

**ICANN BOARD SUBMISSION NO. 2019.11.21.1a**

**TITLE:** **Consideration of Reconsideration Request 19-2**

**PROPOSED ACTION:** **For Board Consideration and Approval**

**EXECUTIVE SUMMARY:**

Namecheap Inc. (Requestor) seeks reconsideration of ICANN organization’s 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs).

Specifically Requestor challenges the ORG/.INFO Renewed RAs insofar as they eliminated “the historic price caps” on domain name registration fees for .ORG and .INFO.<sup>1</sup> The Requestor claims that ICANN org’s “decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN’s Commitments and Core Values, and ICANN should reverse this decision for the public good.”<sup>2</sup> The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.<sup>3</sup> The Requestor “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs.”<sup>4</sup>

The Board previously issued a Proposed Determination denying reconsideration because ICANN org’s execution of the .ORG/.INFO Renewed RAs did not contradict ICANN’s Bylaws, policies, or procedures, and ICANN Staff did not fail to consider material information in executing the Agreements.<sup>5</sup>

Pursuant to Article 4, Section 4.2(q) of the Bylaws, the Requestor submitted a rebuttal to the Proposed Determination. The Requestor challenged the Board’s reliance on evidence concerning and mechanisms designed for New gTLDs, reiterated its argument that ICANN Staff should have acted in accordance with “essentially unanimous public comments in support of price caps,” and

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<sup>1</sup> Request 19-2, § 3, at Pg 2

<sup>2</sup> *Id.* § 8, at Pg 3

<sup>3</sup> *Id.*, § 8, at Pg 10

<sup>4</sup> *Id.*, § 9, at Pg 12

<sup>5</sup> <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1 a>

asserted that the recent acquisition of .ORG by a for-profit entity merits additional scrutiny of the .ORG Renewed RA.<sup>6</sup>

**PROPOSED RESOLUTION:**

Whereas, Namecheap Inc. (Requestor) filed a reconsideration request (Request 19-2) challenging ICANN organization’s 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (collectively, .ORG/.INFO Renewed RAs), insofar as the renewals eliminated “the historic price caps” on domain name registration fees for .ORG and .INFO.<sup>7</sup>

Whereas, the Requestor claims that ICANN org’s “decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN’s Commitments and Core Values, and ICANN should reverse this decision for the public good.”<sup>8</sup> The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of .ORG and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.<sup>9</sup>

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 19-2 is sufficiently stated and sent Request 19-2 to the Ombudsman for consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, pursuant to Article 4, Section 4.2(l), the Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that “the CEO and Staff acted within the scope of the powers given them by the Board,” and that “no rules or duties of corporate governance were violated (including the ICANN Bylaws).”<sup>10</sup>

Whereas, the Board previously issued a [Proposed Determination](#) denying reconsideration because ICANN org’s execution of the .ORG/.INFO Renewed RAs did not contradict ICANN’s

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<sup>6</sup> Rebuttal in Support of Request 19-2, <https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en>

<sup>7</sup> Request 19-2, § 3, at Pg 2

<sup>8</sup> *Id.* at § 3

<sup>9</sup> *Id.*

<sup>10</sup> <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf>

Bylaws, policies, or procedures, and ICANN Staff did not fail to consider material information in executing the Agreements. (See <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.a>.) The Board's action was taken in lieu of the BAMC's substantive evaluation on Request 19-2 pursuant to Article 4, Section 4.2(e) of the Bylaws because the BAMC did not have a quorum to consider Request 19-2.

Whereas, the Board has carefully considered the merits of Request 19-2 and all relevant materials, including the Requestor's rebuttal, and the Board reaffirms its conclusions in the [Proposed Determination](#) that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. The Board further concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2019.11.21.XX), the Board adopts the [Final Determination on Reconsideration Request 19-2](#).

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#### PROPOSED RATIONALE:

##### 1. Brief Summary and Recommendation

The full factual background is set forth in the [Proposed Determination on Request 19-2](#) (Proposed Determination), which is incorporated here.

On 3 November 2019, the Board evaluated Request 19-2 and all relevant materials, and issued a [Proposed Determination](#) denying reconsideration because ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and ICANN Staff did not fail to consider material information in executing the Agreements. (See <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.a>.) The Board's action was taken in lieu of the BAMC's substantive evaluation on Request 19-2 pursuant to Article 4, Section 4.2(e) of the Bylaws because the BAMC did not have a quorum to consider Request 19-2.

On 18 November 2019, the Requestor submitted a rebuttal to the Proposed Determination (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. The Requestor claims that (1) the Board should not have relied on an expert economist's prior assessment of the need for

price caps in new gTLD Registry Agreements; (2) the Base RA’s development process does not support migration of .ORG and .INFO to the Base RA; (3) ICANN Staff disregarded “essentially unanimous public comments in support of price caps”; (4) that it has sufficiently alleged harm, and (5) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed “requires that ICANN [org] review this purchase in detail and take the necessary steps to ensure that .org domains are not used [as] a source of revenue” for certain purposes.<sup>11</sup>

The Board has carefully considered Request 19-2 and all relevant materials, including the Requestor’s rebuttal, and, for the reasons set forth in detail in the [Final Determination](#), the Board reaffirms its conclusions in the [Proposed Determination](#) and concludes that the Rebuttal provides no additional argument or evidence to support reconsideration.

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## 2. Analysis and Rationale

### A. [The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org’s Commitments.](#)

There is no evidence to support the Requestor’s conclusory assertion that ICANN org did not act for the public benefit when it omitted the price caps from the .ORG/.INFO Renewed RAs. As discussed in further detail in the Final Determination, which is incorporated herein, on the contrary, the evidence demonstrates that ICANN org sought community consultation regarding the proposed changes to the .ORG and .INFO RAs through a public comment process. ICANN org reviewed and considered all 3,700 comments received.<sup>12</sup> ICANN Staff presented and discussed the key issues raised in the public comment process and correspondence, including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.<sup>13</sup>

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a “sham” or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff’s careful consideration of the public comments—as reflected in its Report of Public Comments and

<sup>11</sup> Rebuttal in Support of Request 19-2, <https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en>

<sup>12</sup> Report of Public Comments, ORG, at Pg 3; Report of Public Comments, INFO, at Pg 3

<sup>13</sup> 26 July 2019 Letter, at Pg 2.

discussion with the Board,<sup>14</sup> demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

Further, the Report of Public Comments demonstrates ICANN Staff's belief that it was acting for the public benefit by "promot[ing] competition in the registration of domain names," providing the same "protections to existing registrants" afforded to registrants of other TLDs, and treating "the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base [RA]."<sup>15</sup> There is no support for the Requestor's assertion that ICANN Staff's belief in this regard was based upon "conclusory statements not supported by evidence."<sup>16</sup> ICANN org considered Professor Carlton's 2009 expert analysis of the Base RA, and specifically his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.<sup>17</sup>

B. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Core Values.

The Board finds that there is no evidence to support the Requestor's assertion that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Core Value of

[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.<sup>18</sup>

As discussed in further detail in the Final Determination, which is incorporated herein, contrary to the Requestor's argument, ICANN org *did* seek broad, informed participation through the public comment process for the .ORG/.INFO Renewed RAs. Moreover, ICANN org's Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN's various communication channels. ICANN org ultimately

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<sup>14</sup> 26 July 2019 Letter, at Pg 2.

<sup>15</sup> Report of Public Comments, ORG, at Pg 8

<sup>16</sup> Request 19-2, § 8, at Pg 12

<sup>17</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>

<sup>18</sup> Request 19-2, § 8, at Pg 4

determined that ICANN’s Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same “protections to existing registrants” that are afforded to registrants of other TLDs, and treat registry operators equitably.<sup>19</sup> Further, the Base RA, which is incorporated in the .ORG/.INFO Renewed RA, “was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment.”<sup>20</sup>

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org’s transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org’s Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

The Board finds that there is not support for the Requestor’s assertion that omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org’s statement on the public comment proceeding that the “purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement.”<sup>21</sup> As discussed in further detail in the Final Determination, which is incorporated herein, ICANN org’s decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to “obtain community input” or “use[]” the public comment “to guide implementation work” of ICANN org.<sup>22</sup> To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board’s support, to pursue, the global public interest. Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).<sup>23</sup> ICANN org’s general description of the purpose of the public comment process is not a Commitment, Core Value,

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<sup>19</sup> Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7

<sup>20</sup> 26 July 2019 Letter, at Pg 1

<sup>21</sup> *Id.*

<sup>22</sup> *See id.*

<sup>23</sup> Bylaws, Art 4 § 4 2(c) The challenged action must adversely affect the Requestor as well *Id.*

established policy, nor part of ICANN org’s Mission. Accordingly, reconsideration is not supported.

D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

As discussed in further detail in the Final Determination, which is incorporated herein, there is no evidence to support the Requestor’s claim that ICANN org’s analysis of the proposed removal of price caps was taken without material information.

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E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/.INFO Renewed RAs.

The Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. The Requestor asserts that it has been adversely affected by the challenged conduct because, “[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor’s] domain name registration business,” insofar as the .ORG/.INFO Renewed RAs create an “uncertainty of price increases.”<sup>24</sup> The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that “additional analysis is needed to determine whether” the removal of price caps in the .ORG RA “can result in uncompetitive practices.”<sup>25</sup> This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton’s expert report—indicates that such harm is not expected. As noted in the Final Determination, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.<sup>26</sup> Professor Carlton explained that “a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or

<sup>24</sup> Request 19-2, § 6, at Pg 2; *see also id* § 10, at Pg 13

<sup>25</sup> Request 19-2, § 8, at Pg 10

<sup>26</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>



eliminate the incentives for suppliers to act opportunistically.”<sup>27</sup> For these reasons, reconsideration is not warranted.

F. The Rebuttal Does Not Raise Arguments or Facts that Support Reconsideration.

The Requestor makes five arguments in its Rebuttal. None support reconsideration. As discussed in further detail in the [Final Determination](#), the Requestor’s Rebuttal reiterates arguments that the Board addressed in the Proposed Determination. The Requestor’s responses to the Proposed Determination rely on the assumption that legacy gTLDs should be treated differently than new gTLDs and should not migrate to the Base RA; Requestor still offers no evidence supporting this argument, and is incorrect, as demonstrated by the legacy gTLDs that have migrated to the Base RA over the past several years. The .ORG Registry Operator is irrelevant to this Reconsideration Request and does not support reconsideration.

Notwithstanding that we are denying Request 19-2, the Board does acknowledge the recently announced acquisition of PIR, the current .ORG Registry Operator, and the results of that transaction is something that ICANN organization will be evaluating as part of its normal process in such circumstances.

This action is within ICANN’s Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy Stathos, Deputy General Counsel  
Date Noted: 19 November 2019  
Email: [amy.stathos@icann.org](mailto:amy.stathos@icann.org)

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<sup>27</sup> *Id.*

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## REFERENCE MATERIALS – BOARD PAPER NO. 2019.11.21.1a

**TITLE:** **Consideration of Reconsideration Request 19-2**

### **Documents**

The following attachments are relevant to the Board's consideration of Reconsideration Request 19-2.

Attachment A is Reconsideration Request 19-2, submitted on 12 July 2019.

Attachment B is the Ombudsman's Evaluation of Request 19-2, issued 7 September 2019.

Attachment C is the Letter from the Internet Commerce Association to the Ombudsman, dated 12 September 2019.

Attachment D is the Proposed Determination on Request 19-2, adopted by the Board on 3 November 2010.

Attachment E is the Requestor's Rebuttal to the Proposed Determination on Request 19-2, submitted on 18 November 2019.

Attachment F is the Final Determination on Request 19-2.

Attachment G is the redline comparison of the Final Determination against the Proposed Determination on Request 19-2.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 19 November 2019

Email: amy.stathos@icann.org

## **Reconsideration Request Form**

Version as of 21 September 2018

ICANN's Board Accountability Mechanisms Committee (BAMC) is responsible for receiving requests for reconsideration (Reconsideration Request) from any person or entity that has been adversely affected by the following:

- (a) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (b) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (c) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information.

The person or entity submitting such a Reconsideration Request is referred to as the Requestor.

Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please refer to [Article 4, Section 4.2 of the ICANN Bylaws](#) and the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

This form is provided to assist a Requestor in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requestors may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12-point font. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

*For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.*

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

**1. Requestor Information**

**Name:** Namecheap, Inc. (IANA 1068)

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):**

**2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

**3. Description of specific action you are seeking to have reconsidered.**

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

**4. Date of action/inaction:**

30 June 2019

**5. On what date did you become aware of the action or that action would not be taken?**

1 July 2019

**6. Describe how you believe you are materially and adversely affected by the action or inaction:**

As a domain name registrar, removal of price caps for legacy TLDs will negatively impact Namecheap's domain name registration business.

Uncertainty regarding future price increases (including the possibility of increases that exceed historical norms) may cause Namecheap's customers to not renew domain names or not register new domain names in legacy TLDs. This may additionally impact other legacy TLDs subject to renewal, such as .com. ICANN org ignored the overwhelming number of public comments supporting maintaining historical price caps, essentially making a mockery of the public comment process.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

All domain name registrants, especially those who have domains in legacy TLDs with longstanding price caps, will be adversely affected when legacy TLDs begin to raise prices outside of previously established norms. In addition, web developers and internet hosting companies will see decreased sales and revenue. Unrestricted price increases for legacy TLDs will stifle internet innovation, harm lesser served regions and groups, and significantly disrupt the internet ecosystem. An incredible variety of public comments was submitted to ICANN from all continents (except Antarctica) imploring ICANN to maintain the legacy TLD price caps- which were completely discounted and ignored by ICANN org.

**8. Detail of Board or Staff Action/Inaction – Required Information**

**I. Introduction**

Namecheap is submitting this reconsideration request to protect the rights and interests of Namecheap's customers and the entire internet community. Price caps for legacy TLDs have been an integral longstanding foundation for the domain name marketplace, and removing them will result in uncertainty and confusion at a minimum, and in the worst case, increased costs for domain name registrants worldwide. ICANN requested public comment regarding the changes to the .org registry agreement, and the response was overwhelmingly against removing price caps. Comments came from small non-profits, international organizations, government agencies, members of government, individuals, families, businesses, entrepreneurs, and people from lesser developed regions and those underrepresented in the ICANN community. ICANN rejected over 3,500 comments against removing price caps by stating registrants could use other TLDs, renew for 10 years if a price increases were excessive, and claiming (without evidence) that market competition would keep the prices for the third largest TLD from rising compared to other TLDs (ignoring the significant differences between .org and new gTLDs raised by commenters). The decision to ignore public comments to keep price caps in legacy TLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good.

## II. Basis for the Reconsideration Request

ICANN's bylaws include Commitment 4(A), which states that ICANN will “seek input from the public, for whose benefit ICANN in all events shall act.” The bylaws also include the following Core Values:

*“(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent*

[...]

*(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture”*

In line with the Commitments and Core Values, ICANN's Public Comment Opportunities page prominently states:

*“Public Comment is a mechanism that gives the ICANN community and other stakeholders an opportunity to provide input and feedback. Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption. Public Comment is also used to guide implementation work, reviews, and operational activities of the ICANN organization.”*

<https://www.icann.org/public-comments> (accessed 3 July 2019)

Specifically, regarding the public comment period for the Proposed Renewal of .org Registry Agreement, ICANN stated:

*“Purpose: The purpose of this public comment proceeding is to obtain community input on the proposed .org renewal agreement (herein referred to as “.org renewal agreement”).*

[...]

*Following review of the public comments received, ICANN will prepare and publish a summary and analysis of the comments received. The report will be available for the ICANN Board in its consideration of the proposed .org renewal agreement.”*

<https://www.icann.org/public-comments/org-renewal-2019-03-18-en> (accessed 3 July 2019)

In addition to the additional information how ICANN accepts and integrates public comments, for the past few years ICANN org has undertaken efforts to conduct

outreach to domain name registrants and encourage their participation in the ICANN community. Although this can be daunting for non-technical individuals, ICANN org provides good introductory information and in part encourages individuals to provide public comments to ICANN.

ICANN's dedicated section for domain name registrants (<https://www.icann.org/registrants>), states:

*“Throughout all of ICANN’s work, we endeavor to serve the global public interest, domain name registrants and end-users of the Internet by ensuring a secure and stable domain name system (DNS), all while promoting trust, choice, and competition in the industry. Domain name registrants are an integral component of the DNS; they are the entities or individuals that have acquired the right to use a domain name for a period of time via an agreement with a registrar or reseller.*

[...]

#### *Program Goals*

*Identifying and raising awareness about issues and challenges that registrants are facing.”*

- ICANN GDD: Raising Awareness About Registrant Issues and Challenges (presented at ICANN64 <https://64.schedule.icann.org/meetings/962101>) (accessed 3 July 2019)

The domain name registrants page provides links to encourage registrants to participate in ICANN policy, to provide public comments, and to get involved in the ICANN community.

### **III. Public comments submitted to ICANN**

Namecheap reviewed the approximately 3,538 public comments that were submitted in response to the public comment proceedings for the renewal of the .org and .info registry agreements<sup>1</sup>. An analysis of the data shows that while a large number of commenters were Namecheap customers, a majority were not and represent a varied cross-section of internet users. Some key takeaways include:

1. 725 comments were submitted by Namecheap customers (20% of all comments)

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<sup>1</sup> Comments for the renewal of .biz and .asia registry agreements were reviewed, and were similar in content and support of maintaining price caps as the comments for the .org and .info agreements. They are not included in this analysis because many are duplicates comments submitted by the same commenters.



2. 3,474 comments supported maintaining the price caps (98%)
3. 9 comments supported removing the price caps (0.25%)
4. 450 comments were from nonprofits (13%)
5. 1,197 comments were from domain name registrants with domains in the .org, .info, or .biz TLDs (34%)

Many more comments were submitted by domain name registrants. Although it is not possible to accurately determine how many came from registrants, it appears to have been a large majority of commenters.

A number of commenters raised concerns about including the Uniform Rapid Suspension (URS) in the .org registry agreement. Because the URS is being considered in other ICANN forums, Namecheap is not raising this as an issue during this Request for Reconsideration.

The public comments represent a truly global coalition. Although a majority of comments were from North American and Europe, there were comments from Africa, Asia, Australia, and South America. This represents all continents except Antarctica. The comments from Africa were particularly poignant, pleading with ICANN to help maintain a level playing field for them to be able to grow businesses.

Many nonprofits (which will be directly impacted by the removal of the price caps) submitted comments. They represent an incredible diversity of organizations. Below is a summary of the types of organizations that submitted comments, including multiple organizations of the same type. They include:

Advocacy
Aging
Agriculture
Animal Rescue
Arts
Association
Aviation
Charity (20)
Chess
Civic
Club
Community group
Consumer protection
Education (47)
Emergency response

Environmental protection (16)
Government agency (10)
Health
Historical society
Housing
Human Trafficking
Humanitarian
Industry organization
Job support
Justice
Library (6)
Media (4)
Medical (7)
Meditation
Mentoring
Model train
Motorcycle club
Music (8)
Networking
Open source software
Policy
Poverty
Professional
Publishing
Religious (69)
Research
Sailing
Science
Scouting
Service
Social
Software
Sports
Suicide prevention
Support
Support for the disabled (4)
Surgeons

Technology
Theater
Trade group
Trade organization
Transportation
Veterans support
Voting rights
Wellness
Youth

Contained within the comments are appeals to maintain price caps to ensure the survival of organizations that have extremely limited resources:

"[removing the price cap] will negatively affect nonprofit organizations who struggle to survive as it is"

"A rise in any administrative costs means I give less money to sick and disabled children."

"Every dollar you take from us doesn't get to the people who need it."

"A significant increase in the price of our domain would diminish our ability to offer these benefits and threaten our survival."

"Why, in God's name, would anyone decide that .org domains in particular should be a market free-for-all?"

"Every \$1 in increased prices on the 10+ million .org domain users would generate more revenue each year than is utilized by all but the top one-percent of charitable nonprofits. Each one-dollar hike in costs per domain would divert more than \$10 million from nonprofit missions for the enrichment of the monopoly. By anyone's estimate, this money would be better spent delivering an additional 1,600,000 meals by Meals on Wheels to seniors to help maintain their health, independence and quality of life. Or \$10 million could enable nonprofits to provide vision screenings for every two- and three-year-olds in California. Or pay for one million middle school students to attend performances of "Hamilton" or "To Kill a Mockingbird". Nonprofits should not need to choose between paying for a domain name and helping people."

Some of the nonprofits that submitted comments provide truly vital services, helping the most disadvantaged people in the world. This includes organizations that:

- combat human trafficking

- work with indigenous and aboriginal communities in lesser developed regions,
- help prevent suicide
- provide resources for sick and disabled children
- provide support for people with life-threatening medical conditions
- provide food, shelter, and education to orphan children in Africa
- provide free VPN service for areas that struggle with government censorship of the internet
- help farmers in South America expand their businesses

When reviewing all of the comments, some common themes were provided by a number of commenters:

- using a .org domain name is critical to their nonprofit: it is well-known, safe, and trusted.
- many have been using their .org domain for many years, and the cost and risk of moving to another TLD (e.g. losing search engine rankings, notifying the public of the new TLD, etc) causes great concern.
- they do not want to use another TLD, because .org is known to be for nonprofits. There are no equivalent TLDs that have the established reputation of .org.
- if prices increase too much, they might abandon using a domain name in order to migrate to another platform that is outside of ICANN's remit (and would include price certainty). This includes relying solely upon social media or mobile apps.
- there was concern that ICANN was captured by Public Interest Registry (PIR), in that the removal of the price cap only benefits PIR and not registrants in .org or the internet in general.<sup>2</sup>

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<sup>2</sup> Namecheap notes that under the base registry agreement that now covers .org, .info, and other legacy TLDs, registry operators may actually pay **more** fees to ICANN than under the previous agreements. The base agreement includes quarterly fees due to ICANN of US\$6,250 (plus US\$0.25 per domain transaction fee). See Section 6.1 of the registry agreement. The quarterly fee was not present in the prior registry agreements. It is telling that while under the current budget pressure, ICANN did not highlight the additional US\$25,000 that each registry operator would have to pay to ICANN annually under the new agreements (and did not consider

- questions why unrestricted price increases should be considered because at this point PIR is maintaining the .org registry and not undertaking development initiatives that would require additional resources.

- concern that removing the price cap for .org would also lead to removing the price cap for the .com registry agreement (which is subject to renewal in 2024, is the largest TLD by far, and because it is commercial in nature, is more likely to lead to price increases).

#### **IV. ICANN org's response to public comments**

In ICANN org's analysis of the public comments, ICANN rejects all of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence:

"There are now over 1200 generic top-level domains available, and all but a few adhere to a standard contract that does not contain price regulation. Removing the price cap provisions in the .org Registry Agreement is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market."

<https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf> (accessed 3 July 2019)

ICANN then goes on to state that any price increases would require 6 months advance notice and that registrants could renew domains for 10 years at that point.

The generalizations in ICANN org's analysis ignores significant information that is contrary to its sweeping conclusions:

1. The TLD .org is the 3<sup>rd</sup> largest, with over 10 million domains. This is the equivalent number as the top 10 new gTLDs by volume. The TLD .org thus commands a large share of the TLD space, and as suggested by the Registrar Stakeholder Group (RrSG) comment, additional analysis is needed to determine whether this market share can result in uncompetitive practices.

2. The TLD .org was established in 1985. It is universally known, associated with nonprofit use, and has an excellent reputation.

3. Changing domains for an established entity can be a cumbersome and costly

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how registry operators would either absorb this cost or pass this cost to registrars or domain name registrants).

process, often with negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill).

4. TLDs are not interchangeable as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not usable by nonprofits (e.g. trademarks, geographic, restricted for certain uses). Additionally, a number of TLDs are whimsical (e.g. .rocks or .ooo) or targeted to certain uses (e.g. .horse or .motorcycles) and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .org.

5. While there are additional TLDs for nonprofits (launched beginning in 2015 by PIR), there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .org). According to ICANN's monthly reports for March 2019 (at <https://www.icann.org/resources/pages/registry-reports>), the TLDs have the following domain totals:

.ngo<sup>3</sup>: 3,812

.ong<sup>4</sup>: 3,812

.संगठन (.xn--i1b6b1a6a2e)<sup>5</sup>: 1,323

.机构 (.xn--nqv7f)<sup>6</sup>: 1,291

.opr (.xn--c1avg)<sup>7</sup>: 2,317

6. There are some concerns higher levels of abuse exists in new gTLD domains (which decreases the value of new gTLDs in general). This includes (but is not limited to) higher levels of spam (<https://www.techrepublic.com/article/rampant-spam-falling-registrations-show-new-gtlds-have-limited-business-value/>). Additionally, ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs: while new gTLDs represent 12% of total domains, they comprise 52% of domains identified with security threats (see ICANN DAAR report from January 2019 at <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>).

7. Universal acceptance (UA)- including for new gTLDs- continues to be a high

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<sup>3</sup> NGO stands for "non-governmental organization"

<sup>4</sup> ONG is the equivalent of NGO in some languages including French, Spanish, and Portuguese (<https://pir.org/pir-files-applications-to-create-and-manage-ngo-and-ong-domains/>)

<sup>5</sup> the equivalent of .org in Devanagari

<sup>6</sup> the equivalent of .org in Chinese

<sup>7</sup> the equivalent of .org in Russian

priority for ICANN org. ICANN's Board has made improving and promoting UA and Internationalized Domain Name (IDN) implementation one of five strategic priorities for FY21-FY25. (<https://uasg.tech/2018/12/icann-further-commits-to-universal-acceptance-of-domain-names-and-email-addresses/>). Due to issues with universal acceptance, it is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name.

