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June 27, 2023

ICANN Board of Directors  
c/o Tripti Sinha, Chair, ICANN Board of Directors  
12025 Waterfront Drive, Suite 300  
Los Angeles, California  
90094-2536, USA

Dear Ms. Sinha:

**Re: ICANN's "Policy Wash" of the .Net Registry Agreement**

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I am writing to you out of concern regarding the recent [Public Comment Summary Report](#) (the "Summary Report") in connection with the [Public Comments](#) submitted regarding [Proposed Renewal of the Registry Agreement for .NET](#) (the "Public Comments"). In particular, I am concerned that the issues raised in the [ICA's Public Comment](#) have neither been satisfactorily addressed nor adequately conveyed to you via the Summary Report.

For the Board to be able to effectively execute its duties, it needs to be satisfactorily informed of critical issues. Unfortunately, the Summary Report fails to convey the substance of several critical aspects of the Public Comments. It is readily apparent by merely comparing the depth and length of the Public Comments to the relatively brief Summary Report, that only a cursory and perfunctory review was conducted. It is equally apparent from the "analysis" contained in the Summary Report, that the issues raised by the Public Comments were not seriously considered. Combined, the Summary Report leaves the inescapable impression that ICANN views the Public Comment procedure as a mere formality and never intended to learn anything from it, let alone change anything as a result of it.

If the Board were solely to rely upon the Summary Report, it would be effectively misled and thereby unable to genuinely understand and appreciate the critical issues that have been raised by

stakeholders. In particular, the Summary Report brazenly ignores or fails to meaningfully respond to these critical issues and thereby amounts to a “policy wash”.

With a new Board Chair, I am hopeful that the Board will exercise greater scrutiny over the Public Comment process. I am hopeful in particular, that you will bear in mind that in the recent Final Declaration of the Independent Review Process (“IRP”) Panel in [\*Namecheap, Inc. v. ICANN\*](#) (December 23, 2022) squarely condemned ICANN’s failure to fairly to engage in genuinely responsive public consultation procedures.

The IRP Panel’s severe criticism of ICANN’s approach to Public Comments seems to have been entirely ignored and ICANN’s failures simply repeated. As noted by the IRP Panel:

“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.**” Beyond the Staff Report, the only justification ICANN provided to the Internet community were two paragraphs that did not address some of the more significant points made in the comments.<sup>1</sup>  
(IRP Final Declaration at Footnote 339, Page 105)

“**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.”**”<sup>2</sup>  
(IRP Final Declaration at Page 101, Paragraph 326)

“**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.”<sup>3</sup>  
(IRP Final Declaration at Page 115, Paragraph 360)

ICANN org is also known to have concealed economic studies from the public, from stakeholders, and *even from you, its own Board of Directors*. As also noted by the IRP Panel, *supra*:

“ICANN org also obtained a newer report prepared by Professor Carlton in 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....

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<sup>1</sup> IRP Report at Page 134, Paragraph 405.

<sup>2</sup> IRP Report at Page 101, Paragraph 326.

<sup>3</sup> IRP Report at Page 115, Paragraph 360.

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.”<sup>4</sup> (IRP Final Declaration at Footnote 339, Page 105)

Another embarrassing failure to engage in genuinely responsive consultation and an attempted “policy wash” has unfortunately already occurred here, but the Board still has an opportunity to avoid a repeat of governmental intervention. You will recall that on June 30, 2019, ICANN decided to remove all price caps on the .ORG registry despite near universal condemnation and a [“sham” public comment process](#), and did so, as noted by the IRT Panel, in the absence of any responsive explanation or public economic study. [Mr. Xavier Becerra wrote a scathing letter to ICANN](#) dated, April 15, 2020, raising serious concerns about the purported acquisition and requested that ICANN withhold its approval of the acquisition. Mr. Bacerra in particular, noted therein, that **“there is mounting concern that ICANN is no longer responsive to the needs of its stakeholders”**.

The examples of inadequate, cursory, inarticulate, and reflexive responses to the Public Comments – in defiance of the IRP Panel’s admonishment and criticism - are numerous and involve many of the Public Comments, however I will set out below a few examples:

#### Registry Pricing and Economic Studies and/or Market Analysis (Summary Report, Page 7)

Nearly all Public Comments were highly critical of ICANN’s intention to allow the .NET registry operator to continue to raise prices by 10% every year without any apparent justification.

The purported “Analysis of Comments” refers to the nearly unanimous opposition as “several commenters” and states that “these concerns arose even though there are no proposed alterations to the section 7.2(a), which describes to pricing rules that have “been in effect since 2005”. That is the point; no changes were made to the pricing rules despite ICANN having an opportunity to do so. The Summary Report inexplicably purports to confine the relevancy of Public Comments to only those areas which were altered in the Proposed Renewal Agreement when it is equally important to address Public Comments on those provisions which remained unaltered.

The Summary Report “*acknowledges* the comments and *reminds* the community that at this time, ICANN has three model for pricing terms in Registry Agreements”. First of all, this is precisely the kind of minimizing, condescending, and intransigent attitude previously rejected by the IRP Panel. The Summary Report also mischaracterizes the Public Comments and in particular the ICA’s Public Comment by falsely claiming that these comments “sought a fourth approach which was to eliminate the right of the registry operator to increase prices of wholesale domain name registration services”. There was no “fourth approach” recommended and not by the ICA in particular. In fact, the Public Comments and the ICA’s Public Comment in particular, advocated for ICANN to reconsider allowing *this particular* registry operator to get a renewed Registry Agreement without examining whether wholesale prices need to be continually raised throughout its term.

