

EXHIBIT C-1

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

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

FINAL DECISION

Corrected version dated 15 July 2021

20 May 2021

Members of the IRP Panel

Catherine Kessedjian
Richard Chernick
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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GLOSSARY OF DEFINED TERMS

Afilias	Claimant Afilias Domains No. 3 Limited.
Afilias' First DIDP Request	Documentary Information Disclosure Policy request submitted by Afilias to ICANN on 23 February 2018.
Afilias' Response to the <i>Amici's</i> Brief	Afilias' Response to the <i>Amici Curiae</i> Briefs dated 24 July 2020.
Amended Request for IRP	Afilias's Amended Request for Independent Review dated 21 March 2019.
<i>Amici</i>	Collectively, Verisign, Inc. and Nu DotCo, LLC.
<i>Amici's</i> PHB	Verisign, Inc. and Nu DotCo, LLC's post-hearing brief dated 12 October 2020.
Articles	<i>Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers</i> , as approved by the Board on 9 August 2016, and filed on 3 October 2016, Ex. C-2.
Auction Rules	Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4.
Board	ICANN's board of directors.
Blackout Period	Period associated with an ICANN auction extending from the deposit deadline until full payment has been received from the prevailing bidder, and during which discussions among members of a contention set are prohibited.
Bylaws	Bylaws for Internet Corporation for Assigned Names and Numbers, as amended 18 June 2018, Ex. C-1.
CCWG	The Cross-Community Working Group for Accountability created by ICANN's supporting organizations and advisory committees to review and advise on ICANN's accountability mechanisms.
CEP	ICANN's Cooperative Engagement Process, as described in Article 4, Section 4.3(e) of the Bylaws, intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in the IRP.

CEP Rules	Rules applicable to a Cooperative Engagement Process described in an ICANN document dated 11 April 2013, Ex. C-121.
Claimant	Afilias Domains No. 3 Limited.
Claimant’s PHB	Afilias’ post-hearing brief dated 12 October 2020.
Claimant’s Reply	Afilias’ Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review dated 4 May 2020.
Claimant’s Reply Submission on Costs	Afilias’ reply dated 23 October 2020 to the Respondent’s submissions on costs.
Covered Actions	As defined at Section 4.3(b)(ii) of the Bylaws : “any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute”.
DAA, or Domain Acquisition Agreement	Domain Acquisition Agreement between Verisign, Inc. and Nu DotCo, LLC dated 25 August 2015, Ex. C-69.
Decision on Phase I	Panel’s decision on Phase I dated 12 February 2020.
DIDP	ICANN’s Documentary Information Disclosure Policy.
DNS	Domain Name System.
DOJ	United States Department of Justice.
Donuts	Donuts, Inc., the parent company of .WEB applicant Ruby Glen, LLC.
Donuts CEP	Cooperative Engagement Process invoked by Donuts on 2 August 2016 in regard to .WEB.
First Procedural Order	Panel’s first procedural order for Phase II, dated 5 March 2020.
gTLD	Generic top-level domain.
Guidebook	ICANN’s New gTLD Applicant Guidebook, Ex. C-3.
ICANN, or Respondent	Respondent Internet Corporation for Assigned Names and Numbers.
ICANN’s Response to the Amici’s Briefs	ICANN’s response dated 24 July 2020 to the <i>amici curiae</i> briefs.

ICDR	International Centre for Dispute Resolution.
ICDR Rules	International Arbitration Rules of the ICDR.
Interim Procedures	Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process, Ex. C-59.
IOT	Independent Review Process Implementation Oversight Team.
IRP	Independent Review Process provided for under ICANN's Bylaws.
Joint Chronology	Chronology of relevant facts dated 23 October 2020, agreed to by the Parties and the <i>Amici</i> pursuant to the Panel's communication dated 16 October 2020.
NDC	<i>Amicus Curiae</i> Nu DotCo, LLC.
NDC's Brief	Nu DotCo, LLC's <i>amicus curiae</i> brief dated 26 June 2020.
New gTLD Program Rules	Collectively, ICANN's New gTLD Applicant Guidebook, Ex. C-3, and the Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4.
November 2016 Workshop	Workshop held by the Board on 3 November 2016 during which a briefing was presented by in-house counsel regarding the .WEB contention set.
Ombudsman	ICANN's Ombudsman.
Panel	The Panel appointed to resolve Claimant's IRP in the present case.
Phase I	First phase of this Independent Review Process which concluded with the Panel's Decision on Phase I dated 12 February 2020.
Procedural Order No. 2	Panel's second procedural order for Phase II dated 27 March 2020.
Procedural Order No. 3	Panel's third procedural order for Phase II dated 27 March 2020.
Procedural Order No. 4	Panel's fourth procedural order for Phase II dated 12 June 2020.
Procedural Order No. 5	Panel's fifth procedural order for Phase II dated 14 July 2020.
Procedural Order No. 6	Panel's sixth procedural order for Phase II dated 27 July 2020.

Procedural Timetable	Procedural timetable for Phase II attached to the First Procedural Order dated 5 March 2020.
Questionnaire	Questionnaire issued by ICANN on 16 September 2016.
Radix	Radix FZC.
Reconsideration Request 18-7	Reconsideration request submitted by Afilias challenging ICANN's response to its First Documentary Information Disclosure Policy Request.
Reconsideration Request 18-8	Reconsideration request submitted by Afilias challenging ICANN's response to its Second Documentary Information Disclosure Policy Request.
Request for Emergency Interim Relief	Afilias' Request for Emergency Panelist and Interim Measures of Protection, dated 27 November 2018.
Respondent, or ICANN	Respondent Internet Corporation for Assigned Names and Numbers.
Respondent's Answer	ICANN's Answer to the Amended Request for IRP dated 31 March 2019.
Respondent's PHB	ICANN's post-hearing brief dated 12 October 2020.
Respondent's Rejoinder	ICANN's Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review dated 1 June 2020.
Respondent's Response Submission on Costs	ICANN's response dated 23 October 2020 to the Claimant's submissions on costs.
Revised Procedural Timetable	Revised procedural timetable for Phase II attached to the Procedural Order No. 3 dated 13 March 2020.
Ruby Glen	Ruby Glen, LLC.
Ruby Glen Litigation	Ruby Glen, LLC's complaint against ICANN filed in the US District Court of the Central District of California and application seeking to halt the .WEB auction.
Rule 7 Claim	Afilias' claim that ICANN violated its Bylaws in adopting the <i>amicus curiae</i> provisions set out in Rule 7 of the Interim Procedures.

Second DIDP Request	Documentary Information Disclosure Policy request submitted by Afilias to ICANN on 23 April 2018.
Staff	ICANN's Staff.
Supplemental Submission	Afilias' supplemental submission dated 29 April 2020 adding an additional argument in favour of a broader document production by ICANN.
Verisign	<i>Amicus Curiae</i> Verisign, Inc.
Verisign's Brief	Verisign, Inc.'s <i>amicus curiae</i> brief dated 26 June 2020.
10 June Application	Afilias' application dated 10 June 2020 regarding the status of the evidence originating from the <i>Amici</i> which had been filed with the Respondent's Rejoinder.
29 April 2020 Application	Afilias' application seeking assistance from the Panel regarding ICANN's document production and privilege log.

I. INTRODUCTION

A. Overview

1. The Claimant is one of seven (7) entities that submitted an application to the Respondent for the right to operate the registry of the .WEB generic Top-Level Domain (**gTLD**), pursuant to the rules and procedures set out in the Respondent's New gTLD Applicant Guidebook (**Guidebook**) and the Auction Rules for New gTLDs (**Auction Rules**) (collectively, **New gTLD Program Rules**).
2. gTLDs are one category of top-level domains used in the domain name system (**DNS**) of the Internet, to the right of the final dot, such as ".COM" or ".ORG". Under the Guidebook and Auction Rules, in the event of multiple applicants for the same gTLD, the applicants are placed in a "contention set" for resolution privately or, if this first option fails, through an auction administered by the Respondent.
3. On 27 and 28 July 2016, the Respondent conducted an auction among the seven (7) applicants for the .WEB gTLD. Nu DotCo, LLC (**NDC**) won the auction while the Claimant was the second-highest bidder. Shortly after the .WEB auction, it was revealed that NDC and Verisign, Inc. (**Verisign**) had entered into an agreement (**Domain Acquisition Agreement** or **DAA**) under which Verisign undertook to provide funds for NDC's bid for the .WEB gTLD, while NDC undertook, if its application proved to be successful, to transfer and assign its registry operating rights in respect of .WEB to Verisign upon receipt from the Respondent of its actual or deemed consent to this assignment.¹
4. The Claimant initiated the present Independent Review Process (**IRP**) on 14 November 2018, seeking, among others, binding declarations that the Respondent must disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel, proceed with contracting the registry agreement for .WEB with the Claimant.
5. At the outset of these proceedings, on 30 August 2019, the Parties agreed that there should

¹ Domain Acquisition Agreement entered into by NDC and Verisign on 25 August 2015, Ex. C-218, as amended and supplemented by the "Confirmation of Understanding" executed by these same parties on 26 July 2016, Ex. H to Mr. Livesay's witness statement. See below, paras. 39, 84 and 101.

be a bifurcated Phase I in this IRP to address two questions. The first was the Claimant's claim that the Respondent violated its *Bylaws for Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**), in adopting the *amicus curiae* provisions set out in Rule 7 of the *Interim Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process*, adopted by the Respondent's board of directors (**Board**) on 25 October 2018 (**Interim Procedures**), and that Verisign and NDC should be prohibited from participating in the IRP on that basis. This question has been referred to in these proceedings as the Claimant's **Rule 7 Claim**. The second question to be addressed in Phase I was the extent to which, in the event the Rule 7 Claim failed, NDC and Verisign should be permitted to participate in the IRP as *amici*.

6. In its Decision on Phase I dated 12 February 2020 (**Decision on Phase I**), which concluded the first phase of the IRP, this IRP Panel (**Panel**) unanimously decided to grant the requests respectively submitted by Verisign and NDC (collectively, the *Amici*) to participate as *amici curiae* in the present IRP, on the terms and subject to the conditions set out in that decision. On the basis of the Claimant's alternative request for relief in Phase I,² the Panel decided to join to the Claimant's other claims in Phase II those aspects of Afiliias' Rule 7 Claim over which the Panel determined that it had jurisdiction³ – to the extent the Claimant were to choose to maintain them.
7. On 4 March 2020, the Panel held a case management conference in relation to Phase II of the IRP. On that occasion, the Claimant informed the Panel that it intended to maintain its Rule 7 Claim in order to illustrate what it described as the “unseemly relationship between the regulator and the monopolist”⁴ (*i.e.*, in this case, respectively, the Respondent and Verisign). For reasons set out later in this Final Decision, the Panel has determined that the outstanding aspects of the Rule 7 Claim that were joined to the Claimant's other claims in Phase II have become moot by the participation of the *Amici* in this IRP in accordance with the Panel's Decision on Phase I. Accordingly, the Panel has concluded that no useful

² See Decision on Phase I, para. 183.

³ In its decision on Phase I, the Panel found that it has jurisdiction over any actions or failures to act alleged to violate the Articles or Bylaws: (a) committed by the Board; or (b) committed by Staff members of ICANN, but not over actions or failures to act committed by the IRP Implementation Oversight Team as such. See Decision on Phase I, para. 133.

⁴ Transcript of the preparatory conference of 4 March 2020, p. 11.

purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision of Phase I, which the Respondent's Board has no doubt reviewed and can act upon, as deemed appropriate. In this Final Decision, the Panel disposes of the Claimant's other substantive claims in this IRP, as well as its cost claims in connection with the IRP, including in relation to Phase I.

8. After careful consideration of the facts, the applicable law and the submissions made by the Parties and the *Amici*, the Panel finds that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the Board on 9 August 2016, and filed on 3 October 2016 (**Articles**) and its Bylaws by (a) its staff (**Staff**) failing to pronounce on the question of whether the Domain Acquisition Agreement complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken "off hold"; and (b) its Board, having deferred consideration of the Claimant's complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not pronounce on them out of respect for, and in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program. In the opinion of the Panel, the Respondent in so doing violated its commitment to make decisions by applying documented policies objectively and fairly. The Panel also finds that in preparing and issuing its questionnaire of 16 September 2016 (**Questionnaire**), and in failing to communicate to the Claimant the decision made by the Board on 3 November 2016, the Respondent has violated its commitment to operate in an open and transparent manner and consistent with procedures to ensure fairness.
9. The Panel is also of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application

should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules. The Panel therefore denies the Claimant's requests for (a) a binding declaration that the Respondent must disqualify NDC's bid for .WEB for violating the Guidebook and Auction Rules, and (b) an order directing the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant, in exchange for a price to be specified by the Panel and paid by the Claimant.

B. The Parties

10. The Claimant in the IRP is Afilius Domains No. 3 Limited (**Afilius** or **Claimant**), a legal entity organised under the laws of the Republic of Ireland with its principal place of business in Dublin, Ireland. Afilius provides technical and management support to registry operators and operates several generic gTLD registries.
11. The Claimant's parent company, Afilius, Inc., was, until 29 December 2020, a United States corporation that was the world's second-largest Internet domain name registry. As noted below in paragraphs 244 to 249, in post-hearing submissions made in December 2020, the Panel was informed that pursuant to a Merger Agreement signed on 19 November 2020 between Afilius, Inc. and Donuts, Inc. (**Donuts**), these two (2) companies have merged as of 29 December 2020. The Claimant has explained, however, that this transaction does not include the transfer of the Claimant's .WEB application, as both the Claimant as an entity and its .WEB application have been carved out of the transaction.
12. The Claimant is represented in the IRP by Mr. Arif Hyder Ali, Mr. Alexandre de Gramont, Ms. Rose Marie Wong, Mr. David Attanasio, Mr. Michael A. Losco and Ms. Tamar Sarjveladze of Dechert LLP, and by Mr. Ethan Litwin of Constantine Cannon LLP.
13. The Respondent is the Internet Corporation for Assigned Names and Numbers (**ICANN** or **Respondent**), a not-for-profit corporation organised under the laws of the State of California, United States. ICANN oversees the technical coordination of the Internet's DNS on behalf of the Internet community. The essential function of the DNS is to convert

domain names that are easily remembered by humans – such as “icann.org” – into numeric IP addresses understood by computers.

14. ICANN’s core mission, as described in its Bylaws, is to ensure the stable and secure operation of the Internet’s unique identifier system. To that end, ICANN contracts with, among others, entities that operate gTLDs. The Bylaws provide that in performing its mission, ICANN will act in a manner that complies with and reflects ICANN’s commitments and respects ICANN’s core values, as described in the Bylaws.
15. ICANN is represented in the IRP by Mr. Jeffrey A. LeVee, Mr. Steven L. Smith, Mr. David L. Wallach, Mr. Eric P. Enson and Ms. Kelly M. Ozurovich, of Jones Day LLP.

C. The IRP Panel

16. On 26 November 2018, the Claimant nominated Professor Catherine Kessedjian as a panelist for the IRP. On 13 December 2018, the International Centre for Dispute Resolution (**ICDR**) appointed Prof. Kessedjian on the IRP Panel and her appointment was reaffirmed by the ICDR on 4 January 2019.
17. On 18 January 2019, the Respondent nominated Mr. Richard Chernick as a panelist for the IRP and he was appointed to that position by the ICDR on 19 February 2019.
18. On 17 July 2019, the Parties nominated Mr. Pierre Bienvenu, Ad. E., to serve as the IRP Panel Chair. Mr. Bienvenu accepted the nomination on 23 July 2019 and he was appointed by the ICDR on 9 August 2019.
19. In September 2019, with the consent of the Parties, Ms. Virginie Blanchette-Séguin was appointed as Administrative Secretary to the IRP Panel.

D. The Amici

20. Verisign is a publicly traded company organised under the laws of the State of Delaware. Verisign is a global provider of domain name registry services and Internet infrastructure that operates, among others, the registries for the .COM, .NET and .NAME gTLDs. Verisign is represented in this IRP by Mr. Ronald L. Johnston, Mr. James S. Blackburn,

Ms. Maria Chedid, Mr. Oscar Ramallo and Mr. John Muse-Fisher, of Arnold & Porter Kaye Scholer LLP.

21. NDC is a limited liability company organised under the laws of the State of Delaware. NDC was established as a special purpose vehicle to participate in ICANN's New gTLD Program. NDC was initially represented in this IRP by Mr. Charles Elder and Mr. Steven Marenberg, of Irell & Manella LLP, and from 1 March 2020 onward by Mr. Steven Marenberg, Mr. Josh B. Gordon and Ms. April Hua, of Paul Hastings LLP.

E. Place (Legal Seat) of the IRP

22. The Claimant has proposed that the seat of the IRP be London, England, without prejudice to the location of where hearings are held. In its letter dated 30 August 2019, the Respondent has confirmed its agreement with this proposal.

F. Language of the Proceedings

23. In accordance with Section 4.3(I) of the Bylaws, the language of the proceedings of this IRP is English.

G. Jurisdiction of the Panel

24. The Claimant's Request for IRP is submitted pursuant to Article 4, Section 4.3 of the Bylaws, the International Arbitration Rules of the ICDR (**ICDR Rules**), and the Interim Procedures. Section 4.3 of the Bylaws provides for an independent review process to hear and resolve, among others, claims that actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers or Staff members constituted an action or inaction that violated the Articles or the Bylaws.
25. In its Decision on Phase I, the Panel concluded, in respect of Afiliias' Rule 7 Claim, that it has jurisdiction over any actions or failures to act alleged to violate the Articles or Bylaws:
 - (a) committed by the Board; or
 - (b) committed by Staff members;

but not over actions or failures to act allegedly committed by the IRP Implementation Oversight Team (**IOT**), on the ground that the latter does not fall within the enumeration “Board, individual Directors, Officers or Staff members” in the definition of **Covered Actions** at Section 4.3(b)(ii) of the Bylaws.

26. In relation to Phase II issues, the Parties and *Amici* have characterized a number of issues as “jurisdictional”, such as the scope of the dispute described in the Amended Request for IRP, the timeliness of the claims, the applicable standard of review, and the relief that the Panel is empowered to grant. Those issues are addressed in the relevant sections of this Final Decision. However, and subject to the foregoing, the jurisdiction of the Panel to hear the Claimant’s core claims against the Respondent in relation to .WEB is not contested.

H. Applicable Law

27. The rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures.
28. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.
29. At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles and other “quasi-contractual” documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN’s position in this respect.
30. As noted later in these reasons, the issues of privilege that arose in the document production phase of this IRP were resolved applying California law, as supplemented by US federal law.

I. Burden and Standard of Proof

31. It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.
32. As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, “more likely than not”. That said, it is also generally accepted that allegations of dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, “[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established.”⁵
33. These principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.

J. Rules of Procedure

34. The ICDR is the IRP Provider responsible for administering IRP proceedings.⁶ The Interim Procedures, according to their preamble and the contextual note at footnote 1 thereof, are intended to supplement the ICDR Rules in effect at the time the relevant request for independent review is submitted. In the event of an inconsistency between the Interim Procedures and the ICDR Rules, the Interim Procedures govern.⁷

II. HISTORY OF THE PROCEEDINGS

A. Phase I

35. The history of these proceedings up to 12 February 2020, the date of the Panel’s Decision on Phase I, is set out at paragraphs 33 to 67 of the Panel’s Phase I decision, which are

⁵ See, generally, Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, 6th ed., Oxford, Oxford University Press, 2015, para. 6.87.

⁶ See Bylaws, Ex. C-1, Section 4.3 (m).

⁷ See Interim Procedures, Ex. C-59, Rule 2.

incorporated by reference in this Final Decision.

36. In order to provide context for the present decision, the Panel recalls that on 18 June 2018, Afiliás invoked ICANN’s Cooperative Engagement Process (**CEP**) after learning that ICANN had removed the .WEB gTLD contention set’s “on-hold” status. A CEP is intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in an IRP. The Parties participated in the CEP process until 13 November 2018.
37. On 14 November 2018, Afiliás filed its request for IRP with the ICDR. On the same day, ICANN informed Afiliás that it would only keep the .WEB gTLD contention set “on-hold” until 27 November 2018, so as to allow Afiliás time to file a request for emergency interim relief, barring which ICANN would take the .WEB gTLD contention set off of its “on hold” status. Afiliás filed a Request for Emergency Panelist and Interim Measures of Protection with the ICDR on 27 November 2018 (**Request for Emergency Interim Relief**), seeking to stay all ICANN actions that would further the delegation of the .WEB gTLD.
38. From November 2018 to March 2019, the Parties focused on the Claimant’s Request for Emergency Interim Relief and, pursuant to Requests to Participate as *Amicus* in the IRP filed by the *Amici* on 11 December 2018, on the possible participation of the *Amici* in the proceedings.
39. The Emergency Panelist presided over a focused document production process during which, on 18 December 2018, ICANN produced the Domain Acquisition Agreement entered into between Verisign and NDC in connection with .WEB. The Claimant then took the position that the documents produced to it by the Respondent warranted the amendment of its Request for IRP. Accordingly, on 29 January 2019, the Parties agreed to postpone the deadline for the submission of the Respondent’s Answer until after the Claimant filed its Amended Request for IRP. In the event, the Claimant filed its Amended Request for IRP with the ICDR on 21 March 2019 (**Amended Request for IRP**), and the Respondent submitted its Answer to the Amended Request for IRP on 31 May 2019 (**Respondent’s Answer**).
40. In January 2019, the Parties asked the Emergency Panelist to postpone further activity

pending resolution of the *Amici*'s requests to participate in the IRP. After the appointment of this Panel to determine the IRP, the Parties expressed their understanding that it would be for this Panel to resolve the Emergency Interim Relief Request. In the meantime, the Respondent agreed that the .WEB gTLD contention set would remain on hold until the conclusion of this IRP.⁸

41. As for the *Amici*'s requests to participate in the IRP, they were first the subject of proceedings before a Procedures Officer appointed by the ICDR on 21 December 2018. In its final Declaration, dated 28 February 2019, the Procedures Officer found that "the issues raised [...] are of such importance to the global Internet community and Claimants [sic] that they should not be decided by a "Procedures Officer", and therefore the issues raised are hereby referred to [...] the IRP Panel for determination".⁹ The *Amici*'s requests to participate in the IRP were referred to the Panel and, by agreement of the Parties, were resolved in Phase I of this IRP by the Panel's Decision on Phase I dated 12 February 2020.

B. Phase II

42. On 4 March 2020, the Panel presided over a case management conference to discuss the issues to be decided in Phase II and the Parties' respective proposed procedural timetables for the Phase II proceedings. The Parties differed as to the timing of document production and the briefing schedule for Phase II. The Claimant favoured document production taking place after the filing of Afilias' Reply, ICANN's Rejoinder and the *Amici*'s Briefs, such production to be followed by the simultaneous filing of Responses from the Parties. The Respondent, for its part, proposed a document production stage at the outset of Phase II, to be followed by a briefing schedule for the filing of the Parties' additional submissions and the *Amici*'s Briefs.
43. In its First Procedural Order for Phase II, dated of 5 March 2020 (**First Procedural Order**), the Panel decided that the document production phase in relation to Phase II would take place at the outset of Phase II, as proposed by the Respondent, so as to give the Parties

⁸ See ICANN's Response to Afilias' Costs Submission, dated 23 October 2020, at para. 23.

⁹ Declaration of the Procedures Officer dated 28 February 2019, p. 38.

the benefit of the documents produced during this process in their additional submissions in relation to Phase II. With respect to the other elements of the Procedural Timetable, the Panel adopted the Claimant’s proposed briefing sequence, which provided for the filing of the Claimant’s Reply, the Respondent’s Rejoinder, the *Amici*’s Briefs, and an opportunity for the Claimant and the Respondent subsequently to respond simultaneously to the *Amici*’s Briefs. The Panel attached to the First Procedural Order the following procedural timetable for Phase II, reflecting these decisions (**Procedural Timetable**):

No.	Action	Party	Date
1.	Simultaneous requests to produce (via Redfern Schedules)	Afilias and ICANN	6 March 2020
2.	Simultaneous responses/objections (via Redfern Schedules)	Afilias and ICANN	13 March 2020
3.	List of agreed issues to be decided in Phase II and, as the case may be, list(s) of additional issues to be decided in Phase II	Afilias and ICANN	13 March 2020
4.	Simultaneous replies to responses/objections (via Redfern Schedules)	Afilias and ICANN	20 March 2020
5.	Hyperlinked list of constituent elements (as of that date) of the Phase II record	Afilias and ICANN	20 March 2020
6.	Panel ruling on outstanding objections	N/A	27 March 2020
7.	Production of documents	Afilias and ICANN	17 April 2020
8.	Submissions on questions as to which the <i>Amici</i> will be permitted to submit briefings to the Panel, as well as page limits and other modalities	Afilias, ICANN, Verisign and NDC	24 April 2020
9.	Reply (along with all supporting exhibits, witness statements, expert reports and legal authorities)	Afilias	1 May 2020
10.	Rejoinder (along with all supporting exhibits, witness statements, expert reports and legal authorities)	Afilias	29 May 2020
11.	<i>Amici</i> ’s Briefs (along with all supporting exhibits, if any, and legal authorities)	Verisign and NDC	26 June 2020
12.	Simultaneous Responses to the <i>Amici</i> ’s Briefs	Afilias and ICANN	15 July 2020
13.	Parties to identify witnesses called for cross-examination at the hearing	Afilias and ICANN	24 July 2020
14.	Final status and pre-hearing conference	Afilias, ICANN, Verisign and NDC	29 July 2020
15.	Hearing	Afilias, ICANN, Verisign and NDC	3-7 August 2020

No.	Action	Party	Date
16.	Post-hearing submissions	Afilias, ICANN, Verisign and NDC	TBD

44. As reflected in the Procedural Timetable, in its First Procedural Order the Panel also asked the Parties to develop a joint list of issues to be decided in Phase II, and laid out a process for the determination, in consultation with the Parties and as contemplated in the Panel’s Decision on Phase I, of the questions as to which the *Amici* would be permitted to submit briefings to the Panel. The Panel also accepted the Parties’ proposal that the hearing, scheduled on 3-7 August 2020, be held in Chicago, IL.
45. In accordance with the Procedural Timetable, on or about 6 March 2020, the Parties exchanged document production requests in the form of Redfern Schedules. The Claimant addressed twenty-one (21) requests to produce documents to the Respondent, while the Respondent addressed two (2) requests to produce to the Claimant. Responses or objections to those requests were exchanged on or about 13 March 2020. The Claimant objected to both of the Respondent’s requests. The Respondent objected to many, but not all, of the Claimant’s requests, having agreed to search for some categories of documents requested by the Claimant.
46. Also on 6 March 2020, the Claimant sought clarification of the First Procedural Order as regards the question of whether the *Amici* would be permitted, in their briefs, to add new documents to the record as exhibits. The Claimant argued that any documents to be submitted by the *Amici* would inevitably be “cherry picked” and supportive of their submissions. The Claimant thus took the position that if the *Amici* were allowed to refer to documents that are not already in the record, the principles of fundamental fairness and due process required that it be granted an opportunity to request documents from the *Amici*. On 11 March 2020, the Respondent submitted in response that pursuant to the Decision on Phase I, the *Amici* are entitled to submit “briefings and supporting exhibits” and that the provisions of the Interim Procedures relating to the exchange of information do not apply to the *Amici*. On the same date, the *Amici* contended, for their part, that the First Procedural Order clearly states that they may submit exhibits, without specifying that such exhibits are limited to those already in the record. The *Amici* stressed that material evidence may

be in their possession and not in possession of the Parties. They further contended that the Panel had already ruled that they may not propound discovery nor be the recipient of information requests. In its reply dated 12 March 2020, the Claimant reiterated its fairness concerns and stated that the First Procedural Order did not address the question of whether the *Amici*'s exhibits were to be limited to those on record.

47. By email dated 13 March 2020, the Parties informed the Panel that they had attempted – for a second time and still without success – to agree on a joint list of issues to be decided in Phase II. While unable to agree on the joint issues list requested by the Panel, the Parties proposed an agreed procedure for the Panel ultimately to determine the questions on which the *Amici* would be invited to submit briefs. In the event, the Panel accepted the Parties' suggestion in Procedural Order No. 3, and issued a revised procedural timetable reflecting the changes proposed by the Parties (**Revised Procedural Timetable**).
48. In Procedural Order No. 2 dated 27 March 2020 (**Procedural Order No. 2**), the Panel ruled on the outstanding objections to the Parties' respective requests to produce, granting twelve (12) of the Claimant's fourteen (14) outstanding requests and one (1) of the two (2) requests presented by the Respondent. In the same order, the Panel directed each of the Parties to provide to the other a privilege log listing each document over which a privilege is asserted, on the ground that such logs might prove useful to the Parties and the Panel in addressing issues arising from refusals to produce based on privilege.
49. In Procedural Order No. 3, also dated 27 March 2020 (**Procedural Order No. 3**), the Panel ruled on the Claimant's clarification request in regard to the possibility for the *Amici*, as part of their briefs, to add to the evidentiary record of the IRP. It is useful to cite in full the Panel's ruling on that question:

In its Decision on Phase I, the Panel made clear that, under the Interim Procedures, the *Amici* are non-disputing parties whose participation in the IRP is through the submission of "written briefings", possibly supplemented by oral submissions at the merits hearing. The Panel also rejected the notion that, under the Interim Procedures, the *Amici* can enjoy the same participation rights as the disputing parties. It follows that it is for the Parties, who bear the burden of proving their case, to build the evidentiary record of the IRP, and it is based on that record that the *Amici* "may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP Panel may request briefing" (see Rule 7 of the Interim Procedures).

The Panel expects the Parties, in accordance with the Procedural Timetable, to file the entirety of the remainder of their case as part of the second round of submissions contemplated by the timetable, that is to say, with the Claimant's Reply and the Respondent's Rejoinder. As evoked in the Panel's Decision on Phase I (*see* par. 201), if there is evidence in the possession of the *Amici* that the Respondent considers relevant to, and that it wishes to adduce in support of its case, be it witness or documentary evidence, that evidence is required to be filed as part of the Respondent's Rejoinder, and not with the *Amici*'s Briefs.

The Panel did not preclude the possibility in its Phase I Decision (and the Procedural Timetable) that the *Amici* might wish to file documents in support of the submissions to be made in their Briefs. By referring to such documents as "exhibits", however, as other arbitral tribunals have in referring to materials to be filed with the submissions of *amicus* participants, the Panel did not mean to suggest that these "exhibits" (which the Panel would expect to be few in number, and to be directed to supporting the *Amici*'s submissions, not the Respondent's case) would become part of the record and acquire the same status as the documentary evidence filed by the Parties.

Should a Party be of the view that documents submitted in support of the *Amici*'s Briefs are incomplete or somehow misleading, it will be open to that Party to advance the argument in response to the *Amici*'s submissions and to seek whatever relief it considers appropriate from the Panel.¹⁰

50. As regards the Claimant's request to be granted an opportunity to request documents from the *Amici*, the Panel referred to its Decision on Phase I, in which it was noted that the provisions of the Interim Procedures relating to Exchange of Information (Rule 8) apply to *Parties*, not to persons, groups or entities that are granted permission to participate in an IRP with the status of an *amicus curiae*.¹¹
51. On 17 April 2020, the Respondent produced to the Claimant its document production pursuant to the Procedural Order No. 2. On 24 April 2020, the Respondent transmitted to the Claimant a privilege log identifying documents withheld from production based on the attorney-client privilege or the attorney work product doctrine.
52. On 29 April 2020, the Claimant filed an application seeking assistance from the Panel regarding what the Claimant described as the Respondent's "grossly deficient document production and insufficiently detailed Privilege Log" (**29 April 2020 Application**). By way of relief, the Claimant requested in this application that the Panel order the Respondent to "(i) supplement and remedy its production by producing those documents that are subject to the Tribunal's production order or ICANN's production agreement; (ii) produce those

¹⁰ Procedural Order No. 3, pp. 2-3.

¹¹ See Decision on Phase I, para. 195.

documents listed on ICANN's Privilege Log that are not privileged; (iii) produce those documents that contain privileged and non-privileged information with appropriate redactions covering only the privileged information; and (iii) (*sic*) for the remaining documents, remedy its Privilege Log so that the Panel and Afilias can properly assess the validity of the privilege that ICANN has invoked."¹² The Claimant also reserved "its right to request the Panel to conduct an in camera review of documents that ICANN has asserted are covered by privilege".¹³

53. As directed by the Panel, the Respondent responded to the 29 April 2020 Application on 6 May 2020, rejecting the Claimant's complaints and asserting that the Respondent had in all respects complied with the Procedural Order No. 2. The Respondent argued that it searched and produced all non-privileged documents responsive to the Claimant's requests to which the Respondent agreed or was directed by the Panel to respond, and that it properly withheld only those documents protected by attorney-client privilege or the work product doctrine. The Respondent added that it served a privilege log providing, in respect of each withheld document, all of the information necessary to establish privilege.
54. On 11 May 2020, the Panel, as suggested by the Claimant, held a telephonic hearing in connection with the 29 April 2020 Application. On that occasion, both Parties had the opportunity to amplify their written submissions orally and to present arguments in reply. Consistent with the Panel's Decision on Phase I, the *Amici* were permitted to attend this procedural hearing as observers, which they did. In the course of its counsel's reply submissions at the hearing, the Claimant articulated a new waiver argument, namely that by arguing that the Board reasonably decided, in November 2016, not to make any determination regarding NDC's conduct until after the conclusion of the IRP, as alleged in the Respondent's Rejoinder, the Respondent had in effect affirmatively put the reasonableness and good faith of that Board's decision at issue in the case.
55. In accordance with the Revised Procedural Timetable (as modified by the Panel's correspondence of 1 May 2020), on 4 May 2020, the Claimant filed its Reply Memorial in

¹² 29 April 2020 Application, p. 11.

¹³ *Ibid*, fn 29.

Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review (**Claimant's Reply**) and, on 1 June 2020, the Respondent filed its Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review (**Respondent's Rejoinder**).

56. On 10 June 2020, while the Claimant's 29 April 2020 Application regarding document production remained under advisement, the Claimant filed a supplemental submission to add an additional argument in favour of a broader document production by the Respondent, which echoed the new argument put forward in the course of its counsel's reply at the hearing of 11 May 2020 (**Supplemental Submission**). In that supplemental submission, the Claimant argued that the Respondent had waived potentially applicable privilege with the filing of its Rejoinder Memorial where it allegedly put certain documents for which it claimed privilege "at issue" in this IRP.
57. By emails dated 11 June 2020 (corrected the following day), the Panel established a briefing schedule in relation to the Claimant's Supplemental Submission. In accordance with this schedule, the Respondent set out its position in relation to the Supplemental Submission in a response dated 17 June 2020 and a sur-reply dated 26 June 2020, inviting the Panel to find that the Respondent did not waive privilege and, therefore, that the relief sought by the Supplemental Submission should be denied. As for the Claimant, its position in relation to the Supplemental Submission was amplified in a reply dated 19 June 2020. The relief sought by the Claimant's Supplemental Submission as set out in the Claimant's 19 June 2020 reply is that the Panel order the Respondent to produce all documents that formed the basis of its Board's alleged determination, in November 2016, to defer any decision on the .WEB contention set, as well as all documents reflecting any determination by the Board to continue or terminate such deferral, including all such documents for which the Respondent claimed privilege, on the ground that the Respondent has waived any applicable privilege by putting such documents at issue.
58. The Claimant filed another application on 10 June 2020, this one regarding the status of the evidence originating from the *Amici* which had been filed with the Respondent's Rejoinder with the caveat that "ICANN did so without endorsing those statements or

agreeing with them in full”¹⁴ (**10 June Application**). The Claimant argued that ICANN was not permitted, pursuant to Procedural Order No. 3, to submit materials from the *Amici* unless it considered them relevant and wished to adduce them in support of its case. By way of relief, the Claimant requested that the Respondent be directed to resubmit the evidence filed with its Rejoinder that originated from the *Amici*, with a clear indication of the portions thereof with which the Respondent did not agree or which it did not endorse. Should the Respondent fail to do so, the Claimant invited the Panel to hold that all of the evidence submitted by the Respondent should be taken to have been submitted by and on behalf of the Respondent. On 15 June 2020, the Respondent responded to the 10 June Application, arguing that the submission of evidence on behalf of the *Amici* with the Respondent’s Rejoinder complied with Procedural Order No. 3. The Claimant replied on 17 June 2020, contending that the Panel could not allow Respondent to hide the basis for its actions and non-actions by letting the *Amici* defend it in the abstract and without affirming that it agrees with the *Amici*’s evidence.

59. In Procedural Order No. 4 dated 12 June 2020 (**Procedural Order No. 4**), the Panel denied the Claimant’s 29 April 2020 Application while reserving the question raised in the Supplemental Submission. The Panel decided that the Respondent had no obligation to ask the *Amici* to search for documents responsive to the Claimant’s requests to produce, and consequently rejected the Claimant’s claim that the Respondent ought to have produced responsive documents in the possession of the *Amici*. In that same order, a majority of the Panel concluded, applying California law as supplemented by US federal law, that the description used by the Respondent in its privilege log was sufficient to validly assert privilege and, therefore, that the Claimant had failed to justify its request that the Respondent be required to revise its privilege log. One member of the Panel, however, would have required disclosure of more detailed information from the Respondent in order to support the latter’s claims of privilege. Finally, the Panel rejected the remaining allegations of the Claimant regarding the alleged insufficiency of the Respondent’s production. Specifically, the Panel held that it would violate the attorney-client privilege and work product protection to call upon the Respondent, as requested by the Claimant, to

¹⁴ Respondent’s Rejoinder, fn 6.

redact privileged communications or work product documents so as to reveal “facts or information” contained in those protected documents.

