

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

NAMECHEAP, INC.

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Respondent

ICDR Case No. 01-20-0000-6787

EXPERT REPORT BY JEFFREY J. NEUMAN

ICANN INDEPENDENT REVIEW PROCESS

November 19, 2021

Table of Contents

I.	SUMMARY	3
II.	DECLARATIONS AND RESTRICTIONS	3
III.	DISCUSSION	4
A.	ICANN’S ROLE IN DNS GOVERNANCE	4
(i)	<i>The Birth of ICANN</i>	4
(ii)	<i>ICANN Evolution and the IANA Transition</i>	8
B.	ICANN’S ROLE IN THE REGULATION OF PRICING	9
(i)	<i>1999 .COM Agreement (The First Registry Agreement)</i>	10
(ii)	<i>2001 Verisign Agreements & New Unsponsored gTLD Agreements</i>	12
(iii)	<i>ICANN rebids the .ORG TLD in 2002 and the .NET TLD in 2005 using criteria established by the community</i>	13
C.	SPONSORED NEW TLD ROUND AND THE NEW SPONSORED GTLD AGREEMENTS	17
D.	2006 SETTLEMENT OF LITIGATION RESULTING IN REVISED .COM AGREEMENT	18
E.	2006 REVISED .BIZ, .INFO AND .ORG AGREEMENTS AND THE PROMISE OF ECONOMIC STUDIES.....	19
F.	THE FEB 06 PDP	22
G.	ICANN’S ORGANIZATION OF THE NEW GTLD PROGRAM AND THE ECONOMIC ANALYSES OF COMPETITION AT A REGISTRY LEVEL 25	
(i)	<i>The New gTLD Applicant Guidebook and the First Draft of Registry Agreement</i>	26
(ii)	<i>DoC and DoJ Letters on ICANN’s plans to introduce new gTLDs</i>	26
(iii)	<i>Economic Studies on New gTLDs and Pricing Controls</i>	30
(a)	<i>The Carlton Report</i>	30
(b)	<i>The CRA International Report on Vertical Separation of Registries and Registrars</i>	31
H.	ICANN ADDRESSES REGISTRY / REGISTRAR CROSS-OWNERSHIP REQUIREMENTS FOR NEW AND EXISTING REGISTRIES.....	32
(i)	<i>Vertical Integration in the New gTLDs</i>	32
(ii)	<i>Vertical Integration with the Existing Registries</i>	36
I.	REGISTRY AGREEMENTS: 2011 – PRESENT.....	39
(i)	<i>2011 .NET and 2012 .COM Agreements with Verisign</i>	39
(ii)	<i>2013 .BIZ, .INFO and .ORG Renewals</i>	40
(ii)	<i>2019 .BIZ, .INFO and .ORG Agreements</i>	41
(iii)	<i>2020 .COM Amendment</i>	43
IV.	CONCLUSION	45
V.	APPENDIX A: BACKGROUND AND QUALIFICATIONS	47
	WORK EXPERIENCE.....	51
	ADDITIONAL EXPERIENCE	52
	CORE COMPETENCIES.....	52
	EDUCATION	52
	PROFESSIONAL AND COMMUNITY INVOLVEMENT.....	53

I. Summary

1. I have been asked by PETILLION ('Counsel', on behalf of Namecheap, Inc., to provide my independent expert opinion on: (a) the context and conditions leading to the formation of the Internet Corporation for Assigned Names and Numbers (ICANN), and (b) ICANN's role in promoting and sustaining competition amongst gTLD domain name registry operators - namely, by serving as the sole licensing authority, accountable to the Internet community, responsible for negotiating and entering into registry agreements with gTLD registry operators.
2. I submit this report to offer my independent expert opinion regarding this matter.
3. It is my opinion that because of the unique ICANN's role in promoting and sustaining competition, and the fact that it is the sole entity that grants (or elects not to grant) licenses to gTLD registry operators, ICANN is, and has appropriately been, responsible for negotiating contractual terms with registry operators that ensure a competitive environment, including, but not limited to, those terms related to price controls on registration and renewal fees charged by TLD registries to domain name registrars, restrictions on cross-ownership of domain name registries and registrars, and the equitable treatment of all domain name registrars. However, in a desire to ensure consistency in the terms of registry agreements, in the last decade, ICANN has made a number of decisions in negotiating agreements with existing registry operators that has altered the competitive landscape amongst registry operators. It has done so as a result of bilateral negotiations with existing registries without the aid of any analysis by competition experts as to the benefits and/or harms caused by the inclusion or exclusion of terms in the registry agreements. Finally, although ICANN has continued to seek public comment on proposed renewals of registry agreements, unlike in ICANN's earlier years, it has ignored scores of comments relating to the lack of price caps and the impact on registrants.

II. Declarations and Restrictions

4. My name is Jeffrey J. Neuman. I have been providing legal, policy and implementation assistance and advice in the fields of internet governance, intellectual property protection and domain name policy since the mid-1990s. In doing do, I have served in key business, policy and legal roles in the domain name industry for more than 25 years. Currently, I am the Founder and CEO of JJN Solutions, LLC., a consultancy focusing on legal and policy services related to online brand protection, domain name management, intellectual property licensing and enforcement. Of particular relevance for this opinion, I was employed by Neustar between the years 2000 through 2014. The first year I served as outside counsel while working at the law firm of Greenberg Traurig. First, as Director of Law & Policy, then Vice President of Law and Policy and finally as Vice President of Registry Services, I led all negotiations between Neustar and ICANN for the .BIZ top level domain (TLD). A complete list of my background and qualifications, as well as my current CV are attached at **Appendix A**.
5. In forming the opinions expressed in this report, I considered the materials referenced in this report. Further, I relied on my own knowledge, training, my nearly 25 years of experience in the domain name industry, my previous employment with a domain name registry operator, over 20 years of participation in the ICANN community, as well as my previous and current

work in the fields of intellectual property and online brand protection.

6. I have discussed issues relevant to the matter with Counsel. However, the opinions expressed in this report are my own. My compensation is not related in any way to the outcome of this proceeding, and I have no other interest in this proceeding.
7. This report has been prepared solely for use in this matter. It should not be used for any other purpose without prior written authorization. I understand that it will be made available to the Respondent, its counsel, the Panel, and any witnesses and experts in these Proceedings. I also understand that this report may be posted on ICANN’s website in accordance with Section 4(3)(u) of the ICANN Bylaws. As this report contains confidential and proprietary information for which special protection from public disclosure and from use for any purpose other than prosecuting this IRP may be warranted, I have been asked by Counsel to submit both a redacted version of the report that may be posted on ICANN’s website and a non-redacted version, containing information that is designated by the Claimant as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” within the meaning of the Stipulated Protective Order, executed by the Parties on October 29, 2020, a copy of which was shared with me. I agree to be bound by the Stipulated Protective Order. I accept no responsibility to third parties for breaches of any confidentiality obligations.

III. Discussion

A. ICANN’S ROLE IN DNS GOVERNANCE

(i) The Birth of ICANN

8. The Internet is an outgrowth of United States (U.S.) government investments in packet-switching technology and communications networks carried under agreements with the Defense Advanced Research Projects Agency (DARPA), the National Science Foundation (NSF) and other U.S. research agencies. NSF established the NSFNET as a network for research and education purposes, and in 1992 the U.S. Congress gave the NSF statutory authority to commercialize NSFNET, which essentially formed what we consider the Internet today.
9. As part of its responsibilities, NSF solicited proposals for a variety of infrastructure services, including domain name registrations services. Effective January 1, 1993, Network Solutions, Inc. (NSI) was awarded a five-year contract to assume responsibility for all non-military domain name registrations on the Internet¹.
10. On September 13, 1995, as the demand for domain names had moved from being mostly academic to overwhelmingly commercial institutions, NSF authorized NSI for the first time to charge a fee for each domain name registration.² At that time, there were only 120,000 registrations, but by 1998 (when NSF’s agreement with NSI was supposed to expire), the

¹ See <https://archive.icann.org/en/nsi/coopagmt-01jan93.htm>.

² See <https://archive.icann.org/en/nsi/coopagmt-amend4-13sep95.htm>; See also https://www.nsf.gov/od/lpa/news/03/fsnsf_internet.htm. Prior to 1995, domain name registrations were being subsidized by NSF.

number had reached over 2,000,000 registrations.³

11. On July 2, 1997, in response to the rapid commercialization and growth of the Internet, and in recognition of the approaching expiration of the NSF Cooperative Agreement with NSI (“Cooperative Agreement”), the U.S. Government released “*A Request for Comments on the Registration and Administration of Internet Domain Names*”⁴ The paper sought feedback on (i) how to privatize the Domain Name System, (ii) which principles were appropriate in evaluating proposals to manage the registration and administration of Internet domain names, and (iii) what other issues needed to be addressed in the near future (including whether to create new gTLDs, how to create competition in the domain name space, and how to protect trademark rights in the naming system).
12. On January 30, 1998, the National Telecommunications and Information Administration (NTIA), an agency of the U.S. Department of Commerce (DoC), issued for comment, *A Proposal to Improve the Technical Management of Internet Names and Addresses*. The proposed rulemaking, or “Green Paper,” was published in the Federal Register on February 20, 1998, providing opportunity for public comment. The Green Paper proposed certain actions designed to privatize the management of Internet names and addresses in a manner that allows for the development of robust competition and facilitates global participation in Internet management. The Green Paper proposed for discussion a variety of issues relating to DNS management including private sector creation of a new not-for-profit corporation (the “new corporation”) managed by a globally and functionally representative Board of Directors.⁵
13. On June 5, 1998, the NTIA released a *Statement of Policy on the Management of Internet Names and Addresses*, which is generally referred to as the “White Paper”⁶. Given the widespread dissatisfaction about the absence of competition in domain name registration services, the growth of commercial interests in the Internet, the desire to add new top-level domains, NTIA formally recommended the privatization of the domain name system “*in a manner that allows for the development of robust competition and that facilitates global participation in the management of Internet names and address.*”⁷ As part of this revised policy statement, NTIA stated that the U.S. Government was prepared to recognize, by entering into an agreement with, and seeking international support for, a new, not-for-profit corporation formed by private sector Internet stakeholder to administer policy for the Internet name and address system (NewCo).
14. Among the key principals for the transition of these functions to NewCo was: “Where possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage

³ *Id.*

⁴ <https://ntia.doc.gov/federal-register-notice/1997/request-comments-registration-and-administration-internet-domain-names>

⁵ *A Proposal to Improve Technical Management of Internet Names and Addresses Discussion Draft 11/30/98*(<https://www.ntia.doc.gov/legacy/ntiahome/domainname/dnsdrft.htm>),

⁶ NTIA, *Statement of Policy on the Management of Internet Names and Addresses*, June 5, 1998 (“White Paper”), https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses#N_3

⁷ *Id.*

diversity, and enhance user choice and satisfaction.”⁸

15. In the White Paper, however, the U.S. government recognized that certain changes needed to be made to the agreement with NSI to ensure free and fair competition (*i.e.*, “to permit the development of competition in domain name registration and to approximate what would be expected in the presence of marketplace competition”)⁹. These changes included pricing terms and equal access terms. More specifically, it stated:

“The cooperative agreement between NSI and the U.S. Government is currently in its ramp down period. The U.S. Government and NSI will shortly commence discussions about the terms and conditions governing the ramp-down of the cooperative agreement. Through these discussions, the U.S. Government expects NSI to agree to take specific actions, including commitments as to pricing and equal access, designed to permit the development of competition in domain name registration and to approximate what would be expected in the presence of marketplace competition. The U.S. Government expects NSI to agree to act in a manner consistent with this policy statement, including recognizing the role of the new corporation to establish and implement DNS policy and to establish terms (including licensing terms) applicable to new and existing gTLD registries under which registries, registrars and gTLDs are permitted to operate.”¹⁰

16. On October 7, 1998, NTIA extended the NSI Cooperative Agreement through September 30, 2000, “provided however, that as the USG transitions DNS responsibilities to NewCO, corresponding obligations under the Cooperative Agreement as amended will be terminated and, as appropriate, covered in a contract between NSI and NewCo.”¹¹ This amendment to the NSI Cooperative Agreement (“Amendment No. 11”) also required NSI to develop a shared registration system within .COM, .NET and .ORG to support registrars by no later than October 1, 1999. Amendment No. 11 further required that, upon deployment of this system, NSI and the NTIA would agree on a price cap for fees charged to registrars which could only be increased by mutual agreement. NSI was also required to separate its registry and registrar services and provide equal access to all licensed registrars.¹²

⁸ NTIA, *Statement of Policy on the Management of Internet Names and Addresses*, June 5, 1998 (“White Paper”), published in the Federal Register on June 10, 1998 (<https://www.govinfo.gov/content/pkg/FR-1998-06-10/pdf/98-15392.pdf>); also published at <https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses>.

⁹ See Federal Register, <https://www.govinfo.gov/content/pkg/FR-1998-06-10/pdf/98-15392.pdf> at p. 31747

¹⁰ *Id.* At 31751

¹¹ Cooperative Agreement, Special Award Conditions NCR-9218742, Amendment No. 11, https://ntia.doc.gov/files/ntia/publications/amend11_052206.pdf.

¹² *Id.*

17. On November 25, 1998, the DoC executed a Memorandum of Understanding (MoU) with the Internet Corporation for Assigned Names and Numbers (ICANN), a newly formed California not-for-profit corporation, to take on the management and operation of the Internet domain name system.¹³ Though by no means was this a full transition of all of the desired functions, which would not happen for nearly two decades. Under DoC oversight, ICANN committed, among other things, to:
 - a. *“Collaborate on the design, development, and testing of a plan for introduction of competition in domain name registration services”;*
 - b. Develop *“an accreditation procedure for registrars and procedures that subjected registrars to consistent requirements designed to promote a stable and robustly competitive DNS”;*
 - c. *“Collaborate on the design, development and testing of a plan for creating a process that will consider the possible expansion of the number of gTLDs.”*¹⁴
18. ICANN’s role to promote and enhance competition has been recognized in its own Bylaws since ICANN’s original incorporation.¹⁵ In December 2002, after a lengthy review process, ICANN updated its Bylaws to include a Mission Statement as well as a list of “Core Values.” The promotion of, and the sustaining of, competition has appeared as one or more Core Values since that Date. The December 15, 2002 Bylaws stated as Core Values: *“(5) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment”* and *“(6) Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.”*¹⁶
19. In October 2016, after the IANA Transition (discussed below), ICANN amended its Bylaws to include additional “commitments” that included the following statement: *“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.”*¹⁷
20. That commitment has been included in ICANN’s Articles of Incorporation since November 21, 1998. Article 4 of the November 21, 1998, Articles of Incorporation (now Article III of the amended and restated Articles of Incorporation, as approved by the ICANN Board on 9 August

¹³ <https://ntia.doc.gov/other-publication/1998/memorandum-understanding-between-us-department-commerce-and-internet-corporat>

¹⁴ *Id.*

¹⁵ Original ICANN Bylaws, dated November 6, 1998, currently available at <https://www.icann.org/resources/unthemed-pages/bylaws-1998-11-06-en> at Article IV, Section 1(c)(stating “The Corporation 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.”

¹⁶ ICANN Bylaws, December 15, 2002 at Article I, Section 2(5)(available at <https://www.icann.org/resources/unthemed-pages/bylaws-2002-12-15-en#I>)

¹⁷ ICANN Bylaws, dated September 30, 2016, available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en> at Article I, Section 1.2 (a).

2016, and filed with the California Secretary of State on 3 October 2016) states:

“The Corporation [i.e., ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, 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.”¹⁸

(ii) ICANN Evolution and the IANA Transition

21. The original ICANN-DoC MOU from 1998 was extended and then replaced by a “Joint Project Agreement”¹⁹ and then an “Affirmation of Commitments”²⁰ between ICANN and NTIA, each new agreement further reducing the U.S. government’s direct involvement in ICANN’s technical coordination of the DNS. The Affirmation of Commitments was terminated in January 2017 through a process that is commonly known as “the IANA Transition.”
22. Each of the replacements for the MoU required ICANN to affirm its commitment to maintain and enhance processes to ensure that competition, consumer interests, and Internet DNS stability and security issues are considered in TLD management decisions.²¹ The Affirmation of Commitments affirmed ICANN’s commitment to: “(a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.”²²
23. Although each replacement for the MoU acknowledged ICANN’s role in Internet governance and policy development, the performance of the “IANA functions” remained subject to a separate agreement with U.S. Government, called the “IANA Functions Contract.”²³ This contract, originally awarded in 2000, delegated the responsibility of a number of administrative functions involved in maintaining the Internet’s root zone to ICANN. This included receiving delegation and re-delegation requests from ccTLD operators, as well as requests to modify contact information and nameservers associated with all top-level domains. Additionally, the IANA Function contract included the allocation of IP-addresses and the approval of the delegation of new top-level domains into the root.²⁴

¹⁸ <https://www.icann.org/resources/pages/articles-2012-02-25-en>;
<https://www.icann.org/resources/pages/governance/articles-en>.

¹⁹ Joint Project Agreement, DOC-ICANN, (Sept. 29, 2006), available at <https://www.ntia.doc.gov/files/ntia/publications/signedmou290906.pdf>.

²⁰ Affirmation of Commitments, DOC-ICANN, (Sept. 30, 2009), available at https://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf.

²¹ For example, see the Joint Project Agreement, *supra* FN 15, at p. 5-6

²² <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en> at para. 3.

²³ See generally <https://ntia.doc.gov/page/iana-functions-purchase-order>.

²⁴ <https://ntia.doc.gov/files/ntia/publications/ianacontract.pdf>

24. The IANA Functions Contract was awarded to ICANN again in 2001, 2003, 2006 and in 2012. On March 14, 2014, rather than putting the IANA Functions Contract through a competitive bidding process, the U.S. Government announced its intent to transition the IANA Functions Contract to the global multistakeholder community.²⁵ It looked to ICANN to convene stakeholders across the global Internet community to craft an appropriate transition plan.²⁶
25. At the ICANN 49 Meeting in Singapore, ICANN launched a multistakeholder-designed process to gather the community's views and contributions to address how the mechanisms for the transition of NTIA's stewardship of the IANA functions should occur.²⁷
26. After more than two years of work by ICANN's Multi-stakeholder community on both improving the IANA Functions as well as ICANN's accountability mechanisms, the U.S. Government allowed the IANA Functions Contract to expire, signaling the formal transition of the IANA functions to ICANN.²⁸ With the expiration of the IANA Functions Contract, the U.S. Government no longer had any oversight or authority over ICANN, and therefore, ICANN became solely responsible for everything within its mission (including the promotion of competition of domain name registration services). The only remaining mechanisms to hold ICANN accountable for its actions (or lack thereof) were those enumerated within its own Articles of Incorporation and Bylaws, subject to applicable international and local law.

B. ICANN's Role in the Regulation of Pricing

27. Prior to 1999, the oversight over the one generic top-level domain name registry, NSI, was the sole responsibility of the NTIA, an agency within the DoC.²⁹ As stated above, this oversight was accomplished through the Cooperative Agreement, as amended.
28. One of the important elements of the White Paper and the proposed transition of the management of the domain name system was the transitioning of oversight over domain name registries and registrars to what became ICANN.
29. In September 1999, other than with respect to a few aspects to ensure competition in the domain name space, particularly with respect to the .COM TLD, responsibility and oversight of all gTLD registry agreements was transitioned to ICANN. As more fully described below³⁰, in February 1999, NTIA notified NSI that ICANN was empowered to oversee a transition to registrar competition through the development of a Shared Registration System. In addition, ICANN became the sole entity responsible for entering into contracts for reassignments of existing gTLDs as well as the assignment, licensing and renewals of any new gTLDs added to

²⁵ <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

²⁶ *Id.*

²⁷ See <https://archive.icann.org/meetings/singapore2014/en/schedule/mon-iana-accountability.html> generally.