The ICA in particular stated that it “is very concerned that ICANN is *once again* making a monumental decision regarding pricing of a legacy TLD without any economic study having been

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<sup>4</sup> At Page 105, Footnote #339.

undertaken (or at least publicly disclosed) and which would have provided crucial data on whether ICANN is justified in permitting Verisign to perpetually raise .net prices by 10% annually”. The ICA also stated that, “ICANN is obliged to openly and transparently provide its rational basis for proposing annual 10% price hikes for yet another six (6) year term and this can only be achieved by conducting an economic study.”

ICANN purported to explain its failure to even consider whether the Proposed Renewed Registry Agreement should contain continued price hikes by stating that:

“ICANN is not a competition authority or price regulator and does not have the remit to serve as one. As enshrined in ICANN’s Bylaws, which were developed through the bottom up, multistakeholder process, ICANN’s mission is to ensure the security and stability of the Internet’s unique identifier systems.”

First of all, ICANN ignores the provision in its Bylaws which require ICANN to act in a fiscally responsible manner and promote competition, such as;

- a) that ICANN must operate “through open and transparent processes that enable competition” (Commitments - 1.2(a));
- b) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market (Core Values -1.2(b));
- c) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process (Core Values – 1.2(b)(iv));
- d) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community (Core Values 1.2(b)(v));

Secondly, if ICANN’s mission precludes negotiating pricing – as it inexplicably purports - then how did it establish the .net pricing to begin with? I do not need to remind you that [ICANN itself put the .net registry out for bid in 2005](#) and it received several tenders, including from Afilias, Denic, and NeuLevel but ultimately gave the contract to Verisign, and the competitive bidding process resulted in ICANN lowering the Service Fees payable to Versign [from \\$6.00 to \\$3.50](#) per domain name. It was the tendering process itself which provided ICANN with the opportunity to make an informed assessment of suitable Service Fees. As such, ICANN is well acquainted with its actual mandate and responsibility to establish competitive pricing mechanisms for its registry operators and surely this does not make ICANN a price regulator.

In any event, this refrain that ICANN is “not a competition authority or a price regulator” is nothing but misdirection. As set out above, ICANN has a responsibility to foster competition and as explained in the ICA’s Public Comment (which was not addressed by the Summary Report), if by “price regulator”, ICANN is not a “government regulatory agency”, *then of course ICANN is not*

a price regulator. But as the manager of the .net registry, ICANN is perfectly entitled to negotiate Service Fees with its contracted service providers. That *does not* make ICANN a “regulator” at all per se, but rather a responsible steward of the domain name system who undertakes ordinary commercial negotiation of contracts on behalf of the public interest.

Therefore, as the service requestor and not as a regulator, ICANN should follow the common practice of identifying the best combination of quality services and low prices available in the marketplace by seeking conditional bids of the .net registry Agreement. This would enable ICANN to ascertain the lowest Service Fees that a qualified competitor to Verisign would be prepared to accept in order to operate the .net registry on ICANN’s behalf. With this crucial data in hand, ICANN could *then* undertake meaningful negotiations of Service Fee terms with Verisign. If Verisign then declined to reach agreement with ICANN on Service Fee Terms, the Agreement would expire and ICANN could award the contract to the successful conditional bidder.

The Summary Report also misleads by purporting to justify ICANN’s decision to not consider pricing when its .NET registry agreement came up for renewal by stating that, “none of ICANN’s current Registry Agreements absolutely prohibit a registry operator from raising prices of domain name registrations, including the Base RA”. This is entirely besides the point of course. The issue is not “raising prices” as a general policy applicable to all registry agreements, but rather whether ICANN should negotiate pricing as part of its .NET registry agreement renewal negotiations in particular which expressly contemplate such negotiation.

As explained in the ICA’s Public Comment, although ICANN gave Verisign a presumptive right of renewal pursuant to Section 4.2 of the 2017 .NET Registry Agreement, ICANN fortunately included a provision enabling ICANN to negotiate terms when the contract comes up for renewal:

#### **4.2 Renewal.**

...

**The parties agree to initiate negotiations** with respect to each renewal of the Agreement at least six (6) months prior to the respective Expiration Date.  
[emphasis added]

This provision demonstrates that the Agreement expressly contemplates negotiation prior to renewal, which implicitly means that a renewed Agreement *need not be identical* to the prior one. This conclusion is expressly confirmed by Section 4.3 which states:

Section 4.3 **Changes.** While this Agreement is in effect, **the parties agree to engage in good faith negotiations** at regular intervals (at least once every three calendar years following the Effective Date) **regarding possible changes to the terms of the Agreement**, including to Section 7.2 regarding fees. [emphasis added]

Accordingly, although the Agreement provides a presumptive right of renewal, Sections 4.2 and 4.3 in combination makes it clear that the parties may negotiate the terms of a renewed Agreement and those terms include Service Fees. As stated in the ICA’s Public Comment, it doesn’t appear that ICANN has even attempted to negotiate Service Fee terms yet this is simply not addressed in the Summary Report.

Regarding the importance of conducting an economic study as a means of responsibly evaluating whether ICANN should pay more for .NET registry operational services and the absence of a provision requiring cooperation for such a study in the Proposed Registry Agreement, the Summary Report states that “it is important to understand that Section 2.15 which addresses cooperation with economic studies, is intended to “study the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters. It does not pertain to the overall market with legacy TLDs.” That is exactly the problem not an answer to the problem. That is why the ICA amongst others requested that the Proposed Renewed Registry Agreement include such a provision specifically regarding .NET.

Remarkably, the Summary Report stated that: “In addition, some of these comments suggest that adding the provision would enable ICANN to collect data to determine if the price increases are in the public interest or may have an impact on the DNS marketplace. However, since the pricing for .NET is public and the zone file information is available, conducting a study, if necessary, would not be impeded.” This non-response simply side-steps the Public Comments’ demand that an economic study be undertaken by ICANN in order to assess whether ICANN should voluntarily pay more to its .NET registry operator or whether it should engage in a conditional competitive bidding process as suggested by the ICA in its Public Comment, in order to arrive at an appropriately competitive level of Service Fees.