60. On 26 June 2020, NDC and Verisign respectively filed the *Amicus Curiae* Brief of Nu DotCo, LLC (**NDC’s Brief**) and Verisign, Inc.’s Pre-Hearing Brief (Phase II) (**Verisign’s Brief**). In accordance with the Revised Procedural Timetable, the Claimant and the Respondent both responded to the *Amici*’s briefs on 24 July 2020, respectively in Afilias Domains No. 3 Limited’s Response to the *Amicus Curiae* Briefs (**Afilias’ Response to the Amici’s Briefs**) and ICANN’s Response to the Briefs of *Amicus Curiae* (**ICANN’s Response to the Amici’s Briefs**).
61. On 14 July 2020, the Panel issued its fifth procedural order (**Procedural Order No. 5**). In relation to the 10 June Application, the Panel found that the Respondent had allowed its Rejoinder to serve as a vehicle for the filing of what the Respondent itself described as the “*Amici*’s evidence”, the “*Amici*’s expert reports and witness statements”. In the Panel’s view, the Respondent had thus sought to do indirectly what the Panel had decided in Phase I could not be done directly under the Interim Procedures. By way of relief, the Panel directed the Respondent to clearly identify, in a communication to be addressed to the Claimant and the *Amici* and filed with the Panel, those aspects (if any) of the *Amici*’s facts and expert evidence which the Respondent formally refused to endorse, or with which it disagrees, and to provide an explanation for this non-endorsement or disagreement.¹⁵ The Respondent complied with the Panel’s direction by letters dated 17-18 July 2020.
62. The Panel considers it useful to cite the reasons supporting this ruling as they laid the foundations to the Panel’s approach to the issues in dispute in this IRP:

17. The Respondent has filed a Rejoinder seeking to draw a distinction between the Respondent’s evidence, filed without reservation in support of the Respondent’s primary case, and the “*Amici*’s evidence”, which the Respondent states it is filing “on behalf of the *Amici*” “to help ensure that the factual record in this IRP is complete”. However, the Respondent files this *Amici* evidence with the caveat that it is neither endorsing it, nor agreeing with it in full, as set out in the above quoted footnote 6 of the Rejoinder.

¹⁵ Procedural Order No. 5, para. 24.

18. In the Panel's view, the Respondent is thus seeking to do indirectly what the Panel decided in Phase I could not be done directly under the terms of the Interim Procedures. Instead of the *Amici* filing their own evidence with their Briefs, the Respondent has allowed the Rejoinder to serve as a vehicle for the filing of the "*Amici's* evidence", the "*Amici* expert reports and witness statements". This is indeed how the Respondent describes that evidence in its 15 June 2020 correspondence. The fact that the Rejoinder serves as a vehicle for the filing of what is, in effect, the *Amici's* evidence is consistent with the Respondent's proposal, in its submissions of 22 June 2020 relating to the modalities of the merits hearing (discussed below), that "the *Amici* be permitted to [...] introduced and conduct redirect examination of their own witnesses" (Respondent's letter of 22 June 2020, p. 2, para. 3 [emphasis added in PO5]).

19. The Respondent explains, in its 15 June response, that the purpose of the so-called "*Amici* evidence" is to address the Claimant's challenge of the *Amici's* conduct. The Respondent goes on to explain [emphasis added in PO5]:

Given that ICANN has not fully evaluated the competing contentions of Afilias and the *Amici*, for reasons ICANN explains at length in its Rejoinder, ICANN is not in a position to identify the portions of the *Amici* witness statements with which it "agrees or disagrees." But ICANN views it as essential that this evidence be of record, and that the Panel consider it, if the Panel decides to address the competing positions of Afilias and Amici regarding the latter's conduct.

20. The Panel understands the resulting procedural posture to be as follows. The Respondent has adduced evidence in support of its primary case that the ICANN Board, in the exercise of its fiduciary duties, made a decision that is both consistent with ICANN's Articles and Bylaws and within the realm of reasonable business judgment when, in November 2016, it decided not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending. That, according to the Respondent, should define the proper scope of the present IRP.

21. However, recognizing that the Claimant's case against the Respondent includes allegations concerning the *Amici's* conduct (specifically, NDC's alleged non-compliance with the Guidebook and Auction Rules), the Respondent files the "*Amici* evidence" on the ground that the record should include not only Afilias' allegations against Verisign and NDC, "but also Verisign's and NDC's responses." The difficulty is that this evidence is propounded not as the Respondent's defense to Afilias' claims against it, but rather (on the ground that the Respondent has not fully evaluated the competing contentions of Afilias and the *Amici*) as the *Amici's* response to Afilias' allegations that NDC violated the Guidebook and Auction Rules.

22. The Panel recalls that this IRP is an ICANN Accountability Mechanism, the parties to which are the Claimant and the Respondent. As such, it is not the proper forum for the resolution of potential disputes between Afilias and two non-parties that are participating in these proceedings as *amici curiae*. While it is open to the Respondent to choose how to respond to the Claimant's allegations concerning NDC's conduct, and to evaluate the consequences of its choice in this IRP, the Panel is of the view that the Respondent may not at the same time as it elects not to provide a direct response, adduce responsive evidence on that issue on behalf of the *Amici* and, in relation to that evidence, reserve its position as to which portions thereof the Respondent endorses or agrees with. In the opinion of the Panel, this leaves the Claimant uncertain as to the case it has to meet, which the Panel considers unfair, and it has the potential to disrupt the proceedings if the Respondent were later to take a position, for example in its post-hearing brief, which the Claimant would not have had the opportunity to address prior to, or at the merits hearing.

23. The Panel has taken due note of the Respondent's evidence and associated contentions concerning its Board's decision of November 2016. Nevertheless, the Guidebook and Auction Rules originate from ICANN. That being so, in this ICANN Accountability Mechanism in which the Respondent's conduct in relation to the application of the Guidebook and Auction Rules is being impugned, the Respondent should be able to say whether or not the position being defended by the *Amici* in relation to these ICANN instruments is one that ICANN is prepared to endorse and, if not, to state the reasons why.

63. In Procedural Order No. 5, the Panel also ruled on the Claimant's Supplemental Submission by rejecting the Claimant's contention that the Respondent's Rejoinder had itself put in issue in the IRP documents over which the Respondent had claimed privilege, and that the Respondent had thus waived attorney-client privilege. Having quoted the leading case on implied waiver of attorney-client privilege under California law,¹⁶ the Panel wrote:

37. In the Panel's opinion, the Supreme Court's reasoning directly applies, and defeats the Claimant's claim of implied waiver. While the Respondent has disclosed the fact that its Board received legal advice before deciding to defer acting upon Afilias' complaints, the Respondent did not disclose the content of counsel's advice. Nor is the Respondent asserting that the Board's decision was consistent with counsel's advice, or that the Board's decision was reasonable because it followed counsel's advice. Disclosure of the *fact* that the Board solicited and received legal advice does not entail waiver of privilege as to the *content* of that advice. If that were so, the Respondent's compliance with the Panel's directions concerning the contents of the privilege log to be filed in support of its claims of privilege would, in of itself, waive the privilege that the privilege log serves to protect.

[emphasis in the original]

64. On 26 July 2020, the *Amici* filed a request for "urgent clarification from the Panel regarding the status of the evidence from *Amici* that ICANN has not endorsed in response to Procedural Order No. 5". The *Amici* stressed that, while ICANN endorsed almost all of the statements of the *Amici*'s expert witnesses, ICANN declined to endorse almost all of the *Amici*'s fact witnesses. In its order dated 27 July 2020 (**Procedural Order No. 6**), the Panel ruled that, notwithstanding ICANN's decision not to endorse them, the witness statements of Messrs. Paul Livesay and Jose I. Rasco III remained part of the record of this IRP, and that the Panel would consider the evidence of these witnesses, as well as the rest of the evidence filed in the IRP.
65. On 29 July 2020, the Panel held a telephonic pre-hearing conference, which was attended

¹⁶ *Southern Cal. Gas Co. v. Public Utilities Com.*, 50 Cal. 3d 31 (1990).

by the Parties and *Amici*, to discuss various points of order in advance of the merits hearing.

66. The evidentiary hearing in relation to the merits of the IRP was held from 3 to 11 August 2020 inclusive. Because of the ongoing COVID-19 pandemic and the associated air travel restrictions, the hearing was conducted remotely using a videoconference platform selected by the Parties. Since the participants were located in multiple time zones, hearing days had to be shortened. To compensate, three (3) additional days to the five (5) days initially scheduled for the hearing were held in reserve. In the end, fewer witnesses than had been anticipated were heard and the hearing was completed in seven (7) days. A transcript of the hearing was prepared by Ms. Balinda Dunlap.
67. The Claimant had filed with its original Request for IRP witness statements from three (3) fact witnesses, Messrs. John L. Kane, Cedarampattu “Ram” Mohan and Jonathan M. Robinson, as well as one expert report by Mr. Jonathan Zittrain. Upon the filing of its Amended Request for IRP, on 21 March 2019, the Claimant filed one expert report, by Dr. George Sadowsky, and withdrew the witness statements of its three (3) fact witnesses “[i]n light of ICANN’s disclosure of the August 2015 Domain Acquisition Agreement between VeriSign and NDC”.¹⁷
68. For its part, the Respondents filed, on its own behalf, witness statements from five (5) fact witnesses, Ms. J. Beckwith Burr, Mr. Todd Strubbe, Ms. Christine A. Willett, Mr. Christopher Disspain and Ms. Samantha S. Eisner, and one (1) expert report by Dr. Dennis W. Carlton. In addition, the Respondent filed, on behalf of the *Amici*, witness statements from three (3) fact witnesses, Mr. Rasco, of NDC, and Messrs. David McAuley and Paul Livesay, of Verisign, and two (2) expert reports, one (1) by the Hon. John Kneuer, the other by Dr. Kevin M. Murphy. In its letter of 18 July 2020, the Respondent withdrew the witness statement of Mr. Strubbe, a Verisign employee whose evidence had been offered in support of the Respondent’s opposition to the Request for Emergency Interim Relief sought by the Claimant at the outset of the proceedings. The Respondent explained that Mr. Strubbe’s evidence related to the question of whether Verisign would be irreparably injured by a delay in the delegation of .WEB, an issue that had become moot

¹⁷ See Amended Request for IRP, fn 14, at p. ii.

by the time of the hearing.

69. The seven (7) fact witnesses whose witness statements remained in evidence, as well as the three (3) expert witnesses appointed by the Parties, were all initially called to appear at the hearing for questioning.¹⁸ In the course of the hearing, the Claimant informed the Panel of its decision not to cross-examine the Respondent's expert witness, which prompted the Respondent to decide not to cross-examine the Claimant's experts.
70. The evidentiary hearing was thus devoted to hearing the Parties' and *Amici*'s opening statements, and to the questioning of the remaining seven (7) fact witnesses called by the Respondent, on its behalf or on behalf of the *Amici*, namely Ms. Burr, Ms. Willett, Mr. Disspain, Ms. Eisner, Mr. McAuley, Mr. Rasco and Mr. Livesay.
71. At the end of the hearing, it was decided that the Parties and *Amici* would be permitted to file post-hearing briefs on 8 October 2020. The Panel indicated, referring back to a question that had been discussed at the pre-hearing conference, that it would inform the Parties and *Amici* of a date – to be held in reserve – on which the Panel would make itself available to hear oral closing submissions from the Parties and *Amici* should the Panel feel the need to do so after perusing the post-hearing submissions. The date was later set to 20 November 2020.
72. On 23 August 2020, the Panel forwarded to the Parties and *Amici* a list of questions that the Panel invited them to address in their respective post-hearing submissions.
73. Pursuant to a short extension of time granted by the Panel on 6 October 2020, on 12 October 2020, the Parties filed their post-hearing briefs (respectively, **Claimant's PHB** and **Respondent's PHB**), submissions on costs, and updated lists of Phase II issues, along with a factual chronology agreed to by both of them.
74. Also on 12 October 2020, the *Amici* filed a joint post-hearing brief (***Amici's PHB***). In their cover email, as well as in footnote 2 to their PHB, the *Amici* noted that the Parties had not consulted with them in the preparation of their respective issues lists, nor in the preparation

¹⁸ The Claimant did not request the presence of the *Amici*'s expert witnesses at the hearing.

of their joint chronology. The *Amici* therefore objected to the Parties' Phase II issues lists "to the extent that they omit or misrepresent the issues before this Panel", and they objected also to the Parties' joint chronology, which they asserted was incomplete.

75. On 16 October 2020, the Panel noted the *Amici*'s conditional objection to the Parties' respective issues lists. As regards the Parties' joint chronology, the *Amici* were given until 23 October 2020 to file, after consultations with the Parties, an amended version of the joint chronology with marked-up additions showing the items that they consider should be added to the joint chronology for it to be complete.
76. Also on 16 October 2020, the Claimant sought leave to respond to a number of "new non-record documents" cited in the *Amici*'s PHB. Having considered the Respondent's and *Amici*'s comments on this request, on 22 October 2020 the Panel granted the Claimant's request and a response to the impugned non-record documents was filed by the Claimant on 26 October 2020.
77. On 23 October 2020, the Parties filed their respective replies to the cost submissions of the other party (respectively, **Claimant's Reply Submission on Costs** and **Respondent's Response Submission on Costs**). On that date, the Claimant also provided the Panel with a joint chronology which had been agreed by the Parties and the *Amici* pursuant to the Panel's communication dated 16 October 2020 (**Joint Chronology**). The 23 October 2020 Joint Chronology is the chronology referred to in this Final Decision, and it is the one that the Panel has used in its deliberations
78. On 3 November 2020, having had the opportunity carefully to review the Parties' and *Amici*'s comprehensive post-hearing submissions, the Panel informed them of its decision not to avail itself of the possibility to hear additional oral closing submissions. The date reserved for that purpose was therefore released.
79. In a series of letters beginning with counsel for Verisign's letter of 9 December 2020, sent on behalf of both *Amici*, the Panel was informed of an impending, and later consummated merger of the Claimant's parent company, Afilias, Inc., and its competitor Donuts, Inc. This was described by Verisign as "new facts arising subsequent to the merits hearing, as

well as related newly discovered evidence, that contradict critical representations made by Afiliás Domains No. 3 Limited (“Afiliás”) in the pre-hearing pleadings and at the merits hearing [...]”. The *Amici* requested that the Panel consider these new developments in resolving the Claimant’s claims in this IRP. The submissions of the Parties and *Amici* concerning these post-hearing developments are summarized in the next section of this Final Decision.

80. On 7 April 2021, the Panel, being satisfied that the record of the IRP was complete and that the Parties and *Amici* had no further submissions to make in relation to the issues in dispute, formally declared the arbitral hearing closed in accordance with Article 27 of the ICDR Rules.
81. The Panel concludes this history of the proceedings by expressing its gratitude to Counsel for the Parties and *Amici* for their assistance in the resolution of this dispute and the exemplary professional courtesy each and everyone of them displayed throughout these proceedings.

III. FACTUAL BACKGROUND

82. The essential facts of this case have been conveniently laid out in the Joint Chronology dated 23 October 2020 agreed to by the Parties and *Amici*. In order to provide some background for the Panel’s analysis below, the most salient facts of this case are summarized in this section.
83. The deadline for the submission of applications for new gTLDs under the Respondent’s New gTLD Program was 30 May 2012. As mentioned in the overview, the Claimant is one of seven (7) entities that submitted an application to the Respondent for the right to operate the registry of the .WEB gTLD pursuant to the rules and procedures set out in the Respondent’s Guidebook and the Auction Rules for New gTLDs.
84. Because there were multiple applicants for .WEB, the applicants were placed in a “contention set” for resolution either privately or through an auction of last resort administered by the Respondent.
85. Towards the end of 2014, at a time when the .WEB contention set was still on hold, and

had thus not been resolved, Redacted - Third Party Designated Confidential Information

.¹⁹ Apart from filing applications for new gTLDs that were variants of the company's name, for example ".Verisign", or internationalized versions of Verisign's existing TLDs, Verisign had not otherwise sought to acquire rights to new gTLDs as part of ICANN's New gTLD Program. Redacted - Third Party Designated Confidential Information

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86. Verisign identified .WEB as one business opportunity in the New gTLD Program. Redacted - Third Party Designated Confidential Information

. In May 2015, Mr. Livesay contacted Mr. Rasco, NDC's CFO and manager, and expressed interest in working with NDC to acquire the rights to .WEB.²¹

87. On 25 August 2015, Verisign and NDC executed the DAA under which Verisign undertook to provide, Redacted - Third Party Designated Confidential Information, funds for NDC's bid for the .WEB gTLD while NDC undertook, if it prevailed at the auction and entered into a registry agreement with ICANN, to transfer and assign its .WEB registry agreement to Verisign upon receipt of ICANN's actual or deemed consent to the assignment.

88. On 27 April 2016, ICANN scheduled the .WEB auction of last resort for 27 July 2016.

89. Early in June 2016, it became known among members of the .WEB contention set that NDC did not intend to participate in a private auction in order to privately resolve the contention set. It is common ground that the Respondent, as a rule, favours the private resolution of contention sets. On 7 June 2016, in answer to a request to postpone the

¹⁹ Merits hearing transcript, 11 August 2020, pp. 1125:17-1126:15 (Mr. Livesay).

²⁰ Mr. Livesay's witness statement, 1 June 2020, para. 4.

²¹ Merits hearing transcript, 7 August 2020, p. 806:12-18 (Mr. Rasco).

ICANN auction in order for members of the contention set to “try to work this out cooperatively”, Mr. Rasco stated in an email: “I went back to check with the powers that be and there was no change in the response and will not be seeking an extension.”²² The email in question was addressed to Mr. Jon Nevett, of Ruby Glen, LLC (**Ruby Glen**).

90. On 23 June 2016, Ruby Glen informed ICANN that it believed NDC “failed to properly update its application” to account for “changes to the Board of Directors and potential control of [NDC]”.²³ On 27 June 2016, ICANN asked NDC to “confirm that there have not been changes to [its] application or [to its] organization that need to be reported to ICANN.” On the same day, NDC confirmed that “there have been no changes to [its] organization that would need to be reported to ICANN.”²⁴
91. On 29 June 2016, Ms. Willett, then Vice-President of ICANN’s gTLD Operations, informed Ruby Glen that her team had investigated and that NDC had confirmed that there had been no changes to NDC’s ownership or control. As a result, she advised that “ICANN was continuing to proceed with the Auction as scheduled.”²⁵
92. On 30 June 2016, Ruby Glen formally raised its concern about a possible change in control of NDC with ICANN’s ombudsman (**Ombudsman**). On 12 July 2016, the Ombudsman informed Ms. Willett that he had “not seen any evidence which would satisfy [him] that there ha[d] been a material change to the application. So [his] tentative recommendation [was] that there was nothing which would justify a postponement of the auction based on unfairness to the other applicants.”²⁶ The following day, Ms. Willett informed the .WEB contention set accordingly.
93. On 17 July 2016, two other .WEB applicants, Donuts and Radix FZC (**Radix**), filed an emergency Reconsideration Request, alleging that ICANN had failed to perform a “full

²² Mr. Rasco’s email dated 7 June 2016, Ex. C-35.

²³ Ms. Willett’s witness statement, 31 May 2019, Ex. A.

²⁴ Exchanges between Messrs. Rasco and Jared Erwin, Ex. C-96.

²⁵ Declaration of Ms. Willett in support of ICANN’s opposition to Plaintiff’s *ex parte* application for temporary restraining order, Ex. C-40, paras. 15-16.

²⁶ Ms. Willett’s witness statement, 31 May 2019, Ex. G.

and transparent investigation into the material representations made by NDC” and contesting ICANN’s decision to proceed with the ICANN auction.²⁷ Reconsideration is an ICANN accountability mechanism allowing any person or entity materially affected by an action or inaction of the Board or Staff to request reconsideration of that action or inaction.²⁸ Donuts’ and Radix’s Reconsideration Request was denied on 21 July 2016.²⁹

94. On 22 July 2016, Ruby Glen filed a complaint against ICANN in the US District Court of the Central District of California, and an application for a temporary restraining order seeking to halt the .WEB auction (**Ruby Glen Litigation**). On 26 July 2016, the application for a temporary restraining order was denied.³⁰
95. In the meantime, on 20 July 2016, the blackout period associated with the ICANN auction had begun. The blackout period extends from the deposit deadline, in this case 20 July 2016, until full payment has been received from the prevailing bidder (**Blackout Period**). During the Blackout Period, members of a contention set, including the .WEB contention set, “are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s, or any other competing applicants’ bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction.”
96. On 22 July 2016, Mr. Kane, a representative of Afilias, wrote a text message to Mr. Rasco asking whether NDC would consider a private auction if ICANN were to delay the scheduled auction.³¹ Mr. Rasco did not respond to this query, as he testified he considered

²⁷ Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, p. 2.

²⁸ See Bylaws, Ex. C-1, Article 4, Section 4.2.

²⁹ Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, pp. 11-12.

³⁰ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Order on *Ex Parte* Application for Temporary Order (26 July 2016), Ex. R-9.

³¹ See the exchange of text messages between Messrs. Kane and Rasco, Attachment E to Arnold & Porter’s letter to Mr. Enson dated 23 August 2016, Ex. R-18, p. 73.

it an attempt to engage in a prohibited discussion during the Blackout Period.³²

97. Redacted - Third Party Designated Confidential Information

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98. On 27 and 28 July 2016, ICANN conducted the auction of last resort among the seven (7) applicants for the .WEB gTLD. As already mentioned, NDC won the auction while the Claimant was the second-highest bidder.

99. On 28 July 2016, Verisign filed a form with the U.S. Security and Exchange Commission stating that “[s]ubsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third party consent.”³⁴

100. On 31 July 2016, Mr. Rasco informed Ms. Willett that Redacted - Designated Confidential Information

.”³⁵ On 1 August 2016, Verisign issued a press release stating that it had “entered into an agreement with Nu Dot Co LLC wherein the Company provided funds for Nu Dot Co’s bid for the .web TLD.”³⁶

101. The following day, 2 August 2016, Donuts invoked the CEP with ICANN in regard to

³² Mr. Rasco’s witness statement, 10 December 2018, para. 17.

³³ Mr. Livesay’s witness statement, 1 June 2020, para. 27, and Ex. H attached thereto.

³⁴ Verisign’s Form 10-Q, Quarterly Report, Ex. C-45, p. 13.

³⁵ Ms. Willett’s email dated 31 July 2016, Ex. C-100, [PDF] pp. 1-2.

³⁶ Verisign statement regarding .WEB auction results, Ex. C-46.

.WEB (**Donuts CEP**).³⁷ The CEP is a non-binding process in which parties are encouraged to participate to attempt to resolve or narrow a dispute.³⁸ While the CEP is voluntary, the Bylaws create an incentive for parties to participate in this process by providing that failure of a Claimant to participate in good faith in a CEP exposes that party, in the event ICANN is the prevailing party in an IRP, to an award condemning it to pay all of ICANN's reasonable fees – including legal fees – and costs incurred by ICANN in the IRP.

102. On 8 August 2016, Ruby Glen filed an Amended Complaint against ICANN in the Ruby Glen Litigation. Also on 8 August 2016, Afiliis sent to Mr. Atallah a letter raising concerns about Verisign's involvement with NDC and in the ICANN auction, and, on the same day, submitted a complaint with the Ombudsman.
103. On 19 August 2016, ICANN informed the .WEB applicants that the .WEB contention set had been placed “on-hold” to reflect the pending accountability mechanism initiated by Donuts.
104. Redacted - Third Party Designated Confidential Information

105. On 9 September 2016, Afiliis sent ICANN a second letter regarding Afiliis' concerns about Verisign's involvement with NDC's application for .WEB, stating that “ICANN's Board and officers are obligated under the Articles, Bylaws and the Guidebook (as well as

³⁷ Cooperative Engagement and Independent Review Processes Status Update, 8 August 2016, Ex. C-108, [PDF] p. 1.

³⁸ Bylaws, Ex. C-1, Article 4, Section 4.3 (e).

³⁹ Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. R-18, [PDF] pp. 1-8.

⁴⁰ See Respondent's Rejoinder, para. 35 and Transcript of the 11 May 2020 Hearing, Ex. R-29, p. 20:9-15.

international law and California law) to disqualify NDC's bid immediately and proceed with contracting of a registry agreement with Afilias, the second highest bidder", and asking ICANN to respond by no later than 16 September 2016.⁴¹

106. On 16 September 2016, Ms. Willett sent Afilias, Ruby Glen, NDC and Verisign a detailed Questionnaire and invited them to provide information and comments on the allegations raised by Afilias and Ruby Glen.⁴² The Respondent avers that the purpose of the Questionnaire "was to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted by Afilias and Ruby Glen".⁴³ It is common ground that at the time, while ICANN, NDC and Verisign had knowledge of the provisions of the Domain Acquisition Agreement, of which each of them had a copy, Afilias and Ruby Glen did not. Responses to the Questionnaire were provided to ICANN on 7 October 2016 by Afilias⁴⁴ and Verisign⁴⁵, and on 10 October 2016 by NDC.⁴⁶
107. On 19 September 2016, the Ombudsman informed Afilias that he was declining to investigate Afilias' complaint regarding the .WEB auction because Ruby Glen had initiated both a CEP and litigation in respect of the same issue.⁴⁷
108. On 30 September 2016, ICANN acknowledged receipt of Afilias' letters of 8 August 2016 and 9 September 2016, noted that ICANN had placed the .WEB contention set on hold "to reflect a pending ICANN Accountability Mechanism initiated by another member in the contention set", and added that Afilias would "be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms." ICANN further stated that it would "continue to take Afilias' comments,

⁴¹ Afilias' Letter to Mr. Atallah dated 9 September 2016, Ex. C-103.

⁴² ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

⁴³ Respondent's Rejoinder, para. 46.

⁴⁴ Afilias' letter to Ms. Willett dated 7 October 2016, Ex. C-51.

⁴⁵ Arnold & Porter's letter to Ms. Willett dated 7 October 2016, Ex. C-109.

⁴⁶ Mr. Rasco's email to ICANN dated 10 October 2016, Ex. C-110.

⁴⁷ Mr. Herb Waye's email to Mr. Hemphill dated 19 September 2016, Ex. C-101.

and other inputs that we have sought, into consideration as we consider this matter.”⁴⁸

109. On 3 November 2016, the Board of ICANN held a Board workshop during which a briefing was presented by in-house counsel regarding the .WEB contention set (**November 2016 Workshop**).⁴⁹ A memorandum prepared by ICANN’s outside counsel and containing legal advice in anticipation of litigation regarding the .WEB contention set had been sent to “non-conflicted” ICANN Board members on 2 November 2016, in advance of the workshop.⁵⁰ As will be seen in the following section of this Final Decision, the November 2016 Workshop is of particular importance in this case. Suffice it to say for present purposes that, at least according to ICANN, during this workshop the Board “specifically [chose...] not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending”.⁵¹ That decision of the ICANN Board was not communicated to Afilias at the time. Indeed, it was first made public and disclosed to Afilias 3 ½ years later, upon the filing of the Respondent’s Rejoinder in this IRP, filed on 1 June 2020.⁵²
110. On 28 November 2016, the US District Court of the Central District of California dismissed Ruby Glen’s claims against ICANN in the Ruby Glen Litigation on the basis that “the covenant not to sue [in Module 6 of the Guidebook] bars Plaintiff’s entire action.”⁵³
111. On 18 January 2017, the Department of Justice (**DOJ**) issued a civil investigative demand to Verisign, ICANN, and others regarding Verisign’s “proposed acquisition of [NDC’s] contractual rights to the .web generic top-level domain.”⁵⁴ The DOJ requested that ICANN take no action on .WEB during the pendency of the investigation. Between February

⁴⁸ ICANN’s letter to Mr. Hemphill dated 30 September 2016, Ex. C-61.

⁴⁹ Joint Fact Chronology, and ICANN’s Privilege Log of 24 April 2020, pp. 29-30.

⁵⁰ Respondent’s Rejoinder, para. 40.

⁵¹ *Ibid.*, para. 3.

⁵² There are multiple references to the November 2016 Workshop in the Respondent’s privilege log of 24 April 2020, but not to any decision made in respect of .WEB.

⁵³ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), 28 November 2016, Ex. C-106.

⁵⁴ DOJ Civil Investigative Demand to Thomas Indelicarto of Verisign dated 18 January 2017, Ex. AC-31.

and June 2017, ICANN made several document productions and provided information to DOJ, Redacted - Third Party Designated Confidential Information

.⁵⁵ On 9 January 2018, a year after the issuance of the DOJ's investigative demand, the DOJ closed its investigation of .WEB without taking any action.

112. On 30 January 2018, the Donuts CEP closed, and ICANN gave Ruby Glen (the entity through which Donuts, Inc. had submitted an application for .WEB) until 14 February 2018 to file an IRP. Ruby Glen did not file an IRP in respect of .WEB.
113. On 15 February 2018, Mr. Rasco requested via email that ICANN move forward with the execution of a .WEB registry agreement with NDC in light of the termination of the DOJ investigation and the absence of any pending accountability mechanisms.⁵⁶
114. On 23 February 2018, counsel for Afilias submitted a Documentary Information Disclosure Policy (**DIDP**) request to ICANN (**Afilias' First DIDP Request**) and asked for an update on ICANN's investigation of the .WEB contention set.⁵⁷ ICANN responded to Afilias' First DIDP Request on 24 March 2018.
115. On 28 February 2018, counsel for NDC sent a formal letter to ICANN requesting that it move forward with the execution of a registry agreement for .WEB with NDC.⁵⁸
116. On 16 April 2018, counsel for Afilias wrote to the ICANN Board requesting an update on the status of the .WEB contention set, an update on the status of ICANN's investigation, and prior notification of any action by the Board related to .WEB, adding that Afilias "intend[ed] to initiate a CEP and a subsequent IRP against ICANN, if ICANN proceeds toward delegation of .WEB to NDC."⁵⁹

⁵⁵ Respondent's Rejoinder, para. 49.

⁵⁶ Mr. Rasco's email to ICANN dated 15 February 2018, Ex. C-182.

⁵⁷ Dechert's letter to the Board dated 23 February 2018, Ex. C-78.

⁵⁸ Irell & Manella's letter to Messrs. Jeffrey and Atallah dated 28 February 2018, Ex. R-20.

⁵⁹ Dechert's letter to the Board dated 16 April 2018, Ex. C-113.

117. On 23 April 2018, counsel for Afilias wrote to the ICANN Board to object to the non-disclosure of the documents requested in the First DIDP Request by reason of their confidentiality, and to offer to limit their disclosure to outside counsel.⁶⁰ This request was treated as a new DIDP request (**Second DIDP Request**)⁶¹. On the same date, counsel for Afilias submitted a reconsideration request challenging ICANN's response to Afilias' First DIDP Request (**Reconsideration Request 18-7**).⁶²
118. On 28 April 2018, ICANN's outside counsel wrote to counsel for Afilias, confirming that the .WEB contention set was on-hold but declining to undertake to send Afilias prior notice of a change to its status on the ground that doing so "would constitute preferential treatment and would contradict Article 2, Section 2.3 of the ICANN Bylaws."⁶³ Afilias responded to that letter on 1 May 2018, reiterating the arguments it had previously made.⁶⁴
119. On 23 May 2018, ICANN responded to Afilias' Second DIDP Request, and on 5 June 2018, Afilias' Reconsideration Request 18-7 was denied.
120. On 6 June 2018, ICANN took the .WEB contention set off-hold and notified the .WEB applicants by emailing the contacts identified in the applications.⁶⁵ In the following days, the normal process leading to the execution of a registry agreement was put in motion within ICANN in relation to the .WEB registry.
121. On 12 June 2018, Ms. Willett and other Staff approved the draft Registry Agreement for .WEB and its transmittal to NDC. On 14 June 2018, ICANN sent the draft .WEB Registry Agreement to NDC, which NDC promptly signed and returned to ICANN. On the same day, Ms. Willett and other Staff approved executing the .WEB Registry Agreement on

⁶⁰ Dechert's letter to the Board dated 23 April 2018, Ex. C-79.

⁶¹ See Determination of the Board Accountability Mechanisms Committee (BAMC) Reconsideration Request 18-7 dated 5 June 2018, Ex. R-32, p. 5.

⁶² Afilias Domain No. 3 Limited Reconsideration Request, Ex. R-31 or VRSN-26.

⁶³ Jones Day's letter to Mr. Ali dated 28 April 2018, Ex. C-80.

⁶⁴ Dechert's letter to Mr. LeVee dated 1 May 2018, Ex. C-114.

⁶⁵ Exchange of emails between ICANN Staff dated 6 June 2018, Ex. C-166; and Mr. Erwin's email to Ms. Willett and Mr. Christopher Bare dated 6 June 2018, Ex. C-167.

ICANN's behalf.⁶⁶

122. On 18 June 2018, prior to ICANN's execution of the .WEB Registry Agreement, Afilias invoked a CEP with ICANN regarding the .WEB gTLD.⁶⁷ Two days later, ICANN placed the .WEB contention set back on hold to reflect Afilias' invocation of a CEP. As a result, the extant .WEB Registry Agreement was voided.⁶⁸
123. On 22 June 2018, Afilias filed a second reconsideration request (**Reconsideration Request 18-8**), seeking reconsideration of ICANN's response to Afilias' 23 April 2018 DIDP Request. On 6 November 2018, the Board, on the recommendation of the Board Accountability Mechanisms Committee, denied that request.⁶⁹
124. A week later, on 13 November 2018, ICANN wrote to counsel for Afilias to confirm that the CEP for this matter was closed as of that date and to advise that ICANN would grant Afilias an extension of time to 27 November 2018 (fourteen (14) days following the close of the CEP) to file an IRP regarding the matters raised in the CEP, if Afilias chooses to do so. As already noted, Afilias filed its Request for IRP on the following day, 14 November 2018.

IV. SUMMARY OF SUBMISSIONS AND RELIEF SOUGHT

125. The submissions made in relation to Phase II are voluminous. The Panel summarizes these submissions below. Where appropriate, the Panel refers in the analysis section of this Final Decision to those parts of the submissions and evidence found by the Panel to be most pertinent to its analysis. In reaching its conclusions, however, the Panel has considered all of the Parties' submissions and evidence.
126. The submissions made and the relief initially sought in relation to the Claimant's Rule 7 Claim are set out in detail in the Panel's Decision on Phase I. The position adopted by the Claimant in relation to its Rule 7 Claim in Phase II is discussed below, in section V.E. of

⁶⁶ Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

⁶⁷ Dechert's letter to ICANN dated 18 June 2018, Ex. C-52.

⁶⁸ Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

⁶⁹ ICANN, Approved Board Resolutions, Special Meeting of the ICANN Board, 6 November 2018, Ex. C-7, pp. 1-10.

this Final Decision.

A. Claimant's Amended Request for IRP

127. In its Amended Request for IRP dated 21 March 2019, the Claimant claims that the Respondent has breached its Articles and Bylaws as a result of the Board's and Staff's failure to enforce the rules for, and underlying policies of, ICANN's New gTLD Program, including the rules, procedures, and policies set out in the Guidebook and Auction Rules.⁷⁰
128. The Claimant avers that NDC ought to have disclosed the Domain Acquisition Agreement to ICANN and modified its .WEB application to reflect that it had entered into the DAA with Verisign, or to account for the implications of the agreement's terms for its application. The Claimant submits that while it is evident that NDC violated the New gTLD Program Rules, the Respondent has failed to disqualify NDC from the .WEB contention set, or to disqualify NDC's bids in the .WEB auction.
129. The Claimant contends that the Respondent has breached its obligation, under its Bylaws, to make decisions by applying its documented policies "neutrally, objectively, and fairly," in addition to breaching its obligations under international law and California law to act in good faith. The Claimant also submits that the Respondent, by these breaches, has failed to respect one of the pillars of the New gTLD Program and one of ICANN's founding principles: to introduce and promote competition in the Internet namespace in order to break Verisign's monopoly.⁷¹
130. More specifically, the Claimant contends that NDC violated the Guidebook's prohibition against the resale, transfer, or assignment of its application, as NDC transferred to Verisign crucial application rights, including the right to reach a settlement or participate in a private auction. The Claimant also asserts that NDC's bids at the .WEB auction were invalid because they were made on Verisign's behalf, reflecting what the latter was willing to pay and implying no financial risk for NDC.

⁷⁰ Amended Request for IRP, para. 2.

⁷¹ *Ibid*, para. 5.