## **V. Conclusion**

ICANN's Commitment claims that it will seek input from the public, and always act in the benefit of the public. ICANN's Core Values allege that ICANN will seek to determine the global public interest to strike a balance and avoid capture. Additionally, ICANN appears to use the public comment process to obtain community feedback for items such as the renewal of legacy TLD registry agreements, and states that such comments will be considered and incorporated into ICANN actions. Furthermore, ICANN org actively encourages regular internet users to be involved in such processes.

Based upon ICANN org's action in the renewal of the .org and other legacy TLD registry agreements, it is clear that ICANN has failed to abide by its Commitment, Core Values, and public statements. The ICANN org will decide whether to accept or reject public comment, and will unilaterally make its own decisions- even if that ignores the public benefit or almost unanimous feedback to the contrary, and is based upon conclusory statements not supported by evidence. This shows that the public comment process is basically a sham, and that ICANN org will do as it pleases in this and other matters. It is a concern not only for the renewal of the .org and other legacy TLD registry agreements being renewed in 2019, but an even greater concern for the upcoming renewal of the .com registry agreement- as well as other vital policy issues under consideration by ICANN now and in the future.

It is disappointing that when internet users got involved on a massive scale in ICANN processes, ICANN failed its Commitments and Core Values by completely rejecting their feedback. ICANN org should revise all legacy TLD registry agreements to include the now missing price caps, otherwise it is clear that ICANN does not follow its Commitments, Core Values, nor does it serve the greater public good.

### **9. What are you asking ICANN to do now?**

Namecheap requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs.

### **10. Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.**



Namecheap is an ICANN-accredited domain name registrar, and as indicated above, unrestricted price increases will have a direct impact on Namecheap's domain registration business as well as additional services (e.g. domain hosting). Namecheap is additionally filing this Reconsideration Request on behalf of the 725 Namecheap customers and internet users that submitted public comments stating how they will be harmed by removing the price cap, and who all likely lack the knowledge about ICANN processes to submit their own Reconsideration Requests. All of Namecheap's customers, as well as the internet community as a whole, will be harmed by uncertainty of price increases, or will be further harmed when prices increase for .org or other legacy TLDs after price caps are removed.

Maintaining the historical price caps will ensure that prices for .org and other legacy TLDs will be predictable and not harm the greater internet population.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

No

**11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.**

Although the resulting impact will be different for Namecheap and domain name registrants, all of them will be negatively impacted by the uncertain threat of price increases without price caps, or will be actually harmed when prices increase in .org and other legacy TLD once price caps are removed.

**12. Are you bringing this Reconsideration Request on an urgent basis pursuant to Article 4, Section 4.2(s) of the Bylaws?**

Yes

No

**12a. If yes, please explain why the matter is urgent for reconsideration.**

**13. Do you have any documents you want to provide to ICANN?**

No.

**Terms and Conditions for Submission of Reconsideration Requests**

Reconsideration Requests from different Requestors may be considered in the

same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

The BAMC shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The BAMC may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The BAMC's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

Hearings are not required in the Reconsideration Process; however, Requestors may ask for the opportunity to be heard. The BAMC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BAMC's decision on any such request is final.


For all Reconsideration Requests that are not summarily dismissed, except where the Ombudsman is required to recuse himself or herself and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request. The BAMC shall make a final recommendation to the Board with respect to a Reconsideration Request following its receipt of the Ombudsman's evaluation (or following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable).

The final recommendation of the BAMC shall be documented and promptly (i.e., as soon as practicable) posted on the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en> and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BAMC's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the ICANN Reconsideration Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the BAMC's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

The ICANN Board shall not be bound to follow the recommendations of the BAMC. The ICANN Board's decision on the BAMC's recommendation is final

and not subject to a Reconsideration Request.

By submitting my personal data, I agree that my personal data will be processed in accordance with the ICANN [Privacy Policy](#), and agree to abide by the website [Terms of Service](#).

  
Signature

07/12/2019  
Date

Richard Kirkendall  
Print Name

## Substantive Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2

This substantive evaluation of Request for Reconsideration (“RFR”) 19-2 by the ICANN Ombudsman is required under the Paragraph 4.2(l) of the current ICANN Bylaws (“Bylaws” (as amended July 22, 2017)).

Under ICANN Bylaws 4.2(c), a Requestor can bring a Request for Reconsideration concerning an action or inaction as follows:

### Section 4.2. RECONSIDERATION...

(c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.

Unpacking the above language, did an action (or inaction – in other words an action that could have been taken which was not taken) contradict or violate ICANN’s Mission or established policy (including the Bylaws and relevant California laws<sup>1</sup>)? Or, was an action taken (or not taken) without consideration of material information, or was it the result of reliance on false or inaccurate relevant information? In providing the Board Accountability Mechanism Committee (“BAMC”) and the ICANN Board of Directors a “substantive evaluation” of a Request for Reconsideration, the Ombudsman must look at the substance of what is being requested in the Request, and of course at the actions (or inaction) for which the Requestor seeks Reconsideration.

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<sup>1</sup> While laws of a state or country are not mentioned explicitly in Bylaws Section 4.2, the Mission of a California public benefit corporation includes implicitly abiding by the relevant laws: here those are the applicable corporate laws pertinent to the governance of the corporation. If an action or inaction clearly is in violation of California law, it is improper. Similarly, the word “Commitments” suggests the commitment ICANN makes to be law abiding, especially of the laws of the State wherein and whereby it was formed, where it is headquartered, and where much of its operation takes place.

Request for Reconsideration 19-2 was filed by Namecheap, Inc. (“Requestor”) on July 12<sup>th</sup>, 2019, seeking reconsideration of ICANN organization’s renewal of the Registry Agreements with Public Interest Registry (“PIR”) and Afilias Limited (“Afilias”) for the .org and .info top-level domains (TLDs), respectively (collectively, the .org/.info renewed Registry Agreements are “Renewal Registry Agreements”), insofar as the renewals eliminated “the historic price caps” on domain name registration fees for .org and .info. The Requestor claims that ICANN org’s “decision to ignore public comments to keep price caps in legacy TLDs is contrary to ICANN’s Commitments and Core Values, and ICANN should reverse this decision for the public good.”

The Renewal Registry Agreements (RA) (and their Addenda) that are at the heart of this Reconsideration Request can be found here:

<https://www.icann.org/resources/agreement/org-2019-06-30-en> and <https://www.icann.org/resources/agreement/info-2019-06-30-en>.

The history of these RAs (which is detailed on the public comments pages) may be helpful to explain why and how these negotiations came about. [<https://www.icann.org/public-comments/org-renewal-2019-03-18-en> and <https://www.icann.org/public-comments/info-renewal-2019-03-18-en>]

The Registries for these two historic and significant Top-Level Domains (TLDs) are Public Interest Registry (PIR) (for .org) and Afilias (for .info), (the former is a Pennsylvania non-profit corporation and the latter is a Pennsylvania corporation both are the “Registry Operators”). ICANN and the Registry Operators each bilaterally negotiated Registry Agreement renewals with ICANN org. ICANN and the Registry Operators “agreed to implement the incorporation of unique legacy-related terms of .org (and .info) through an ‘Addendum’ to the Registry Agreement.”

[<https://www.icann.org/resources/agreement/org-2019-06-30-en>]

The initial Registry Agreements for .org and .info were due to expire on June 30<sup>th</sup>, 2019. In anticipation of that nearing expiration date, ICANN and PIR, and ICANN and Afilias, bilaterally negotiated renewals of their respective Registry Agreements. The proposed renewals were based on ICANN’s current Base gTLD Registry Agreement.

The Addendum allowed the Registry Operator to renew with “unique terms” included via the Addendum. The reasons ICANN and the Registry Operators were willing to renew with unique terms may have to do with the historical nature of these TLDs, their size, and the fact that in the case of .org, a vast number of non-profits and public interest entities are registered thereunder (ICANN itself is icann.org). The .org TLD is currently the third largest TLD, with at present more than 10 million registrants, and .info is the fourth largest (with ~4.65 million registrants as of May 2019).<sup>2</sup>

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<sup>2</sup> The TLDs .com and .net are the two largest according to the latest statistics on Statista. [<https://www.statista.com/statistics/262947/domain-numbers-of-the-ten-largest-top-level-domains/>]

It's no understatement to note that regarding the history of Internet domains, putting all TLDs in context over the past 30 odd years, the three TLDs .org, .info, and .biz, (plus .com and .net), comprise the most important, most recognized, and just *most* period.

Viewed separately or together, these TLDs are *the most significant* TLDs; thus, it is not surprising that ICANN would take time and care to treat them differently in terms of their renewals, and be willing to renew them on unique terms. The removal of price controls brings these renewals in line with the current Base gTLD Registry Agreements, creating potential conformity for all (or almost all) TLD agreement terms going forward.

When bilateral renewal negotiations were finished, ICANN org posted the proposed, bilaterally negotiated renewal of the unique .org Registry Agreements for public comment (from March 18<sup>th</sup>, 2019 through April 29<sup>th</sup>, 2019).

According to the Staff Report of Public Comment Proceeding ("Staff Report") which was posted on June 3<sup>rd</sup>, 2019, ICANN received 3,200+ submissions during the public comment period for .org alone. (The Staff Report is available at <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>).

The Staff Report notes this number of comments is comparable to a prior .org Registry Agreement renewal comment period in 2006, where over 2,000 comments were received. All of the present comments were submitted through an ICANN org public comment portal requiring human interaction; yet many of these comments seem clearly to be computer generated that is to say, they may be "comments" in some way, shape or form, but a vast number of comments are identical, with only the email address of the comment submitter changing. A brief search on the Internet identified one source of recurring comments to be: <https://www.internetcommerce.org/comment-org/> (Web page accessed Sept. 7<sup>th</sup>, 2019).

As far as comments go for ICANN, 3200+ appears to be quite a sizeable number. But, seeing as how the public comments can be filled out and submitted electronically, it is not unexpected that many of the comments are, in actuality, more akin to spam.

After the public comment period closed, ICANN Staff prepared the Staff Report, which was circulated to the ICANN Board, and then subsequently made available to the public at the beginning of June 2019. All Board Directors could access all of the public comments, as could *anyone* (they live online here: <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>). Given the significance of these Legacy TLDs, the Board was briefed about the negotiations in January 2019; subsequently (in June of 2019) the Board was briefed about the public comments and the decision taken by ICANN Staff and the President and CEO ("CEO") to go ahead with the renewals under the published terms.

Following consultation with the Board, ICANN published correspondence affirming that renewal of TLDs by the CEO and Staff continues to be a proper delegation of authority by the Board to the CEO and Staff.

[\[https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf\]](https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf)

What may not be understood by the Community is that ICANN's Board delegated such authority to negotiate and renew Registry Agreements to the CEO and Staff long ago, utilizing the executive authority resident in the Chief Executive and its powers:

#### **Section 15.4. PRESIDENT**

The President shall be the Chief Executive Officer (CEO) of ICANN in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio Director, and shall have all the same rights and privileges of any Director. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.

They call these powers "Executive" for a reason: the Staff and the officers under the CEO *execute* agreements, operations, etc. Indeed, the Board's delegation of authority to negotiate and enter into contracts is consistent with the Bylaws and the state laws of California, under and by which ICANN is formed as a corporation, as noted in Footnote 1 above (owing to Bylaws Section 4.2 inclusion of ICANN's "Mission" and "Commitments").

The most relevant Bylaw, however, is probably Bylaws Section 2.1:

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in [Section 7.1](#)).

The Board of Directors has specifically directed the CEO and Staff to negotiate and execute agreements especially Registry Agreements. This authority is periodically reaffirmed, as appears to have happened in June 2019. Indeed, *executing* Registry Agreements (and their renewals) are, to an extent, the *raison d'être* and life's blood of ICANN; it makes total sense that the Board gave and keeps giving this authority and power to the CEO and his Staff.

The Bylaws specifically authorize the CEO's power to enter into and execute contracts (including, of course, Registry Agreements). Per the Bylaws, Section 21.1:

#### **CONTRACTS**

The Board may authorize any Officer or Officers, agent or agents, to enter into any contract or execute or deliver any instrument in the name of and on behalf of ICANN, and such authority may be general or confined to specific instances.

Following the ICANN 65 Marrakech Policy Meeting in June 2019, the Registry Operators for the .org, .info and .biz TLDs executed their bilaterally negotiated Renewal Registry



Agreements with ICANN (on June 30<sup>th</sup>, 2019). The choice to include unique terms (or any terms, unique or not) properly belongs to the CEO and Staff, and all the included and proposed terms were bilaterally negotiated by Staff with the respective Registry Operators.

After investigation, it seems apparent to me that the CEO and Staff acted within the scope of the powers given them by the Board. The Board retained oversight, the Board was briefed on the negotiations for the renewals of the Registry Agreements for the Legacy TLDs, and the Board was well aware of the public comments related thereto. The Board could have directed the CEO and Staff *not* to renew under these terms had it thought that warranted. It decided not to do so.

The Board were well aware of the public comments, had been briefed on them by the CEO and Staff, and had been provided with the Staff Report summarizing them; they chose to let Staff go ahead and renew on the terms agreed to with the Registry Operators, and the renewal Registry Agreements were duly and timely executed. Nothing about this seems to me, based on my investigation and understanding of the relevant rules, laws and Bylaws, to be any kind of violation or dereliction of CEO and Staff's normal executive obligations and duties, or of the Mission, Core Values, or Commitments of ICANN.

Ultimately, my substantive evaluation of this Request is that the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws). I have more to say about all this in the "companion" Substantive Evaluation of Reconsideration Request 19-3 (see Annex 1), which relates to other terms of these same renewal Registry Agreements (and which I have submitted per the Bylaws on the same day as I submitted this Evaluation: September 7<sup>th</sup>, 2019).

What Requestor set forth and requests in Request for Reconsideration 19-2 does not merit a recommendation by me to the BAMC or the Board to take the action Requestor requests, or to take any action at all.



**Via Email:**  
[correspondence@icann.org](mailto:correspondence@icann.org)  
[ombudsman@icann.org](mailto:ombudsman@icann.org)  
[herb.waye@icann.org](mailto:herb.waye@icann.org)

September 12 2019

Mr. Herb Waye  
Ombudsman  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, California  
90094-2536, USA

Dear Mr. Waye:

**Re: Your Response to Reconsideration Request 19-2**

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The position of Ombudsman has a crucial role within an organization and requires respect for stakeholders, sound judgment, and neutrality.

On or about September 7, 2019, in your position as ICANN Ombudsman, you issued a “Substantive Evaluation” of NameCheap, Inc.’s Request for Reconsideration wherein you made ill-informed and disparaging comments about members of the ICANN community.

On Page 3 of your “Substantive Evaluation” (“SE”) at Paragraph 6, you stated that “many of the [3200+] comments are, in actuality, more akin to spam”.

You also stated therein at Paragraph 5, that “many of these comments seem clearly to be computer generated—that is to say, they may be ‘comments’ in some way, shape or form, but a vast number of comments are identical, with only the email address of the comment submitter changing.” You further stated therein that “a brief search on the Internet identified one source of recurring comments to be: <https://www.internetcommerce.org/comment-org/> (Web page accessed Sept. 7th, 2019)”.

Your disparagement of public comments from concerned stakeholders, which were duly submitted through the ICANN comment portal, is deeply concerning, particularly for an Ombudsman. Furthermore, your misrepresentation of facts demonstrates a failure to reasonably inform yourself prior to reaching an ill-advised and incorrect conclusion.

There was an unprecedented groundswell of public opposition to the Proposed .org Renewal Registry Agreement as demonstrated by the 3,200 Comments which were properly submitted. Each of these comments expressed the genuine perspective of the person or organization that submitted the comment. Many of these Comments were from major non-profit organizations, community groups, small associations, religious organizations, environmental groups, academics, and individual registrants. One could reasonably conclude that these Comments are indicative of the tens of thousands of other individuals and organizations with similar concerns that either were not aware of the Comment Period or who did not take the time and trouble to submit a Comment.

You however, attempted to denigrate and dismiss the volume of Comments on the purported basis of many of them being “spam”. You attempted to justify your conclusion on the basis that many of the comments were, according to you, “computer generated” and were “identical, with only the email address of the comment submitter changing.” This is misleading.

As a way to facilitate engagement with ICANN by the millions of .org registrants who would be harmed by the terms of the .org renewal agreement drafted by ICANN staff, and who are largely unfamiliar with ICANN’s public comment procedure and who may be intimidated by what can only be construed as a user *un*-friendly procedure requiring individual email correspondence on complex policy matters, the Internet Commerce Association (“ICA”) established a web page which facilitated a user-friendly and simple way for concerned stakeholders to make their voice heard. Any interested person could use the user-friendly ICA form to send a Comment to ICANN. Hundreds and perhaps thousands of individuals on their own initiative used the comment form as an aid to participating in the ICANN comment process. The vast majority of Commenters who used the ICA web page facility had no affiliation with the ICA and were unknown to the ICA.

The form allowed Commenters to write their own original Comment, or to choose from a selection of possibly applicable comments, or to create a comment from a combination of both. This is something that ICANN itself should have done long ago, and indeed ICANN is currently seeking feedback from stakeholders about changing the current procedure for submitting comments. In the ICANN survey (See; <http://input.icann.org/app/survey/response.jsp>), ICANN asks in part, “Would you (or a group you directly contribute to) respond more often to Public Comments if the consultation included short and precise questions regarding the subject matter in a Survey Monkey or similar format?”

Accordingly, human interaction was present in each and every one of the Comments which were submitted via the ICA user-friendly form. Each person who used the form took the time and effort to submit the form and select the comments that they wished to make or used the form to submit their own comments. All followed the established procedures which do not exclude emails submitted through a user-friendly portal. Most of these Commenters were from outside of

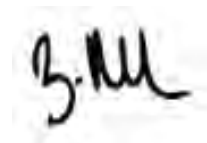
the usual ICANN community of Commenters, as they learned of this important issue from their registrar, from the press, from blogs, from online forums, and from each other.

Furthermore, contrary to your claim that these Comments “only [included] the email address”, and did not otherwise identify the sender, each Comment submitted generally included the Commenter’s name and email address, both of which are normally transmitted by a sender’s own email application as with all correspondence and Comments submitted by email in the usual course. This was not “spam” as you alleged. "Spam" is unwelcome, unsolicited commercial messages sent from an unknown source. Contrary to your mischaracterization, these Comments expressed the genuine opinions of individuals from the community that ICANN purports to serve, and who took the trouble to share their viewpoints to better inform ICANN's decision-making process, only to find their views scorned and disregarded.

Rather than dismiss and effectively disenfranchise thousands of Commenters who duly expressed their views using this method, an Ombudsman should have embraced them and encouraged them. As you yourself admit, an Ombudsman’s job is to listen. You failed to listen or were otherwise determined not to listen. Instead, you dismissed and deprecated legitimate Comments from members of the public and that is a disappointing dereliction of duty for someone in your position. In our view, your mischaracterization of much of the Comments submitted by the public as “spam” ostensibly submitted by spammers, calls into question your ability to fairly and impartially carry out your primary function which is to encourage and respect stakeholders who express themselves to ICANN. Moreover, you failed to conduct any meaningful research prior to reaching your conclusions on the nature of the Comments, other than apparently by visiting a web page. You could have and should have made inquiries of the ICA which would have informed you of the actual nature of its facilitation efforts.

Under the circumstances, we think that it is incumbent upon you to apologize to the numerous people who submitted these Comments and to retract your ill-advised statements. The Ombudsman should seek ways to increase public participation, particularly from those who are underrepresented or unengaged in ICANN's policy development, rather than devaluing and dismissing their contributions to the policy development process.

Yours truly,  
**INTERNET COMMERCE ASSOCIATION**



Per:  
Zak Muscovitch  
General Counsel, ICA

**PROPOSED DETERMINATION  
OF THE ICANN BOARD OF DIRECTORS<sup>1</sup>  
RECONSIDERATION REQUEST 19-2  
3 November 2019**

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The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization’s 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afiliás Limited (Afiliás) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs), insofar as the renewals eliminated “the historic price caps” on domain name registration fees for .ORG and .INFO.<sup>2</sup> The Requestor claims that ICANN org’s “decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN’s Commitments and Core Values, and ICANN should reverse this decision for the public good.”<sup>3</sup>

Specifically, the Requestor claims that the .ORG/.INFO Renewed RAs are contrary to:

- (i) ICANN org’s commitment to “seek input from the public, for whose benefit ICANN in all events shall act.”<sup>4</sup>
- (ii) ICANN org’s Core Value of “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.”<sup>5</sup>
- (iii) ICANN org’s Public Comment Opportunities page, which states that “Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential

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<sup>1</sup> The Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee. See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en>. Here, the majority of the BAMC members have recused themselves from voting on this matter due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2 so the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC.

<sup>2</sup> Request 19-2, § 3, at Pg. 2.

<sup>3</sup> *Id.* § 8, at Pg. 3.

<sup>4</sup> *Id.* § 8, at Pg. 4.

<sup>5</sup> *Id.* § 8, at Pg. 4.

adoption,” and is “used to guide implementation work, reviews, and operational activities of the ICANN organization.”<sup>6</sup>

- (iv) ICANN org’s statements concerning its call for Public Comment that the “purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement.”<sup>7</sup>

The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.<sup>8</sup>

The Requestor “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs.”<sup>9</sup>

## **I. Brief Summary.**

PIR is the registry operator for the .ORG TLD.<sup>10</sup> ICANN org and PIR entered into an RA on 2 December 2002 for the continued operation of the .ORG gTLD, which was renewed in 2006 and 2013.<sup>11</sup> ICANN org and Afilias first entered into an RA on 11 May 2001 for the operation of the .INFO gTLD, which was renewed in 2006 and 2013.<sup>12</sup> Before the recent renewals, the RAs for .ORG and .INFO included price caps, which limited the initial prices and allowable price increases for registrations.<sup>13</sup> Both RAs were scheduled to expire on 30 June 2019.

In anticipation of the 30 June 2019 expiration, ICANN org bilaterally negotiated renewals to the agreements with each registry operator. The proposed renewals were based on

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<sup>6</sup> *Id.* § 8, at Pg. 4.

<sup>7</sup> *Id.*, § 8, at Pg. 4.

<sup>8</sup> *Id.*, § 8, at Pg. 10.

<sup>9</sup> *Id.*, § 9, at Pg. 12.

<sup>10</sup> Public Comment Proceeding, Proposed Renewal of .ORG RA, 18 March 2019 (2019 .ORG RA Public Comment Proceeding), <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

<sup>11</sup> *Id.*

<sup>12</sup> Public Comment Proceeding, Proposed Renewal of .INFO RA, 18 March 2019 (2019 .INFO RA Public Comment Proceeding), <https://www.icann.org/public-comments/info-renewal-2019-03-18-en>.

<sup>13</sup> 2002 .ORG RA, <https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en>; 2001 .INFO RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en>.

ICANN org’s base generic TLD Registry Agreement updated on 31 July 2017 (Base RA), modified to account for the specific nature of the .ORG and .INFO gTLDs.<sup>14</sup> As a result, the proposed Renewed RAs’ terms were substantially similar to the terms of the Base RA.

From January 2019 to June 2019, ICANN Staff briefed and met with the Board several times regarding the proposed .ORG/.INFO Renewed RAs.<sup>15</sup> On 18 March 2019, ICANN Staff published the proposed .ORG/.INFO Renewed RAs for public comment to obtain community input on the proposed renewals. ICANN Staff described the material differences between proposed renewals and the current .ORG and .INFO RAs. These differences included removal of limits on domain name registration fee increases that had been in prior .ORG and .INFO RAs. ICANN Staff explained that the change would “allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA],” while “tak[ing] into consideration the maturation of the domain name market and the goal of treating the Registry Operator[s] equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].”<sup>16</sup>

and .INFO agreements.<sup>17</sup> The comments predominantly related to three themes: (1) the proposed removal of price cap provisions; (2) inclusion of certain rights protection mechanisms

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<sup>14</sup> See 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding. The RA for the operation of .BIZ was also set to expire on 30 June 2019; as a result of bilateral negotiations with the registry operator for .BIZ and after considering public comments, ICANN org and the registry operator for .BIZ entered into a Renewed RA for .BIZ that was based on (and therefore substantially similar to) the Base RA. See <https://www.icann.org/resources/agreement/biz-2019-06-30-en>.

<sup>15</sup> Letter from Namazi to Muscovitch, 26 July 2019, at Pg. 2, <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>.

<sup>16</sup> 2019 .ORG RA Public Comment Proceeding. New gTLDs are TLDs released as part of ICANN org’s New gTLD Program. See <https://newgtlds.icann.org/en/about/program>. Legacy gTLDs are gTLDs that existed before ICANN org’s New gTLD Program. .ORG and .INFO are legacy TLDs.

<sup>17</sup> Report of Public Comments, .ORG, at Pg. 3, <https://www.icann.org/en/system/files/report-comments-org-renewal-03jun19-en.pdf>; Report of Public Comments, .INFO, at Pg. 3, <https://www.icann.org/en/system/files/report-comments-info-renewal-03jun19-en.pdf>.