²⁸ <https://www.icann.org/en/announcements/details/stewardship-of-iana-functions-transitions-to-global-internet-community-as-contract-with-us-government-ends-1-10-2016-en>

²⁹ Technically there were other so-called gTLDs including .edu, .gov, .int, .mil and .arpa, which were also managed by the U.S. government, but they were (and still are) closed TLDs that were not made available to the general public. For the purposes of this opinion, they have been intentionally excluded.

³⁰ See paras. 33 and following.

the root zone.

30. Although a number of policies governing the operation and administration of gTLDs were subject to the ICANN multi-stakeholder policy development process, at the end of the day, ICANN itself was, and still is, the singular negotiating body on behalf of the Internet community to enter into or amend registry agreements.³¹ ICANN’s primary mechanism to carry out its mission and enforce policies against domain name registries and registrars is through the contracts it holds with those entities.
31. In other words, ICANN is the only entity that can enter into agreements with registries to operate and administer gTLDs, and as such, has both responsibility: (a) for ensuring that the promotion and maintenance of competition is implemented through the registry and registrar agreements, and (b) by virtue of being the only entity, to accredit third parties to serve as a registry or registrar. As such, ICANN has incredible leverage in contractual negotiations over these entities. For example, as the sole licensing authority, if a registry operator cannot convince ICANN and/or its Board of Directors of needed revisions to a registry agreement, those revisions will not be made. Similarly, if a registry operator could not agree to contractual terms proposed by ICANN with respect to a new gTLD, that new gTLD will not get delegated to that entity.
32. Generally, with the exception of the initial 2005 .NET Agreement with VeriSign³², once negotiations on a new agreement are completed, in a renewal agreement or an amendment to an existing registry agreement, those agreements are generally subject to a standard public comment period by the community.³³ If the community is able to convince ICANN staff and/or the ICANN Board that changes to the proposed agreements or amendments are necessary, the impacted registry(ies) may enter into negotiations with ICANN to attempt to address the expressed concerns.
 - (i) 1999 .COM Agreement (The First Registry Agreement)
33. Prior to Amendment 11 of the NTIA/NSI Cooperative Agreement, effective as of February 26, 1999, all oversight over NSI’s operation of the .COM, .NET and .ORG registries was the

³¹ As discussed later in this opinion, the NTIA did (and still does) retain the ability to approve of certain amendments to the .COM registry, this too has been transitioned to ICANN to a large extent.

³² Although the base .NET agreement was published as part of the 2005 .NET procurement, as detailed in Section III (B)(iii) below, the actual negotiated agreement with Verisign initially executed by ICANN and Verisign contained a number of provisions that *were not* put out for public comment, including the unfettered ability to raise prices after the first 18 months of the Agreement. After significant protests were received by Registrars, as detailed in Section III(B)(iii) below, ICANN and Verisign agreed to introduce price controls on increases of registration and renewal fees.

³³ Public comment periods on ICANN Agreements are not specifically referenced in the ICANN Bylaws. However, ICANN’s *Public Comment Guidelines* (last updated on October 9, 2019) states that Public Comment will continue to apply to the following categories: . . . ICANN org base agreements with registry operators and registrars.”). See <https://www.icann.org/en/blogs/details/public-comment-guidelines-for-the-icann-organization-9-10-2019-en>. In addition, public comment “Posting Periods” are included in the Base Registry Agreement (Section 7.6 and 7.7), <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.html#article> 7.6, and Section 6 in the Registry-Registrar Agreements (<https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#raa>)

responsibility of the NTIA.³⁴

34. Amendment 11, which recognized ICANN as “NewCO”, required NSI to develop a shared registration system within .COM, .NET and .ORG to support registrars accredited by ICANN by no later than October 1, 1999. It also required that upon deployment of this system, NSI and the NTIA would agree on a price cap for fees charged to registrars which could only be increased by mutual agreement. NSI was also required to separate its registry and registrar services and provide equal access to all licensed registrars.³⁵
35. In April 1999, Amendment 13 to the Cooperative Agreement provided that NSI could not charge more than \$9 per year for each domain name registration but could require new registrations to be for two years at \$18 total. NTIA also approved the first form Registry-Registrar Agreement.³⁶
36. On September 28, 1999, ICANN announced a tentative agreement with the NTIA and NSI on a series of agreements. The series of agreements included a Registry Agreement between ICANN and NSI, a revised Registrar Accreditation Agreement between ICANN and all registrars registering names in .COM, .NET and .ORG, and a revised Memorandum of Understanding between the DoC and ICANN. These agreements, adopted by the ICANN Board on November 4, 1999 (i.e., the original Registry Agreement)³⁷, required NSI to:
 - a. Recognize ICANN as the sole accrediting body for registrars;
 - b. lower the maximum registry price for .COM, .NET and .ORG domain names to no more than \$6.00 per year; and
 - c. provide all registrars with equivalent access to the shared registration system.
37. More specifically, the Registry Agreement for the .COM, .NET and .ORG TLDs, required NSI to comply with Consensus Policies. Consensus Policies were those that were approved by a consensus of Internet stakeholders through ICANN’s formal policy development process (PDP)³⁸.
38. In the original Registry Agreement, there were no restrictions on the subjects to which Consensus Policies could relate. In other words, there were no restrictions on Consensus Policies relating to the pricing of registry (or registrar) services. The original Registry Agreement stated the definitive price for all .COM, .NET and .ORG domain names to the registrars. It explicitly stated that these fees could only be increased through an amendment of the agreement *“to reflect demonstrated increases in the net costs of operating the registry arising from (1) ICANN policies adopted after the date of this Agreement, or (2) legislation specifically applicable to the provision of Registry Services adopted after the date of this Agreement, to ensure that NSI recovers such costs and a reasonable profit thereon; provided*

³⁴ https://ntia.doc.gov/files/ntia/publications/amend11_052206.pdf

³⁵ *Id.*

³⁶ <https://ntia.doc.gov/files/ntia/publications/amendment13.pdf>

³⁷ <https://www.icann.org/en/registry-agreements/multiple/icann-nsi-registry-agreement-10-11-1999-en>.

³⁸ *Id.* At Section 1.

that such increases exceed any reductions in costs arising from (1) or (2) above.”³⁹

39. Finally, according to the original Registry Agreement, NSI was required to divest its registrar business within 18 months after the date of the agreement (by May 2001). It also stated that neither NSI nor the divested registrar entity could own more than 25% of the shares and/or board of the other.

(ii) 2001 Verisign Agreements & New Unsponsored gTLD Agreements

40. On November 16, 2000, ICANN selected seven new gTLDs to move ahead into contract negotiations which were scheduled to complete by December 31, 2000. The first two registries to enter into negotiations were .BIZ and .INFO. Negotiations began in December 2000 and, due to the complexity of issues, carried over until May 2001.
41. ICANN began posting drafts of the new Registry Agreements for .BIZ and .INFO on February 26, 2001. These agreements prohibited the new registries from operating as a registrar with respect to the TLD that they operated. In addition, it required strict adherence to a code of conduct requiring the equivalent treatment of all registrars. Like the previous agreement with NSI, the maximum fee that could be charged for a domain name registration was set forth in the new Registry Agreement and it could only be increased with approval by ICANN and only to the extent it reflected new costs from the implementation of policy or legislation specifically applicable to the registry in order for the registry to recover its costs. The term of the new Registry Agreement was set at five years after the delegation the registry⁴⁰, and would only renew if ICANN accepted a renewal proposal submitted by the registry; otherwise, the registries would be subject to re-compete.⁴¹
42. At the time ICANN was negotiating the new .BIZ and .INFO registries, ICANN also entered into bilateral negotiations with Verisign (formerly NSI)⁴² on a new registry agreement for the .COM, .NET and .ORG registries. In March 2001, prior to completing negotiations with the .BIZ and .INFO registries, ICANN posted for public comment new amendments for Verisign. According to ICANN, because the introduction of competition in the registrar market was more successful than anticipated (the average retail price of .COM, .NET and .ORG registrations dropped from \$70 for a two-year registration to \$15 per year)⁴³, it agreed to (a) split the agreements for .COM, .NET and .ORG into three separate registry agreements, (b) shorten the term of .ORG to December 31, 2002, at which time a new operator would be selected to run .ORG, (c) extend the term of the .NET Registry agreement until January 1, 2006, at which time the .NET registry would be opened up to competitive proposals (in which Verisign could bid), (d) extend the .COM registry agreement until 2007, at which time the .COM Agreement would be renewed in perpetuity unless Verisign were found to be in breach of the .COM Agreement (“Presumptive

³⁹ See <https://www.icann.org/en/registry-agreements/multiple/icann-nsi-registry-agreement-10-11-1999-en, Clause 20 and Appendix B>.

⁴⁰ The Agreements provided an extra year for the term if the volume of registrations were lower than what had been predicted.

⁴¹ See, for example, Section 5.2 of the .BIZ Registry Agreement executed on May 11, 2001, <https://www.icann.org/en/registry-agreements/multiple/proposed-unsponsored-tld-agreement-11-5-2001-en>.

⁴² In March 2000, Verisign acquired Network Solutions for \$21 Billion. See <https://web.archive.org/web/20110412050645/http://money.cnn.com/2000/03/07/deals/verisign/#>

⁴³ See <https://archive.icann.org/en/meetings/melbourne/proposed-verisign-agreements-topic.htm>

Renewal”), and (e) Verisign would no longer need to have legal ownership separation of its registry and registrar businesses, but would only be required to have structural separation to separate the registry and registrar functions. No changes were made to the provisions governing the price that Verisign could charge for .COM, .NET or .ORG from the 1999 Agreement. ICANN’s Board approved the amendments on April 2, 2001.⁴⁴

43. Despite the more favorable renewal terms offered to Verisign for the largest TLD, .COM, the option for a “Presumptive Renewal” was not offered to NeuLevel and Afilias for the .BIZ and .INFO TLDs. In a desire to launch their new businesses, already delayed by five months, NeuLevel and Afilias had no choice but to agree to less favorable renewal terms and execute their agreements on May 11, 2001 for .BIZ and .INFO, respectively.

(iii) ICANN rebids the .ORG TLD in 2002 and the .NET TLD in 2005 using criteria established by the community

(a) *Public Interest Registry acquires the .ORG TLD*

44. Pursuant to the agreement entered into between Verisign and ICANN for the .ORG TLD in May 2001, Verisign had agreed to cease being the registry operator for the .ORG TLD as of December 31, 2002. On June 4, 2001, the ICANN Board referred to the Domain Name Supporting Organization Names Council (Names Council)⁴⁵ for its consideration of the issues raised by the scheduled transition of the operation of the .org top-level domain from VeriSign to a new entity, which included, *inter alia*, the selection criteria for the entity or its organizers.
45. A final report from the Names Council containing recommended criteria for the selection of the successor .ORG TLD operator was submitted to the ICANN Board on February 5, 2002.⁴⁶ On May 1, 2002, ICANN posted for comment by the Names Council an initial set of criteria for the selection of the successor .ORG operator.⁴⁷ The Noncommercial Constituency submitted the only comments to the draft criteria noting that the new entity should have support from the “Dot Org” community.⁴⁸ The criteria for the selection of the successor operator were finalized on May 20, 2002, when ICANN posted the criteria for assessing proposals as part of the RFP.⁴⁹
46. One of the 12 criteria was “the type, quality, and cost of the registry services proposed.” More specifically, it stated, “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,

⁴⁴ <https://www.icann.org/en/announcements/details/icann-announces-decision-on-registry-agreement-for-comnetorg-domains-2-4-2001-en>

⁴⁵ At the time of the .ORG Rebid, the Domain Name Supporting Organization (DNSO) consisted of 7 constituencies, including the ccTLD registries, gTLD registries, the business constituency, the IP constituency, the non-commercial constituency, registrars and the ISP constituency. In 2003, after the ccTLD registries left the DNSO to for the Country-Code Names Supporting Organization (ccNSO), the DNSO was renamed the Generic Names Supporting Organization (GNSO), which was made up of the six remaining constituencies.

⁴⁶ See <http://www.dnso.org/clubpublic/council/Arc09/msg00122.html>.

⁴⁷ <https://archive.icann.org/en/tlds/org/criteria-01may02.htm>

⁴⁸ <http://www.dnso.org/clubpublic/council/Arc10/msg00203.html>

⁴⁹ <https://archive.icann.org/en/tlds/org/criteria.htm>

consistent with the maintenance of good-quality service.”⁵⁰ Although the successful applicant was expected to negotiate a new registry agreement, a model .ORG agreement was published along with the RFP.⁵¹

47. Eleven organizations submitted proposals to become the successor operator for .ORG.⁵² Most of the applicants submitted proposed pricing in the \$5 to \$6 range, which was generally consistent with the then current price charged to registrars per year for each .ORG registration. Ultimately, the proposal, submitted by the Internet Society (forming a new corporation called the “Public Interest Registry (PIR)”) was selected and PIR became the successor .ORG registry.
48. On December 2, 2002, ICANN and PIR entered into an unsponsored Registry agreement for the administration of the.ORG top level domain. That Agreement was very similar to the ones signed by NeuLevel and Afilias for the .BIZ and .INFO TLDs, respectively. Unlike the former .ORG agreement with Verisign, this agreement had no presumption of renewal, and prohibited PIR from acting as a registrar with respect to the .ORG TLD.

(b) Verisign Litigation, the .NET Rebid and the new .NET Agreement

49. On 15 September 2003, Verisign deployed a "wildcard" service (Sitefinder) into the .COM and .NET Top Level Domain zones. Verisign's wildcard creates a registry-synthesized address record in response to lookups of domains that are not otherwise present in the zone (including restricted names, unregistered names, and registered but inactive names). The VeriSign wildcard redirects traffic that would otherwise have resulted in a "no domain" response to a VeriSign-operated website with search results and links to paid advertisements.⁵³
50. In response to widespread expressions of concern from the Internet community about the effects of the introduction of the wildcard, ICANN called upon Verisign to voluntarily suspend the service until it could be reviewed by ICANN's Security and Stability Advisory Committee (SSAC), but Verisign refused to suspend the service.⁵⁴
51. On September 22, 2003, the SSAC found that the Sitefinder “appears to have considerably weakened the stability of the Internet, introduced ambiguous and inaccurate responses in the DNS, and has caused an escalating chain reaction of measures and countermeasures that contribute to further instability.”⁵⁵ Recognizing the concerns about the wildcard service, the SSAC “called on VeriSign to voluntarily suspend the service and participate in the various review processes now underway.”
52. By letter dated October 3, 2003, Verisign reluctantly agreed to suspend Sitefinder, but claimed

⁵⁰ Id. At the time of the .org RFP, Verisign charged registrars \$6.00 per .org domain name per year.

⁵¹ <https://archive.icann.org/en/tlds/org/model-registry-agmt.htm>

⁵² See <https://archive.icann.org/en/tlds/org/applications/>. Applicants included both for-profit and not-for-profit organizations affiliated with the Internet Society, Neustar, Register.com, and an applicant in which Verisign proposed operating the back-end technical functions.

⁵³ <https://www.icann.org/en/announcements/details/advisory-concerning-verisigns-deployment-of-dns-wildcard-service-19-9-2003-en>

⁵⁴ <https://www.icann.org/en/correspondence/lewis-to-twomey-21sep03.htm>

⁵⁵ <https://www.icann.org/resources/pages/secsac-to-board-2003-09-22-en>

that ICANN was attempting to improperly regulate Verisign's business stating that it considers *"ICANN's actions a violation of the Registry Agreements as well as an anti-competitive interference with VeriSign's existing contractual and other advantageous business relationships."*⁵⁶

53. Verisign filed suit against ICANN on February 26, 2004 for: (a) prohibiting Verisign from launching Sitefinder, WaitList Service and International Domain Names, (b) attempting to regulate or fix the prices at which those services are being offered, and (c) restricting Verisign's marketing methods or promotions it uses to promote its services.⁵⁷ The lawsuit was filed less than two weeks prior to ICANN's consideration of opening up the rebid process for .NET.
54. On March 6, 2004, the ICANN Board adopted a resolution requiring that ICANN staff take steps to prepare for the rebid of .NET.⁵⁸ The ICANN Board approved the process for the rebid of the .NET registry on June 29, 2004, which included a plan to work with the Generic Names Supporting Organization ("GNSO") to finalize the .NET successor registry criteria. The GNSO developed both absolute and relative criteria. Absolute criteria were those that established thresholds, the failure to meet would disqualify an applicant. Relative criteria were to be applied only to those registry applicants that met the absolute criteria. They included the bases for weighing one application against another. The first relative criteria related to the "promotion of competition". More specifically, according to the report, *"preference should be given to proposals offering lower overall costs to the registrar, including the registry price."*⁵⁹
55. On November 10, 2004, just two days prior to publishing a draft of the .NET Request for Proposals (RFP), ICANN filed a Request for Arbitration against Verisign, under the .NET Agreement, seeking: (a) a declaration of VeriSign's obligations under the .NET agreement, and (b) a declaration that VeriSign has violated its obligations under the agreement. ICANN alleged this action was necessary to ensure that VeriSign's activities in operating the .NET registry, *"do not endanger the stability or security of the Internet and are consistent with ICANN's goals in coordinating the domain name system, including promoting competition in the provision of registration services. [It] may also be relevant to the ongoing process of determining whether VeriSign or some other entity should be chosen to operate the .NET registry when the existing agreement expires."*⁶⁰
56. On November 12, 2004, ICANN released for public comment a draft of the .NET RFP.⁶¹ On December 10, 2004, ICANN published the final .NET RFP.⁶² The RFP made it clear that *"the per-name price charged to registrars is a relative criterion, with lower committed prices being preferable to higher prices."*⁶³

⁵⁶ <https://www.icann.org/en/system/files/files/verisign-to-twomey-03oct03-en.pdf>

⁵⁷ <https://www.icann.org/en/system/files/files/complaint-26feb04-en.pdf>

⁵⁸ <https://www.icann.org/resources/board-material/resolutions-2004-03-06-en>

⁵⁹ https://gns0.icann.org/sites/default/files/filefield_5863/dotnet-reportv9.pdf at p. 6.

⁶⁰ <https://www.icann.org/en/system/files/files/icann-net-arbitration-request-12nov04-en.pdf>. The Request for Arbitration was eventually dismissed in December 2006, after .NET awarded to Verisign and the new .COM agreement approved.

⁶¹ <https://www.icann.org/en/announcements/details/icann-releases-net-rfp-for-public-comment-12-11-2004-en>

⁶² <https://archive.icann.org/en/tlds/dotnet-reassignment/net-rfp-final-10dec04.pdf> and

⁶³ <https://archive.icann.org/en/tlds/dotnet-reassignment/net-rfp-final-10dec04.pdf> at p. 12.

57. On January 19, 2005, ICANN announced that it had received five applications in response to the .NET RFP, including one from the incumbent operator, Verisign. The evaluators completed their evaluation and posted their final recommendation on May 27, 2005.⁶⁴ The applicant who proposed the lowest price was not selected. Verisign was one of two applicants to propose the second lowest price.
58. On June 8, 2005, ICANN formally selected Verisign as the winner of the RFP. It entered into an agreement with Verisign for the .NET registry effective July 1, 2005. Unlike the .BIZ, .INFO, and .ORG Agreements at the time, Verisign was able to negotiate a presumptive renewal for the registry. In addition, the new .NET Agreement only required VeriSign to commit to a maximum price of \$4.25 for the first 18 months of the Agreement. Thereafter, all price controls for .NET were eliminated⁶⁵. No other registry operator at the time for an unsponsored TLD was given that same ability. Verisign was also required to agree that it would not act as a registrar with respect to its own TLD nor was it allowed to *“acquire, directly or indirectly, control of, or a greater than fifteen percent ownership interest in, any ICANN accredited registrar.”*⁶⁶ This was also the first agreement to state that Consensus Policies may not *“prescribe or limit the price of Registry Services.”*⁶⁷
59. On July 12, 2005, during the ICANN meeting in Luxembourg, the Registrars Stakeholder Group unanimously denounced ICANN’s decision to lift all price controls in .NET in the new .NET Agreement:⁶⁸

“Registrars trusted the ICANN Board and the ICANN staff to act on behalf of the ICANN community in negotiating a new contract with Verisign for dot NET. Registrars consider there to be a breach of trust by the ICANN Board and the ICANN staff in approving a contract with Verisign that contains significant changes from the original draft .dot NET Agreement posted on the ICANN website without any public consultation. We consider this not only a breach of trust but also a breach of the transparency provision which is the .Article III of the ICANN Bylaws.”⁶⁹

⁶⁴ <https://archive.icann.org/en/tlds/dotnet-reassignment/net-rfp-finalreport-issue4-27may05.pdf>

⁶⁵ See Original 2005 .NET Agreement (archived at <http://www.icann.org/tlds/agreements/net/net-registry-agreement-01jul05.pdf>). Section 7.3(a) stated: “From 1 July 2005 through 31 December 2006, the price 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, shall not exceed US\$4.25 (consisting of a US\$3.50 service fee and a US\$0.75 ICANN fee). On 1 January 2007, the controls on Registry Operator’s pricing set forth in this Agreement shall be eliminated, provided that the same price shall be charged to all registrars with respect to each annual increment of a new or renewal domain name registration, and for transferring a domain name registration from one ICANN-accredited registrar to another (provided that volume discounts and marketing support and incentive programs may be made if the same opportunities to qualify for those discounts and marketing support and incentive programs is available to all ICANN-accredited registrars).”

