function within ICANN. The Risk Appetite Statement was reviewed by the

organization Executive Team and approved by the ICANN President and CEO for initial consideration by the Board Risk Committee. The Board Risk Committee then reviewed and recommended that the Board approve the ICANN Risk Appetite Statement. The Board Risk Committee recently re-reviewed the Risk Appetite Statement that the Board adopted in 2020 and have recommended some revisions, which the CEO Risk Management Committee also reviewed.

Adopting the revised Risk Appetite Statement is in the public interest and is also fully consistent with ICANN's mission as it articulates the risk appetite of ICANN, which will be used to guide the operations of ICANN.

Adopting the BRC's recommendation has no financial impact on ICANN and could have a positive impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require Public Comment.

d. Approval of Fundamental Bylaws Amendment on Accountability Mechanisms

Whereas, the ICANN community, through the Cross Community Working Group on New gTLD Auction Proceeds (CCWG-AP), made a recommendation that utilization of ICANN's Reconsideration and Independent Review processes (collectively, ICANN Accountability Mechanisms) should be limited in certain circumstances (Recommendation 7). During ICANN organization's (ICANN org) work to implement the ICANN Grant Program aligned with the CCWG-AP's full set of recommendations, Recommendation 7 posed a unique challenge, as the CCWG-AP's language was too narrow based on the implementation design.

Whereas, the ICANN Board has taken a series of actions and communications to move forward with the ICANN Grant Program while trying to address the issues presented by the original language of Recommendation 7, including:

- 26 October 2023 resolutions revisiting the Board's prior approval of Recommendation 7 and directing the development of a more general process for the ICANN community to indicate when ICANN's Accountability Mechanisms should not be available;
- **2 March 2024 letter (/files/correspondence/sinha-to-clemente-et-al-02mar24-en.pdf)** to the CCWG-AP's Chartering Organizations specifying a proposed change to Recommendation 7 to remove a reference to the "Independent Application Assessment Panel" so that Recommendation 7 could better achieve its goal of preserving auction proceeds for grants instead of funding challenges to decisions on grant applications; and the
- **21 January 2024 initiation (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-21-01-2024-en#section2.d)** of a Fundamental Bylaws amendment process setting forth the general process for the ICANN community to limit access to ICANN's Accountability Mechanisms.

Whereas, in response to **Public Comment (/en/public-comment/proceeding/proposed-bylaws-updates-to-limit-access-to-accountability-mechanisms-27-02-2024)** on the proposal for a general process on limitation of access to ICANN Accountability Mechanisms, the ICANN community was not supportive. The ICANN Board therefore, on **29 July 2024 (/en/board-activities-and-meetings/materials/approved-resolutions-special-meeting-of-the-icann-board-29-07-2024-en#section2.c)**, reinitiated a Fundamental Bylaws Amendment Process with a more narrow scope, amending the ICANN Reconsideration process (at ICANN Bylaws, Article 4, Section 4.2) and the Independent Review process (at ICANN Bylaws, Article 4, Section 4.3) to specifically exclude claims or disputes "relating to decisions to approve or not approve an application to the ICANN Grant Program" from

each of the relevant mechanisms. In that resolution, the Board clarified "that it is no longer pursuing the previously posted amendment to Article 4, Section 4.1 of the Bylaws."

Whereas, on 7 August 2024 ICANN opened a **Public Comment Forum (/en/public-comment/proceeding/proposed-fundamental-bylaws-amendments-related-to-grant-program-07-08-2024)** on the updated Fundamental Bylaws Proposal. Nine submissions were received (including one late), and all commenters were supportive of the proposal as posted for Public Comment. Commenters, noted that the updated proposal was better aligned to the intention of Recommendation 7 and was a more appropriate means of implementation than the prior proposal. The Governmental Advisory Committee (GAC) specifically noted that the new proposal on the Fundamental Bylaws narrows the impact on ICANN's Accountability Mechanisms about which the GAC **raised a concern** (**<https://gac.icann.org/contentMigrated/proposed-update-to-recommendation-7-by-the-new-gtld-auction-proceeds-cross-community-working-group-ccwg-ap>**) in May 2024.