(RPMs), including the Uniform Rapid Suspension (URS) rules; and (3) the RA renewal process.<sup>18</sup>

ICANN Staff analyzed the public comments, including those addressing the proposed removal of price cap provisions, in its Report of Public Comments.<sup>19</sup> It concluded that removing the price cap provisions was “consistent with the Core Values of ICANN org as enumerated in the Bylaws,” insofar as removing the price cap provisions would “promote competition in the registration of domain names,” and enabled ICANN org to “depend upon market mechanisms to promote and sustain a competitive environment in the [Domain Name System (DNS)] market.”<sup>20</sup> ICANN org also noted that the Base RA protected existing registrants’ pricing by requiring the registry operator to: (1) give registrars six months’ advance notice of price changes; and (2) allow registrants to renew their domain name registrations for up to 10 years *before* those price changes take effect.<sup>21</sup> ICANN Staff then noted that it would “consider the feedback from the community on this issue,”<sup>22</sup> “and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”<sup>23</sup>

Following consultation with the ICANN Board of Directors and with the Board’s support, on 30 June 2019, ICANN Staff announced that it had executed the .ORG/.INFO Renewed RAs. The .ORG/.INFO Renewed RAs did not include price caps.<sup>24</sup>

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<sup>18</sup> Report of Public Comments, .INFO, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.

<sup>19</sup> ICANN org received some comments supporting removal of the price cap provision because “ICANN org is not and should not be a price regulator,” and because the Base RA would provide certain protections to current registrants. Report of Public Comments, .ORG, at Pg. 6.

<sup>20</sup> *Id.*, at Pg. 8.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, at Pg. 1.

<sup>24</sup> See ICANN org announcements: .ORG Renewed RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>; .INFO Renewed RA, <https://www.icann.org/resources/agreement/info-2019-06-30-en>.

On 12 July 2019, the Requestor filed Request 19-2, seeking reconsideration of the .ORG/.INFO Renewed RAs.

The Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that “the CEO and Staff acted within the scope of the powers given them by the Board,”<sup>25</sup> and that “no rules or duties of corporate governance were violated (including the ICANN Bylaws).”<sup>26</sup>

The Board has considered Request 19-2 and all relevant materials. Based on its extensive review of all relevant materials, the Board finds that reconsideration is not warranted because ICANN org’s execution of the .ORG/.INFO Renewed RAs was consistent with ICANN’s Bylaws, policies, and procedures, and ICANN Staff considered all material information prior to executing the .ORG/.INFO Renewed RAs.

## **II. Facts.**

### **A. Historic .ORG and .INFO RAs.**

On 2 December 2002, ICANN org and PIR entered into a RA for the continued operation of .ORG, which became effective in 2003.<sup>27</sup> ICANN org and Afilias first entered into a RA on 11 May 2001 for the operation of .INFO.<sup>28</sup> Both RAs included price caps.<sup>29</sup>

In 2006, ICANN org considered removing price caps from several legacy gTLDs, including .INFO and .ORG.<sup>30</sup> However, after reviewing over 2,000 comments from over 1,000 commenters, many opposing removal of the price caps, and at the Board’s direction, ICANN org

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<sup>25</sup> Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019, <https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en>.

<sup>26</sup> *Id.*

<sup>27</sup> 2019 .ORG RA Public Comment Proceeding; *see also* <https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en>; <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>.

<sup>28</sup> 2019 .INFO RA Public Comment Proceeding.

<sup>29</sup> 2002 .ORG RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>; 2001 .INFO RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en>.

<sup>30</sup> 2006 Public Comment of .BIZ, .INFO, .ORG, <https://www.icann.org/news/announcement-3-2006-07-28-en>.

renegotiated the .ORG and .INFO RAs to include price caps.<sup>31</sup> Following a public comment period for the revised RAs (which included price caps), on 8 December 2006, the Board approved .ORG and .INFO RAs with price caps (as proposed and posted during the public comment period for the revised RAs).<sup>32</sup>

B. The New gTLD Program and the Base RA.

In 2005, ICANN's Generic Names Supporting Organization (GNSO) undertook a policy development process to consider expanding the DNS by introducing new gTLDs.<sup>33</sup> In 2007, the GNSO concluded that "ICANN must implement a process that allows the introduction of new [gTLDs]."<sup>34</sup> Accordingly, ICANN org established and implemented the New gTLD Program, "enabling the largest expansion of the [DNS]."<sup>35</sup>

In 2009, ICANN org commissioned Professor Dennis W. Carlton to analyze "whether price caps... would be necessary to insure the potential competitive benefits" of new gTLDs.<sup>36</sup> Carlton concluded that price caps were "unnecessary to insure competitive benefits of the proposed process for introducing new [gTLDs]," and also noted that "competition among suppliers to attract new customers in markets characterized by switching costs [such as the

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<sup>31</sup> See Revised .BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, <https://www.icann.org/news/announcement-2006-10-24-en>.

<sup>32</sup> .ORG RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en>; .INFO RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en>.

<sup>33</sup> <https://newgtlds.icann.org/en/about/program>.

<sup>34</sup> GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, [https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm#\\_Toc43798015](https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm#_Toc43798015).

<sup>35</sup> <https://newgtlds.icann.org/en/about/program>.

<sup>36</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 4, March 2009 <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>. Professor Carlton has been a Professor of Economics at the Booth School of Business of The University of Chicago, and Co-Editor of the Journal of Law and Economics, Competition Policy International since 1984. *Id.*, at ¶¶ 1-2. He also served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, United States Department of Justice from October 2006 through January 2008. *Id.*, at ¶ 3. In 2014, Professor Carlton was designated Economist of the Year by Global Competition Review. <https://www.chicagobooth.edu/faculty/directory/c/dennis-w-carlton>. Professor Carlton previously served as Professor of Economics at the Massachusetts Institute of Technology. Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 1.

market for gTLDs] limits or eliminates the suppliers' [*i.e.*, the registry operators'] incentive and ability to act opportunistically."<sup>37</sup> He explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."<sup>38</sup>

Carlton performed his analysis during the Base RA development process.<sup>39</sup> That process included multiple rounds of public comment on the proposed Base RA, several months of negotiations, meetings with stakeholders and communities, and formal community feedback via a public comment forum.<sup>40</sup> The Base RA was established in 2013 and aligns with the GNSO's policy recommendations for new gTLDs.<sup>41</sup> Since 2014, ICANN org has worked with legacy gTLD registry operators to transition the agreements for legacy gTLDs to the Base RA as well, and several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in renewal agreements.<sup>42</sup> The Base RA does not contain price caps, but it "does contain requirements designed to protect registrants from a price perspective," including requirements that registry operators "provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals."<sup>43</sup> In addition, the registry operators must allow registrants

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<sup>37</sup> *Id.*, at ¶ 12.

<sup>38</sup> *Id.*

<sup>39</sup> See New gTLD Program gTLD Applicant Guidebook, Version 2012-06-04, Preamble, available for download at <https://newgtlds.icann.org/en/applicants/agb>.

<sup>40</sup> <https://www.icann.org/public-comments/base-agreement-2013-04-29-en>; see also 26 July 2019 Letter, at Pg. 1.

<sup>41</sup> 26 July 2019 Letter, at Pg. 1; see also GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, [https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#\\_Toc43798015](https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015).

<sup>42</sup> 26 July 2019 Letter, at Pg. 1.

<sup>43</sup> *Id.*

to renew for up to 10 years before implementing a price change, and subject to restrictions on discriminatory pricing.<sup>44</sup>

Using the Base RA for renewed legacy gTLDs without price cap provisions “is consistent with the gTLDs launched via the new gTLD program and will reduce ICANN org’s role in domain pricing.”<sup>45</sup> This promotes ICANN’s Core Values of “introduc[ing] and promot[ing] competition in the registration of domain names and, where feasible and appropriate, depend[ing] upon market mechanisms to promote and sustain a competitive environment in the DNS market.”<sup>46</sup>

The Base RA provides additional protections for the public benefit. For example, in 2015 the Board noted that the Base RA allows ICANN org to “designate an emergency interim registry operator of the registry for the TLD, which would mitigate the risks to the stability and security of the [DNS].”<sup>47</sup> Additionally, using the Base RA ensures that the Registry will use “uniform and automated processes, which will facilitate operation of the TLD,” and “includes safeguards in the form of public interest commitments in Specification 11.”<sup>48</sup>

The Board has also explained that transitioning legacy gTLDs to the Base RA “will provide consistency across all registries leading to a more predictable environment for end-users.”<sup>49</sup> The Base RA’s requirement that the registry operator only use ICANN accredited

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, at Pg. 2.

<sup>47</sup> Rationale for Board Resolution 2015.09.28.06 (renewal of .PRO RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e.rationale>; see also Rationale for Board Resolution 2015.09.28.04 (renewal of .CAT RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c.rationale>; Rationale for Board Resolution 2015.09.28.05 (renewal of .TRAVEL RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d.rationale>; 2019 .ORG RA, Art. 2, § 2.13, at Pg. 7, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>.

<sup>48</sup> Rationale for Board Resolution 2015.09.28.06; see also 2019 .ORG RA, Specification 11, at Pgs. 95-96, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>.

<sup>49</sup> Rationale for Board Resolution 2015.09.28.06.

registrars that are party to the 2013 Registrar Accreditation Agreement “will provide more benefits to registrars and registrants.”<sup>50</sup> Finally, the Board has noted that the Base RA “includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS,”<sup>51</sup> another public benefit.

C. The 2019 .ORG and .INFO RA Renewals.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.<sup>52</sup> Likewise, the .INFO RA with Afilias was renewed on 22 August 2013.<sup>53</sup>

In anticipation of the 30 June 2019 expiration of the 2013 .ORG and .INFO RAs, ICANN org bilaterally negotiated renewals with each registry operator. The proposed renewals were based on ICANN org’s Base RA, modified “to account for the specific nature[s]” of each TLD and as a result of negotiations between ICANN and the registry operators.<sup>54</sup> On 18 March 2019, ICANN org published the proposed .ORG/.INFO RAs for public comment to obtain community input on the proposed renewals. ICANN org published redline versions of the proposed renewal agreements against the Base RA, and identified the material differences between proposed renewals and the Base RA. ICANN org explained that

[i]n alignment with the [Base RA], the price cap provisions in the current .ORG [and .INFO] agreement[s], which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG [and .INFO] renewal agreement[s]. Protections for existing registrants will remain in place, in line with the [Base RA]. This change will not only allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> 2019 .ORG RA Public Comment Proceeding.

<sup>53</sup> 2019 .INFO RA Public Comment Proceeding.

<sup>54</sup> *See* 2019 .ORG RA Public Comment Proceeding ; 2019 .INFO RA Public Comment Proceeding.

equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].<sup>55</sup>

The public comment period for the .ORG/.INFO Renewed RAs opened on 18 March 2019 and closed on 29 April 2019.<sup>56</sup> During that time, ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG agreement,<sup>57</sup> and over 500 submissions in response to its call for comments on the proposed .INFO agreement.<sup>58</sup> The comments predominantly related to three themes: (1) the proposed removal of the price cap provisions; (2) inclusion of the RPMs; and (3) the RA renewal process.<sup>59</sup>

ICANN org detailed its analysis of the public comments concerning the .ORG/.INFO Renewed RAs—including those addressing the proposed removal of price cap provisions—in its Report of Public Comments.<sup>60</sup> ICANN org concluded that

[r]emoving the price cap provisions in the .ORG [and .INFO RAs] is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.<sup>61</sup>

ICANN org also noted that

the Base [RA] would also afford protections to existing registrants . . . [e]nacting this change will not only allow the .ORG renewal agreement to conform to the Base [RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry

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<sup>55</sup> 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.

<sup>56</sup> 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.

<sup>57</sup> Report of Public Comments, .ORG, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>.

<sup>58</sup> Report of Public Comments, .INFO, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf>.

<sup>59</sup> *Id.*, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.

<sup>60</sup> Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

<sup>61</sup> Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

operators of new gTLDs and other legacy gTLDs utilizing the Base [RA].<sup>62</sup>

ICANN org explained that it would “consider the feedback from the community on this issue,”<sup>63</sup> and then ICANN org would “consider the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”<sup>64</sup>

ICANN org reviewed and considered all of the comments submitted concerning the proposed .ORG/.INFO Renewed RAs,<sup>65</sup> then ICANN Staff briefed the ICANN Board on its analysis of the public comments during the Board workshop on 21-23 June 2019.<sup>66</sup> With support from the Board to proceed with execution of the proposed renewals and pursuant to the [ICANN Delegation of Authority Guidelines](#), on 30 June 2019, ICANN org executed the .ORG/.INFO Renewed RAs.<sup>67</sup>

#### D. The Request for Reconsideration and Ombudsman Report.

The Requestor submitted Request 19-2 on 12 July 2019.

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 19-2 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.<sup>68</sup>

After investigating, the Ombudsman concluded that “the CEO and Staff acted within the scope of the powers given them by the Board,”<sup>69</sup> and that “no rules or duties of corporate

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<sup>62</sup> Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

<sup>63</sup> Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

<sup>64</sup> Report of Public Comments, .ORG, at Pg. 1; Report of Public Comments, .INFO, at Pg. 1.

<sup>65</sup> 26 July 2019 Letter, at Pg. 2.

<sup>66</sup> 26 July 2019 Letter at Pg. 2.

<sup>67</sup> See ICANN org announcements: .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>; .INFO RA, <https://www.icann.org/resources/agreement/info-2019-06-30-en>.

<sup>68</sup> <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-ombudsman-action-redacted-27aug19-en.pdf>.

<sup>69</sup> Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019.



governance were violated (including the ICANN Bylaws).”<sup>70</sup> He determined that the “Board were well aware of the public comments” because ICANN Staff briefed the Board on the comments, and because the comments were publicly available, so Board members could have read each comment had they so desired.<sup>71</sup> Additionally, the Ombudsman concluded that “the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws).”<sup>72</sup>

E. Relief Requested.

The Requestor “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs.”<sup>73</sup>

**III. Issues Presented.**

The issues are as follows:

1. Whether ICANN Staff’s decision not to include price caps in the .ORG/.INFO Renewed RA contradicts ICANN’s Mission, Commitments, Core Values, or established ICANN policies; and
2. Whether ICANN Staff failed to consider material information when it executed the .ORG/.INFO Renewed RAs.

**IV. The Relevant Standards for Reconsideration Requests.**

Articles 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity “may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*, at Pg. 5. On 12 September 2019, the Internet Commerce Association (ICA) wrote to the Ombudsman, asserting that the Ombudsman “made ill-informed and disparaging comments about members of the ICANN community” in the Ombudsman’s evaluation. 12 September 2019 letter from Z. Muskovitch to H. Waye, <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-letter-ica-to-icann-ombudsman-12sep19-en.pdf>. The ICA asked the Ombudsman to “apologize to the numerous people who submitted these Comments and to retract [his] ill-advised statements.” *Id.*, at Pg. 3.

<sup>73</sup> Request 19-2, § 9, at Pg. 12.

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or Staff’s reliance on false or inaccurate relevant information.”<sup>74</sup>

The Board now considers Request 19-2’s request for reconsideration of Staff action<sup>75</sup> on the grounds that the action was taken in contradiction of ICANN’s Bylaws and without consideration of material information. The Board has reviewed the Request and now makes this proposed determination. Denial of a Request for Reconsideration of ICANN Staff action is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>76</sup>

## **V. Analysis and Rationale.**

### **A. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org’s Commitments.**

The Requestor claims that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org’s Commitment to “seek input from the public, for whose benefit ICANN in all events shall act.”<sup>77</sup>

The Requestor acknowledges that “ICANN [org] requested public comment regarding the changes to the .ORG registry agreement.”<sup>78</sup> It asserts, however, that ICANN org “reject[ed] all

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<sup>74</sup> Bylaws, Art. 4 §§ 4.2(a) and (c).

<sup>75</sup> The Requestor sought reconsideration of Board and Staff Action, and brought the Request on behalf of itself and “725 Namecheap customers and internet users.” *See* Request 19-2, § 2, at Pg. 2; *id.* § 10, at Pg. 12. Request 19-2 does not identify an action or inaction of the Board. Further, the Requestor’s claim on behalf of its customers is not sufficiently stated because it does not satisfy the requirement that the Requestor, not a third party, must have been adversely affected by the challenged action. Accordingly, the Board’s consideration is with respect to the Requestor’s challenge to Staff action.

<sup>76</sup> Bylaws, Art. 4 § 4.2(e).

<sup>77</sup> Request 19-2, § 8, at Pg. 4.

<sup>78</sup> *Id.* § 8, at Pg. 3.

of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence,” and as a result, “the public comment process is basically a sham.”<sup>79</sup> In sum, the Requestor claims that including price caps in the .ORG/.INFO Renewed RAs “ignore[d] the public benefit or almost unanimous feedback to the contrary.”<sup>80</sup>

The Requestor does not dispute that ICANN org “review[ed] and consider[ed] all 3,200+ comments received,”<sup>81</sup> and acknowledged that the removal of the price caps was “[a] primary concern voiced in the comments.”<sup>82</sup> ICANN Staff presented and discussed the “key issues raised in the public comment process and correspondence,” including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.<sup>83</sup> Further, as the Ombudsman noted, the Board was “well aware of the public comments.”<sup>84</sup>

The Reports of Public Comment were the result of ICANN Staff’s extensive analysis of the comments; consistent with ICANN Staff’s ordinary process for preparing the Report of Public Comment, ICANN Staff identified the main themes in the comments and summarized them, providing exemplary excerpts for each of those themes.<sup>85</sup> Neither the Bylaws, nor any ICANN policy or procedure, requires ICANN Staff to discuss each position stated in each comment. By the same token, there is no threshold number of comments about a topic that, if reached, requires ICANN Staff to address that topic in the Report of Public Comments. Even a single comment on a theme may merit inclusion in the report, under certain circumstances;

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<sup>79</sup> *Id.* § 8, at Pgs. 10, 12.

<sup>80</sup> *Id.* § 8, at Pg. 12.

<sup>81</sup> 26 July 2019 Letter at Pg. 2.

<sup>82</sup> Report of Public Comments, .ORG, at Pg. 3; Report of Public Comments, .INFO, at Pg. 3.

<sup>83</sup> 26 July 2019 Letter, at Pg. 2.

<sup>84</sup> Ombudsman Evaluation of Request 19-2, at Pg. 5.

<sup>85</sup> *See* Report of Public Comments, .ORG, at Pg. 3 (“This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor.”); Report of Public Comments, .INFO, at Pg. 3 (same).

likewise, a multitude of comments on a theme may merit little or no consideration in the report, under other circumstances.<sup>86</sup>

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a “sham” or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff’s careful consideration of the public comments—as reflected in its Report of Public Comments and discussion with the Board,<sup>87</sup> demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

Further, the Report of Public Comments demonstrates ICANN Staff’s belief that it was acting for the public benefit by “promot[ing] competition in the registration of domain names,” providing the same “protections to existing registrants” afforded to registrants of other TLDs, and treating “the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base [RA].”<sup>88</sup> There is no support for the Requestor’s assertion that ICANN Staff’s belief in this regard was based upon “conclusory statements not supported by evidence.”<sup>89</sup> ICANN org considered Professor Carlton’s 2009 expert analysis of the Base RA, and specifically his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.<sup>90</sup>

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<sup>86</sup> The Board acknowledges the ICA’s disagreement with the Ombudsman’s characterization of certain comments as “spam” and “computer generated.” 12 September 2019 Letter, at Pgs. 1-2. ICANN Staff acknowledged both the volume of comments submitted concerning the proposed .ORG/.INFO Renewed RAs and the issues they raised—including the removal of price cap provisions—without discounting the comments based on their apparent source. *See* Report of Public Comments, .ORG; Report of Public Comments, .INFO. Accordingly, the ICA’s arguments do not change the Board’s determination that reconsideration is not warranted here.

<sup>87</sup> 26 July 2019 Letter, at Pg. 2.

<sup>88</sup> Report of Public Comments, .ORG, at Pg. 8.

<sup>89</sup> Request 19-2, § 8, at Pg. 12.

<sup>90</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.

Finally, ICANN Staff was aware of the Board’s 2015 statements (made in the course of approving the migration of another legacy gTLD, .PRO, to the Base RA) that the Base RA as a whole benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end-users.<sup>91</sup>

In sum, the Requestor’s conclusory assertion that ICANN org did not act for the public benefit is unsupported and does not support reconsideration.

B. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org’s Core Values.

The Requestor asserts that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org’s Core Value of

[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.<sup>92</sup>

Contrary to the Requestor’s argument, ICANN org *did* seek broad, informed participation through the public comment process for the .ORG/.INFO Renewed RAs. As noted above, ICANN org considered the responses and other factors, including its commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,”<sup>93</sup> and its Core Values of “depending on market mechanisms to promote and sustain a competitive environment in the DNS market” where “feasible and appropriate,” and “[i]ntroducing and promoting competition in

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<sup>91</sup> See Rationale for Board Resolution 2015.09.28.06.

<sup>92</sup> Request 19-2, § 8, at Pg. 4.

<sup>93</sup> Bylaws, Art. 1, § 1.2(a)(v); *see also* 26 July 2019 Letter, at Pg. 1.

the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.”<sup>94</sup>

Moreover, the public comment process is but one of several channels for ICANN’s multistakeholder community to voice opinions. Members of the community may also voice their opinions in public meetings and through the final recommendations of supporting organizations, advisory committees, and direct correspondence with ICANN org. Accordingly, the multistakeholder community provides input to ICANN org in many ways, and ICANN org considers this input to ensure that all views have been taken into account during a decision-making process.

However, ICANN org’s Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN’s various communication channels. Here, ICANN org ultimately determined that ICANN’s Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same “protections to existing registrants” that are afforded to registrants of other TLDs, and treat registry operators equitably.<sup>95</sup> Further, the Base RA, which is incorporated in the .ORG/.INFO Renewed RA, “was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment.”<sup>96</sup>

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org’s transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by

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<sup>94</sup> Bylaws, Art. 1, § 1.2(b)(iii), (iv); *see also* 26 July 2019 Letter, at Pg. 2.

<sup>95</sup> Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

<sup>96</sup> 26 July 2019 Letter, at Pg. 1.

migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org’s Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

The Requestor asserts that reconsideration is warranted because omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org’s statement on its Public Comment Opportunities page that “Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption,” and is “used to guide implementation work, reviews, and operational activities of the ICANN organization.”<sup>97</sup> The Requestor asserts that omitting the price caps is inconsistent with ICANN org’s statement that the “purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement.”<sup>98</sup>

Ultimately, ICANN org’s decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to “obtain community input” or “use[]” the public comment “to guide implementation work” of ICANN org.<sup>99</sup> To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board’s support, to pursue, the global public interest.

Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).<sup>100</sup> ICANN org’s general description of the purpose of the public comment process is

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<sup>97</sup> Request 19-2, § 8, at Pg. 4.

<sup>98</sup> *Id.*

<sup>99</sup> *See id.*

<sup>100</sup> Bylaws, Art. 4 § 4.2(c). The challenged action must adversely affect the Requestor as well. *Id.*

not a Commitment, Core Value, established policy, nor part of ICANN org’s Mission.

Accordingly, even if ICANN org’s decision to execute the .ORG/.INFO Renewed RAs without price caps contradicted these statements—and it did not, as explained in Section V.A above — this inconsistency could not form the basis of a Reconsideration Request.

D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

The Requestor asserts that ICANN org’s analysis of the proposed removal of price caps “ignores significant information that is contrary to its sweeping conclusions.”<sup>101</sup> Specifically, the Requestor asserts that ICANN org’s analysis ignores that:

1. .ORG “is the 3rd largest” TLD, and “additional analysis is needed to determine whether this market share can result in uncompetitive practices,”<sup>102</sup>
2. .ORG “was established in 1985,” “is universally known, associated with nonprofit use, and has an excellent reputation,”<sup>103</sup>
3. It can be “a cumbersome and costly process” for an established entity to change domain name, and “often” leads to “negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill).”<sup>104</sup>
4. “TLDs are not interchangeable, as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not useable by nonprofits . . . or targeted to certain uses . . . and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .ORG.”<sup>105</sup>
5. Although some new gTLDs are targeted to nonprofits, “there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .ORG).”<sup>106</sup>

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<sup>101</sup> Request 19-2, § 8, at Pg. 10.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*, at Pg. 10-11.

<sup>105</sup> *Id.*, at Pg. 11.

<sup>106</sup> *Id.*



6. “There are some concerns [that] higher levels of abuse exists in new gTLD domains . . . . ICANN’s own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs.”<sup>107</sup>
7. “[I]t is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name.”<sup>108</sup>

The Report of Public Comments for the .ORG Renewed RA makes clear that ICANN org *did* consider some of these concerns. Specifically, with respect to Item 1, ICANN Staff noted that commenters “questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections.”<sup>109</sup> With respect to Item 2, ICANN Staff acknowledged that commentators noted that “.ORG was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations.”<sup>110</sup> With respect to Items 3, 4, 5, and 7, ICANN Staff acknowledged “concerns about the burden and costs associated with moving [a] web presence to another TLD,” along with comments characterizing .ORG as “the most appropriate registry for a charity or non-profit.”<sup>111</sup> Accordingly, the Requestor’s argument that the information about these six “concerns” was not considered or was ignored is incorrect and therefore does not support reconsideration.