131. By way of relief, the Claimant requested the Panel to issue a binding declaration:
- (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;
 - (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules;
 - (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;
 - (4) specifying the bid price to be paid by Afilias;
 - (5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by Verisign and/or NDC;
 - (6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings; and
 - (7) granting such other relief as the Panel may consider appropriate in the circumstances.⁷²

B. Respondent's Response

132. In its Response dated 31 May 2019, the Respondent argues that it complied with its Articles, Bylaws, and policies in overseeing the .WEB contention set disputes and resulting accountability mechanisms.

⁷² Amended Request for IRP, para. 89.

133. The Respondent contends that it thoroughly investigated claims made prior to the .WEB auction about NDC’s alleged change of control, and notes that it was not alleged at the time that NDC had an agreement with Verisign regarding .WEB. Accordingly, what the Respondent investigated was an alleged change in ownership, management or control of NDC, which it found had not occurred.
134. With regard to alleged Guidebook violations resulting from the Domain Acquisition Agreement with Verisign, the Respondent notes that due to the pendency of the DOJ investigation and various accountability mechanisms – including this IRP – its Board has not yet had an opportunity to fully evaluate the Guidebook violations alleged by the Claimant, adding that those are hotly contested and would not in any event call for automatic disqualification of NDC.⁷³
135. The Respondent explains that, with the exception of approximately two weeks in June 2018, after Afiliias’ DIDP-related Reconsideration Requests were resolved and before Afiliias initiated its CEP, the .WEB contention set has been on hold from August 2016 through today. The Respondent observes that during the entire period from July 2016 through June 2018, the Claimant took no action that could have placed the .WEB issues before the Board, although it could have.⁷⁴
136. The Respondent adds that the Guidebook breaches alleged by the Claimant “are the subject of good faith dispute by NDC and VeriSign”. The Respondent also avers that while the Claimant’s IRP “is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and VeriSign to which NDC and VeriSign have responses”.⁷⁵ The Respondent argues, speaking of its Board, that deferring consideration of the alleged violations of the Guidebook until this Panel renders its final decision is within the realm of reasonable business judgment.⁷⁶

⁷³ Respondent’s Response, para. 61.

⁷⁴ *Ibid*, para. 62. As noted above, the Claimant’s second Reconsideration Request was lodged on 22 June 2018, and therefore after the Respondent placed the .WEB contention set back on hold following the Claimant’s commencement of a CEP.

⁷⁵ Respondent’s Response, para. 63.

⁷⁶ *Ibid*, para. 66.

137. The Respondent underscores that the Guidebook does not require ICANN to deny an application where an applicant failed to inform ICANN that previously submitted information has become untrue or misleading. Rather, according to ICANN, the Guidebook gives it discretion to determine whether the changed circumstances are material and what consequences, if any, should follow. By disqualifying NDC, this Panel would, in ICANN's submission, usurp the Board's discretion and exceed the Panel's jurisdiction.
138. As for the Claimant's allegation that the Domain Acquisition Agreement between NDC and Verisign is anticompetitive, the Respondent notes that this is denied by Verisign and contradicted by the DOJ's decision not to take action following its investigation into the matter. The Respondent also denies Afilias' assertion that the sole purpose of the New gTLD Program was to create competition for Verisign. The Respondent also contends, relying on the evidence of its expert economist, Dr. Carlton, that there is no evidence that .WEB will be a unique competitive check on .COM, nor that the Claimant would promote .WEB more aggressively than Verisign.
139. As regards the applicable standard of review, the Respondent submits that an IRP panel is asked to evaluate whether an ICANN action or inaction was consistent with ICANN's Articles, Bylaws, and internal policies and procedures. However, with respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, the Respondent submits that an IRP Panel is not empowered to substitute its judgment for that of ICANN. Rather, its core task is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.⁷⁷
140. The Respondent contends that all of Afilias' claims are time-barred under both the Bylaws in force in 2016 and the current Interim Procedures. The Bylaws in force in 2016 provided that an IRP had to be filed within thirty (30) days of the posting of the Board minutes relating to the challenged ICANN decision or action. The Interim Procedures now provide that an IRP must be filed within 120 days after a claimant becomes aware "of the material effect of the action or inaction" giving rise to the dispute, provided that an IRP may not be filed more than twelve (12) months from the date of such action or inaction.

⁷⁷ Respondent's Response, para. 55.

The Respondent contends that Afiliás' claims regarding alleged deficiencies in ICANN's pre-auction investigation accrued on 12 September 2016, when it posted minutes regarding the Board's denial of Ruby Glen's Reconsideration Request challenging that investigation. The Respondent takes the position that the facts and claims supporting the Claimant's allegations of Guidebook and Auction Rules violations were set forth in Afiliás' letters dated August and September 2016, and were therefore known to the Claimant at that time.⁷⁸

141. As for the Claimant's requested relief, the Respondent contends that it goes far beyond what is permitted by the Bylaws and calls for the Panel to decide issues that are reserved to the discretion of the Board.

C. Claimant's Reply

142. In its Reply dated 4 May 2020 (revised on 6 May 2020), the Claimant rejects ICANN's self-description as a mere not-for-profit corporation, averring that the Respondent serves as the *de facto* international regulator and gatekeeper to the Internet's DNS space, with no government oversight.⁷⁹
143. Regarding the standard of review, the Claimant denies that this case involves the exercise of the Board's fiduciary duties. The Panel is required to conduct an objective, *de novo* examination of the Dispute. Moreover, quite apart from the Board's alleged determination to defer consideration of the Claimant's claims until this Panel has issued its decision, the Claimant notes that this IRP also impugns the flawed analysis of the New gTLD Program Rules by the Staff, ICANN's inadequate investigation of the *Amici*'s conduct, its failure to disqualify NDC's application and auction bids, and its decision to proceed with contracting with NDC in respect of .WEB.⁸⁰
144. The Claimant submits that the Respondent's defences are baseless and self-contradictory:

⁷⁸ *Ibid*, paras. 73-76.

⁷⁹ Claimant's Reply, paras. 1-3.

⁸⁰ *Ibid*, para. 8.

on the one hand it argues that it appropriately handled Afiliias' concerns while on the other it asserts that its Board has deferred consideration of these concerns until the Panel's final decision in this IRP.⁸¹ The Claimant reiterates that ICANN violated its Bylaws and Articles by not disqualifying NDC's application and bids for .WEB, and in proceeding to contract with NDC for the .WEB registry agreement.

145. The Claimant contends that the New gTLD Program Rules are mandatory. In its view, it is not within ICANN's discretion to overlook violations of those rules by some applicants, such as NDC, nor to allow non-applicants like Verisign to circumvent them by "enlisting a shell like NDC".⁸² According to the Claimant, the Respondent improperly ignored NDC's clear violation of the prohibition against the resale, transfer or assignment of rights and obligations in connection with its application.
146. In addition, the Claimant contends that the public portions of NDC's application, left unchanged after its agreement with Verisign, deceived the Internet community as to the identity of the true party-in-interest behind NDC's .WEB application.⁸³ All in all, the Domain Acquisition Agreement constituted, according to the Claimant, a change of circumstances that rendered the information in NDC's application misleading, yet the Respondent did nothing to redress that situation even after it was provided with a copy of the Domain Acquisition Agreement.⁸⁴
147. In reply to the Respondent's argument that the Guidebook does not impose, but merely allows ICANN to disqualify applications containing a material misstatement, misrepresentation, or omission, the Claimant counters that the Respondent must exercise any discretion it may have in this regard consistent with its Articles and Bylaws and in accordance with its obligation towards the Internet community to implement the New gTLD Program openly, transparently and fairly, treating all applicants equally. According to the Claimant, the Respondent's position, were it accepted, would wipe away years of

⁸¹ *Ibid*, para. 20.

⁸² *Ibid*, para. 27.

⁸³ Claimant's Reply, para. 40.

⁸⁴ *Ibid*, para. 69.

carefully deliberated policy development work by the ICANN community.⁸⁵

148. The Claimant also submits that NDC's bids in the auction were invalid for failure to comply with the Auction Rules.⁸⁶ In that respect, the Claimant stresses that while the Auction Rules provide that bids must be placed by or on behalf of a Qualified Applicant, in the present case the DAA makes it clear that NDC was making bids “Redacted - Third Party Designated Confidential Information”

⁸⁷ Afilias therefore claims that the New gTLD Program Rules required ICANN to declare NDC's bids invalid and award the .WEB gTLD to Afilias, as the next highest bidder.

149. The Claimant avers that ICANN's investigation of its stated concerns was superficial, self-serving, and designed to protect itself, without the transparency, openness, neutrality, objectivity, fairness and good faith required under the Bylaws. In that respect, the Claimant stresses that the Respondent received the Domain Acquisition Agreement on 23 August 2016, and ought to have disqualified NDC's application and bids upon review of its terms.

150. Instead, the Respondent issued its 16 September 2016 Questionnaire to Afilias, Verisign, NDC and Ruby Glen, making no mention of the fact that the Respondent had already sought and received input from Verisign, nor of the fact that at the time, ICANN, Verisign and NDC had knowledge of the contents of the Domain Acquisition Agreement, whereas Afilias had not. According to the Claimant, the Questionnaire was a “pure artifice”, designed to elicit answers that would help Verisign's cause if its arrangement with NDC was challenged at a later date and to protect ICANN from the type of criticism and concerns already raised by Afilias.⁸⁸

151. The Claimant notes that there is no indication that the Respondent did anything with the responses it received to the Questionnaire, or what steps were taken to achieve an “informed resolution” of the concerns raised by Afilias. What is known is merely that the

⁸⁵ *Ibid*, para. 85.

⁸⁶ *Ibid*, para. 88.

⁸⁷ *Ibid*, para. 95.

⁸⁸ Claimant's Reply, para. 114.

Board decided not to make a determination on the merits on Afilias' contentions against Verisign and NDC until all accountability mechanisms had been concluded, and that on 6 June 2018, the Respondent decided to remove the .WEB contention set from its on-hold status and to proceed with the delegation of .WEB to NDC. This, the Claimant asserts, suggests that the Respondent had in fact made a determination on the merits of Afilias' contentions.⁸⁹

152. According to the Claimant, ICANN must exercise its discretion insofar as the application of the New gTLD Program Rules is concerned consistently with what the Claimant describes as the Respondent's competition mandate, that is, the mandate to promote competition and to constrain the market power of .COM.⁹⁰ In the Claimant's view, the DOJ's investigation is irrelevant to deciding this IRP as the DOJ's official policy is that no inference should be drawn from a decision to close a merger investigation without taking further action.
153. In response to the Respondent's contention that its claims are time-barred, the Claimant argues that the lack of merit of this defence is underscored by the Respondent's assertion that the Claimant's claims are in one sense premature and in another sense overdue. The Claimant recalls that (1) between August 2016 and the end of 2016, ICANN represented that it would seek the informed resolution of Afilias' concerns, and keep Afilias informed of the outcome; (2) between January 2017 and January 2018, the DOJ was conducting its antitrust investigation, and had asked ICANN to take no action on .WEB; and (3) between January 2018 and June 2018, Afilias repeatedly asked ICANN for information about the status of .WEB, which ICANN failed to provide until the Claimant was notified that the .WEB contention set had been taken off-hold, whereupon Afilias invoked the Cooperative Engagement Process.⁹¹
154. The Claimant disputes that the complaints it made in its 2016 letters are the same as those relied upon in its Amended Request for IRP: the former were based on public information

⁸⁹ *Ibid*, para. 118.

⁹⁰ *Ibid*, paras. 125-128.

⁹¹ Claimant's Reply, paras. 137-139.

only, and requested an investigation; the latter were prompted by the realization that in spite of its requests that NDC's application and bids be disqualified, ICANN had now signaled that it was proceeding to contract with NDC.

155. The Claimant contends that the Respondent misstates the relief that an IRP Panel may order. According to the Claimant, the Panel has the power to issue "affirmative declaratory relief" requiring the Respondent to disqualify NDC's application and bids and to offer the Claimant the rights to .WEB.⁹²

D. Respondent's Rejoinder

156. In its Rejoinder Memorial dated 1 June 2020, the Respondent states that a feature that sets this IRP apart is that ICANN has not yet fully addressed the ultimate dispute underlying the Claimant's claims.⁹³ In that respect, the Respondent stresses that, since the inception of the New gTLD Program, it placed applications and contention sets "on hold" when related accountability mechanisms were initiated.⁹⁴ In its view, the Respondent followed its processes by specifically choosing, in November 2016, not to address the issues surrounding .WEB while an accountability mechanism regarding that gTLD was pending.⁹⁵ When it received the Domain Acquisition Agreement in August of 2016, ICANN did not disqualify NDC's application because the .WEB contention set was on hold at that time due to a pending accountability mechanism by the parent company of another .WEB applicant.⁹⁶ The Respondent argues that it was reasonable for the Board to make this choice because the results of the accountability mechanism, and the subsequent DOJ investigation, could have had an impact on any eventual analysis ICANN might be called upon to make.⁹⁷

157. The Respondent explains that, in the November 2016 Workshop, Board members and

⁹² *Ibid*, paras. 147-155.

⁹³ Respondent's Rejoinder, para. 1.

⁹⁴ *Ibid*, paras. 2 and 89.

⁹⁵ *Ibid*, paras. 3 and 89.

⁹⁶ *Ibid*, para. 4.

⁹⁷ *Ibid*, paras. 41 and 91.

ICANN's in-house counsel discussed the issue of .WEB and chose to not take any action at that time regarding .WEB because an accountability mechanism was pending regarding .WEB. The Respondent states that it did not seem prudent for the Board to interfere with or pre-empt the issues that were the subject of the accountability mechanism. The Respondent underscores that the Claimant does not explain how the Board's determination not to make a decision regarding .WEB during the pendency of an accountability mechanism or other legal proceedings on the same issue represents an inconsistent application of documented policies.⁹⁸

158. Responding to the Claimant's suggestion that ICANN was beholden to Verisign, the Respondent avers that it has an arms-length relationship with Verisign which is no different from ICANN's relationship with other registry operators, including Afilias.⁹⁹
159. Regarding the applicable standard of review, the Respondent argues that the Panel must apply a *de novo* standard in making findings of fact and reviewing the actions or inactions of individual directors, officers or Staff members, but has to review actions or inactions of the Board only to determine whether they were within the realm of reasonable business judgment. In other words, in the Respondent's view, it is not for the Panel to opine on whether the Board could have acted differently than it did.¹⁰⁰
160. The Respondent maintains that the Claimant's claims regarding actions or inactions of ICANN in August through October 2016 are time-barred under Rule 4 of the Interim Procedures.¹⁰¹ The Respondent stresses that the Claimant's IRP was filed more than two (2) years after it sent letters complaining about the auction and NDC's relationship with Verisign.¹⁰² According to the Respondent, the Claimant was aware, in 2016, of the actions and inactions that it seeks to challenge, along with the material effect of those

⁹⁸ Respondent's Rejoinder, paras. 40-41 and 92.

⁹⁹ *Ibid*, paras. 51-53.

¹⁰⁰ *Ibid*, paras. 54-62.

¹⁰¹ *Ibid*, paras. 9 and 63-64.

¹⁰² *Ibid*, para. 65.

actions, even if it did not have a copy of the Domain Acquisition Agreement.¹⁰³ In any event, the Respondent contends that the Claimant ignores the final clause of Rule 4, which states that a statement of dispute may not be filed more than twelve (12) months from the date of the challenged action or inaction.¹⁰⁴ Responding to the equitable estoppel argument advanced by the Claimant, the Respondent argues that there is nothing in its 2016 letters to suggest that it encouraged the Claimant to delay the filing of an IRP, and that the Claimant has not alleged that it relied on those letters in deciding not to file an IRP.¹⁰⁵ The Respondent also notes that the Claimant was represented by experienced counsel throughout the period at issue.¹⁰⁶

161. Responding to the Claimant's contentions pertaining to its post-auction investigation, the Respondent notes that the Claimant asserted no claim in that regard in its Amended Request for IRP, which focussed on pre-auction rumors.¹⁰⁷ In addition, the Respondent avers that its post-auction investigation was prompt, thorough, fair, and fully consistent with its Bylaws and Articles.¹⁰⁸
162. The Respondent also observes that the Guidebook and Auction Rules violations alleged by the Claimant do not require the automatic disqualification of NDC and instead that ICANN is vested with significant discretion to determine what the penalty or remedy should be, if any.¹⁰⁹
163. The Respondent contends that it has, as yet, taken no position on whether NDC violated the Guidebook.¹¹⁰ The Respondent adds that determining whether NDC violated the Guidebook "is not a simple analysis that is answered on the face of the Guidebook" which,

¹⁰³ *Ibid*, paras. 66-70.

¹⁰⁴ Respondent's Rejoinder, paras. 64-65.

¹⁰⁵ *Ibid*, paras. 72-75.

¹⁰⁶ *Ibid*, paras. 76-78.

¹⁰⁷ *Ibid*, paras. 104-105.

¹⁰⁸ *Ibid*, paras. 8 and 107-113.

¹⁰⁹ *Ibid*, paras. 80-88.

¹¹⁰ *Ibid*, para. 81.

according to the Respondent, includes no provision that squarely addresses an arrangement like the Domain Acquisition Agreement. The Respondent submits that a “true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA”. The Respondent argues that “[t]his analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN.”¹¹¹

164. The Respondent notes, referring to the evidence of the *Amici*, that there have been a number of arrangements that appear to be similar to the DAA in the secondary market for new gTLDs.¹¹² Because it has the ultimate responsibility for the New gTLD Program, the Board has reserved the right to individually consider any application to determine whether approval would be in the best interest of the Internet community.¹¹³
165. Turning to the Claimant’s arguments regarding competition, the Respondent denies that it has exercised its discretion to benefit Verisign, repeating that it has not “fully evaluated” the Domain Acquisition Agreement – and NDC’s related conduct – because the .WEB contention set has been on hold due to the invocation of ICANN’s accountability mechanisms and the DOJ investigation. Accordingly, the Claimant’s assertion that the Respondent has violated its so-called “competition promotion mandate” is not ripe for consideration.¹¹⁴
166. The Respondent adds that it is not required or equipped to make judgment about which applicant for a particular gTLD would more efficiently promote competition. Rather, ICANN complies with its core value regarding competition by coordinating and implementing policies that facilitate market-driven competition, and by deferring to the appropriate government regulator, such as the DOJ, the investigation of potential competition issues. The Respondent notes, pointing to the evidence of Drs. Carlton and

¹¹¹ *Ibid*, para. 82.

¹¹² Respondent’s Rejoinder, para. 83.

¹¹³ *Ibid*, para. 87.

¹¹⁴ *Ibid*, para. 95.

Murphy, that there is no evidence that Verisign's operation of .WEB would restrain competition.¹¹⁵

167. Finally, the Respondent argues that the Claimant seeks relief which is beyond the Panel's jurisdiction and not available in these proceedings. While the Panel is empowered to declare whether the Respondent complied with its Articles and Bylaws, it cannot disqualify NDC's application, or bid, and offer Claimant the rights to .WEB.¹¹⁶

E. The *Amici*'s Briefs

1. NDC's Brief

168. In its *amicus* brief dated 26 June 2020, NDC alleges that ICANN has approved many post-delegation assignments of registry agreements for new gTLDs pursuant to pre-delegation financing and other similar agreements.¹¹⁷ NDC notes that Afilias itself has participated extensively in the secondary market for new gTLDs.¹¹⁸
169. NDC argues that, having won the auction, it has the right and ICANN has the obligation under the Guidebook to execute the .WEB registry agreement, subject to compliance with the appropriate conditions. Although additional steps remain before the delegation of .WEB, NDC characterizes those as routine and administrative.¹¹⁹
170. Turning to the Panel's jurisdiction, NDC stresses that the Panel's remedial powers are significantly circumscribed. Section 4.3(o) of the Bylaws provides a closed list that only authorizes the Panel to take the actions enumerated therein. NDC contends that while the Panel is authorized to determine whether ICANN violated its Bylaws, it cannot decide the Claimant's claims on the merits or grant the affirmative relief sought by Afilias.¹²⁰

¹¹⁵ *Ibid.*, paras. 94-103.

¹¹⁶ *Ibid.*, paras. 114-124.

¹¹⁷ NDC's Brief, paras. 32-37.

¹¹⁸ *Ibid.*, paras. 38-39.

¹¹⁹ *Ibid.*, paras. 55-56.

¹²⁰ *Ibid.*, paras. 64-69.

171. NDC further argues that Section 4.3(o) does not permit the Panel to second-guess the Board's reasonable business judgment. If the Panel finds that there has been a violation of the Bylaws, the proper remedy is to issue a declaration to that effect. It would then be up to the Board to exercise its business judgment and decide what action to take in light of such declaration.¹²¹
172. According to NDC, the Panel's limited remedial authority is consistent with the terms of the Guidebook providing that ICANN retains the sole decision-making authority with respect to the Claimant's objections and NDC's .WEB application. NDC submits that only ICANN possesses the required expertise and resources to craft DNS policy and to weight the competing interests and policies that would factor into a decision on .WEB.¹²²
173. NDC argues that if ICANN were to find that NDC violated the Guidebook or other applicable rules, ICANN's discretion to make determinations regarding gTLD applications would offer it a wide range of possible reliefs, not limited to the relief that the Claimant has asked the Panel to grant.¹²³
174. Responding to the Claimant's argument that IRP decisions are intended to be final and enforceable, NDC contends that the binding nature of a dispute resolution procedure and the enforceability of a decision arising out of such procedure cannot expand the scope of the adjudicator's circumscribed remedial jurisdiction.¹²⁴ In that regard, the Cross-Community Working Group for Accountability (CCWG) did not, contrary to the Claimant's contention, recommend that IRP panels should be authorized to dictate a remedy in cases in which ICANN would be found to have violated its Articles or Bylaws. Rather, the CCWG stated that an IRP would result in a declaration that an action/failure to act complied or did not comply with ICANN's obligations.¹²⁵

¹²¹ *Ibid*, paras. 70-74.

¹²² NDC's Brief, paras. 75-79.

¹²³ *Ibid*, para. 80.

¹²⁴ *Ibid*, paras. 81-84.

¹²⁵ *Ibid*, paras. 85-89.

175. Finally, NDC denies making any material misrepresentations to ICANN, as there had been no change to its management, control or ownership since the filing of its .WEB application.¹²⁶ NDC also contends that it did not violate any ICANN rules by agreeing with Verisign to a post-auction transfer of .WEB. In arranging for such a post-auction transfer, NDC asserts that it acted consistently with what the industry understood was permissible.¹²⁷ In that respect, NDC argues that Afiliás' own participation in the secondary market – on both sides of transfers – belies its protestations in this case.¹²⁸ In addition, NDC submits that Afiliás itself violated the Guidebook by contacting NDC during the Blackout Period.¹²⁹
176. For these reasons, NDC requests that the Panel deny in its entirety the relief requested by the Claimant.¹³⁰

2. Verisign's Brief

177. In its *amicus* brief also dated 26 June 2020, Verisign declares that it joins in the sections of NDC's brief setting forth the background of this IRP and the scope of the Panel's authority, including as to the issues properly presented to the Panel for decision. In the submission of Verisign, the only question properly before the Panel is whether ICANN violated its Bylaws when it decided to defer a decision on the Claimant's objections, and the Panel should decline to determine the merits or lack thereof of these objections, or to award .WEB to the Claimant. According to Verisign, the Domain Acquisition Agreement complies with the Guidebook, is consistent with industry practices under the New gTLD Program, and there is no basis for refusing to delegate .WEB based on ICANN's mandate to promote competition.¹³¹
178. The Domain Acquisition Agreement, according to its terms, does not constitute a resale,

¹²⁶ *Ibid*, paras. 96-99.

¹²⁷ *Ibid*, paras. 100-107.

¹²⁸ *Ibid*, paras. 108-113.

¹²⁹ *Ibid*, paras. 114-119.

¹³⁰ *Ibid*, para. 120.

¹³¹ Verisign's Brief, pp. 1-2.

assignment, or transfer of rights or obligations with respect to NDC's .WEB application, nor does it require Verisign's consent for NDC to take any action necessary to comply with the Guidebook or with NDC's obligations under the application. Verisign argues that the only sale, assignment or transfer contemplated in the Domain Acquisition Agreement is the possible future and conditional assignment of the registry agreement for .WEB. Verisign contends that Section 10 of Module 6 of the Guidebook is intended to limit the acquisition of rights over the gTLD *by applicants*, providing that applicants would only acquire rights with respect to the subject gTLD upon execution of a post-delegation registry agreement with ICANN. Verisign contends that Section 10 does not prohibit future transfers of rights. Verisign further argues that restrictions on the assignment or transfer of a contract are to be narrowly construed consistent with the purpose of the contract.¹³² Verisign argues that the Domain Acquisition Agreement provides only for a possible future assignment of the registry agreement of .WEB upon ICANN's prior consent.¹³³

179. Verisign avers that the Domain Acquisition Agreement is consistent with industry practices under the Guidebook, including assignments of gTLDs approved by ICANN. According to Verisign, there exists a robust secondary marketplace with respect to the New gTLD Program in which Afilias itself has participated. Verisign argues that the Domain Acquisition Agreement contemplates nothing more than what has already often occurred under the Program.¹³⁴ Verisign further claims that it would be fundamentally unfair – and a violation of the equal treatment required under the Bylaws – if ICANN or the Panel were to adopt a new interpretation of the anti-assignment provision of the Guidebook.¹³⁵
180. In addition, Verisign argues that the drafting history of the Guidebook contradicts the Claimant's claims. According to Verisign, ICANN purposely declined to include proposed limits on post-delegation assignments of registry agreements, choosing instead to rely on ICANN's right, upon a post-delegation request for assignment of a registry agreement, to

¹³² *Ibid*, paras. 2-4, 6 and 11-20.

¹³³ *Ibid*, paras. 4 and 21-34.

¹³⁴ Verisign's Brief, paras. 5, 9-10 and 35-45.

¹³⁵ *Ibid*, para. 46.

approve such assignment.¹³⁶

181. Verisign contends that, in an attempt to contrive support for its contention that NDC sold the application to Verisign, the Claimant takes out of context select obligations of NDC under the Domain Acquisition Agreement to protect Verisign’s loan of funds to NDC for the auction.¹³⁷ Redacted - Third Party Designated Confidential Information

¹³⁸ In addition, Verisign underscores that there was no obligation for NDC to disclose Verisign’s support in the resolution of the contention set. As Verisign puts it, “confidentiality in such matters is common”.¹³⁹

182. Verisign argues that the Guidebook requires an amendment to the application only when previously submitted information becomes untrue or inaccurate, which was not the case here since the Domain Acquisition Agreement did not make Verisign the owner of NDC’s application.¹⁴⁰ Furthermore, Verisign asserts that the mission statement in a new gTLD application is irrelevant to its evaluation.¹⁴¹

183. Verisign also argues that there is no basis for refusing to delegate .WEB based on ICANN’s mandate to promote competition.¹⁴² According to Verisign, ICANN has no regulatory authority – including over matters of competition – and was not intended to supplant existing legal structures by establishing a new system of Internet governance.¹⁴³ In Verisign’s submission, ICANN has acted upon its commitment to enable competition by helping to create the conditions for a competitive DNS and by referring competition

¹³⁶ *Ibid*, paras. 49-51.

¹³⁷ *Ibid*, para. 52.

¹³⁸ *Ibid*, para. 57.

¹³⁹ *Ibid*, para. 62.

¹⁴⁰ *Ibid*, paras. 65-76.

¹⁴¹ *Ibid*, paras. 77-86.

¹⁴² *Ibid*, paras. 88-93.

¹⁴³ Verisign’s Brief, paras. 94-101.

issues to the relevant authorities.¹⁴⁴

184. Verisign claims that there is no threat or injury to competition resulting from its potential operation of the .WEB registry, and that the Claimant has submitted no economic evidence to support the contrary view.¹⁴⁵ Verisign further stresses that it does not have a dominant market position and that it is not a “monopoly”, as it has less than 50% of the relevant market.¹⁴⁶ In the view of the expert economists retained by Verisign and the Respondent, there is no evidence that .WEB will be a particularly significant competitive check on .COM.¹⁴⁷
185. Verisign concludes by reiterating that this Panel should only determine whether ICANN properly exercised its reasonable business judgment when it deferred making a decision on Afiliás’ claims regarding the .WEB auction. To the extent that the Panel considers the substance of the Claimant’s claims, Verisign submits that they are meritless and should be rejected.¹⁴⁸

F. Parties’ Responses to *Amici*’s Briefs

1. Afiliás’ Response to *Amici*’s Briefs

186. The Claimant begins its 24 July 2020 Response to the *Amici*’s Briefs by addressing what it describes as the omissions and misrepresentations of key facts in the *Amici*’s submissions.¹⁴⁹ The Claimant insists on the fact that Verisign failed to apply for .WEB by the set deadline¹⁵⁰ and provides no explanation for that failure. It observes that had Verisign applied for .WEB in 2012, its status as an applicant would have been known and the public

¹⁴⁴ *Ibid.*, paras. 102-107.

¹⁴⁵ *Ibid.*, paras. 108-112.

¹⁴⁶ *Ibid.*, paras. 112-119.

¹⁴⁷ *Ibid.*, paras. 125-134.

¹⁴⁸ *Ibid.*, para. 140.

¹⁴⁹ Claimant’s Response to *Amici*’s Briefs, paras. 5-66.

¹⁵⁰ While not material to the issues in dispute, there is some confusion in the Claimant’s submissions as to what the deadline was. In the Claimant’s Response, the deadline is said to be 13 June 2012 (para. 9); in the Claimant’s PHB, it is said to be 20 April 2012 (para. 10); while in the Joint Chronology, it is stated that it was 30 May 2012.

portions of its application would have been available for the public and governments to comment upon.¹⁵¹

187. Turning to the circumstances of the execution of the Domain Acquisition Agreement, the Claimant notes that as a small company with limited funding, NDC had no chance of obtaining .WEB for itself and was thus the perfect vehicle to allow Verisign to fly “under the radar” of the other .WEB applicants and to blindsides them with a high bid that none could have seen coming.¹⁵² The Claimant asks, if the *Amici* believed that their arrangement complied with the New gTLD Program Rules, why go through such lengths to conceal the Domain Acquisition Agreement not only to their competitors, but also to ICANN.¹⁵³ The Claimant notes in this regard Verisign’s inquiry to ICANN, shortly after the execution of the DAA, about ICANN’s practice when approached to approve the assignment of a new registry agreement. On that occasion, Verisign mentioned neither the DAA, nor .WEB.¹⁵⁴ The Claimant vehemently denies that the other transactions identified by the *Amici* as industry practice are analogous to the Domain Acquisition Agreement.¹⁵⁵
188. According to the Claimant, the *Amici*’s pre-auction conduct, including the execution of the Confirmation of Understandings of 26 July 2016, also exemplifies their concerted attempts to conceal the DAA and Verisign’s interest in .WEB. In regard to the post-auction period, the Claimant argues that the *Amici* misrepresent the Claimant’s letters of 8 August and 9 September 2016 as asserting the same claims as those made in this IRP, and adds that they have failed to explain how and why ICANN’s outside counsel came to contact Verisign’s outside counsel, by phone, to request information about the DAA.
189. With respect to the *Amici*’s reliance on ICANN’s purported “decision not to decide” of November 2016, the Claimant denies the existence of the “well-known practice” upon which the Board’s decision was allegedly based; states that this alleged practice is

¹⁵¹ Claimant’s Response to *Amici*’s Briefs, paras. 8-16.

¹⁵² *Ibid*, para. 20.

¹⁵³ *Ibid*, para. 22.

¹⁵⁴ *Ibid*, paras. 24-29.

¹⁵⁵ *Ibid*, para. 23.

inconsistent with ICANN’s conduct at the time; that not taking action on a contention set while an accountability mechanism is pending is not among ICANN’s documented policies;¹⁵⁶ that ICANN never informed Afiliás of such decision until well into this IRP;¹⁵⁷ and that such decision is not even documented.¹⁵⁸

190. The Claimant also notes that there is no indication that the Staff had undertaken any analysis of the compatibility of the DAA with the New gTLD Program Rules when the Staff moved toward contracting with NDC in June 2018, as soon as the Board rejected Afiliás’ request to reconsider the denial of its most recent document disclosure request.¹⁵⁹ Nor is it known what assessment of that question had been made by the Board. In this regard, the Claimant claims there is a contradiction between the Respondent’s statement in this IRP that it has not yet considered the Claimant’s complaints, and the Respondent’s submission to the Emergency Arbitrator that ICANN had evaluated these complaints.¹⁶⁰

191. According to the Claimant, the *Amici* misrepresent the nature of the Domain Acquisition Agreement. The Claimant notes that Redacted - Third Party Designated Confidential Information and were therefore not “executory” in nature.¹⁶¹ The Claimant also rejects any analogy between the Domain Acquisition Agreement and a financing agreement.¹⁶² In the Claimant’s submission, it is self-evident that the DAA was an attempt to circumvent the New gTLD Program Rules, and this should have been patently clear to the Staff and Board upon its review. The Domain Acquisition Agreement makes plain that NDC resold, assigned or transferred to Verisign several rights and obligations in its application for .WEB, including: Redacted - Third Party Designated Confidential Information

¹⁵⁶ *Ibid*, paras. 54-55.

¹⁵⁷ Claimant’s Response to *Amici*’s Briefs, para. 56.

¹⁵⁸ *Ibid*, paras. 49-58.

¹⁵⁹ *Ibid*, para. 62.

¹⁶⁰ *Ibid*, para. 65.

¹⁶¹ *Ibid*, paras. 67-71.

¹⁶² *Ibid*, paras. 72-73.

192. The Claimant avers that NDC violated the Guidebook by failing to promptly inform ICANN of the terms of the Domain Acquisition Agreement since those terms made the information previously submitted in NDC's .WEB application untrue, inaccurate, false or misleading. The Claimant stresses that the Guidebook does not exempt the section of the application that details the applicant's business plan from the obligation to notify changes to ICANN. In any event, NDC also failed to update its responses regarding the technical aspects of NDC's planned operation of the .WEB registry. The Claimant argues as well that NDC intentionally failed to disclose the Domain Acquisition Agreement prior to the auction, when Mr. Rasco was specifically asked whether there were any changed circumstances needing to be reported to ICANN.¹⁶⁴
193. The Claimant reiterates its arguments about NDC having violated the Guidebook by submitting invalid bids – made on behalf of a third party – at the .WEB auction. In the Claimant's submission, the *Amici's* examples of market practice are inapposite for a variety of reasons, and none of them reflects the level of control that the Domain Acquisition Agreement gave Verisign.¹⁶⁵
194. Responding to the *Amici's* arguments pertaining to the discretion enjoyed by ICANN in the administration of the New gTLD Program, the Claimant contends that such discretion is circumscribed by the Articles and Bylaws, as well as principles of international law, including the principle of good faith.¹⁶⁶ The Claimant underscores that the Bylaws require ICANN to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. The Claimant argues that due process and procedural fairness require, among other procedural protections, that decisions be based on evidence and on appropriate inquiry into the facts. According to the Claimant,

¹⁶³ *Ibid*, paras. 74-98.

¹⁶⁴ Claimant's Response to *Amici's* Briefs, paras. 99-114.

¹⁶⁵ *Ibid*, paras. 121-136.

¹⁶⁶ *Ibid*, paras. 140-144.

ICANN repeatedly failed to comply with those principles in regards to Afiliás' claims. The Claimant notes again that even in this IRP the Respondent has taken diametrically opposed positions as to whether or not it has evaluated Afiliás' concerns.¹⁶⁷

195. The Claimant also argues that ICANN is required by its Bylaws to afford impartial and non-discriminatory treatment, an obligation that is consistent with the principles of impartiality and non-discrimination under international law. The Claimant submits that, upon receipt of the Domain Acquisition Agreement, and without conducting any investigation on the matter, ICANN accepted the *Amici*'s positions on their agreement at face value, and incorporated them into a questionnaire that was designed to elicit answers to advance the *Amici*'s arguments, and that was based on information that ICANN and the *Amici* had in their possession – but which they knew was unavailable to Afiliás.¹⁶⁸
196. The Claimant avers that the Respondent also failed to act openly and transparently as required by the Articles, Bylaws and international law. The Claimant contends that, far from acting transparently, ICANN allowed NDC to enable Verisign to secretly participate in the .WEB auction in disregard of the New gTLD Program Rules, failed to investigate NDC's conduct and instead proceeded to delegate .WEB to NDC in an implicit acceptance of its conduct at the auction, all the while keeping Afiliás in the dark about the status of its investigation regarding the .WEB gTLD for nearly two years.¹⁶⁹ The Claimant further claims that the Respondent failed to respect its legitimate expectations despite its commitment to make decisions by applying documented policies consistently, neutrally, objectively and fairly. According to the Claimant, had the Respondent followed the New gTLD Program Rules, it would necessarily have disqualified NDC from the application and bidding process.¹⁷⁰
197. As regards the applicable standard of review, the Claimant denies that the Board's conduct in November 2016 constitutes a decision protected by the business judgment rule. The

¹⁶⁷ *Ibid*, paras. 145-147.

¹⁶⁸ Claimant's Response to *Amici*'s Briefs, paras. 148-149.

¹⁶⁹ *Ibid*, paras. 151-158.

¹⁷⁰ *Ibid*, paras. 159-161.