Whereas, at or before the forthcoming ICANN81 Public Meeting, ICANN will take the opportunity to finalize confirmation with the Chartering Organizations of the CCWG-AP their support or non-objection to the proposal to update Recommendation 7, including confirmation with the GAC that it too is in a position to support or not object to the updating of Recommendation 7, in light of the Board's acceptance of this alternate path. The Board will, prior to the approval of a slate of successful applications to the first cycle of the ICANN Grant Program, formally confirm its adoption of the updated Recommendation 7.

Resolved (2024.11.10.04), the ICANN Board, pursuant to Article 25, Section 25.2 of the ICANN Bylaws, approves the amendment of the Fundamental Bylaws at Article 4, Section 4.2(d) and Section 4.3(d), as posted for public comment. The ICANN Interim President and CEO, or her designee, is directed to provide all required notice to the Empowered Community to support its Approval process.

Resolved (2024.11.10.05), the ICANN Board confirms that in the event the Empowered Community approves the Fundamental Bylaws amendment, the Board's 26 October 2023 resolutions 2023.10.26.11-12 (removing the dependency of a Fundamental Bylaws amendment on the ICANN Grant Cycle and reliance upon contractual terms and conditions as the mechanism to enforce limitations on access to ICANN Accountability Mechanisms within the ICANN Grant Program) are both rescinded .

Rationale for Resolutions 2024.11.10.04 – 2024.11.10.05

Today's Board action in approving an amendment to the Fundamental Bylaws set out at Article 4, Section 4.2(d) and Section 4.3(d) represents a path to closure of the conversation about the Cross-Community Working Group on New gTLD Auction Proceeds (CCWG-AP) Recommendation 7. With this amendment, ICANN's Reconsideration (Article 4, Section 4.2) and Independent Review (Article 4, Section 4.3) processes will not be available for challenges to decisions to approve or not approve an application to the ICANN Grant Program. Those exclusions will be formally built into the ICANN Bylaws, without any other modification to either accountability mechanism.

The Cross-Community Working Group on New gTLD Auction Proceeds '(CCWG-AP) Final Report included Recommendation 7, which states in relevant part "Existing ICANN accountability mechanisms such as IRP or other appeal mechanisms cannot be used to challenge a decision from the Independent Project Applications Evaluation Panel to approve or not approve an application. Applicants not selected should receive further details about where information can be found about the next round of applications as well as any educational materials that may be available to assist applicants. The CCWG recognizes that there will need to be an amendment to the Fundamental Bylaws to eliminate the opportunity to use the Request for Reconsideration and Independent Review Panel to challenge grant decisions." Though the Board previously accepted Recommendation 7 on 12 June 2022, on 23 October 2023, the Board revisited that action because of implementation challenges that arose during the design of the ICANN Grant Program. The Board explained:

In order to account for the design work that has progressed since the Board's June 2022 action which defines different stages of assessment of individual applications, from admissibility to eligibility to substantive evaluation by an Independent Application Assessment Panel, the Board expects the limitation to restrict access to ICANN's accountability mechanisms for all decisions on those individual applications, not limited only to those made by the Independent Application Assessment Panel (as stated within the CCWG-AP recommendation). Anything short of this comprehensive view makes it possible that some applicants could have access to ICANN's accountability mechanisms for decisions on their individual applications as long as that action wasn't taken by the Independent Application Assessment Panel. If allowed, this uneven access to the accountability mechanisms still risks the use of auction proceeds to defend against accountability challenges on individual application decisions in a manner the CCWG-AP wished to protect against.

The Board, considering alternative means to achieve the CCWG-AP's stated goal, asked ICANN org to produce a more general Bylaws amendment that would provide a process through which the ICANN community could signal its intent to limit the use of ICANN's Accountability Mechanisms. A draft Bylaws amendment to Article 4, Section 4.1, drafted to support this more general approach was posted for Public Comment in April 2024. The comments received in that forum confirmed the ICANN community was not satisfied with and did not support the general process approach.