With respect the Requestor’s assertion that “ICANN’s own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs,”<sup>112</sup> the Requestor mischaracterizes the cited ICANN report. As the Requestor notes, the 2019 Domain Abuse Activity Reporting (DAAR) report concluded that 48.11% of the “domains identified as security threats . . . were in legacy

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<sup>107</sup> *Id.* citing <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>.

<sup>108</sup> *Id.*, at Pg. 11-12.

<sup>109</sup> Report of Public Comments, .ORG, at Pg. 5.

<sup>110</sup> *Id.*, at Pgs. 3-4.

<sup>111</sup> *Id.*, at Pgs. 4-5.

<sup>112</sup> *Id.*, citing 31 January 2019 DAAR Report, <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>.

[TLDs],” and the remaining 51.89% of the domains identified as threats were in new gTLDs.<sup>113</sup> Further, the Report indicates that about 12% of TLD domain names are hosted on new gTLDs.<sup>114</sup> However, the Report also notes that 88% of the new gTLD domains identified as security threats were concentrated in only 25 new gTLDs, out of over 340 new gTLDs.<sup>115</sup> The Report further noted that 98% of the domains identified as security threats were hosted by “the 50 most-exploited new [TLDs].”<sup>116</sup> Accordingly, even if ICANN Staff did not consider the 2019 DAAR Report, the Requestor has not shown that the information contained in it was material to the inclusion of price caps in the .ORG/.INFO Renewed RAs. Moreover, the cited portions of the DAAR Report relate to security threats, not domain name registration fees. This argument does not support reconsideration.

E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/.INFO Renewed RAs.

The Requestor asserts that it has been adversely affected by the challenged conduct because, “[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor’s] domain name registration business,” insofar as the .ORG/.INFO Renewed RAs create an “uncertainty of price increases.”<sup>117</sup> That the Requestor could not quantify the actual financial impact on the Requestor of removing the price caps at the time it submitted Request 19-2 was not material to our preliminary procedural evaluation, because the Requestor asserted that the financial uncertainty *itself* is the harm. Accordingly, the Board Accountability Mechanisms Committee (BAMC) concluded that Request 19-2 was sufficiently

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<sup>113</sup> 31 January 2019 DAAR Report, Executive Summary.

<sup>114</sup> *Id.*, at Pg. 5.

<sup>115</sup> *Id.*, at Pg. 6. Similarly, four legacy TLDs hosted more than 94% of the legacy TLD domains identified as security threats. *Id.*

<sup>116</sup> *Id.*, at Pg. 6.

<sup>117</sup> Request 19-2, § 6, at Pg. 2; *see also id.* § 10, at Pg. 13.

stated.<sup>118</sup> However, the BAMC’s conclusion that the Requestor sufficiently asserted that it was materially harmed was not a determination that the Requestor was in fact materially harmed or, if so, that removing the .ORG/.INFO Renewed RAs caused that harm.

The Board now concludes that the Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. As noted above, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.<sup>119</sup> Professor Carlton explained that “a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically.”<sup>120</sup>

The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that “additional analysis is needed to determine whether” the removal of price caps in the .ORG RA “can result in uncompetitive practices.”<sup>121</sup> This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton’s expert report—indicates that such harm is not expected. Accordingly, reconsideration is not warranted.

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<sup>118</sup> See Ombudsman Action on Request 19-2, at Pg. 2.

<sup>119</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.

<sup>120</sup> *Id.*

<sup>121</sup> Request 19-2, § 8, at Pg. 10.

**VI. Proposed Determination.**

The Board has considered the merits of Request 19-2 and, based on the foregoing, concludes that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board proposes denying Request 19-2.

Because the BAMC did not have a quorum to consider Request 19-2, the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC. Accordingly, the issuance of this Proposed Determination triggers Requestor's right to file a rebuttal consistent with Article 4, Section 4.2(q) of the Bylaws.

## I. Introduction

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

As Requestor explains in this Rebuttal, ICANN's Decision and the Board's Recommendation have been made (i) in disregard of ICANN's fundamental rules and obligations, (ii) on the basis of an incomplete and non-transparent record. First, ICANN's reliance upon Professor Carlton's 2009 analysis is misguided because it is an opinion not based upon evidence or facts, but relies upon outdated and incomplete assumptions. Second, ICANN claims that the Base RA was developed through the ICANN policy process, however there is no evidence to suggest that those participants intended or considered the Base RA to apply to legacy TLDs (rather it was clear the intent was to develop an agreement for new gTLD registries only). Third, ICANN's failure to incorporate essentially unanimous public comments in support of price caps shows that ICANN will do as it pleases regardless of whether it solicits public comments. And finally, the recent purchase of Public Interest Registry (PIR), the operator of the .org TLD by an equity firm and its subsequent conversion into a for profit, along with the intermingling of ex-ICANN executives and industry insiders requires that ICANN review this purchase in detail and take necessary steps to ensure that .org domains are not used a source of revenue to support expansion by PIR or payment of dividends to PIR's shareholders (which are against the original nonprofit origins of the .org TLD). The .org and .info TLDs are unlike new gTLDs. Treating like cases alike and unlike cases differently is a general axiom of rational

behavior. This axiom is an absolute requirement to comply with ICANN's fundamental obligation to provide for non-discriminatory treatment.

## II. Professor Carlton's 2009 "Analysis"

ICANN's determination relies substantially upon the Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries to support the removal of price caps from the Base RA as well as the registry agreements for legacy TLDs. ICANN's reliance is flawed for several reasons. First, the document is more opinion than a fact-based analysis. A review of the document fails to identify any data sources or references to support the sweeping opinions of the author- including but not limited to data pertaining to domain name registrant behavior, the degree of fungibility between gTLDs, or considering the entire DNS (including ccTLDs and underserved regions). Second, Prof. Carlton concludes in ¶ 5 that "...price caps ... [for] **new gTLD registries** are unnecessary to insure competitive benefits ... for introducing new gTLDs." Nowhere does the analysis consider removing price caps for legacy TLDs, and it states in ¶ 20 that "...**the existence of the caps [in legacy TLDs] limits the prices** that new gTLDs can charge by capping the price that the major registry operators can charge." Third, the DNS has changed significantly from June 2008 data cited in his report- rendering it antiquated and stale. In addition, the analysis was narrowly focused on gTLDs, completely ignoring a significant sector of the DNS: ccTLDs. The complete DNS data for Q2 2008 and Q2 2019 are included in Exhibit A, and demonstrate the significant changes to the DNS since 2008.

The analysis was subject to public comment, and the vast majority of public comments to the document were either against it and/or raised significant concerns about its methodology (with only one commenter supporting the analysis)<sup>1</sup>. One commenter stated, "I am an economist

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<sup>1</sup> See <https://forum.icann.org/lists/competition-pricing-prelim/>

by training, and the report struck me as more argument than study, more an attempt to justify the new gTLD process than a serious evaluation of the facts of the matter.”<sup>2</sup> Another comment included a longer report (with supporting data) that concluded, “Professor Carlton has made a number of assumptions about both the benefits and costs of new gTLDs that are simply not supported by market facts.”<sup>3</sup> While it appears that ICANN disregarded the feedback and data provided disputing the findings in Prof. Carlton’s analysis, Requestor attempted to review ICANN’s Summary/analysis of comments<sup>4</sup> to confirm. However, that link redirected to Prof. Carlton’s preliminary analysis and Requestor could not review ICANN’s analysis or the reasons why it ignored facts and feedback contrary to its position. Furthermore, to date, ICANN has not conducted a data-based economic study regarding pricing and competition in the DNS (despite multiple requests over the past decade)<sup>5</sup>. One possible reason ICANN has not conducted such a study is because at least one assessment by ICANN based upon empirical data (rather than opinion) support’s Prof. Carlton’s position that price caps in legacy TLDs have maintained lower prices. As the assessment states on page 1: “The presence of price caps on legacy TLDs may help to explain the absence of changes in legacy TLD wholesale prices”.<sup>6</sup>

Finally, ICANN’s reliance on Prof. Carlton’s Preliminary Analysis is nothing but a *post factum* construction in an attempt to justify ICANN’s decision to remove the price cap. In 2013, Prof. Carlton’s opinion was clearly not an impediment to maintain the price cap when renewing

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<sup>2</sup> See <https://forum.icann.org/lists/competition-pricing-prelim/msg00019.html>

<sup>3</sup> See <https://forum.icann.org/lists/competition-pricing-prelim/pdf2m9kAd0xph.pdf>

<sup>4</sup> Online at <https://www.icann.org/resources/pages/compri-2009-03-04-en>

<sup>5</sup> Two examples are <https://forum.icann.org/lists/competition-pricing-prelim/pdf2m9kAd0xph.pdf> and <https://mm.icann.org/pipermail/comments-info-renewal-18mar19/attachments/20190430/11faa379/Responseto.Org.Info.BIZRenewalAgreementsv21.pdf>

<sup>6</sup> See <https://newgtlds.icann.org/en/reviews/cct/competitive-effects-phase-two-assessment-11oct16-en.pdf>

the .org and .info RAs. So, why would this opinion suddenly become relevant now, where it was clearly not in 2013?

### III. Reliance upon Base RA

Throughout the Determination, ICANN repeatedly states that the Base RA is the result of the ICANN policy development process (PDP), and provides links to various reports, documents, and letters to show that there was broad consensus to remove price caps from the Base RA. It is worth noting that the Base RA was developed for the *new gTLD registries*, and all of the evidence cited by ICANN confirms this. Requestor could not locate any confirmation in the references provided by ICANN that those participating in the development of the Base RA were aware that ICANN staff would subsequently apply the Base RA *to legacy TLDs* (e.g. they did not consider that price caps would be removed for legacy TLDs). As the public comments in 2006 and 2019 against removing price caps from the .org and .info registry agreements demonstrate, significant community opposition to removing the caps exists. Moreover, ICANN should have clarified to the participants in the development of the Base RA that it would later apply to legacy TLDs. Any statements by ICANN that the Base RA was intended to apply to legacy TLDs are disingenuous and revisionist by ICANN. The PDP on new gTLDs never aimed at changing the legal framework for legacy TLDs. The continued opposition, even with the advance notice of increases and the ability to renew for up to 10 years shows that the public still demands maintaining price caps to ensure predictable pricing for important TLDs.

ICANN also justifies adopting the Base RA for legacy TLDs because it includes protections for registrant pricing by requiring advance notice of price changes and allowing renewals of up to 10 years before the changes take effect. It is not clear why ICANN uses this



argument to justify its current decision, as those protections were present in the [.org](#) and [.info](#) registry agreements since 2006.<sup>7</sup>

The Base RA was adopted by ICANN on 2 July 2013,<sup>8</sup> and the registry agreements for [.org](#) and [.info](#) were last renewed on 22 August 2013<sup>9</sup>. As the Base RA was available to ICANN during the 2013 RA renewal process for these legacy TLDs, and if converting legacy TLDs to the Base RA was so important as to ignore massive public comment to the contrary, it is not clear why ICANN waited an additional six years to make the change.

#### IV. Public Comments

Although ICANN repeatedly states in its Determination that it considered the comments in detail, there are several factors which belie this position. A detailed review of the public comments submitted to ICANN regarding the changes to the [.org](#) and [.info](#) registry agreements reveals that ICANN ignored a number of glaring issues:

- a. A number of commenters requested that ICANN keep their comment and/or their information private (yet it was published on [icann.org](#));
- b. A majority of comments published on [icann.org](#) included personally identifiable information (including full names, home addresses, telephone numbers, and email addresses) for individuals around the world (including the European Economic Area);  
and
- c. One comment on [icann.org](#) reviewed by Namecheap was an ASCII representation of a hardcore pornographic image (which was removed in response to a Tweet by a

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<sup>7</sup> See <https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en> and <https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en>

<sup>8</sup> See <https://www.icann.org/resources/pages/archive-54-2012-02-25-en>

<sup>9</sup> See <https://www.icann.org/resources/agreement/org-archive-1999-11-10-en> and <https://www.icann.org/resources/agreement/info-archive-2001-05-11-en>

Namecheap staff member, just several weeks before ICANN published its staff report on the public comments).<sup>10</sup>

For obvious reasons, Requestor is not providing examples of the concerns above, however examples (including the ASCII art) can be provided upon request.

Additionally, it is still not clear why ICANN bothered to solicit public comment. Almost all of the comments were against removing price caps; yet ICANN decided to maintain its predetermined action. ICANN may state that it “considered” or “acknowledged” the public comment, but the fact that it maintained its prior position from before the public comment period shows otherwise. It is also absurd to state that the ICANN Board could read each comment had they so desired- the hundreds of hours required to review over 3,000 comments is a significant undertaking for Board members who have other responsibilities. It is a shame that ICANN staff chose not to share with the Board the multitude of personal stories from individuals and nonprofits as to how they will be adversely impacted by uncertain price increases. This effectively silenced the many voices that took the effort to provide feedback to ICANN.

#### V. Requestor Will Be Adversely Affected By Removal Of Price Caps

Although Requestor cannot now calculate future harm for price increases, its request detailed harms likely to occur in the future when prices rise for Namecheap, its customers, and various business sectors of the internet. The only time this harm can be measured is when prices do increase unreasonably, however at that point action through ICANN will not be possible. That is why ICANN must consider the substantial number of examples provided in Requestor’s request and in the voluminous public comments with specific and real-world examples of harm by increased domain name registration prices. ICANN’s Determination discounted all of these

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<sup>10</sup> See <https://twitter.com/lothar97/status/1128352716630085632>

potential harms, allegedly by relying upon Prof. Carlton's opinion that price caps were unnecessary to protect against unreasonable price increases. As indicated above, reliance upon the opinion of a professor in 2009 unsupported by any real data or research is a significantly flawed position for ICANN to maintain when the lives of potentially tens of millions (or more) of people around the world may be impacted by its decision.

#### VI. Sale Of Public Interest Registry

On 13 November 2019, the Internet Society and Public Interest Registry (PIR) announced that PIR was sold to the investment firm Ethos Capital for an undisclosed sum of money<sup>11</sup> (however there is reasoned speculation the price was over \$1 billion<sup>12</sup>). PIR is no longer a nonprofit company, will not pay upwards of \$50 million annually to the Internet Society<sup>13</sup>, and is now able to pay dividends to its shareholders. Additionally, it is not known how much of this acquisition was through debt (which will be required to be repaid with interest). Because this information was not available to Requestor (or ICANN) until last week, it is pertinent to be addressed in Requestor's rebuttal. The timing and the nature of this entire process is suspicious, and in a well-regulated industry, would draw significant scrutiny from regulators. For ICANN not to scrutinize this transaction closely in a completely transparent and accountable fashion (including public disclosure of pertinent information regarding the nature, cost, the terms of any debt associated with the acquisition, timeline of all parties involved, and the principals involved) would demonstrate that ICANN org and the ICANN Board do not function as a trusted or reliable internet steward.

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<sup>11</sup> See <https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/>

<sup>12</sup> See <https://domainnamewire.com/2019/11/14/the-economics-of-org-domain-names/>

<sup>13</sup> See <http://domainincite.com/24976-selling-off-pir-did-isoc-just-throw-org-registrants-under-a-bus>

The likely corporate entity for Ethos Capital was formed on 14 May 2019- the day after ICANN was due to publish its summary of public comments regarding the renewal of the .org registry agreement. The domain name ethoscapital.com was obtained by the investment firm sometime after July 2019 (as indicated by Exhibit B)- after ICANN removed the price cap requirement from the .org registry agreement. The domain name ethoscapital.org was registered on 7 May 2019 by the former CEO of ICANN Fadi Chehadé- who is a Senior Advisor for Abry Partners that led the acquisition of Donuts, Inc. (the entity that operates the most new gTLDs<sup>14</sup> and also the top 20 registrar Name.com<sup>15</sup>) (see attached registration data report from August 2018 to present as Exhibit C).

Mr. Chehadé is not the only former senior ICANN executive involved in these entities. Akram Atallah (former President of ICANN Global Domains Division (GDD)) is the CEO of Donuts (which was acquired by an affiliated private equity company). Nora Abusitta-Ouri (former Senior Vice President, Development and Public Responsibility Programs at ICANN, then employed by Mr. Chehadé’s firm Chehadé & Company<sup>16</sup>) is the Chief Purpose Officer of Ethos Capital<sup>17</sup>. Ms. Abusitta-Ouri’s LinkedIn profile indicates that she is also the Executive Director of the Digital Ethos Foundation. That Foundation uses the domain name digitaletmos.foundation, which is registered to Binky Moon, LLC, the company operated by Donuts for contractual purposes with ICANN.<sup>18</sup> The word “ethos” has a connection for Mr. Chehadé, as he created the Multistakeholder Ethos Award while CEO of ICANN.<sup>19</sup> There are several other principals not previously employed by ICANN that make this transaction worthy of

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<sup>14</sup> See <https://www.prnewswire.com/news-releases/abry-partners-enters-into-agreement-to-invest-majority-stake-in-donuts-inc-300706706.html>

<sup>15</sup> See <https://www.domainstate.com/top-registrars.html>

<sup>16</sup> See <https://www.crunchbase.com/person/nora-abusitta#section-overview>

<sup>17</sup> See <https://www.linkedin.com/in/nora-abusitta/>

<sup>18</sup> See <http://domainincite.com/22675-donuts-scraps-200-companies-consolidates-under-binky-moon>

<sup>19</sup> See <https://www.icann.org/news/blog/multistakeholder-ethos-award-nomination-process>

scrutiny. Jon Nevett is the current President and CEO of PIR.<sup>20</sup> He is a co-founder of Donuts, and left in October 2018<sup>21</sup> - and was replaced by Mr. Atallah.<sup>22</sup> The founder and CEO of Ethos Capital is Erik Brooks, who previously was at Abry Partners<sup>23</sup> and as recently as of October 2018, a board member of Donuts.<sup>24</sup>

When PIR adopted the new .org registry agreement, it stated it “is a mission driven non-profit registry and currently has no specific plans for any price changes for .ORG.”<sup>25</sup> After the acquisition, PIR stated that it plans future takeovers and growth, however does not specify the resources to support these plans.<sup>26</sup> Considering that almost the entire source of revenue for PIR is from .org domain names, this strongly suggests the need to raise registration fees. The third largest gTLD registry, with an established and sterling reputation will be able to use its market power to raise prices as it sees fit. As PIR stated in August 2019 regarding price cap concerns, “We ourselves are a nonprofit, and we are driven by our mission of serving the public interest online. Public Interest Registry has served as the nonprofit registry operator for .ORG for more than 15 years and in that time, we have always strived to be thoughtful and responsible stewards of the Internet’s most trusted and admired top-level domain. Our stewardship of .ORG will continue in the exact same manner for years to come.”<sup>27</sup> This dynamic has been significantly altered, and ICANN must include the historical price caps in the .org registry agreement to ensure that future .org registrants are protected.

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<sup>20</sup> See <https://thenew.org/org-people/about-pir/team/executive-team/>

<sup>21</sup> See <https://domainnamewire.com/2018/12/05/jon-nevett-named-new-ceo-of-pir-org/>

<sup>22</sup> See <https://www.prnewswire.com/news-releases/donuts-appoints-akram-j-atallah-as-ceo-300728610.html>

<sup>23</sup> See <https://ethoscapital.com/>

<sup>24</sup> See <https://donuts.news/donuts-appoints-akram-j-atallah-as-ceo>

<sup>25</sup> See <https://thenew.org/pir-welcomes-renewed-org-agreement/>

<sup>26</sup> See <http://www.domainpulse.com/2019/11/14/pir-eyeing-growth-ethos-capital-takeover/>

<sup>27</sup> See <https://mashable.com/article/dot-org-domain-private-equity-acquisition/>

Another reason why this transaction and price caps needs to be reviewed is what happened when Donuts was acquired by Abry Partners. In 2017, Donuts was emphatic that it would not raise prices for existing registrants.<sup>28</sup> Within months of be acquired by Abry Partners, it raised prices in 2019 for 220 out of its 241 TLDs.<sup>29</sup> Any statements by PIR now to not raise prices unreasonably are just words,<sup>30</sup> and without price caps, there is no way that .org registrants are not used a source to generate revenue for acquisitions or to pay dividends to its shareholders.

While all of these connections and timing may be purely coincidental and above reproach, ICANN has a duty to review these concerns, and take steps to ensure that legacy TLD price caps maintained.

## VII. Conclusion

Based on the foregoing and on the reasons expressed in RfR 19-2 and the letters exchanged in relation to this RfR, Requestor requests that the Board deny the Recommendation and grant RfR 19-2. This rebuttal is made reserving all rights, especially in view of the procedural imbalance, created *inter alia* by ICANN's requirement to respond to a 23-page Recommendation in a 10-page rebuttal, which was provided to Requestor 24 days after the expiration of the 90-day limit specified in the Standard Reconsideration Request Process<sup>31</sup> (and which also happened to be received on the first day of an ICANN meeting).

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<sup>28</sup> See <https://onlinedomain.com/2017/03/09/domain-name-news/donuts-no-plans-increase-prices-existing-registrants/>

<sup>29</sup> See <https://domainnamewire.com/2019/04/02/donuts-to-increase-domain-prices-in-october/>

<sup>30</sup> See <http://domainincite.com/24976-selling-off-pir-did-isoc-just-throw-org-registrants-under-a-bus>

<sup>31</sup> See <https://www.icann.org/en/system/files/files/reconsideration-request-timeline-24oct17-en.pdf>

## EXHIBIT A

	Q2 2008 <sup>1</sup>	Q2 2019 <sup>2</sup>
All TLDs	162 million	354 million
gTLDs	99 million	196 million
ccTLDs	63 million	159 million
Legacy TLDs	99 million	173 million
New gTLDs	NA	23 million
.com	77 million <sup>3</sup>	142 million
.net	12 million	13 million
.org	7 million	10 million
.info	5 million	4.5 million
.biz	2 million	1.5 million

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<sup>1</sup> See <https://www.verisign.com/assets/domain-name-report-june08.pdf>

<sup>2</sup> See <https://www.verisign.com/assets/domain-name-report-Q22019.pdf>

<sup>3</sup> The data for .com, .net, .org, .info, and .biz are from Prof. Carlton's analysis rather than Verisign's Q2 2008 Domain Name Industry Brief

## EXHIBIT B



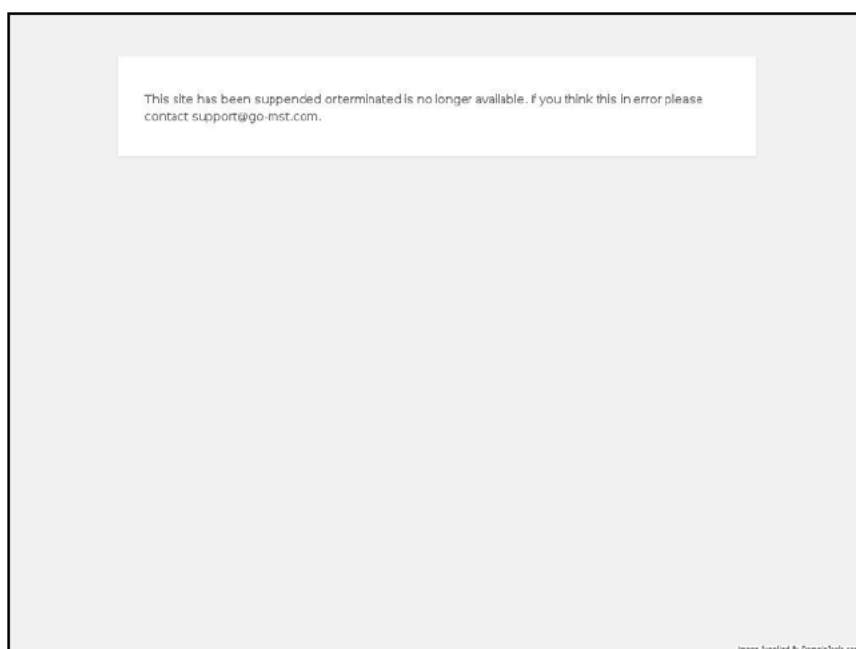


# Domain Report - EthosCapital.com

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Domain Name **EthosCapital.com**

Prepared On **November 13, 2019**



Website Screenshot taken 04/09/2016

## About This Report

This report documents a thorough analysis of the Internet domain name "**EthosCapital.com**". It draws on the extensive DomainTools dataset and aims to deliver a comprehensive view of the domain's ownership profile, key historical events and technically linked domain names.

All data in this Report is, or was, freely available through standard Internet DNS and query protocols. DomainTools has not altered the data in any way from its original form, except in certain instances to format it for readability in this Report.

Data from DomainTools is presented as-is, and as captured from the original source. We make no representations or warranties of fitness of any kind.

## About DomainTools

DomainTools offers the most comprehensive searchable database of domain name registration and hosting data. Combined with our other data sites such as DailyChanges.com, Screenshots.com and ReverseMX.com, users of DomainTools.com can review millions of historical domain name records from basic Whois, and DNS information, to homepage images and email settings. The Company's comprehensive snapshots of past and present domain name registration, ownership and usage data, in addition to powerful research and monitoring resources, help customers by unlocking everything there is to know about a domain name. DomainTools is a Top 250 site in the Alexa rankings.

Reach us at [memberservices@domaintools.com](mailto:memberservices@domaintools.com) if you have any questions on this report.