Claimant also stresses that neither the *Amici* nor the Respondent assert that the business judgment rule applies to the decision taken by ICANN in June 2018 to proceed with delegating .WEB to NDC. The Claimant takes the position that its claims regarding (1) the Respondent's failure to disqualify NDC, (2) its failure to offer Afilias the rights to .WEB and (3) the delegation process for .WEB after a superficial investigation of the Claimant's complaints, do not concern the Board's exercise of its fiduciary duties. The Claimant contends finally that, even assuming *arguendo* that the business judgment rule has any application, the secrecy regarding the Board's November 2016 conduct makes it impossible for this Panel to evaluate the reasonableness of that conduct.¹⁷¹

198. Responding to the *Amici*'s claims regarding its own conduct, the Claimant denies having violated the Blackout Period. It contends that the provisions relating to Blackout Period are designed to prevent bid rigging and do not prohibit any and all contact among the members of the contention set.¹⁷²
199. The Claimant states that the *Amici* misrepresent the scope and effect of ICANN's competition mandate. The Claimant argues that ICANN must act to promote competition pursuant to its Bylaws, and that it failed to do so when it permitted Verisign to acquire .WEB in a program designed to challenge .COM's dominance. The Claimant stresses that Dr. Carlton – the economist retained by the Respondent – expressed views on the competitive benefits of introducing new gTLDs in 2009 that differ from those expressed in his report prepared for the purpose of this IRP.¹⁷³ According to the Claimant, any decision furthering Verisign's acquisition of .WEB is inconsistent with ICANN's competition mandate. In the Claimant's view, .WEB cannot be considered as "just another gTLD", since it has been uniquely identified by members of the Internet community as the next best competitor for .COM. The Claimant contends that the high price paid by Verisign for .WEB was at least partly driven by the benefits it would derive from keeping that

¹⁷¹ *Ibid*, paras. 165-178.

¹⁷² *Ibid*, paras. 179-184.

¹⁷³ Claimant's Response to *Amici*'s Briefs, paras. 164 and 185-198.

competitive asset out of the hands of its competitors.¹⁷⁴ The Claimant reiterates its submission that the DOJ's decision to close its investigation is irrelevant to the Panel's analysis.¹⁷⁵

200. Turning to the Panel's remedial authority, the Claimant argues that the *Amici* are wrong in asserting that the Panel's authority is limited to issuing a declaration as to whether ICANN acted in conformity with its Articles and Bylaws when its Board deferred making any decision on .WEB in November 2016. The Claimant urges that meaningful and effective accountability requires review and redress of ICANN's conduct. In that regard, the Claimant invokes the international law principle that any breach of an engagement involves an obligation to make reparation.¹⁷⁶ Finally, the Claimant contends that the Panel must determine the scope of its authority based on the text, context, object and purposes of the IRP, and not only on Section 4.3(o) of the Bylaws, which is not exhaustive and should be read, *inter alia*, with reference to Section 4.3(a).¹⁷⁷

2. ICANN's Response to the *Amici*'s Briefs

201. In its brief Response dated 24 July 2020 to the *Amici*'s Briefs, the Respondent notes that the position advocated by the *Amici* in their respective briefs is generally consistent with its own position as regards the following three (3) issues: (1) the Panel's jurisdiction and remedial authority, (2) the nature and implications of the Bylaws' provisions in relation to competition, and (3) whether Verisign's potential operation of .WEB would be anticompetitive.¹⁷⁸
202. The Respondent reiterates that it does not take a position on what it describes as the Claimant's and NDC's "allegations against each other" regarding their respective pre-auction, and auction conduct, or whether NDC violated the Guidebook and Auction

¹⁷⁴ *Ibid*, paras. 199-209.

¹⁷⁵ *Ibid*, paras. 210-213.

¹⁷⁶ *Ibid*, paras. 218-220.

¹⁷⁷ *Ibid*, paras. 223-236.

¹⁷⁸ Respondent's Response to *Amici*'s Briefs, paras. 2-6.

Rules by the execution of the DAA, adding that it will consider those issues after this IRP concludes.¹⁷⁹

G. Post-Hearing Submissions

203. The Parties and *Amici* have filed comprehensive post-hearing submissions in which they have reiterated their respective positions on all issues in dispute. In the summary below, the Panel focuses on those aspects of the post-hearing submissions that comment on the hearing evidence, or put forward new points.

1. Claimant's Post-Hearing Brief

204. In its Post-Hearing Brief dated 12 October 2020, the Claimant argues that the two fundamental questions before the Panel are whether the Respondent was required to (i) determine that NDC is ineligible to enter into a registry agreement for .WEB for having violated the New gTLD Program Rules and, if so, (ii) offer the .WEB gTLD to the Claimant. The Claimant submits that the hearing evidence leaves no doubt that these questions must be answered in the affirmative.

205. The evidence revealed that the Respondent's failure to act upon the Claimant's complaints was a result of the unjustified position that these were motivated by "sour grapes" for having lost the auction. According to the Claimant, this attitude permeated every aspect of the Respondent's consideration of the Claimant's concerns, including its decision, in the course of 2018, to approve a gTLD registry contract for NDC.¹⁸⁰

206. The Claimant notes that Ms. Willett acknowledged that the decision of an applicant to participate in an Auction of Last Resort is one of the applicant's rights under a gTLD application. Redacted - Third Party Designated Confidential Information ^{.181}

207. The Claimant argues that the evidence of Mr. Livesay confirms the competitive significance of .WEB, in that Verisign's CEO was directly involved in the 2014 initiative

¹⁷⁹ *Ibid*, para. 7.

¹⁸⁰ Claimant's PHB, paras. 1-2.

¹⁸¹ Claimant's PHB, para. 16.

to seek to participate in the gTLD market. Mr. Livesay also confirmed, as did Mr. Rasco, that Redacted - Third Party Designated Confidential Information

According to the Claimant, the evidence of these witnesses demonstrates that they harboured serious doubts as to whether they were acting in compliance with the Program Rules; otherwise, why conceal the DAA's terms from ICANN's scrutiny, and keep Verisign's involvement in NDC's application hidden from the Internet community? In sum, the Claimant submits that the *Amici's* conduct evidence an attempt to "cheat the system".¹⁸²

208. In the pre-auction period, the Claimant focuses on Mr. Rasco's representation to the Ombudsman that there had been no changes to the NDC application, a statement that cannot be reconciled with the terms of the DAA, according to the Claimant. Also plainly incorrect, in the submission of the Claimant, is Mr. Rasco's assurance to Ms. Willett, as evidenced in the latter's email communication to the Ombudsman, that the decision not to resolve the contention set privately "was in fact his".
209. The Claimant notes that from the moment Verisign's involvement in NDC's application for .WEB was made public, the Respondent treated Verisign as though it was the *de facto* applicant for .WEB, for example, by directly contacting Verisign about questions concerning NDC's application and working with Verisign on the delegation process for .WEB. In regard to Verisign's detailed submission of 23 August 2016, which included a copy of the DAA, the Claimant notes that only the Claimant's outside counsel and Mr. Scott Hemphill have been able to review it and that the Internet community remains unaware of the Agreement's details. The Claimant finds surprising that Ms. Willett, in spite of her leadership position within ICANN in respect of the Program, would have never reviewed – indeed seen – the DAA, or Verisign's 23 August 2016 letter.¹⁸³
210. The Claimant also notes Ms. Willett's inability to address questions concerning the Questionnaire that was sent to some contention set members under cover of her letter

¹⁸² *Ibid*, paras. 21-23.

¹⁸³ *Ibid*, paras. 46-56.

dated 16 September 2016, including the fact that some questions were misleading for anyone, such as the Claimant, who had no knowledge of the terms of the DAA. The Claimant also notes that the Respondent presented no evidence explaining what it did with the responses to the Questionnaire, other than Mr. Disspain confirming that the responses were never considered by the Board.

211. Turning to the “load-bearing beam of ICANN’s defense in this case”, the November 2016 Board decision to defer consideration of Afilias’ complains, the Claimant submits that the evidence belies that any such decision was in fact made. Rather, according to the Claimant, both Ms. Burr and Mr. Disspain testified that ICANN simply adhered to its practice to put the process on hold once an accountability mechanism has been initiated, a practice that the Claimant says has not been proven in fact to exist. The Claimant quotes the evidence of Ms. Willett, who testified that work and communications within ICANN would continue while an accountability mechanism was pending, simply that the contention set would not move to the next phase; and points to the fact that the Staff were engaging with NDC and Verisign in December 2017 and January 2018 on the subject of the assignment of .WEB even though Ruby Glen had not yet resolved its CEP, or ICANN considered Afilias’ concerns. The Claimant also sees a contradiction between the Respondent’s claim that it has not yet taken a position on the merits of Afilias’ complaints, and the evidence of Ms. Willett that ICANN would not delegate a gTLD until a pending matter was resolved.¹⁸⁴
212. The Claimant reviews in its PHB the evidence concerning the genesis of Rule 7 of the Interim Procedures, as it reveals the degree to which, in its submission, the Respondent was willing to go to make things easier for itself and for Verisign to defend against future efforts by the Claimant to challenge ICANN’s conduct. The Claimant notes that Ms. Eisner and Mr. McAuley did speak over the phone on 15 October 2018, and that shortly thereafter, Ms. Eisner reversed her positions and expanded the categories of *amicus* participation to cover the circumstances in which the *Amici* found themselves at the time.¹⁸⁵

¹⁸⁴ Claimant’s PHB, paras. 61-76.

¹⁸⁵ *Ibid*, paras. 77-91.

213. Insofar as the DAA is concerned, the Claimant notes that the evidence confirms that NDC and Verisign performed exactly as the language of the DAA provides.¹⁸⁶
214. The Claimant argues that ICANN violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign. For instance, the Claimant notes that ICANN: failed to provide timely answers to Afilias' letters while Verisign was able to reach ICANN easily to discuss .WEB, even though it was a non-applicant; informally invited Verisign's counsel to comment on Afilias' concerns; discussed the .WEB registry agreement with NDC, all the while stating that ICANN was precluded from acting on Afilias' complaints due to the pendency of an accountability mechanism; and also advocated for the *Amici* and against Afilias throughout this IRP. According to the Claimant, further evidence of disparate treatment can be found in the Staff's decision to make Rule 4 retroactive so as to catch the Claimant's CEP.¹⁸⁷
215. According to the Claimant, the Staff's decision to take the .WEB contention set off hold and to conclude a registry agreement with NDC also violated the Bylaws and ICANN's obligation to enforce its policies fairly. The Claimant argues that the Board delegated the authority to enforce the New gTLD Program Rules to Staff who authorized the .WEB registry agreement to be sent to NDC and would have countersigned it if the Claimant had not initiated a CEP. The Board did not act to stop the process even though it was aware that the execution of the .WEB registry agreement was imminent.¹⁸⁸
216. In addition, the Claimant contends that ICANN failed to enable and promote competition in the DNS contrary to its Bylaws. The Claimant submits that the only decision ICANN could have taken regarding .WEB to promote competition would have been to reject NDC's application and delegate .WEB to Afilias. In its view, ICANN cannot satisfy its competition mandate by relying on regulators or the DOJ's decision to close its .WEB investigation.¹⁸⁹

¹⁸⁶ *Ibid*, para. 103.

¹⁸⁷ Claimant's PHB, paras. 126-138.

¹⁸⁸ *Ibid*, paras. 139-143.

¹⁸⁹ *Ibid*, paras. 144-154.

217. In relation to its Rule 7 Claim, the Claimant maintains that the Staff improperly coordinated with Verisign the drafting of that rule. In response to a question raised by the Panel, the Claimant explained that its Rule 7 Claim remains relevant at the present stage of the IRP because the Respondent's breach of its Articles and Bylaws in regard to the development of Rule 7 justifies an award of costs in the Claimant's favour.¹⁹⁰
218. As regards the Respondent's argument based on the business judgment rule, the Claimant points to the evidence of Ms. Burr concerning the nature of Board workshops to advance the position that a workshop is not a forum where the Respondent's Board can take any action at all, still less one that is protected by the business judgment rule. The Claimant also asserts that the evidence of the Respondent's witnesses supports its position that no affirmative decision regarding .WEB had been taken during the November 2016 workshop. Finally, the Claimant reiterates that there is no evidence of an ICANN policy or practice to defer decisions while accountability mechanisms are pending.¹⁹¹
219. Turning to the limitations issue, the Claimant avers that the Respondent's position that the Claimant's claims are time-barred is inherently inconsistent with its assertion that ICANN has not yet addressed the fundamental issues underlying those claims. According to the Claimant, its claims are based on conduct of the Staff and Board that culminated in irreversible violations of Afilias' rights when the Staff proceeded with the delegation of .WEB to NDC on 6 June 2018. Consequently, the Claimant argues that its claims are not time-barred pursuant to Rule 4 of the Interim Procedures.
220. Responding to the Respondent's argument that the claims brought in the Amended Request for IRP are time-barred because Afilias raised the same issues in its letters of August and September 2016, the Claimant contends that in the face of ICANN's representations that it was considering the matter, it would have been unreasonable for Afilias to file contentious dispute resolution proceedings in 2016. The Claimant adds that those letters described how NDC had violated the New gTLD Program Rules – not how ICANN had violated its

¹⁹⁰ *Ibid*, para. 157.

¹⁹¹ Claimant's PHB, paras. 159-170.

Articles and Bylaws.¹⁹²

221. The Claimant further contends that, because of the circumstances in which Rule 4 of the Interim Procedures was adopted, it cannot be applied to its claims. The Claimant avers that four (4) days after the Claimant commenced its CEP – understanding that its claims had never been subject to any time limitation – ICANN launched a public comment process concerning the addition of timing requirements to the rules governing IRPs. In spite of the fact that the public comment period on proposed Rule 4 remained open, ICANN included Rule 4 in the draft Interim Procedures that were presented to the Board for approval, and adopted by the Board on 25 October 2018. The Respondent further provided that the Interim Procedures would apply as from 1 May 2018, and no carve out was made for pending CEPs or IRPs. According to the Claimant, the decision to make Rule 4 retroactive can only have been made in an attempt to preclude Afilias from arguing that its CEP had been filed prior to the adoption of the new rules. The Claimant avers that ICANN’s enactment and invocation of Rule 4 is an abuse of right and is contrary to the international law principle of good faith.¹⁹³
222. In response to the argument that Afilias should have submitted a reconsideration request to the Board, the Claimant argues that, prior to June 2018, there was no action or inaction by the Staff or Board to be reconsidered.¹⁹⁴
223. The Claimant contends that the Board waived its right to individually consider NDC’s application by failing to do so at a time where such review would have been meaningful. The Claimant underscores that the Board failed to do so in November 2016, and again in early June 2018 when it was informed that the Staff was going to conclude a registry agreement for .WEB with NDC. According to the Claimant, there is no evidence to suggest that the Board ever intended to consider whether NDC had violated the New gTLD Program Rules, and it is now for this Panel to decide the Claimant’s claims.¹⁹⁵

¹⁹² *Ibid*, paras. 177-183.

¹⁹³ Claimant’s PHB, paras. 184-192.

¹⁹⁴ *Ibid*, paras. 193-195.

¹⁹⁵ *Ibid*, paras. 196-202.

224. Moving to the issue of the Panel’s jurisdiction, the Claimant emphasizes that this is the first IRP under both ICANN’s revised Bylaws and the Interim Procedures. The Claimant stresses that the IRP is a “final, binding arbitration process” and that the Panel is “charged with hearing and resolving the Dispute”. According to the Claimant, this is particularly important in light of the litigation waiver that ICANN required all new gTLD applicants to accept and to avoid an accountability gap that would leave claimants without a means of redress against ICANN’s conduct. The Claimant submits that the Panel’s jurisdiction extends to granting the remedies that Afilias has requested. In the Claimant’s view, the inherent jurisdiction of an arbitral tribunal sets the baseline for the Panel’s jurisdiction and any deviation must be justified by the text of the Bylaws. In that respect, the Claimant also invokes the international arbitration principle that a tribunal has an obligation to exercise the full extent of its jurisdiction.¹⁹⁶
225. The Claimant notes that the CCWG intended to enhance ICANN’s accountability with an expansive IRP mechanism to ensure that ICANN remains accountable to the Internet community. In Afilias’ view, the CCWG’s report “provides binding interpretations for the provisions of ICANN’s Bylaws that set forth the jurisdiction and powers of an IRP panel – none of which are inconsistent with the CCWG Report.”¹⁹⁷
226. The Claimant alleges that in the Ruby Glen Litigation before the Ninth Circuit, ICANN represented that the litigation waiver would neither affect the rights of New gTLD Program applicants nor be exculpatory, with the implication that the IRP could do anything that the courts could. In Afilias’ view, ICANN’s position before the Ninth Circuit contradicts ICANN’s position in this IRP when it asserts that the Panel cannot order mandatory or non-interim affirmative relief.¹⁹⁸
227. In relation to the relief it is requesting from the Panel, the Claimant avers that the CCWG Report states that claimants have a right to “seek redress” against ICANN through an IRP. According to the Claimant, unless the Panel directs ICANN to remedy the alleged

¹⁹⁶ *Ibid*, paras. 203-210.

¹⁹⁷ Claimant’s PHB, paras. 211-220.

¹⁹⁸ *Ibid*, paras. 221-228.

violations, there is a serious risk that this dispute will go unresolved. For that reason, the Claimant requests that the Panel issue a decision that is legally binding on the Parties and that fully resolves the Dispute. By way of injunctive relief, the Claimant asks the Panel to: reject NDC's application for the .WEB gTLD; disqualify NDC's bids at the ICANN auction; deem NDC ineligible to execute a registry agreement for the .WEB gTLD; offer the registry rights to the .WEB gTLD to Afilias, as the next highest bidder in the ICANN auction; set the bid price to be paid by Afilias for the .WEB gTLD at USD 71.9 million; pay the Claimant's fees and costs.¹⁹⁹

2. Respondent's Post-Hearing Brief

228. In its Post-Hearing Brief dated 12 October 2020, the Respondent argues that the Claimant has effectively abandoned its competition claim, which was rooted in the notion that ICANN's founding purpose was to promote competition and that this competition mandate and ICANN's Core Values regarding competition required it to disqualify NDC and block Verisign's potential operation of .WEB. The Respondent contends that without this competition claim, the Claimant's case boils down to whether the Respondent was required to disqualify NDC for a series of alleged violations of the Guidebook and Auction Rules.²⁰⁰ As to those, the Respondent reiterates that it has not decided whether the DAA violates the Guidebook or Auction Rules, or the appropriate remedy for any violation that may be found. Relying on the evidence of Mr. Disspain, the Respondent contends that the propriety of the DAA is a matter for the ICANN Board.
229. According to the Respondent, the practice of placing contention sets on hold while accountability mechanisms are pending is well known. Accordingly, the Board's decision to defer making a decision on .WEB in November 2016 should have come as no surprise to the Claimant and is entitled to deference from this Panel. As for the transmission of a registry agreement for .WEB to NDC in June 2018, the Respondent claims that it did not reflect a decision that the DAA was compliant with the Guidebook and Auction Rules, but

¹⁹⁹ *Ibid.*, paras. 229-246. The Parties' submissions on costs are summarized below, in the section of this Final Decision dealing with the Claimant's cost claim.

²⁰⁰ Respondent's PHB, paras. 1-6.

was merely a ministerial act triggered by the removal of the set's on hold status.²⁰¹

230. The Respondent recalls that the Panel's jurisdiction is circumscribed by the Bylaws in relation to the types of disputes that may be addressed, the claims that can be raised, the remedies available, the time within which a Dispute may be brought, and the standard of review.²⁰² The Respondent contends that the Panel can only address alleged violations that are asserted in the Amended Request. In relation to those, the Panel's remedial authority is limited to issuing a declaration as to whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws. According to the Respondent, the relief requested by the Claimant clearly exceeds the Panel's limited remedial authority, which does not include the authority to disqualify NDC's bid, proceed to contracting with Afilias, specify the price to be paid by Afilias, or invalidate Rule 7. The Respondent argues that the Panel is authorized to shift costs only on a finding that the losing party's claim or defence is frivolous or abusive. The Respondent submits that the CCWG's Supplemental Proposal dated 23 February 2016 does not expand the Panel's remedial authority. If there is any inconsistency, the Bylaws clearly control.²⁰³
231. The Respondent argues that there is no "gap" created by the litigation waiver and avers that it takes the same position in this IRP as it did in the Ruby Glen Litigation, where it sought to enforce the litigation waiver. The Respondent submits that the Claimant's position in this regard is based on the false premise that remedies available in IRPs must be co-extensive with remedies available in litigation.²⁰⁴
232. The Respondent also contends that the Panel is required to apply the prescribed standard of review. The first sentence of Section 4.3(i) of the Bylaws establishes a general *de novo* standard, and Subsection (iii) then creates a carve-out, providing that actions of the Board in the exercise of its fiduciary duty are entitled to deference provided that they are within the realm of "reasonable judgment". The Respondent argues that all actions by the Board

²⁰¹ Respondent's PHB, paras. 10-12.

²⁰² *Ibid*, para. 14.

²⁰³ *Ibid*, paras. 15-45.

²⁰⁴ *Ibid*, paras. 46-48.

on behalf of ICANN are subject to a fiduciary duty to act in good faith in the interests of ICANN.²⁰⁵

233. Turning to time limitation, the Respondent notes that the Panel has jurisdiction only over claims brought within the time limits established by Rule 4 of the Interim Procedures, and contends that the limitations and repose periods set out in Rule 4 are jurisdictional in nature.²⁰⁶ According to the Respondent, the Claimant's claim that ICANN had an unqualified obligation to disqualify NDC is barred by the repose period and the time limitation, which are dispositive.²⁰⁷ The Respondent contends that the Claimant's claim that the Staff violated the Articles and Bylaws in their investigation of pre-auction rumors or post-auction complaints is also time-barred and therefore outside the jurisdiction of the Panel.²⁰⁸ The Respondent denies that it is equitably estopped from relying on its time limitation defence, and avers that the repose and limitations periods apply retroactively because of the express terms of the Interim Procedures. According to the Respondent, if the Claimant wished to challenge Rule 4, it could have brought such a claim in this IRP, as it did with Rule 7.²⁰⁹
234. Regarding the merits of the Claimant's claims, the Respondent notes the Claimant's decision not to cross-examine Mr. Kneuer, Dr. Carlton, or Dr. Murphy, indicating the abandonment of its competition claim, and reiterates that ICANN does not have the mandate, authority, expertise or resources to act as a competition regulator of the DNS.²¹⁰ According to the Respondent, the unrebutted economic evidence establishes that .WEB will not be competitively unique such that Verisign's operation of .WEB would be anticompetitive.²¹¹

²⁰⁵ Respondent's PHB, paras. 49-57.

²⁰⁶ *Ibid*, paras. 58-61.

²⁰⁷ *Ibid*, paras. 62-69.

²⁰⁸ *Ibid*, paras. 70-72.

²⁰⁹ *Ibid*, paras. 73-85.

²¹⁰ *Ibid*, paras. 86-101.

²¹¹ *Ibid*, paras. 102-129.

235. The Respondent further contends that it was not required to disqualify NDC based on alleged violations of the Guidebook and Auction Rules. According to the Respondent, “it is not a foregone conclusion that NDC is or is not in breach”.²¹² The Respondent argues that the Guidebook and Auction Rules grant it significant discretion to determine whether a breach of their terms has occurred and the appropriate remedy, and that ICANN has not yet made that determination.²¹³ The Respondent maintains that it, and not the Panel, is in the best position to make a determination as to the propriety of the DAA, and its consistency with the Guidebook or Auction Rules.²¹⁴ According to the Respondent, its commitment to transparency and accountability is not relevant to the Claimant’s contention regarding NDC’s alleged violations.²¹⁵
236. The Respondent reiterates that the Board complied with ICANN’s obligations by deciding not to take any action regarding the .WEB contention set while accountability mechanisms were pending, and that the Panel should defer to this reasonable business judgment.²¹⁶ The Respondent adds that its obligations to act transparently did not require the Board to inform Afiliats of its 3 November 2016 decision. In that respect, the Respondent argues that the Claimant has not put forward a single piece of evidence suggesting that it would have acted differently had it known that the Board decided in November 2016 to take no action while the contention set remained on hold.²¹⁷
237. The Respondent takes the position that the Claimant has not properly challenged ICANN’s transmittal of a form registry agreement to NDC in June 2018 and, in any event, that in doing so it acted in accordance with Guidebook procedures and the Articles and Bylaws.²¹⁸
238. According to the Respondent, the Claimant’s claims that ICANN’s pre- and post- auction

²¹² Respondent’s PHB, para. 138.

²¹³ *Ibid.*, paras. 136-150.

²¹⁴ *Ibid.*, paras. 151-156.

²¹⁵ *Ibid.*, paras. 157-158.

²¹⁶ *Ibid.*, para. 159.

²¹⁷ *Ibid.*, paras. 182-189.

²¹⁸ *Ibid.*, paras. 190-197.

investigations violated the Articles and Bylaws have no merit and in any event are time-barred.²¹⁹

239. As regards the Rule 7 Claim, the Respondent submits that to the extent it is maintained, it must be rejected both as lacking merit and because there is no valid basis for an order shifting costs on the ground of Rule 7's alleged wrongful adoption.²²⁰

3. *Amici's Post-Hearing Brief*

240. In their joint Post-Hearing Brief dated 12 October 2020, the *Amici* submit that adverse inferences against the Claimant should be made with respect to every issue in the IRP based on "Afilias purposefully, voluntarily and knowingly withholding" evidence from the Panel. According to the *Amici*, the Claimant's executives whose witness statements were withdrawn had substantial direct personal knowledge and special industry expertise material to virtually every contested issue in the IRP.²²¹

241. The *Amici* argue that the Panel's jurisdiction is limited to declaring whether the Respondent violated its Bylaws, and does not extend to making findings of fact in relation to third-party claims or awarding relief contravening third party rights.²²² As a result, the *Amici* submit that the Panel lacks authority to find that the Domain Acquisition Agreement violates the Guidebook or that the *Amici* engaged in misconduct.²²³ According to the *Amici*, the Panel should limit its review to ICANN's decision making process and only make non-binding recommendations that relate to that process, as opposed to the decision ICANN should make.²²⁴

242. The *Amici* contend that a decision granting the Claimant's requested relief, or making findings on the Domain Acquisition Agreement or their conduct, would violate their due

²¹⁹ *Ibid*, paras. 198-217.

²²⁰ Respondent's PHB, paras. 218-231.

²²¹ *Ibid*, paras. 6 and 13-21.

²²² *Ibid*, paras. 22-49.

²²³ *Ibid*, paras. 62-67.

²²⁴ *Ibid*, paras. 68-81.

process rights because of their limited participation in the IRP.²²⁵

243. According to the *Amici*, the Domain Acquisition Agreement complies with the Guidebook. The *Amici* also allege that transactions comparable to the Domain Acquisition Agreement have regularly occurred as part of the gTLD Program, with ICANN's knowledge and approval and consistent with the Guidebook.²²⁶ They further urge that Section 10 of the Guidebook prohibits only the sale and transfer of an entire application, and does not prohibit agreements between an applicant and a third party to request ICANN to approve a future assignment of a registry agreement.²²⁷ The *Amici* aver that ICANN has approved many assignments of registry agreements under such circumstances.²²⁸
244. The *Amici* state that they did not seek to evade scrutiny by maintaining the Domain Acquisition Agreement confidential during the auction, and argue that the Guidebook did not require disclosure of that agreement prior to the auction. They note that the DAA was always intended to be, and will be subject to the same scrutiny as the numerous other post-delegation assignments of new gTLDs. In addition, the *Amici* deny that the confidentiality of the Domain Acquisition Agreement provided them with any undue advantage.²²⁹
245. The *Amici* argue that there is no evidence of anticompetitive intent or effect, and submit that Afilias has abandoned its competition claims. In addition, the *Amici* urge that ICANN is not an economic regulator, that competition is not a review criterion under the New gTLD Program, and that ICANN's competition mandate was fulfilled by the DOJ investigation.²³⁰
246. Finally, the *Amici* note that the Claimant never rebutted the evidence of its own violation of the Guidebook when a representative of the Claimant contacted NDC during

²²⁵ *Ibid*, paras. 82-86.

²²⁶ *Ibid*, paras. 8 and 87-123.

²²⁷ *Amici's* PHB, paras. 100-109.

²²⁸ *Ibid*, paras. 124-153.

²²⁹ *Ibid*, paras. 153-180.

²³⁰ *Ibid*, paras. 181-205.

the Blackout Period.²³¹

H. Submissions Regarding the Donuts Transaction

247. As noted in the History of the Proceedings’ section of this Final Decision, the *Amici* have requested that the Panel take into consideration their submissions concerning the 29 December 2020 merger between Afilias, Inc. and Donuts, Inc. Those submissions, and that of the Parties, are summarized below.
248. In counsel’s letter of 9 December 2020, the *Amici* described the contemplated transaction, based on publicly disclosed information, as a sale to Donuts of Afilias, Inc.’s entire existing registry business, with only the .WEB application itself being retained within an Afilias, Inc. shell. This, the *Amici* averred, is information that the Claimant ought to have disclosed to the Panel as it is inconsistent with the Claimant’s claims and requested relief in this IRP. Moreover, the *Amici* contended that by withdrawing the witness statements of its party representatives in this IRP, the Claimant sought to prevent the Respondent and the *Amici* from eliciting this information.
249. In its response of 16 December 2020 to the *Amici*’s letter, the Claimant submitted that Afilias, Inc.’s arrangement with Donuts has no bearing on the issues in dispute in the IRP. The Claimant explained that the contemplated transaction concerned the registry business of Afilias, Inc., not its registrar business²³², and that the Claimant as an entity, as well as its .WEB application, had been carved out of the transaction. The Claimant added that after the transaction it will remain part of a group of companies that will control a significant registrar business. Accordingly, the Claimant averred that its new structure will not impact its ability to launch .WEB. Finally, the Claimant noted that it has informed the Respondent of a possible sale of its registry business back in September 2020.

²³¹ *Ibid*, paras. 206-214.

²³² Registry operators are parties to Registry Agreements with ICANN that set forth their rights, duties and obligations as operators. Companies known as “registrars” sell domain name registrations to entities and individuals within existing gTLDs. See Respondent’s Rejoinder, 31 May 2019, paras. 17 and 23. As explained in the preamble of the Guidebook, Ex. C-3, “[e]ach of the gTLDs has a designated ‘registry operator’ and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in the TLD. The gTLDs are served by 900 registrars, who interact with registrants to perform domain name registration and other related services.” (p. 2 of the PDF).

250. Also on 16 December 2020, the Respondent confirmed that it was aware that Afilias, Inc. and Donuts had entered into an agreement by which the latter would acquire the former's TLD registry business, excluding the Claimant's .WEB application. The Respondent submitted that these developments reinforced the importance for the Panel not to exceed its "limited jurisdiction to determine only whether a Covered Action by ICANN violated the Articles of Bylaws and to issue a declaration to that effect."
251. On 21 December 2020, with leave of the Panel, the *Amici* replied to the Parties' letters of 16 December 2020. According to the *Amici*, the Claimant's response only reinforced the "the inappropriateness and inadvisability of the Panel deciding allegations concerning the transactions at issue." That is because, according to the *Amici*, it is a fundamental principle and tenet of the Respondent's Bylaws and IRP procedures that matters involving multiple parties and interests such as the matters at issue in this case are to be addressed in the first instance by the Respondent. The *Amici* also reiterated their claim that the Claimant has not been transparent about its plans and that of Afilias, Inc. as they affected the Claimant's ability to execute on its proposed deployment of .WEB.
252. On 30 December 2020, the day after the closing of the Donuts transaction, Afilias responded to the *Amici*'s letter of 21 December 2020, stating that it "was yet another attempt to divert the Panel's attention from the relevant issue to be arbitrated in this IRP." The Claimant rejected the notion that the Donuts transaction, much like the other transactions the *Amici* had pointed to in their written submissions, bear any resemblance to the Domain Acquisition Agreement, and it listed what it considers are key differences between the two (2) situations.

V. ANALYSIS

A. Introduction

253. As the Panel observed in its Procedural Order No. 5, this IRP is an ICANN accountability mechanism, the Parties to which are the Claimant and the Respondent. As such, it is not the forum for the resolution of potential disputes between the Claimant and the *Amici*, two (2) non-parties that are participating in this IRP as *amici curiae*, or of divergence and

potential disputes between the *Amici* and the Respondent by reason of the latter's actions or inactions in addressing the question of whether the DAA complies with the New gTLD Program Rules.

254. The Claimant's core claims against the Respondent in this IRP arise from the Respondent's failure to reject NDC's application for .WEB, disqualify its bids at the auction, and deem NDC ineligible to enter into a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules.²³³ The Respondent's impugned conduct engages its Staff's actions or inactions in relation to allegations of non-compliance with the Guidebook and Auction Rules on the part of NDC, communicated in correspondence to the Respondent in August and September 2016, and the Staff's decision to move to delegate .WEB to NDC in June 2018 by proceeding to execute a registry agreement in respect of .WEB with that company; as well as the Board's decision not to pronounce upon these allegations, first in November 2016, and again in June 2018 when, to the knowledge of the Board, the .WEB contention set was taken off hold and the Staff put in motion the process to delegate the .WEB gTLD to NDC.
255. As already noted, the Claimant's core claims serve to support the Claimant's requests that the Panel disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel and paid by the Claimant, order the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant.
256. The Claimant's core claims have been articulated with increasing particulars as these proceedings progressed. This, in the opinion of the Panel, is understandable in light of the manner in which the Respondent's defences have themselves evolved, most particularly the defence based on the Board's 3 November 2016 decision to defer consideration of the issues raised in connection with .WEB. This reason alone justifies rejection of the Respondent's contention that the Claimant failed to sufficiently plead a violation of the Respondent's Articles and Bylaws in connection with ICANN's post-auction investigation of Afiliás' allegations that NDC violated the Guidebook and Auction Rules. In any event,

²³³ See Afiliás' PHB, para. 247. See also Claimant's Reply, para. 16, where the Claimant describes its "principal claim".

the Panel considers that the Claimant's core claims are comprised within the broad allegations of breach made in the Amended Request for IRP.²³⁴

257. The Respondent's main defences are, first, that the Claimant's claims regarding the Respondent's actions or inactions in 2016 are time-barred. While reserving its position about the propriety of the DAA under the New gTLD Program Rules, the Respondent also denies that it was obligated to disqualify NDC, whether it be by reason of its alleged competition mandate or as a necessary consequence of a violation of the Guidebook or Auction Rules. The Respondent also contends that it complied with its Articles and Bylaws when it decided not to take any action regarding the .WEB contention set while accountability mechanisms in relation to .WEB were pending, and that the Panel should defer to the Board's reasonable business judgment in coming to that decision. As noted, the Respondent rejects as unauthorized under the Bylaws, the Claimant's requests that the Respondent be ordered to proceed with contracting the Registry Agreement for .WEB with the Claimant, at a bid price to be specified by the Panel.
258. The Panel begins its analysis by considering the Respondent's time limitations defence. The Panel then addresses the standard by which the Respondent's actions or inactions should be reviewed. Thereafter, the Panel turns to examining the Respondent's conduct against the backdrop of the entire chronology of events, and considers whether it was open to the Respondent, both its Staff and its Board, not to pronounce upon the DAA's alleged non-compliance with the Guidebook and Auction Rules following the Claimant's complaints, an inaction that endures to this day. The Panel then considers, in turn, the Claimant's Rule 7 Claim, and the scope of the Panel's remedial authority in light of its findings that the Respondent, as set out in these reasons, violated its Articles and Bylaws. The Panel concludes its analysis by designating the prevailing party, as required by Section 4.3(r) of the Bylaws, and determining the Claimant's cost claim.

²³⁴ See, e.g., Amended Request for IRP, para. 2.

B. The Respondent's Time Limitations Defence

1. Applicable Time Limitations Rule

259. Three (3) successive limitations regimes have been referred to as potentially relevant to determining the timeliness of the Claimant's claims in this IRP.
260. Prior to 1 October 2016, at a time when only Board actions could be the subject of an IRP, the Bylaws required that a request for independent review be filed within thirty (30) days of the posting of the Board's minutes relating to the challenged Board decision.²³⁵
261. New ICANN Bylaws came into force as of 1 October 2016. However, these did not contain any provision setting a time limitation for the filing of an IRP. Since the supplementary rules for IRPs in force at the time did not contain a time limitation provision either, it is common ground that, during the period from 1 October 2016 to 25 October 2018, IRPs were subject neither to a limitation period nor to a repose period.
262. The Respondent's time limitations defence is based on Rule 4 of the Interim Procedures which, inclusive of the footnote that forms part of the Rule, reads as follows:

4. Time for Filing³

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

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

³ The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.

²³⁵ See Bylaws (as amended on 11 February 2016), Ex. C-23, Article IV, Section 3.3.