I am attaching the ICA’s Public Comment since the Summary Report ignored and misrepresented its content. I also encourage you to personally review each of the Public Comments to obtain a genuine appreciation of the issues that are raised since the Summary Report appears to be nothing but a “policy wash” of the exact same kind and nature as the IRP Panel previously condemned. As can readily be seen, the Summary Report self-servingly purports to defend ICANN’s decisions without proving satisfactory explanations, ignores or misrepresents the nature of the criticisms and recommendations, and provides virtually meaningless rejoinders. This is clearly a perfunctory exercise designed to justify ICANN’s opaque and irresponsible decision making regarding the .NET registry renewal. The Board should not abide by this.

I would be pleased to discuss this matter with you at your convenience should you have questions or wish to have a constructive dialogue on the Proposed .NET Registry Agreement and the Public Comment process.

Sincerely,  
**INTERNET COMMERCE ASSOCIATION**



Per:  
Zak Muscovitch  
General Counsel, ICA

Encl.

cc: Sally Costerton, ICANN Interim President and CEO  
(via email: [sally.costerton@icann.org](mailto:sally.costerton@icann.org))

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and Via ICANN's Public Comment Portal

May 23, 2023

ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, California  
90094-2536, USA

Attn: Karla Hakansson, GDD Program Director

Dear Ms. Hakansson:

**Re: Proposed Renewal of the Registry Agreement for .NET**

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I write to you on behalf of the members of the Internet Commerce Association (the "ICA"). Founded in 2006, the ICA is a non-profit trade association representing domain name registrants and investors, secondary market participants, and related service providers. The ICA's mission is to assist with the development of domain name related policy.

The Proposed .net Renewal Agreement (the "Proposed Renewal Agreement" or the "Agreement") is of substantial importance due to the number of .net domain name registrations involved as well as the volume of revenue that it represents. We are therefore pleased to provide our Comments herein [in response to your request for input](#) on the [Proposed Renewal Agreement](#). **Part I** of the below comment covers the proposed registry Service Fees and **Part II** covers various other proposed revisions.

### **PART I – Service Fee Levels**

#### **1. Verisign's "Service Fees" Will Exceed ICANN's Entire Budget**



According to Verisign’s [Domain Name Industry Brief](#) (Volume 20, March 2023), with 13.2 million domain name registrations, the .net registry is the second largest gTLD after .com. Currently, Verisign receives \$9.92 per .net domain name per year in “Service Fees”. Multiplied by 13.2 million .net domain names, **Verisign currently receives an estimated \$130,944,000.00 in “Service Fees”, per year** – an amount which approaches ICANN’s entire 2023 operational budget of \$148 million. The Proposed Renewal Agreement allows Verisign to raise its “Service Fees” even more, from the current \$9.92 to \$10.67 and by another 10%, compounded, in each and every remaining year of the proposed six-year term. Based upon current registration volumes by the end of the proposed six-year term, Verisign will receive \$17.56 per .net domain name per year which amounts to an **estimated \$231,792,000 per year in Verisign’s portion of the “Service Fees”,** and an **estimated Billion Dollars in the aggregate over the Term.**

## **2. There is No Rational Basis for ICANN Agreeing to Such High Fees**

No explanation is provided by ICANN as to why it is interested in continuing to retain Verisign’s registry management service at such an extremely high cost or why Verisign’s “Service Fees” need to go up even more every single year. There appears to be no infrastructure or expenses that would justify such exorbitant fees nor is there any evidence that Verisign’s costs go up by 10% a year. Accordingly, **there appears to be no rational basis for ICANN agreeing to such high fees** by its service provider.

## **3. Is ICANN Forced to Agree to High Service Fees?**

Although ICANN gave Verisign a presumptive right of renewal pursuant to Section 4.2 of the 2017 .net Registry Agreement, ICANN fortunately included a provision enabling ICANN to negotiate terms when the contract comes up for renewal:

### **4.2 Renewal.**

...

**The parties agree to initiate negotiations** with respect to each renewal of the Agreement at least six (6) months prior to the respective Expiration Date.  
[emphasis added]

This provision demonstrates that the Agreement expressly contemplates negotiation prior to renewal, which implicitly means that a renewed Agreement *need not be identical* to the prior one. This conclusion is expressly confirmed by Section 4.3 which states:

Section 4.3 **Changes.** While this Agreement is in effect, **the parties agree to engage in good faith negotiations** at regular intervals (at least once every three calendar years following the Effective Date) **regarding possible changes to the terms of the Agreement,** including to Section 7.2 regarding fees. [emphasis added]

Accordingly, although the Agreement provides a presumptive right of renewal, Sections 4.2 and 4.3 in combination makes it clear that the parties may negotiate the terms of a renewed Agreement and those terms include Service Fees.

It doesn’t appear that ICANN has even attempted to negotiate Service Fee terms. Verisign’s position would ostensibly be that despite the Agreement’s contemplation of negotiated terms, that

it is nonetheless entitled not only to the perpetual right to operate the registry, but also to the perpetual right to raise Service Fees. ICANN's position however, would be that Verisign has the right to continue to operate the registry, but if Verisign doesn't like the Service Fees, it can decline and stop operating the registry.

Has ICANN ever considered this legal position and if not, why not? Perhaps ICANN is fearful of being [sued by Verisign again](#)? Has ICANN obtained any independent and non-conflicted legal opinion that address its right to negotiate terms and shared such an opinion with the Board? It would be an astonishing abdication of ICANN's responsibilities if all this time, ICANN has been permitting Verisign to perpetually hike Service Fees and make hundreds of millions of dollars from ICANN's .net registry, when ICANN could have been negotiating lower Service Fees as it is permitted to under the Agreement.