# Domain Profile

As of November 13, 2019

## Ownership

Registered Owner	<b>Afternic DNescrow</b>
Owned Domains	<b>About 514 other domains</b>
Email Addresses	<b>abuse@godaddy.com</b>
Registrar	<b>godaddy.com, llc</b>

## Registration

Created	<b>Oct 21, 2011</b>
Expires	<b>Aug 3, 2020</b>
Updated	<b>Aug 6, 2019</b>
Domain Status	<b>Parked</b>
Whois Server	<b>whois.godaddy.com</b>
Name Servers	<b>domaincontrol.com</b>

## Network

Website IP Address	<b>198.49.23.144</b>
IP Location	<b>United States-New York-New York City Squarespace Inc.</b>
IP ASN	<b>AS53831</b>

# Current Whois Record

*Reported on Nov 13, 2019*

Domain Name: ethoscapi tal.com  
Registry Domain ID: 1683367694\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.godaddy.com  
Registrar URL: http://www.godaddy.com  
Updated Date: 2019-08-06T20:11:18Z  
Creation Date: 2011-10-21T18:12:01Z  
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z  
Registrar: GoDaddy.com, LLC  
Registrar IANA ID: 146  
Registrar Abuse Contact Email: abuse@godaddy.com  
Registrar Abuse Contact Phone: +1.4806242505  
Domain Status: clientTransferProhibited <http://www.icann.org/epp#clientTransferProhibited>  
Domain Status: clientUpdateProhibited <http://www.icann.org/epp#clientUpdateProhibited>  
Domain Status: clientRenewProhibited <http://www.icann.org/epp#clientRenewProhibited>  
Domain Status: clientDeleteProhibited <http://www.icann.org/epp#clientDeleteProhibited>  
Registrant Organization: Afternic DNescrow  
Registrant State/Province: Massachusetts  
Registrant Country: US  
Registrant Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ethos>  
Admin Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ethoscapi>  
Tech Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ethoscapi>  
Name Server: PDNS03.DOMAINCONTROL.COM  
Name Server: PDNS04.DOMAINCONTROL.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: <http://wdprs.internic.net/>

# Ownership History

## Whois History for EthosCapital.com

DomainTools has 49 distinct historical ownership records for EthosCapital.com. The oldest record dates Jun 19, 2007. Each record is listed on its own page, starting with the most recent record. The date at the start of the section indicates the first time we captured the record. The website screenshot, when available, will be the image captured as close as possible to the record date.

## About Whois History

DomainTools takes periodic snapshots of domain name Whois records and stores them for subsequent analysis. The database contains billions of Whois records across hundreds of millions of domains, dating back in some cases to 2001.

## Whois Record on Oct 24, 2019

Domain Name: ethoscapi tal.com  
Registry Domain ID: 1683367694\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.godaddy.com  
Registrar URL: http://www.godaddy.com  
Updated Date: 2019-08-06T20:11:18Z  
Creation Date: 2011-10-21T18:12:01Z  
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z  
Registrar: GoDaddy.com, LLC  
Registrar IANA ID: 146  
Registrar Abuse Contact Email: abuse@godaddy.com  
Registrar Abuse Contact Phone: +1.4806242505  
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited  
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited  
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited  
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited  
Registrant Organization: Afternic DNescrow  
Registrant State/Province: Massachusetts  
Registrant Country: US  
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Name Server: PDNS03.DOMAINCONTROL.COM  
Name Server: PDNS04.DOMAINCONTROL.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/



Screenshot taken Apr 9, 2016

## Whois Record on Oct 18, 2019

Domain Name: ethoscapi tal.com  
Registry Domain ID: 1683367694\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.godaddy.com  
Registrar URL: http://www.godaddy.com  
Updated Date: 2019-08-06T20:11:18Z  
Creation Date: 2011-10-21T18:12:01Z  
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z  
Registrar: GoDaddy.com, LLC  
Registrar IANA ID: 146  
Registrar Abuse Contact Email: abuse@godaddy.com  
Registrar Abuse Contact Phone: +1.4806242505  
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited  
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited  
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited  
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited  
Registrant Organization: Afternic DNescrow  
Registrant State/Province: Massachusetts  
Registrant Country: US  
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Name Server: PDNS03.DOMAINCONTROL.COM  
Name Server: PDNS04.DOMAINCONTROL.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/



Screenshot taken Apr 9, 2016

## Whois Record on Oct 16, 2019

Domain Name: ethoscapi tal.com  
Registry Domain ID: 1683367694\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.godaddy.com  
Registrar URL: http://www.godaddy.com  
Updated Date: 2019-08-06T20:11:18Z  
Creation Date: 2011-10-21T18:12:01Z  
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z  
Registrar: GoDaddy.com, LLC  
Registrar IANA ID: 146  
Registrar Abuse Contact Email: abuse@godaddy.com  
Registrar Abuse Contact Phone: +1.4806242505  
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited  
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited  
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited  
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited  
Registrant Organization: Afternic DNescrow  
Registrant State/Province: Massachusetts  
Registrant Country: US  
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Name Server: PDNS03.DOMAINCONTROL.COM  
Name Server: PDNS04.DOMAINCONTROL.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/



Screenshot taken Apr 9, 2016



## Whois Record on Aug 5, 2019

Domain Name: ethoscapi tal.com  
Registry Domain ID: 1683367694\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.godaddy.com  
Registrar URL: http://www.godaddy.com  
Updated Date: 2019-07-31T21:55:22Z  
Creation Date: 2011-10-21T18:12:01Z  
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z  
Registrar: GoDaddy.com, LLC  
Registrar IANA ID: 146  
Registrar Abuse Contact Email: abuse@godaddy.com  
Registrar Abuse Contact Phone: +1.4806242505  
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited  
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited  
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited  
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited  
Registrant Organization: Afternic DNescrow  
Registrant State/Province: Massachusetts  
Registrant Country: US  
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapi tal.com  
Name Server: NS13.DOMAINCONTROL.COM  
Name Server: NS14.DOMAINCONTROL.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/



Screenshot taken Apr 9, 2016

## Whois Record on Jul 24, 2019

Domain Name: ETHOSCAPITAL.COM  
Registry Domain ID: 1683367694\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.godaddy.com  
Registrar URL: <http://www.godaddy.com>  
Updated Date: 2018-08-03T15:49:37Z  
Creation Date: 2011-10-21T18:12:01Z  
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z  
Registrar: GoDaddy.com, LLC  
Registrar IANA ID: 146  
Registrar Abuse Contact Email: [abuse@godaddy.com](mailto:abuse@godaddy.com)  
Registrar Abuse Contact Phone: +1.4806242505  
Domain Status: clientTransferProhibited <http://www.icann.org/epp#clientTransferProhibited>  
Domain Status: clientUpdateProhibited <http://www.icann.org/epp#clientUpdateProhibited>  
Domain Status: clientRenewProhibited <http://www.icann.org/epp#clientRenewProhibited>  
Domain Status: clientDeleteProhibited <http://www.icann.org/epp#clientDeleteProhibited>  
Registrant Organization: Ethos Capital Group  
Registrant State/Province: Texas  
Registrant Country: US  
Registrant Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Admin Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Tech Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Name Server: NS13.DOMAINCONTROL.COM  
Name Server: NS14.DOMAINCONTROL.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: <http://wdprs.internic.net/>



Screenshot taken Apr 9, 2016

## Whois Record on Apr 30, 2019

Domain Name: ETHOSCAPITAL.COM  
Registry Domain ID: 1683367694\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.godaddy.com  
Registrar URL: <http://www.godaddy.com>  
Updated Date: 2018-08-03T15:49:37Z  
Creation Date: 2011-10-21T18:12:01Z  
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z  
Registrar: GoDaddy.com, LLC  
Registrar IANA ID: 146  
Registrar Abuse Contact Email: [abuse@godaddy.com](mailto:abuse@godaddy.com)  
Registrar Abuse Contact Phone: +1.4806242505  
Domain Status: clientTransferProhibited <http://www.icann.org/epp#clientTransferProhibited>  
Domain Status: clientUpdateProhibited <http://www.icann.org/epp#clientUpdateProhibited>  
Domain Status: clientRenewProhibited <http://www.icann.org/epp#clientRenewProhibited>  
Domain Status: clientDeleteProhibited <http://www.icann.org/epp#clientDeleteProhibited>  
Registrant Organization: Ethos Capital Group  
Registrant State/Province: Texas  
Registrant Country: US  
Registrant Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Admin Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Tech Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Name Server: NS13.DOMAINCONTROL.COM  
Name Server: NS14.DOMAINCONTROL.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: <http://wdprs.internic.net/>



Screenshot taken Apr 9, 2016

## Whois Record on Feb 11, 2019

Domain Name: ETHOSCAPITAL.COM  
Registry Domain ID: 1683367694\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.godaddy.com  
Registrar URL: http://www.godaddy.com  
Updated Date: 2018-08-03T15:49:37Z  
Creation Date: 2011-10-21T18:12:01Z  
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z  
Registrar: GoDaddy.com, LLC  
Registrar IANA ID: 146  
Registrar Abuse Contact Email: abuse@godaddy.com  
Registrar Abuse Contact Phone: +1.4806242505  
Domain Status: clientTransferProhibited <http://www.icann.org/epp#clientTransferProhibited>  
Domain Status: clientUpdateProhibited <http://www.icann.org/epp#clientUpdateProhibited>  
Domain Status: clientRenewProhibited <http://www.icann.org/epp#clientRenewProhibited>  
Domain Status: clientDeleteProhibited <http://www.icann.org/epp#clientDeleteProhibited>  
Registrant Organization: Ethos Capital Group  
Registrant State/Province: Texas  
Registrant Country: US  
Registrant Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Admin Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Tech Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Name Server: NS13.DOMAINCONTROL.COM  
Name Server: NS14.DOMAINCONTROL.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: <http://wdprs.internic.net/>



Screenshot taken Apr 9, 2016

## Whois Record on Nov 8, 2018

Domain Name: ETHOSCAPITAL.COM  
Registry Domain ID: 1683367694\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.godaddy.com  
Registrar URL: <http://www.godaddy.com>  
Updated Date: 2018-08-03T15:49:37Z  
Creation Date: 2011-10-21T18:12:01Z  
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z  
Registrar: GoDaddy.com, LLC  
Registrar IANA ID: 146  
Registrar Abuse Contact Email: [abuse@godaddy.com](mailto:abuse@godaddy.com)  
Registrar Abuse Contact Phone: +1.4806242505  
Domain Status: clientTransferProhibited <http://www.icann.org/epp#clientTransferProhibited>  
Domain Status: clientUpdateProhibited <http://www.icann.org/epp#clientUpdateProhibited>  
Domain Status: clientRenewProhibited <http://www.icann.org/epp#clientRenewProhibited>  
Domain Status: clientDeleteProhibited <http://www.icann.org/epp#clientDeleteProhibited>  
Registrant Organization: Ethos Capital Group  
Registrant State/Province: Texas  
Registrant Country: US  
Registrant Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Admin Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Tech Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Name Server: NS13.DOMAINCONTROL.COM  
Name Server: NS14.DOMAINCONTROL.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: <http://wdprs.internic.net/>



Screenshot taken Apr 9, 2016

## Whois Record on Aug 5, 2018

Domain Name: ETHOSCAPITAL.COM  
Registry Domain ID: 1683367694\_DOMAIN\_COM-VRSN  
Registrar WHOIS Server: whois.godaddy.com  
Registrar URL: <http://www.godaddy.com>  
Updated Date: 2018-08-03T15:49:37Z  
Creation Date: 2011-10-21T18:12:01Z  
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z  
Registrar: GoDaddy.com, LLC  
Registrar IANA ID: 146  
Registrar Abuse Contact Email: [abuse@godaddy.com](mailto:abuse@godaddy.com)  
Registrar Abuse Contact Phone: +1.4806242505  
Domain Status: clientTransferProhibited <http://www.icann.org/epp#clientTransferProhibited>  
Domain Status: clientUpdateProhibited <http://www.icann.org/epp#clientUpdateProhibited>  
Domain Status: clientRenewProhibited <http://www.icann.org/epp#clientRenewProhibited>  
Domain Status: clientDeleteProhibited <http://www.icann.org/epp#clientDeleteProhibited>  
Registrant Organization: Ethos Capital Group  
Registrant State/Province: Texas  
Registrant Country: US  
Registrant Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Admin Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Tech Email: Select Contact Domain Holder link at <https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM>  
Name Server: NS13.DOMAINCONTROL.COM  
Name Server: NS14.DOMAINCONTROL.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: <http://wdprs.internic.net/>



Screenshot taken Apr 9, 2016

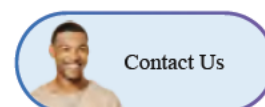
## EXHIBIT C

## Search the WHOIS Database

[Private Registration](#) [Local listings](#)

### WHOIS search results

Domain Name: ethoscapital.org  
Registry Domain ID: D40220000010251407-LROR  
Registrar WHOIS Server: whois.godaddy.com  
Registrar URL: http://www.godaddy.com  
Updated Date: 2019-05-07T14:42:39Z  
Creation Date: 2019-05-07T14:42:38Z  
Registrar Registration Expiration Date: 2020-05-07T14:42:38Z  
Registrar: GoDaddy.com, LLC  
Registrar IANA ID: 146  
Registrar Abuse Contact Email: abuse@godaddy.com  
Registrar Abuse Contact Phone: +1.4806242505  
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited  
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited  
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited  
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited  
Registry Registrant ID: CR370633889  
Registrant Name: Contact Information Redacted  
Registrant Organization:  
Registrant Street: Contact Information Redacted  
Registrant City: Contact Information Redacted  
Registrant State/Province: Contact Information Redacted  
Registrant Postal Code: Contact Information  
Registrant Country: Contact Information  
Registrant Phone: Contact Information Redacted  
Registrant Phone E  
Registrant Fax:  
Registrant Fax Ext:  
Registrant Email: Contact Information Redacted  
Registry Admin ID: CR370633894  
Admin Name: Contact Information Redacted  
Admin Organization:  
Admin Street: Contact Information Redacted  
Admin City: Contact Information Redacted  
Admin State/Province: Contact Information Redacted  
Admin Postal Code: Contact Information Redacted  
Admin Country: Contact Information





Admin Phone: Contact Information Redacted  
Admin Phone Ext:  
Admin Fax:  
Admin Fax Ext:  
Admin Email: Contact Information Redacted  
Registry Tech ID: CR370633801  
Tech Name: Contact Information Redacted  
Tech Organization:  
Tech Street: Contact Information Redacted  
Tech City: Contact Information Redacted  
Tech State/Province: Contact Information  
Tech Postal Code: Contact Information  
Tech Country: Contact Information Redacted  
Tech Phone: Contact Information Redacted  
Tech Phone Ext:  
Tech Fax:  
Tech Fax Ext:  
Tech Email: Contact Information Redacted  
Name Server: PDNS09.DOMAINCONTROL.COM  
Name Server: PDNS10.DOMAINCONTROL.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: <http://wdprs.internic.net/>  
>>> Last update of WHOIS database: 2019-11-13T20:00:00Z <<<

For more information on Whois status codes, please visit <https://www.icann.org/resources/pages/epp-status-codes-2014-06-16-en>

#### Notes:

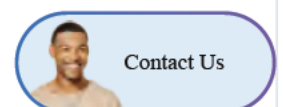
**IMPORTANT:** Port43 will provide the ICANN-required minimum data set per ICANN Temporary Specification, adopted 17 May 2018.

Visit <https://whois.godaddy.com> to look up contact data for domains not covered by GDPR policy.

The data contained in GoDaddy.com, LLC's Whois database, while believed by the company to be reliable, is provided "as is" with no guarantee or warranties regarding its accuracy. This information is provided for the sole purpose of assisting you in obtaining information about domain name registration records.

Any use of this data for any other purpose is expressly forbidden without the prior written permission of GoDaddy.com, LLC. By submitting an inquiry, you agree to these terms of usage and limitations of warranty. In particular, you agree not to use this data to allow, enable, or otherwise make possible, dissemination or collection of this data, in part or in its entirety, for any purpose, such as the transmission of unsolicited advertising and solicitations of any kind, including spam. You further agree not to use this data to enable high volume, automated or robotic electronic processes designed to collect or compile this data for any purpose, including mining this data for your own personal or commercial purposes.

Please note: the registrant of the domain name is specified



in the "registrant" section. In most cases, GoDaddy.com, LLC is not the registrant of domain names listed in this database.

[See Underlying Registry Data](#) | [Contact Domain Holder](#) | [Report Invalid Whois](#)

### Want to buy this domain?

Get it with our Domain Broker Service.

[Go](#)

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Add hosting, email and more.

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**guides**



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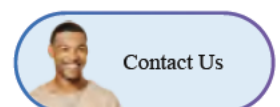
Newsroom

Investor Relations

Careers

Corporate Responsibility

GoDaddy Store



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[Site Map](#)

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### Partner Programs

[Affiliates](#)

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[GoDaddy Pro](#)

### Account

[My Account](#)

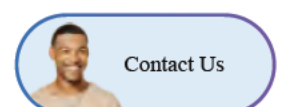
[My Renewals](#)

[Create Account](#)

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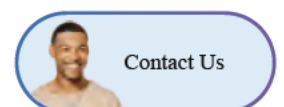
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**FINAL DETERMINATION  
OF THE ICANN BOARD OF DIRECTORS  
RECONSIDERATION REQUEST 19-2  
21 November 2019**

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The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization’s 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afiliás Limited (Afiliás) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs), insofar as the renewals eliminated “the historic price caps” on domain name registration fees for .ORG and .INFO.<sup>1</sup> The Requestor claims that ICANN org’s “decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN’s Commitments and Core Values, and ICANN should reverse this decision for the public good.”<sup>2</sup>

Specifically, the Requestor claims that the .ORG/.INFO Renewed RAs are contrary to:

- (i) ICANN org’s commitment to “seek input from the public, for whose benefit ICANN in all events shall act.”<sup>3</sup>
- (ii) ICANN org’s Core Value of “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.”<sup>4</sup>
- (iii) ICANN org’s Public Comment Opportunities page, which states that “Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption,” and is “used to guide implementation work, reviews, and operational activities of the ICANN organization.”<sup>5</sup>

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<sup>1</sup> Request 19-2, § 3, at Pg. 2.

<sup>2</sup> *Id.* § 8, at Pg. 3.

<sup>3</sup> *Id.* § 8, at Pg. 4.

<sup>4</sup> *Id.* § 8, at Pg. 4.

<sup>5</sup> *Id.* § 8, at Pg. 4.

- (iv) ICANN org’s statements concerning its call for Public Comment that the “purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement.”<sup>6</sup>

The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.<sup>7</sup>

The Requestor “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs.”<sup>8</sup>

## **I. Brief Summary.**

PIR is the registry operator for the .ORG TLD.<sup>9</sup> ICANN org and PIR entered into an RA on 2 December 2002 for the continued operation of the .ORG gTLD, which was renewed in 2006 and 2013.<sup>10</sup> ICANN org and Afilias first entered into an RA on 11 May 2001 for the operation of the .INFO gTLD, which was renewed in 2006 and 2013.<sup>11</sup> Before the recent renewals, the RAs for .ORG and .INFO included price caps, which limited the initial prices and allowable price increases for registrations.<sup>12</sup> Both RAs were scheduled to expire on 30 June 2019.

In anticipation of the 30 June 2019 expiration, ICANN org bilaterally negotiated renewals to the agreements with each registry operator. The proposed renewals were based on ICANN org’s base generic TLD Registry Agreement updated on 31 July 2017 (Base RA),

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<sup>6</sup> *Id.*, § 8, at Pg. 4.

<sup>7</sup> *Id.*, § 8, at Pg. 10.

<sup>8</sup> *Id.*, § 9, at Pg. 12.

<sup>9</sup> Public Comment Proceeding, Proposed Renewal of .ORG RA, 18 March 2019 (2019 .ORG RA Public Comment Proceeding), <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

<sup>10</sup> *Id.*

<sup>11</sup> Public Comment Proceeding, Proposed Renewal of .INFO RA, 18 March 2019 (2019 .INFO RA Public Comment Proceeding), <https://www.icann.org/public-comments/info-renewal-2019-03-18-en>.

<sup>12</sup> 2002 .ORG RA, <https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en>; 2001 .INFO RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en>.

modified to account for the specific nature of the .ORG and .INFO gTLDs.<sup>13</sup> As a result, the proposed Renewed RAs' terms were substantially similar to the terms of the Base RA.

From January 2019 to June 2019, ICANN Staff briefed and met with the Board several times regarding the proposed .ORG/.INFO Renewed RAs.<sup>14</sup> On 18 March 2019, ICANN Staff published the proposed .ORG/.INFO Renewed RAs for public comment to obtain community input on the proposed renewals. ICANN Staff described the material differences between proposed renewals and the current .ORG and .INFO RAs. These differences included removal of limits on domain name registration fee increases that had been in prior .ORG and .INFO RAs. ICANN Staff explained that the change would “allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA],” while “tak[ing] into consideration the maturation of the domain name market and the goal of treating the Registry Operator[s] equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].”<sup>15</sup>

ICANN org received over 3,700 submissions in response to its call for public comments on the proposed .ORG and .INFO agreements.<sup>16</sup> The comments predominantly related to three themes: (1) the proposed removal of price cap provisions; (2) inclusion of certain rights

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<sup>13</sup> See 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding. The RA for the operation of .BIZ was also set to expire on 30 June 2019; as a result of bilateral negotiations with the registry operator for .BIZ and after considering public comments, ICANN org and the registry operator for .BIZ entered into a Renewed RA for .BIZ that was based on (and therefore substantially similar to) the Base RA. See <https://www.icann.org/resources/agreement/biz-2019-06-30-en>.

<sup>14</sup> Letter from Namazi to Muscovitch, 26 July 2019, at Pg. 2, <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>.

<sup>15</sup> 2019 .ORG RA Public Comment Proceeding. New gTLDs are TLDs released as part of ICANN org's New gTLD Program. See <https://newgtlds.icann.org/en/about/program>. Legacy gTLDs are gTLDs that existed before ICANN org's New gTLD Program. .ORG and .INFO are legacy TLDs.

<sup>16</sup> Report of Public Comments, .ORG, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>; Report of Public Comments, .INFO, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf>.

protection mechanisms (RPMs), including the Uniform Rapid Suspension (URS) rules; and (3) the RA renewal process.<sup>17</sup>

ICANN Staff analyzed the public comments, including those addressing the proposed removal of price cap provisions, in its Report of Public Comments.<sup>18</sup> It concluded that removing the price cap provisions was “consistent with the Core Values of ICANN org as enumerated in the Bylaws,” insofar as removing the price cap provisions would “promote competition in the registration of domain names,” and enabled ICANN org to “depend upon market mechanisms to promote and sustain a competitive environment in the [Domain Name System (DNS)] market.”<sup>19</sup> ICANN org also noted that the Base RA protected existing registrants’ pricing by requiring the registry operator to: (1) give registrars six months’ advance notice of price changes; and (2) allow registrants to renew their domain name registrations for up to 10 years *before* those price changes take effect.<sup>20</sup> ICANN Staff then noted that it would “consider the feedback from the community on this issue,”<sup>21</sup> “and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”<sup>22</sup>

Following consultation with the ICANN Board of Directors and with the Board’s support, on 30 June 2019, ICANN Staff announced that it had executed the .ORG/.INFO Renewed RAs. The .ORG/.INFO Renewed RAs did not include price caps.<sup>23</sup>

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<sup>17</sup> Report of Public Comments, .INFO, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.

<sup>18</sup> ICANN org received some comments supporting removal of the price cap provision because “ICANN org is not and should not be a price regulator,” and because the Base RA would provide certain protections to current registrants. Report of Public Comments, .ORG, at Pg. 6.

<sup>19</sup> *Id.*, at Pg. 8.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, at Pg. 1.

<sup>23</sup> See ICANN org announcements: .ORG Renewed RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>; .INFO Renewed RA, <https://www.icann.org/resources/agreement/info-2019-06-30-en>.



On 12 July 2019, the Requestor filed Request 19-2, seeking reconsideration of the .ORG/.INFO Renewed RAs.

The Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that “the CEO and Staff acted within the scope of the powers given them by the Board,”<sup>24</sup> and that “no rules or duties of corporate governance were violated (including the ICANN Bylaws).”<sup>25</sup>

The Board adopted a Proposed Determination denying Request 19-2 on 3 November 2019.<sup>26</sup> On 18 November 2019, the Requestor submitted a rebuttal to the Board’s Proposed Determination. The Requestor challenged the Board’s reliance on evidence concerning and mechanisms designed for new gTLDs as compared to legacy TLDs, reiterated its argument that ICANN Staff should have acted in accordance with “essentially unanimous public comments in support of price caps,” and asserted that the recent acquisition of .ORG by a for-profit entity merits additional scrutiny of the .ORG Renewed RA.<sup>27</sup>

The Board has considered Request 19-2 and all relevant materials. Based on its extensive review of all relevant materials, the Board finds that reconsideration is not warranted because ICANN org’s execution of the .ORG/.INFO Renewed RAs was consistent with ICANN’s

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<sup>24</sup> Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019, <https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en>.

<sup>25</sup> *Id.*

<sup>26</sup> Board action on Proposed Determination on Request 19-2, <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.a>; Proposed Determination on Request 19-2, <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf>. The Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee. See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en>. Here, the majority of the BAMC members recused themselves from voting on this matter due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC did not have a quorum to consider Request 19-2 so the Board itself issued the Proposed Determination in lieu of a Recommendation from the BAMC.