263. This Rule 4 came into being as part the new Interim Procedures adopted by the Board on 25 October 2018. As set out in some detail in the Panel’s Decision on Phase I, this was the culmination of a development process within ICANN’s IOT that began on 19 July 2016, with the circulation to IOT members of a first draft of proposed Updated Supplementary Procedures, and concluded on 22 October 2018, when draft Interim Supplementary Procedures were sent to the Board for adoption.²³⁶
264. While the Interim Procedures were adopted on 25 October 2018, the first paragraph of their preamble provides that “[t]hese procedures apply to all independent review process proceedings filed after 1 May 2018.” Rule 2 of the Interim Procedures confirms the retroactive application of the Interim Procedures in two (2) ways: first, by providing that they apply to IRPs submitted to the ICDR after the Interim Procedures “go onto effect”; and second, by providing that IRPs commenced prior to the Interim Procedures’ “adoption” (on 25 October 2018) shall be governed by the procedures “in effect at the time such IRPs were commenced”. For IRPs commenced after 1 May 2018, this would point to the Interim Procedures.
265. Ms. Eisner acknowledged in her evidence that Rule 4 was the subject of considerable debate within the IOT. She also confirmed that by October 2018, “ICANN org”²³⁷ was anxious to get a set of procedures in place. Indeed, Ms. Eisner had noted during the IOT meeting held of 11 October 2018 that “we at ICANN org are getting nervous about being on the precipice of having an IRP filed”.²³⁸ It is recalled that on 10 October 2018, the day prior to this meeting, the Claimant had, in the context of its pending CEP, provided the Respondent’s in-house counsel with a draft of the Claimant’s Request for an IRP in connection with .WEB.²³⁹
266. Underlying the footnote to Rule 4 is the fact that the Interim Procedures were conceived as a provisional instrument, designed to apply until the Respondent, in accordance with the

²³⁶ See Decision on Phase I, paras. 139-171.

²³⁷ “ICANN org” is an expression used to refer to ICANN’s Staff and organization, as opposed to ICANN’s Board or its supporting organizations and committees. See Merits hearing transcript, 4 August 2020, p. 391:6-15 (Ms. Burr).

²³⁸ Merits hearing transcript, 5 August 2020, pp. 495 and 498; see also pp. 479-480 (Ms. Eisner).

²³⁹ See Decision on Phase I, para. 151, and Merits hearing transcript, 5 August 2020, p. 494 (Ms. Eisner).

applicable governance processes, will come to develop and adopt final supplementary procedures for IRPs. Specifically in relation to the introduction of a “Time for Filing” provision in the Interim Procedures, Ms. Eisner explained that the IOT:

[...] agreed at some point and finalized language on a footnote that would confirm that if there was a future change in a deadline for time for filing, that ICANN would work to make sure no one was prejudiced by that. [...]

The footnote that was included in the Rule 4 was about the change between the -- we are putting the interim rules into effect. And then if in the future a discussion where people were suggesting that there should be basically no statute of limitations on the ability to challenge an act of ICANN, if that were to be the predominant view, and what the Board put into effect that there would be some sort of stopgap measure put in so that anyone who was not able to file under the interim rules and the timing set out there but could have filed if the other rules, the broader rules had been in effect, that we would put in a stopgap to make sure that no one was prejudiced by that differentiation because we had agreed on a different timing for the final set.²⁴⁰

267. In its Post-Hearing Brief dated 12 October 2020, the Respondent advised that as of that date, final Supplementary Procedures had not been completed or adopted.²⁴¹
268. Having identified and placed in context the rule on which the Respondent relies in support of its time limitations defence, the Panel turns to consider the merits of that defence.

2. Merits of the Respondent’s Time Limitations Defence

269. It is the Respondent’s contention that the Claimant’s claim that ICANN had an unqualified obligation to disqualify NDC upon receiving the DAA in August 2016 is barred by the repose period of Rule 4 because the Claimant challenges actions or inactions that occurred in 2016, more than two (2) years before the Claimant filed its IRP in November 2018. The Respondent adds that the limitations period of Rule 4 also bars the Claimant’s claims because the Claimant was aware of the material effect of the alleged actions or inactions of ICANN by August and September 2016, as evidenced by its letters of 8 August 2016 and 9 September 2016, demanding that ICANN disqualify NDC.
270. The Claimant’s position is that its claims against the Respondent for violating its Articles

²⁴⁰ Merits hearing transcript, 5 August 2020, pp. 496-498 (Ms. Eisner).

²⁴¹ Respondent’s PHB, fn 103, p. 38.

and Bylaws, as opposed to its claims that NDC had violated the New gTLD Program Rules, accrued no earlier than on 6 June 2018, when the Respondent proceeded with the delegation process for .WEB with NDC,²⁴² and that even if the time limitations and repose periods were applicable to its claims against the Respondent, which the Claimant contends they are not, they would have been tolled by its CEP that lasted from 18 June 2018 to 13 November 2018.

271. The Panel has carefully reviewed the Claimant's August and September 2016 correspondence relied upon by the Respondent, and cannot accept the latter's contention that the claims asserted by Afiliis in its 2016 letters to ICANN are the same as the claims asserted by the Claimant in this IRP. Whereas the Claimant's 2016 letters sought to demonstrate NDC's alleged violations of the New gTLD Program Rules, the Claimant's IRP, using these violations as a predicate, impugns the conduct of the Respondent itself in response to NDC's conduct. Stated otherwise, the Claimant's claims in this IRP concern not NDC's conduct, but rather the Respondent's actions or inactions in response to NDC's conduct.²⁴³
272. As amplified later in these reasons, when the Panel considers the Respondent's handling of the Claimant's complaints, the Panel does not accept, as urged by the Respondent, that the Claimant can be faulted for having waited for some form of determination by the Respondent before alleging in an IRP that the Respondent's actions or inaction violated its Articles and Bylaws. The Panel recalls that, in its responses to the Claimant's letters of 8 August 2016 and 9 September 2016, the Staff indicated, on 16 September 2016, that ICANN would pursue "informed resolution" of the questions raised by the Claimant and Ruby Glen,²⁴⁴ and, in ICANN's letter of 30 September 2016, that it would "continue to take Afiliis' comments, and other inputs that [it] ha[d] sought, into consideration as [it] consider[ed] this matter."²⁴⁵

²⁴² *Ibid*, para. 179.

²⁴³ Claimant's PHB, para. 182.

²⁴⁴ ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

²⁴⁵ ICANN's letter to Mr. Hemphill dated 30 September 2016 and attached Questionnaire, Ex. C-61.

273. The first of these letters attached a detailed Questionnaire designed to assist ICANN in evaluating the concerns raised by Afiliás and Ruby Glen, and the second represented in no uncertain terms that the Respondent’s consideration of this matter was continuing. In such circumstances, there is force to the Claimant’s contention that commencing contentious dispute resolution proceedings at that time would have interfered with the “informed resolution” that ICANN had represented it would undertake, and would likely have attracted an objection of prematurity.
274. The Panel also recalls, a fact that is not in dispute, that the Respondent did not communicate to the Claimant any view or determination in respect of the many questions raised in the Questionnaire attached to the Respondent’s letter of 16 September 2016. As for the Board’s decision in November 2016 to defer consideration of the complaints raised in relation to NDC’s conduct, it is common ground that it was never communicated to the Claimant or otherwise made public, and that it was disclosed for the first time upon the filing of the Respondent’s Rejoinder in this case, on 1 June 2020.
275. From November 2016 to the beginning of the year 2018, as seen already, the .WEB contention set was on hold by reason of the pendency of an accountability mechanism and the DOJ investigation. The situation evolved with the DOJ’s decision to close its investigation on 9 January 2018, the closure of Donuts’ CEP on 30 January 2018, and the expiration on 14 February 2018 of the 14-day period given to Ruby Glen to file an IRP. Shortly thereafter, the Claimant, on 23 February 2018, formally requested an update on ICANN’s investigation of the .WEB contention set and requested documents by way of its First DIDP Request.²⁴⁶ The Claimant also requested that the Respondent take no action in regard to .WEB pending conclusion of this DIDP Request.
276. The Claimant was notified on 6 June 2018 that the Respondent had removed the .WEB contention set from its on-hold status.²⁴⁷ While the Claimant was still ignorant of any determination by the Respondent in respect of the concerns raised in August and

²⁴⁶ Dechert’s letter to the Board dated 23 February 2018, Ex. C-78.

²⁴⁷ ICANN Global Support’s email to Mr. Kane dated 7 June 2018, Ex. C-62, p. 1. Mr. Kane was in Australia at the time, which is why the date on the Afiliás’ copy is 7 June 2018, although ICANN sent it on 6 June 2018.

September 2016, which were the subject of the Respondent’s Questionnaire of 16 September 2016, a necessary implication of the Respondent’s decision was that these concerns did not stand – or no longer stood – in the way of the delegation of .WEB to NDC. In the Panel’s opinion, this is when the Claimant’s complaints about NDC’s conduct crystallized into a claim against the Respondent. To quote from Rule 4, but recalling that in June 2018 it had not yet been adopted, this is when the Claimant “[became] aware of the material effect of the action or inaction giving rise to the DISPUTE”.

277. The Claimant commenced its CEP on 18 June 2018, twelve days after the removal of the .WEB contention set from its on-hold status. As already explained, potential IRP claimants are “strongly encouraged” to engage in this non-binding process for the purpose of attempting to narrow the Dispute, and an additional incentive to do so resides in their exposure to a cost-shifting decision if they fail to partake in a CEP and ICANN prevails in the IRP.²⁴⁸
278. The rules applicable to a CEP are described in an ICANN document dated 11 April 2013 (**CEP Rules**).²⁴⁹ The CEP Rules provide that, if the parties have failed to agree a resolution of all issues in dispute upon conclusion of the CEP, the potential IRP claimant’s time to file a request for independent review shall be extended for each day of the CEP but in no event, absent agreement, for more than fourteen (14) days.
279. The Claimant’s CEP was terminated by the Respondent on 13 November 2018. Consistent with the CEP Rules, the Respondent informed the Claimant that “ICANN will grant Afiliis an extension of time to 27 November 2018 (14 days following the close of CEP) to file an IRP”, adding that “this extension will not alter any deadlines that may have expired before the initiation of the CEP”.²⁵⁰ The Claimant commenced its IRP the next day, on 14 November 2018.
280. The Respondent has not challenged the application of the CEP Rules to the Claimant’s

²⁴⁸ Bylaws, Ex. C-1, Article 4, Section 4.3(e)(i)-(ii).

²⁴⁹ Cooperative Engagement Process Rules, 11 April 2013, Ex. C-121.

²⁵⁰ Exchange of emails between ICANN and Dechert, Ex. C-54.

CEP and the time for the filing of its IRP. In response to the Claimant's argument that the retroactive time limitations period set out in Rule 4 was tolled from 18 June 2018 to 13 November 2018, while its CEP was pending, the Respondent argued that the tolling was irrelevant because the limitations period had already long expired based on its submission that the Claimant's claims had accrued in August/September 2016, a submission that this Panel has rejected.

281. In sum, the Panel finds that the Claimant's core claims against the Respondent, as summarized above in paragraph 251 of this Final Decision, only accrued on 6 June 2018. Since the Claimant's CEP had the effect of tolling the time available to the Claimant to file an IRP until 27 November 2018, fourteen (14) days after closure of the CEP, the Claimant's IRP was timely and the Respondent's time limitations defence insofar as the Claimant's core claims are concerned must be rejected.

282. The Claimant has accused the Respondent of having enacted Rule 4 and given it retroactive effect in order to retroactively time bar its claims in this IRP. In support of this contention, the Claimant advances the following factual allegations:

- The Respondent only launched the solicitation of public comments concerning the addition of timing requirements to the draft procedures governing IRPs on 22 June 2018, shortly after Afiliás filed its CEP;
- In spite of the fact that the public comment period on proposed Rule 4 remained open, Rule 4 was included in the proposed Interim Procedures presented to the Board for approval on 25 October 2018;
- Having received a draft of the Claimant's IRP in the context of its CEP on 10 October 2018, the Respondent decided to give retroactive effect to the Interim Procedures to 1 May 2018, six (6) weeks prior to the initiation of the Claimant's CEP, with no carve-out for pending CEPs (of which there were several) or IRPs

(of which there was none); and

- Having terminated the Claimant’s CEP on 13 November 2018, and received its IRP on 14 November 2018, the Respondent was able to rely on the retroactive application of the Interim Procedures to support its Rule 4 time limitations defence.

283. In light of the Panel’s finding as to the accrual date of the Claimant’s core claims, it is not necessary further to consider these allegations. However, the Panel does wish to record its view that, from a due process perspective, the retroactive application of a time limitations provision is inherently problematic. A retroactive law changes the legal consequences of acts committed or the legal status of facts and relationships prior to the enactment of the law.²⁵¹ The potential for unfairness is apparent and thus, in many legal systems, there are restrictions on, and presumptions against, giving legal rules a retroactive effect.

284. Between 1 October 2016 and 25 October 2018, there was no time limitation for the filing of an IRP in respect of the Respondent’s actions or failures to act. Yet an IRP timely filed under the Bylaws, say on 18 June 2018, would, if Rule 4 of the Interim Procedures were given effect to, retroactively be barred and the claims advanced therein defeated with no consideration of their merits because of the retroactive application of the Interim Procedures adopted on 25 October 2018. The fact that only a single case, the Claimant’s IRP, was in fact affected by the retroactive application of the Interim Procedures only heightens the due process concern. The Panel recalls that under Section 4.3(n)(i) of the Bylaws, the rules of procedure for the IRP to be developed by the IOT “should apply fairly to all parties”.

C. Standard of Review

285. The standard of review applicable to an IRP under the Bylaws is provided in Section 4.3(i) of the Bylaws and Rule 11 of the Interim Procedures, which are in substance identical.

²⁵¹ David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, p. 41. See also Black’s Law Online Dictionary, 2nd ed., s.v. “retroactive statute”: <https://thelawdictionary.org/retroactive-statute/> (consulted on 7 February 2021): “a law that imposes a new obligation on past things or a law that starts from a date in the past.”

Section 4.3(i) of the Bylaws reads in relevant parts as follows:

(i) Each IRP Panel shall conduct an objective, *de novo* examination of the Dispute.

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

(ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

(iii) For Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

286. It is common ground that, except for claims potentially falling under sub-paragraph (iii) of Section 4.3(i), the Panel must conduct an objective, *de novo* examination of claims that actions or failures to act on the part of the Respondent violate its Articles or Bylaws, and make appropriate findings of fact in light of the evidence. The Parties therefore agree that this is the standard applicable to the Panel's review of actions or failures to act on the part of the Respondent's Staff.

287. There is profound divergence between the Parties as to the import of sub-paragraph (iii) of Section 4.3(i), relating to Claims arising out of the Board's exercise of its fiduciary duties. The Respondent argues that the effect of this rule is to incorporate the "business judgment rule" into the independent review of ICANN's Board action, a doctrine which the Respondent avers is recognized in California²⁵² and, according to the California Supreme Court, which "exists in one form or another in every American jurisdiction".²⁵³ More specifically, the Parties diverge both as to the scope of the carve-out made in Section 4.3 (i)(iii), and the question of whether the Board actions and inactions that are impugned by the Claimant involve the Board's exercise of its fiduciary duties.

288. These questions are addressed when the Panel comes to consider the merits of the Claimant's claims. For present purposes, it is noted that the Parties agree that, to the extent

²⁵² Respondent's PHB, para. 50.

²⁵³ *Landen v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 257 (1999) (quoting *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 507 n.14 (1986), RLA-13).

the Panel finds that the business judgment rule as it may have been incorporated in Section 4.3(i)(iii) of the Bylaws has any application in the present case, it refers to a “judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.”²⁵⁴

D. Merits of the Claimant’s Core Claims

289. While the Panel has found that the Claimant’s core claims against the Respondent crystallized on 6 June 2018, the Panel’s view is that a proper analysis of the Claimant’s claims requires an examination of the Respondent’s conduct – that of its Board, individual Directors, Officers and Staff – against the backdrop of the entire chronology of events leading to the Respondent’s decision of 6 June 2018. Before embarking on this examination, however, the Panel considers it useful to recall the key standards against which the Respondent has determined that its conduct should be assessed.

1. Relevant Provisions of the Articles and Bylaws

290. Article 2, paragraph III of the Respondent’s Articles reads, in part, as follows:

The Corporation shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets.[...]

291. Under its Bylaws, the Respondent has committed to “act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values”.²⁵⁵

292. The Respondent’s Commitments that are relied upon by the Claimant or appear germane to its claims, are expressed as follows in the Bylaws:

In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and

²⁵⁴ *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 711 (1996) (quoting *Barnes v. State Farm Mut. Auto Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)).

²⁵⁵ Bylaws, Ex. C-1, Section 1.2.

open entry in Internet-related markets. Specifically, ICANN commits to do the following (each, a "**Commitment**," and collectively, the "**Commitments**"):

[...]

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

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.²⁵⁶

293. As for ICANN's Core Values, which are to "guide the decisions and actions" of the Respondent, they include:

(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;²⁵⁷

294. The Bylaws further provide that ICANN's Commitments and Core Values "are intended to apply in the broadest possible range of circumstances".²⁵⁸

295. Finally, under Article 3 of the Bylaws, entitled Transparency, the Respondent has committed that it and its constituent bodies:

[...] shall operate to the maximum extent possible in an open and transparent manner and consistent with procedures designed to ensure fairness, [...]²⁵⁹

296. Bearing the standards set out in those commitments and core values in mind, the Panel turns to consider the Respondent's conduct, beginning with the Claimant's complaints about the Respondent's pre-auction investigation.

2. Pre-Auction Investigation

297. The Claimant has criticized the Respondent's pre-auction investigation of the allegation

²⁵⁶ Bylaws, Ex. C-1, Section 1.2(a)(v)(vi).

²⁵⁷ *Ibid*, Section 1.2 (b) (v) and (vi).

²⁵⁸ *Ibid*, Section 1.2 (b) (c).

²⁵⁹ *Ibid*, Section 3.1.

by Ruby Glen that NDC had failed properly to update its application following an alleged change of ownership or control of NDC. This allegation was prompted by Mr. Rasco's email of 7 June 2016 to Mr. Nevett, where he stated that the "powers that be" had indicated there was no change in position and that NDC would not be seeking an extension of the auction date. The Claimant strenuously argues that Mr. Rasco's representations, first to an employee of ICANN's New gTLD Operations section, Mr. Jared Erwin,²⁶⁰ and then to the Ombudsman,²⁶¹ were both misleading (in the first case) and erroneous (in the second).

298. As regards the Respondent's pre-auction investigation – on which, in the opinion of the Panel, very little turns insofar as the Claimant's core claims are concerned – the Panel accepts the evidence of Ms. Willett that prior to the auction, the Respondent was unaware of Verisign's involvement in NDC's application. Having considered the witness and documentary evidence on this question, which is preponderant, the Panel finds that the allegation presented to the Respondent was one of change of control within NDC, that it was promptly investigated by Ms. Willett's team and the Respondent's Ombudsman, and that in light of the representations made by Mr. Rasco, it was reasonable for the Respondent to conclude, as Ruby Glen and the other applicants in the contention set were advised in Ms. Willett's letter of 13 July 2016, that the Respondent "found no basis to initiate the application change request process or postpone the auction."²⁶² The Panel therefore rejects the Claimant's contention that the Respondent violated its Bylaws by the manner in which it investigated and resolved the pre-auction allegations of change of control within NDC.

3. Post-auction Actions or Inactions

(i) Overview

299. The evidence leads the Panel to a different conclusion insofar as the post-auction actions and inactions of the Respondent are concerned. What the evidence establishes is that upon it being revealed that Verisign had entered into an agreement with NDC and provided funds

²⁶⁰ Exchanges between Messrs. Erwin and Rasco, Ms. Willett's witness statement, 31 May 2019, Ex. B.

²⁶¹ Exchanges between Messrs. LaHatte and Rasco, Mr. Rasco's witness statement, 30 May 2020, Ex. N, [PDF] p. 2.

²⁶² Ms. Willett's letter to members of the .WEB/.WEBS contention set dated 13 July 2016, Ex. C-44.

in support of NDC's successful bid for .WEB, questions were immediately raised by two (2) members of the .WEB contention set as to the propriety of NDC's conduct as a gTLD applicant in light of the New gTLD Program Rules. As explained later in these reasons, the Panel accepts that these questions, including the fundamental question of whether or not the DAA violates the Guidebook and the Auction Rules, are better left, in the first instance, to the consideration of the Respondent's Staff and Board. However, it needs to be emphasized that this deference is necessarily predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules. After all, these instruments originate from the Respondent, and it is the Respondent that is entrusted with responsibility for the implementation of the gTLD Program in accordance with the New gTLD Program Rules, not only for the benefit of direct participants in the Program but also for the benefit of the wider Internet community.

300. The evidence in the present case shows that the Respondent, to this day, while acknowledging that the questions raised as to the propriety of NDC's and Verisign's conduct are legitimate, serious, and deserving of its careful attention, has nevertheless failed to address them. Moreover, the Respondent has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes.
301. In the paragraphs below, the Panel sets out its reasons for making those findings and reaching this conclusion.

(ii) The Claimant's 8 August and 9 September 2016 Letters

302. In the first of these two (2) letters, Mr. Hemphill, at the time, Afilias' Vice President and General Counsel, makes clear that while he has not been able to review a copy of the agreement(s) between NDC and Verisign, what has been made public about the arrangements between the two (2) companies raises sufficient concerns for Afilias to "request that ICANN promptly undertake an investigation" and "take appropriate action against NDC and its .WEB application for violations of the Guidebook, as we had

requested". Mr. Hemphill concludes his letter by urging the Respondent to stay any further action in relation to .WEB and, in particular, not to act upon any request for NDC or Verisign to enter into a registry agreement for .WEB with the Respondent.²⁶³

303. The Claimant's 9 September 2016 letter, noting that the Respondent had not responded to its earlier letter of 8 August, reiterated the request that the Respondent take no steps in relation to .WEB until ICANN, its Ombudsman, or its Board had reviewed NDC's conduct and determined whether or not to disqualify NDC's bid and reject its application. The letter then proceeds to explain, in detail, the reasons why, in the opinion of Afilias, the Respondent was obliged to disqualify NDC's application and proceed to contract for .WEB with Afilias. Specifically, Afilias articulated, by reference to the New gTLD Program Rules, the Articles and the Bylaws, why it considered that NDC had violated the Guidebook and Auction Rules and why ICANN was under a duty to contract with the next highest bidder in the auction. The Claimant concluded its letter by requesting a response by no later than 16 September 2016.²⁶⁴
304. The Claimant is not the only member of the contention set that raised questions, after the auction, about the propriety of Verisign's involvement in, and support for, the application of NDC. Contemporaneously with the Claimant's letters just reviewed, on 8 August 2016 Ruby Glen filed an Amended Complaint in the proceedings it had commenced in the US District Court prior to the auction. In its Amended Complaint, Ruby Glen questioned the legality of the auction for .WEB and sought an order enjoining the execution of a registry agreement pending resolution of its claims.
305. Before coming to the Questionnaire that the Respondent sent out on 16 September 2016, in part in response to Afilias' two (2) letters, the Panel recalls that in the meantime the Respondent had initiated a dialogue directly with Verisign, when outside counsel for the Respondent communicated by telephone with Verisign's outside counsel. The exact request that was made of Verisign's counsel remains unknown. However, it is undisputed that it was prompted by the Claimant's and Ruby Glen's complaints about the propriety of

²⁶³ Afilias' letter to Mr. Atallah dated 8 August 2016, Ex. C-49, pp. 1 and 3-4.

²⁶⁴ Afilias' letter to Mr. Atallah dated 9 September 2016, Ex. C-103.

NDC's arrangements with Verisign. Why the Respondent chose to request assistance at that point directly from Verisign, a non-applicant, rather than from NDC, is a question that was largely left unaddressed apart from outside counsel for the Respondent explaining, during the hearing held in connection with Afilias' Application of 29 April 2020, that counsel knew Verisign's lead counsel from prior cases, and therefore decided to contact him.²⁶⁵

306. On 23 August 2016, in response to this request, Verisign's and NDC's counsel, unbeknownst to the Claimant and likely to the other members of the contention set (except NDC), filed a submission with the Respondent on behalf of NDC and Verisign in the form of an eight (8) page letter and five (5) attachments, one of which was the DAA. The letter states that it is being submitted in response to the request by ICANN's counsel for information regarding the agreement between NDC and Verisign relating to .WEB. Redacted - Third Party Designated Confidential Information

²⁶⁶ The *Amici's* counsel's letter was marked as "Highly Confidential – Attorneys' Eyes Only", while the attached DAA, as already mentioned, was marked as "Confidential Business Information – Do Not Disclose". The letter of 23 August 2016 sent on behalf of the *Amici* was not posted on ICANN's website or disclosed to the Claimant because of its sender's request that it be kept confidential.²⁶⁷

(iii) The 16 September 2016 Questionnaire

307. Turning to the Respondent's Questionnaire of 16 September 2016, the evidence reveals that it resulted from a collaborative effort by and between Ms. Willett, who prepared a first

²⁶⁵ Transcript of the 11 May 2020 Hearing, Ex. R-29, p. 20:12-15 (Mr. Enson: "The lawyers ... -- ICANN and Verisign had been adverse to one another on a number of occasions. The lawyers know each other well and there is nothing extraordinary or sinister about me picking up the phone to call Mr. Johnston about an issue like this.") See also the response from counsel for the Claimant: Merits hearing transcript, 3 August 2020, p. 53:1-10 (Claimant's Opening).

²⁶⁶ Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. C-102.

²⁶⁷ See Merits hearing transcript, 6 August 2020, pp. 690-691 (Ms. Willett).

draft of the questions, and Respondent's counsel. At that time, Ms. Willett held the position of Vice-President, gTLD Operations, Global Division of ICANN, reporting directly to Mr. Atallah.²⁶⁸ The Questionnaire was sent out to Afilias, Ruby Glen, NDC, and Verisign, under cover of a letter of even date signed by Ms. Willett.²⁶⁹ Ms. Willett was asked why the Questionnaire was not sent to all members of the contention set, but the question was objected to on the ground of privilege.

308. The Panel has already noted that Ms. Willett's cover letter refers in introduction to questions having been raised in various fora about whether NDC should have participated in the 27-28 July 2016 auction, and whether NDC's application should have been rejected. The letter goes on to note:

To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information.

Accordingly, ICANN invites Ruby Glen, NDC, Afilias, and Verisign, Inc. (Verisign) to provide information and comment on the topics listed in the attached. Please endeavor to respond to all of the topics/questions for which you have information to do so. To allow ICANN promptly to evaluate these matters, please provide response [...] no later than 7 October 2016.²⁷⁰

309. Ms. Willett was asked what she meant when she stated that the Respondent was seeking information to facilitate "informed resolution". It was put to her that this "sounds like an investigation at the end of which ICANN would resolve the questions that had been raised". In response, Ms. Willett denied that she was undertaking an investigation, and stated that the responses eventually received to the Questionnaire were simply passed on to counsel.²⁷¹
310. The Questionnaire is six (6) pages long and lists twenty (20) "topics" on which the entities to which it was addressed are invited to comment. The introductory paragraph echoes Ms. Willett's cover letter in stating that "all responses to these questions will be taken into

²⁶⁸ Merits hearing transcript, 5 August 2020, p. 545 (Ms. Willett). Ms. Willett left the employ of the Respondent in December 2019.

²⁶⁹ ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

²⁷⁰ *Ibid.*, p. 1 [emphasis added].

²⁷¹ Merits hearing transcript, 6 August 2020, pp. 696-697 (Ms. Willett) : "[...] I was not undertaking an investigation. ICANN counsel handled and administered the CEP process. So the responses which I received to these letters I passed along to counsel."

consideration in ICANN’s evaluation of the issues raised [...]’.²⁷²

311. As already noted, while the Respondent, NDC and Verisign had knowledge of the terms of the DAA at that time, Afilias and Ruby Glen did not. It seems to the Panel evident that this asymmetry of information put Afilias and Ruby Glen at a significant disadvantage in addressing the topics listed in the Questionnaire in the context of “ICANN’s evaluation of the issues raised”. By way of example, the first topic asked for evidence regarding whether ownership or control of NDC changed after NDC applied for .WEB. The Respondent, NDC and Verisign were able to comment on the alleged change of ownership or control resulting from the contractual arrangements between the *Amici* by reference to the actual terms of the DAA. However, Afilias and Ruby Glen were not.
312. Other topics in the Questionnaire would attract very different answers depending on whether the responding party had knowledge of the terms of the DAA. By way of examples:

4. In his 8 August 2016, letter, Scott Hemphill stated: “A change in control can be effected by contract as well as by changes in equity ownership.” Do you think that an applicant’s making a contractual promise to conduct particular activities in which it is engaged in a particular manner constitutes a “change in control” of the applicant? Do you think that compliance with such a contractual promise constitutes such a change in control? Please give reasons.

5. Do you think that AGB Section 1.2.7 requires an applicant to disclose to ICANN all contractual commitments it makes to conduct its affairs in particular ways? If not, in what circumstances (if any) would disclosure be required? [...]

7. Do you think that changes to an applicant’s financial condition that do not negatively reflect on an applicant’s qualifications to operate the gTLD should be deemed material? If so, why? Do you think that an applicant’s obtaining a funding commitment from a third party to fund bidding at auction negatively affects that applicant’s qualifications to operate the gTLD? Please explain why, describing your view of the relevance of (a) the funding commitment the applicant received and (b) the consideration the applicant gave to obtain that commitment (e.g., a promise to repay; a promise to use a particular backend provider; an option to receive some ownership interest in the applicant in the future; some promise about how the gTLD will be operated).[...]

9. Do you think that requiring applicants to disclose funding commitments (whether through loans, contributions from affiliated companies, or otherwise) they obtain for auction bids would help or harm the auction process? Would a requirement that applicants disclose their funding arrangements create problems for applicants (for example, making funding commitments harder to obtain)? To what extent, if any, do you think scrutinizing such arrangements (beyond determining whether they negatively reflect on an applicant’s

²⁷² ICANN’s letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50, p. 2 [emphasis added].

qualifications) would be within ICANN's proper mission? Would required disclosure of applicants' funding sources pose any threat to robust competition?

313. Another noteworthy feature of the Questionnaire is that while it contains many references to Mr. Hemphill's letters, it does not refer to the letter of 23 August 2016 from counsel for the *Amici*, nor in terms to the DAA. This was because one and the other had been marked confidential when submitted to the Respondent. Ms. Willett was asked about ICANN's practice when presented with a request to keep correspondence confidential:

[...] our practice was that we respected those requests for confidentiality and we did not post those -- such correspondences, with one exception.

At some point if some other party asked for something to be published or it became desirable and relevant to something else, I recall, again, it's been years, so I don't recall a specific example, but as a general practice, I recall that ICANN might ask the sender if it would be possible to publish a letter, but we respected their requests for confidential correspondence.²⁷³

314. The Panel is of the view that the Respondent could have, and ought to have requested Verisign and NDC for authorization to disclose the DAA to the other addressees of its Questionnaire, be it on an "external counsel's eyes only" basis. There is no evidence that this possibility was explored. It seems to the Panel that in the context of an information gathering exercise such as that in which the Respondent chose to engage with its Questionnaire, it would have been, to quote Ms. Willett's evidence, both "desirable" and "relevant" to do so. The Panel also believes that ICANN's evaluation of the issues would have been better informed had Afilias and Ruby Glen been given an opportunity to know, and address directly, the arguments advanced on behalf of the *Amici* in response to the concerns they had raised. At the very least, the Respondent could have disclosed that the Questionnaire had been prepared with knowledge of the terms of the DAA, which would have given interested parties an opportunity to seek to obtain a copy of the agreement, either voluntarily by requesting it from the *Amici*, or through compulsion by available legal means.
315. The foregoing leads the Panel to find that the preparation and issuance of the Respondent's Questionnaire in the circumstances just reviewed violated the Respondent's commitment,

²⁷³ Merits hearing transcript, 6 August 2020, pp. 690-691 (Ms. Willett).

under the Bylaws, to operate in an open and transparent manner and consistent with procedures designed to ensure fairness.

316. As noted, Afilias, NDC and Verisign forwarded responses to the Questionnaire, but Ruby Glen did not. Ms. Willett testified that she passed on the responses she received to ICANN's legal team, without undertaking her own analysis. She was not sure what counsel did with them.²⁷⁴ As for any external follow-up, it is common ground that no feedback whatsoever was given to the Claimant of the Respondent's evaluation of these responses.

(iv) The Respondent's Letter of 30 September 2016

317. In the meantime, on 30 September 2016, Mr. Atallah, on behalf of the Respondent, acknowledged receipt of Afilias' 8 August and 9 September 2016 letters and, as found by the Panel when considering the Respondent's time limitations defence, represented in explicit terms that the Respondent's consideration of this matter was continuing. It bears noting that in 2016, Mr. Atallah was President of the Respondent's Global Domains Division, reporting to the CEO, and was the person responsible for overseeing the administration of the New gTLD Program.²⁷⁵

(v) Findings as to the Seriousness of the Issues Raised by the Claimant, and the Respondent's Representation that It Would Evaluate Them

318. In the Panel's opinion, the implication of the Respondent's decision to prepare and send out its 16 September 2016 Questionnaire, and of Mr. Atallah's letter of 30 September 2016 in response to the Claimant's letters of 8 August and 9 September 2016, was that the questions raised by the Claimant and Ruby Glen in connection with NDC's conduct and the latter's arrangements with Verisign were serious and deserving of the Respondent's consideration. This was admitted by the Respondent in its pleadings in this IRP, where the

²⁷⁴ Merits hearing transcript, 6 August 2020, pp. 719-720 (Ms. Willett).

²⁷⁵ Merits hearing transcript, 7 August 2020, pp. 917-918 (Mr. Disspain).

Respondent averred:

[...] ...determining that NDC violated the Guidebook is not a simple analysis that is answered on the face of the Guidebook. There is no Guidebook provision that squarely addresses an arrangement like the DAA. A true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA. This analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN.²⁷⁶

319. In making its finding as to the seriousness of the questions raised by the Claimant, the Panel is mindful of Ms. Willett’s evidence when asked, in cross-examination, whether she considered that the concerns that Afiliis had raised were serious. Her answer was that she “considered them to be sour grapes”, and she admitted that she may have shared that view with others within ICANN.²⁷⁷ However, Ms. Willett having testified that she never even read the DAA when these events were unfolding, nor had she read the 23 August 2016 letter sent to the Respondent on behalf of the *Amici*, the Panel must conclude that her stated view was more in the nature of a personal impression than a considered opinion. Moreover, in all appearance her impression was not shared by those who invested time in assisting her preparing the Questionnaire, or by Mr. Atallah who subsequently confirmed that ICANN was continuing to consider the questions raised by the Claimant. In any event, and as just seen, it is not the position formally adopted by the Respondent in this IRP.
320. The questions raised by the Claimant that are, in the opinion of the Panel, serious and deserving of the Respondent’s consideration, include the following, which the Panel merely cites as examples:
- Whether, in entering into the DAA, NDC violated the Guidebook and, more particularly, the section providing that an “Applicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application”.
 - Whether the execution of the DAA by NDC constituted a “change in circumstances

²⁷⁶ Respondent’s Rejoinder, para. 82.

²⁷⁷ Merits hearing transcript, 6 August 2020, p. 746 (Ms. Willett).

that [rendered] any information provided in the application false and misleading”.

- Whether by entering into the DAA after the deadline for the submission of applications for new gTLDs, and by agreeing with NDC provisions designed to keep the DAA strictly confidential, Verisign impermissibly circumvented the “roadmap” provided for applicants under the New gTLD Program Rules, and in particular the public notice, comment and evaluation process contemplated by these Rules.

321. The Panel expresses no view on the answers that should be given to those questions and the other questions arising from the execution of the DAA by NDC and Verisign, other than to reiterate, as acknowledged by the Respondent, that they are deserving of careful consideration.

322. The Panel has no hesitation in finding, based on the above, that that the Respondent represented by its conduct that the questions raised by the Claimant and “others in the contention set” were worthy of the Respondent’s consideration, and that the Respondent would consider, evaluate, and seek informed resolution of the issues arising therefrom. By reason of this conduct on the part of the Respondent, the Panel cannot accept the Respondent’s contention that there was nothing for the Respondent to consider, decide or pronounce upon in the absence of a formal accountability mechanism having been commenced by the Claimant. The fact of the matter is that the Respondent *represented* that it would consider the matter, and made that representation at a time when Ms. Willett confirmed the Claimant had no pending accountability mechanism.²⁷⁸ Moreover, since the Respondent is responsible for the implementation of the New gTLD Program in accordance with the New gTLD Program Rules, it would seem to the Panel that the Respondent itself had an interest in ensuring that these questions, once raised, were addressed and resolved. This would be required not only to preserve and promote the integrity of the New gTLD

²⁷⁸ Merits hearing transcript, 6 August 2020, p. 745 (Ms. Willett).

Program, but also to disseminate the Respondent’s position on those questions within the Internet community and allow market participants to act accordingly.