If Verisign refuses to accept ICANN's right to negotiate Service Fees and other terms, then ICANN has a duty to seek a court ruling affirming its rights even if ICANN itself is less than certain of its right to negotiate under the Agreement. A court would likely take into account the unusual nature of this Agreement wherein ICANN gave Verisign a perpetual right of renewal and would therefore likely conclude that the parties intended that Service Fees like other terms would be negotiable - as otherwise the Agreement would not make any reasonable commercial sense. No reasonable and sophisticated parties would expect that a contract that is perpetual would enable the service provider to perpetually raises fees without any rational bases for raising of fees and with no opportunity to negotiate them. The only reasonable interpretation of the Agreement is that it gives Verisign a presumptive right of renewal *but* with ICANN maintaining the crucial lever of being able to negotiate changes in Service Fees - a right which surely must be indicative of ICANN's bargaining power. Otherwise, the Agreement would be so one-sided that it would be unconscionable. Surely ICANN would never have agreed to permit Verisign to raise Service Fees perpetually with no right to negotiate them, given ICANN's duty to safeguard registrants and the public interest.

ICANN therefore has a duty to attempt to assert, if not insist upon its rights under the Agreement in negotiations with Verisign, rather than abandon its rights or potential rights and capitulate to its service provider - especially when hundreds of millions of dollars are at stake. Even if ICANN were to be less than certain of its right to negotiate Service Fees and other terms under the Agreement, if it were to ask a court to rule on this issue the court could potentially confirm that ICANN does in fact have the right. No reasonable not-for-profit or for-profit corporation would ever voluntarily abandon its right or the right to seek confirmation of its potential right, to negotiate pricing terms *even if* it meant going to court and incurring the associated legal fees since such colossal sums are at stake. In any event, even if the legal fees to seek a court's declaration of ICANN's rights were substantial, it would inevitably be a paltry amount in relation to the hundreds of millions of dollars that are at stake here. In short, there is little downside and tremendous upside for ICANN to finally assert itself either directly with Verisign via negotiations or indirectly via seeking declaratory relief from the court.

A court could even potentially conclude that although Verisign had the right to indefinitely renew [the original 2005 Agreement](#), Verisign's right to renew the original Agreement meant that it was *at most*, entitled to renew on the basis of the precise terms of the original Agreement "as is", i.e.

without making improvements in Verisign’s favor by revising the Service Fee provisions. Since the original Agreement only included provisions for the Service Fee being \$4.25 with 10% annually increases during the *original* Term ending in 2011, a renewal on the identical terms would restart the Service Fees at the original \$4.25. As such, the cycle would repeat itself with Verisign “repeating” the original Agreement indefinitely. Accordingly, if the 2017 Agreement is renewed on identical terms, then commencing on July 1, 2023, the Service Fees would be crystallized at the original \$4.25 from 2005.

In other words, a court could conclude that Versign can renew the 2017 Agreement with the Services Fees as they existed on the first day of the original Term of the 2005 Agreement, namely \$4.25. If a court determined that ICANN had acquiesced or condoned Verisign’s unjustified Service Fee hikes all the way from 2005 until today based upon a flawed understanding of the Agreement or due to inadvertence, then at worst, ICANN is stuck with hundreds of millions that Verisign would have unjustifiably received to-date, but Verisign would be stuck with the Service Fees as crystalized in Agreement as of the last day of the 2017 Agreement, namely \$8.95 with 10% annual increases from there, and upon renewal in 2029, reverting to the \$8.95 again - and Verisign can take it or leave it.

***ICA RECOMMENDATION 1:***

Accordingly, the ICA recommends that;

- a) ICANN staff, including ICANN’s internal and external legal advisors, report in writing to the Board as to; a) whether ICANN has ever considered asserting its right to negotiate terms including Service Fees, and if not, why not?; and b) whether ICANN has ever considered asking a court to confirm whether ICANN has the right to negotiate Service Fees, and if not, why not?
- b) ICANN develop a legal strategy for negotiating lower Service Fees with Verisign, even if it means testing ICANN’s legal rights to negotiate Service Fees in court, since the potential upside is in the hundreds of millions of dollars whereas the potential legal fees for making this effort are relatively negligible and well worth the chance; and
- c) if ICANN determines, after taking appropriate legal advice from independent and non-conflicted counsel, that it chooses to abandon or has abandoned any claim to negotiate Service Fees with Verisign, then ICANN should publicly disclose its decision and explain the basis for it, as not only do stakeholders have the right to know why ICANN has potentially abandoned hundreds of millions of dollars, but there would also be no reason to conceal such a decision on the basis of purported legal privilege since such a decision itself would ipso facto mean that ICANN has no legal interest that it wishes to protect.

#### 4. What Should the Service Fees Be?

Undoubtedly, ICANN has the right and the obligation to manage the .net registry in the public interest though it may contract out certain registry operations services to a professional registry operator, of which there are many. Indeed, ICANN as the sole entity that grants licenses to gTLD registries, has appropriately been responsible for negotiating contractual terms with registry operators to ensure a competitive environment, including to but not limited to those terms related to price controls and pricing”.<sup>1</sup> This is despite ICANN’s claim that [“it is not a price regulator”](#).

Nevertheless, if by “price regulator”, ICANN is not a “government regulatory agency”, *then of course ICANN is not a price regulator*. But as the manager of the .net registry, ICANN is perfectly entitled to negotiate Service Fees with its contracted service providers. That *does not* make ICANN a “regulator” at all per se, but rather a responsible steward of the domain name system who undertakes ordinary commercial negotiation of contracts on behalf of the public interest. Therefore, as the service requestor and not as a regulator, ICANN should follow the common practice of identifying the best combination of quality services and low prices available in the marketplace by seeking conditional bids of the .net registry Agreement. This would enable ICANN to ascertain the lowest Service Fees that a qualified competitor to Verisign would be prepared to accept in order to operate the .net registry on ICANN’s behalf. With this crucial data in hand, ICANN could then undertake meaningful negotiations of Service Fee terms with Verisign. If Verisign then declined to reach agreement with ICANN on Service Fee Terms, the Agreement would expire and ICANN could award the contract to the successful conditional bidder.