<sup>27</sup> Rebuttal in Support of Request 19-2,

Bylaws, policies, and procedures, and ICANN Staff considered all material information prior to executing the .ORG/.INFO Renewed RAs.

## **II. Facts.**

### **A. Historic .ORG and .INFO RAs.**

On 2 December 2002, ICANN org and PIR entered into a RA for the continued operation of .ORG, which became effective in 2003.<sup>28</sup> ICANN org and Afilias first entered into a RA on 11 May 2001 for the operation of .INFO.<sup>29</sup> Both RAs included price caps.<sup>30</sup>

In 2006, ICANN org considered removing price caps from several legacy gTLDs, including .INFO and .ORG.<sup>31</sup> However, after reviewing over 2,000 comments from over 1,000 commenters, many opposing removal of the price caps, and at the Board's direction, ICANN org renegotiated the .ORG and .INFO RAs to include price caps.<sup>32</sup> Following a public comment period for the revised RAs (which included price caps), on 8 December 2006, the Board approved .ORG and .INFO RAs with price caps (as proposed and posted during the public comment period for the revised RAs).<sup>33</sup>

### **B. The New gTLD Program and the Base RA.**

In 2005, ICANN's Generic Names Supporting Organization (GNSO) undertook a policy development process to consider expanding the DNS by introducing new gTLDs.<sup>34</sup> In 2007, the GNSO concluded that "ICANN must implement a process that allows the introduction of new

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<sup>28</sup> 2019 .ORG RA Public Comment Proceeding; *see also* <https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en>; <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>.

<sup>29</sup> 2019 .INFO RA Public Comment Proceeding.

<sup>30</sup> 2002 .ORG RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>; 2001 .INFO RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en>.

<sup>31</sup> 2006 Public Comment of .BIZ, .INFO, .ORG, <https://www.icann.org/news/announcement-3-2006-07-28-en>.

<sup>32</sup> *See* Revised .BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, <https://www.icann.org/news/announcement-2006-10-24-en>.

<sup>33</sup> .ORG RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en>; .INFO RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en>.

<sup>34</sup> <https://newgtlds.icann.org/en/about/program>.

[gTLDs].”<sup>35</sup> Accordingly, ICANN org established and implemented the New gTLD Program, “enabling the largest expansion of the [DNS].”<sup>36</sup>

In 2009, ICANN org commissioned Professor Dennis W. Carlton to analyze “whether price caps... would be necessary to insure the potential competitive benefits” of new gTLDs.<sup>37</sup> Carlton concluded that price caps were “unnecessary to insure competitive benefits of the proposed process for introducing new [gTLDs],” and also noted that “competition among suppliers to attract new customers in markets characterized by switching costs [such as the market for gTLDs] limits or eliminates the suppliers’ [*i.e.*, the registry operators’] incentive and ability to act opportunistically.”<sup>38</sup> He explained that “a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically.”<sup>39</sup>

Carlton performed his analysis during the Base RA development process.<sup>40</sup> That process included multiple rounds of public comment on the proposed Base RA, several months of negotiations, meetings with stakeholders and communities, and formal community feedback via

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<sup>35</sup> GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07 htm# Toc43798015>.

<sup>36</sup> <https://newgtlds.icann.org/en/about/program>.

<sup>37</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 4, March 2009 <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>. Professor Carlton has been a Professor of Economics at the Booth School of Business of The University of Chicago, and Co-Editor of the Journal of Law and Economics, Competition Policy International since 1984. *Id.*, at ¶¶ 1-2. He also served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, United States Department of Justice from October 2006 through January 2008. *Id.*, at ¶ 3. In 2014, Professor Carlton was designated Economist of the Year by Global Competition Review. <https://www.chicagobooth.edu/faculty/directory/c/dennis-w-carlton>. Professor Carlton previously served as Professor of Economics at the Massachusetts Institute of Technology. Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 1.

<sup>38</sup> *Id.*, at ¶ 12.

<sup>39</sup> *Id.*

<sup>40</sup> See New gTLD Program gTLD Applicant Guidebook, Version 2012-06-04, Preamble, available for download at <https://newgtlds.icann.org/en/applicants/agb>.

a public comment forum.<sup>41</sup> The Base RA was established in 2013 and aligns with the GNSO’s policy recommendations for new gTLDs.<sup>42</sup> Since 2014, ICANN org has worked with legacy gTLD registry operators to transition the agreements for legacy gTLDs to the Base RA as well, and several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in renewal agreements.<sup>43</sup> The Base RA does not contain price caps, but it “does contain requirements designed to protect registrants from a price perspective,” including requirements that registry operators “provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals.”<sup>44</sup> In addition, the registry operators must allow registrants to renew for up to 10 years before implementing a price change, and subject to restrictions on discriminatory pricing.<sup>45</sup>

Using the Base RA for renewed legacy gTLDs without price cap provisions “is consistent with the gTLDs launched via the new gTLD program and will reduce ICANN org’s role in domain pricing.”<sup>46</sup> This promotes ICANN’s Core Values of “introduc[ing] and promot[ing] competition in the registration of domain names and, where feasible and appropriate, depend[ing] upon market mechanisms to promote and sustain a competitive environment in the DNS market.”<sup>47</sup>

The Base RA provides additional protections for the public benefit. For example, in 2015 the Board noted that the Base RA allows ICANN org to “designate an emergency interim

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<sup>41</sup> <https://www.icann.org/public-comments/base-agreement-2013-04-29-en>; *see also* 26 July 2019 Letter, at Pg. 1.

<sup>42</sup> 26 July 2019 Letter, at Pg. 1; *see also* GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, [https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#\\_Toc43798015](https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015).

<sup>43</sup> 26 July 2019 Letter, at Pg. 1.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*, at Pg. 2.

registry operator of the registry for the TLD, which would mitigate the risks to the stability and security of the [DNS].”<sup>48</sup> Additionally, using the Base RA ensures that the Registry will use “uniform and automated processes, which will facilitate operation of the TLD,” and “includes safeguards in the form of public interest commitments in Specification 11.”<sup>49</sup>

The Board has also explained that transitioning legacy gTLDs to the Base RA “will provide consistency across all registries leading to a more predictable environment for end-users.”<sup>50</sup> The Base RA’s requirement that the registry operator only use ICANN accredited registrars that are party to the 2013 Registrar Accreditation Agreement “will provide more benefits to registrars and registrants.”<sup>51</sup> Finally, the Board has noted that the Base RA “includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS,”<sup>52</sup> another public benefit.

### C. The 2019 .ORG and .INFO RA Renewals.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.<sup>53</sup> Likewise, the .INFO RA with Afilias was renewed on 22 August 2013.<sup>54</sup>

In anticipation of the 30 June 2019 expiration of the 2013 .ORG and .INFO RAs, ICANN org bilaterally negotiated renewals with each registry operator. The proposed renewals were based on ICANN org’s Base RA, modified “to account for the specific nature[s]” of each TLD

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<sup>48</sup> Rationale for Board Resolution 2015.09.28.06 (renewal of .PRO RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e.rationale>; see also Rationale for Board Resolution 2015.09.28.04 (renewal of .CAT RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c.rationale>; Rationale for Board Resolution 2015.09.28.05 (renewal of .TRAVEL RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d.rationale>; 2019 .ORG RA, Art. 2, § 2.13, at Pg. 7, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>.

<sup>49</sup> Rationale for Board Resolution 2015.09.28.06; see also 2019 .ORG RA, Specification 11, at Pgs. 95-96, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>.

<sup>50</sup> Rationale for Board Resolution 2015.09.28.06.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 2019 .ORG RA Public Comment Proceeding.

<sup>54</sup> 2019 .INFO RA Public Comment Proceeding.

and as a result of negotiations between ICANN and the registry operators.<sup>55</sup> On 18 March 2019, ICANN org published the proposed .ORG/.INFO RAs for public comment to obtain community input on the proposed renewals. ICANN org published redline versions of the proposed renewal agreements against the Base RA, and identified the material differences between proposed renewals and the Base RA. ICANN org explained that

[i]n alignment with the [Base RA], the price cap provisions in the current .ORG [and .INFO] agreement[s], which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG [and .INFO] renewal agreement[s]. Protections for existing registrants will remain in place, in line with the [Base RA]. This change will not only allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA], 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 RA].<sup>56</sup>

The public comment period for the .ORG/.INFO Renewed RAs opened on 18 March 2019 and closed on 29 April 2019.<sup>57</sup> During that time, ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG agreement,<sup>58</sup> and over 500 submissions in response to its call for comments on the proposed .INFO agreement.<sup>59</sup> The comments predominantly related to three themes: (1) the proposed removal of the price cap provisions; (2) inclusion of the RPMs; and (3) the RA renewal process.<sup>60</sup>

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<sup>55</sup> See 2019 .ORG RA Public Comment Proceeding ; 2019 .INFO RA Public Comment Proceeding.

<sup>56</sup> 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.

<sup>57</sup> 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.

<sup>58</sup> Report of Public Comments, .ORG, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>.

<sup>59</sup> Report of Public Comments, .INFO, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf>.

<sup>60</sup> *Id.*, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.

ICANN org detailed its analysis of the public comments concerning the .ORG/.INFO Renewed RAs—including those addressing the proposed removal of price cap provisions—in its Report of Public Comments.<sup>61</sup> ICANN org concluded that

[r]emoving the price cap provisions in the .ORG [and .INFO RAs] is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.<sup>62</sup>

ICANN org also noted that

the Base [RA] would also afford protections to existing registrants . . . [e]nacting this change will not only allow the .ORG renewal agreement to conform to the Base [RA], 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 [RA].<sup>63</sup>

ICANN org explained that it would “consider the feedback from the community on this issue,”<sup>64</sup> and then ICANN org would “consider the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”<sup>65</sup>

ICANN org reviewed and considered all of the comments submitted concerning the proposed .ORG/.INFO Renewed RAs,<sup>66</sup> then ICANN Staff briefed the ICANN Board on its analysis of the public comments during the Board workshop on 21-23 June 2019.<sup>67</sup> With support from the Board to proceed with execution of the proposed renewals and pursuant to the [ICANN](#)

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<sup>61</sup> Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

<sup>62</sup> Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

<sup>63</sup> Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

<sup>64</sup> Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

<sup>65</sup> Report of Public Comments, .ORG, at Pg. 1; Report of Public Comments, .INFO, at Pg. 1.

<sup>66</sup> 26 July 2019 Letter, at Pg. 2.

<sup>67</sup> 26 July 2019 Letter at Pg. 2.

[Delegation of Authority Guidelines](#), on 30 June 2019, ICANN org executed the .ORG/.INFO Renewed RAs.<sup>68</sup>

D. The Request for Reconsideration.

The Requestor submitted Request 19-2 on 12 July 2019.

Pursuant to Article 4, Section 4.2(l) of the Bylaws, ICANN org transmitted Request 19-2 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.<sup>69</sup>

After investigating, the Ombudsman concluded that “the CEO and Staff acted within the scope of the powers given them by the Board,”<sup>70</sup> and that “no rules or duties of corporate governance were violated (including the ICANN Bylaws).”<sup>71</sup> He determined that the “Board were well aware of the public comments” because ICANN Staff briefed the Board on the comments, and because the comments were publicly available, so Board members could have read each comment had they so desired.<sup>72</sup> Additionally, the Ombudsman concluded that “the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws).”<sup>73</sup>

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<sup>68</sup> See ICANN org announcements: .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>; .INFO RA, <https://www.icann.org/resources/agreement/info-2019-06-30-en>.

<sup>69</sup> <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-ombudsman-action-redacted-27aug19-en.pdf>.

<sup>70</sup> Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*, at Pg. 5. On 12 September 2019, the Internet Commerce Association (ICA) wrote to the Ombudsman, asserting that the Ombudsman “made ill-informed and disparaging comments about members of the ICANN community” in the Ombudsman’s evaluation. 12 September 2019 letter from Z. Muskovitch to H. Wayne, <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-letter-ica-to-icann-ombudsman-12sep19-en.pdf>. The ICA asked the Ombudsman to “apologize to the numerous people who submitted these Comments and to retract [his] ill-advised statements.” *Id.*, at Pg. 3.



The Board adopted a Proposed Determination denying Request 19-2 on 3 November 2019.<sup>74</sup> On 18 November 2019, the Requestor submitted a rebuttal to the Board’s Proposed Determination. The Requestor argued that: (1) the Board should not have relied on an expert economist’s 2009 assessment of the propriety of price caps in new gTLD Registry Agreements; (2) the Base RA’s development process does not support migration of .ORG and .INFO to the Base RA; (3) ICANN Staff disregarded “essentially unanimous public comments in support of price caps”; and (4) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed “requires that ICANN [org] review this purchase in detail and take the necessary steps to ensure that .org domains are not used [as] a source of revenue” for certain purposes.<sup>75</sup>

E. Relief Requested.

The Requestor “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs.”<sup>76</sup>

**III. Issues Presented.**

The issues are as follows:

1. Whether ICANN Staff’s decision not to include price caps in the .ORG/.INFO Renewed RA contradicts ICANN’s Mission, Commitments, Core Values, or established ICANN policies; and
2. Whether ICANN Staff failed to consider material information when it executed the .ORG/.INFO Renewed RAs.

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<sup>74</sup> Board action on Proposed Determination on Request 19-2, <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.a>; Proposed Determination on Request 19-2, <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf>.

<sup>75</sup> Rebuttal in Support of Request 19-2, [INSERT CITE WHEN POSTED].

<sup>76</sup> Request 19-2, § 9, at Pg. 12.

#### **IV. The Relevant Standards for Reconsideration Requests.**

Articles 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity "may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information."<sup>77</sup>

The Board now considers Request 19-2's request for reconsideration of Staff action<sup>78</sup> on the grounds that the action was taken in contradiction of ICANN's Bylaws and without consideration of material information. The Board has reviewed the Request and all relevant materials and now makes this final determination. Denial of a Request for Reconsideration of ICANN Staff action is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>79</sup>

#### **V. Analysis and Rationale.**

##### **A. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Commitments.**

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<sup>77</sup> Bylaws, Art. 4 §§ 4.2(a) and (c).

<sup>78</sup> The Requestor sought reconsideration of Board and Staff Action, and brought the Request on behalf of itself and "725 Namecheap customers and internet users." *See* Request 19-2, § 2, at Pg. 2; *id.* § 10, at Pg. 12. Request 19-2 does not identify an action or inaction of the Board. Further, the Requestor's claim on behalf of its customers is not sufficiently stated because it does not satisfy the requirement that the Requestor, not a third party, must have been adversely affected by the challenged action. Accordingly, the Board's consideration is with respect to the Requestor's challenge to Staff action.

<sup>79</sup> Bylaws, Art. 4 § 4.2(e).

The Requestor claims that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org’s Commitment to “seek input from the public, for whose benefit ICANN in all events shall act.”<sup>80</sup>

The Requestor acknowledges that “ICANN [org] requested public comment regarding the changes to the .ORG registry agreement.”<sup>81</sup> It asserts, however, that ICANN org “reject[ed] all of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence,” and as a result, “the public comment process is basically a sham.”<sup>82</sup> In sum, the Requestor claims that including price caps in the .ORG/.INFO Renewed RAs “ignore[d] the public benefit or almost unanimous feedback to the contrary.”<sup>83</sup>

The Requestor does not dispute that ICANN org “review[ed] and consider[ed] all 3,200+ comments received,”<sup>84</sup> and acknowledged that the removal of the price caps was “[a] primary concern voiced in the comments.”<sup>85</sup> ICANN Staff presented and discussed the “key issues raised in the public comment process and correspondence,” including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.<sup>86</sup> Further, as the Ombudsman noted, the Board was “well aware of the public comments.”<sup>87</sup>

The Reports of Public Comment were the result of ICANN Staff’s extensive analysis of the comments;<sup>88</sup> consistent with ICANN Staff’s ordinary process for preparing the Report of

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<sup>80</sup> Request 19-2, § 8, at Pg. 4.

<sup>81</sup> *Id.* § 8, at Pg. 3.

<sup>82</sup> *Id.* § 8, at Pgs. 10, 12; *see also* Rebuttal, at Pg. 5 (“it is still not clear why ICANN [org] bothered to solicit public comment”; omitting price caps from the .ORG/.INFO Renewed RAs “effectively silenced” those who submitted public comments opposing removal of price caps).

<sup>83</sup> Request 19-2, § 8, at Pg. 12.

<sup>84</sup> 26 July 2019 Letter at Pg. 2.

<sup>85</sup> Report of Public Comments, .ORG, at Pg. 3; Report of Public Comments, .INFO, at Pg. 3.

<sup>86</sup> 26 July 2019 Letter, at Pg. 2.

<sup>87</sup> Ombudsman Evaluation of Request 19-2, at Pg. 5.

<sup>88</sup> The Requestor argues that ICANN Staff did not conduct an extensive analysis of the public comments because of “glaring issues” with the manner in which certain comments were posted to ICANN org’s website. Rebuttal, at Pg. 5. Those issues do not concern the substance of public comments concerning the proposed price caps. They are not relevant to Request 19-2.

Public Comment, ICANN Staff identified the main themes in the comments and summarized them, providing exemplary excerpts for each of those themes.<sup>89</sup> Neither the Bylaws, nor any ICANN policy or procedure, requires ICANN Staff to discuss each position stated in each comment. By the same token, there is no threshold number of comments about a topic that, if reached, requires ICANN Staff to address that topic in the Report of Public Comments. Even a single comment on a theme may merit inclusion in the report, under certain circumstances; likewise, a multitude of comments on a theme may merit little or no consideration in the report, under other circumstances.<sup>90</sup>

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a “sham,” “silence[.]” public comments, or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff’s careful consideration of the public comments—as reflected in its Report of Public Comments and discussion with the Board,<sup>91</sup> demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

Further, the Report of Public Comments demonstrates ICANN Staff’s belief that it was acting for the public benefit by “promot[ing] competition in the registration of domain names,” providing the same “protections to existing registrants” afforded to registrants of other TLDs, and treating “the Registry Operator equitably with registry operators of new gTLDs and other

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<sup>89</sup> See Report of Public Comments, .ORG, at Pg. 3 (“This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor.”); Report of Public Comments, .INFO, at Pg. 3 (same).

<sup>90</sup> The Board acknowledges the ICA’s disagreement with the Ombudsman’s characterization of certain comments as “spam” and “computer generated.” 12 September 2019 Letter, at Pgs. 1-2. ICANN Staff acknowledged both the volume of comments submitted concerning the proposed .ORG/.INFO Renewed RAs and the issues they raised—including the removal of price cap provisions—without discounting the comments based on their apparent source. See Report of Public Comments, .ORG; Report of Public Comments, .INFO. Accordingly, the ICA’s arguments do not change the Board’s determination that reconsideration is not warranted here.

<sup>91</sup> 26 July 2019 Letter, at Pg. 2.

legacy gTLDs utilizing the Base [RA].”<sup>92</sup> There is no support for the Requestor’s assertion that ICANN Staff’s belief in this regard was based upon “conclusory statements not supported by evidence.”<sup>93</sup> ICANN org considered Professor Carlton’s 2009 expert analysis of the Base RA, and specifically his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.<sup>94</sup> Finally, ICANN Staff was aware of the Board’s 2015 statements (made in the course of approving the migration of another legacy gTLD, .PRO, to the Base RA) that the Base RA as a whole benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end-users.<sup>95</sup>

In sum, the Requestor’s conclusory assertion that ICANN org did not act for the public benefit is unsupported and does not support reconsideration.

B. The .ORG/INFO Renewed RAs Are Consistent With ICANN Org’s Core Values.

The Requestor asserts that omitting the price caps from the .ORG/INFO Renewed RAs contradicts ICANN org’s Core Value of

[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.<sup>96</sup>

Contrary to the Requestor’s argument, ICANN org *did* seek broad, informed participation through the public comment process for the .ORG/INFO Renewed RAs. As noted above,

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<sup>92</sup> Report of Public Comments, .ORG, at Pg. 8.

<sup>93</sup> Request 19-2, § 8, at Pg. 12.

<sup>94</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.

<sup>95</sup> See Rationale for Board Resolution 2015.09.28.06.

<sup>96</sup> Request 19-2, § 8, at Pg. 4.

ICANN org considered the responses and other factors, including its commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,”<sup>97</sup> and its Core Values of “depending on market mechanisms to promote and sustain a competitive environment in the DNS market” where “feasible and appropriate,” and “[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.”<sup>98</sup>

Moreover, the public comment process is but one of several channels for ICANN’s multistakeholder community to voice opinions. Members of the community may also voice their opinions in public meetings and through the final recommendations of supporting organizations, advisory committees, and direct correspondence with ICANN org. Accordingly, the multistakeholder community provides input to ICANN org in many ways, and ICANN org considers this input to ensure that all views have been taken into account during a decision-making process.

However, ICANN org’s Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN’s various communication channels. Here, ICANN org ultimately determined that ICANN’s Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same “protections to existing registrants” that are afforded to registrants of other TLDs, and treat registry operators equitably.<sup>99</sup> Further, the Base RA, which is incorporated in the .ORG/.INFO

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<sup>97</sup> Bylaws, Art. 1, § 1.2(a)(v); *see also* 26 July 2019 Letter, at Pg. 1.

<sup>98</sup> Bylaws, Art. 1, § 1.2(b)(iii), (iv); *see also* 26 July 2019 Letter, at Pg. 2.

<sup>99</sup> Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

Renewed RA, “was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment.”<sup>100</sup>

On rebuttal, the Requestor asserts that the Base RA “was developed for the new gTLD registries” and there is no evidence that participants in the Base RA development understood that ICANN org might use the Base RA for legacy gTLDs.<sup>101</sup> But ICANN org “has consistently used the Base RA as the starting point for discussions with legacy gTLD operators about renewing their Registry Agreements” since no later than 2014.<sup>102</sup> Since then, the following other legacy gTLDs have adopted the Base RA in renewed agreements: .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, .ASIA, and .BIZ.<sup>103</sup> Accordingly, ICANN org adhered to its commitment to treat the .ORG and .INFO registry operators consistently with other legacy gTLD registry operators (rather than single them out for discriminatory treatment) when it used the Base RA as the starting point for its renewal discussions in 2019.<sup>104</sup>

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org’s transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org’s Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

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<sup>100</sup> 26 July 2019 Letter, at Pg. 1.

<sup>101</sup> Rebuttal, at Pg. 4.

<sup>102</sup> 26 July 2019 Letter, at Pg. 1.

<sup>103</sup> *Id.*

<sup>104</sup> *See* ICANN Bylaws, Art. 1, § 1.2(a)(v). That the .ORG and .INFO RAs that were renewed in August 2013 did not adopt the Base RA, which had been adopted just one month earlier, is not relevant. As noted above, ICANN org’s consistent practice of using the Base RA for discussions with legacy gTLDs began in 2014. 26 July 2019 Letter, at Pg. 1.

The Requestor asserts that reconsideration is warranted because omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org’s statement on its Public Comment Opportunities page that “Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption,” and is “used to guide implementation work, reviews, and operational activities of the ICANN organization.”<sup>105</sup> The Requestor asserts that omitting the price caps is inconsistent with ICANN org’s statement that the “purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement.”<sup>106</sup>

Ultimately, ICANN org’s decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to “obtain community input” or “use[]” the public comment “to guide implementation work” of ICANN org.<sup>107</sup> To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board’s support, to pursue, the global public interest.

Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).<sup>108</sup> ICANN org’s general description of the purpose of the public comment process is not a Commitment, Core Value, established policy, nor part of ICANN org’s Mission. Accordingly, even if ICANN org’s decision to execute the .ORG/.INFO Renewed RAs without price caps contradicted these statements—and it did not, as explained in Section V.A above — this inconsistency could not form the basis of a Reconsideration Request.

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<sup>105</sup> Request 19-2, § 8, at Pg. 4.

<sup>106</sup> *Id.*

<sup>107</sup> *See id.*

<sup>108</sup> Bylaws, Art. 4 § 4.2(c). The challenged action must adversely affect the Requestor as well. *Id.*



D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

The Requestor asserts that ICANN org’s analysis of the proposed removal of price caps “ignores significant information that is contrary to its sweeping conclusions.”<sup>109</sup> Specifically, the Requestor asserts that ICANN org’s analysis ignores that:

1. .ORG “is the 3rd largest” TLD, and “additional analysis is needed to determine whether this market share can result in uncompetitive practices,”<sup>110</sup>
2. .ORG “was established in 1985,” “is universally known, associated with nonprofit use, and has an excellent reputation,”<sup>111</sup>
3. It can be “a cumbersome and costly process” for an established entity to change domain name, and “often” leads to “negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill).”<sup>112</sup>
4. “TLDs are not interchangeable, as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not useable by nonprofits . . . or targeted to certain uses . . . and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .ORG.”<sup>113</sup>
5. Although some new gTLDs are targeted to nonprofits, “there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .ORG).”<sup>114</sup>
6. “There are some concerns [that] higher levels of abuse exists in new gTLD domains . . . ICANN’s own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs.”<sup>115</sup>
7. “[I]t is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name.”<sup>116</sup>

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<sup>109</sup> Request 19-2, § 8, at Pg. 10.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*, at Pg. 10-11.