⁶⁶ See <https://www.icann.org/en/registry-agreements/net/net-registry-agreement-1-7-2005-en>. It is important to note that by the time this new agreement was executed, Verisign had sold its registrar business to a private equity firm, retaining only a 15% ownership stake in the new Network Solutions, Inc. The divestiture was announced on October 16, 2003. <https://www.eweek.COM/it-management/verisign-sells-network-solutions-business/>.

⁶⁷ See <https://www.icann.org/en/registry-agreements/net/net-registry-agreement-1-7-2005-en> Section 3.1 (b)(v)(A)

⁶⁸ See <https://archive.icann.org/en/meetings/luxembourg/captioning-gnso-forum-12jul05.htm>

⁶⁹ *Id.*

60. After the ICANN meeting in Luxembourg, ICANN met with the registrars and with Verisign to discuss reopening the executed .NET Agreement. On September 22, 2005, ICANN and Verisign agreed to post a draft amendment to .NET Agreement which required that the price of .NET registrations remain fixed at \$4.25 per year for the first 18 months of the Agreement. Thereafter, Verisign would have the ability to increase its prices by 10% per year.⁷⁰ The .NET Amendment No. 1 was approved on October 12, 2005⁷¹ and was incorporated into the Registry Agreement now found on ICANN's website as the 2005 .NET Agreement.⁷²

C. Sponsored New TLD Round and the new Sponsored gTLD Agreements

61. On October 18, 2002, ICANN published "a plan for action regarding new gTLDs"⁷³ covering the possibility of moving forward with some sort of limited new gTLD program, even while the evaluation of the 2000 round was still in process. ICANN concluded that, despite the fact that the 2000 round encountered issues related to launch programs and intellectual property protections, these problems were not present in "sponsored TLDs."
62. On December 15, 2003, ICANN released a request for proposals for sponsored top-level domains.⁷⁴ ICANN received 10 applications for new sTLDs which were published for public comment in March 2004⁷⁵. The selection of successful applications was announced on a rolling basis by ICANN. The first two of which were .POST and .TRAVEL. However, it was not until March 24, 2005, that ICANN completed negotiations with the applicants for .TRAVEL and .JOBS.⁷⁶
63. The Registry Agreements for .TRAVEL and .JOBS, like other Sponsored TLDs, contained a presumption of renewal as well as a prohibition acting as a registrar in its own TLD. Further, it also contained a restriction that "*Registry Operator shall not acquire, directly or indirectly, control of, or a greater than fifteen percent ownership interest in, any ICANN-accredited registrar.*"⁷⁷ As a Sponsored TLD, policies regarding eligibility to register names within those TLDs as well as the price of domain name registrations to registrars, were matters delegated to the sponsoring organization and therefore were not subject to any price controls.

⁷⁰ <https://www.icann.org/en/registry-agreements/net/amendment-no-1-to-net-registry-agreement-22-9-2005-en>

⁷¹ <https://www.icann.org/resources/board-material/resolutions-2005-10-12-en>

⁷² See <https://www.icann.org/en/registry-agreements/net/net-registry-agreement-1-7-2005-en> which incorporates the October 12, 2005 amendment.

⁷³ <https://archive.icann.org/en/committees/ntepptf/new-gtld-action-plan-18oct02.htm#>

⁷⁴ <https://www.icann.org/en/announcements/details/icann-releases-request-for-proposals-for-sponsored-top-level-domain-names-15-12-2003-en>

⁷⁵ See <https://www.icann.org/en/announcements/details/icann-progress-in-process-for-introducing-new-sponsored-top-level-domains-19-3-2004-en> and <https://www.icann.org/en/announcements/details/announcement--public-comment-on-sponsored-tld-applications-opens-31-march-2004-26-3-2004-en>

⁷⁶ See <https://www.icann.org/en/announcements/details/icann-moves-forward-in-first-phase-commercial--technical-negotiations-with-two-stld-applicants-27-10-2004-en>. Although .post was selected prior to .jobs, it would take several more years for ICANN to complete negotiations with the Universal Postal Union for .post.

⁷⁷ See <https://itp.cdn.icann.org/en/files/registry-agreements/jobs/proposed-jobs-agmt-24mar05-en.pdf>.

D. 2006 Settlement of Litigation resulting in Revised .Com Agreement

64. On October 24, 2005, ICANN and Verisign announced an end to their litigation through a settlement agreement that also contained a newly proposed .COM Agreement.⁷⁸ For the first time, Verisign received approval from ICANN to raise the prices of .COM registrations up to 7% per year, provided that Verisign gave at least 6 months' notice. The agreement also prohibited Verisign from owning more than 15% of an ICANN-accredited registrar and from acting as a registrar in its own TLD.⁷⁹
65. In response to the proposed agreement, ICANN received hundreds of comments, most of which opposed the revision of the .COM agreement, and more specifically the ability to raise prices.⁸⁰ ICANN's rationale for allowing for the price increases was: "In order to provide for a transition to allowing market forces to determine prices, ICANN and VeriSign agreed to relax the current price cap, which has remained unchanged since ICANN came into existence, on a graduated basis."⁸¹ Although ICANN agreed to allow Verisign to raise the price of domain name registrations, but to cap such increases at 7% per year, ICANN took the position that the *"determination of whether a registry's action raises competition issues is an appropriate function of existing governmental competition authorities."* ICANN stated that it *"consulted with the U.S. Department of Commerce and its views were taken into account by ICANN and VeriSign in agreeing to the pricing provisions in the proposed new .COM agreement."*⁸²
66. In response to a number of public comments, a revised Settlement Agreement was posted on January 29, 2006, which allowed Verisign to only increase prices up to a 7% price cap in 4 out of the 6-year term. The revised agreement allowed Verisign to propose further increases due to any increased burdens from new consensus policies.⁸³
67. The ICANN Board approved the settlement agreements and the new .COM agreement on Feb 28, 2006.⁸⁴ As required under the Memorandum of Understanding / Joint Project Agreement between the DoC and ICANN⁸⁵, as well as the Cooperative Agreement between Verisign and the DoC, the .COM agreement was forwarded to the DoC for its approval. Although the .COM agreement was signed on March 1, 2006, it was formally approved by the DoC on November

⁷⁸ <https://www.icann.org/en/registry-agreements/com/proposed-settlement-agreements--new-com-registry-agreement-24-10-2005-en>

⁷⁹ See <https://itp.cdn.icann.org/en/files/registry-agreements/com/com-registry-agreement-22sep05-en.pdf> at Section 7.1(b) and (c).

⁸⁰ <https://forum.icann.org/lists/settlement-comments/>

⁸¹ <https://www.icann.org/en/announcements/details/information-on-proposed-verisign-settlement-and-new-com-agreement-21-11-2005-en>

⁸² <https://www.icann.org/en/announcements/details/information-on-proposed-verisign-settlement-and-new-com-agreement-21-11-2005-en>

⁸³ <https://archive.icann.org/en/topics/vrsn-settlement/revision-matrix-29jan06.pdf>

⁸⁴ <https://www.icann.org/en/announcements/details/icann-board-approves-verisign-settlement-agreements-28-2-2006-en>

⁸⁵ Memorandum of Understanding between ICANN and DoC (<https://www.ntia.doc.gov/other-publication/1998/memorandum-understanding-between-us-department-commerce-and-internet-corporat>), which became the Joint Project Agreement between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers on September 29, 2006 (See <https://www.ntia.doc.gov/files/ntia/publications/signedmou290906.pdf>)

29, 2006.⁸⁶

E. 2006 Revised .BIZ, .INFO and .ORG Agreements and the Promise of Economic Studies

68. The .BIZ and .INFO Agreements had a term that was to expire in May 2007 (6 Years after the TLD was Delegated). According to the terms of those agreements, the registries needed to submit final “Renewal Proposals” to ICANN by no later than 18 months prior to the expiration date. This meant that renewal proposals for those two registries were due by November 2005. In addition, ICANN had until May 2006 to consider whether to accept the Renewal Proposal or recompute a registry so that a new registry operator could be in place by the contract expiration in May 2007.
69. Shortly after the .NET agreement was executed in 2005, both NeuLevel and Afilias approached ICANN to discuss renewal terms that were on par with the .NET agreement that was executed in July 2005.⁸⁷ However, ICANN did not actually start negotiating with either NeuLevel or Afilias until January 2006.⁸⁸ Although neither company knew why ICANN delayed the start of the renewal negotiations for .BIZ and .INFO, when ICANN published its settlement agreement with Verisign in October 2005 containing a new .COM agreement, it became clear to me, as primary negotiator for NeuLevel, that the delay was caused by ICANN’s negotiations with Verisign.
70. By the time that ICANN actually engaged in negotiations with NeuLevel and Afilias, ICANN was nearing finalization of the .COM agreement and incorporating mechanisms to address public comments that were received.⁸⁹ Although the .COM agreement was not technically finalized until February 28, 2006, the nearly-finalized .COM registry agreement would not only have presumptive renewal, but would also have the ability to raise the price of .COM registrations, just as Verisign had negotiated for the 2005 .NET agreement. Further, both the .COM and .NET Registry Agreements had specific definitions for what constituted “Consensus Policies” as well as the types of issues that could not be considered Consensus Policies. Those included the fact that consensus policies could not “prescribe or limit the price of Registry Services.”
71. In March 2006, Neustar, Inc., the then-owner of 90% of the outstanding shares in NeuLevel, acquired the remaining shares of NeuLevel and assigned the Registry Agreement to Neustar on October 10, 2006.⁹⁰ As the chief negotiator for the .BIZ registry for NeuLevel, and after the Neustar acquisition, for Neustar, I believed that it would be unfair to give the incumbent dominant market player, Verisign, more favorable terms than ICANN had given to the new

⁸⁶ https://ntia.doc.gov/files/ntia/publications/amend30_11292006.pdf

⁸⁷ Although the .org agreement was not set to expire for an additional two years, the Public Interest Registry subsequently joined the negotiations as well because it had essentially the same Registry Agreement as NeuLevel had for .BIZ and Afilias had for .info.

⁸⁸ See comments by Paul Twomey, ICANN CEO during the ICANN Board Meeting in Sao Paulo, Brazil on December 8, 2006 available at <https://archive.icann.org/en/meetings/saopaulo/captioning-board-old-08dec06.htm>.

⁸⁹ As stated above, ICANN posted a revised .COM Registry Agreement on January 29, 2006 which incorporated feedback from the community. See <https://www.icann.org/en/announcements/details/icann-posts-revised-settlement-agreement-29-1-2006-en>

⁹⁰ See <https://sec.report/Document/0000950133-06-001512/> and <https://www.icann.org/en/system/files/files/neustar-to-icann-10oct06-en.pdf>.

entrants (.BIZ and .INFO) in the DNS. Verisign, through its operation of .COM and .NET, controlled more than 85% of the total number of gTLD registrations. It seemed unreasonable to allow Verisign to have (a) a presumption of renewal for its registries, (b) the ability to raise the prices of its registrations, and (c) a different, more limited definition of what the community could regulate; yet not give those benefits to the newer registries.

72. Afilias, NeuLevel and PIR believed that denying the same terms and conditions to the newer registries was a violation of their Registry Agreements by ICANN⁹¹ who had an obligation to *“not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause....”*⁹²
73. By that point in time, ICANN, however, had received an extremely negative reaction from the community to both the .NET and .COM agreements. The community expressed concerns about the ability under the .NET and .COM agreements to raise prices (even with price caps), the presumption of renewal, and a variety of other contractual terms in those agreements. Members of the community had felt that their overwhelmingly negative comments to those agreements were ignored and that ICANN had made a mistake in allowing those changes to Verisign’s .NET and .COM Agreements. An organization called the Coalition for ICANN Transparency (CFIT) filed a lawsuit against ICANN and Verisign for violation of antitrust law, the Lanham Act, and Intentional Interference with Prospective Economic Advantage in the United States District Court for the Northern District of California.⁹³ The lawsuit sought to prevent the execution of the new .COM agreement, a requirement that the .COM registry be put out for competitive rebid and that any new contract not allow for any rise in the prices for domain name registrations, absent substantial justification. It also sought that Verisign be classified as a monopoly under the law.⁹⁴
74. Recognizing that the negotiations with NeuLevel and Afilias would not be completed by the contractually required date, ICANN agreed to extend the date that a renewal proposal would be due until September 2006. It wasn’t until the end of June 2006 that ICANN completed negotiations with the .BIZ, .INFO and .ORG registries for renewal agreements which were posted for Public Comment on July 28, 2006.⁹⁵
75. The new proposed agreements contained many of the same provisions as in the already executed .NET and .COM agreements including a presumption of renewal, definition of

⁹¹ See for example, <https://www.icann.org/en/system/files/files/neustar-to-icann-10oct06-en.pdf> (Letter from NeuLevel to ICANN dated October 10, 2006); and <https://www.icann.org/en/system/files/files/afilias-to-icann-10oct06-en.pdf> (Letter from Afilias to ICANN dated October 10, 2006)

⁹² <https://www.icann.org/en/registry-agreements/multiple/proposed-unsponsored-tld-agreement-11-5-2001-en> at Section 2.1.3 in the .BIZ 2001 Registry Agreement.

⁹³ <https://www.icann.org/en/system/files/files/cfit-complaint-28nov05-en.pdf>. CFIT a not-for-profit corporation whose members consisted of certain domain name registrars, registrants, back and service providers, and other Internet stakeholders.

⁹⁴ Ultimately the litigation was dismissed (See <https://www.icann.org/resources/pages/cfit-v-icann-2012-02-25-en>), but the lawsuit was a reflection of an anger from parts of the community to allowing these changes to the .COM and .NET agreements.

⁹⁵ <https://www.icann.org/en/announcements/details/proposed-biz-info-and-org-gtld-registry-agreements-28-7-2006-en>

Consensus Policies and its limitations, a process for the approval of new registry services and other standardized terms. However, unlike the .COM and .NET agreements which allowed the raising of prices for domain name registrations up to a 7% (.COM) or 10% (.NET) cap, the new proposed agreements contained a complete lifting of all price controls on Registry Services provided that the registries provide six months notice before any increase of price.⁹⁶

76. On September 11, 2006, ICANN released a “Draft Summary of Public Comments on Proposed .BIZ, .INFO and .ORG, gTLD Registry Agreements.”⁹⁷ There were 2689 responses received (though only 1014 unique senders due to many sending in multiple responses). Most of the concerns centered around the complete lifting of price controls and concerns that the renewal provisions were too lenient. More specifically, commenters were concerned that registries would have the ability to implement variable pricing in a discriminatory manner. For example, it was a concerning that the .ORG registry could charge one price for .ORG domain names to certain registrars that it liked, and a higher charge to those it did not. Or alternatively, it could charge a higher price to those entities that express different views than that supported by the registry’s management. Further, there was a concern that registries (especially .ORG) could charge exorbitant renewal rates once it was clear that registrants were reliant on such domains. Finally, many commenters urged ICANN to wait for the Feb 06 PDP⁹⁸ (explained in more detail below) to be completed prior to determining what should be in any future registry agreement.⁹⁹
77. In response to the comments, Neustar, Inc. stated that it never intended to have variable pricing on a domain-by-domain basis and therefore it would agree to a prohibition on doing so, provided that other registries were similarly prohibited.¹⁰⁰ In addition, Neustar claimed that ICANN was obliged to include a presumptive renewal clause in the .BIZ, registry agreement , just as it had done not only for .COM and .NET, but also with .JOBS, .TRAVEL, .MOBI, .CAT, and .TEL (five of the TLDs selected during the 2003 sponsored gTLD (sTLD) round of new gTLDs). It claimed that failure to give Neustar the same benefits as it gave Verisign for .COM and .NET would be a breach of ICANN’s agreement with Neustar as well as a violation of its own bylaws by failing to treat all registries equitably.¹⁰¹ Each of the other registries, as well as the .ASIA registry (a 6th sTLD looking to sign a Registry Agreement), submitted its own response.¹⁰²

⁹⁶ <https://www.icann.org/en/announcements/details/proposed-biz-info-and-org-gtld-registry-agreements-28-7-2006-en>

⁹⁷ <https://www.icann.org/en/announcements/details/draft-summary-of-public-comments-on-proposed-biz-info-and-org-gtld-registry-agreements-11-9-2006-en> and <https://www.icann.org/en/public-comment/draft-summary-of-public-comments-on-proposed-biz-info-and-org-agreements-7-9-2006-en>.

⁹⁸ See Section ___ below which addresses the policy process commenced by the GNSO Council on February 6, 2006 in response to the proposed 2006 .COM Agreement (FEB 06 PDP) to discuss standardizing registry agreement provisions amongst all of the Unsponsored registries.

⁹⁹ *Id.*

¹⁰⁰ <https://www.icann.org/en/system/files/files/neustar-to-icann-10oct06-en.pdf>

¹⁰¹ *Id.*

¹⁰² <https://www.icann.org/en/announcements/details/icann-board-receives-responses-to-request-for-information-by-registry-operators-of-biz-info-and-org-and-proposed-registry-operator-of-asia-12-10-2006-en>

78. At its board meeting on October 18, 2006,¹⁰³ ICANN directed its president to (a) renegotiate the proposed agreements relating to “*competition-related concerns (in particular price increase restrictions)*”, and (b) separately “*commission an independent study by a reputable economic consulting firm or organization to deliver findings on economic questions relating to the domain registration market such as:*
- i. *whether the domain registration market is one market or whether each TLD functions as a separate market,*
 - ii. *whether registrations in different TLDs are substitutable,*
 - iii. *what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD to another,*
 - iv. *what is the effect of the market structure and pricing on new TLD entrants, and*
 - v. *whether there are other markets with similar issues, and if so how are these issues addressed and by who?”*
79. On October 24, 2006, ICANN posted revised agreements for .BIZ, .INFO and .ORG for public comment. These agreements contained the same price caps that were included in the .NET agreement (prices could increase up to 10% per year, provided that six months’ notice was given prior to such increase). The agreements also contained a new provision stating, “*ICANN shall consider and discuss with Registry Operator other appropriate changes to pricing and related terms under the Agreement in the event ICANN shall obtain further independent data from professional experts providing analysis of the pricing of domain name registrations and competitive market considerations.*”¹⁰⁴
80. On December 8, 2006, the ICANN Board officially approved the new .BIZ, .INFO and .ORG Agreements.¹⁰⁵

F. The Feb 06 PDP

81. In December 2005, both in anticipation of a new round of unsponsored gTLDs¹⁰⁶ and in response to the proposed draft .COM agreement and ICANN’s proposed settlement agreement with Verisign¹⁰⁷, the GNSO sought to commence a policy development process on standardizing the contractual conditions for existing and new TLD Registries.
82. With respect to standardizing the contractual conditions of existing registries, an Issues Report was published on February 2, 2006.¹⁰⁸ This became known as the “Feb 06 PDP.”