Competitive bidding for registry contracts is nothing new. When Australia [was recently looking for a new manager](#) for auDa’s registry of 4.2 million .au domain names, it issued a [request for tender](#) which included a request for a [“Registry Services Price Quote”](#) on a ‘per year, per domain name basis’. Previously when Affilias had won the tender process in 2017, AuDA’s CEO [stated that the tender processed allowed auDa to “test pricing”](#) and resulted in lower pricing.

When the United States government was inter alia [concerned with the high price that Verisign was charging to manage .gov domain names](#) and wanted to [find out which other potential vendors](#) were available, they [conducted market research and asked for public feedback](#) and the U.S. Cybersecurity and Infrastructure Security Agency ultimately [changed managers from Verisign to Cloudflare](#) without any interruption of registry services and reduced the \$400 per domain name fee that Verisign was charging, to zero. Similarly, ICANN should conduct market research to determine what the market identified as the appropriate level of Service Fees by qualified registry operators and use this information to negotiate terms with Verisign.

When India put its 2.4 million .in domain name registry management contract out for bid in 2018, [Neustar won the contract](#) from Afilias who had been operating the registry [on Nixi’s behalf since 2005](#) and reportedly bid [just \\$0.70 per domain name when Afilias had been charging \\$1.65](#). This demonstrates that the tendering process is a crucial step in responsibly managing a registry in the public interest since it enables the registry’s guardian to find a suitable manager at appropriate levels of Service Fees based upon market guidance.

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<sup>1</sup> See: <https://www.icann.org/en/system/files/files/irp-namecheap-expert-report-neuman-redacted-30nov21-en.pdf> at [Page 3](#), Paragraph 3.

When France requested competitive bids for management of its 3 million .fr domain name registrations in 2012, there were 12 bidders and the contract ultimately went to AFNIC [which lowered registration fees](#).

By requesting competitive conditional bids, Public Interest Registration successfully slashed its .org registration service fees to [\\$18.1 million in 2018, down from \\$37.8 million in 2017](#). With about 10 million .org domain names, that worked out to less than \$2.00 per domain name.

[Even ICANN itself put the .net registry out for bid in 2005](#) and it received several tenders, including from Afilias, Denic, and NeuLevel but ultimately gave the contract to Verisign, yet the competitive bidding process resulted in ICANN lowering the Service Fees payable to Versign [from \\$6.00 to \\$3.50](#) per domain name. It was the tendering process itself which provided ICANN with the opportunity to make an informed assessment of suitable Service Fees.

It is important to note that at the time that the .net management agreement went out for rebid, no unsponsored registry had ever increased its service fees nor did they have a right to do so without having such fees approved explicitly by ICANN. Thus, when Verisign initially bid on .net, it was apparently doing so under the premise that it would never have the right to increase its Service Fees until potentially the next renewal cycle. After VeriSign was selected as the winner of that rebid, it negotiated the first-ever right to increase registry fees reportedly behind closed doors with ICANN. Reportedly unbeknownst to the rest of the community, VeriSign was also reportedly negotiating its 2006 .com renewal agreement in which it was apparently also seeking the ability to increase its pricing by a certain percentage every year.<sup>2</sup> Other than VeriSign, no other Registry operator of an unsponsored TLD had the ability to increase its Service Fees. It wasn't until December 2006 that any other unsponsored registry was able to increase its pricing at all.<sup>3</sup>

With competitive conditional bids, ICANN will near certainly determine that it is vastly overpaying Verisign for its operator services and can then use this realization as a basis to negotiate substantially lower Service Fees with Verisign. Indeed, it appears that ICANN has not undertaken any negotiations with Verisign regarding lowering Service Fees and appears to have simply permitted Verisign to continue to reap outsized rewards for a job that any other qualified operator would be more than happy to do for a fraction of the cost. This appears to be a kind of 'commercial malpractice' by ICANN and raises the unavoidable question of whose interests exactly, is ICANN representing when it proposed the revised registry Agreement? It certainly appears that the only interest that ICANN protected was Verisign's, and perhaps its own.

It is irresponsible for ICANN to agree to any amount of Service Fees, let alone perpetually increasing Service Fees, without *first* determining the appropriate level via a competitive conditional bidding procedure. Competitive service fees are likely in \$1 - \$3 per domain name

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<sup>2</sup> See <https://www.icann.org/en/system/files/files/irp-namecheap-expert-report-neuman-redacted-30nov21-en.pdf> at Footnote 32.

<sup>3</sup> See; <https://www.icann.org/en/system/files/files/irp-namecheap-expert-report-neuman-redacted-30nov21-en.pdf> at [Page 16](#) at Para. 58. Although sponsored registries such as .museum and .aero has no limitations on pricing due to the fact that they were community driven registries, the unsponsored registries including .biz, .info, and .name had no ability to increase their prices until they signed their 2006 registry agreements in December, 2006.

range, rather than the \$9.92 plus 10% increase per year, compounded, as proposed in the revised Agreement. Otherwise, ICANN is literally handing over hundreds of millions of dollars paid by registrants to Verisign for no good reason.

In fact, the United States Department of Justice (“DOJ”) already told ICANN that ICANN is obliged to protect consumers from the exercise of market power by gTLD operators and manage its registries “in a manner which safeguards the interests of registrants in obtaining high quality domains at the lowest possible prices”<sup>i</sup>. The DOJ advised back in 2008, that ICANN “should require competitive bidding for renewal of a gTLD registry agreement rate rather than granting the incumbent operator a perpetual right to renew without competition [but] instead ICANN has ...effectively granted[ed] perpetual renewal rights to registry operators without the prospect of periodic rebuilding and without regard to potential adverse competitive effect”.