The ICANN Board also, in March 2024, sent a letter to the Chartering Organizations to the CCWG-AP explaining that an update to the CCWG-AP's Recommendation 7 to remove the words "from the Independent Project Applications Evaluation Panel" would cure much of the Board's concerns in supporting full implementation of the CCWG-AP's Recommendation 7. That letter confirmed that there are two dependencies to the Board approving the distribution of any grants within the ICANN Grant Program: (1) updating Recommendation 7 and (2) amending the Bylaws to confirm the restriction access to ICANN's Accountability Mechanisms. To date, ICANN has heard back from all Chartering Organizations, with all but one stating either

support or non-objection to proceeding with the updated text. The seventh Chartering Organization, the Governmental Advisory Committee (GAC) noted a need for further clarification of how the Board would address the potential for other impacts on the ICANN Accountability Mechanisms that were evident in the disfavored Bylaws proposal as posted for comment in April.

In July 2024, after consideration of the public comment received on the earlier proposal to amend the Bylaws, the Board determined that it was no longer pursuing the general approach that was highly disfavored. Instead, the Board initiated a new Fundamental Bylaws Amendment process that provides specific exclusions from the use of the Reconsideration and Independent Review Processes for decisions on individual applications in the ICANN Grant Program. As both the Reconsideration and Independent Review processes already enumerate excluded topics for claims or disputes, the proposed amendment approved today adds to each of those exclusions, relying on language as contemplated within an updated Recommendation 7 ("cannot be used to challenge a decision to approve or not approve an application").

Nine comments were received in the August 2024 Public Comment proceeding on the revised proposal. Every commenter was supportive of the proposed amendments as posted, including comments confirming that the updated proposal implements the intention of Recommendation 7.

This action supports the Board's duty and interest in remaining accountable for the use of the auction proceeds funds that support the ICANN Grant Program. The approval of this Bylaws amendment helps mitigate the risk that auction proceeds will be used to defend against accountability challenges on individual grant decisions. This decision also fills a gap created in the Board's October 2023 decision, as that decision did not impact third party access to ICANN Accountability Mechanisms for challenges related to the ICANN Grant Program. The Bylaws amendments approved today impose an exclusion regardless of whether the challenge would be brought by an applicant or a third party.

The Board notes that while the path to resolution of how to address Recommendation 7 has been long and spurred controversy, the outcome here shows the power of ICANN's multistakeholder community. The checks built into the ICANN Bylaws regarding public comment and the powers of the Empowered Community to weigh in on Bylaws amendments have now brought about a result that is better scoped for the ICANN Grant Program and the public interest. The Board thanks the community for the productive dialogue and efforts to reach this outcome.

The Board's October 2023 actions removed the need for a fundamental Bylaws change, and required reliance on contractual terms and conditions as the sole mechanism to make the ICANN Accountability Mechanisms unavailable. The Board notes that while it is formally rescinding those actions, the Board is not directing any amendment to the ICANN Grant Program Terms and Conditions as published for the first cycle of applications. First, all applications within the first cycle have already been received. Second, it is an operational decision to put the applicants on notice that their methods of challenge will be limited, even though the Terms and Conditions itself will no longer be the relevant source to substantiate and enforce such limitations.

The next step for the Fundamental Bylaws Amendment Process is the Empowered Community Approval Process. The Board looks forward to participating in the Community Forum on this issue. The next step for the ICANN Grant Program is that the Board will conclude its confirmation with the Chartering Organizations to the CCWG-AP regarding updating Recommendation 7, and will formally renew its approval of that Recommendation 7 in advance of any Board action on a slate of successful applicants within the first cycle of the ICANN Grant Program.

Today's action is directly related to how the ICANN Community may hold ICANN accountable to its mission and work. Today's action is in the public interest, and is aligned with ICANN's Bylaws, in preserving accountability for funds under the ICANN Grant Program and faithfully implementing the recommendations of the community.

This actions is not anticipated to result in any impact to the security, stability or resiliency of the Internet's DNS. Nor is this action anticipated to result in any budgetary or financial implications.

This is an Organizational Administrative Function decision requiring public comment.

2. Executive Session

a. Interim President and CEO Goals for FY25

Whereas, the Compensation Committee has worked with the Interim President and CEO to develop a set of performance goals for FY25.

Resolved (2024.11.10.06), the Board hereby approves performance goals for the Interim President and CEO for FY25.