<sup>113</sup> *Id.*, at Pg. 11.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* citing <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>.

<sup>116</sup> *Id.*, at Pg. 11-12.

The Report of Public Comments for the .ORG Renewed RA makes clear that ICANN org *did* consider some of these concerns. Specifically, with respect to Item 1, ICANN Staff noted that commenters “questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections.”<sup>117</sup> With respect to Item 2, ICANN Staff acknowledged that commentators noted that “.ORG was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations.”<sup>118</sup> With respect to Items 3, 4, 5, and 7, ICANN Staff acknowledged “concerns about the burden and costs associated with moving [a] web presence to another TLD,” along with comments characterizing .ORG as “the most appropriate registry for a charity or non-profit.”<sup>119</sup> Accordingly, the Requestor’s argument that the information about these six “concerns” was not considered or was ignored is incorrect and therefore does not support reconsideration.

With respect the Requestor’s assertion that “ICANN’s own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs,”<sup>120</sup> the Requestor mischaracterizes the cited ICANN report. As the Requestor notes, the 2019 Domain Abuse Activity Reporting (DAAR) report concluded that 48.11% of the “domains identified as security threats . . . were in legacy [TLDs],” and the remaining 51.89% of the domains identified as threats were in new gTLDs.<sup>121</sup> Further, the Report indicates that about 12% of TLD domain names are hosted on new gTLDs.<sup>122</sup> However, the Report also notes that 88% of the new gTLD domains identified as security threats

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<sup>117</sup> Report of Public Comments, .ORG, at Pg. 5.

<sup>118</sup> *Id.*, at Pgs. 3-4.

<sup>119</sup> *Id.*, at Pgs. 4-5.

<sup>120</sup> *Id.*, citing 31 January 2019 DAAR Report, <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>.

<sup>121</sup> 31 January 2019 DAAR Report, Executive Summary.

<sup>122</sup> *Id.*, at Pg. 5.

were concentrated in only 25 new gTLDs, out of over 340 new gTLDs.<sup>123</sup> The Report further noted that 98% of the domains identified as security threats were hosted by “the 50 most-exploited new [TLDs].”<sup>124</sup> Accordingly, even if ICANN Staff did not consider the 2019 DAAR Report, the Requestor has not shown that the information contained in it was material to the inclusion of price caps in the .ORG/.INFO Renewed RAs. Moreover, the cited portions of the DAAR Report relate to security threats, not domain name registration fees. This argument does not support reconsideration.

E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/.INFO Renewed RAs.

The Requestor asserts that it has been adversely affected by the challenged conduct because, “[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor’s] domain name registration business,” insofar as the .ORG/.INFO Renewed RAs create an “uncertainty of price increases.”<sup>125</sup> That the Requestor could not quantify the actual financial impact on the Requestor of removing the price caps at the time it submitted Request 19-2 was not material to our preliminary procedural evaluation, because the Requestor asserted that the financial uncertainty *itself* is the harm. Accordingly, the Board Accountability Mechanisms Committee (BAMC) concluded that Request 19-2 was sufficiently stated.<sup>126</sup> However, the BAMC’s conclusion that the Requestor sufficiently asserted that it was materially harmed was not a determination that the Requestor was in fact materially harmed or, if so, that removing the .ORG/.INFO Renewed RAs caused that harm.

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<sup>123</sup> *Id.*, at Pg. 6. Similarly, four legacy TLDs hosted more than 94% of the legacy TLD domains identified as security threats. *Id.*

<sup>124</sup> *Id.*, at Pg. 6.

<sup>125</sup> Request 19-2, § 6, at Pg. 2; *see also id.* § 10, at Pg. 13.

<sup>126</sup> *See* Ombudsman Action on Request 19-2, at Pg. 2.

The Board now concludes that the Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. As noted above, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.<sup>127</sup> Professor Carlton explained that “a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically.”<sup>128</sup> The Requestor disagrees with the Board’s conclusion, but raises no new arguments or evidence supporting its disagreement.<sup>129</sup> Instead, in its Rebuttal, the Requestor merely repeats the argument from its original Request, namely that the claimed harm is “likely to occur,” rather than presently existing.<sup>130</sup>

Regardless of whether the speculative harm on which Requestor bases Request 19-2 could be sufficient to support a Reconsideration Request, it is not sufficient here because (1) ICANN Staff acted consistent with ICANN Bylaws, policies, and procedures when it renewed the .ORG/.INFO RAs,<sup>131</sup> and (2) the additional safeguards discussed above demonstrate that, at this time, Requestor’s concerns are not well founded.

In its Rebuttal the Requestor also challenges the Board’s reliance on Professor Carlton’s 2009 Preliminary Analysis Regarding Price Caps.<sup>132</sup> The Requestor asserts that the Board should disregard Professor Carlton’s analysis because: (1) it is an opinion and does not cite “any data sources or references,” (2) certain public commenters disagreed with Professor Carlton, (3)

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<sup>127</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.

<sup>128</sup> *Id.*

<sup>129</sup> Rebuttal, at Pgs. 6-7.

<sup>130</sup> *Id.* at Pg. 6.

<sup>131</sup> *See supra* § V.B.

<sup>132</sup> Rebuttal, at Pg. 2.

it focused on the propriety of removing price caps for new gTLDs and not legacy gTLDs, and (4) the Board did not reference Professor Carlton's analysis when the .ORG/.INFO RAs were renewed in 2013.<sup>133</sup>

The Requestor's first and second arguments amount to a disagreement with Professor Carlton's conclusions. They do not support reconsideration. Professor Carlton is a leader in economic analysis, particularly concerning antitrust issues.<sup>134</sup> His 2009 Preliminary Analysis is based on his extensive experience with and expertise in market forces. It is not—and does not claim to be—a data-driven study or survey.<sup>135</sup> The Requestor's disagreement with Professor Carlton's conclusions does not necessarily render them incorrect.

The Requestor's third argument does not support reconsideration because, although Professor Carlton did note that price caps in legacy gTLDs had the effect of limiting prices that new gTLDs could charge, Professor Carlton identified other controls that also have the effect of limiting price increases.<sup>136</sup> The Requestor's fourth argument likewise does not support reconsideration. The Requestor has identified no established policy or procedure (because there is none) requiring the Board to consider the exact same information and materials for every RA renewal. The Requestor has not demonstrated that consideration of Professor Carlton's analysis violates ICANN Bylaws or established policies or procedures.

The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that "additional analysis is needed to

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<sup>133</sup> *Id.* at Pg. 2-3.

<sup>134</sup> *See supra* § II.B.

<sup>135</sup> *See* Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.

<sup>136</sup> *See supra* § II.B.

determine whether” the removal of price caps in the .ORG RA “can result in uncompetitive practices.”<sup>137</sup> This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton’s expert report—indicates that such harm is not expected. Accordingly, reconsideration is not warranted.

F. The Parent Company of the .ORG Registry Operator Is Not Relevant to the Reconsideration Request and Does Not Support Reconsideration.

The Requestor argues that the “timing and nature” of the 13 November 2019 acquisition of the .ORG Registry Operator PIR by an investment firm “is suspicious” because the Requestor believes that negotiations for the acquisition began before the .ORG RA was renewed.<sup>138</sup> Accordingly, the Requestor asserts, ICANN should “scrutinize this transaction closely.”<sup>139</sup> However, PIR’s corporate structure is not relevant to Request 19-2, which concerns the 30 June 2019 renewal of the .ORG RA and must be evaluated in accordance with the grounds for reconsideration as set forth in ICANN’s Bylaws. The Ethos Capital acquisition of PIR, which was announced more than four months after the execution of the .ORG Renewed RA, did not impact ICANN Staff’s determination that ICANN’s Mission and Core Values were best served by migrating the .ORG/.INFO RAs to the Base RA.<sup>140</sup>

In sum, Request 19-2 is not the appropriate vehicle for challenging Ethos Capital’s acquisition of PIR.

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<sup>137</sup> Request 19-2, § 8, at Pg. 10.

<sup>138</sup> Rebuttal, at Pg. 7.

<sup>139</sup> *Id.*

<sup>140</sup> *See supra* § II.C. Neither ICANN Staff nor PIR were aware that Ethos Capital would acquire PIR when the parties finalized the .ORG Renewed RA. *See* <http://domainincite.com/24988-i-attempt-to-answer-icas-questions-about-the-terrible-blunder-org-acquisition>.

**VI. Determination.**

The Board has considered the merits of Request 19-2 and, based on the foregoing, concludes that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board denies Request 19-2.

**FINAL DETERMINATION**  
**OF THE ICANN BOARD OF DIRECTORS**  
**RECONSIDERATION REQUEST 19-2**  
**21 November 2019**

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The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization’s 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs), insofar as the renewals eliminated “the historic price caps” on domain name registration fees for .ORG and .INFO.<sup>2</sup> The Requestor claims that ICANN org’s “decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN’s Commitments and Core Values, and ICANN should reverse this decision for the public good.”<sup>3</sup>

Specifically, the Requestor claims that the .ORG/.INFO Renewed RAs are contrary to:

- (i) ICANN org’s commitment to “seek input from the public, for whose benefit ICANN in all events shall act.”<sup>4</sup>
- (ii) ICANN org’s Core Value of “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.”<sup>5</sup>
- (iii) ICANN org’s Public Comment Opportunities page, which states that “Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption,” and is “used to guide implementation work, reviews, and operational activities of the ICANN organization.”<sup>6</sup>

<sup>2</sup> Request 19-2, § 3, at Pg 2

<sup>3</sup> *Id.* § 8, at Pg 3

<sup>4</sup> *Id.* § 8, at Pg 4

<sup>5</sup> *Id.* § 8, at Pg 4

<sup>6</sup> *Id.* § 8, at Pg 4



(iv) ICANN org’s statements concerning its call for Public Comment that the “purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement.”<sup>7</sup>

The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.<sup>8</sup>

The Requestor “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs.”<sup>9</sup>

#### **I. Brief Summary.**

PIR is the registry operator for the .ORG TLD.<sup>10</sup> ICANN org and PIR entered into an RA on 2 December 2002 for the continued operation of the .ORG gTLD, which was renewed in 2006 and 2013.<sup>11</sup> ICANN org and Afilias first entered into an RA on 11 May 2001 for the operation of the .INFO gTLD, which was renewed in 2006 and 2013.<sup>12</sup> Before the recent renewals, the RAs for .ORG and .INFO included price caps, which limited the initial prices and allowable price increases for registrations.<sup>13</sup> Both RAs were scheduled to expire on 30 June 2019.

In anticipation of the 30 June 2019 expiration, ICANN org bilaterally negotiated renewals to the agreements with each registry operator. The proposed renewals were based on ICANN org’s base generic TLD Registry Agreement updated on 31 July 2017 (Base RA),

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<sup>7</sup> *Id.*, § 8, at Pg 4

<sup>8</sup> *Id.*, § 8, at Pg 10

<sup>9</sup> *Id.*, § 9, at Pg 12

<sup>10</sup> Public Comment Proceeding, Proposed Renewal of .ORG RA, 18 March 2019 (2019 .ORG RA Public Comment Proceeding), <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>

<sup>11</sup> *Id.*

<sup>12</sup> Public Comment Proceeding, Proposed Renewal of .INFO RA, 18 March 2019 (2019 .INFO RA Public Comment Proceeding), <https://www.icann.org/public-comments/info-renewal-2019-03-18-en>

<sup>13</sup> 2002 .ORG RA, <https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en>; 2001 .INFO RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en>

modified to account for the specific nature of the .ORG and .INFO gTLDs.<sup>14</sup> As a result, the proposed Renewed RAs' terms were substantially similar to the terms of the Base RA.

From January 2019 to June 2019, ICANN Staff briefed and met with the Board several times regarding the proposed .ORG/.INFO Renewed RAs.<sup>15</sup> On 18 March 2019, ICANN Staff published the proposed .ORG/.INFO Renewed RAs for public comment to obtain community input on the proposed renewals. ICANN Staff described the material differences between proposed renewals and the current .ORG and .INFO RAs. These differences included removal of limits on domain name registration fee increases that had been in prior .ORG and .INFO RAs. ICANN Staff explained that the change would “allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA],” while “tak[ing] into consideration the maturation of the domain name market and the goal of treating the Registry Operator[s] equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].”<sup>16</sup>

ICANN org received over 3,700 submissions in response to its call for public comments on the proposed .ORG and .INFO agreements.<sup>17</sup> The comments predominantly related to three themes: (1) the proposed removal of price cap provisions; (2) inclusion of certain rights

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<sup>14</sup> See 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding. The RA for the operation of .BIZ was also set to expire on 30 June 2019; as a result of bilateral negotiations with the registry operator for .BIZ and after considering public comments, ICANN org and the registry operator for .BIZ entered into a Renewed RA for .BIZ that was based on (and therefore substantially similar to) the Base RA. See <https://www.icann.org/resources/agreement/biz-2019-06-30-en>

<sup>15</sup> Letter from Namazi to Muscovitch, 26 July 2019, at Pg. 2, <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>

<sup>16</sup> 2019 .ORG RA Public Comment Proceeding. New gTLDs are TLDs released as part of ICANN org's New gTLD Program. See <https://newgtlds.icann.org/en/about/program>. Legacy gTLDs are gTLDs that existed before ICANN org's New gTLD Program. .ORG and .INFO are legacy TLDs.

<sup>17</sup> Report of Public Comments, .ORG, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>; Report of Public Comments, .INFO, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf>

protection mechanisms (RPMs), including the Uniform Rapid Suspension (URS) rules; and (3) the RA renewal process.<sup>18</sup>

ICANN Staff analyzed the public comments, including those addressing the proposed removal of price cap provisions, in its Report of Public Comments.<sup>19</sup> It concluded that removing the price cap provisions was “consistent with the Core Values of ICANN org as enumerated in the Bylaws,” insofar as removing the price cap provisions would “promote competition in the registration of domain names,” and enabled ICANN org to “depend upon market mechanisms to promote and sustain a competitive environment in the [Domain Name System (DNS)] market.”<sup>20</sup> ICANN org also noted that the Base RA protected existing registrants’ pricing by requiring the registry operator to: (1) give registrars six months’ advance notice of price changes; and (2) allow registrants to renew their domain name registrations for up to 10 years *before* those price changes take effect.<sup>21</sup> ICANN Staff then noted that it would “consider the feedback from the community on this issue,”<sup>22</sup> “and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”<sup>23</sup>

Following consultation with the ICANN Board of Directors and with the Board’s support, on 30 June 2019, ICANN Staff announced that it had executed the .ORG/.INFO Renewed RAs. The .ORG/.INFO Renewed RAs did not include price caps.<sup>24</sup>

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<sup>18</sup> Report of Public Comments, INFO, at Pg 3; Report of Public Comments, ORG, at Pg 3.

<sup>19</sup> ICANN org received some comments supporting removal of the price cap provision because “ICANN org is not and should not be a price regulator,” and because the Base RA would provide certain protections to current registrants. Report of Public Comments, ORG, at Pg 6

<sup>20</sup> *Id.*, at Pg 8

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, at Pg 1

<sup>24</sup> See ICANN org announcements: ORG Renewed RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>; INFO Renewed RA, <https://www.icann.org/resources/agreement/info-2019-06-30-en>

On 12 July 2019, the Requestor filed Request 19-2, seeking reconsideration of the .ORG/INFO Renewed RAs.

The Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that “the CEO and Staff acted within the scope of the powers given them by the Board,”<sup>25</sup> and that “no rules or duties of corporate governance were violated (including the ICANN Bylaws).”<sup>26</sup>

[The Board adopted a Proposed Determination denying Request 19-2 on 3 November 2019.](#)<sup>27</sup> [On 18 November 2019, the Requestor submitted a rebuttal to the Board’s Proposed Determination. The Requestor challenged the Board’s reliance on evidence concerning and mechanisms designed for new gTLDs as compared to legacy TLDs, reiterated its argument that ICANN Staff should have acted in accordance with “essentially unanimous public comments in support of price caps,” and asserted that the recent acquisition of .ORG by a for-profit entity merits additional scrutiny of the .ORG Renewed RA.](#)<sup>28</sup>

The Board has considered Request 19-2 and all relevant materials. Based on its extensive review of all relevant materials, the Board finds that reconsideration is not warranted because ICANN org’s execution of the .ORG/INFO Renewed RAs was consistent with ICANN’s

<sup>25</sup> Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg 5, 7 September 2019, <https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en>

<sup>26</sup> *Id*

<sup>27</sup> [Board action on Proposed Determination on Request 19-2, https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1](https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1); [Proposed Determination on Request 19-2, https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf). The Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests Bylaws, Art 4, § 4 2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee. See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en>. Here, the majority of the BAMC members recused themselves from voting on this matter due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC did not have a quorum to consider Request 19-2 so the Board itself issued the Proposed Determination in lieu of a Recommendation from the BAMC.

<sup>28</sup> Rebuttal in Support of Request 19-2, [\[INSERT CITE WHEN POSTED\]](#).

Bylaws, policies, and procedures, and ICANN Staff considered all material information prior to executing the .ORG/.INFO Renewed RAs.

## II. Facts.

### A. Historic .ORG and .INFO RAs.

On 2 December 2002, ICANN org and PIR entered into a RA for the continued operation of .ORG, which became effective in 2003.<sup>29</sup> ICANN org and Afilias first entered into a RA on 11 May 2001 for the operation of .INFO.<sup>30</sup> Both RAs included price caps.<sup>31</sup>

In 2006, ICANN org considered removing price caps from several legacy gTLDs, including .INFO and .ORG.<sup>32</sup> However, after reviewing over 2,000 comments from over 1,000 commenters, many opposing removal of the price caps, and at the Board's direction, ICANN org renegotiated the .ORG and .INFO RAs to include price caps.<sup>33</sup> Following a public comment period for the revised RAs (which included price caps), on 8 December 2006, the Board approved .ORG and .INFO RAs with price caps (as proposed and posted during the public comment period for the revised RAs).<sup>34</sup>

### B. The New gTLD Program and the Base RA.

In 2005, ICANN's Generic Names Supporting Organization (GNSO) undertook a policy development process to consider expanding the DNS by introducing new gTLDs.<sup>35</sup> In 2007, the GNSO concluded that "ICANN must implement a process that allows the introduction of new

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<sup>29</sup> 2019 .ORG RA Public Comment Proceeding; *see also* <https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en>; <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>

<sup>30</sup> 2019 .INFO RA Public Comment Proceeding

<sup>31</sup> 2002 .ORG RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>; 2001 .INFO RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en>

<sup>32</sup> 2006 Public Comment of BIZ, .INFO, .ORG, <https://www.icann.org/news/announcement-3-2006-07-28-en>

<sup>33</sup> *See* Revised BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, <https://www.icann.org/news/announcement-2006-10-24-en>

<sup>34</sup> .ORG RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en>; .INFO RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en>

<sup>35</sup> <https://newgtlds.icann.org/en/about/program>

[gTLDs].”<sup>36</sup> Accordingly, ICANN org established and implemented the New gTLD Program, “enabling the largest expansion of the [DNS].”<sup>37</sup>

In 2009, ICANN org commissioned Professor Dennis W. Carlton to analyze “whether price caps... would be necessary to insure the potential competitive benefits” of new gTLDs.<sup>38</sup> Carlton concluded that price caps were “unnecessary to insure competitive benefits of the proposed process for introducing new [gTLDs],” and also noted that “competition among suppliers to attract new customers in markets characterized by switching costs [such as the market for gTLDs] limits or eliminates the suppliers’ [*i.e.*, the registry operators’] incentive and ability to act opportunistically.”<sup>39</sup> He explained that “a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically.”<sup>40</sup>

Carlton performed his analysis during the Base RA development process.<sup>41</sup> That process included multiple rounds of public comment on the proposed Base RA, several months of negotiations, meetings with stakeholders and communities, and formal community feedback via

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<sup>36</sup> GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug 2007, [https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm#\\_Toc43798015](https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm#_Toc43798015)

<sup>37</sup> <https://newgtlds.icann.org/en/about/program>

<sup>38</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 4, March 2009 <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf> Professor Carlton has been a Professor of Economics at the Booth School of Business of The University of Chicago, and Co-Editor of the Journal of Law and Economics, Competition Policy International since 1984 *Id.*, at ¶¶ 1-2 He also served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, United States Department of Justice from October 2006 through January 2008 *Id.*, at ¶ 3 In 2014, Professor Carlton was designated Economist of the Year by Global Competition Review <https://www.chicagobooth.edu/faculty/directory/c/dennis-w-carlton> Professor Carlton previously served as Professor of Economics at the Massachusetts Institute of Technology Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 1

<sup>39</sup> *Id.*, at ¶ 12

<sup>40</sup> *Id.*

<sup>41</sup> See New gTLD Program gTLD Applicant Guidebook, Version 2012-06-04, Preamble, *available for download at* <https://newgtlds.icann.org/en/applicants/agb>

a public comment forum.<sup>42</sup> The Base RA was established in 2013 and aligns with the GNSO’s policy recommendations for new gTLDs.<sup>43</sup> Since 2014, ICANN org has worked with legacy gTLD registry operators to transition the agreements for legacy gTLDs to the Base RA as well, and several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in renewal agreements.<sup>44</sup> The Base RA does not contain price caps, but it “does contain requirements designed to protect registrants from a price perspective,” including requirements that registry operators “provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals.”<sup>45</sup> In addition, the registry operators must allow registrants to renew for up to 10 years before implementing a price change, and subject to restrictions on discriminatory pricing.<sup>46</sup>

Using the Base RA for renewed legacy gTLDs without price cap provisions “is consistent with the gTLDs launched via the new gTLD program and will reduce ICANN org’s role in domain pricing.”<sup>47</sup> This promotes ICANN’s Core Values of “introduc[ing] and promot[ing] competition in the registration of domain names and, where feasible and appropriate, depend[ing] upon market mechanisms to promote and sustain a competitive environment in the DNS market.”<sup>48</sup>

The Base RA provides additional protections for the public benefit. For example, in 2015 the Board noted that the Base RA allows ICANN org to “designate an emergency interim

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<sup>42</sup> <https://www.icann.org/public-comments/base-agreement-2013-04-29-en>; see also 26 July 2019 Letter, at Pg 1  
<sup>43</sup> 26 July 2019 Letter, at Pg 1; see also GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug 2007, [https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#\\_Toc43798015](https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015)  
<sup>44</sup> 26 July 2019 Letter, at Pg 1  
<sup>45</sup> *Id.*  
<sup>46</sup> *Id.*  
<sup>47</sup> *Id.*  
<sup>48</sup> *Id.*, at Pg 2

registry operator of the registry for the TLD, which would mitigate the risks to the stability and security of the [DNS].”<sup>49</sup> Additionally, using the Base RA ensures that the Registry will use “uniform and automated processes, which will facilitate operation of the TLD,” and “includes safeguards in the form of public interest commitments in Specification 11.”<sup>50</sup>

The Board has also explained that transitioning legacy gTLDs to the Base RA “will provide consistency across all registries leading to a more predictable environment for end-users.”<sup>51</sup> The Base RA’s requirement that the registry operator only use ICANN accredited registrars that are party to the 2013 Registrar Accreditation Agreement “will provide more benefits to registrars and registrants.”<sup>52</sup> Finally, the Board has noted that the Base RA “includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS,”<sup>53</sup> another public benefit.