Remarkably, the DOJ noted that “experience with the .net registry and other gTLDs has shown that competitive bidding in the award of gTLD registry agreements, and periodic rebidding, has served as an effective tool for managing the interests of registrants in gTLDs...and has resulted in lower domain prices and higher operating specification than what ICANN has achieved through non-competitive negotiations”. The DOJ concluded that “ICANN has not come close to fulfilling its obligations to employ competitive principles in its management of TLD operations” and has failed to “safeguar[d] the interests of registrants in obtaining high quality domains at the lowest possible prices”.

Accordingly, it is clear that ICANN’s refrain that it is “not a price regulator” is nothing more than a misguided or cynical misdirection to avoid fulfilling its obligations to manage its registries in the public interest rather than in the interests of its contracted registry operators. Registry operators often change with no interruption and there are many qualified operators that are capable of professionally operating the .net registry on ICANN’s behalf, all of whom would be eager to take over the operation of the .net registry if Verisign were to no longer be interested in it as a result of the Service Fees payable.

Verisign, as the current operator with a presumptive right of renewal can choose to renew its management Agreement if it wants to, subject to agreeing on negotiated Service Fees with ICANN after a conditional competitive bidding process as set out above. The Service Fees are a matter of negotiation between ICANN as principal and Verisign as service provider and have nothing to do with price regulation. On the contrary, as the DOJ explained to ICANN as set out above, ICANN is obliged as the manager of the registry, to safeguard the interests of registrants by seeking lower prices through a competitive process. ICANN *cannot* ignore its fiduciary duties and just continue to hand out hundreds of millions to its contracted operators in the absence of any rational basis or competitive process for negotiating Service Fees.

## **ICA RECOMMENDATION 2:**

The ICA recommends that ICANN identify appropriate Service Fee levels through a conditional bidding process from qualified competitors of Verisign. With this data in hand, ICANN should undertake the negotiation of terms of the renewed Agreement with Verisign as contemplated by the Agreement. If Verisign declines to renew the Agreement with Service Fee levels within an appropriate range as identified through the conditional bidding process, then ICANN can award the contract to the successful conditional bidder.

## **PART II – Comments on Specific Proposed Revisions**

### **Registry Discretion to Deny, Cancel, or Transfer Domain Names**

The proposed revision to Section 2.7(b)(ii) entitles the Registry “to deny, cancel, redirect or transfer any registration or transaction, or place any domain name(s) on registry lock, hold or similar status as it deems necessary, in its unlimited and sole discretion”. ICANN specifically addressed this issue in an [April 26, 2023 update to the framework](#) for the Public Comment. The ICA recognizes that this provision is substantially similar to other provisions in other registry and registrar agreements and in any event, from a liability and business perspective, such provisions are likely considered crucial from a registry’s perspective. As such, the ICA understands and does not object to this proposed revision per se.

Nevertheless, the ICA recognizes that online businesses sometimes face pressure from foreign governments, agencies, and courts who demand compliance with their national law, orders, or directives - even if they are contrary to the online company’s domestic laws. This is often a tricky balancing act for online businesses. For example, American online businesses may generally want to afford their customers the maximum protection for free speech afforded by the United States Constitution but may sometimes face pressure to restrict such freedoms in foreign countries where their online services are available. We [recently saw this with Twitter](#), who faced pressure from the Turkish government to censor certain tweets during the recent Turkish election. We also have seen [governments in Australia and Canada](#), for example, pass legislation imposing certain payment obligations on online platforms available in those countries.

It is up to each company to determine how they will react to such governmental orders, directives, and demands and TLDs face comparable pressures. There is an assumption or expectation that the contracted manager of the .net registry would prudently exercise its discretion in such cases and afford registrants the maximum protection available to them under the registry’s local law, wherever possible where doing so would not cause significant harm or disruption to registry operations. That however, may not be the case as we simply do not know to what extent registries face such pressures. The public, stakeholders, and online businesses should all be aware if foreign governments, courts, or agencies are unjustly interfering with a website by demanding that a registry cancel, disable, or transfer a domain name that would be perfectly legal under the registry’s domestic law. Otherwise, foreign interference may regularly occur unabated in the shadows with neither ICANN nor the public unaware.

There are already a number of registry operators publicly who disclose certain types of ‘take-down’ statistics, such as Public Interest Registry (<https://thenew.org/org-people/about-pir/resources/anti-abuse-metrics/>) and Identity Digital (<https://identity.digital/wp-content/uploads/2022/09/Anti-Abuse-Report-Q2-2022.pdf>).

### **ICA RECOMMENDATION 3:**

The ICA joins with the BC and with ALAC in recommending that ICANN, in conjunction with the contracted parties, develop a disclosure framework for court and government ordered domain name transfers, cancellations, and takedowns which identifies the nature and source of each demand and whether or not it was complied with by the register or registry.

Based upon the evaluation of this data after a year, it is recommended that ICANN consider whether further policies are required to address the volume and/or seriousness of foreign governmental pressures on registries and registrars that unfairly, unjustly, or unreasonably infringes upon the rights of registrants.

### **Cooperation with Economic Studies**

We note that *missing* from the proposed revisions which draw from the Base Agreement, is a provision respecting cooperation with economic studies despite ICANN including other provisions from the Base Agreement in the Proposed Agreement. The current provision respecting cooperation with economic studies is set out in part, below:

**“2.15 Cooperation with Economic Studies.** If ICANN initiates or commissions an economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters, Registry Operator shall reasonably cooperate with such study, including by delivering to ICANN or its designee conducting such study all data related to the operation of the TLD reasonably necessary for the purposes of such study requested by ICANN or its designee, provided, that Registry Operator may withhold (a) any internal analyses or evaluations prepared by Registry Operator with respect to such data and (b) any data to the extent that the delivery of such data would be in violation of applicable law.