¹⁰³ <https://www.icann.org/resources/board-material/minutes-2006-10-18-en>

¹⁰⁴ See for example <https://itp.cdn.icann.org/en/files/registry-agreements/biz/revised-biz-redline-24oct06-en.pdf> at 4.3.

¹⁰⁵ See <https://www.icann.org/resources/board-material/minutes-2006-12-08-en>

¹⁰⁶ See <https://www.icann.org/en/announcements/details/public-comment-forum-for-terms-of-reference-for-new-gtlds-6-12-2005-en#TOR>

¹⁰⁷ See Section 6 above.

¹⁰⁸ https://gns0.icann.org/sites/default/files/filefield_5951/issues-report-02feb06.pdf. Although the Issues report was initially focused on the .COM TLD, after advice from ICANN’s General Counsel and the fact that a PDP could not single out any one individual registry operator, the GNSO expanded the subject matter to cover all existing registries.

83. The GNSO Council formally kicked off the Feb 06 PDP on February 6, 2006¹⁰⁹ and approved a Terms of Reference on March 2, 2006.¹¹⁰ The topics included whether to develop a policy regarding price controls for registry services (e.g., price caps, same pricing for all registrars), and if so, to examine objective measures (cost calculation method, cost elements, reasonable profit margin) for approving an application for a price increase when a price cap exists. It also included whether or not there should be a policy governing the renewal of a registry agreement, and whether the existing definition and limitations on Consensus Policies were appropriate.
84. By the time the Feb 06 PDP Task Force published its Draft Initial Report in June 2006, Verisign and ICANN had already executed the 2006 .COM Agreement, but that Agreement was still pending review by the DoC.¹¹¹ In August 2006, the Initial Report for contractual conditions was published for comment.¹¹²
85. In September 2006, in response to questions posed by the Feb 06 PDP Task Force, ICANN's General Counsel sent a letter to the Feb 06 PDP Task Force stating that whether contractual provisions determined through the ICANN policy development process may be enforced as "Consensus Policies" depends on the language in each of the applicable Registry Agreements¹¹³. "Since there has been no uniform language on consensus policies included in each ICANN registry agreement, this has been the subject of bilateral negotiations between ICANN and each registry operator and sponsor."¹¹⁴ The letter pointed out that some of the then-current gTLD Agreements included limitations on the topics that may be the subject of new binding obligations. However, it may nonetheless "be useful in negotiating future agreements and might impact the amendments to existing agreements, even where consensus policy might limit the impact of such advice or policy on current Agreements."¹¹⁵
86. By the time the Feb 06 PDP Task Force completed its work in April 2007¹¹⁶, ICANN had already proceeded to the execution of new renewal agreements for .BIZ, .INFO, .ORG and several other TLDs. Each of these agreements incorporated presumptive renewal, price caps, and standardized definitions for "Consensus Policies" that not only included subjects that were appropriate for policy making, but also limitations on what could not be the subject of a Consensus Policy. One of the limitations was that Consensus Policies shall not "*prescribe or limit the price of Registry Services.*" Therefore, it became clear to the Task Force members, that their work would not retroactively apply to the already executed gTLD Registry Agreements, but could have an impact on future new gTLDs and new registry agreements.

¹⁰⁹ <https://gns0.icann.org/en/council/resolutions/1999-2019#200603>

¹¹⁰ See <https://mm.icann.org/pipermail/council/2006-February/002125.html> for clean Terms of Reference.

¹¹¹ https://gns0.icann.org/sites/default/files/filefield_5890/tld-contract-policies-16jun06.pdf

¹¹² https://gns0.icann.org/sites/default/files/filefield_5914/pcc-pdp-03aug06.pdf

¹¹³ See https://gns0.icann.org/sites/default/files/filefield_5766/jeffrey-to-tonkin-27sep06.pdf

¹¹⁴ *Id.*

¹¹⁵ https://gns0.icann.org/sites/default/files/filefield_5766/jeffrey-to-tonkin-27sep06.pdf

¹¹⁶ https://gns0.icann.org/sites/default/files/filefield_6411/gns0-pdp-feb06-tfr-10apr07.pdf

87. The Final Task Force Report¹¹⁷ on Policies for Contractual Conditions regarding existing registries was submitted to the GNSO for consideration. In that report, there were a number of recommendations that obtained “Majority Support”. These included recommendations that (a) there should be a policy guiding registry agreement renewal, (b) individual negotiations for fees paid to ICANN should be avoided, and (c) baseline requirements for the security and stability of registries should be established. Other recommendations that received some support included one that requires ICANN to determine whether that registry is market dominant. That determination should be made by a panel of competition experts including competition lawyers and economists. If the panel determined that there was market power, then the Registry agreement must include a pricing provision for new registrations as currently included in all of the largest gTLD Registry Agreements. If there is no market power, then there would be no need for a pricing provision related to new registrations. That recommendation also states that, “*regardless of whether there is market dominance, consumers should be protected with regard to renewals due to high switching costs associated with domain names.*”¹¹⁸ In other words, “*this policy recommendation is to continue the system of pricing provisions in the current unsponsored TLD Agreements with regard to domain name renewals.*”¹¹⁹
88. On July 27, 2007, ICANN staff published a paper entitled Policies for Contractual Conditions ICANN Staff Discussion Points¹²⁰ ICANN staff indicated that its understanding that the majority supported recommendations were “intended to guide ICANN’s actions in the relevant areas, and [was] not intended to directly impose new requirements on contracted parties.”¹²¹ More specifically, with respect to the recommendation that registry contracts should be “re-bid”, ICANN staff committed to “examine the existing agreements, conditions for termination and nonrenewal of agreements, and experiences to date in order to determine whether the conditions under which re-bids would occur are appropriate for new registry agreements.”¹²²
89. At the GNSO Council meeting held on August 9, 2007, GNSO Councilor Philip Sheppard emphasized to ICANN staff that recommendation 1C was premised on requiring all registry renewals (both existing and new registries) to go through a rebid process. In response, ICANN staff stated that “it would be expected that as staff examines the issue, they would be coming back with the various options as part of the interaction with the Council.”¹²³ Based on that discussion with ICANN staff, the GNSO Council approved by a Supermajority a resolution to support the recommendations, as a whole, as set out in the Final Report of the Policies for

¹¹⁷ Liz Williams (ICANN), *Task Force Report: Policies for Contractual Conditions Existing Registries PDP Feb 06*, https://gns0.icann.org/sites/default/files/filefield_6411/gns0-pdp-feb06-tfr-10apr07.pdf.

¹¹⁸ Liz Williams (ICANN), *Task Force Report: Policies for Contractual Conditions Existing Registries PDP Feb 06*, https://gns0.icann.org/sites/default/files/filefield_6411/gns0-pdp-feb06-tfr-10apr07.pdf, p. 8.

¹¹⁹ Liz Williams (ICANN), *Task Force Report: Policies for Contractual Conditions Existing Registries PDP Feb 06*, https://gns0.icann.org/sites/default/files/filefield_6411/gns0-pdp-feb06-tfr-10apr07.pdf, p. 8.

¹²⁰ https://gns0.icann.org/sites/default/files/filefield_6432/gns0pdpfeb06-staffmemo-27jul07.pdf

¹²¹ *Id.* at Section 1.6.

¹²² *Id.* at Section 2.3

¹²³ See <https://gns0.icann.org/mailling-lists/archives/council/msg03734.html>.

Contractual Conditions Existing Registries, PDP Feb 06 going forward to the ICANN Board.¹²⁴

90. A Council report of the recommendations was submitted to the ICANN Board on November 2, 2007.¹²⁵ The Council report to the Board contained only the “majority supported” recommendations from the Final Report. This included the recommendation supporting the concept of a re-bid of registry contracts.¹²⁶
91. On January 23, 2008, the ICANN Board accepted “the GNSO’s recommendations on contractual conditions for existing gTLDs, and direct[ed] staff to implement the recommendations as outlined in the Council Report to the Board for PDP Feb-06.”¹²⁷ In accepting the recommendations, despite representing to the GNSO Council that ICANN staff would come back to the Council with respect to the rebidding of existing registry contracts, the ICANN Board interpreted that recommendation (along with all of the other recommendations contained within the final report) in a way that “would not impose any new obligations directly on gTLD registries or registrars under contract with ICANN, but instead would result in certain operational steps to be taken by ICANN, as identified in the Council Report to the Board on PDP Feb-06 posted on 4-October 2007.”¹²⁸

G. ICANN’s organization of the New gTLD Program and the economic analyses of competition at a registry level

92. In addition to working on the contractual conditions for existing and new gTLD registries (Feb 06 PDP), in parallel the GNSO Council was developing principles, recommendations and implementation guidelines on the introduction of new gTLDs.
93. The final report of those principles, recommendations and implementation guidelines was published on August 8, 2007.¹²⁹ These included some of the final recommendations from the Feb 06 PDP but applied to the new gTLD process. For example, (a) there must be a base contract provided to applicants at the beginning of the application process, (b) the initial registry agreement term must be of a commercially reasonable length, (c) there must be a renewal expectancy, (d) registries must apply existing consensus policies and adopt new consensus policies as they are approved, and (e) a clear compliance and sanctions process must be set out in the base contract. However, the proposed contract did not include a re-bid process for the renewal of the registry agreement as recommended by the GNSO Council in that final report.¹³⁰

¹²⁴ See https://gns0.icann.org/sites/default/files/filefield_5954/council-report-to-board-pdp-feb-06-04oct07.pdf, Exhibit B.

¹²⁵ https://gns0.icann.org/sites/default/files/filefield_5954/council-report-to-board-pdp-feb-06-04oct07.pdf

¹²⁶ *Id.* at Recommendation 1C.

¹²⁷ See <https://www.icann.org/resources/board-material/minutes-2008-01-23-en>.

¹²⁸ See <https://www.icann.org/resources/board-material/minutes-2008-01-23-en> (citing https://gns0.icann.org/sites/default/files/filefield_5954/council-report-to-board-pdp-feb-06-04oct07.pdf).

¹²⁹ <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

¹³⁰ *Id.* at Recommendation 1C

94. It also recommended that the base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing marketplace.
95. On June 26, 2008, the ICANN Board approved the GNSO policy recommendations for the introduction of new gTLD and directed ICANN staff to further develop and complete its detailed implementation plan and provide the board with the final version to approve before the new gTLD introduction process is launched.¹³¹

(i) The New gTLD Applicant Guidebook and the First Draft of Registry Agreement

96. The first draft Applicant Guidebook was published on October 16, 2008. It consisted of six parts (called modules), including the “Transition to Delegation” which contained, among other things, a first draft of a base Registry agreement.¹³² A redline version of the draft base Registry agreement (as compared with gTLD Agreements from 2005-2007) was provided in December 2008 to assist in the review of the new agreement.¹³³
97. Though not fully complete, the proposed agreement contained no provision for setting forth maximum registration and renewal prices, no provisions regarding differential pricing or any other form of price control, except a requirement that the registry prominently post on its website an up-to-date listing of all prices and policies relating to notice of price changes for new and renewal domain name registrations. It also contained a presumption of renewal and the standardized formula fees that would be owed to ICANN per quarter.
98. Absent from this first draft, is a section on whether domain name registries for new gTLDs could be “vertically integrated”, meaning whether registries could own part or all of a domain name registrar and whether a registry could provide domain name registration services in its own TLD. These two requirements existed for all gTLDs at the time. However, registrars were not bound by those same prohibitions. In other words, registrars could own 100% of a domain name registry and could continue to offer domain name registrations in every TLD, including their own. Over the next three years, this would become one of the most contentious competition issues for ICANN to address prior to launching the new round of gTLDs.

(ii) DoC and DoJ Letters on ICANN’s plans to introduce new gTLDs

99. On October 24, 2008, ICANN posted for public comment, a series of documents including a draft Applicant Guidebook, related to ICANN’s efforts to introduce new gTLDs.
100. On December 18, 2008,¹³⁴ the DoC submitted a letter to ICANN reiterating the foundational and core principle for ICANN “to manage the Internet domain name and addressing system (DNS) in a manner that permits market mechanisms to support competition and consumer choice so that lower costs are realized, innovation is promoted, and user choice and satisfaction are enhanced.” In this respect, the DoC stressed the need for ICANN to perform an

¹³¹ https://www.icann.org/resources/board-material/resolutions-2008-06-26-en#_Toc76113171

¹³² <https://newgtlds.icann.org/en/about/historical-documentation/matrix-agb-v1>

¹³³ <https://archive.icann.org/en/topics/new-gtlds/draft-agreement-annotated-comparison-03dec08-en.pdf>

¹³⁴ <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>

economic study to address the following questions: (a) “whether the domain registration market is one market or whether each TLD functions as a separate market”, (b) “whether registrations in different TLDs are substitutable”, (c) “what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD to another”, (d) “what is the effect of the market structure and pricing on new TLD entrance”, and (e) “whether there are other markets with similar issues, and if so, how are those issues addressed and by who[sic]?” The decision to commission such economic study had been approved by the ICANN Board on October 18, 2006.

101. Attached to the DoC letter was a letter from the DoJ about potential competition issues raised by the new gTLD program.

102. The Department of Justice (DoJ) found that some new gTLDs likely would have market power. In addition, the DoJ found that “the creation of additional gTLDs is unlikely to constrain the exercise of market power by existing TLDs, especially the .com registry operated by Verisign.”¹³⁵ While recognizing that new gTLDs may generate some consumer benefits, the DoJ wrote that “ICANN should take additional steps to ensure that the process of creating new gTLDs incorporates to the maximum extent possible competition-based mechanisms and also imposes other constraints on the exercise of market power by gTLD operators.” The DoJ also made two specific recommendations:
 - i. “ICANN’s general approach to new gTLDs should be revised to give greater consideration to consumer interests” and “ICANN should more carefully weigh the potential consumer harms against potential consumer benefits before adding new gTLDs and renewing new gTLD registry agreements.”
 - ii. The “process and proposed Registry agreement should include provisions that enable ICANN to constrain new registry operators from exercising market power. In particular, ICANN should establish competitive mechanisms for authorizing new gTLDs and renewals of gTLD registry agreements whereby prospective gTLD operators would compete for gTLDs by proposing registry terms – including maximum fee schedules – that would provide consumer benefits.”

103. Although the DoC in 2006, upon approval of the .COM agreement, made it public that the terms of the proposed .COM agreement were reviewed by the DoJ, this letter of 2008 for the first time (upon information and belief) revealed some of the findings it made and what went into its decision to approve the .COM agreement.
 - i. It found that Verisign possesses significant market power because many registrants did not perceive .COM and other gTLDs (such as .BIZ and .INFO) and country code TLDs to be substitutes. Instead, they were viewed as compliments to .COM domains in that registrants generally registered in .BIZ and .INFO because of a desire to

¹³⁵ *Id* at p.4.

expand their presence on the Internet and to protect their brands from being exploited by others.¹³⁶

- ii. It also concluded that existing gTLDs likely would not become a competitive threat to .COM registrations because the network effects that make .COM registrations so valuable to consumers, will be difficult for other TLDs to overcome due to its first mover advantage and high brand awareness.
- iii. It found there will continue to be a need for price controls to replace the discipline that market competition does not provide in this setting, as well as continuing DoC oversight of the .COM registry.

104. Further, the DoJ “found evidence that other [existing] gTLD registry operators may possess a degree of market power” and that the market power inherent in the other gTLDs, although less than .COM, is still material. The DoJ’s investigation found that this market power “*is constrained to some extent by the registry agreements applicable to the other gTLDs. Without those constraints, the gTLD operators likely could profitably charge even higher fees that reflect their market power as to registrants that are willing to pay a premium for their domains.*” Although not explicitly stated in the letter, it is apparent that the DoJ was referring to the price controls in the .NET, .BIZ, .INFO and .ORG registry agreements.

105. With respect to the addition of new gTLDs, the DoJ did not believe that the introduction of such new gTLDs would itself constrain the exercise of market power by the existing gTLDs, although without sufficient controls could impose substantial additional domain registration costs on many consumers. And some new gTLD registry operators may develop market power over registrants.

106. Thus, the DoJ recommended that ICANN perform the economic studies it promised in October 2006, weigh the potential consumer harms and benefits, evaluate the impact new gTLDs will have on competition of the registry level, and establish mechanisms or processes that would minimize the potential harm from new gTLDs while enabling the potential benefits to be realized.

107. The DoJ concluded that ICANN’s approach to TLD management demonstrates that it had adopted an “ineffective approach with respect to its obligation to promote competition at the registry level.” The DoJ believed that “ICANN has not come close to fulfilling its obligations to employ competitive principles in its management of TLD registry operations.” The DoJ thus recognized ICANN’s obligation to promote competition and rejected ICANN’s preferred approach not to have any pricing controls in its registry agreements:

“ICANN has consistently told us that his primary concern is with DNS management from a technical perspective, and that it does not have the expertise or inclination to protect or preserve the public interest in competition and low domain costs, preferring instead to allow government competition

¹³⁶ *Id.* At p. 5

authorities to address issues of competitive abuse. The problem with ICANN's preferred approach is that the antitrust laws generally do not proscribe a registry operator's unilateral decisions made under the processes established by ICANN - such as, for instance, pricing decisions. See, e.g. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 US 398, 407 (2004) ("the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not... Unlawful...."). Accordingly, ICANN should create rules fostering a competitive environment to the greatest extent possible."

108. The DoJ further recommended that ICANN (i) implement a process by which prospective gTLD registry operators compete for the privilege of operating a particular gTLD by offering terms that benefit consumers, and (ii) consider revising the proposed Registry agreement for new gTLDs to include provisions designed to limit the ability of the registry operator to exercise market power, i.e., price caps and commitments against price discrimination and tying.
109. Finally, the DoJ considered that ICANN should require competitive bidding for the renewals of all gTLD registry agreements¹³⁷:

"Finally, ICANN should require competitive bidding for renewals of a gTLD registry agreement, rather than granting the incumbent operator a perpetual right to renew without competition. Such a mechanism would both assist in disciplining the conduct of the incumbent during the initial term insofar as the incumbent would want to maximize the likelihood of renewal, and ensure the benefits of competition when potential operators bid for the right to operate the gTLD in the renewal term. Instead, ICANN has conformed the proposed registry agreement to the existing gTLD agreements, effectively granting perpetual renewal rights to registry operators without the prospect of periodic rebidding, and without regard to potential adverse competitive effect. Experience with the .net TLD 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. Indeed, competitive bidding has resulted in lower domain prices and higher operating specifications than what ICANN has achieved through non-competitive negotiations. In particular, competitive bidding prompts bidders to propose and accept registry improvements, higher operating standards, and lower registration fees to win the contract. [...] experience demonstrates that any concern about the risk of transferring a new gTLD registry after a rebid is misplaced. Management and operation of many gTLDs and ccTLDs have been successfully transferred without imposing undue burdens on DNS stability or security. For example, VeriSign successfully transferred the .org registry to the Public Interest Registry in January 2003."

¹³⁷ Although the letter made it clear that all gTLD agreements should be required to be renewed through a competitive bidding process, it also recognized that some of the existing registry agreements granted registries perpetual renewal rights. However, the DoJ nonetheless recommended that competitive bidding for renewals would "both assist in disciplining the conduct of the incumbent during the initial term insofar as the incumbent would want to maximize the likelihood of renewal, and ensure the benefits of competition when potential operators bid for the right to operate the gTLD in the renewal term." *Id.* A p. 7.

(iii) Economic Studies on New gTLDs and Pricing Controls

110. ICANN commissioned several economic studies, but none of them addressed the Board's questions from the October 2006 meeting resolution.

(a) *The Carlton Report*

111. On June 5, 2009, Compass Lexecon¹³⁸ released the final "Report of Dennis Carlton Regarding ICANN's Proposed Mechanism for Introducing New gTLDs" (Carlton Report).¹³⁹ A preliminary draft of this report was put out for public comment in March 2009.¹⁴⁰ This final report provides updates to the original recommendations as well as responses to some of the public comments. The scope of the Carlton Report was 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." The Carlton Report included Dennis Carlton's evaluation of "various concerns that have been raised by the Antitrust Division of the U.S. Department of Justice (DOJ), the National Telecommunications Information Agency (NTIA) of the U.S. Department of Commerce, and comments of third parties submitted to ICANN in response to its proposal to introduce new gTLDs or in response to [Carlton's] previous two preliminary reports." In conjunction with this analysis, the report also addressed "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."