Rationale for Resolution 2024.11.10.06

Consistent with all personnel with the ICANN organization, the Interim President and CEO is to be evaluated against specific performance goals, which the Interim President and CEO sets in coordination with the Compensation Committee and the Board.

The Compensation Committee discussed and agreed with the Interim President and CEO on a set of performance goals for the Interim President and CEO for FY25. The Board has evaluated these goals and agrees that they are appropriate and consistent with ICANN's Strategic and Operating plans.

Taking this decision is in furtherance of ICANN's Mission and is in the public interest in that the Interim and President and CEO's performance goals are fully consistent with ICANN's Strategic and Operating plans.

The decision to adopt FY25 performance goals for the Interim President and CEO will not have a direct fiscal impact on ICANN. This decision will not have an impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

Published on 11 November 2024

Footnotes

[1] (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note1) Additional background information is available in the Board's **21 January 2023 Resolution and Rationale (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-21-01-2023-en#section2.b)** and in the Board's **11 June 2023 Resolution and Rationale (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-11-06-2023-en#section2.a)**, and is incorporated herein.

[2] (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note2) Dr. Leonard's opinion that competition (not price controls) has historically been the operative restraint on pricing is consistent with the findings and opinions of Dr. Dennis Carlton, the expert economist who testified on ICANN's behalf in the Namecheap IRP. In the IRP, Dr. Carlton "conclude[d] that TLD competition and other factors limit .ORG, .INFO, and .BIZ's ability to raise prices and that they are unlikely to raise prices significantly above the levels that would have been allowed under the prior price controls. If they did attempt to raise prices above the levels allowed by the prior price controls, registrants

—even locked-in registrants—could mitigate the harm of any such increases." **Carlton Expert Report (/files/files/irp-namecheap-expert-report-carlton-redacted-14jan22-en.pdf)**, ¶ 47.

[3] (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note3) Economic Report (/files/files/economic-analysis-info-org-14feb24-en.pdf), 4-5.

[4] (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note4) Economic Report (/files/files/economic-analysis-info-org-14feb24-en.pdf), 4 ("To the extent that the regulated price differs from the price that would have been set by the market, the regulated price will distort the incentives to economic agents and thus distort the allocation of resources.").

[5] (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note5) Bylaws (/resources/pages/governance/bylaws-en), Art. 1, § 1.1(c) ("ICANN does not hold any governmentally authorized regulatory authority."); *Afilias Domains Limited No. 3 v. ICANN*, Final Declaration, ¶ 352 (finding that ICANN is not an economic regulator).

[6] (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note6) Witness Statement of J. Beckwith Burr (/files/files/irp-namecheap-witness-statement-burr-14jan22-en.pdf), January 14, 2022, ¶ 19; **Witness Statement of Maarten Botterman (/files/files/irp-namecheap-witness-statement-botterman-14jan22-en.pdf)**, January 14, 2022, ¶ 8.

[7] (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note7) *See*, **2024 Global Amendment to the Base RA (https://itp.cdn.icann.org/en/files/registry-agreements/base-registry-agreement-global-amendment-05-04-2024-en.pdf)**.

[8] (</en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note8>) *See*, **2023 Global Amendment to the Base RA** (<https://itp.cdn.icann.org/en/files/registry-agreements/base-registry-agreement-global-amendment-07-08-2023-en.pdf>).

[9] (</en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note9>) *See*, public comment summary report at <https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-xxx-top-level-domain-tld2-13-09-2024-en.pdf>. (<https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-xxx-top-level-domain-tld2-13-09-2024-en.pdf>)

[10] (</en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note10>) *See*, **Public Comment Proceeding on the Proposed Renewal of the .XXX Registry Agreement** (</en/public-comment/proceeding/proposed-renewal-of-the-registry-agreement-for-the-xxx-top-level-domain-tld-18-03-2024>).

[11] (</en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note11>) *See*, public comment summary report at <https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-xxx-top-level-domain-tld2-13-09-2024-en.pdf> (<https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-xxx-top-level-domain-tld2-13-09-2024-en.pdf>).