ICANN’s 2018 [Competition, Consumer Trust, and Consumer Choice Review](#) (“CCTC”) noted at Page 57, that:

“the current substantial increase in the number of gTLDs provides an opportunity for ICANN to evaluate the claim of some that legacy gTLDs remain “market dominant” and for ICANN to re-examine its earlier claim that the entry of new gTLDs, in much greater numbers than had occurred earlier, has weakened the rationale for price regulation. However, “in the absence of adequate data on the wholesale prices actually charged by both legacy and new gTLDs, the review team has been unable to address this issue”.



In recommendation 2, the review team suggests that ICANN collect additional data to remedy this shortcoming in the future.”

The [CCTC’s Recommendation 2](#) was:

“Collect wholesale pricing for legacy gTLDs. Rationale/related findings: The lack of data from legacy gTLDs and transactional data will continue to hinder future CCT Review Teams’ efforts to analyze competition between registries in the domain marketplace. In particular, the review team was unable to determine whether wholesale prices charged by legacy gTLDs had declined as a result of increased competition due to the introduction of new gTLDs.

Details: ICANN could work with an appropriate contractor and registry operators to acquire wholesale price information from both legacy and new gTLD registries on a regular basis, including at least a sample of transactional data. Transactional data is essential to allow analysis of the cost of similar strings across TLDs, and to understand the role of promotional pricing by registries.

Despite the above recommendation coming out in 2018, ICANN still notes that the collection of TLD registration date is [“in progress”](#) and it is unknown to what extent ICANN is collecting the recommended data. Regardless however, mere data collection is insufficient as it is not a substitute for a genuine and professional economic study. The Base Agreement implicitly acknowledges the importance of ICANN conducting formal and professional economic studies yet there is no economic study being undertaken prior to entering into the Proposed Renewal Agreement despite purporting to permit perpetual 10% price hikes.

ICANN’s failure to conduct appropriate economic studies in relation to legacy TLD pricing is well known. In the recent Final Declaration of the Independent Review Process (“IRP”) Panel in [Namecheap, Inc. v. ICANN](#) (December 23, 2022), the Panel noted that ICANN *failed* to address whether it had conducted an appropriate economic analysis or explain why such an analysis was unnecessary” in relation to the removal of .org price caps.

The Panel [further noted](#) that despite “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”, “the Board meeting minutes do not disclose the result of this discussion [and] there is no evidence of any further economic analysis”, imply[ing] that the Board concluded that no further economic analysis was needed in view of a prior study that took place during the development of the New gTLD Program” in 2009. Yet that “economic study” was merely a “preliminary report” and focused only new gTLDs and not legacy TLDs. The Panel concluded that [by failing to provide any responsive explanation of why an economic study that addressed pricing in legacy TLDs was not required](#), “contrary to its Bylaws, ICANN did not operate to the maximum extent feasible in an open and transparent manner”.<sup>4</sup>

ICANN org is also known to have concealed economic studies from the public, from stakeholders, and even its own Board of Directors. As noted by the Panel in the *Namecheap* case, *supra*:

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<sup>4</sup> At Page 106, Para. 337 and 338

“ICANN org also obtained a newer report prepared by Professor Carlton in 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.... 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.”<sup>5</sup>

The ICA is very concerned that ICANN is *once again* making a monumental decision regarding pricing of a legacy TLD without any economic study having been undertaken (or at least publicly disclosed) and which would have provided crucial data on whether ICANN is justified in permitting Verisign to perpetually raise .net prices by 10% annually. ICANN is obliged to openly and transparently provide its rational basis for proposing annual 10% price hikes for yet another six (6) year term and this can only be achieved by conducting an economic study.

ICANN’s refusal to responsibly manage domain name registries has previously caused embarrassment and deep concern when the then Attorney General of California, Mr. Xavier Becerra was compelled to intervene in ICANN’s affairs. On June 30, 2019, ICANN decided to remove all price caps on the .ORG registry despite near universal condemnation from registrant community, a [“sham” public comment process](#), and did so, as noted by the IRT Panel, in the absence of any responsive explanation or public economic study.

As a direct consequence of ICANN’s removal of the price caps, a private equity firm, Ethos Capital, swooped in and attempted to purchase the entire registry for \$1.2 billion, ostensibly to take advantage of ICANN’s improvident removal of price constraints on a largely captive market. After widespread outcry, [Mr. Xavier Becerra wrote a scathing letter to ICANN](#) dated, April 15, 2020, raising serious concerns about the purported acquisition and requested that ICANN withhold its approval of the acquisition. Bacerra in particular, noted therein, that “there is mounting concern that ICANN is no longer responsive to the needs of its stakeholders” and that the “automatic renewal provision leaves the nonprofit community that uses the .ORG registry with no protection”. a result of the California Attorney General’s intervention, [ICANN subsequently withheld its approval](#) of the private equity takeover of the .ORG registry.

Once again, ICANN is failing to protect the interests of registrants. An economic study is a prerequisite to ICANN making any informed, transparent, rational, and responsible decision to permit Verisign to raise its Service Fees 10% annually on a compounded basis. Without an economic study, ICANN is blindly agreeing to raise Service Fees on the backs of registrants without even considering the market power that the .net registry wields as a result of its establishment and the switching costs. As noted in the [Namecheap IRP](#), *supra*, ICANN was already called out once for its failure to consider the issue of market power or to provide a detailed explanation as to how market power affected its decision making (Page 98). ICANN has been put on notice by the IRP that its reflexive and unsupported rationales for its economic decision making regarding registry agreements will no longer be tolerated. ICANN must support its decisions with actual data, must consider market power, and as the California Attorney General stated, *supra*, must protect the interests of registrants.

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<sup>5</sup> At Page 1-5, Footnote #339.