C. The 2019 .ORG and .INFO RA Renewals.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.<sup>54</sup> Likewise, the .INFO RA with Afiliac was renewed on 22 August 2013.<sup>55</sup>

In anticipation of the 30 June 2019 expiration of the 2013 .ORG and .INFO RAs, ICANN org bilaterally negotiated renewals with each registry operator. The proposed renewals were based on ICANN org’s Base RA, modified “to account for the specific nature[s]” of each TLD

<sup>49</sup> Rationale for Board Resolution 2015 09 28 06 (renewal of PRO RA), [https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1\\_e\\_rationale](https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1_e_rationale); see also Rationale for Board Resolution 2015 09 28 04 (renewal of CAT RA), [https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1\\_c\\_rationale](https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1_c_rationale); Rationale for Board Resolution 2015 09 28 05 (renewal of TRAVEL RA), [https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1\\_d\\_rationale](https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1_d_rationale) 2019 .ORG RA, Art 2, § 2 13, at Pg 7, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>

<sup>50</sup> Rationale for Board Resolution 2015 09 28 06; see also 2019 .ORG RA, Specification 11, at Pgs 95-96, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>

<sup>51</sup> Rationale for Board Resolution 2015 09 28 06

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> 2019 .ORG RA Public Comment Proceeding

<sup>55</sup> 2019 .INFO RA Public Comment Proceeding



and as a result of negotiations between ICANN and the registry operators.<sup>56</sup> On 18 March 2019, ICANN org published the proposed .ORG/.INFO RAs for public comment to obtain community input on the proposed renewals. ICANN org published redline versions of the proposed renewal agreements against the Base RA, and identified the material differences between proposed renewals and the Base RA. ICANN org explained that

[i]n alignment with the [Base RA], the price cap provisions in the current .ORG [and .INFO] agreement[s], which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG [and .INFO] renewal agreement[s]. Protections for existing registrants will remain in place, in line with the [Base RA]. This change will not only allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA], 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 RA].<sup>57</sup>

The public comment period for the .ORG/.INFO Renewed RAs opened on 18 March 2019 and closed on 29 April 2019.<sup>58</sup> During that time, ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG agreement,<sup>59</sup> and over 500 submissions in response to its call for comments on the proposed .INFO agreement.<sup>60</sup> The comments predominantly related to three themes: (1) the proposed removal of the price cap provisions; (2) inclusion of the RPMs; and (3) the RA renewal process.<sup>61</sup>

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<sup>56</sup> See 2019 .ORG RA Public Comment Proceeding ; 2019 .INFO RA Public Comment Proceeding

<sup>57</sup> 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding

<sup>58</sup> 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding

<sup>59</sup> Report of Public Comments, .ORG, at Pg 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>

<sup>60</sup> Report of Public Comments, .INFO, at Pg 3, <https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf>

<sup>61</sup> *Id.*, at Pg 3; Report of Public Comments, .ORG, at Pg 3

ICANN org detailed its analysis of the public comments concerning the .ORG/.INFO Renewed RAs—including those addressing the proposed removal of price cap provisions—in its Report of Public Comments.<sup>62</sup> ICANN org concluded that

[r]emoving the price cap provisions in the .ORG [and .INFO RAs] is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.<sup>63</sup>

ICANN org also noted that

the Base [RA] would also afford protections to existing registrants . . . [e]nacting this change will not only allow the .ORG renewal agreement to conform to the Base [RA], 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 [RA].<sup>64</sup>

ICANN org explained that it would “consider the feedback from the community on this issue,”<sup>65</sup> and then ICANN org would “consider the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”<sup>66</sup>

ICANN org reviewed and considered all of the comments submitted concerning the proposed .ORG/.INFO Renewed RAs,<sup>67</sup> then ICANN Staff briefed the ICANN Board on its analysis of the public comments during the Board workshop on 21-23 June 2019.<sup>68</sup> With support from the Board to proceed with execution of the proposed renewals and pursuant to the [ICANN](#)

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<sup>62</sup> Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7

<sup>63</sup> Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7

<sup>64</sup> Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7

<sup>65</sup> Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7

<sup>66</sup> Report of Public Comments, ORG, at Pg 1; Report of Public Comments, INFO, at Pg 1

<sup>67</sup> 26 July 2019 Letter, at Pg 2

<sup>68</sup> 26 July 2019 Letter at Pg 2

[Delegation of Authority Guidelines](#), on 30 June 2019, ICANN org executed the .ORG/.INFO Renewed RAs.<sup>69</sup>

D. The Request for Reconsideration.

The Requestor submitted Request 19-2 on 12 July 2019.

Pursuant to Article 4, Section 4.2(I) of the Bylaws, ICANN org transmitted Request 19-2 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.<sup>70</sup>

After investigating, the Ombudsman concluded that “the CEO and Staff acted within the scope of the powers given them by the Board,”<sup>71</sup> and that “no rules or duties of corporate governance were violated (including the ICANN Bylaws).”<sup>72</sup> He determined that the “Board were well aware of the public comments” because ICANN Staff briefed the Board on the comments, and because the comments were publicly available, so Board members could have read each comment had they so desired.<sup>73</sup> Additionally, the Ombudsman concluded that “the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws).”<sup>74</sup>

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<sup>69</sup> See ICANN org announcements: ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en> INFO RA, <https://www.icann.org/resources/agreement/info-2019-06-30-en>

<sup>70</sup> <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-ombudsman-action-redacted-27aug19-en.pdf>

<sup>71</sup> Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg 5, 7 September 2019

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, at Pg 5 On 12 September 2019, the Internet Commerce Association (ICA) wrote to the Ombudsman, asserting that the Ombudsman “made ill-informed and disparaging comments about members of the ICANN community” in the Ombudsman’s evaluation 12 September 2019 letter from Z Muskovitch to H Waye, <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-letter-ica-to-icann-ombudsman-12sep19-en.pdf> The ICA asked the Ombudsman to “apologize to the numerous people who submitted these Comments and to retract [his] ill-advised statements” *Id.*, at Pg 3

[The Board adopted a Proposed Determination denying Request 19-2 on 3 November 2019.](#)<sup>75</sup> [On 18 November 2019, the Requestor submitted a rebuttal to the Board’s Proposed Determination. The Requestor argued that: \(1\) the Board should not have relied on an expert economist’s 2009 assessment of the propriety of price caps in new gTLD Registry Agreements; \(2\) the Base RA’s development process does not support migration of .ORG and .INFO to the Base RA; \(3\) ICANN Staff disregarded “essentially unanimous public comments in support of price caps”; and \(4\) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed “requires that ICANN \[org\] review this purchase in detail and take the necessary steps to ensure that .org domains are not used \[as\] a source of revenue” for certain purposes.](#)<sup>76</sup>

E. Relief Requested.

The Requestor “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs.”<sup>77</sup>

**III. Issues Presented.**

The issues are as follows:

1. Whether ICANN Staff’s decision not to include price caps in the .ORG/.INFO Renewed RA contradicts ICANN’s Mission, Commitments, Core Values, or established ICANN policies; and
2. Whether ICANN Staff failed to consider material information when it executed the .ORG/.INFO Renewed RAs.

<sup>75</sup> Board action on Proposed Determination on Request 19-2, [https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1 a: Proposed Determination on Request 19-2](https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1_a:Proposed_Determination_on_Request_19-2), <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf>

<sup>76</sup> Rebuttal in Support of Request 19-2, [\[INSERT CITE WHEN POSTED\]](#)

<sup>77</sup> Request 19-2, § 9, at Pg 12

#### IV. The Relevant Standards for Reconsideration Requests.

Articles 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity "may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information."<sup>78</sup>

The Board now considers Request 19-2's request for reconsideration of Staff action<sup>79</sup> on the grounds that the action was taken in contradiction of ICANN's Bylaws and without consideration of material information. The Board has reviewed the Request and [all relevant materials](#) and now makes this [final](#) determination. Denial of a Request for Reconsideration of ICANN Staff action is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>80</sup>

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#### V. Analysis and Rationale.

- A. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Commitments.

<sup>78</sup> Bylaws, Art 4 §§ 4 2(a) and (c)

<sup>79</sup> The Requestor sought reconsideration of Board and Staff Action, and brought the Request on behalf of itself and "725 Namecheap customers and internet users" See Request 19-2, § 2, at Pg 2; *id.* § 10, at Pg 12 Request 19-2 does not identify an action or inaction of the Board Further, the Requestor's claim on behalf of its customers is not sufficiently stated because it does not satisfy the requirement that the Requestor, not a third party, must have been adversely affected by the challenged action Accordingly, the Board's consideration is with respect to the Requestor's challenge to Staff action

<sup>80</sup> Bylaws, Art 4 § 4 2(e)

The Requestor claims that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org’s Commitment to “seek input from the public, for whose benefit ICANN in all events shall act.”<sup>81</sup>

The Requestor acknowledges that “ICANN [org] requested public comment regarding the changes to the .ORG registry agreement.”<sup>82</sup> It asserts, however, that ICANN org “reject[ed] all of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence,” and as a result, “the public comment process is basically a sham.”<sup>83</sup> In sum, the Requestor claims that including price caps in the .ORG/.INFO Renewed RAs “ignore[d] the public benefit or almost unanimous feedback to the contrary.”<sup>84</sup>

The Requestor does not dispute that ICANN org “review[ed] and consider[ed] all 3,200+ comments received,”<sup>85</sup> and acknowledged that the removal of the price caps was “[a] primary concern voiced in the comments.”<sup>86</sup> ICANN Staff presented and discussed the “key issues raised in the public comment process and correspondence,” including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.<sup>87</sup> Further, as the Ombudsman noted, the Board was “well aware of the public comments.”<sup>88</sup>

The Reports of Public Comment were the result of ICANN Staff’s extensive analysis of the comments;<sup>89</sup> consistent with ICANN Staff’s ordinary process for preparing the Report of

<sup>81</sup> Request 19-2, § 8, at Pg 4

<sup>82</sup> *Id.* § 8, at Pg 3

<sup>83</sup> *Id.* § 8, at Pgs 10, 12; *see also* Rebuttal, at Pg 5 (“it is still not clear why ICANN [org] bothered to solicit public comment” omitting price caps from the .ORG/.INFO Renewed RAs “effectively silenced” those who submitted public comments opposing removal of price caps).

<sup>84</sup> Request 19-2, § 8, at Pg 12

<sup>85</sup> 26 July 2019 Letter at Pg 2

<sup>86</sup> Report of Public Comments, .ORG, at Pg 3; Report of Public Comments, .INFO, at Pg 3

<sup>87</sup> 26 July 2019 Letter, at Pg 2.

<sup>88</sup> Ombudsman Evaluation of Request 19-2, at Pg 5

<sup>89</sup> The Requestor argues that ICANN Staff did not conduct an extensive analysis of the public comments because of “glaring issues” with the manner in which certain comments were posted to ICANN org’s website. Rebuttal, at Pg 5. Those issues do not concern the substance of public comments concerning the proposed price caps. They are not relevant to Request 19-2.

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Public Comment, ICANN Staff identified the main themes in the comments and summarized them, providing exemplary excerpts for each of those themes.<sup>90</sup> Neither the Bylaws, nor any ICANN policy or procedure, requires ICANN Staff to discuss each position stated in each comment. By the same token, there is no threshold number of comments about a topic that, if reached, requires ICANN Staff to address that topic in the Report of Public Comments. Even a single comment on a theme may merit inclusion in the report, under certain circumstances; likewise, a multitude of comments on a theme may merit little or no consideration in the report, under other circumstances.<sup>91</sup>

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a “sham,” “silence[]” public comments, or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff’s careful consideration of the public comments—as reflected in its Report of Public Comments and discussion with the Board,<sup>92</sup> demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

Further, the Report of Public Comments demonstrates ICANN Staff’s belief that it was acting for the public benefit by “promot[ing] competition in the registration of domain names,” providing the same “protections to existing registrants” afforded to registrants of other TLDs, and treating “the Registry Operator equitably with registry operators of new gTLDs and other

<sup>90</sup> See Report of Public Comments, ORG, at Pg 3 (“This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor”); Report of Public Comments, INFO, at Pg 3 (same)

<sup>91</sup> The Board acknowledges the ICA’s disagreement with the Ombudsman’s characterization of certain comments as “spam” and “computer generated” 12 September 2019 Letter, at Pgs 1-2 ICANN Staff acknowledged both the volume of comments submitted concerning the proposed ORG/ INFO Renewed RAs and the issues they raised—including the removal of price cap provisions—without discounting the comments based on their apparent source See Report of Public Comments, ORG; Report of Public Comments, INFO Accordingly, the ICA’s arguments do not change the Board’s determination that reconsideration is not warranted here

<sup>92</sup> 26 July 2019 Letter, at Pg 2.

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legacy gTLDs utilizing the Base [RA].<sup>93</sup> There is no support for the Requestor's assertion that ICANN Staff's belief in this regard was based upon "conclusory statements not supported by evidence."<sup>94</sup> ICANN org considered Professor Carlton's 2009 expert analysis of the Base RA, and specifically his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.<sup>95</sup> Finally, ICANN Staff was aware of the Board's 2015 statements (made in the course of approving the migration of another legacy gTLD, .PRO, to the Base RA) that the Base RA as a whole benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end-users.<sup>96</sup>

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In sum, the Requestor's conclusory assertion that ICANN org did not act for the public benefit is unsupported and does not support reconsideration.

**B. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Core Values.**

The Requestor asserts that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Core Value of

[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.<sup>97</sup>

Contrary to the Requestor's argument, ICANN org *did* seek broad, informed participation through the public comment process for the .ORG/.INFO Renewed RAs. As noted above,

<sup>93</sup> Report of Public Comments, ORG, at Pg 8

<sup>94</sup> Request 19-2, § 8, at Pg 12

<sup>95</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>

<sup>96</sup> See Rationale for Board Resolution 2015 09 28 06

<sup>97</sup> Request 19-2, § 8, at Pg 4



ICANN org considered the responses and other factors, including its commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,”<sup>98</sup> and its Core Values of “depending on market mechanisms to promote and sustain a competitive environment in the DNS market” where “feasible and appropriate,” and “[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.”<sup>99</sup>

Moreover, the public comment process is but one of several channels for ICANN’s multistakeholder community to voice opinions. Members of the community may also voice their opinions in public meetings and through the final recommendations of supporting organizations, advisory committees, and direct correspondence with ICANN org. Accordingly, the multistakeholder community provides input to ICANN org in many ways, and ICANN org considers this input to ensure that all views have been taken into account during a decision-making process.

However, ICANN org’s Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN’s various communication channels. Here, ICANN org ultimately determined that ICANN’s Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same “protections to existing registrants” that are afforded to registrants of other TLDs, and treat registry operators equitably.<sup>100</sup> Further, the Base RA, which is incorporated in the .ORG/.INFO

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<sup>98</sup> Bylaws, Art 1, § 1 2(a)(v); *see also* 26 July 2019 Letter, at Pg 1

<sup>99</sup> Bylaws, Art 1, § 1 2(b)(iii), (iv); *see also* 26 July 2019 Letter, at Pg 2

<sup>100</sup> Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7

Renewed RA, “was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment.”<sup>101</sup>

On rebuttal, the Requestor asserts that the Base RA “was developed for the new gTLD registries” and there is no evidence that participants in the Base RA development understood that ICANN org might use the Base RA for legacy gTLDs.<sup>102</sup> But ICANN org “has consistently used the Base RA as the starting point for discussions with legacy gTLD operators about renewing their Registry Agreements” since no later than 2014.<sup>103</sup> Since then, the following other legacy gTLDs have adopted the Base RA in renewed agreements: .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, .ASIA, and .BIZ.<sup>104</sup> Accordingly, ICANN org adhered to its commitment to treat the .ORG and .INFO registry operators consistently with other legacy gTLD registry operators (rather than single them out for discriminatory treatment) when it used the Base RA as the starting point for its renewal discussions in 2019.<sup>105</sup>

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org’s transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org’s Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

<sup>101</sup> 26 July 2019 Letter, at Pg 1

<sup>102</sup> Rebuttal, at Pg 4

<sup>103</sup> 26 July 2019 Letter, at Pg 1

<sup>104</sup> *Id.*

<sup>105</sup> See ICANN Bylaws, Art 1, § 1 2(a)(v) That the .ORG and .INFO RAs that were renewed in August 2013 did not adopt the Base RA, which had been adopted just one month earlier, is not relevant. As noted above, ICANN org’s consistent practice of using the Base RA for discussions with legacy gTLDs began in 2014. 26 July 2019 Letter, at Pg 1

The Requestor asserts that reconsideration is warranted because omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org’s statement on its Public Comment Opportunities page that “Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption,” and is “used to guide implementation work, reviews, and operational activities of the ICANN organization.”<sup>106</sup> The Requestor asserts that omitting the price caps is inconsistent with ICANN org’s statement that the “purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement.”<sup>107</sup>

Ultimately, ICANN org’s decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to “obtain community input” or “use[]” the public comment “to guide implementation work” of ICANN org.<sup>108</sup> To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board’s support, to pursue, the global public interest.

Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).<sup>109</sup> ICANN org’s general description of the purpose of the public comment process is not a Commitment, Core Value, established policy, nor part of ICANN org’s Mission. Accordingly, even if ICANN org’s decision to execute the .ORG/.INFO Renewed RAs without price caps contradicted these statements—and it did not, as explained in Section V.A above — this inconsistency could not form the basis of a Reconsideration Request.

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<sup>106</sup> Request 19-2, § 8, at Pg 4

<sup>107</sup> *Id.*

<sup>108</sup> *See id.*

<sup>109</sup> Bylaws, Art 4 § 4 2(c) The challenged action must adversely affect the Requestor as well *Id.*

D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

The Requestor asserts that ICANN org’s analysis of the proposed removal of price caps “ignores significant information that is contrary to its sweeping conclusions.”<sup>110</sup> Specifically, the Requestor asserts that ICANN org’s analysis ignores that:

1. .ORG “is the 3rd largest” TLD, and “additional analysis is needed to determine whether this market share can result in uncompetitive practices,”<sup>111</sup>
2. .ORG “was established in 1985,” “is universally known, associated with nonprofit use, and has an excellent reputation,”<sup>112</sup>
3. It can be “a cumbersome and costly process” for an established entity to change domain name, and “often” leads to “negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill).”<sup>113</sup>
4. “TLDs are not interchangeable, as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not useable by nonprofits . . . or targeted to certain uses . . .and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .ORG.”<sup>114</sup>
5. Although some new gTLDs are targeted to nonprofits, “there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .ORG).”<sup>115</sup>
6. “There are some concerns [that] higher levels of abuse exists in new gTLD domains . . . ICANN’s own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs.”<sup>116</sup>
7. “[I]t is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name.”<sup>117</sup>

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<sup>110</sup> Request 19-2, § 8, at Pg 10

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, at Pg 10-11

<sup>114</sup> *Id.*, at Pg 11

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* citing <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>

<sup>117</sup> *Id.*, at Pg 11-12

The Report of Public Comments for the .ORG Renewed RA makes clear that ICANN org *did* consider some of these concerns. Specifically, with respect to Item 1, ICANN Staff noted that commenters “questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections.”<sup>118</sup> With respect to Item 2, ICANN Staff acknowledged that commentators noted that “.ORG was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations.”<sup>119</sup> With respect to Items 3, 4, 5, and 7, ICANN Staff acknowledged “concerns about the burden and costs associated with moving [a] web presence to another TLD,” along with comments characterizing .ORG as “the most appropriate registry for a charity or non-profit.”<sup>120</sup> Accordingly, the Requestor’s argument that the information about these six “concerns” was not considered or was ignored is incorrect and therefore does not support reconsideration.

With respect the Requestor’s assertion that “ICANN’s own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs,”<sup>121</sup> the Requestor mischaracterizes the cited ICANN report. As the Requestor notes, the 2019 Domain Abuse Activity Reporting (DAAR) report concluded that 48.11% of the “domains identified as security threats . . . were in legacy [TLDs],” and the remaining 51.89% of the domains identified as threats were in new gTLDs.<sup>122</sup> Further, the Report indicates that about 12% of TLD domain names are hosted on new gTLDs.<sup>123</sup> However, the Report also notes that 88% of the new gTLD domains identified as security threats

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<sup>118</sup> Report of Public Comments, .ORG, at Pg 5

<sup>119</sup> *Id.*, at Pgs 3-4

<sup>120</sup> *Id.*, at Pgs 4-5

<sup>121</sup> *Id.*, citing 31 January 2019 DAAR Report, <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>

<sup>122</sup> 31 January 2019 DAAR Report, Executive Summary

<sup>123</sup> *Id.*, at Pg 5

were concentrated in only 25 new gTLDs, out of over 340 new gTLDs.<sup>124</sup> The Report further noted that 98% of the domains identified as security threats were hosted by “the 50 most-exploited new [TLDs].”<sup>125</sup> Accordingly, even if ICANN Staff did not consider the 2019 DAAR Report, the Requestor has not shown that the information contained in it was material to the inclusion of price caps in the .ORG/INFO Renewed RAs. Moreover, the cited portions of the DAAR Report relate to security threats, not domain name registration fees. This argument does not support reconsideration.

E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/INFO Renewed RAs.

The Requestor asserts that it has been adversely affected by the challenged conduct because, “[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor’s] domain name registration business,” insofar as the .ORG/INFO Renewed RAs create an “uncertainty of price increases.”<sup>126</sup> That the Requestor could not quantify the actual financial impact on the Requestor of removing the price caps at the time it submitted Request 19-2 was not material to our preliminary procedural evaluation, because the Requestor asserted that the financial uncertainty *itself* is the harm. Accordingly, the Board Accountability Mechanisms Committee (BAMC) concluded that Request 19-2 was sufficiently stated.<sup>127</sup> However, the BAMC’s conclusion that the Requestor sufficiently asserted that it was materially harmed was not a determination that the Requestor was in fact materially harmed or, if so, that removing the .ORG/INFO Renewed RAs caused that harm.

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<sup>124</sup> *Id.*, at Pg 6 Similarly, four legacy TLDs hosted more than 94% of the legacy TLD domains identified as security threats *Id.*

<sup>125</sup> *Id.*, at Pg 6

<sup>126</sup> Request 19-2, § 6, at Pg 2; *see also id* § 10, at Pg 13

<sup>127</sup> *See* Ombudsman Action on Request 19-2, at Pg 2

The Board now concludes that the Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. As noted above, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.<sup>128</sup> Professor Carlton explained that “a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically.”<sup>129</sup> [The Requestor disagrees with the Board’s conclusion, but raises no new arguments or evidence supporting its disagreement.](#)<sup>130</sup> [Instead, in its Rebuttal, the Requestor merely repeats the argument from its original Request, namely that the claimed harm is “likely to occur,” rather than presently existing.](#)<sup>131</sup>

[Regardless of whether the speculative harm on which Requestor bases Request 19-2 could be sufficient to support a Reconsideration Request, it is not sufficient here because \(1\) ICANN Staff acted consistent with ICANN Bylaws, policies, and procedures when it renewed the .ORG/.INFO RAs,<sup>132</sup> and \(2\) the additional safeguards discussed above demonstrate that, at this time, Requestor’s concerns are not well founded.](#)

[In its Rebuttal the Requestor also challenges the Board’s reliance on Professor Carlton’s 2009 Preliminary Analysis Regarding Price Caps.<sup>133</sup> The Requestor asserts that the Board should disregard Professor Carlton’s analysis because: \(1\) it is an opinion and does not cite “any data sources or references,” \(2\) certain public commenters disagreed with Professor Carlton, \(3\)](#)

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<sup>128</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>

<sup>129</sup> *Id.*

<sup>130</sup> [Rebuttal, at Pgs 6-7](#)

<sup>131</sup> [Id. at Pg 6](#)

<sup>132</sup> [See supra § V B](#)

<sup>133</sup> [Rebuttal, at Pg 2](#)

it focused on the propriety of removing price caps for new gTLDs and not legacy gTLDs, and (4) the Board did not reference Professor Carlton’s analysis when the .ORG/.INFO RAs were renewed in 2013.<sup>134</sup>

The Requestor’s first and second arguments amount to a disagreement with Professor Carlton’s conclusions. They do not support reconsideration. Professor Carlton is a leader in economic analysis, particularly concerning antitrust issues.<sup>135</sup> His 2009 Preliminary Analysis is based on his extensive experience with and expertise in market forces. It is not—and does not claim to be—a data-driven study or survey.<sup>136</sup> The Requestor’s disagreement with Professor Carlton’s conclusions does not necessarily render them incorrect.

The Requestor’s third argument does not support reconsideration because, although Professor Carlton did note that price caps in legacy gTLDs had the effect of limiting prices that new gTLDs could charge, Professor Carlton identified other controls that also have the effect of limiting price increases.<sup>137</sup> The Requestor’s fourth argument likewise does not support reconsideration. The Requestor has identified no established policy or procedure (because there is none) requiring the Board to consider the exact same information and materials for every RA renewal. The Requestor has not demonstrated that consideration of Professor Carlton’s analysis violates ICANN Bylaws or established policies or procedures.

The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that “additional analysis is needed to

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<sup>134</sup> Id. at Pg 2-3

<sup>135</sup> See supra § II B.

<sup>136</sup> See Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.

<sup>137</sup> See supra § II B.



determine whether” the removal of price caps in the .ORG RA “can result in uncompetitive practices.”<sup>138</sup> This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton’s expert report—indicates that such harm is not expected. Accordingly, reconsideration is not warranted.

F. The Parent Company of the .ORG Registry Operator Is Not Relevant to the Reconsideration Request and Does Not Support Reconsideration.

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The Requestor argues that the “timing and nature” of the 13 November 2019 acquisition of the .ORG Registry Operator PIR by an investment firm “is suspicious” because the Requestor believes that negotiations for the acquisition began before the .ORG RA was renewed.<sup>139</sup> Accordingly, the Requestor asserts, ICANN should “scrutinize this transaction closely.”<sup>140</sup> However, PIR’s corporate structure is not relevant to Request 19-2, which concerns the 30 June 2019 renewal of the .ORG RA and must be evaluated in accordance with the grounds for reconsideration as set forth in ICANN’s Bylaws. The Ethos Capital acquisition of PIR, which was announced more than four months after the execution of the .ORG Renewed RA, did not impact ICANN Staff’s determination that ICANN’s Mission and Core Values were best served by migrating the .ORG/.INFO RAs to the Base RA.<sup>141</sup>

In sum, Request 19-2 is not the appropriate vehicle for challenging Ethos Capital’s acquisition of PIR.

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<sup>138</sup> Request 19-2, § 8, at Pg 10

<sup>139</sup> Rebuttal, at Pg 7

<sup>140</sup> *Id.*

<sup>141</sup> See *supra* § II C. Neither ICANN Staff nor PIR were aware that Ethos Capital would acquire PIR when the parties finalized the .ORG Renewed RA. See <http://domainincite.com/24988-i-attempt-to-answer-icas-questions-about-the-terrible-blunder-org-acquisition>

**VI. Determination.**

The Board has considered the merits of Request 19-2 and, based on the foregoing, concludes that ICANN org’s execution of the .ORG/.INFO Renewed RAs did not contradict ICANN’s Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board denies Request 19-2.

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**Deleted:** Because the BAMC did not have a quorum to consider Request 19-2, the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC. Accordingly, the issuance of this Proposed Determination triggers Requestor’s right to file a rebuttal consistent with Article 4, Section 4.2(q) of the Bylaws