112. The Carlton Report concluded:

- a. "ICANN's proposed framework for introducing new TLDs is likely to facilitate entry and create new competition to the major gTLDs such as .com, .net, and .org. Like other actions that remove artificial restrictions on entry, the likely effect of ICANN's proposal is to increase output, lower price and increase innovation. This conclusion is based on the fundamental principles that competition promotes consumer welfare and restrictions on entry impede competition."
- b. "that price caps or ceilings on prices charged by operators of new gTLD registries are not necessary to ensure that consumers benefit from new gTLDs. competitive benefits of the proposed process for introducing new gTLDs. [...] The rates charged by new gTLDs will face competition from existing registries and other entrants, and operators of new gTLD registries that attempt to act opportunistically by subsequently raising prices face significant risk of harming their reputation and the loss of future customers. Further, the imposition of price caps for new gTLDs may inhibit the development and marketplace acceptance of

¹³⁸ Compass Lexecon is an economic consulting firm. Compass Lexecon was commissioned by ICANN to analyze from an economic perspective ICANN's anticipated introduction of new gTLDs.

¹³⁹ <https://archive.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf>.

¹⁴⁰ <https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf>

new gTLDs by limiting the pricing flexibility of entrants to the provision of new registry services without generating significant benefits to registrants of the new gTLDs.”¹⁴¹

(b) *The CRA International Report on Vertical Separation of Registries and Registrars*¹⁴²

113. CRA International (“CRA”)¹⁴³ considered the impact of the vertical separation requirement in the then current TLD agreements on the then current public Internet and evaluated whether continued application of the requirement to new and existing gTLDs would be beneficial to consumers (registrants). In particular, it considered the potential effects on registrants of maintaining the current vertical separation requirement for all registries, eliminating or altering the requirement for some (but not all) registries, or eliminating or altering the requirement for all gTLDs.
114. CRA found that “there can be various, sometimes subtle, economic incentives for a registry to discriminate among registrars in a manner that harms consumers (registrants). Those incentives are especially clear and strong when a registry is operating under a binding price cap. Under those circumstances, vertical separation and equal access requirements are useful tools for limiting the possibility of such harmful discrimination.”¹⁴⁴
115. For registries not operating under a binding price cap, CRA found that “the arguments in favor of vertical separation and equal access requirements are less clear cut.”¹⁴⁵ CRA warned that any steps towards liberalization of vertical separation and equal access requirements should be taken gradually, “as these sorts of reforms are difficult to reverse.”¹⁴⁶ CRA considered that “[t]wo proposed business models may lend themselves to service as test cases for relaxing constraints on registry/registrar relations” and CRA “encouraged ICANN to bring these two models up for discussion with the broader (registry, registrar, and registrant) community.”¹⁴⁷ The proposed test cases were: (a) Single-Organization TLD in which the registry and registrants are one and the same – no price controls and integration allowed; and (b) Hybrid model in which a registry can own a registrar, but registrar cannot serve the registry that owns it or that it owns. Equal access would be required under this hybrid model.¹⁴⁸

¹⁴¹ <https://archive.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf>.

¹⁴² CRA International, *Revisiting Vertical Separation of Registries and Registrars*, <https://archive.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf>.

¹⁴³ CRA International is a global consulting firm that offers economic, financial, and strategic advice. CRA analyzed the economic relationship between the registry and registrar functions on behalf of ICANN.

¹⁴⁴ CRA International, *Revisiting Vertical Separation of Registries and Registrars*, <https://archive.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf>, p.3.

¹⁴⁵ CRA International, *Revisiting Vertical Separation of Registries and Registrars*, <https://archive.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf>, p.3.

¹⁴⁶ CRA International, *Revisiting Vertical Separation of Registries and Registrars*, <https://archive.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf>, p.3.

¹⁴⁷ CRA International, *Revisiting Vertical Separation of Registries and Registrars*, <https://archive.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf>, p.3.

¹⁴⁸ CRA International, *Revisiting Vertical Separation of Registries and Registrars*, <https://archive.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf>, pp.3-4.

116. A number of comments were submitted to the CRA report and its conclusions.

- a. Some incumbent registries, including the Public Interest Registry (PIR), who administered the .org TLD, opposed any liberalization of vertical separation requirements.¹⁴⁹ PIR submitted its own study entitled "A name by any other rows: an economic consideration of vertical cross-ownership between registries and registrars" by Professor Jonathan A.K. Cave, University of Warwick.¹⁵⁰ That study concluded that the vertical separation should continue with the following additional recommendations: (a) "a limit on ownership of registries by registrars to complement the current one-way limit"; (b) allowing adjustments to the price caps "to minimize adverse effects and control the incentives of players to seek market control via other (structural or quality-of-service) discriminatory strategies", and (c) a stronger compliance program to address other potential forms of "integration" by conduct (e.g., collusion, operational influence, etc.) rather than solely looking at ownership ("a policy that would complement the current *ex ante* and uniform constraint on 'mere ownership' with a more flexible *ex post* approach aligned with the real problems of conduct (operational influence) rather than structure (ownership)").
- b. Others, including NSI, submitted comments urging ICANN to continue price caps for registries that have market power.¹⁵¹
- c. I submitted a comment on behalf of Neustar noting that ICANN needed to lay out clear rules with respect to cross-ownership of registries and registrars in the new gTLD round. The then-current rules stated that registrars could apply to operate registries directly or indirectly, but registries (particularly the existing gTLD registries) were prohibited from doing so.¹⁵²

H. ICANN Addresses Registry / Registrar Cross-Ownership Requirements for New and Existing Registries

(i) Vertical Integration in the New gTLDs

117. Prior to the 2012 new gTLD round, there had been no official policy regarding the subject of cross-ownership of registries and registrars. Whether ICANN permitted cross-ownership of registries and registrars and to what degree, was determined contractually.

118. In the 2005-2006 registry agreements for unsponsored top-level domains, cross-ownership restrictions (barring registries from owning more than 15% of any ICANN-accredited registrar)

¹⁴⁹ <https://forum.icann.org/lists/crai-report/docnfnLs39uxn.doc>

¹⁵⁰ <https://forum.icann.org/lists/crai-report/docnfnLs39uxn.doc>

¹⁵¹ See e.g., Network Solutions' comment available at <https://forum.icann.org/lists/crai-report/pdfjQZhXfkLDc.pdf>.

¹⁵² <http://forum.icann.org/lists/craireport/msg00025.html>. Neustar also claimed that registrars that serve as backend registry operators would be able to offer a direct marketing relationship with registrants, and existing registries would not be able to provide that service. Registrars could also offer a guaranteed distribution channel, which existing registries could not.

were the product of negotiation as opposed to any policy development process. Although certain registries were subject to ownership interest restrictions in registrars, registrars had no such restrictions on owning a portion, or even all, of a registry.

119. After the approval of the GNSO policy on new gTLDs in 2008, a number of ICANN-accredited registrars announced their intention to apply for, or otherwise support, new gTLDs.¹⁵³ Registries that were subject to cross-ownership restrictions demanded that ICANN either release those cross-ownership restrictions or develop a new policy that would be equally applicable to domain name registries and registrars.¹⁵⁴
120. In February 2009, after publishing and receiving comments to the CRA Report,¹⁵⁵ ICANN proposed a new registry-registrar integration model that allowed full cross-ownership of registries and registrars, but only allowed Registrars affiliated with the TLD to register domain names until the total number of domain names in that TLD reached 100,000 domain names.¹⁵⁶ Debate on this issue continued throughout 2009 as part of the implementation process for the new gTLD round.
121. Wanting to address this from a policy perspective, the GNSO Council on September 24, 2009,

¹⁵³ By the end of 2009, a number of ICANN-Accredited Registrars either directly or through partnerships began advertising their services for new gTLD including GoDaddy, Enom, and Network Solutions, 3 of the then top 5 ICANN-Accredited Registrars. See for example,

<https://web.archive.org/web/20090306040921/http://www.centralregistryolutions.COM/> (Central Registry Solutions, a joint venture between CentralNIC and Network Solutions – Archive snapshot from 3/6/09) ;

¹⁵⁴ See e.g., PIR’s comment, supported by the study by Professor Jonathan A.K. Cave, that the conclusions of the CRA report do not give ICANN a basis for implicit policy to remove all cross-ownership restrictions on new gTLDs and expressing the believe that any policy ultimately adopted should be applicable equally to registries and registrars and to existing and new gTLDs. PIR’s comment is available at <https://forum.icann.org/lists/crai-report/pdfjQZhXfkLDc.pdf>. See also my letter on behalf of Neustar of December 5, 2008, highlighting these issues:

“...[E]xisting registries are currently prohibited from serving as an ICANN-Accredited Registrar and therefore have no direct access to registrants for marketing or promoting its own gTLD. [...] For .biz, registrars are the only ones currently that are able to do so and therefore have built up large customer bases over the past eight years.

These registrars, or affiliates of these registrars, do not have any prohibitions on applying to become registries directly or indirectly. As a result, existing registrars have been actively luring prospective registries to serve as their back-end registry operator under the premise that unlike the current registry operators, they could deliver to prospective registries an established customer base, prominence on their website and guaranteed marketing designed to reach ultimate end users. [...]

In addition, while the existing registries fight for “shelf space” with ICANN-Accredited registrars and to get their TLD actively marketed, current registrars that are allowed to become registries (either directly or indirectly as a back-end provider), can promise to deliver the prospective registries actual shelf space and TLD prominence.... Allowing registrars to own new registries, but not allowing existing registries to own registrars is not only fundamentally unfair, but will materially impair existing registries’ ability to compete with the registrars entering the registry market place” (available at <https://forum.icann.org/lists/gtld-guide/pdfeQAotoXHmm.pdf>).

¹⁵⁵ See Paragraphs 102-105 above.

¹⁵⁶ <https://archive.icann.org/en/topics/new-gtlds/regy-regr-separation-18feb09-en.pdf>

requested an Issues Report on vertical Integration and Registry/Registrar cross-ownership to determine whether a Policy Development Process (“PDP”) should be initiated on providing policy guidance regarding the proper approach to cross ownership and vertical integration.¹⁵⁷ The Issues Report was published on December 4, 2009¹⁵⁸.

122. In the Issues Report, ICANN staff recommended that a PDP not be initiated on Vertical Integration at that time, but rather that it should be handled through the implementation process that was underway for the New gTLD Program.¹⁵⁹ ICANN staff asked the GNSO Council to wait until after the launch of new gTLDs to “gather data on the impact of the initial distribution model, and to determine whether there has been competitive harm in the domain name market.”¹⁶⁰
123. Despite the recommendation of ICANN staff, the GNSO Council initiated the PDP on Vertical Integration of registries and registrars on January 28, 2010.¹⁶¹ Although the motion carried, all of the registries and registrar representatives on the GNSO Council voted against the motion. The GNSO proceeded with preparing a Charter, outlining the PDP Working Group’s mission and objectives. The GNSO approved the Charter on March 10, 2010¹⁶² (and amended Objective No. 5 on April 10, 2010)¹⁶³.
124. In parallel with the work of the PDP Working Group, the ICANN Board was still discussing the issue of vertical integration as part of the implementation of the new gTLD Program. The Board took the view that, unless and until the GNSO PDP produced a concrete policy on this issue, the Board itself would need to decide the policy for the next round of new gTLDs. A report entitled “Registry-Registrar Separation: Vertical Integration Options”¹⁶⁴ was presented to the ICANN Board of Directors at its meeting on February 4, 2010 and was subsequently made available to the ICANN community on March 8, 2010. In that report, which was also presented to the vertical integration Working Group, the authors of the paper explained that vertical integration and vertical contracts between registries and registrars could create both competitive harms and competitive benefits. “In their opinion, the most important factor in predicting whether vertical integration is capable of generating competitive harms is the presence of market power.”¹⁶⁵ Therefore, the authors recommended a case-by-case approach with referral to a government competition authority for evaluation and action, if deemed necessary.
125. At its meeting in Nairobi, Kenya on March 12, 2010, the Board passed a resolution indicating that, as a default position, no cross-ownership would be allowed in the new gTLD program but that, if the GNSO were to develop a policy recommendation on the subject prior to the launch

¹⁵⁷ <https://gns0.icann.org/en/council/resolutions/1999-2019#20090924-2>

¹⁵⁸ https://gns0.icann.org/sites/default/files/filefield_8013/report-04dec09-en.pdf

¹⁵⁹ See https://gns0.icann.org/sites/default/files/filefield_8013/report-04dec09-en.pdf at Section 4.

¹⁶⁰ *Id.*

¹⁶¹ <https://gns0.icann.org/en/council/resolutions/1999-2019#20100128-1>

¹⁶² <https://gns0.icann.org/en/council/resolutions/1999-2019#20100310-1>

¹⁶³ Charter is at https://gns0.icann.org/sites/default/files/filefield_12103/vi-chartered-objectives-01apr10-en.pdf.

¹⁶⁴ Steven C. Salop and Joshua D. Wright, “Registry-Registrar Separation: Vertical Integration Options”, found at <https://archive.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf>

¹⁶⁵ https://gns0.icann.org/sites/default/files/filefield_13977/vi-pdp-wg-initial-report-23jul10-en.pdf at p. 8.

of new gTLDs, the Board would consider that policy.¹⁶⁶ After over a year after this resolution passed, the ICANN Board provided the following rationale for the default position not to allow cross-ownership: “This “default” position was intended to encourage the community to develop a policy so that the Board would not have to address the issue on an implementation level.”¹⁶⁷

126. Despite having an intended effect of pushing the Working Group towards a compromise policy solution, the ICANN Board’s action caused those that supported strict separation of registries and registrars to refuse to discuss any potential compromise. Certain legacy registry operators did not want a lifting of the restrictions, which could encourage new market entrants. They believed that, by not entertaining any potential compromise, it would result in the Working Group being unable to develop a policy which, according to the ICANN Board, would result in the default option of no cross-ownership.
127. On July 10, 2010, the Working Group published an Initial Report for comment.¹⁶⁸ The Initial Report did not provide any concrete recommendations, but rather provided a snapshot of the major proposals that were being debated within the group. Though some of the proposals attempted to provide compromise solutions, some of the proposals presented were diametrically opposed to each other (ranging from strict separation to the complete lifting of cross-ownership requirements and all restrictions).
128. After the public comment period ended, the Working Group presented a Revised Initial Report on Vertical Integration Between Registrars and Registries¹⁶⁹ to the ICANN Board.¹⁷⁰
129. On September 25, 2010, the ICANN Board asked the GNSO Council to send a letter to the Board, by no later than October 8, 2010, that either (a) indicated “that no consensus on vertical integration issues had been reached to date”, or (b) indicated “its documented consensus position.” If no response was received by that date (or if the GNSO indicated that no consensus could be reached, the ICANN Board would make determinations around these issues as necessary. If the GNSO could agree on a solution, then that would be included in the applicant guidebook for future application rounds.”¹⁷¹
130. This resolution did not state that if the GNSO indicated there was no consensus, the board would resort to the default strict separation language in its March 12, 2010, resolution. Rather, it only stated that the Board would make determination around these issues.
131. On October 8, 2010, the GNSO informed the board that it was unable to reach consensus on any of the proposals it had previously submitted to the ICANN Board.¹⁷²
132. The ICANN Board met on November 5, 2010, and rather than adopt the position it took on

¹⁶⁶ <https://www.icann.org/resources/board-material/resolutions-2010-03-12-en#5>

¹⁶⁷ See Rationale for ICANN Board’s Cross-Ownership Decision, dated March 21, 2011, <https://www.icann.org/en/system/files/bm/rationale-cross-ownership-21mar11-en.pdf> at p. 3.

¹⁶⁸ https://gns0.icann.org/sites/default/files/filefield_13977/vi-pdp-wg-initial-report-23jul10-en.pdf

¹⁶⁹ https://gns0.icann.org/sites/default/files/filefield_14303/revised-vi-initial-report-18aug10-en.pdf

¹⁷⁰ See https://gns0.icann.org/sites/default/files/filefield_14303/revised-vi-initial-report-18aug10-en.pdf at p. 3.

¹⁷¹ <https://www.icann.org/resources/board-material/resolutions-2010-09-25-en#2.11>

¹⁷² <https://www.icann.org/en/system/files/bm/rationale-cross-ownership-21mar11-en.pdf>

Match 12, 2010, it passed a resolution setting forth the following principles:

“(1) ICANN will not restrict cross-ownership between registries and registrars. [...]

(2) Registry Agreements will include requirements and restrictions on any inappropriate or abusive conduct arising out of registry-registrar cross-ownership, including, without limitations provisions protecting against:

- (a) misuse of data; or
- (b) violations of a code of conduct;

(3) These provisions may be enhanced by additional enforcement mechanisms such as the use of self-auditing requirements, and the use of graduated sanctions up to and including contractual termination and punitive damages.

(4) ICANN will permit existing registry operators to transition to the new form of Registry agreement, except that additional conditions may be necessary and appropriate to address particular circumstances of established registries.

(5) ICANN will have the ability to refer issues to relevant competition authorities.

(6), ICANN will have the ability to address possible abuses that may arise out of registry-registrar cross-ownership through the consensus policy process.”¹⁷³

133. ICANN included language in the proposed Final Applicant Guidebook dated November 12, 2010, implementing the ICANN Board’s November 5, 2010 resolution.¹⁷⁴

134. Although there were minor changes to the language used in the ultimate Applicant Guidebook for the 2012 New gTLD round, and in the base new gTLD Registry Agreement, each of the new gTLDs approved in the 2012 new gTLD round executed agreements reflecting the ICANN Board’s November 5, 2010, decision.¹⁷⁵

(ii) Vertical Integration with the Existing Registries

135. On March 10, 2011, in line with the Board’s resolution on November 5, 2010, allowing existing registries the opportunity to move to the new gTLD Base Registry Agreement (which allowed the cross-ownership of registries and registrars), I sent a letter to the CEO of ICANN on behalf of Neustar, formally requesting that ICANN immediately commence a process to enable Neustar to seek accreditation as a registrar. Neustar requested approval to lift the cross-ownership restrictions in its then-current Registry Agreement to allow enough time for Neustar to be able to offer both registry and registrar services prior to the opening of the 2012

¹⁷³ <https://www.icann.org/resources/board-material/resolutions-2010-11-05-en>

¹⁷⁴ <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean12nov10-en.pdf> which included a new Specification 9 entitled the “Registry Operator Code of Conduct.” See <http://www.icann.org/en/topics/new-gtlds/draft-agreement-specs-clean12nov10-en.pdf>

¹⁷⁵ See <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.html#article2.9> at Sections 2.9, 2.11 and 2.14, and Specification 9.

new gTLD round.¹⁷⁶ Neustar believed that it was at a competitive disadvantage because, although ICANN approved lifting of the restrictions on cross-ownership for the new gTLDs, ICANN had not begun the process to lift those restrictions for the existing gTLD operators.