An economic study would inter alia likely demonstrate that Verisign has market power with the .net registry due to its longstanding established market and switching costs. An economic study would also likely demonstrated that increased Service Fees have no correlation whatsoever to Verisign’s costs of running the registry and that continual Service Fees hikes merely contribute to Verisign’s massive operating margin which increased from 59.7% in 2017 when the current Agreement commenced, to 66.2% in 2022. An economic study would likely confirm that Verisign, whose operating margins increase even when as they raise their Service Fees, appears to have substantial market power. An economic study would also confirm that rather than offsetting any increased costs of operating the registry on ICANN’s behalf, Verisign’s increasing Service Fees appear to merely go towards padding Verisign’s already remarkable profit margin. As noted by the IRP Panel in relation to the evidence presented by Dr. Langer, cost decreases combined with increased profit margins is a “reliable indicator of market power”.<sup>6</sup> Moreover, an economic study would help determine whether the arbitrary 10% cap effectively controls market power in the absence of a genuinely competitive market achieved through rebidding. To-date there has never been any study justifying this entirely arbitrary figure of 10%.

ICANN however, as usual, appears intent on proceeding headlong into a billion-dollar deal with no economic understanding of the market dynamics nor any care about registrants, and instead relying upon its usual refrains that have no basis in fact and which ignoring all feedback to the contrary. As noted by the IRP Panel in the *Namecheap* matter, ICANN cannot just “repeat its prior explanations”, fail “to consider the issue” of market power, and fail to address public comments on this issue.<sup>7</sup> Nor can ICANN again fail to address concerns regarding switching costs as the IRP Panel found that it did with .org.<sup>8</sup>

The IRP Panel in the *Namecheap* matter was clear and unequivocal: ICANN must consider and address points made in the public comments, including this one. A failure to do so and in particular a failure to articulate a basis for disregarding them, constitutes a “failure to engage in a responsive consultation procedure”.<sup>9</sup>

#### **ICA RECOMMENDATION 4:**

Given the very concerning history of ICANN’s failure to conduct economic studies, failure to be responsive to registrant and stakeholder concerns, and failure to provide meaningful explanations for its decisions, we recommend that ICANN;

- a) include a “Cooperation with Economic Studies” provision comparable to that of the Base Registry Agreement be included in the Proposed Revised Agreement;
- b) commission an economic study of the .net registry and .net Service Fees in order to determine whether there is satisfactory evidence supporting the appropriateness of annual 10% Service Fee hikes in the .net Registry Agreement; and

<sup>6</sup> IRP Report at Page 97, Paragraph 313.

<sup>7</sup> IRP Report at Page 98, Paragraph 318.

<sup>8</sup> IRP Report at Page 97, Paragraph 319.

<sup>9</sup> IRP Report at Page 101, Paragraph 326.

c) commission a broader economic study encompassing all legacy TLDs and new gTLDs, including but not limited to .org, .net, and .com, so as to gain an understanding of questions including but not limited to, whether registries have market power, whether price caps are appropriate, and whether bidding upon renewal is appropriate.

### **Defined Terms for Security and Stability**

The ICA shares ALAC's and the BC's respective concern about using defined terms for Security and Stability that might limit policy obligations for the .net registry operator.

#### **ICA RECOMMENDATION 5:**

The ICA recommends that ICANN and Verisign both explain in writing, why the Proposed Renewal Agreement uses defined terms for 'security and stability' as it applies to consensus policies and why this differs from the Base Agreement.

### **Special Restricted Fund for Developing Country Internet Communities**

Section 7.2(a) states that "ICANN intends to apply this [Registry-Level Transaction Fee] to purposes including: (a) a special restricted fund for developing country Internet communities to enable further participation in the ICANN mission by developing country stakeholders".

It is unclear to what extent ICANN has fulfilled its above-noted intention. The \$0.75 per fee works out to \$9,750,000.00 per year based upon the registry's current 13 million domain name registrations.

#### **ICA RECOMMENDATION 6:**

The ICA recommends that ICANN; a) Advise when it established a special restricted fund for developing country Internet communities; b) Advise how much has been directed to a special restricted fund; and c) Publish a full accounting of how the revenue from the Registry-Level Transaction Fees has been spent, including in accordance with Section 7.2(a).

### **Thick Whois**

As stated in our [2017 Public Comment](#) in connection with the last .net renewal, the ICA supports the existing restrictions on use of Traffic Data in connection with possible adoption of thick Whois as set out at Section 3.1(f) of the Proposed Renewal Agreement, namely; "in the event the TLD registry is a "thick" registry model, the traffic data that may be accessible to and used by Registry Operator shall be limited to the data that would be accessible to a registry operated under a "thin" registry model."

**ICA RECOMMENDATION 7:**

The ICA recommends that ICANN continue to include this important provision in the Proposed Renewal Agreement and to rigorously enforce this contractual restriction and in particular the prohibition of the reintroduction by Verisign of its “Sitefinder” business or any other wildcard service and require the availability of traffic data on a non-discriminatory basis.

**Reserved Domain Names**

At Section 3.1(d)(i) of the Proposed Registry Agreement, the intent of the revisions is somewhat unclear. In particular, as a result of the removal of the word “initial”, it is somewhat unclear whether the intent of the proposed revisions is to prohibit registrations of certain reserved TLD strings or whether the intent is to prohibit the registration and even the renewal of already registered strings in the TLD that would otherwise be prohibited as a result of inclusion in Appendix 6.

**ICA RECOMMENDATION 8:**

The ICA recommends that ICANN clarify the intention of the revisions to Section 3.1(d) and if necessary revert to the original language if the intention was to only prohibit new registrations of reserved strings rather than the renewal of already registered strings that would otherwise be prohibited as a result of inclusion in Appendix 6.

Yours truly,  
**INTERNET COMMERCE ASSOCIATION**



Per:  
Zak Muscovitch  
General Counsel, ICA

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<sup>i</sup> <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>