(vi) The November 2016 Board Workshop

323. The Panel comes to the November 2016 Workshop session at which “the Board chose not to take any action at that time regarding .WEB because an Accountability Mechanism was pending regarding .WEB.”²⁷⁹
324. The existence of this November 2016 Workshop was revealed for the first time in the Respondent’s Rejoinder, filed on 1 June 2020. For example, no mention of it is made in the chronology of events contained in the Respondent’s Response,²⁸⁰ where it was merely pleaded, with no reference to the workshop session, that the Board had not yet had an opportunity to fully address the issues being pursued by Afiliis in this IRP and that “[d]eferring such consideration until this Panel renders its final decision is well within the realm of reasonable business judgment.”²⁸¹
325. The Panel had the benefit of hearing the evidence of two (2) witnesses who were in attendance at the November 2016 Workshop: Mr. Disspain, a long-standing member of ICANN’s Board, and Ms. Burr, who attended the workshop as an observer shortly before being herself appointed to the Board. Both of these witnesses are intimately familiar with the Respondent and its processes, and both testified openly and credibly.
326. This is how Mr. Disspain described the November 2016 Workshop session in his witness statement:

10. In November 2016, the Board received a briefing from ICANN counsel on the status of, and issues being raised regarding, .WEB. The communications during that session, in which ICANN’s counsel, John Jeffrey (ICANN’s General Counsel) and Amy Stathos (ICANN’s Deputy General Counsel), were integrally involved, are privileged and, thus, I will not disclose details of those discussions so as to avoid waiving the privilege. I recall that, prior to this session, the Board received Board briefing materials directly from ICANN’s counsel that set forth relevant information about the disputes regarding .WEB, the parties’ legal and factual contentions and a set of options the Board could consider.

²⁷⁹ Respondent’s Rejoinder, paras. 40-41.

²⁸⁰ Respondent’s Response, paras. 40-54.

²⁸¹ Respondent’s Response, para. 66.

During the session, Board members discussed these topics and asked questions of, and received information and advice from, ICANN’s counsel.

11. At the November 2016 session, the Board chose not to take any action at that time regarding the claims arising from the .WEB auction, including the claim that, by virtue of the agreement between Verisign and NDC, NDC had committed violations of the Applicant Guidebook which merited the disqualification of its application for .WEB and the rejection of its winning bid. Given the Accountability Mechanisms that had already been initiated over .WEB, and given the prospect of further Accountability Mechanisms and legal proceedings, the Board decided to await the results of such proceedings before considering and determining what action, if any, to take at that time. [...]

327. In the course of his cross-examination, Mr. Disspain had the opportunity to add the following to the evidence set out in his witness statement:

- The workshop session of 3 November 2016 was separate and distinct from the actual Board meeting, which took place on 5 November 2016.²⁸²
- The session was attended by a significant number of Board members, in his estimation more than 50%.²⁸³ Also in attendance were ICANN’s CEO, its in-house lawyers, and likely Mr. Atallah.²⁸⁴
- The letters that Afilias had sent Mr. Atallah were known to those in attendance and “would have been part of the briefing”;²⁸⁵ the Questionnaire prepared by ICANN in response to these letters was also known.²⁸⁶ However, the DAA, the 23 August 2016 letter sent on behalf of the *Amici*, and the Questionnaire were not part of the briefing materials.²⁸⁷

²⁸² Merits hearing transcript, 7 August 2020, pp. 918-919 (Mr. Disspain).

²⁸³ *Ibid.*, p. 923 (Mr. Disspain).

²⁸⁴ Merits hearing transcript, 7 August 2020, p. 924 (Mr. Disspain).

²⁸⁵ Merits hearing transcript, 7 August 2020, p. 917 (Mr. Disspain).

²⁸⁶ Merits hearing transcript, 7 August 2020, p. 928 (Mr. Disspain).

²⁸⁷ Merits hearing transcript, 7 August 2020, pp. 930-931 (Mr. Disspain).

- There was a full and open discussion, that likely lasted more than fifteen (15) minutes.
- Rather than “proactively decide” or “agree” its course of action, the Board “made a choice” to follow its longstanding practice of not doing anything when there is a pending outstanding accountability mechanism.²⁸⁸
- The Board made this choice without the need for a vote, straw poll or show of hands.²⁸⁹

328. Ms. Burr explained that Board workshops are informal working sessions. A quorum is not required, attendance is not taken, nor are minutes prepared or resolutions passed.²⁹⁰

329. It is common ground that the choice, or decision, made by the Board at its November 2016 Workshop session was not communicated to Afilias or otherwise made public. In response to a question from the Panel, Mr. Disspain indicated that the question of whether the Board’s 3 November 2016 decision would or would not be communicated to the members of the .WEB contention set was not discussed at the workshop session.²⁹¹ Indeed, Mr. Disspain only became aware through his involvement in this IRP that the November 2016 Board decision to defer consideration of the issues raised in relation to .WEB was only communicated to the Claimant – and made public – when it was revealed in the Respondent’s Rejoinder.

330. Mr. Disspain was invited by the Panel to confirm that after the November 2016 Board workshop, he knew that the question of whether NDC’s bid was compliant with the New gTLD Program Rules had been raised by Afilias and was a “pending question, one on which the Board had not pronounced and had decided not to address.” [emphasis added]

²⁸⁸ Merits hearing transcript, 7 August 2020, pp. 938-939 (Mr. Disspain).

²⁸⁹ Merits hearing transcript, 7 August 2020, p. 935 (Mr. Disspain).

²⁹⁰ Merits hearing transcript, 4 August 2020, pp. 282-286 (Ms. Burr).

²⁹¹ Merits hearing transcript, 7 August 2020, p. 975 (Mr. Disspain).

Mr. Disspain provided this confirmation. The Panel can safely assume that what was true for Mr. Disspain was equally true for his fellow Board members who were in attendance at the workshop.

331. The Respondent urges that it was not a violation of the Respondent’s Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC’s application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board’s exercise of its fiduciary duties.
332. The Panel does find, however, that it was a violation of the commitment to operate “in an open and transparent manner and consistent with procedures to ensure fairness”²⁹² for the Respondent to have failed to communicate the Board’s decision to the Claimant. As noted already, the Respondent had clearly represented in its letters of 16 and 30 September 2016 that it would evaluate the issues raised in connection with NDC’s application and auction bids for .WEB. Since the Board’s decision to defer consideration of these issues contradicted the Respondent’s representations, it was incumbent upon the Respondent to communicate that decision to the Claimant.

(vii) The Respondent’s Decision to Proceed with Delegation of .WEB to NDC in June 2018

333. Mr. Disspain confirmed that by early 2018, the situation as described in paragraph 327 above “remained unchanged.”²⁹³ That is, the question of whether NDC’s bid, post-DAA, was compliant with the New gTLD Program Rules had been raised and remained a pending question on which the Board had yet to pronounce. The extent to which the Respondent’s

²⁹² See Bylaws Ex. C-1, Art. 3.

²⁹³ Merits hearing transcript, 7 August 2020, pp. 976-977 (Mr. Disspain).

Staff had, by early 2018, progressed in their consideration of the questions that had been raised by the Claimant, if at all, is unknown. However, the evidence establishes that no determination of these questions was communicated to the Claimant, and that neither those questions nor any Staff position in relation thereto were brought back to the Board for its consideration. Ms. Willett explained in the course of her cross-examination that the on-hold status of an application or contention set does not mean “that all work ceases”, or that the Respondent is prevented from continuing to gather information.²⁹⁴ Hence, the fact that the contention set was on hold throughout the period from November 2016 to June 2018 would not justify the lack of progress in evaluating the issues that had been raised in connection with .WEB.

334. This brings the Panel to considering the Respondent’s decision to put the .WEB contention set “off hold” on 6 June 2018, the day after Afiliat’s Reconsideration Request 18-7 was denied.²⁹⁵ As seen, this immediately set back in motion the Respondent’s internal process leading to the execution of a registry agreement. On 12 June 2018, Ms. Willett and other ICANN staff approved a draft registry agreement for .WEB; the registry agreement was forwarded for execution to NDC on 14 June 2018; the agreement was promptly signed and returned to ICANN and, on the same day, ICANN’s Staff approved executing the .WEB Registry Agreement with NDC on behalf of ICANN.
335. In the opinion of the Panel, the Respondent’s decision to move to delegation without having pronounced on the questions raised in relation to .WEB was inconsistent with the representations made in Ms. Willett’s letter of 16 September 2016, the text in the introduction to the attached Questionnaire,²⁹⁶ and Mr. Atallah’s letter of 30 September 2016.²⁹⁷ The Panel also finds this conduct to be inconsistent with the Board’s decision of 3 November 2016 which, while it deferred consideration of the .WEB issues, nevertheless acknowledged that they were deserving of consideration, a position reiterated

²⁹⁴ Merits hearing transcript, 6 August 2020, pp. 697-698 (Ms. Willett).

²⁹⁵ See above, para. 117.

²⁹⁶ ICANN’s letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

²⁹⁷ ICANN’s letter to Mr. Hemphill dated 30 September 2016, Ex. C-61.

by the Respondent in this IRP.

336. Mr. Disspain testified about the Respondent's decision to put the contention set off hold in June 2018. While he had made the point in his witness statement that this was a decision made by ICANN's Staff,²⁹⁸ he confirmed at the hearing that the Board was aware, ahead of time, that the .WEB contention set would be put off hold. He added, however, that he and his fellow Board members fully expected the Claimant to make good on its promise to initiate an IRP, which would result in the contention set being put back on hold.²⁹⁹
337. Mr. Disspain was asked by the Panel what would the Board have done had the Claimant, contrary to his and his colleagues' expectation, *not* initiated an IRP. Might that not have resulted in a registry agreement for .WEB being signed by the Staff on behalf of the Respondent without the Board having the opportunity to address the questions it had chosen to defer in November 2016? Mr. Disspain, understandably, did not want to speculate as to what the Board would have done.³⁰⁰ However, when shown internal correspondence evidencing that signature of the registry agreement for .WEB on behalf of ICANN had in fact been approved by ICANN's Staff after receipt of the executed copy of the agreement by NDC, he did confirm that Board approval is not required for the execution of a registry agreement by ICANN.³⁰¹ Thus, clearly, a registry agreement with NDC for .WEB could have been executed by ICANN's Staff and come into force without the Board having pronounced on the propriety of the DAA under the Guidebook and Auction Rules.
338. In the course of her examination, Ms. Willett was asked the following hypothetical question:

[PANEL MEMBER]: [...] If [...] an applicant had failed to respect the guidebook, but there had been no accountability mechanism to complain about that noncompliance, would you, by reason of the absence of an accountability mechanism, have sent a draft Registry Agreement for execution?

²⁹⁸ Mr. Disspain's witness statement, 1 June 2020, para. 13.

²⁹⁹ Merits hearing transcript, 7 August 2020, pp. 978-980 (Mr. Disspain).

³⁰⁰ *Ibid.*, pp. 981-982 (Mr. Disspain).

³⁰¹ *Ibid.*, pp. 1002-1004 (Mr. Disspain).

THE WITNESS: No, I don't believe we would have. If we determined that an applicant had violated the terms of the guidebook, I don't believe that my team and I would have given our approvals to proceed with contracting.³⁰²

339. In the Panel's view, Ms. Willett's evidence in answer to this question reflects the kind of ownership of compliance issues with the New gTLD Program Rules that the Respondent did not display in its dealing with the concerns raised in connection with NDC's arrangements with Verisign.
340. The Panel observes that the Respondent's Staff's failure to take a position on the question of whether the DAA complies with the New gTLD Program Rules before moving to delegation stands in contrast with the resolution that was brought to the pre-auction allegation of change of control within NDC, which had also been raised, initially, in correspondence. Ms. Willett confirmed in her evidence that the Respondent's pre-auction investigation was prompted by Ruby Glen's email of 23 June 2016.³⁰³ Once the investigation was completed, Ms. Willett informed Ruby Glen of ICANN's decision³⁰⁴ and advised Ruby Glen that if dissatisfied with the decision, it could invoke ICANN's accountability mechanisms.³⁰⁵ No such decision was made by ICANN's Staff in relation to the issues raised by the Claimant that could have formed the basis for a formal accountability mechanism, in the context of which positions would have been adopted, battle lines would have been drawn, and an adversarial process such as an IRP would have resulted in a reasoned decision binding on the parties.
341. What the Panel has described as a failure on the part of the Respondent to take ownership of the issues arising from the concerns raised by the Claimant and Ruby Glen finds expression in the Respondent's submission in this IRP that the dispute arising out of NDC's arrangement with Verisign is in reality a dispute between the Claimant and the *Amici*. For example, the Respondent writes in its Response:

³⁰² Merits hearing transcript, 6 August 2020, pp. 749-750 (Ms. Eisner).

³⁰³ Merits hearing transcript, 6 August 2020, p. 617 (Ms. Willett).

³⁰⁴ See Ms. Willett's letter to members of the .WEB/.WEBS contention set dated 13 July 2016, Ex. C-44.

³⁰⁵ Merits hearing transcript, 6 August 2020, pp. 621-622 (Ms. Willett).

[...] the Guidebook breaches that Afilias alleges are the subject of good faith dispute by NDC and Verisign, both of which are seeking to participate in this IRP pursuant to their *amicus* applications. [...] While Afilias' Amended IRP Request is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and Verisign, to which NDC and Verisign have responses. [...]³⁰⁶

342. Another example can be found in the Respondent's post-hearing brief where it is stated:

The testimony at the hearing established that there is a good-faith and fundamental dispute between *Amici* and *Afilias* about whether the DAA violated the Guidebook or Auction Rules, meaning that reasonable minds could differ on whether NDC is in breach of either and, if so, whether this qualification is the appropriate remedy. Accordingly, Afilias' additional argument that ICANN can only exercise its discretion reasonably by disqualifying NDC must be rejected.³⁰⁷

343. It may be fair to say, as averred in the Respondent's Response, that "ICANN has been caught in the middle of this dispute between powerful and well-funded businesses".³⁰⁸ However, in the Panel's view, it is not open to the Respondent to add, as it does in the same sentence of its Response, "[and ICANN] has not taken sides", as if the Respondent had no responsibility in bringing about a resolution of the dispute by itself taking a position as to the propriety of NDC's arrangements with Verisign.

344. In the opinion of the Panel, there is an inherent contradiction between proceeding with the delegation of .WEB to NDC, as the Respondent was prepared to do in June 2018, and recognizing that issues raised in connection with NDC's arrangements with Verisign are serious, deserving of the Respondent's consideration, and remain to be addressed by the Respondent and its Board, as was determined by the Board in November 2016. A necessary implication of the Respondent's decision to proceed with the delegation of .WEB to NDC in June 2018 was some implicit finding that NDC was not in breach of the New gTLD Program Rules and, by way of consequence, the implicit rejection of the Claimant's allegations of non-compliance with the Guidebook and Auction Rules. This is difficult to reconcile with the submission that "ICANN has taken no position on

³⁰⁶ See Respondent's Response, para. 63.

³⁰⁷ Respondent's PHB, para. 90 [emphasis added].

³⁰⁸ Respondent's Response, para. 4.

whether NDC violated the Guidebook”.³⁰⁹

345. The same can be said of the Respondent taking the position, shortly after Afiliias filed its IRP, that it would only keep the .WEB contention set on hold until 27 November 2018, so as to allow the Claimant to file a request for interim relief, barring which the Respondent would take the contention set off hold.³¹⁰ It seems to the Panel that the Respondent was once again adopting a position that could have resulted in .WEB being delegated to NDC without the Board having determined whether NDC’s arrangements with Verisign complied within the New gTLD Program Rules.
346. The Panel also finds it contradictory for the Respondent to assert in pleadings before this Panel that the Respondent has not yet considered the Claimant’s complaints, having represented to the Emergency Panelist earlier in these proceedings that ICANN “ha[d] evaluated these complaints” and that the “time ha[d] therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers”.³¹¹
347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN’s Staff, and the rationale of the Board’s decision, in November 2016, to defer consideration of the issues raised in relation to NDC’s application for .WEB, for the Respondent’s Staff, to the knowledge of the Respondent’s Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.
348. As a direct result of the foregoing, the Panel has before it a party – the Claimant – attacking a decision – the Respondent’s failure to disqualify NDC’s application and auction bids – that the Respondent insists it has not yet taken. Moreover, the Panel finds itself in the

³⁰⁹ Respondent’s Rejoinder, para. 81.

³¹⁰ See Decision on Phase I, para. 40.

³¹¹ ICANN’s Opposition to Afiliias Domains No. 3 LTD.’s Request for Emergency Panelist and Interim Measures of Protection, para. 3.

unenviable position of being presented with allegations of non-compliance with the New gTLD Program Rules in circumstances where the Respondent, the entity with primary responsibility for this Program, has made no first instance determination of these allegations, whether through actions of its Staff or Board, and declines to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP. The Panel addresses these peculiar circumstances further in the section of this Final Decision addressing the proper relief to be granted.

(viii) Other Related Claims

349. In addition to what the Panel has described as the Claimant's core claims, the Claimant has advanced a number of related claims, including that the Respondent violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign, and by failing to enable and promote competition in the DNS.
350. As regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant's core claims, such as turning to Verisign rather than NDC to obtain information about NDC's arrangements with Verisign, allowing for asymmetry of information to exist between the recipients of the 16 September 2016 Questionnaire, delaying providing a response to Afilias' letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject of an ongoing public comment process, and making that rule retroactive so as to encompass the Claimant's claims within its reach. Accordingly, the Panel does not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims.
351. Turning to the claim that the Respondent failed to enable and promote competition in the DNS, it was summarized in the Claimant's PHB as the contention that "to the extent ICANN has discretion regarding the enforcement of the New gTLD Program Rules, ICANN may not exercise its discretion in a manner that would be inconsistent with its competition mandate (or with its other Articles and Bylaws)."³¹² As seen, the Respondent

³¹² Claimant's PHB, para. 145.

has not as yet exercised whatever discretion it may have in enforcing the New gTLD Program Rules in relation to .WEB, and therefore this claim, as just summarized, appears to the Panel to be premature.

352. For reasons expressed elsewhere in this Final Decision, the Panel is of the opinion that it is for the Respondent to decide, in the first instance, whether NDC violated the Guidebook and Auction Rules and, assuming the Respondent determines that it did, what consequences should follow. Likewise, the Respondent is invested with the authority to approve an eventual transfer of a possible registry agreement for .WEB from NDC to Verisign, which it may or may not be called upon to exercise depending on whether NDC's application is rejected and its bids disqualified. That said, and even though it is not strictly necessary to decide the question, the Panel accepts the submission that ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct. Compelling evidence to that effect was presented by Ms. Burr and Mr. Kneuer, supported by Mr. Disspain, and it is consistent with a public statement once endorsed by the Claimant, in which it was asserted:

While ICANN's mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. *Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.* Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.³¹³

353. As noted in the History of the Proceedings section of this Final Decision,³¹⁴ the Parties came to the understanding that it would be for this Panel to determine the Claimant's Request for Emergency Interim Relief upon the Respondent agreeing that the .WEB gTLD contention set would remain on hold until the conclusion of this IRP. For the reasons set out in the section of this Final Decision analysing the Claimant's cost claim,³¹⁵ the Panel is of the view that the Claimant's Request for Emergency Interim Relief was well founded, and that it should be granted with effect until such time as the Respondent has considered

³¹³ Registry Operators' Submission Re: Objections to the Proposed Versign Settlement, Ex. R-21, p. 8 [emphasis added].

³¹⁴ See above, para. 40.

³¹⁵ See below, paras. 402-407.

the present Final Decision.

354. As regards the Donuts transaction of 29 December 2020, the Panel does not consider it relevant to the issues determined in this Final Decision. It will be for the Respondent to consider, in the first instance, whether this transaction is of relevance to the Claimant's request that following a possible disqualification of NDC's bid for .WEB, the Respondent must, in accordance with the New gTLD Program Rules, contract the Registry Agreement for .WEB with the Claimant.

E. The Rule 7 Claim

355. The Panel recalls that the Rule 7 Claim was first raised as a defence to the *Amici*'s requests, based on Rule 7 of the Interim Procedures, to participate in this IRP as *amici curiae*. In its Decision on Phase I, the Panel granted the *Amici*'s requests – subject to modalities set out in that decision – and, to the extent the Claimant wished to maintain its Rule 7 Claim, joined those aspects of the claim over which the Panel found it has jurisdiction to the claims to be decided in Phase II. The *Amici* have since participated in this IRP to the full extent permitted by the Decision on Phase I, as described in earlier sections of this Final Decision.
356. The Panel included in its list of questions to be addressed in post-hearing briefs a request to the Claimant to clarify what remained to be decided in connection with its Rule 7 Claim given the Decision on Phase I and the conduct of the IRP in accordance with that ruling. The Claimant's response is that the Rule 7 Claim remains relevant to justify an award of costs in its favour.
357. As explained in the sections of this Final Decision dealing, respectively, with the designation of the prevailing party and the Claimant's cost claim, there is, in the opinion of the Panel, no basis on which the Claimant could be awarded costs in relation to Phase I or in relation to the outstanding aspects of the Rule 7 Claim. This being so, it is the Panel's opinion that no useful purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision on Phase I, which the Respondent's Board has no doubt reviewed and can act upon, as appropriate. The Panel wishes to make clear that in making this Final Decision, the Panel expresses no view on

the merit of those outstanding aspects of the Rule 7 Claim over which the Panel found that it has jurisdiction, beyond that expressed in paragraph 408 of these reasons.

F. Determining the Proper Relief

358. The remedial authority of IRP Panels is set out in Section 4.3(o) of the Bylaws, which reads as follows:

(o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;

(ii) Request additional written submissions from the Claimant or from other parties;

(iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;

(iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;

(v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

(vi) Determine the timing for each IRP proceeding; and

(vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

[emphasis in the original]

359. Of relevance to situating the remedial authority of IRP Panels in their proper context are the provisions of Section 4.3(x), which it is useful to cite in full:

(x) The IRP is intended as a final, binding arbitration process.

(i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.

(ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN without a *de novo* review of the decision of the IRP Panel or en banc Standing Panel, as applicable, with respect to factual findings or conclusions of law.

(iii) ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.

(A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.

(B) If an IRP Panel decision in a Community IRP is in favor of the EC, the Board shall comply within 30 days of such IRP Panel decision.

(C) If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC may seek enforcement in a court of competent jurisdiction. In the case of the EC, the EC Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.

[italics in the original]

360. The Panel also notes the provisions of Section 4.3(t) which, among others, require each IRP Panel decision to “specifically designate the prevailing party as to each part of a Claim”.
361. In the opinion of the Panel, the Claimant is entitled to a declaration that the Respondent violated its Articles and Bylaws to the extent found by the Panel in the previous sections of this Final Decision, and to being designated the prevailing party in respect of the liability portion of its core claims.
362. As foreshadowed earlier in these reasons, the Panel is firmly of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC’s application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules.
363. The Panel also accepts the Respondent’s submission that it would be improper for the Panel to dictate what should be the consequence of NDC’s violation of the New gTLD Program

Rules, assuming a violation is found. The Panel is mindful of the Claimant’s contention that whatever discretion the Respondent may have is necessarily constrained by the Respondent’s obligation to enforce the New gTLD Program Rules objectively and fairly. Nevertheless, the Respondent does enjoy some discretion in addressing violations of the Guidebook and Auction Rules and it is best that the Respondent first exercises its discretion before it is subject to review by an IRP Panel.

364. In the opinion of the Panel, the foregoing conclusions are consistent with the authority of IRP Panels under Section 4.3 (o) (iii) of the Bylaws, which grants the Panel authority to “declare” whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws.

G. Designating the Prevailing Party

365. Section 4.3(t) of the Bylaws requires the Panel to designate the prevailing party “as to each part of a Claim”.³¹⁶ This designation has relevance, among others, to the Panel’s exercise of its authority under Section 4.3(r) of the Bylaws to shift costs by providing for the “losing party” to pay the administrative costs and/or fees of the “prevailing party” in the event the Panel identifies the losing party’s Claim or defence as frivolous or abusive.³¹⁷
366. The Panel has already determined that the Claimant is entitled to be designated as the prevailing party in relation to the liability portion of its core claims. In the opinion of the Panel, the Claimant should also be designated the prevailing party in relation to its Request for Emergency Interim Relief, insofar as the Respondent eventually agreed to keep .WEB on hold until this IRP is concluded, consistent with the rationale of the Board’s decision of November 2016 to defer consideration of the issues raised in relation to .WEB and the status of NDC’s application, post-DAA, while accountability mechanisms remained

³¹⁶ The equivalent provision in the Interim Procedures, Ex. C-59, Rule 13 b., differs slightly in that it requires the IRP Panel Decision to “specifically designate the prevailing party as to each Claim”.

³¹⁷ See also Section 4.3(e)(ii) of the Bylaws, which requires an IRP Panel to award to ICANN all reasonable fees and costs incurred by ICANN in the IRP in the event it is the prevailing party in a case in which the Claimant failed to participate in good faith in a CEP.

pending.

367. With respect to Phase I of this IRP, the Claimant has argued that the prevailing party remained to be determined depending on the outcome of Phase II.³¹⁸ This is correct in regard to those aspects of the Claimant's Rule 7 Claim that were joined to the Claimant's other claims in Phase II, pursuant to the Panel's Decision on Phase I. However, the Respondent prevailed in Phase I on the question of whether the Panel had jurisdiction over actions or failures to act committed by the IOT and, importantly, on the principle of the *Amici*'s requests to participate in the IRP as *amici curiae*. These requests were both granted, albeit with narrower participation rights than those advocated by the Respondent.³¹⁹ In light of the foregoing, the Panel does not consider that the Claimant can be designated as the prevailing party in respect of Phase I of the IRP.
368. Turning to the requests for relief sought by the Claimant, the Respondent must be designated as the prevailing party in regard to all aspects of the Claimant's requests for relief other than (a) the request for a declaration that ICANN acted inconsistently with its Articles and Bylaws as described, among others, in paragraph 8 of this Final Decision and the *Dispositif*, and (b) the outstanding aspects of the Rule 7 Claim. With regard to the latter, which the Panel has determined have become moot by the participation of the *Amici* in this IRP in accordance with the Panel's Decision on Phase I, the Claimant cannot be designated as the prevailing party either, the matter not having been adjudicated upon. For the reasons set out in next section of this Final Decision, however, the fact that those aspects of the Rule 7 Claim have become moot and are therefore not decided in this Final Decision is without consequence on the Claimant's cost claim in relation to the Rule 7 Claim because, in the opinion of the Panel, it simply cannot be argued that the Respondent's defence to the Rule 7 Claim was frivolous and abusive.

³¹⁸ See *Afilias' Reply Costs Submission*, para. 9.

³¹⁹ See *Decision on Phase I*, paras. 96-97.

VI. COSTS

A. Submissions on Costs

369. In its decision on Phase I, the Panel deferred to Phase II the determination of costs in relation to Phase I of this IRP.³²⁰ The Parties' submissions on costs therefore relate to both phases of the IRP.

1. Claimant's Submissions on Costs

370. The Claimant submitted its cost submissions in a brief separate from, but filed simultaneously with its PHB, on 12 October 2020.³²¹ The Claimant argues that it should be declared the prevailing party on all of its claims in the IRP. Relying on Section 4.3(r) of the Bylaws, the Claimant requests that the Panel shift all of its fees and costs to the Respondent on the ground that the Respondent's defences in the IRP were "frivolous or abusive". In the alternative, the Claimant argues that the Respondent should at least bear all of its costs and fees related to the participation of the *Amici* in the IRP and the Emergency Interim Relief proceedings.

371. The Claimant states that there was no need for this IRP to be as procedurally and substantively complicated as it has been.³²² First, the Claimant avers that the Respondent used the CEP as cover to push through "interim procedures" that would provide the Respondent with a limitations defence. Second, the Claimant argues that the Respondent ought not to have forced the Claimant to seek emergency interim relief to protect against the .WEB contention set being taken off hold. Third, the Claimant blames the Respondent's belated disclosure of the DAA for the need for it to have filed an Amended Request for IRP. Fourth, the Claimant reproaches the Respondent for pressing for the *Amici*'s participation in the IRP, particularly Verisign, which was not even a member of the contention set. Finally, the Claimant contends that the Respondent ought

³²⁰ Decision on Phase I, para. 205(c).

³²¹ The Claimant's Submissions on Costs were corrected on 16 October 2020 apparently due to a technical problem with Afiliast's exhibit management software.

³²² Claimant's Submissions on Costs, paras. 1-2.

not to have hidden its central defence – the Board’s decision of November 2016 – until the filing of its Rejoinder.

372. In the Claimant’s submission, the Respondent’s central defence in this IRP – articulated for the first time on 1 June 2020 and based on an alleged Board decision taken during the November 2016 Workshop – frivolously and abusively sought to immunize the Respondent from any accountability and to render the present IRP an empty shell.³²³ The Claimant argues that it was abusive for the Respondent to center its defence around a decision that had never been made public or disclosed to Afiliis prior to the Respondent’s Rejoinder.³²⁴
373. The Claimant also contends that the Respondent’s defence frivolously and abusively sought to deprive the Claimant of an effective forum. In that regard, the Claimant avers that ICANN’s enactment of the Interim Procedures, weeks before the Claimant filed its IRP, was frivolous and abusive because it allowed the Respondent to advance a time-limitation defence that would otherwise not have been available to it previously and to enable the participation of the *Amici* in the IRP. In the Claimant’s view, the circumstances in which ICANN enacted the Interim Procedures made it clear that they were specifically targeted to undermine the Claimant’s position in the present IRP.³²⁵
374. The Claimant submits that ICANN’s refusal to put .WEB on hold after the filing of the IRP was also frivolous and abusive and needlessly forced the Claimant to pursue a “costly, distracting, and unwarranted Emergency Interim Relief phase”. The Claimant avers that the Respondent’s action was frivolous and abusive because the Respondent later abandoned its refusal to put .WEB on hold – but only after the Claimant had incurred extensive fees and costs on the Request for Emergency Interim Relief.³²⁶
375. The Claimant argues as well that the Respondent must bear its costs and fees associated with the *Amici*’s participation in the IRP. This is so because, in the submission of

³²³ Claimant’s Submissions on Costs, para. 16.

³²⁴ *Ibid*, paras. 12-17.

³²⁵ *Ibid*, paras. 19-25.

³²⁶ *Ibid*, paras. 26-27.

the Claimant, the Respondent abusively included Rule 7 in the Interim Supplementary Procedures in view of the present IRP and then used the *Amici* as surrogates for its defence.

2. Respondent's Submissions on Costs

376. The Respondent's submissions on costs are set out in its PHB dated 12 October 2020.

377. The Respondent takes the position that the Bylaws and Interim Procedures authorize the Panel to shift costs only in the event of a finding that, when viewed in its entirety, a party's case was frivolous or abusive. The Respondent stresses that while this is an uncommonly high standard for international arbitration, it is more permissive than the "American rule" under which legal fees cannot ordinarily be shifted to the non-prevailing party. The Respondent also recalls that, under the Bylaws, it is the Respondent that bears all the administrative costs of maintaining the IRP mechanism, including the fees and expenses of the panelists and the ICDR.³²⁷

378. ICANN states that it does not view the Claimant's case as a whole to be frivolous or abusive, even though, in the Respondent's submission, the Claimant has from time to time employed abusive tactics and taken positions that clearly have no merit. The Respondent therefore does not seek an award for costs.

379. The Respondent argues that the Claimant cannot plausibly contend that ICANN's defence triggers the Panel's authority to allocate legal expenses in favour of the Claimant. For these reasons, ICANN contends that the Parties should bear their own legal expenses.³²⁸

3. Claimant's Reply Submission on Costs

380. In its Reply Costs Submissions dated 23 October 2020, the Claimant argues that the Panel is empowered to shift costs if any part of the Respondent's defence lacked merit or was otherwise improper. In the Claimant's view, the standard for cost shifting must be informed, not by the California Code of Civil Procedure, which is relied upon by

³²⁷ Respondent's PHB, paras. 232-234.

³²⁸ *Ibid*, paras. 235-240.

the Respondent, but by international arbitration norms and ICANN’s obligation to conduct its activities “consistently, neutrally, objectively, and fairly” and “transparently.”³²⁹

381. The Claimant avers that the Respondent’s PHB underscores that its defence has been frivolous and abusive, both in general and in its particulars.³³⁰ The Claimant argues that the three (3) main planks of ICANN’s substantive defence were each frivolous and abusive: the belatedly disclosed Board decision of November 2016,³³¹ the allegedly limited remedial jurisdiction of the Panel,³³² and the time bar defence, based on Rule 4, which was made applicable to this IRP by distorting the Respondent’s rule-making process and violating the “fundamental rule” against retroactivity.³³³ The Claimant also asserts that the Respondent’s alleged reliance on the *Amici* as a defensive tactic allegedly to deflect attention from its own conduct has been frivolous and abusive, “both in conception and execution” in that it was facilitated by improper collaboration with Verisign in the process of adoption of Rule 7, and by using the *Amici* participation as an excuse to avoid answering the Claimant’s claims.³³⁴

382. In light of the foregoing, the Claimant requests that the Panel order the Respondent to pay the Claimant: USD 11,291,997.13 in compensation for the total fees and costs incurred by the Claimant in this IRP; or, in the alternative: USD 2,383,703.11 for the Claimant’s fees and costs incurred in relation to the *Amici* participation; and USD 823,811.88 for the fees and costs incurred in relation to the Emergency Interim Relief phase, along with pre- and post-award interest “at a reasonable rate from the date of this filing”.³³⁵

4. Respondent’s Response Submission on Costs

383. In its 23 October 2020 Response to Afiliias’ Costs Submission, the Respondent contends

³²⁹ Claimant’s Reply Submissions on Costs, paras. 3-4.

³³⁰ *Ibid*, para. 5.

³³¹ *Ibid*, para. 6.

³³² *Ibid*, para. 7.

³³³ *Ibid*, para. 8.

³³⁴ *Ibid*, para. 9.

³³⁵ *Ibid*, paras. 10-11.

that the Claimant's request for an order requiring ICANN to pay all its costs and legal fees should be denied because it is legally and factually baseless. In the Respondent's submission, the Claimant applies an incorrect standard for cost shifting, since Section 4.3(r) of the Bylaws allows the Panel to shift legal expenses and costs only when a party's IRP Claim or defence as a whole is found to be frivolous or abusive.³³⁶ The Respondent further argues that the Claimant's cost-shifting arguments are misplaced and baseless since its arguments in defence were not frivolous or abusive.³³⁷ Finally, the Respondent avers that the Claimant's legal fees and costs are unreasonable as to both their total amount and their allocation as between the subject matters in relation to which separate cost shifting requests are made.³³⁸

384. For those reasons, the Respondent requests that the Claimant's request for an order requiring the Respondent to reimburse its costs and legal fees should be denied in its entirety.³³⁹

B. Analysis Regarding Costs

1. Applicable Provisions

385. The Panel begins its analysis by citing the provisions of the Bylaws and Interim Procedures that are relevant to the Claimant's cost claim.

386. Section 4.3(r) of the Bylaws reads as follows:

(r) ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

³³⁶ Respondent's Reply Submissions on Costs, paras. 4-8.

³³⁷ *Ibid*, paras. 9-24.

³³⁸ *Ibid*, paras. 25-28.

³³⁹ *Ibid*, para. 29.

387. Rule 15 of the Interim Procedures is to the same effect:

15. Costs

The IRP Panel shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

388. As discussed in the previous section of this Final Decision, it is pursuant to the provisions of Section 4.3(t) that the Panel is required to designate the prevailing party "as to each part of a Claim".³⁴⁰

2. Discussion

389. A threshold issue that falls to be determined is whether the Respondent is correct in arguing that costs and legal expenses can only be shifted, pursuant to Section 4.3(r) and Rule 15, if a Claim as a whole, or an IRP defence as a whole, is found by the Panel to be frivolous or abusive. In support of its position, the Respondent relies on the definition of Claim in Section 4.3(d) of the Bylaws, which reads as follows:

(d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "**Claim**") with the IRP Provider (described in Section 4.3(m) below). For the EC to commence an IRP ("**Community IRP**"), the EC shall first comply with the procedures set forth in Section 4.2 of Annex D.

390. Based on this definition, the Respondent submits that "costs and legal expenses may be shifted onto the Claimant only if the Request for IRP as a whole is frivolous or abusive".³⁴¹ By parity of reasoning, the Respondent argues that the same standard must apply to the Panel's authority to shift legal expenses onto ICANN which, so the argument goes, can only be done if ICANN's defence as a whole is found to be frivolous or abusive.

391. The Panel cannot accept the Respondent's proposed interpretation of the Bylaws

³⁴⁰ Rule 13 b. of the Interim Procedures, Ex. C-59, requires the Panel to designate the prevailing party "as to each Claim".

³⁴¹ ICANN's Response to Afiliias' Costs Submission, para. 5.

and Interim Procedures, which the Panel considers to be inconsistent with Section 4.3(t) of the Bylaws and Rule 13 b. of the Interim Procedures, and which would considerably restrict the scope of application of a carve-out that is already very narrow. The Panel's reasons in that respect are as follows.