136. On April 21, 2011, the ICANN Board directed the CEO to develop a process for existing gTLD registry operators to transition to the new form of Registry agreement, or to request amendments to their Registry Agreements to remove the cross-ownership restrictions.¹⁷⁷ This process would be available to existing operators upon Board approval of the new gTLD program.¹⁷⁸
137. On May 2, 2011, ICANN published a draft process for handling requests for the removal of cross-ownership restrictions for existing gTLDs, which was put out for public comment.¹⁷⁹
138. The proposed process would require existing gTLD operators to agree to a number of covenants contained in the Base new gTLD Registry Agreement, including a Code of Conduct requiring legal separation of its registrar and registry businesses, an obligation to treat all registrars equitably, and an auditing process of those requirements at ICANN's sole discretion. Each request to remove cross-ownership restrictions would also be subject to a competition review by ICANN. If ICANN reasonably determined that removal of the restrictions might raise significant competition issues, ICANN would refer that request to the appropriate governmental competition authority with jurisdiction over the matter.
139. On June 16, 2011, the DoJ, through the DoC, sent a letter to ICANN with extensive comments to the proposed process for lifting cross-ownership restrictions in existing TLDs.¹⁸⁰ More specifically, the DoC and the DoJ recommended that ICANN undertake a more comprehensive competitive analysis to understand the potential consumer harms in lifting the cross-ownership restrictions for existing registries operating under price caps. The DoJ pointed out that "it is well established that firms subject to price caps or other regulatory restrictions can evade such restrictions by integrating either upstream or downstream".¹⁸¹ In addition, cross-ownership may allow a registrar or registry to disadvantage its rivals, by closing competition and harming registrants. The DoJ explained that, because there are often deficiencies to vertical integration, the DoJ typically requires a showing of market power before it considers whether vertical arrangement poses serious competitive concerns. The DoJ considered that "ICANN should retain its prohibition on vertical integration for existing gTLDs, except in cases where ICANN, in consultation with public and private sector stakeholders and independent analysts, determines the registry does not have, or is unlikely to obtain, market power." The DoJ therefore recommended that:

¹⁷⁶ It is important to note that no decision had been made as to when the new gTLD round would actually open, but it was believed in early 2011 that the opening would be imminent.

¹⁷⁷ <https://www.icann.org/resources/board-material/minutes-2011-04-21-en#6.1>

¹⁷⁸ The new gTLD Program was formally approved in June 2011.

¹⁷⁹ <https://www.icann.org/en/announcements/details/public-comment-proposed-icann-process-for-handling-requests-for-removal-of-cross-ownership-restrictions-for-existing-gtlds-2-5-2011-en>

¹⁸⁰ <https://www.icann.org/en/system/files/files/strickling-to-dengate-thrush-16jun11-en.pdf>

¹⁸¹ For example, a gTLD subject to price Could develop or purchase a registrar, granted an exclusive contract, and exercise its market power by increasing the registrar's price. *Id at p. 3 (p. 2 of the actual DoJ letter).*

- a. “ICANN should retain cross-ownership restrictions for existing gTLDs that are subject to price caps, unless ICANN determines that the price caps no longer constrain the exercise of market power. Based on past analysis by the Antitrust Division as well as independent reports commissioned by ICANN, [the DOJ believed] that removing cross-ownership restrictions would lead to substantial price increases for .com[...], .net, and.org, and would likely lead to price increases for .info and .biz.”¹⁸²
- b. “for existing sponsors and unsponsored gTLDs that are not subject to price caps, [...] cross-ownership should presumptively be allowed, unless consultations with public and private sector stakeholders along with independent analysts, lead ICANN to determine that the TLD has market power.”¹⁸³
- c. “new gTLDs should be permitted to adopt Registry Agreements that allow for cross ownership subject to a determination by ICANN that the gTLD is unlikely to possess market power.”¹⁸⁴
- d. ICANN, in consultation with public and private sector stakeholders and independent analysts, should make a market power determination before removing cross-ownership restrictions.¹⁸⁵

140. The DoJ considered that the latter recommendation was necessary for ICANN to honor its commitment to promote competition.¹⁸⁶

141. On June 20, 2011¹⁸⁷, in the same resolution to approve the new gTLD program, ICANN also approved the modified process to handle requests for the removal of cross-ownership restrictions for existing registries¹⁸⁸. However, the resolution also explicitly stated that this modified process was still under discussion with the competition authorities.¹⁸⁹

142. It was not until October 18, 2012, that ICANN approved the final process for handling requests for removal of cross-ownership restrictions for existing registries, after having discussed the process with relevant competition authorities and hearing no further comments.¹⁹⁰ As discussed below, despite this process being established for the existing registry operators, neither Afiliás, Neustar nor PIR went through this process prior to having the cross-ownership restrictions removed in June 2019.

¹⁸² *Id a p. 4 (p. 3 of the actual DoJ letter).*

¹⁸³ *Id a p. 4 (p. 3 of the actual DoJ letter).*

¹⁸⁴ *Id a p. 4 (p. 3 of the actual DoJ letter).* The DoJ added that it anticipated that most new gTLDs are unlikely to possess significant market power. ICANN should however require all new gTLDs to take steps to minimize external costs that defensive registrations will impose on owners of domains that reflect brands or trademarks.

¹⁸⁵ It also reminded ICANN that only the Department of Commerce could approve the lifting of cross ownership requirements for .COM as provided for in the Cooperative Agreement.

¹⁸⁶ <https://www.icann.org/en/system/files/files/strickling-to-dengate-thrush-16jun11-en.pdf> , at p. 4 (p. 3 of the actual DoJ letter).

¹⁸⁷ <https://www.icann.org/en/minutes/process-cross-ownership-restrictions-gtlds-20jun11-en.pdf>

¹⁸⁸ <https://www.icann.org/en/minutes/process-cross-ownership-restrictions-gtlds-20jun11-en.pdf>

¹⁸⁹ See Approval of the New gTLD Program resolution, <https://www.icann.org/resources/board-material/resolutions-2011-06-20-en> at No. 5.

¹⁹⁰ <https://www.icann.org/resources/board-material/resolutions-2012-10-18-en>

I. Registry Agreements: 2011 – Present

(i) 2011 .NET and 2012 .COM Agreements with Verisign

143. On April 11, 2011, ICANN published for public comment a “Proposal for Renewal of the .NET Registry Agreement.”¹⁹¹ Unlike previous versions of the .NET Agreement, no major revisions to the material terms of the agreement were proposed. The only material difference between the 2005 .NET Agreement and the proposed renewal agreement was that in the former Verisign could only raise prices for .NET registrations after the first 18 months of the agreement, whereas with respect to the 2011 .NET agreement, Verisign could continue to raise prices for .NET registrations up to a maximum of 10% above the previous price each year from the start of the agreement.¹⁹² The agreement was approved by the ICANN Board on June 24, 2011¹⁹³ and effective as of July 1, 2011.¹⁹⁴
144. On March 27, 2012, ICANN published Verisign’s proposal to renew its 2006 .COM agreement.¹⁹⁵ Most of the proposed changes to the agreement were aimed at bringing the .COM agreement in alignment with the 2011 executed .NET agreement. No changes were proposed to the pricing provisions from the 2006 .COM agreement containing the ability for Verisign to raise .COM domain name prices up to 7% for 4 out of the 6 year term. The ICANN Board approved the new 2012 .COM agreement on June 23, 2012¹⁹⁶. As required under Verisign’s Cooperative Agreement with the DoC, any renewal agreement with ICANN must be approved in writing by the DoC¹⁹⁷.
145. Unlike in 2006, the DoC did not approve Verisign’s ability to increase prices by 7% for 4 out of the 6 years. Rather, after review by both the DoC and the DoJ, the U.S. Government concluded on November 29, 2012, that the prices for .COM should be frozen at its then-current amount. Increases in prices charged by Verisign for .COM domain names would only be allowed with the express approval from the DoC, and only where new Consensus Policies were implemented and required additional fees. This was memorialized in Amendment 32 to the Cooperative Agreement.¹⁹⁸ Although there is no public documentation regarding the rationale for the U.S. Government’s overruling ICANN and Verisign’s agreement which allowed for Verisign to raise the price of .com domain names, there were primarily two factors at play. First, the .COM registry had over 108 million domain names under management in November 2012.¹⁹⁹ The

¹⁹¹ <https://www.icann.org/en/announcements/details/public-comment-proposal-for-renewal-of-the-net-registry-agreement-11-4-2011-en>

¹⁹² <https://itp.cdn.icann.org/en/files/registry-agreements/net/draft-net-agreement-redline-11apr11-en.pdf> at Section 7.3 (a).

¹⁹³ <https://www.icann.org/resources/board-material/resolutions-2011-06-24-en#4>

¹⁹⁴ <https://www.icann.org/en/registry-agreements/net/net-registry-agreement-1-7-2011-en>

¹⁹⁵ <https://www.icann.org/en/announcements/details/com-registry-agreement-renewal-27-3-2012-en>

¹⁹⁶ <https://www.icann.org/resources/board-material/resolutions-2012-06-23-en>

¹⁹⁷ *Amendment 30 of the Cooperative Agreement between VeriSign and NTIA, Section 2* (https://www.ntia.doc.gov/files/ntia/publications/amend30_11292006.pdf)(amending Section I.B>2.A of Amendment 19).

¹⁹⁸ https://www.ntia.doc.gov/files/ntia/publications/amendment_32_11292012.pdf

¹⁹⁹ See Global Phishing Survey: Trends and Domain Name Use 2H2012, by the Anti-Phishing Working Group (APWG)(located at https://docs.apwg.org/reports/APWG_GlobalPhishingSurvey_2H2012.pdf)(published April 2013) at p. 23.

next largest domain name registry, .NET, which had 15+ million names, was also run by Verisign. Thus, Verisign had nearly 125 million domain names under management for these two gTLDs only. This was more than six times the number of domain names in the rest of the existing gTLDs combined (.biz, .info and .org had 2.3 million names, 7.5 million names, and 10 million names, respectively).²⁰⁰ Second, although the 2012 round of new gTLDs was launched, none of the new gTLDs were delegated and the U.S. Government likely wanted to see if the launch of new gTLDs would have an impact on Verisign's management of 85% of the gTLD registrations.

146. In response to the Amendment 32 of the Verisign cooperative agreement with the DoC, ICANN revised the proposed 2012 agreement to freeze Verisign's ability to raise the price of .COM registrations above \$7.85.²⁰¹

147. On December 1, 2012, ICANN and Verisign executed the new .COM agreement²⁰². Although the renewed agreement was set to expire in 2018, ICANN, Verisign and the DoC approved an amendment to the .COM agreement extending the term until November 30, 2024.²⁰³

(ii) 2013 .BIZ, .INFO and .ORG Renewals

148. On June 3, 2013, ICANN posted proposed renewal agreements for .BIZ²⁰⁴ and .INFO²⁰⁵, and on June 21, 2013, ICANN posted a proposed .ORG renewal agreement for public comment.²⁰⁶

149. The proposed agreements, which were all materially the same, according to ICANN, were designed to bring them more in line with the base New gTLD Agreement²⁰⁷. However, there were some notable differences between the Base new gTLD Registry Agreement and the proposed renewal agreements for .BIZ, .INFO and .ORG. Although the proposed agreement lifted the prohibition on acquiring control of more than 15% of an ICANN accredited registrar, the agreements still contained a restriction for the registries on acting as an ICANN accredited registrar in their own TLD.²⁰⁸ The proposed renewal agreements allowed Afilias, Neustar and PIR, as the .INFO, .BIZ and .ORG registries, respectively, however, to become resellers of ICANN-Accredited Registrar for the purposes of registering domain names in their own TLDs, but not as a registrar directly.

²⁰⁰ See *id.* at pp. 22, 25, and 26.

²⁰¹ https://ntia.doc.gov/files/ntia/publications/amendment_32_11292012.pdf and

²⁰² <https://www.icann.org/en/registry-agreements/com/com-registry-agreement-1-12-2012-en>

²⁰³ https://ntia.doc.gov/files/ntia/publications/amendment_34.pdf

²⁰⁴ <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-biz-gtld-registry-agreement-03-06-2013>

²⁰⁵ <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-info-gtld-registry-agreement-03-06-2013>

²⁰⁶ <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-org-gtld-registry-agreement-21-06-2013#announcement>

²⁰⁷ The then-current draft final base New gTLD Agreement was found at <https://www.icann.org/en/public-comment/proceeding/proposed-final-new-gtld-registry-agreement-29-04-2013>.

²⁰⁸ <https://itp.cdn.icann.org/en/files/registry-agreements/org/draft-org-agreement-redline-21jun13-en.pdf> at p. 16-17.

150. In addition, unlike the Base new gTLD Agreements, the 2013 .BIZ, .INFO and .ORG proposed renewal agreements did not lift the then-existing price caps (allowing the registries to increase the price of registrations by a maximum of 10% per year). This was similar to the price controls that were also contained within the 2011 .NET agreement.

151. ICANN approved the three renewal agreements on August 22, 2013.²⁰⁹

152. Although these agreements lifted the cross-ownership restrictions, there was no information provided by ICANN indicating that it had performed a competition review of the .BIZ, .INFO and .ORG registries in line with the process approved by the ICANN Board on October 18, 2012 (less than one year prior to approving these renewal agreements).

(ii) 2019 .BIZ, .INFO and .ORG Agreements

153. On March 18, 2019, ICANN posted for public comment a proposed renewal agreements for the .INFO²¹⁰ and .ORG TLDs²¹¹ It posted the .BIZ renewal agreement on April 3, 2019²¹² for public comment.

154. Many of the revisions proposed to the 2019 renewal agreements were intended to bring these agreements more in line with the Base New gTLD Agreement. This included adding the Uniform Rapid Suspension service (URS) for clear cut cases of cybersquatting, an approved services appendix and public interest commitments comparable with the commitments made by new gTLD Registries.

155. However, the most notable proposed change to each of these agreements was the complete lifting of all price caps, which limited the price of registrations and renewals and allowable price increases for registrations and renewals. 'ICANN's announcement provided as follows:

“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.”²¹³

²⁰⁹ <https://www.icann.org/resources/board-material/resolutions-2013-08-22-en#2.c>

²¹⁰ <https://www.icann.org/en/announcements/details/proposed-renewal-of-info-registry-agreement-18-3-2019-en>

²¹¹ <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-org-registry-agreement-18-03-2019>

²¹² <https://www.icann.org/en/announcements/details/proposed-renewal-of-biz-registry-agreement-3-4-2019-en>

²¹³ <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-org-registry-agreement-18-03-2019> (.org); See <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-info-registry-agreement-18-03-2019> for the proposed .info agreement and <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-biz-registry-agreement-03-04-2019> for the proposed .biz agreement.

156. Although ICANN did not explicitly point this out in the summary of the changes to the legacy agreements, the new version of the legacy agreements removed the requirement in the 2013 Registry Agreements that prohibited the Registry from acting as a registrar in its own TLD.^{214 215}
157. ICANN received thousands of comments to the proposed changes to the .ORG agreement alone. According to the Staff Report summarizing the comments received, “[a] primary concern voiced in the comments was with respect to the proposed removal of the price cap provisions.”²¹⁶ 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. In addition to its history as a legacy TLD, commenters noted that the .ORG TLD is also unique in that .ORG was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations.²¹⁷
158. There was also a concern that without price controls, prices to renew domain names could become prohibitively expensive which could have a significant negative impact on the non-profit, charitable, and small organizations who are registrants of the .ORG TLD.²¹⁸ Commenters expressed their view that .ORG was essentially a monopoly TLD for charities and non-profits and that other TLDs were not effective substitutes for the .ORG TLD. As this is well known by Public Interest Registry, commenters were concerned that PIR could raise the price of .ORG registrations higher than most other TLDs because of the lack of proper substitutes and the very high switching costs, especially for registrants that have been using the .ORG TLD as their primary domain for twenty or more years.
159. In response, ICANN argued that removal of the price caps was consistent with ICANN’s core values and brings the legacy agreements more in line with the base registry agreement. ICANN believed that registrants were protected because they would be given six months’ notice of the price increase and could register/renew the .ORG domain name for up to ten years at the then-current price.²¹⁹

All three of these proposed agreements were substantively the same with regards to contractual provisions relating to term, cross ownership requirements, price controls, etc.

²¹⁴ See for example, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-org-registry-agreement-18-03-2019> where there is no reference to removal of this language from the 2013 agreement. Also see the proposed renewal agreements for .BIZ and .INFO as referenced in FN 203.

²¹⁵ One additional change, which was not described in the summary of changes for the .BIZ Agreement was the removal of all registry restrictions applicable to .BIZ registrations. See summary at <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-biz-registry-agreement-03-04-2019> and compare to Appendix 11 of the 2013 .BIZ Agreement (available at <https://www.icann.org/en/registry-agreements/biz/biz-agreement-appendix-11--biz-registration-restrictions--22-august-2013-22-8-2013-en>).

²¹⁶ <https://itp.cdn.icann.org/en/files/registry-agreement/report-comments-org-renewal-03jun19-en.pdf>

²¹⁷ *Id.*

²¹⁸ *Id.* At p. 4.

²¹⁹ Similar Renewal Proposals were put out for public comment for .info (on March 18, 2019, See <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-info-registry-agreement-18-03-2019>) and .BIZ (on April 3, 2019, See <https://www.icann.org/en/announcements/details/proposed-renewal-of->

160. On June 30, 2019, ICANN executed the .ORG, BIZ and .INFO Agreements without any changes from the previously proposed drafts.

(iii) 2020 .COM Amendment

161. On October 26, 2018, Verisign and the DoC executed amendment 35 of the Cooperative Agreement.²²⁰ In this amendment to the Cooperative Agreement, the DoC agreed to permit Verisign in each of the last 4 years of the .COM Agreement (and any subsequent renewals) to increase the price for .COM registrations and renewals up to a maximum of 7% over the highest maximum price charged in the previous calendar year.

162. According to Section 2 of Amendment 35, Verisign was given this pricing flexibility “because of the more dynamic DNS marketplace brought about from the introduction of new gTLDs, and the use of social media.”²²¹

163. In addition, the amendment clarified that the restrictions on Verisign’s ownership of any ICANN accredited registrar were intended to apply solely to the .COM registry, and therefore, Verisign and ICANN may agree to amend the .COM registry agreement to allow Verisign to own or control any registrar that does not register .COM domain names.²²² For example, if there is an agreement signed by ICANN and Verisign for the .web top-level domain, Verisign would not be prohibited from owning a registrar that offers .web domain name registrations, provided that that Registrar does not also offer .COM domain registrations.

1. On January 3, 2020, ICANN published a proposed amendment 3 to the .COM registry agreement for public comment.²²³ This amendment was proposed along with a draft binding letter of intent, which, according to ICANN: (1) aligned certain terms of the .COM agreement with the DoC amendment 35 to the Cooperative Agreement, allowing Verisign to raise the prices for .COM registrations, (2) aligned certain technical and reporting obligations for .COM with those contained in the base gTLD registry agreement, and (3) contained commitments for ICANN and Verisign to work together to promote security, stability and resiliency of the DNS (which included the obligation of Verisign to pay ICANN an additional \$4 million each year for 5 years to be put towards that work).²²⁴

164. ICANN received over 9,000 comments concerning the proposed amendment 3 and posted a summary of the comments and analysis on March 26, 2020.²²⁵ According to the summary, 95%

[biz-registry-agreement-3-4-2019-en](#)). Though these agreements did not get nearly the same amount of comments, the general tone and substance of the comments were similar (minus the reliance on the TLDs by non-profits).

²²⁰ https://ntia.doc.gov/files/ntia/publications/amendment_35.pdf

²²¹ *Id.* at Section 2.

²²² *Id.* at Section 3.

²²³ <https://www.icann.org/en/public-comment/proceeding/proposed-amendment-3-to-the-com-registry-agreement-03-01-2020>

²²⁴ <https://itp.cdn.icann.org/en/files/registry-agreements/com/com-proposed-loi-03jan20-en.pdf>

²²⁵ <https://itp.cdn.icann.org/en/files/registry-agreement/report-comments-com-amendment-3-26mar20-en.pdf>

of the comments related to the proposed increase of the maximum allowable wholesale price for .COM registry services. The comments submitted were overwhelmingly negative and included comments about the lack of transparency of the process, the potential harm on business, no promise of increased service and the fact that if the .COM registry were put out for competitive bidding, there would be many other registries that could operate the registry at a much lower cost. Some called on ICANN to perform an economic study to examine the impact of Verisign being allowed to continually raise the price of .COM every 4 out of 6 years by 7%.²²⁶

165. Pushing back on the comments received, ICANN referred back to the NTIA Statement on Amendment 35 to the Cooperative Agreement with Verisign published by the DoC on November 1, 2018.²²⁷ The announcement stated “*NTIA and Verisign have agreed to extend and modify the Cooperative Agreement. These modifications are in line with policy priorities of the Trump Administration. The changes create a new commitment to content neutrality in the Domain Name System (DNS), provide market-based pricing flexibility, and reduce the regulatory burden on Verisign. [...] The amendment repeals Obama-era price controls and provides Verisign the pricing flexibility to change its .com Registry Agreement with ICANN to increase wholesale .com prices.*”²²⁸

166. ICANN rationalized that:

“...[A]s enshrined in ICANN’s Bylaws, which were developed through a bottom up, multistakeholder process, ICANN’s mission is to ensure the security and stability of the Internet’s unique identifier systems. Accordingly, ICANN must defer to relevant competition authorities and/or regulators, and let [sic] them determine if any conduct or behavior raises anti-competition concerns and, if so, to address such concerns, whether it be through price regulation or otherwise.”²²⁹

167. ICANN proclaimed that it had not done an economic study in 2006 when the original price caps were negotiated but relied on the DoC and DoJ, just as it was deferring to them again.