[12] (</en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note12>) *See*, ICANN Board resolution on renewal of .MOBI registry contract at <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann->

[board-16-03-2017-en#1.d.rationale \(/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-16-03-2017-en#1.d.rationale\)](#).

[\[13\] \(/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note13\)](#) See. IFFOR response to queries following ICANN Public Comment Period: Q1. A1 at **<https://iffor.org/iffor-response-to-queries-following-icann-public-comment-period-us/>** (**<https://iffor.org/iffor-response-to-queries-following-icann-public-comment-period-us/>**).

[\[14\] \(/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note14\)](#) See, letter from IFFOR to ICANN at **[https://www.icann.org/en/system/files/correspondence/iffor-board-directors-to-icann-18oct23-en.pdf](https://www.icann.org/en/system/files/correspondence/iffor-board-directors-to-icann-18oct23-en.pdf (/files/correspondence/iffor-board-directors-to-icann-18oct23-en.pdf))** (**[/files/correspondence/iffor-board-directors-to-icann-18oct23-en.pdf](https://www.icann.org/en/system/files/correspondence/iffor-board-directors-to-icann-18oct23-en.pdf (/files/correspondence/iffor-board-directors-to-icann-18oct23-en.pdf))**).

[\[15\] \(/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-11-2024-en#note15\)](#) See, public comment summary report at **[https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-xxx-top-level-domain-tld2-13-09-2024-en.pdf](https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-xxx-top-level-domain-tld2-13-09-2024-en.pdf (https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-xxx-top-level-domain-tld2-13-09-2024-en.pdf))** (**[https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-xxx-top-level-domain-tld2-13-09-2024-en.pdf](https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-xxx-top-level-domain-tld2-13-09-2024-en.pdf (https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-xxx-top-level-domain-tld2-13-09-2024-en.pdf))**).

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Exhibit H

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[中文\(/zh/governance/documents/amended-and-restated-articles-of-incorporation-of-internet-corporation-for-assigned-names-and-numbers-09-08-2016-zh\)](#)

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AMENDED AND RESTATED ARTICLES OF INCORPORATION OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Date

9 August 2016

As approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016

The undersigned certify that:

1. They are the president and the secretary, respectively, of Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation.
2. The Articles of Incorporation of this corporation are amended and restated to read as follows:
 - I. The name of this corporation is Internet Corporation for Assigned Names and Numbers (the “**Corporation**”).
 - II. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law for charitable and public purposes. The Corporation is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “**Code**”), or the corresponding provision of any future United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any future United States tax code. In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article IV hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by carrying out the mission set forth in the bylaws of the Corporation (“**Bylaws**”). Such global public interest may be determined from time to time. Any determination of such global public interest shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process.
 - III. The Corporation shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.
 - IV. Notwithstanding any other provision of these Articles:
 - a. The Corporation shall not carry on any other activities not permitted to be carried on (i) by a corporation exempt from United States income tax under § 501(c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under § 170(c)(2) of the Code.
 - b. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall be empowered to make the election under § 501 (h) of the Code.

- c. The Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.
 - d. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its directors, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article II hereof.
- V. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter in effect, no director of the Corporation shall be personally liable to the Corporation for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article V shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.
- VI. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article II hereof and, if possible, to a § 501(c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.
- VII. Any amendment to these Articles shall require (a) the affirmative vote of at least three-fourths of the directors of the Corporation, and (b) approval in writing by the Empowered Community, a California nonprofit association established by the Bylaws (the "**Empowered Community**"), following procedures set forth in Article 25.2 of the Bylaws.
- VIII. Any transaction or series of transactions that would result in the sale or disposition of all or substantially all of ICANN's assets shall require (a) the affirmative vote of at least three-fourths of the directors of the Corporation, and (b) approval in writing by the Empowered Community prior to the consummation of the transaction, following procedures set forth in Article 26 of the Bylaws.
3. The foregoing amendment and restatement of Articles of Incorporation has been duly approved by the board of directors.
4. The corporation has no members.

We further declare under penalty of perjury under the laws of the State of California that the matters set forth in this certificate are true and correct of our own knowledge.

Date: 30 September 2016

Göran Marby, President

John Jeffrey, Secretary

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