392. The cost-shifting authority of IRP Panels is contingent upon two (2) findings. First, that the party claiming its costs be the prevailing party; and second, that the IRP Panel identify the losing party's Claim or defence as frivolous or abusive.
393. The Panel's obligation to designate the prevailing party is based on Section 4.3(t), which requires the Panel to make such a designation "as to each part of a Claim". It seems to the Panel that there would be no purpose in designating a prevailing party as to "each part of a Claim" if the Panel were required to consider "a Claim" as an indivisible whole for the purpose of the Panel's cost-shifting authority.
394. The Respondent's argument also fails if consideration is given to the slightly different wording used in Rule 13 b. of the Interim Procedures, which calls for the designation of the prevailing party "as to each Claim".
395. Finally, it would seem that the interpretation of the applicable provisions advocated by the Respondent would be unfair if it mandated that a single, isolated well-founded element of a Claim otherwise manifestly frivolous or abusive would suffice to save a Claimant from a potential cost-shifting order.
396. The better interpretation, one that harmonizes the provisions of Sections 4.3(r) and 4.3(t) of the Bylaws (that are clearly meant to operate in tandem) and reflects the practice of international arbitration, is the interpretation that allows IRP Panels to shift costs in relation to "parts" of the losing party's Claim or defence, which parts are the necessary reflection of the "parts" in respect of which the other party is designated as the prevailing party.
397. Applying the relevant provisions of the Bylaws and Interim Procedures, properly construed, to the facts of this IRP, the only parts of the Claimant's case as to which it has been designated as the prevailing party are the liability portion of its core claims and its Request for Emergency Interim Relief. This being so, those are the only parts of

the Claimant's case as to which the Panel needs to evaluate whether the Respondent's defence was frivolous or abusive.

398. While the Respondent has failed in its defence of the conduct of its Staff and Board in relation to the Claimant's core claims, the Panel cannot accept the Claimant's submission that ICANN's defence of its conduct in relation to these aspects of the case was frivolous or abusive.
399. To state the obvious, not every claim or defence that does not prevail in an IRP will result in an award of costs. The applicable cost shifting rule requires that the claim or defence be found to be frivolous or abusive. This standard binds the Parties as well as the Panel.
400. The Bylaws and Interim Procedures do not define the terms "frivolous" or "abusive". The Respondent has contended that they should be interpreted having regard to their well-established meaning under California law. The Panel agrees with the Claimant that there are good reasons not to seek guidance for the interpretation of those terms in a California statutory standard, which operates in an environment where the default rule is the so-called "American Rule" under which legal fees cannot ordinarily be shifted to the non-prevailing party.
401. In the opinion of the Panel, the terms "frivolous" and "abusive" as used in the Bylaws and Interim Procedures should be given their ordinary meanings. According to the Merriam-Webster Dictionary, "frivolous" means "of little weight or importance", "having no sound basis (as in fact or law)" or "lacking in seriousness".³⁴² According to Black's Law Dictionary, "[a]n answer or plea is called 'frivolous' when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the plaintiff."³⁴³ For its part, the term "abusive" is defined by the Merriam-Webster Dictionary as "characterized by wrong or improper use or action"³⁴⁴, while the term "abuse" is defined in Black's Law

³⁴² Merriam-Webster *s.v.* "frivolous": <https://www.merriam-webster.com/dictionary/frivolous> (consulted on 23 March 2021).

³⁴³ Black's Law Online Dictionary, 2nd ed., *s.v.* "frivolous": <https://thelawdictionary.org/frivolous/> (consulted on 23 March 2021).

³⁴⁴ Merriam-Webster *s.v.* "abusive": <https://www.merriam-webster.com/dictionary/abusive> (consulted on 23 March 2021).

Dictionary as a “misuse of anything”.³⁴⁵

402. In the case of the Claimant’s core claims, the Respondent’s defences consisted in the main of the time limitations defence, and the rejection of the Claimant’s arguments based on the Respondent’s so-called competition mandate and on the asserted manifest incompatibility of the DAA with the provisions of the Guidebook and Auction Rules. The Respondent also raised as a defence the deference owed to its Board’s business judgment when it decided to take no action regarding the .WEB contention set while a related accountability mechanism was pending.
403. The time limitations defence was asserted by the Respondent in circumstances where the validity of Rule 4, unlike that of Rule 7, had not been directly challenged by the Claimant. While the Panel has expressed concern as a matter of principle with the retroactive application of a time limitations rule, the Respondent’s reliance on a rule, the validity of which had not been challenged and that on its face appeared to provide a defence, was not, in the opinion of the Panel, abusive or frivolous.
404. As regards the Respondent’s other defences, the Panel does not accept that it was frivolous or abusive for the Respondent to argue that it was reasonable for its Board to defer consideration of the issues raised with .WEB while accountability mechanisms were pending; that the propriety of the DAA under the New gTLD Program Rules was a debatable issue requiring careful consideration by the Respondent’s Board; or that the Respondent did not have the “competition mandate” contended for by the Claimant. These were all defensible positions and there is no evidence that they were advanced for an improper purpose or in bad faith. While the Respondent did fail in its contention that there was nothing for its Staff or Board to pronounce upon in the absence of a formal accountability mechanism challenging their action or inaction in relation to .WEB, the Respondent’s position in this respect cannot, in the opinion of the Panel, be said to have been frivolous or abusive. Accordingly, the Claimant’s claim for reimbursement of its costs in relation to the liability portion of its core claims must be dismissed.

³⁴⁵ Black’s Law Online Dictionary, 2nd ed., s.v. “abuse”: <https://thelawdictionary.org/abuse/> (consulted on 23 March 2021).

405. The Panel does consider that the Claimant’s cost claim in relation to its Request for Emergency Interim Relief is meritorious. The Claimant was forced to introduce this request as a result of the Respondent’s refusal to keep the .WEB contention set on hold in spite of the Claimant having commenced an IRP upon the termination of its CEP. When this decision was made, the .WEB contention set had already been on hold for more than two (2) years, precisely because accountability mechanisms were pending. The Board’s decision to defer consideration of the questions raised in relation to .WEB in November 2016 was likewise based on the fact that accountability mechanisms were pending. This is how the Claimant describes the sequence of events in its Request for Emergency Interim Relief:

13. On 13 November 2018, Afilias and ICANN participated in a final CEP meeting, following which ICANN terminated the CEP. On 14 November 2018, Afilias filed its Request for IRP. Hours later, ICANN responded by informing Afilias that it intended to take the .WEB contention set “off hold” on 27 November 2018 even though Afilias had commenced an ICANN accountability procedure that follows-on from a failed CEP.³⁰ ICANN provided Afilias with no explanation justifying its decision.

14. On 20 November 2018, Afilias wrote to ICANN about its decision to proceed with the delegation of .WEB despite Afilias’ commencement of the IRP.³¹ In its letter, Afilias questioned ICANN’s motives for removing the hold on .WEB, given that ICANN had voluntarily delayed the delegation of .WEB for several years and the lack of any apparent harm to ICANN if the .WEB contention set were to remain on hold for the duration of the IRP. Afilias requested an explanation justifying what appeared to be rash and arbitrary conduct by ICANN in proceeding with delegation of .WEB at this time, as well as the production of relevant documents. Afilias wrote to ICANN again on 24 November 2018 requesting a response to its 20 November 2018 letter.

15. ICANN did not respond to Afilias’ letter until after 9:00 pm EDT on 26 November 2018—quite literally the eve of the deadline that ICANN previously set for Afilias to submit this Interim Request to prevent ICANN from taking the .WEB contention set “off hold.”³² ICANN noted in its response that ICANN’s practice is to remove the hold on contention sets following CEP, notwithstanding the pendency of an IRP and despite the unanimous criticism of this practice in previous IRPs. ICANN also rejected Afilias’ request to produce documents related to its dealings with NDC and VeriSign about .WEB. Instead, ICANN inexplicably offered to keep the .WEB contention set “on hold” for another two weeks, until 11 December 2018, something that Afilias had not requested and that did not remotely address any of the concerns Afilias had raised.³³

16. It is because of ICANN’s unreasonable conduct and refusal to act in a transparent manner—as required by its Articles and Bylaws—that Afilias has been forced to file, at significant cost and expense, this Interim Request.

³⁰ Email from Independent Review (ICANN) to A. Ali and R. Wong (Counsel for Afilias) (14 Nov. 2018), [Ex. C-64], p. 1.

³¹ Letter from A. Ali (Counsel for Afilias) to Independent Review (ICANN) (20 Nov. 2018), [Ex. C-65].

³² Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afiliias) (26 Nov. 2018), [Ex. C-66].

³³ Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afiliias) (26 Nov. 2018), [Ex. C-66], p. 1.

406. Having forced the Claimant to initiate emergency interim relief proceedings, the Respondent eventually changed course and agreed to keep .WEB on hold until the conclusion of this IRP.
407. In the opinion of the Panel, the Respondent's requirement, as part of its defence strategy, that the Claimant introduce a Request for Emergency Interim Relief at the outset of the IRP, failing which the Respondent would lift the "on hold" status of the .WEB contention set, was "abusive" within the meaning of the cost shifting provisions of the Bylaws and Interim Procedures, all the more so in light of the Respondent's subsequent decision to agree to keep the .WEB contention set on hold until the conclusion of this IRP. In the opinion of the Panel, this conduct on the part of the Respondent was unjustified and obliged the Claimant to incur wasted costs that it would be unfair for the Claimant to have to bear.
408. The Claimant has claimed in relation to its Request for Emergency Interim Relief an amount of USD 823,811.88. This is said to represent 50% of the Claimant legal fees from 14 November 2018 to 10 December 2018; 33% of the Claimant's total fees from 11 December 2018 through 31 March 2019; and 50% of its fees from 1 April 2019 through 14 May 2019.
409. The Respondent has challenged the reasonableness of the fees claimed by the Claimant in relation to its Request for Emergency Interim Relief, pointing out that it entailed the preparation and presentation of the request, one supporting brief, and requests for production of documents which were resolved by 12 December 2018.³⁴⁶ As noted in the History of the Proceedings' section of this Final Decision, the Parties asked the Emergency Panelist to postpone further activity in January 2019.

³⁴⁶ See ICANN's Response to Afiliias' costs Submission, para. 28.

410. The Panel has difficulty accepting that such a significant amount of fees as that claimed by the Claimant in regard to the Request for Emergency Interim Relief can reasonably be attributed to the preparation of this request and the subsequent proceedings before the Emergency Panelist. Exercising its discretion in relation to the fixing of the legal expenses reasonably incurred that may be ordered to be reimbursed pursuant to a cost-shifting decision, the Panel reduces the Claimant's claim on account of the Request for Emergency Interim Relief to USD 450,000, inclusive of pre-award interest.
411. This leaves for consideration the Claimant's cost claim in relation to the outstanding aspects of the Rule 7 Claim which, pursuant to the Panel's Decision on Phase I, were joined to the Claimant's other claims in Phase II, a cost claim that the Panel takes to have been subsumed in the Claimant's global cost claim in relation to the *Amici* participation. In the opinion of the Panel, it suffices to read the Panel's Decision on Phase I to conclude that it cannot seriously be argued that the Respondent's defence to the Rule 7 Claim was frivolous and abusive. It follows from this assessment of the Respondent's defence that the fact that those aspects of the Rule 7 Claim have been found by the Panel to have become moot and are therefore not decided in this Final Decision is without consequence on the Claimant's cost claim in relation to the Rule 7 Claim. In other words, the Panel has sufficient familiarity with the Parties' respective positions on the merits of the outstanding aspects of the Rule 7 Claim to know, and hereby to determine, that regardless of the outcome, the Panel would not have accepted the submission that the Respondent's defence to this claim was frivolous and abusive.
412. The ICDR has informed the Panel that the administrative fees of the ICDR and the fees and expenses of the Panelists, the Emergency Panelist, and the Procedures Officer in this IRP total USD 1,198,493.88. The ICDR has further advised that the Claimant has advanced, as part of its share of these non-party costs of the IRP, an amount of USD 479,458.27. In accordance with the general rule set out in Section 4.3(r) of the Bylaws, the Claimant is entitled to be reimbursed by the Respondent the share of the non-party costs of the IRP that it has incurred, in the amount of USD 479,458.27.

VII. *DISPOSITIF*

413. For the reasons set out in this Final Decision, the Panel unanimously decides as follows:

1. **Declares** that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the ICANN Board on 9 August 2016, and filed on 3 October 2016 (**Articles**), and its *Bylaws for Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**), by (a) its staff (**Staff**) failing to pronounce on the question of whether the Domain Acquisition Agreement entered into between Nu DotCo, LLC (**NDC**) and Verisign Inc. (**Verisign**) on 25 August 2015, as amended and supplemented by the “Confirmation of Understanding” executed by these same parties on 26 July 2016 (**DAA**), complied with the New gTLD Program Rules following the Claimant’s complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken “off hold”; and (b) its Board, having deferred consideration of the Claimant’s complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not pronounce on them out of respect for, and in order to give priority to the Board’s expertise and the discretion afforded to it in the management of the New gTLD Program;
2. **Declares** that in so doing, the Respondent violated its commitment to make decisions by applying documented policies objectively and fairly;
3. **Declares** that in preparing and issuing its questionnaire of 16 September 2016 (**Questionnaire**), and in failing to communicate to the Claimant the decision made by the Board on 3 November 2016, the Respondent has violated its commitment to operate in an open and transparent manner and consistent with procedures to ensure

fairness;

4. **Grants** in part the Claimant's Request for Emergency Interim Relief dated 27 November 2018, and directs the Respondent to stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent has considered the present Final Decision;
5. **Recommends** that the Respondent stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent's Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified;
6. **Designates** the Claimant as the prevailing party in relation to the above declarations, decisions, findings, and recommendations, which relate to the liability portion of the Claimant's core claims and the Claimant's Request for Emergency Interim Relief dated 27 November 2018;
7. **Dismisses** the Claimant's other requests for relief in connection with its core claims and, in particular, the Claimant's request that that the Respondent be ordered by the Panel to disqualify NDC's bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant, all of which are premature pending consideration by the Respondent of the questions set out above in sub-paragraph 410 (5);
8. **Designates** the Respondent as the prevailing party in respect of the matters set out in the immediately preceding paragraph;
9. **Determines** that the outstanding aspects of the Rule 7 Claim that were joined to the Claimant's other claims in Phase II have become moot by the participation of

the *Amici* in this IRP in accordance with the Panel's Decision on Phase I and, for that reason, decides that no useful purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision of Phase I;

10. **Fixes** the total costs of this IRP, consisting of the administrative fees of the ICDR, and the fees and expenses of the Panelists, the Emergency Panelist, and the Procedures Officer at USD 1,198,493.88, and in accordance with the general rule set out in Section 4.3(r) of the Bylaws, **declares** that the Respondent shall reimburse the Claimant the full amount of the share of these costs that the Claimant has advanced, in the amount of USD 479,458.27;
11. **Finds** that the Respondent's requirement, as part of its defence strategy, that the Claimant introduce a Request for Emergency Interim Relief at the outset of the IRP, failing which the Respondent would lift the "on hold" status of the .WEB contention set, was abusive within the meaning of the cost shifting provisions of the Bylaws and Interim Procedures in light of the Respondent's subsequent decision to agree to keep the .WEB contention set on hold until the conclusion of this IRP; and, as a consequence of this finding,
12. **Grants** the Claimant's request that the Panel shift liability for the Claimant's legal fees in connection with its Request for Emergency Interim Relief, **fixes** at USD 450,000, inclusive of pre-award interest, the amount of the legal fees to be reimbursed to the Claimant on account of the Emergency Interim Relief proceedings, and **orders** the Respondent to pay this amount to the Claimant within thirty (30) days of the date of notification of this Final Decision, after which 30 day-period this amount shall bear interest at the rate of 10% *per annum*;
13. **Dismisses** the Claimant's other requests for the shifting of its legal fees in connection with this IRP;
14. **Dismisses** all of the Parties' other claims and requests for relief.

414. This Final Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

(s) Catherine Kessedjian

(s) Richard Chernick

Catherine Kessedjian

Richard Chernick

(s) Pierre Bienvenu

Pierre Bienvenu, Ad. E., Chair

Dated: 20 May 2021

EXHIBIT C-2

Redacted - Third Party Designated Confidential Information

EXHIBIT C-3



**AUCTION RULES FOR
NEW gTLDs:
INDIRECT CONTENTIONS EDITION
VERSION 2015-02-24**

PREPARED FOR ICANN

BY POWER AUCTIONS LLC



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Auction Rules for New gTLDs: Indirect Contentions Edition

1. This document (“Auction Rules”) sets out the auction rules for resolving string contention among applicants for new gTLDs by the Internet Corporation for Assigned Names and Numbers (“ICANN”), for Contention Sets containing one or more Indirect Contention relationships.
2. Auctions for resolving string contention among applicants for new gTLDs will occur in a series of auction events. In each auction event (“Auction”), bidding will occur for one or more Contention Sets. If bidding occurs for at least two Contention Sets within an Auction, the bidding will occur simultaneously.
3. ICANN will be assisted in the implementation of these Auctions by its independent auction consultant, Power Auctions LLC (the “Auction Manager”).

Definitions and Interpretation

4. The definitions are set out in the Glossary at the end of the Auction Rules. The majority of the terms are explained in the body of the Auction Rules. Terms used but not otherwise defined herein shall have the meanings ascribed to them in the gTLD Applicant Guidebook (the “Applicant Guidebook”) or the “Bidder Agreement” (defined below). In the event of any inconsistency between the Bidder Agreement and the Applicant Guidebook or the Auction Rules, the Bidder Agreement shall prevail.
5. All prices in the Auction are expressed in whole numbers of United States dollars (\$US).
6. All references to time, unless otherwise stated, are to time defined under the UTC time standard.
7. Text boxes containing additional explanations and examples have been included in this document to assist applicants. The contents of these text boxes are not formally part of the Auction Rules.

 *Text boxes like these contain additional explanation and examples.*

Participation in the Auction

8. Prior to the scheduling of an Auction, an Intent to Auction notice will be provided to all members of an eligible Contention Set via the ICANN Customer Portal. To be eligible to receive an Intent to Auction notice from ICANN, requirements a-d below must be met:

All active applications in the Contention Set have:

- a) Passed evaluation
- b) Resolved any applicable GAC advice
- c) Resolved any objections

d) No pending ICANN Accountability Mechanisms

ICANN intends to initiate the Auction process once the composition of the contention set has stabilized. ICANN reserves the right not to send Intent to Auction notices and/or to postpone a scheduled Auction if a change request by one or more applicants in the Contention Set is pending, but believes that in most instances the Auction should be able to proceed without further delay.

9. [Reserved for future use.]
10. After an applicant receives the Intent to Auction notice from ICANN pursuant to the eligibility requirements described in clause 8, if each and every member of the Contention Set submits a postponement request through the ICANN Customer Portal, ICANN at its sole discretion may postpone the Auction for that Contention Set to a future date. Postponement requests must be submitted by all members of the Contention Set by the due date specified within the ICANN Customer Portal, generally twenty eight (28) days after receipt of Intent to Auction notice from ICANN. If a postponement request is not submitted by the due date specified within the ICANN Customer Portal or is not accommodated by ICANN, an applicant may request an advancement/postponement request via submission of the Auction Date Advancement/Postponement Request Form. The form must be submitted at least 45 days prior to the scheduled Auction Date and ICANN must receive a request from each member of the contention set. Without limiting the foregoing, ICANN reserves the right at its sole discretion to postpone the Auction for any Contention Set to a future date regardless of whether each and every member of the Contention Set has submitted a postponement request.
11. Eligible Contention Sets containing one or more Indirect Contention relationships, pursuant to clauses 8 -10, will generally be notified of ICANN's Intent to Auction the contention set priority order. ICANN in its sole discretion will determine the scheduling of each Auction.

It is anticipated that Auctions for Contention Sets containing one or more Indirect Contention relationships will be scheduled in separate Auction events from Contention Sets involving Direct Contention relationships only. Each Auction event will include only one or two Contention Sets with Indirect Contention relationships. The scheduling may not necessarily be based upon the priority order of these Contention Sets, but may be based on operational issues relating to the conduct of the Auctions, including the complexity of a given Contention Set.

12. Before an Auction, each Qualified Applicant may designate a party to bid on its behalf ("Designated Bidder"). Each Qualified Applicant or its Designated Bidder must execute a Bidder Agreement with the Auction Manager. The Bidder Agreement must be signed and returned to ICANN by the deadline specified in the Intent to Auction notice. A Qualified Applicant or its Designated Bidder, after executing a Bidder Agreement with Auction Manager, will henceforth be referred to as a "Bidder". Participation in an Auction is limited to Bidders. Failure to execute a Bidder Agreement by the deadline specified in the Intent to Auction notice and to submit a Deposit which is received into the Auction Bank Account by the Deposit Deadline may result in the inability to participate in the Auction

for the Contention Set, which will result in the rejection of the Qualified Applicant's application for the Contention String and the Contention String not being assigned or delegated to the relevant Qualified Applicant.

13. Before each Auction, each Bidder shall nominate up to two people ("Authorized Individuals") to bid on its behalf in the Auction.

✍ Training materials will be made available to Authorized Individuals in advance of each Auction. In addition, Authorized Individuals will be invited and encouraged to participate in a mock auction, which will be conducted on the Auction Site prior to the live Auction.

14. The first time in each Auction that an Authorized Individual accesses the Auction Site, he/she will be required to confirm acceptance of the Bidder Agreement and the Auction Rules.
15. All actions of Authorized Individuals on the Auction Site will be attributed to the Bidder that nominated the Authorized Individual to bid on its behalf.

Auction Process

16. Bidding will take place online at the Auction Site. Authorized Individuals will be given the web address of the Auction Site and will be provided with individual user names and passwords in order to access it. Authorized Individuals shall be obligated to keep this information confidential. The public will not have any access to the Auction Site.
17. Each Auction will take place in a number of Rounds, using an auction format known as an ascending clock auction. Each Round of an Auction will have a Starting Time and an Ending Time designated by the Auction Manager. There will be a Recess after each Round. Bids will be submitted between the Starting Time and Ending Time of the Round, subject to clause 39, and the results of the Round will be posted during the Recess after the Round.
18. These Auction Rules set out the rules for Contention Sets containing one or more Indirect Contention relationships. The changes introduced into the current document are not applicable to the substantial majority of Auctions, in which there are Direct Contention relationships only.

Auction Information and Scheduling

19. Prior to the Commencement Date of the Auction, ICANN or the Auction Manager will inform Bidders of relevant information relating to the Auction, including:
 - (a) The Contention Set or Sets that will be the subject of the Auction;
 - (b) confirmation of the Commencement Date; and
 - (c) the Starting Time, Ending Time and duration of Round 1.
20. The first Round of an Auction will start on the Commencement Date and last 30 minutes, the recess after the first Round will last 20 minutes, and all subsequent Rounds and recesses will last 20 minutes

each. The Auction Manager may open Round 1 for Early Bidding, a time period prior to the standard 30 minutes of bidding for Round 1 of a duration designated by the Auction Manager. A Bid submitted during Early Bidding has the same effect as a Bid submitted during the standard 30 minutes of Round 1. All Contention Sets within a single Auction event will follow the same Auction Schedule. The Auction Manager may lengthen the Round or Recess timescales on an ad hoc basis at its sole discretion. The Auction Manager may also shorten the Round or Recess timescales on an ad hoc basis, but only with the electronic written consent of all remaining participants in an Auction.

21. The Auction Site will contain a schedule showing the indicative times for each Round and each Recess (the "Auction Schedule"). The Auction Schedule will be updated as necessary during the course of the Auction. When applicable, the Early Bidding Starting Time will be announced by the Auction Manager.

✍ The Auction Manager intends to provide Early Bidding for most Auction events. Early bidding will provide an additional period of time prior to the standard bidding time allotted in Round 1 to accommodate Bidders in various time zones who may prefer to submit a Proxy Bid. The Auction Manager generally intends to open Early Bidding approximately 8 hours prior to the start of Round 1. The opening for early bidding may take place on the day prior to the official Commencement Date of the Auction. ICANN or the Auction Manager will communicate the opening of Round 1 to Bidders, pursuant to clause 19.

It should be noted, the Auction Manager does not intend to provide live customer support throughout the Early Bidding period. Live customer support will begin approximately 1 hour prior to the start of Round 1.

Auction Bank Account and Deposits

22. In advance of an Auction, each Bidder will receive wire instructions for an Auction Bank Account, which will be established for auction purposes by ICANN and Power Auctions LLC at a major US commercial bank. The funds in the Auction Bank Account will be held in escrow and segregated on a Bidder-by-Bidder basis.
23. All Deposits to the Auction Bank Account must be made by bank wire. All bank wires to the Auction Bank Account must be denominated in \$US. All bank wires to the Auction Bank Account must clearly identify the relevant Bidder and the relevant Contention Set. All Deposits to the Auction Bank Account and all payments of the net balance of the aggregate Winning Prices to the Auction Bank Account must be net of all taxes, tariffs and duties of any kind and all wire and service fees, all of which are the sole responsibility of the Bidder.
24. All bank wires to the Auction Bank Account must be made from a bank account owned by the Bidder. If the Qualified Applicant is an entity that does not own a bank account, it is required to designate a Designated Bidder that owns a bank account. All refunds from the Auction Bank Account will be made only to the same bank account from which the associated deposit was made, except for exceptional circumstances and at the sole discretion of the Auction Manager.

Bidding Limits

25. Each Bidder will be assigned a Bidding Limit applicable to a Contention Set within an Auction based on the amount of the Deposit, net of any bank fees, submitted by the Bidder for such Contention Set.
26. The Bidding Limit will be determined by the amount of the Deposit applicable to the Contention Set received from the Bidder. If the Deposit is less than \$2,000,000, the Bidding Limit will be set at ten (10) times the Deposit. If the Deposit is \$2,000,000 or greater, the Bidding Limit will be deemed to be "Unlimited".
27. If a Bidder is eligible to bid for more than one Application within an Auction, the Bidder will be assigned a separate Bidding Limit for each such Application, and the Bidding Limits will be non-transferable among Applications. If any wire to the Auction Bank Account is intended to provide Deposits for more than one Application, the Bidder must provide clear instructions in a specified form to the Auction Manager as to the allocation of Deposits among the Applications.
28. All wires and all instructions associated with Deposits, including instructions regarding the allocation of funds among Contention Sets from wires and funds rolled over from previous Auctions, must be received no later than 16:00 UTC on the day that is seven (7) calendar days prior to the Commencement Date of the relevant Auction (the "Deposit Deadline"), unless this deadline is waived, at the Auction Manager's sole discretion.

Participation in an Auction

29. To place Bids on an Application within an Auction, a Bidder must submit a Deposit and thereby establish a positive Bidding Limit pursuant to clauses 25 – 28. In the event that no Qualified Applicant in a given Contention Set submits a Deposit by the Deposit Deadline, ICANN reserves the right to reject all Applications subject to the Contention Set and not delegate any of the Contention Strings.
30. A Bidder who has submitted a Deposit for an Application in a Contention Set is required to participate in the Auction for the Contention Set unless the Bidder sends ICANN and the Auction Manager written notice that it has withdrawn from the Auction for the Contention Set. Such notification must be received by ICANN and the Auction Manager no later than the Deposit Deadline. In the absence of written notification or non-participation in the Auction, a default bid of one dollar (\$1), pursuant to clauses 31 and 42, will be entered automatically on the Bidder's behalf.

Bidding

31. For each Round and for each Open Contention Set, a Start-of-Round Price and an End-of-Round Price will be announced to Bidders for the Contention Set. The Start-of-Round Price for each Contention Set in Round 1 will be one dollar (\$1). The Start-of-Round and End-of-Round Prices will increase as the Auction progresses, pursuant to clauses 44(d), 45 and 48.
32. A Bid represents a price, which a Bidder is willing to pay to resolve string contention within a Contention Set in favor of its Application.
33. There are two types of Bids:

- (a) *Continue Bids*: A Continue Bid is a Bid for an Application at the End-of-Round Price for the relevant Contention Set (or a Proxy Bid at a specified greater price, see clauses 37 and 38 for further explanation of Proxy Bids); and
- (b) *Exit Bids*: An Exit Bid is a Bid for an Application at a specified price, which is less than the End-of-Round Price but at least the amount of the previous Bid for the Application (or \$1 in Round 1).

The Auction Site will include a link to make it very easy to submit a Continue Bid. Clicking on this link will generate a bid at the End-of-Round Price. Bids may also be typed at other allowable prices.

34. After each Round of the Auction, it is determined whether each Application that was eligible for bidding in the Round is Enduring, by sequentially applying conditions 34(a), 34(b) and 34(c) below. Only Enduring Applications may force the Auction to go to a next Round:

- (a) An Application that was eligible for bidding in the Round and received a Continue Bid is deemed to be Enduring;
- (b) An Application that was eligible for bidding in the Round is deemed not to be Enduring if an Exit Bid was received for this Application and if a higher Bid has been received for another Application that was Positioned the Same or Better than this Application; and
- (c) Under the assumption that conditions (a) and (b) are not satisfied: An Application that was eligible for bidding in the Round is deemed to be Enduring *if and only if* an Exit Bid was received for this Application, but this Application was part of a Feasible Set of Applications eligible for bidding in the Round whose Bids summed to at least the End-of-Round Price of the Round.

The purpose of the bidding restriction in clause 34 is to prevent "bid sniping": a Bidder is not permitted to wait until the very end of the Auction to bid. Instead, the Bidder is required to bid sufficiently much for its Application in each and every Round (or to place a Proxy Bid that has the same effect).

A Continue Bid guarantees that the Bidder's Application will not be eliminated from the Open Contention Set in the then current Round. By contrast, an Exit Bid may result in the Application being eliminated from the Auction or remaining in the Auction, in accordance with conditions (b) and (c), respectively.

35. After the processing of Round n ($n \geq 1$) pursuant to clause 34:

- (a) The Auction proceeds to Round $n + 1$ *if and only if* there remain two or more Enduring Applications that are in a Direct Contention relationship with one another—see clauses 44 and 46 below; and

- (b) Any Enduring Application that is no longer in a Direct Contention relationship with any other Enduring Application will be deemed to be a Winning Application, and will be removed from the list of Enduring Applications. Any Winning Application will no longer be treated as part of the Auction beginning in Round $n + 1$, if applicable; and
 - (c) Any Enduring Application that is in a Direct Contention relationship with another Enduring Application will be eligible for bidding in Round $n + 1$,
36. Bids may only be submitted during a Round (i.e. between the Starting Time and the Ending Time). During a Round, a Bidder may edit or cancel its Bids as often as desired, subject to the conditions set out in these Auction Rules. The valid Bids residing on the Auction Site at the Ending Time of the Round are binding on the respective Bidders and may not be amended or removed except pursuant to clause 39.
37. The End-of-Round Price for a Round is only the minimum price for a Continue Bid. Subject to limitations in clause 40, Continue Bids may be placed at prices higher than the End-of-Round Price. These are often referred to as Proxy Bids.
38. A Proxy Bid submitted by a Bidder in a prior Round, will be treated the same as a Bid that has been placed in the current Round, subject to clauses 34 and 35. It will be treated as an Exit Bid if its price is less than the relevant End-of-Round Price of the current Round, or otherwise as a Continue Bid.

The Proxy Bid capability makes it possible to submit a Bid in Round 1 and to take no further active part in the auction. In other words, it is not necessary to bid in real time in each Round. Proxy Bids submitted in a given Round will be processed by the auction software in each subsequent Round in exactly the same way as equivalent bids submitted during the Round. A Proxy Bid entered in one Round may also be amended during a subsequent Round, so long as the price was sufficiently large to keep the Bidder in the Auction until the subsequent Round.

39. In the event that an Authorized Individual loses access to the Internet or is otherwise unable to place a Bid, the Auction Manager, at its sole discretion, may permit the submission of Bids by alternative means, generally by fax. The Auction Manager will provide forms for any submissions by fax. All such submissions by alternative means must be validated by an Authorized Individual. Any Authorized Individual who submits Bids by alternative means shall be deemed to have confirmed acceptance of the Bidder Agreement and the Auction Rules as if he or she had accepted them on the Auction Site pursuant to clause 14.

Validity of Bids

40. In order to be valid, a Bid must satisfy each and all of the following conditions:
- (a) the Bid must have been submitted no earlier than the Starting Time of the relevant Round and no later than the Ending Time of the relevant Round, with the exception of Bids permitted by the Auction Manager pursuant to clause 39;
 - (b) the Bid must be placed by a Bidder for its Application in an Open Contention Set;

- (c) in Round 2 or later, the Bid must be placed by a Bidder for an Application that is deemed to be eligible for bidding pursuant to clause 35;
 - (d) the price of the Bid must be a whole number of \$US that is not less than the Bid of the previous Round (or \$1 in the first Round); and
 - (e) the price of the Bid must not exceed the Bidding Limit assigned to the Bidder for the Contention Set—this clause will not place any constraint if the Bidding Limit is “Unlimited”.
41. The Auction Site will enforce the conditions of clause 40 on Bid submissions.
42. If a Bidder who is eligible to bid for a Contention Set in a given Round does not submit a valid Bid during the Round and is unable to correct this omission pursuant to clause 39, then a Bid equal to the amount of the Bid of the previous Round (or \$1 in the first Round) will be entered automatically on the Bidder’s behalf.

Processing of Bids after a Round

43. During the Recess after each Round, the Auction Manager will process the Bids for each Open Contention Set and post the following results on the Auction Site to Bidders for the Contention Set:
- (a) the Number of Applications remaining eligible for bidding in the next Round , i.e., the Number of Enduring Applications, and the number of Enduring Applications that received Continue Bids in the Round (“Aggregate Demand”), but not the identities of the Enduring Applications or the Applications that received Continue Bids; and
 - (b) Start-of-Round Price and an End-of-Round Price for the next round of the Auction.
44. An Open Contention Set will remain Open in the next Round if there remain two or more Enduring Applications that are in a Direct Contention relationship with one another. In this event:
- (a) the number of Enduring Applications and the Aggregate Demand (but not the identities of the Enduring Applications or the Applications that received Continue Bids), will be posted to Bidders for the Contention Set;
 - (b) if any Application is eliminated after a Round, thereby causing another Application to be deemed a Winning Application pursuant to clause 35(b), or, if any Application is eliminated, thereby causing the Contention Set to divide into two or more disjoint subsets, this information (including the position of the eliminated Application in the Contention Set, as well as the Winning Application’s identity) will be communicated to Bidders for the Contention Set;
 - (c) the next Round’s Start-of-Round Price for the Contention Set, equal to the current Round’s End-of-Round Price, will be announced to Bidders for the Contention Set; and
 - (d) the next Round’s End-of-Round Price for the Contention Set, strictly greater than the current Round’s End-of-Round Price, will be announced to Bidders for the Contention Set.
45. The price increment used to obtain the End-of-Round Price in clause 44(d) will be set by the Auction Manager taking into account Aggregate Demand for the Contention Set and other information

relevant to the likely level of prices for the Contention Set, but the actual level of increment that is selected will be at the Auction Manager's sole discretion.

✍ Aggregate Demand is defined as the number of Continue Bids for Applications received in a Round, aggregated over all Applications that remained eligible for bidding in the Contention Set after a Round. It does not attempt to describe commercial demand for the gTLD.

46. An Open Contention Set will close after a Round if there do not remain two or more Enduring Applications that are in a Direct Contention relationship with one another. In this event:
- (a) The Auction Manager will select the Feasible Set of Applications for which the sum of the associated Bids is maximized.
 - (b) In the event that the maximization problem of clause (a) has a unique solution, the Applications in the selected Feasible Set will be deemed to be Winning Applications; and
 - (c) the Bidder(s) associated with Winning Applications will be deemed the Winner(s) of the Contention Set.
47. The Winning Prices will be determined by "second-price principles," specified as follows:
- (a) The sum of the Winning Prices associated with a set of Winning Applications shall not be less than the sum of the Bids for a non-winning set of Applications, evaluated in the Round in which the set of Winning Applications caused the non-winning set of Applications to be eliminated from the Auction.
 - (b) In applying clause (a), to the extent that the Bids of non-winning Applications need to be allocated among two or more Winning Applications, they shall be allocated proportionally. For example, suppose that Applications A and C together eliminate Application B in Round 3, and suppose that the Bids for these Applications in Round 3 are p_A , p_C and p_B , respectively. Then we require:
 - The Winning Price of Application A is not less than $\left(\frac{p_A}{p_A+p_C}\right)p_B$; and
 - The Winning Price of Application C is not less than $\left(\frac{p_C}{p_A+p_C}\right)p_B$.
 - (c) For the avoidance of doubt, the Bid amounts used in the calculation of clause (b) shall be the Bid amounts in the Round in which the Winning Applications caused the non-winning Applications to be eliminated.
 - (d) In particular, the Winning Price associated with a Winning Application shall not be less than any Bid, submitted in any Round of the Auction, for any other Application that is Positioned the Same or Better than the Winning Application.
 - (e) If applying these second-price principles generates two or more constraints on the Winning Price of a Winning Application, then each and every one of these constraints is required to

be satisfied. For example, if these rules determine that the Winning Price shall be not less than X and that the Winning Price shall not be less than Y, then the Winning Price shall not be less than the maximum of X and Y.