168. On March 27, 2020, ICANN’s CEO executed Amendment No. 3 to the .COM Registry Agreement.²³⁰ In a blog post dated that same day, ICANN’s CEO, Goran Marby stated:

“Overall, the decision to execute the .COM Registry Agreement amendment and the proposed binding Letter of Intent is of benefit to the Internet community. . . . I also want to take this opportunity to clarify ICANN’s role with respect to wholesale pricing of top-level domains. Let me be clear, ICANN org is not a competition authority or price regulator. We have long-deferred to the U.S. Government Department of Commerce (DOC) and Department of Justice for the regulation of pricing for .COM registry services, as per the Cooperative Agreement between Verisign and the DOC. That hasn’t

²²⁶ *Id.* at p. 7.

²²⁷ <https://www.ntia.doc.gov/press-release/2018/ntia-statement-amendment-35-cooperative-agreement-verisign>

²²⁸ *Id.*

²²⁹ <https://itp.cdn.icann.org/en/files/registry-agreement/report-comments-com-amendment-3-26mar20-en.pdf> at p. 9.

²³⁰ See <https://itp.cdn.icann.org/en/files/registry-agreements/com/com-decision-document-27mar20-en.pdf>

changed.”²³¹

IV. Conclusion

169. Since its incorporation in 1998, ICANN has had essentially the same mission, namely that it must operate 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.”²³²

170. Although there has been a vast expansion in the number of domain name registries and registrars in the DNS, there has always been a need for ICANN and the Internet community to take steps to promote and sustain competition. As the sole licensing authority for gTLD domain name registries and registrars, ICANN is the only entity that is in a position to determine the licensing terms and conditions under which gTLD registries and registrars operate. To do this, ICANN relies on the global multi-stakeholder community to develop the policies and procedures that must be incorporated into the ICANN agreements in furtherance of its mission.

171. In addition, ICANN has developed its own processes and procedures governing the initial contracting and the renewal of gTLD Registry Agreements. This includes soliciting public comment, and incorporating necessary changes stemming from those public comments, into those agreements as warranted.

172. Between the years of 1998 and 2012, ICANN was able to negotiate Registry Agreements (and their renewals) and balance the requests made by gTLD registries with the need to promote and sustain competition, while at the same being as responsive as possible with the Internet community. This included the ability to treat registries equitably, while at the same time recognizing that certain protections were needed to be in place to sustain competition. For example, ICANN recognized that price controls were necessary on all gTLDs, but those controls could be different based on the differing market dynamics of each registry. Therefore, some of the smaller sponsored registries (eg., .MUSEUM and .AERO) could raise their prices for registrations without a cap, other registries would not be able to raise prices (.COM, .NET, .ORG, etc. between 1998 and 2005), and after 2006, because of the market landscape, it could allow those registries to raise prices up to a certain cap. ICANN implemented this price regulation through the Registry Agreements. In addition, during those years, ICANN recognized that a prohibition on vertical integration between registries and registrars was necessary to ensure open competition amongst registrars. This competition enabled a proliferation of competition amongst the domain name registrars as well as the addition of a dozen or so new gTLDs (eg, .INFO, .BIZ, .XXX and .TRAVEL to name a few).

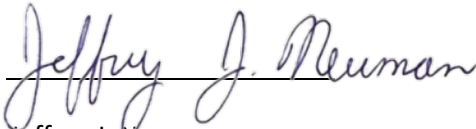
173. However, in 2012 the largest ever expansion of new gTLDs took place with applications received for over 1200 new gTLDs. This expansion changed not only the competitive

²³¹ <https://www.icann.org/en/blogs/details/icann-decides-on-com-amendment-and-proposed-binding-letter-of-intent-between-icann-and-verisign-27-3-2020-en>.

²³² <https://www.icann.org/resources/pages/articles-2012-02-25-en>;
<https://www.icann.org/resources/pages/governance/articles-en>

landscape, but also the focus of ICANN to prioritize having consistent Registry Agreements as opposed to distinguishing between and amongst registries even though the legacy registries (which included .COM, .NET, .ORG, .BIZ and .INFO) had a demonstrable larger market share than any of the new registries that were being introduced in 2012.

174. In addition, despite putting appropriate processes and procedures in place in response to comments from the governments and the Internet community to evaluate the potential adverse competitive impacts of allowing vertical integration in the legacy TLDs, ICANN did not appear to follow those processes which were approved in 2012 when it lifted the cross-ownership requirements for .BIZ, .INFO, and .ORG (and subsequently .NET and .COM).
175. Finally, in 2019, with the approval of the most recent versions of the .INFO, .BIZ and .ORG Registry Agreements, ICANN removed the last remaining price controls for these legacy TLDs despite the overwhelming community comments against the lifting of those controls. It did so without any competitive analysis of the impact of the removal of the price caps and in contrast to previous advice from the DoC and Justice. In fact, the sole reason given by ICANN for ignoring the comments made and the pleas for an economic study was to bring the Registry Agreements for .INFO, .BIZ and .ORG “more in line with the base registry agreement.” By doing so, without policy or advice from the ICANN multi-stakeholder community, ICANN prioritized having a uniform registry agreement over its Core Value to “Introduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;”²³³



Jeffrey J. Neuman

²³³ Section 1.2(b)(iv) of the Bylaws for Internet Corporation for Assigned Names and Numbers (as amended November 28, 2019), located at <https://www.icann.org/resources/pages/governance/bylaws-en/#article1>.

V. Appendix A: Background and Qualifications

176. I received two Bachelor of Arts degrees from the Pennsylvania State University in 1994; one in Labor & Industrial Relations and one in Political Science with a business minor. I graduated Summa Cum Laude and was the student Marshall for the Labor & Industrial Relations department.
177. In 1997, I received a J.D. from The George Washington University Law School in Washington, D.C. During my tenure there I became a member and editor of the American Intellectual Property Law Association Law Journal and focused on what was then called “Computer Law”.
178. During the summer of 1996, and throughout my third year of law school, I worked as a student associate at the law firm of Arter & Hadden, LLP in the Washington, D.C. office and continued to work there after I graduated from law school until 1999, when I left to join the law firm of Greenberg Traurig.
179. While working at Arter & Hadden, I became a member of the bar in both the Commonwealth of Virginia as well as the District of Columbia.
180. At Arter & Hadden, I became the “go-to” lawyer for all domain name enforcement issues and represented clients including [REDACTED] Redacted - Confidential Information [REDACTED] [REDACTED].
181. In addition, I joined the American Intellectual Property Association (“AIPLA”) and became one of the first co-chairs of their “Cyberlaw” committee. On behalf of both AIPLA and the clients we represented, I was asked to participate in the Internet Governance discussions in 1997/1998 with the United States Department of Commerce and members of the Internet Community. Through this representation, I assisted in the formation of the Internet Corporation of Names and Numbers (“ICANN”) in 1998 on behalf of Intellectual Property owners and was one of the first members of the Intellectual Property Constituency (“IPC”) of ICANN.²³⁴
182. In 1999 I joined the law firm of Greenberg Traurig serving in their Intellectual Property and Information Technology transaction groups. I continued to represent clients participating in ICANN’s IPC and was appointed to the Working Group responsible for the development of the Uniform Dispute Resolution Policy (“UDRP”), an alternative dispute resolution mechanism designed as a faster, cheaper, and more efficient process in handling domain names registered and used in bad faith. The UDRP formally went into effect in 1999 and was ICANN’s first

²³⁴ ICANN is a not-for-profit, public-benefit organization formed in 1998. Its staff operates the Internet’s Domain Name System, coordinates allocation and assignment of the Internet’s unique identifiers, such as Internet Protocol addresses, accredits generic top-level domain (gTLD) name registrars, and helps facilitate the voices of volunteers worldwide who are dedicated to keeping the Internet secure, stable and interoperable. ICANN promotes competition in the domain name space and helps develop Internet policy. See <https://www.icann.org/en/system/files/files/participating-08nov13-en.pdf>.

“Consensus Policy.”²³⁵

183. In 2000, I was introduced to Neustar, Inc., who at the time was a telecommunications client of Greenberg Traurig. During discussions with their head of business development, I encouraged Neustar to apply for a generic top-level domain (“gTLD”) in the then-upcoming new gTLD application process and introduced Neustar to a domain name registrar called MelbourneIT. I assisted in the formation of the partnership (initially called “JVTeam” and subsequently renamed “NeuLevel”) and led the application process on behalf of NeuLevel for the .BIZ gTLD, which was selected by ICANN as one of the first competitors to .COM.²³⁶ For .BIZ, I invented the Intellectual Property Claims Service (now called Trademark Claims), which is still in use today for all new gTLDs.²³⁷ This was a unique service that (a) provided notice to perspective registrants that the domain name they were applying for was subject to a trademark owner’s claim of intellectual property rights (putting registrants on notice), and (b) if the registrant continued with the registration, the trademark owner would be notified about the registration. As part of this, I created a new alternative dispute resolution mechanism, modeled after the UDRP, called the Start-up Trademark Opposition Policy (“STOP”) whereby trademark owners could allege that registrants, who had notice of the trademark owners’ rights, continued to register and use the domain name in bad faith.
184. After being selected, I was asked in January 2001 to join Neustar in as its Director of Law and Policy responsible for all legal and policy work related to Neustar’s domain name business as well as corporate wide intellectual property, employment, and insurance-related matters. In this capacity, I served as the primary legal contact and chief negotiator of all domain name registry agreements and amendments with ICANN as well as all registrar agreements with ICANN-accredited and/or ccTLD Accredited registrars (as applicable)
185. On March 22, 2001, I was invited to testify before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary House of Representatives.²³⁸ The hearing examined ICANN, New gTLDs and the protection of Intellectual Property in the 2000 round of new gTLDs.
186. In mid-2001, I led Neustar’s legal and policy team in its effort to acquire the .us country-code top-level domain through a competitive procurement process with the United States Department of Commerce (DoC). After being selected, I authored the first verified Sunrise Policy for trademark owners as well as one of the first ccTLD Dispute Resolution Policy (called the usDRP), which is still in place today.
187. During the next 10 years I was promoted to Vice President of Law & Policy and not only headed up the legal and policy services for Neustar’s domain and DNS businesses, but also its

²³⁵ Consensus Policies are those policies of the Multi-stakeholder community of ICANN that are incorporated into the Registry and Registrar agreements governing the domain name registries and registrars and which must be passed through to domain name registrants.

²³⁶ <https://www.icann.org/en/announcements/details/icann-announces-selections-for-new-top-level-domains-16-11-2000-en>

²³⁷ A description of the IP Claims Service (initially called Intellectual Property Notification Service) can be found at <https://www.icann.org/en/registry-agreements/biz/unsponsored-tld-agreement-appendix-j-biz-11-5-2001-en>.

²³⁸ http://commdocs.house.gov/committees/judiciary/hju72143.000/hju72143_0.HTM.

security services, enterprise services and complex franchise transactions. In this role, I served as the primary contact responsible for the negotiations of the 2006 .BIZ renewal Registry Agreement, as well as one of the gTLD Registries Stakeholder Group (RySG), formerly called the gTLD Registries Constituency (RyC), in its development of the new gTLD Base Registry Agreement. With respect to the new gTLD Base Registry Agreement, Becky Burr and I led the RySG negotiating team on revisions to the Base Registry Agreement in 2013 when ICANN's CEO proposed additional terms to the agreement after applications had been submitted.

188. In 2011, after Neustar's then head of registry services departed, I was asked to serve as Neustar's Vice President of Registry Services responsible for all of Neustar's registry businesses, including its sales, marketing, business development and customer support. While serving as the business lead, I led the acquisition of .co Internet S.A.S. (owners of the .co ccTLD), as well as 350 new gTLD applications for which Neustar served as the back-end technical registry services provider. In addition, I was responsible for the acquisition, development and launch of the .nyc new gTLD on behalf of the City of New York, which launched in 2014.
189. I left Neustar in January 2015 to lead Com Laude, USA, the North American arm of Nom-IQ Ltd., d/b/a Com Laude, a corporate domain name registrar and consultancy service located in the United Kingdom. I was hired to expand Com Laude's operations and business into North America, and to oversee all business development efforts in the United States. Com Laude maintained domain name portfolios for some of the largest global companies including [Redacted - Confidential Information]. In addition, we would assist our clients in acquiring domain names owned by other third parties, file domain name disputes where those third parties abusively registered the domain names, and engaged in other online brand enforcement activities.
190. I also led the United States team in providing consultancy services to brands that acquired their own TLDs. These clients included [Redacted - Confidential Information].
191. On July 1, 2020, I founded a new legal and policy consulting company called JJN Solutions, LLC which specializes in providing legal and policy services involving intellectual property, information technology transactions, Internet governance, domain name disputes, and Entertainment Law.
192. During my career, I have held a number of leadership positions within the Internet, Intellectual Property and ICANN communities. These include, *inter alia*:
- a. FORUM Accredited Panelist (2020-present) – Panelist presiding on Uniform Dispute Resolution Policy (“UDRP”) cases. To date, I have issued 14 sole panelist UDRP decisions involving disputes filed by trademark owners and domain name registrants.
 - b. GNSO Liaison to the Governmental Advisory Committee (2020 – Present) responsible for ensuring the collaboration of and participation of the Generic Names Supporting Organization (“GNSO”) with the Governmental Advisory Committee (“GAC”). The GNSO

is responsible for the development of policy with respect to new gTLDs, and the GAC is an organization comprised of governmental officials from around the world representing their individual national governments.

- c. Co-Chair Policy Development Process on Subsequent Rounds of New gTLDs (2016-2021). This committee (“SubPro”) was responsible for the review of the 2012 round of new gTLDs and for making recommendations for future introductions of new gTLDs. I was one of two co-chairs overseeing 250+ members from around the world representing applicants, governments, business, civil society, business and IP interests.
 - d. Biden Innovation Policy Committee (2020) – Served on the Subcommittee on Cybersecurity, Privacy and Intellectual Property supporting the Biden Presidential Campaign.
 - e. Nominee for the Community Excellence Award (2020). Received nomination from members of the Internet community for an annual award ICANN gives to community members “who have deeply invested in consensus-based solutions, acknowledging the importance of ICANN’s multistakeholder model of Internet governance, and contributed in a substantive way to the higher interests of ICANN’s organization and its community.”
 - f. Domain Name Association, Board Member (2013-2014; 2015-2017). The DNA was the first domain name industry trade association that represents the interests of the domain name industry.
 - g. GNSO Councilor / Vice Chair (2002 – 2004; 2011-2013). The GNSO Council is the Policy Development body of ICANN.
 - h. Center for Safe Internet Pharmacies, Founding Board Member & Treasurer (2011-2014). CSIP’s mission is to promote and encourage safe online pharmacies through education, enforcement, and information sharing.
 - i. Chairman, gTLD Registries Stakeholder Group (2001-2004). Elected as first chair of the gTLD Registries Stakeholder Group after it expanded in 2001. This group is responsible for representing the interests of gTLD registries within ICANN.
193. I have been a member of the International Trademark Association for a number of years and have previously served several terms on the Internet Committee. I am a frequent speaker on issues involving intellectual property, domain names, online dispute resolution, and the introduction of new gTLDs. In addition, I have written numerous articles on the domain name industry that have been featured on jnsolutions.COM and CircleID and have been interviewed in several worldwide publications including the New York Times, Wired Magazine, IP Asia and the World Trademark Review.

JEFFREY J. NEUMAN

Vienna, VA | +Contact Information Redacted

Accomplished legal and policy services professional with 10+ years of expertise in online brand protection, domain name management, intellectual property licensing, and enforcement. Successful at providing strategic policy, implementation assistance, and advice for Internet governance while serving in key business, policy, and legal roles. Proven ability to deliver outside-the-box solutions with integrity and a can-do mentality.

WORK EXPERIENCE

JJN Solutions, LLC | Vienna, VA

Founder & CEO | July 2020 – Present

- Found consultancy focusing on providing legal and policy advice to clients related to online brand protection and domain name management services
- Provided governance, acquisition, enforcement and disputes, Internet policy advice, top-level domain management, infrastructure licensing transactions services to get brands up and running online

Com Laude / Valideus | McLean, VA

Senior Vice President | January 2015 – June 2020

- Served as overall business and strategic lead for North American operations
- Bestowed policy assistance and advice in fields of Internet governance, intellectual property protection, and domain name portfolio management and operations
- Governed new Generic Top-level Domains (gTLD) business development program which secured more than 350 new gTLD applications, more than any other registry services provider
- Ran front-end registry management services for new gTLD applicants/registry operators and provision of corporate domain name portfolio management while serving as Executive Lead in North America
- Spearheaded P&L for Registry Consulting Services and Corporate Domain Name Management in USA
- Conducted presentations and spoke frequently on issues involving intellectual property, domain names, domain name registry operations and management, and introduction of new gTLDs
- Created and pioneered intellectual property protection and dispute services for domain name system, which is in use today by 1200+ gTLDs and many ccTLDs

Neustar, Inc. (NSR) | Sterling, VA January 2001 – January 2015

Vice President, Registry Services | March 2010 – January 2015

- Served as sales, business, legal, and policy lead for Registry Services business while managing strategic accounts for Neustar's registry services and implementing new gTLD program
- Led team of 25 employees while directing franchise registry business, including top-level domains, common short code registry, Ultraviolet, and Global System for Mobile

Communications (GSMA)

- Piloted P&L of \$100M domain name registry business at Neustar overseeing sales, business development, channel relationships, marketing, operations, and customer service

Vice President, Law & Policy | January – 2001 | February – 2010

- Managed all legal services and policy for Neustar's enterprise services, including domain name registries, mobile registries, bar codes, Internet Information Services (IIS), and Media lines of business
- Oversaw intellectual property law and policy matters, information technology licensing as well as legal issues, including litigation, related to employment and insurance matters
- Steered legal counsel on all software technology agreements for advanced services, domain name services, registry, wireless data, common short code, and other IP lines of business
- Developed, negotiated, closed, and implemented software licenses and service agreements, vendor agreements, joint venture, marketing distribution, and reseller agreements
- Assisted General Counsel with public company reporting, corporate governance, and legal compliance while heading policy development for .us and .BIZ top-level domains
- Acted as Liaison for United States Department of Commerce, Internet Corporation for Assigned Names and Numbers (ICANN) and Generic Name Supporting Organization of ICANN, and other entities

ADDITIONAL EXPERIENCE

Greenberg Traurig /Akin, Gump, Strauss, Hauer & Feld | Information Technology Associate
Arter & Hadden, LLP Associate | Summer Associate

CORE COMPETENCIES

Corporate, Litigation, Intellectual Property Law, Internet Policy Law, Labor Law, Domain Name Management, Legal Counseling, IP and Technology Licensing, Board Activity Oversight, Board Advising, Program Development and Implementation, Project Management, Strategic Planning, Vendor Management, Stakeholder Relations, Operations Management, Transparency and Accountability Strategies, Risk Management, Ethics and Integrity, Governance Policy Setting, Team Leadership

EDUCATION

Juris Doctor, Cum Laude, The George Washington University Law School, Washington, DC, Notes Editor, American Intellectual Property Law Association Quarterly Journal
Legal Fellow, Administrative Advocacy Legal Clinic

Bachelor of Arts, Political Science, Pennsylvania State University, University Park, PA, Summa Cum Laude

Bachelor of Arts, Labor and Industrial Relations, Student Marshal (only for top students), Phi Beta Kappa

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- FORUM, Uniform Dispute Resolution Policy and Uniform Rapid Suspension Qualified Dispute Resolution Panelist
- Board Member of NextStop Theatre, Herndon, VA (January 2021-Present)
- Member, Biden's Innovation Policy Committee's Subcommittee on Cybersecurity, Privacy and Intellectual Property (2020 – Present)
- ICANN GNSO Council's Liaison to the Governmental Advisory Committee (October 2020 – Present)
- Co-Chair, GNSO Policy Development Process on new gTLD Subsequent Procedures (2016 – Present)
- Former Co-Chair of GNSO New gTLD Discussion Group (2014 – 2016)
- Former Council Member and Vice Chairman of ICANN's Generic Names Supporting Organization (GNSO) on behalf of the gTLD Registries Stakeholder Group (RySG)
- Board member of the Domain Name Association (2013 – 2014; 2015 – 2017)
- Member of the International Trademark Association's Internet Committee (2010–2013; 2016–Present)
- Testified before Subcommittee on Courts, Internet and Intellectual Property of the Committee on the Judiciary, U.S. House of Representatives Oversight Committee regarding "ICANN, New gTLDs and the Protection of Intellectual Property."
- Frequent speaker on issues involving intellectual property, domain names, online dispute resolution, and introduction of new generic top-level domain names
- Featured in worldwide publications, including the New York Times, Wired Magazine, and IP Asia regarding domain name issues
- Served as Treasurer and Founding Board member for Center for Safe Internet Pharmacies (CSIP)
- Member of Pharmacy Advisory Committee in support of National Association of Boards of Pharmacy's Application

APPENDIX B

Articles I have Authored

1. “Comment on the Kleiman/Komatis Proposal on Multiple Clearinghouses for the New gTLD Process”, CircleID, August 13, 2009,
(https://circleid.COM/posts/comment_on_kleiman_komaitis_proposal_multiple_ip_clearinghouses_f_or_gtld)
2. “Post Delegation Dispute: A Once Supportable Concept Proposed by the IRT is No Unsupportable”, CircleID, October 7, 2009
(https://circleid.COM/posts/post_delegation_dispute_irt_concept_unsupportable)
3. “Say No to WIPO’s Proposal to Amend the PDDRP to Create New Law”, CircleID, May 5, 2010
(https://circleid.COM/posts/say_no_to_wipos_proposal_to_amend_the_pddrp_to_create_new_law/)
4. “Neustar Urges Caution to ICANN Before Batching”, CircleID, June 7, 2012
(https://circleid.COM/posts/20120607_neustar_urges_caution_to_icann_before_batching)
5. “Under pressure: new call for increased gTLDs trademark protection mechanisms”, World Trademark Review (October 8, 2012)(<https://www.worldtrademarkreview.COM/online/under-pressure-new-call-increased-gtlds-trademark-protection-mechanisms>) (Subscription Required).
6. “Clearing up the “logjam”: ICANN Must Drop its Request for a Unilateral Right to Amend the Agreements”, CircleID, May 16, 2013
(https://circleid.COM/posts/20130316_icann_must_drop_request_for_unilateral_right_to_amend_agreements)
7. “Neustar Analysis Shows ICANN Study Overstates Risk of Harmful Domain-Name Collision”, CircleID, September, 17, 2013,
https://circleid.COM/posts/20130717_neustar_analysis_icann_overstates_risk_of_harmful_domain_collision/
8. “Is Your New TLD Protected Against Phishing and Malware?”, CircleID, June 19, 2014
(https://circleid.COM/posts/20140619_is_your_new_tld_protected_against_phishing_and_malware)

9. “Ask Not What ICANN Can Do for You, But What You Can Do for ICANN”, CircleID, February 23, 2017
(https://circleid.COM/posts/20170223_ask_not_what_icann_can_do_for_you_but_what_you_can_do_for_icann)
10. “In Search of a Geographic Name Policy”, Com Laude Spring Newsletter, March 2018 p. 2-3.
(<https://comlaude.COM/app/uploads/2018/09/Com-Laude-Newsletter-March-2018-Final.pdf>)
11. “Will PDP 3.0 Save the Multi-Stakeholder Model?”, CircleID, April 1, 2019
(https://circleid.COM/posts/20190401_dwill_pdp_3_save_the_multi_stakeholder_model)
12. “DNS = Brand”, JIN Solution Blog, July 27, 2020 (<https://www.jinsolutions.COM/post/dns-brand>)
13. “Enhancing the Multi-stakeholder model within ICANN Part 2 (Problems Still Exist), JIN Solutions Blog, July 29, 2020 (<https://www.jinsolutions.COM/post/enhancing-the-multi-stakeholder-model-within-icann-part-2-problems-still-exist>)
14. “Help Save the Multi-stakeholder Model (Part 3), JIN Solutions Blog, July 31, 2020
(<https://www.jinsolutions.COM/post/help-save-the-multi-stakeholder-model-part-3>)
15. “The Predictability Problem of the New gTLD Process (Part 1), JIN Solutions Blog, September 4, 2020 (<https://www.jinsolutions.COM/post/the-predictability-problem-of-the-new-gtld-process-part-1>)
16. “The Predictability Problem of the New gTLD Process (Part 2: A Proposed Solution”, JIN Solutions Blog, September 15, 2020 (<https://www.jinsolutions.COM/post/the-predictability-problem-of-the-new-gtld-process-part-2-a-proposed-solution>)
17. “Is the Root Zone Growing too Quickly? All you have to do is ask.”, JIN Solutions Blog, October 7, 2020 (<https://www.jinsolutions.COM/post/is-the-root-zone-growing-too-quickly-all-you-have-to-do-is-ask>)

Interviews / Mentions

1. “Trying to Win a New Name Game; Trademarks Must Vie for Net Addresses”, New York Times, June 25, 2001 (<https://www.nytimes.COM/2001/06/25/business/trying-to-win-a-new-name-game-trademarks-must-vie-for-net-addresses.html>)
2. “News Focus: Interview: Jeff Neuman”, Managing IP, June 30, 2001
(<https://www.managingip.COM/article/b1kcgqvc4tmhlf/news-focus-interview-jeff-neuman>)

(Subscription Required)

3. “Compressed Data; Suit Filed in Registration of Domain Names”, New York Times, July 30, 2001 (<https://www.nytimes.COM/2001/08/15/business/efforts-to-ease-worries-on-new-net-addresses.html>)
4. “Efforts to Ease Worries on New Net Addresses”, New York Times, August 15, 2001 (<https://www.nytimes.COM/2001/08/15/business/efforts-to-ease-worries-on-new-net-addresses.html>)
5. “.BIZ address absorbs lawyers, not marketers”, Boston Business Journal, August 20, 2001 (<https://www.BIZjournals.COM/boston/stories/2001/08/20/story3.html>)
6. “Injunction against .BIZ domain registrar dropped”, CNN.Com/SCI-Tech, October 29, 2001 (<http://www.cnn.COM/2001/TECH/internet/10/29/biz.injunction.idg/index.html>)
7. “Seoul matters: how brand owners connected with domainers via ICANN”, World Trademark Review, November 10, 2009 (<https://www.worldtrademarkreview.COM/search?search=Neuman&sort=2&page=1>) (subscription required).
8. “What if There Were an Application For Dot Wikileaks?”, Intellectual Property Watch, September 12, 2010 (<https://www.ip-watch.org/2010/12/09/what-if-there-were-an-application-for-dot-wikileaks/>)
9. “Jeff Neuman Talks New TLDs and Trademark Protection”, Mobilenextbigthing, March 4, 2011 (<https://www.youtube.COM/watch?v=FDbkci18QIE>)
10. “UDRP review due in June”, Managing IP, March 21, 2011 (<https://www.managingip.COM/article/b1kc164kbj1p3x/udrp-review-due-in-june>) (Subscription Required)
11. “Jeff Neuman Discusses Key gTLD Applications and Uses”, Mobilenextbigthing, March 30, 2011 (https://www.youtube.COM/watch?v=wEB_KJOAsqE)
12. “Jeff Neuman Discussed Branded New gTLDs and Security. ICANN, April 11, 2011 (<https://www.youtube.COM/watch?v=63DDOSvP1aA>)
13. “Ruling on .US Domain Raises Privacy Issues”, Washington Post, March 4, 2005 (<https://www.washingtonpost.COM/wp-dyn/articles/A7251-2005Mar4.html>)
14. “How Registrars tackle domain name abuse”, IT World Canada, September 16, 2009 (<https://www.itworldcanada.COM/article/how-registrars-tackle-domain-name-abuse/39768>)

15. “Is the Dot Future Now? The ABC’s of the New gTLDs”, Corporate Counsel, May 16, 2011 (Full Interview)(<https://www.law.COM/corpcounsel/almID/1202493951675/?slreturn=20210821113605>) (Subscription Required)(Also posted at https://thepriorart.typepad.COM/the_prior_art/domain-names/).
16. “Prepare for new gTLD approval – even if the policy isn’t finished”, World Trademark Review, June 3, 2011 (<https://www.worldtrademarkreview.COM/governmentpolicy/prepare-new-gtld-approval-even-if-policy-isnt-finished>) (Subscription Required).
17. “Your .brand gTLD: hopeful registry partners go into marketing overdrive”, World Trademark Review, July 7, 2011 (<https://www.worldtrademarkreview.COM/brand-management/your-brand-gtld-hopeful-registry-partners-go-marketing-overdrive>) (Subscription Required)
18. “New GNSO Council Appointment: Jeff Neuman”, Managing IP, October 10, 2011 (<https://www.managingip.COM/article/b1kc0v1lbrvy8l/new-gnso-council-appointment>) (Subscription Required).
19. “IGF-USA 2012 – Jeff Neuman on competition driving innovation.mov”, Internet Governance Forum – USA, July 26, 2012 (https://www.youtube.COM/watch?v=FxIE9Wm_XJU)
20. “Summary of the TMCH Meeting”, August 18, 2012, Neustar Blog, August 28, 2012 (<https://www.about.us/blog/summary-of-the-trademark-clearinghouse-meeting/369>) (link to paper no longer resolves).
21. “Concerns voiced over trademark clearinghouse processes at ICANN meeting”, World Trademark Review, October 28, 2011 (<https://www.worldtrademarkreview.COM/brand-management/concerns-voiced-over-trademark-clearinghouse-processes-icann-meeting>) (Subscription Required).
22. “Law Enforcement officers want “more verification” on domain contracts”, Heise online, April 7, 2013 (<https://www.heise.de/newsticker/meldung/Strafverfolger-wollen-mehr-Verifizierung-bei-Domainvertraegen-1836659.html>) (Original Article in German).
23. “Debate in Beijing: ICANN As Online Content Regulator”, Intellectual Property Watch, April 12, 2013 (<https://www.ip-watch.org/2013/04/12/debate-in-beijing-icann-as-online-content-regulator/>)
24. “Domain name decision-maker growing into a big machine”, Internet Policy Review, July 18, 2013 (<https://policyreview.info/articles/news/domain-name-decision-maker-growing-big-machine/174>)
25. “New York City Gets One Step Closer to Its Own Corner of the Internet”, Next City, December 10, 2013 (<https://nextcity.org/daily/entry/new-york-city-gets-one-step-closer-to-its-own-corner-of-the->

[internet](#))

26. “dotStrategy Selects Neustar’s Registry Threat Mitigation Services for .Buzz Registry”, CircleID, April 3, 2014
https://circleid.COM/posts/20140403_dotstrategy_selects_neustars_registry_threat_mitigation_service/
27. “New York Boosts Its Brand on Web with .NYC Domain”, Wall Street Journal, September 24, 2014
<https://www.wsj.COM/articles/new-york-boosts-its-brand-on-web-with-nyc-domain-1411611828>).
28. “PR Blitz Blankets Big Apple for .NYC Domain”, AdAge, October 8, 2014
<https://adage.COM/node/1104671/printable/print>
29. “NYC’s domain on record pace with over 56,000 accounts so far”, Engadget, November 13, 2014
<https://news.yahoo.COM/2014-11-13-nyc-domain-fastest-growing.html>
30. “Jeff Neuman VP at Neustar - .us National 12K 2014”, USATF.tv interview, November 16, 2014
https://www.usatf.tv/gprofile.php?mgrou p_id=45365&mgrou p_event_id=8644&year=2014&do=vid eos&video_id=127339
31. “Valideus Launches in US with Neuman hire”, Managing IP, January 26, 2015
<https://www.managingip.COM/article/b1kbp7td310wsh/valideus-launches-in-us-with-neuman-hire>
32. “Thich Whois vote delayed until March”, Managing IP, February 12, 2016
<https://www.managingip.COM/article/b1kc1nn8kq395s/thick-whois-vote-delayed-until-march>
(Subscription Required).
33. “Jeff Neuman Discusses the new gTLD subsequent Procedures PDP”, ICANN, June 3, 2016
<https://www.youtube.COM/watch?v=JWE2nYQgOII>
34. “Com Laude hits out at ‘.sucks’ after contract termination; Vox Populi fires back”, World Trademark Review, June 20, 2016 (<https://www.worldtrademarkreview.COM/online/com-laude-hits-out-sucks-after-contract-termination-vox-populi-fires-back>) (Subscription Required)
35. “Domain name system transitions to private sector”, Managing IP, October 3, 2016
<https://www.managingip.COM/article/b1kbp9w1n9dlr/domain-name-system-transitions-to-private-sector>
36. “Update on New gTLD Subsequent Procedures”, ICANN, June 28, 2017
<https://www.youtube.COM/watch?v=wcal0u8YYdY>

37. “Preparing for the next round of new gTLDs: ICANN insider reveals key issues brand owners need to be aware of”, World Trademark Review, April 24, 2018 (<https://www.worldtrademarkreview.COM/online/preparing-next-round-new-gtlds-icann-insider-reveals-key-issues-brand-owners-need-be>) (Subscription Required)
38. “New gTLD Subsequent Procedures”, ICANN, June 27, 2018 (https://www.youtube.COM/watch?v=ujErN_AuTww)
39. “Brands and Domains Conference Recap”, CircleID, October 24, 2017 (https://circleid.COM/posts/20171024_brands_and_domains_conference_recap/)

Speaking Engagements / Conference Presentations

1. “ISOC-NY Panel: The Future of WHOIS Policy (Webcast), CircleID, November 16, 2006 (https://circleid.COM/posts/isoc_ny_panel_whois_policy/); Podcast at <http://punkcast.COM/1064/index.html>.
2. “New gTLD Implementation Consultation Session – Sydney, Australia”, hosted by ICANN on June 24, 2009 during ICANN 35 in Sydney Australia (<https://archive.icann.org/en/meetings/sydney2009/node/3788.html>)
3. “New gTLD Implementation Consultation Session” hosted by ICANN at the Hudson Theatre, Millennium Hotel in New York City, July 13, 2009 (Video Archives can be found at <http://archive.icann.org/en/topics/new-gtlds/consultation-outreach-en.htm>).
4. “New gTLD Implementation Consultation Session in London” hosted by ICANN at the Royal Institute of British Architects, July 15, 2009 (Video Archives can be found at <http://archive.icann.org/en/topics/new-gtlds/consultation-outreach-en.htm>)
5. “Legal and Technological Preparation for ICANN’s New gTLDs”, Greenberg Traurig panel discussion on December 15, 2010 (<https://docplayer.NET/17639470-Legal-and-technological-preparation-for-icann-s-new-gtlds.html>)
6. “The Changing Landscape of the Domain Name System: New Generic Top Level Domains (gTLDs) and their Implications for Users.”, Internet Governance Forum USA Panel Discussion (July 26, 2012).
7. “.NYC Public Workshop and Info Session”, hosted by the Brooklyn Law School on December 9, 2013 (<https://youtu.be/5HK1gO6cPBk>)

8. “Erasing Geographic and Linguistic Boundaries; .GEOs and Community-Driven Generics”, Beyond the Dot Conference, February 19, 2014.
(<http://events.r20.constantcontact.COM/register/event?oeidk=a07e8mvryk45f74987f&llr=lhgd5amab&showPage=true>) (No video of presentation).
9. “The Launch of .nyc: Protecting your New York City Business Online” hosted by the New York Law School – Institute for Information Law and Policy, April 23, 2014 (<https://isoc.live/tag/dotnyc/>) (Video no longer available).
10. “Positioning Your Business to Succeed in the New .Dot/Anything World”, Panel discussion hosted by Domainskate at WeWork SOHO on September 11, 2014.
11. “ICANN, .nyc, and Multi-stakeholder Innovation” Panel Discussion, Internet Society Chapters Webcasting, November 24, 2014 (<https://www.youtube.COM/watch?v=HRZ4A0-C9Kg>)
12. “‘Inside Out’: Global Portfolio Management on a Budget”, International Trademark Association’s Trademark Administrators and Practitioners Meeting”, September 16, 2016
(<https://www.inta.org/events/2016-tmap-trademark-administrators-and-practitioners-meeting/>)
13. “ICANN and the New Top-Level Domains” Panel 2, Washington College of Law, American University, February 25, 2019 (https://www.youtube.COM/watch?v=9_zLGUz_-mg) – starting at 1:58:00.
14. “How Will dotBrands shape the future and the next round of new gTLDs”, Brands and Domains Conference hosted by the Brand Registry Group (November 7, 2019).
15. “Webinar: Have your say on ICANN’s Rights Protection Mechanisms”, Com Laude, April 15, 2020
(<https://www.COMlaude.COM/listen-webinar-webinar-rpms/>)
16. “Intelligence Briefing on ICANN’s Second Round of New gTLDs”, Internet Commerce Association, August 6, 2021 (<https://www.internetcommerce.org/watch-the-recording-of-our-business-intelligence-briefing-on-the-second-round-of-new-gtlds/>)

Testimony

“ICANN, New gTLDs, and the Protection of Intellectual Property”, Hearing Before the Subcommittee on Courts, The Internet, and Intellectual Property of the Committee on the Judiciary House of Representatives, 107th Congress, March 22, 2001
(http://commdocs.house.gov/committees/judiciary/hju72143.000/hju72143_0.HTM)

List of Published UDRP Decisions as a Panelist for the FORUM

1. *Micros Systems, Inc. / Oracle International Corporation v. Jaron Hunter*, FA 1904194 (8/8/2020)
2. *Offerpad, Inc. v. Phillip Haynes*, FA 1909553 (9/30/2020)
3. *Cooper's Hawk Intermediate Holding, LLC v. Tech Admin / Virtual Point Inc.*, FA 1916204 (11/17/2020)
4. *Google LLC v. Floan Delveir*, FA 1925079 (1/21/2021)
5. *Google LLC v. Robert Stabile*, FA 1926977 (2/15/2021)
6. *Toei Animation Co., Ltd. v. Jeff Green / SpeedyWebz*, FA 1929303 (3/03/2021)
7. *Snap Inc. v. Dan Premium*, FA 1931133 (3/24/2021)
8. *Coldwell Banker Real Estate LLC v. Jenks Presley*, FA 1933334 (4/12/2021)
9. *Sig Sauer Inc. v. Joseph Lawrence*, FA 1937107 (4/22/2021)
10. *Google LLC v. Gabriel Duby*, FA 1940674 (5/12/2021)
11. *Dr. Seuss Enterprises, L.P. v. Domain Administrator / Fundacion Privacy Services LTD*, FA 1941414 (6/03/2021)
12. *Course Hero, Inc. v. Julius Njeri*, FA 1945579 (6/29/2021)
13. *Ruggable, LLC v. Zhichao Yang*, FA 1950397 (7/21/2021)
14. *Kings Point Recreation Corporation, Inc. v. Marty Koitz / martin koitz*, FA 957570 (9/14/2021)

APPENDIX B

Sources Considered in this Opinion

All of the sources used in the drafting of this opinion are contained in the footnotes associated with the specific content set forth therein.