- (f) Similarly, in the event that a non-winning set of Applications can be eliminated by a set that includes either of two Enduring Applications, then the constraints generated on Winning Prices are required to hold in relation to each choice of these Enduring Applications, including the Enduring Application whose Bid is the minimum.
 - (g) In no event will the Winning Price for a Winning Application exceed the highest Bid submitted for the Winning Application. Additionally, in no event will the Winning Price for a Winning Application be less than \$1.
 - (h) The fact that the Contention Set has Closed, and the amounts of the Winning Prices, will be announced to all Bidders for the Contention Set when the Contention Set Closes.
 - (i) Greater detail on applying the second-price principles is provided in the paper, "Auction Design for Indirect Contentions."
 - (j) If ICANN or the Auction Manager feels there is any ambiguity in applying the second-price principles to a Contention Set, ICANN and the Auction Manager may issue an Addendum giving more detailed examples for the Contention Set. Such Addendum, if issued, will be provided to Bidders prior to the Deposit Deadline for the Contention Set and will be deemed to provide the definitive interpretation of the pricing rules for the Contention Set.
48. In the event that that the maximization problem of clause 46(a) has two or more solutions (i.e. there is a tie), the Contention Set will enter a single Tie-Breaking Round, which will be conducted as follows:
- (a) only those Bidders whose Exit Bids for the Contention Set were part of the tie are eligible to bid in the Tie-Breaking Round;
 - (b) the price of the Bid must be a whole number of \$US that is not less than the Bidder's previous Bid amount; and
 - (c) the price of the Bid must not exceed the Bidding Limit assigned to the Bidder for the Contention Set by more than \$50,000—this clause will not place any constraint if the Bidding Limit is "Unlimited".
49. If a Bidder who is eligible to bid in a Tie-Breaking Round does not submit a valid Bid during the Round and is unable to correct this omission pursuant to clause 39, then a Bid at the Bidder's previous Bid amount will be entered automatically on the Bidder's behalf.
50. The solution to the maximization problem of clause 46(a), as solved using the Bids from the Tie-Breaking Round including automatic bids entered pursuant to clause 49, shall determine the Winning Applications after the Tie-Breaking Round, if applicable. The Winning Prices shall be determined by applying clause 47 to the full set of Bids, including the Bids from the Tie-Breaking Round. In the event that there is a tie for Winner of the Tie-Breaking Round, the tie will be broken by means of a quasi-random number generator accessed by the Auction Site.

✍ The probability of ties can be reduced by utilizing the full richness of allowable prices, rather than bidding round numbers. For example, instead of placing a Bid at \$250,000, consider placing a Bid at \$250,017.

The use of quasi-random numbers to break ties is a well-established practice in spectrum auctions organized by various national telecommunications regulators around the world.

Conclusion of the Auction

51. The Auction concludes when every Contention Set in the Auction has Closed.
52. After a Contention Set has Closed, the Winning Bidder will be informed that it has won and will be informed of the Winning Price. All other Bidders for the Contention Set will be informed of the Winning Price only.
53. After the Auction has concluded, the Auction Manager will provide a complete, confidential report about the Auction to ICANN.
54. After receiving the Auction Manager's report, ICANN will make the following information publicly available on its website within seven (7) Calendar Days:
 - (a) the Start-of-Round and End-of-Round Prices of each Round, for each Contention Set;
 - (b) the number of Enduring Applications and the Aggregate Demand for each Round (except the final Round) for each Contention Set (but not the identities of the participants in each Round);
 - (c) the additional information, if any, implied by clause 44(b);
 - (d) the Winning Price for each Winning Application; and
 - (e) the identity of each Winning Application.

Payments, Defaults and Penalties

55. If a Bidder has one or more Winning Applications in the Auction, each Deposit will be applied to the respective Winning Application and any unused part of its aggregate Deposit for the Auction will be automatically applied toward payment of its aggregate Winning Prices. To the extent the aggregate Deposit exceeds the aggregate Winning Prices and any penalties, if applicable, the Bidder will be entitled to a refund.
56. The Winner of any Contention Set is required to pay the net balance of the aggregate Winning Prices by bank wire to the Auction Bank Account. Payment must be received within twenty (20) Business Days of the Close of the Auction for the Contention Set. In the event that a Bidder anticipates that it would require a longer payment period than twenty (20) Business Days due to verifiable government-imposed currency restrictions, the Bidder may advise Auction Manager well in advance of the Auction and Auction Manager will consider applying a longer payment period to all Bidders within the same Contention Set.

57. Any Winner from whom the net balance owed of the Winning Price(s) is not received within twenty (20) Business Days of the Close of the Auction for the Contention Set is subject to being declared in default. The Auction Manager, at its sole discretion, may delay the declaration of default for a brief period, but only if the Auction Manager determines in its sole discretion that receipt of full payment appears to be imminent.
58. Once declared in default, any Winner is subject to immediate forfeiture of its position in the Auction and assessment of default penalties.
59. After a Winner is declared in default, the remaining Applications (that have not been withdrawn from the New gTLD Program) which are not in a Direct Contention relationship with any of the non-defaulting Winning Applications will receive offers to have their Applications accepted, one at a time, in descending order of and subject to payment of its respective final Exit Bid. In this way, the next Bidder would be declared the winner subject to payment of its Exit Bid. In the event that there is a tie between two or more of the remaining Bidders that are next in descending order, the tie will be broken by means of a quasi-random number generator accessed by the Auction Site to determine the order in which the tied Bidders will receive offers to have their Applications accepted. Each Bidder that is offered the relevant gTLD will be given four (4) Business Days to respond as to whether it wants its Application to win. A Bidder who responds in the affirmative will have four (4) Business Days after its response to submit a 10% deposit and an additional sixteen (16) Business Days to submit the balance of its payment. The same default procedures and penalties are in place for any runner-up Bidder receiving such an offer. A Bidder who declines such an offer cannot rescind its decision to decline the offer, has no further obligations in this context and will not be considered in default.
60. The penalty for defaulting on the Winning Price will equal 10% of the Winning Price, but not to exceed two million dollars (\$2,000,000). Default penalties will be forfeited on an individual Contention String basis and charged against the Bidder's aggregate Deposit for the Auction. In the event a Bidder participates in multiple Contention Sets in an Auction and defaults on its net balance owed, the Bidder must provide by written notice the order of allocation of the aggregate Deposit net of penalties to those Contention Sets it has won.
61. A Bidder will be subject to a penalty of up to the full amount of the Deposit forfeiture of its Applications and/or termination of any or all of its registry agreements for a serious violation of the Auction Rules or Bidder Agreement. Without limiting the foregoing, violations of clause 68 (the anti-collusion clause) shall be considered to be serious violations of the Auction Rules.

Effect of Ineligibility of Winner To Sign a Registry Agreement or To Be Delegated the Contention String

62. If, at any time following the conclusion of an Auction, the Winner is determined by ICANN to be ineligible to sign a Registry Agreement for the Contention String that was the subject of the Auction, the remaining Bidders (with applications that have not been withdrawn from the New gTLD Program) will receive offers to have their Applications accepted, one at a time, in descending order of and subject to payment of its respective Exit Bid. In this way, the next Bidder would be declared the Winner subject to payment of its Exit Bid. Each Bidder that is offered the relevant gTLD will be given four (4) Business Days to respond as to whether it wants its Application to win. A Bidder who responds in the affirmative will have four (4) Business Days after its response to submit a 10% deposit and an additional sixteen (16) Business Days to submit the balance of its payment. The same procedures and

penalties are in place for any runner-up Bidder receiving such an offer. A Bidder who declines such an offer cannot rescind its decision to decline the offer, has no further obligations in this context and will not be considered in default.

Refunds and Rollovers

63. If a Bidder did not win any Contention Sets in an Auction, its Deposits will be eligible for a refund. All refunds are denominated in \$US.
64. If a Bidder wins at least one Contention Set in an Auction, and the Bidder's aggregate Deposit exceed its aggregate Winning Prices for an auction and any applicable Penalties, the Bidder will be entitled to a refund of the excess funds.
65. If a Winner is determined by ICANN following the conclusion of the Auction to be ineligible to sign a Registry Agreement, it will be eligible for a refund of the amount of any Deposit and Winning Price paid by the Winner for the Contention String. Nothing contained in this clause 65 limits any of ICANN's rights or remedies under the Applicant Guidebook in the event the Winner (a) fails to pay the full amount of the Winning Price within 20 business days of the end of an auction or (b) fails to fulfil its obligation to execute the required Registry Agreement within 90 days of the end of the auction for any reason other than a determination by ICANN that the Winner is ineligible to sign the Registry Agreement.
66. All refunds are net of any associated wire fees and will be initiated to the Bidder within seven (7) calendar days after the conclusion of the Auction unless the Bidder requests the funds be committed to Deposits for a future Auction, subject to clause 67.
67. Upon the Bidder's request and to the extent practical, the Auction Manager will work with the Bidder to roll over the Deposit to a future Auction. Such a request must be received no later than 16.00 UTC two (2) calendar days following the day on which the Auction concluded.

✍ Rollover: After the conclusion of an Auction a Bidder may request the excess funds from its Deposit to be applied toward a future Auction. This request is due to the Auction Manager by 16.00 UTC 2 calendar days after the conclusion of the Auction.

The allocation of the Rollover to various Contention Sets must be provided to the Auction Manager prior to the Deposit Deadline for the next applicable Auction.

General Terms and Conditions

68. For each Contention Set in an Auction, there will be a Blackout Period, extending from the Deposit Deadline for the Auction until full payment has been received in the Auction Bank Account from the Winner of the Contention Set, pursuant to clause 55, or another Bidder, pursuant to clauses 57-59, and that the following rules relate to the Blackout Period:
 - (a) During the Blackout Period, all applicants for Contention Strings within the Contention Set are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating

settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction. The provisions of this section shall not prohibit cooperation or collaboration among two or more Applications in the same Contention Set that were filed by the same applicant or were filed by applicants under the common control of the same entity, provided that the same Bidder has been designated for each Application.

- (b) The prohibition against these activities applies only with respect to Contention Strings that are within Blackout Periods; during the same time periods, applicants are permitted to engage in these activities with respect to other Contention Strings that are not within Blackout Periods and applicants are permitted to engage in discussions unrelated to Contention Strings.
 - (c) ICANN and the Auction Manager shall be permitted to disclose to other Bidders for the Contention Set that multiple Applications were filed by the same applicant or were under the common control of the same entity.
69. ICANN or the Auction Manager may terminate, suspend and resume, re-run a round, or change all or any part of an Auction, if ICANN or the Auction Manager determines in its sole discretion that such decision is justified by a technical or operational reason. ICANN or the Auction Manager will, without undue delay, give notice to each Bidder of any decision taken under this clause 69 and the respective reason(s).
70. ICANN shall be entitled, in its sole reasonable discretion, to amend these Auction Rules for any Auction at any time at least fifteen (15) days prior to that Auction. Any amendments to these Auction Rules will be published to the New gTLD microsite.
71. (a) The Bidder agrees to indemnify, defend and hold Auction Manager harmless from and against any and all claims, damages, losses, liabilities, costs or expenses, including reasonable attorneys' fees, whether direct or indirect, which may arise from or be related to the actual or alleged acts or omissions of the Bidder respecting (i) its participation in the Auction, (ii) its performance under the Bidder Agreement, or (iii) any other transaction in which the Bidder participates to which the Bidder Agreement relates.
- (b) Except to the extent set forth in Section 71(c) below, the Bidder expressly releases Auction Manager from any liability for (i) any and all claims, damages, losses, liabilities, costs or expenses, including reasonable attorneys' fees and costs, whether direct or indirect, which may arise from or be related to any Auction, the Bidder Agreement, or any other transaction to which the Bidder Agreement relates, including without limitation the conduct of the Auction, the quality or availability of the Auction Site or any tools or materials provided by the Auction Manager, any disturbance in the technical process, the receipt, storage and/or security of bids, or the award or failure to award a Contention String to any Bidder or other person, and (ii) any incidental or consequential damage, lost profits or lost opportunity which may arise from or be related to any Auction, the Bidder Agreement, or any other transaction to which the Bidder Agreement relates.
- (c) Auction Manager agrees to indemnify and hold harmless the Bidder from any and all third-party claims (including all damages, losses, liabilities, costs or expenses and claims thereof) which may arise from a claim that the Bidder's use of the Auction-Manager-provided Auction Site or participation in the Auction-Manager-provided Auction, as such use or participation is intended within the scope of

the Bidder Agreement, infringes, violates or misappropriates a valid third-party patent, copyright or other intellectual property right, provided that: (1) Auction Manager is notified promptly in writing of any such claim or action; (2) Bidder has neither reached any compromise or settlement of such claim or action nor made any admissions in respect of the same; (3) Auction Manager, at its option and expense, has sole control over the defense of any such claim or action and any related settlement negotiations; and (4) Bidder provides all requested reasonable assistance to defend the same (including, without limitation, by making available to Auction Manager all documents and information in Bidder's possession or control that are relevant to the infringement or misappropriation claims, and by making Bidder's personnel available to testify or consult with Auction Manager or its attorneys in connection with such defense). For the avoidance of doubt, this Section applies only in relation to claims of infringement, violation or misappropriation of intellectual property rights in auction technology or auction software arising directly from an Auction administered by the Auction Manager on behalf of ICANN, and, without limitation, this Section does not apply to any claims involving ownership rights, trademark rights or other rights to (or third-party agreements or rights involving) any gTLD.

(d) The Auction-Manager-Provided Auction Site and Auction-Manager-Provided Auction are provided "As Is" without warranty of any kind, either express or implied, including without limitation of any implied warranties of condition, uninterrupted use, merchantability, and fitness for a particular purpose.

72. If any dispute or disagreement arises in connection with these Auction Rules, including the interpretation or application of these Auction Rules, or the form, content, validity or time of receipt of any Bid, ICANN's decision shall be final and binding.

Schedule – Table of Definitions

Item	Applies to	Definition
Active	Round	A Round status denoting the Round is open for bidding.
Aggregate Demand	Contention Set, with respect to a Round	The number of Continue Bids for Applications received in a Round, aggregated over all Applications that remain eligible to be bid in the Contention Set in the next Round.
Application	Contention Set	An application for a specific gTLD string.
Auction	Bidders	The ICANN auction event for resolving string contention among Applications for one or more Contention Sets, governed by a Bidder Agreement and the Auction Rules as set out in this document.
Auction Bank Account	Auction	A bank account maintained by Power Auctions or ICANN to receive Deposits.
Auction Manager	Auction	Power Auctions LLC.
Auction Schedule	Auction	A schedule showing the indicative timing of each Round and each Recess in relation to an Auction.
Auction Site	Auction	The website at which Bids will be submitted
Authorized Individuals	Bidder	Up to two individuals nominated by a Bidder to bid on its behalf.
Blackout Period	Contention Set	A time period, extending from the Deposit Deadline until full payment has been received, during which applicants are prohibited from engaging in the activities described in clause 68.
Bid	Contention Set during a Round	A Bidder's binding willingness to secure its Application within the Contention Set at prices up to the specified price.
Bidder	Auction	A Qualified Applicant or its Designated Bidder identified as the Bidder in the ICANN Registration Form.
Bidder Agreement	Auction	The Agreement entered into between Bidders and the Auction Manager that provides terms and conditions for participation in the Auction.

Item	Applies to	Definition
Bidding Limit	Bidder, for a Contention Set	An upper limit on the price that a Bidder can specify for its Bid on an Application within a Contention Set, based on the Deposit submitted by the Bidder for that Contention Set.
Business Day		Monday to Friday, excluding days that banks are closed in New York City, New York
Closed	Contention Set	A status for a Contention Set indicating that the condition set out in clauses 46 has been met. Bidding on Applications in the Contention Set is no longer permitted.
Commencement Date	Auction	The date on which the standard 30 minutes of Round 1 of the Auction is scheduled to occur. If applicable, Early Bidding may start prior to the Commencement Date.
Contention Set	Auction	A group of Applications that are connected by a series of Direct Contention relationships.
Continue Bid	Application during a Round	A Bid for an Application within a Contention Set at the End-of-Round Price for that Contention Set or any higher price.
Deposit	Bidder, for a Contention Set	Money deposited into the Auction Bank Account by a Bidder for a nominated Contention Set.
Deposit Deadline	Bidder, for a Contention Set	16:00 UTC on the day that is seven calendar days prior to the Commencement Date of the relevant Auction.
Designated Bidder	Qualified Applicant	A party designated by a Qualified Applicant to bid on its behalf in an Auction
Direct Contention	Applications	The relationship between two Applications for strings that are identical or confusingly similar to one another and so both cannot be awarded.

Item	Applies to	Definition
Early Bidding	Auction	A time period prior to the standard 30 minutes of Round 1 that allows for Bidders to submit bids. Bids placed during Early Bidding will have the same effect as Bids submitted during the standard 30 minutes of Round 1. During this time period, the Auction Manager may not be available by phone or email, subject to the Auction Manager's standard business hours (i.e. 1 hour before an Auction, and Monday to Friday 8:30 AM to 5:00 PM US Eastern Time Zone). Offering Early Bidding for any particular Auction event is in the Auction Managers discretion, as is the duration of the Early Bidding period.
End-of-Round Price	Contention Set during a Round	The lowest price at which a Continue Bid for an Application within a Contention Set may be placed in a Round.
Ending Time	Round	The time at which any particular Round ends.
Enduring Application	Application	An Application for which a Continue Bid has been submitted or which satisfies the condition of clause 34(c), but which has not been deemed to be a Winning Application pursuant to clause 35(b).
Exit Bid	Application during a Round	A Bid for an Application at any price less than the End-of-Round Price but greater than or equal to the amount of the previous Bid for the Application (or \$1 in Round 1).
Feasible Set	Applications	A collection of Applications such that no two of the Applications are in a Direct Contention relationship with one another.
ICANN		Internet Corporation for Assigned Names and Numbers
Indirect Contention	Applications	The relationship between two Applications that are in the same Contention Set but are not in a Direct Contention relationship with one another.
Open	Contention Set during Round	A status indicating that any eligible Bidder for that Contention Set may place a Bid on its Application, if that Bid meets the requirements in clause 40. All Contention Sets are Open in Round 1.

Item	Applies to	Definition
Positioned Better	Applications	The position of a first Application relative to a second Application if the two Applications are in a Direct Contention relationship with one another, and if the set of all other Applications that are in a Direct Contention relationship with the first Application is a subset of the set of all other Applications that are in a Direct Contention relationship with the second Application.
Positioned the Same	Applications	The position of a first Application relative to a second Application if the two Applications are in a Direct Contention relationship with one another, and if the set of all other Applications that are in a Direct Contention relationship with the first Application is the same as the set of all other Applications that are in a Direct Contention relationship with the second Application.
Posted	Round	A Round status indicating that the Bids from the most recent Round have been processed and that the results have been made available to Bidders. When a Round is Posted, Bidders will be able to see the number of Enduring Applications and the Aggregate Demand for the Contention Sets that they have Applications within, whether any of these Contention Sets have Closed, the Applications that they have secured and the associated Winning Prices.
Proxy Bid	Application during a Round	A Bid for an Application within a Contention Set at a price higher than the End-of-Round Price for that Contention Set.
Qualified Applicant	Auction	An entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction
Recess	Auction	The time interval between Rounds when Bids are processed, during which no bids may be submitted.
Round	Auction	The time interval during which Bids may be submitted.
Starting Time	Round	The time at which any particular Round starts.
Start-of-Round Price	Contention Set during a Round	In Round 1, \$1; in Round 2 or later, the End-of-Round Price of the previous Round.
Tie-Breaking Round	Contention Set	A single Round that is held in the case where there is a tie among the highest Exit Bids.

Item	Applies to	Definition
Tying Bid Price	Contention Set	The price of the highest Exit Bids that were tied.
Unlimited	Bidding Limit	The absence of any Bidding Limit for a Bidder for a Contention Set that has submitted a Deposit of \$2,000,000 or greater amount for that Contention Set.
Winner	Contention Set	A Bidder that secures its Application in the Contention Set.
Winning Application	Contention Set	An Application that prevails contention.
Winning Price	Contention Set	The price to be paid by a Winner to secure its Winning Application.

EXHIBIT C-4

New gTLD Auctions Bidder Agreement

Version 2014-04-03

This Qualified Applicant / Bidder Agreement (the "**Bidder Agreement**"), is made and entered into by the Qualified Applicant or Designated Bidder (collectively the "**Bidder**"), and Power Auctions, a limited liability company organized in the State of Delaware, United States of America, with offices in Washington DC (the "**Auction Manager**"), each of the Bidder and the Auction Manager referred to as a "**Party**" and, together, referred to as the "**Parties**". The terms and conditions set forth in this Bidder Agreement are to be read together with the Auction Rules. Terms used but not otherwise defined herein shall have the meanings ascribed to them in the gTLD Applicant Guidebook (the "**Applicant Guidebook**") or the "**Auction Rules**" (as defined below). In the event of any inconsistency between the Bidder Agreement and the Applicant Guidebook or the Auction Rules, the Bidder Agreement shall prevail.

RECITALS

WHEREAS, the Qualified Applicant has submitted an application (the "**gTLD Application**") for a new generic top-level domain ("**gTLD String**"), to the Internet Corporation for Assigned Names and Numbers ("**ICANN**") pursuant to the ICANN new gTLD program (the "**gTLD Program**");

WHEREAS, ICANN has identified and published a group of applications (the "**Contention Set**") containing identical or confusingly similar applied-for gTLD Strings (the "**Contention Strings**");

WHEREAS, the Qualified Applicant's gTLD Application is for a Contention String that has been included in a Contention Set;

WHEREAS, the Auction Manager will be administering an auction on behalf of ICANN to resolve string contention for the Contention Strings in the Contention Set (the "**Auction**") pursuant to section 4.3 of the ICANN gTLD Applicant Guidebook (the "**Applicant Guidebook**");

WHEREAS, the Auction Manager will provide an auction service on the internet ("**Auction Site**") which Bidders will use to participate in the Auction;

WHEREAS, ICANN has published an auction rules document ("**Auction Rules**") on its website which is binding upon Bidders in the Auction;

WHEREAS, the Qualified Applicant will place bids in the Auction on its own behalf or may designate an agent ("**Designated Bidder**") to enter bids in the Auction on the Qualified Applicant's behalf;

NOW, THEREFORE, in consideration of the premises and agreements of the parties contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Bidder and the Auction Manager agree as follows:

ARTICLE 1

STRING CONTENTION RESOLUTION BY AUCTION

Section 1.1 The Bidder. The Bidder represents that it is either: (a) a Qualified Applicant for one or more Contention Strings for which ICANN has provided to the Qualified Applicant a Notice of Intent to Auction; or (b) the Designated Bidder authorized by a Qualified Applicant for one or more Contention Strings for which ICANN has provided to the Qualified Applicant a Notice of Intent to Auction.

Section 1.2 Effective Date. This Bidder Agreement will become effective on the day that it has been executed by the Bidder and countersigned by the Auction Manager.

Section 1.3 Endorsement. The Parties agree that the Bidder may endorse this Bidder Agreement for additional gTLD Applications for Contention Strings for which it is the Qualified Applicant or the Designated Bidder, and that the Bidder may make such endorsement on the Auction Site by purely electronic means. If the Bidder endorses this Agreement for additional gTLD Applications, then this Agreement will apply with the same force and effect to the additional gTLD Applications as it does to the initial gTLD Application.

Section 1.4 The Auction. The Bidder shall participate in the Auction(s) for the relevant Contention Sets on the terms set forth herein and under the Auction Rules. The Auction(s) shall be conducted in accordance with the procedure set out in the Auction Rules. The Bidder acknowledges that it has reviewed the Auction Rules that will govern the participation of the Bidder in the Auction(s) and that the Auction(s) will be administered by the Auction Manager. By this Agreement, the Bidder agrees to be bound by the Auction Rules as published on ICANN's website.

Section 1.5 Consequences of Losing. The Bidder acknowledges and agrees that failure to submit a deposit by the specified deadline, failure to participate in the Auction or losing in the Auction will result in the rejection of the Qualified Applicant's application for the Contention String and the Contention String not being assigned or delegated to the relevant Qualified Applicant.

ARTICLE 2

BIDDER REPRESENTATIONS AND WARRANTIES

The Bidder represents and warrants to the Auction Manager as follows:

Section 2.1 Good Standing. The Bidder (i) is duly organized and validly existing under the laws of the jurisdiction of its organization or incorporation, (ii) is in good standing under such laws and (iii) has full power and authority to execute, deliver and perform its obligations, under this Bidder Agreement.

Section 2.2 Authorization. The Bidder Agreement has been duly and validly authorized, executed and delivered by the Bidder to the Auction Manager and constitutes the legal, valid and binding obligation of the Bidder, enforceable against the Bidder in accordance with its terms.

Section 2.3 Notifications and Instructions. Any notifications, including but not limited to the documents provided to the Auction Manager as represented by the Bidder Form or Bidder Designation Form included in this Bidder Agreement, signed by any authorized signatories of the Bidder, and delivered to the Auction Manager shall be deemed a representation and warranty by the Bidder to the Auction Manager as to the matters covered thereby.

Section 2.4 Account Information. The Bidder agrees not to disclose to any unauthorized party the Bidder's usernames, passwords, Auction Site URL or any other authentication credentials assigned to the Bidder ("**Account Information**") in connection with the gTLD Application or the Auction. The Bidder acknowledges that it shall be responsible for maintaining the confidentiality of such Account Information and for all utilizations of the Account Information.

Section 2.5 Auction Site. The Bidder agrees not to use the Auction Site for any purpose other than participation in Auctions that the Bidder is entitled to participate or to take any actions aimed at preventing the appropriate use of the Auction Site by any party.

Section 2.6 Anti-Collusion Rules. The Bidder and the Qualified Applicant each acknowledges for each Contention Set in an Auction, there will be a Blackout Period, extending from the Deposit Deadline for the Auction until full payment has been received in the Auction Bank Account from the Winner of the Contention Set, pursuant to Clause 55, or another Bidder, pursuant to clauses 57-59 of the Auction Rules. During the Blackout Period, all applicants for Contention Strings within the Contention Set are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction. The prohibition against these activities applies only with respect to Contention Strings that are within Blackout Periods; during the same time periods, applicants are permitted to engage in these activities with respect to other Contention Strings that are not within Blackout Periods and applicants are permitted to engage in discussions unrelated to Contention Strings.

Section 2.7 Compliance. ICANN reserves the right to conduct due diligence on the Qualified Applicant and the Designated Bidder in an effort to ensure compliance with all applicable laws, regulations and rules governing the Auction and the transfer of funds in connection with the Auction. ICANN reserves the right to require the Qualified Applicant to substitute its Designated Bidder and/or the bank account from which Bidder wires funds to its designated Auction Bank Account if a compliance issue is identified with respect to an applicable law, regulation or rule governing the Auction or the transfer of funds in connection with the Auction.

Section 2.8 Assignment of Contention String. In the event the Bidder is designated a winner at the close of an Auction ("**Winner**") for one or more Contention Sets, its aggregate Deposits for such Auction will be automatically applied towards payment of its aggregate Winning Price(s). In the event the aggregate Deposits exceed the aggregate Winning Prices and penalties, if applicable, a refund will be initiated to the Bidder no later than 16:00 UTC on the day that is seven (7) calendar days after the conclusion of the Auction, subject to Section 2.9. If a net balance of the aggregate Winning Prices is due, the Winner is required to settle the amount owed by bank wire to its designated Auction Bank Account. Payment must be received no later than 16:00 UTC on the day that is twenty (20) "**Business Days**" (as defined in the Auction Rules) after the close of the Auction. In the event Bidder is a Winner and anticipates that it would require a longer payment period due to verifiable government-imposed currency restrictions, Bidder may advise Auction Manager well in advance of the Auction and Auction Manager will consider applying a longer payment period for all Winner(s) within the same Contention Set.

Section 2.9 Default. A Winner not in compliance with Section 2.8 is subject to being declared in default. Auction Manager at its sole discretion, may delay the declaration of default for a brief period, but only if Auction Manager determines in its sole discretion that receipt of full payment appears to be imminent. Once declared in default, the Winner is subject to immediate forfeiture of its position in the Auction and assessment of default penalties as set forth in clauses 58-60 in the Auction Rules. Default penalties will be forfeited and charged against the Bidder's aggregate Deposit(s) of the Auction. If a Winner defaults on multiple contention sets, ICANN reserve the right, in its sole discretion, to ban such Winner from future Auctions.

Section 2.10 Penalties. The Bidder acknowledges that it may be subject to a penalty of up to the full amount of the Deposit and forfeiture of its Applications or termination of its registry agreements for a serious violation of the Auction Rules or Bidder Agreement. Without limiting the foregoing, a violation of Section 2.6 of the Bidder Agreement shall be considered to be a serious violation of the Bidder Agreement.

Section 2.11 Reliance on Counsel. The Bidder acknowledges that it has been advised by its own counsel regarding the terms of the Bidder Agreement and Auction Rules and in participating in the Auction has not relied and is not relying on any representations, warranties or other statements whatsoever, whether written or oral, from or by the Auction Manager or ICANN, other than those expressly set out in this Bidder Agreement, the Auction Rules and the Applicant Guidebook.

ARTICLE 3

AUCTION BANK ACCOUNT

Section 3.1 Escrow Agreement. The Auction Manager represents that it and ICANN have entered into an agreement ("**Escrow Agreement**") whereby any funds provided by the Bidder to be used in connection with the Auction shall be held in escrow in a bank account ("**Auction Bank Account**") by an escrow agent (the "**Escrow Agent**"). The Auction Manager will provide the Bidder with Auction Bank Account details and wire instructions.

Section 3.2 Auction Bank Account. The Bidder will deposit funds by bank wire into the Auction Bank Account to be held in escrow pursuant to this Bidder Agreement and the Escrow Agreement. The Auction Bank Account is denominated in United States dollars (\$US) and all transactions to and from such account must be in \$US. Funds deposited into escrow by the Bidder may be applied by the Auction Manager in accordance with the Bidder Agreement and Auction Rules. Upon the occurrence of a withdrawal by a Qualified Applicant pursuant to Section 3.4 or termination of this Bidder Agreement pursuant to Section 5 or otherwise, the Auction Manager may direct the Escrow Agent to set-off and apply any amount deposited by the Bidder against any, to the extent amounts are owed, other payments due. The Auction Manager agrees promptly to notify the Bidder after any such set-off is made by the Auction Manager, provided that the failure to give such notice shall not affect the validity of the action.

Section 3.3 Deposits, Refunds, Rollovers. In all respects, including in relation to deposits, refunds and rollovers the Bidder agrees to comply with the provisions of the Bidder Agreement and Auction Rules. The deposit amount(s) made into the Auction Bank Account (the "**Deposit(s)**") including all instructions associated with Deposits and allocation of funds among Contention Sets from wires and funds rolled over from previous Auctions, must be received by the Auction Manager no later than 16:00 UTC on the day that is seven (7) calendar days prior to the commencement date of the Auction ("**Deposit Deadline**"). Failure by Bidder to deposit the Deposit(s) by the Deposit Deadline may, at the Auction Manager's sole discretion, result in the Bidder's ineligibility to participate in the Auction for the Contention Set, which will result in the rejection of the Qualified Applicant's application for the Contention String and the Contention String not being assigned or delegated to the relevant Qualified Applicant. If a Deposit(s) is received and the Bidder is determined to be ineligible for the Auction, a refund of the Deposit will be initiated to the bank account as specified by the Bidder no later than 16:00 UTC on the day that is seven (7) calendar days after the conclusion of the Auction. In the event the Bidder does not win in an Auction, or a Bidder's aggregate Deposits exceed its aggregate Winning Prices for an Auction, any excess amount will be refunded subject to Section 2.8 and 2.9. In the event a refund becomes due, a Bidder may request, by submitting rollover instructions to the Auction Manager by no later than 16:00 UTC two calendar days following the day on which the Auction concluded, that the Auction Manager, to the extent practical, assigns funds to a future Auction ("**Rollover**"). If this Bidder Agreement is terminated for any reason other than breach of contract by the Bidder, a refund of any remaining Deposit will be initiated to the Bidder no later than 16:00 UTC on the day that is seven (7) calendar days after the conclusion of the next scheduled Auction. All refunds are net of associated wire fees.

Section 3.4 Withdrawal Notices and Withdrawal Refunds. In all respects, including in relation to withdrawal refunds and the Qualified Applicant's notice of withdrawal, the Bidder agrees to comply with the provisions of the Bidder Agreement and Auction Rules. Applicants that are identified as being in contention are encouraged by ICANN to reach a settlement or agreement among themselves that resolves the contention prior to the date of the Auction, as set forth in section 4.1.3 of the Applicant Guidebook. Such settlement or agreement is allowed up until the Deposit Deadline of the Auction for such applicable Contention Set(s). In the event settlement is reached prior to the Deposit Deadline, the relevant Qualified Applicants shall send both ICANN and the Auction Manager

written notice and follow the process specified by ICANN to withdraw any application(s) for such Contention Strings that will not proceed as a result of the resolution. Such notification must be received by ICANN and the Auction Manager no later than the Deposit Deadline. The Auction Manager will remove such Contention Sets from the Auction upon receipt of instructions from ICANN applicable to such Contention Sets. A refund for the Deposit(s) corresponding to these Contention Sets will be initiated to the Bidder no later than 16:00 UTC on the day seven (7) calendar days after the conclusion of the Auction unless the Auction Manager receives rollover instructions from the Bidder by no later than 16:00 UTC two calendar days following the day on which the Auction concluded. After the Deposit Deadline each Bidder that submitted a Deposit is required to participate in the Auction.

ARTICLE 4

INDEMNIFICATION, WAIVERS OF LIABILITY AND RELEASE

Section 4.1 Auction Rules. The Auction Manager acknowledges its obligation to make a good-faith effort to administer the Auction in accordance with the Auction Rules.

Section 4.2 Indemnification and Waiver.

(a) The Bidder agrees to indemnify, defend and hold Auction Manager harmless from and against any and all claims, damages, losses, liabilities, costs or expenses, including reasonable attorneys' fees, whether direct or indirect, which may arise from or be related to the actual or alleged acts or omissions of the Bidder respecting (i) its participation in the Auction, (ii) its performance under this Bidder Agreement, or (iii) any other transaction in which the Bidder participates to which this Bidder Agreement relates.

(b) Except to the extent set forth in Section 4.2(c) below, the Bidder expressly releases Auction Manager from any liability for (i) any and all claims, damages, losses, liabilities, costs or expenses, including reasonable attorneys' fees and costs, whether direct or indirect, which may arise from or be related to any Auction, this Bidder Agreement, or any other transaction to which this Bidder Agreement relates, including without limitation the conduct of the Auction, the quality or availability of the Auction Site or any tools or materials provided by the Auction Manager, any disturbance in the technical process, the receipt, storage and/or security of bids, or the award or failure to award a Contention String to any Bidder or other person, and (ii) any incidental or consequential damage, lost profits or lost opportunity which may arise from or be related to any Auction, this Bidder Agreement, or any other transaction to which this Bidder Agreement relates.

(c) Auction Manager agrees to indemnify and hold harmless the Bidder from any and all third-party claims (including all damages, losses, liabilities, costs or expenses and claims thereof) which may arise from a claim that the Bidder's use of the Auction-Manager-provided Auction Site or participation in the Auction-Manager-provided Auction, as such use or participation is intended within the scope of

this Bidder Agreement, infringes, violates or misappropriates a valid third-party patent, copyright or other intellectual property right, provided that: (1) Auction Manager is notified promptly in writing of any such claim or action; (2) Bidder has neither reached any compromise or settlement of such claim or action nor made any admissions in respect of the same; (3) Auction Manager, at its option and expense, has sole control over the defense of any such claim or action and any related settlement negotiations; and (4) Bidder provides all requested reasonable assistance to defend the same (including, without limitation, by making available to Auction Manager all documents and information in Bidder's possession or control that are relevant to the infringement or misappropriation claims, and by making Bidder's personnel available to testify or consult with Auction Manager or its attorneys in connection with such defense). For the avoidance of doubt, this Section applies only in relation to claims of infringement, violation or misappropriation of intellectual property rights in auction technology or auction software arising directly from an Auction administered by the Auction Manager on behalf of ICANN, and, without limitation, this Section does not apply to any claims involving ownership rights, trademark rights or other rights to (or third-party agreements or rights involving) any gTLD.

(d) The Auction-Manager-Provided Auction Site and Auction-Manager-Provided Auction are provided "As Is" without warranty of any kind, either express or implied, including without limitation of any implied warranties of condition, uninterrupted use, merchantability, and fitness for a particular purpose.

Section 4.3 Force Majeure. No Party to this Bidder Agreement shall be responsible or liable for any failure or delay in the performance of its obligation under this Bidder Agreement arising out of or caused, directly or indirectly, by circumstances beyond their reasonable control, including, without limitation, acts of God; earthquakes; fire; flood; wars; acts of terrorism; civil or military disturbances; sabotage; epidemic; riots; accidents; labor disputes; acts of civil or military authority or governmental action; it being understood that each party to this Bidder Agreement shall use commercially reasonable efforts which are consistent with accepted practices to resume performance as soon as reasonably practicable under the circumstances; provided that Bidder's loss of access to the Internet during an Auction shall not be deemed a matter beyond Bidder's reasonable control in light of Bidder's ability to (a) designate two Authorized Individuals under the Auction Rules; and (b) employ alternative bidding mechanisms during the Auction via fax.

Section 4.4 Liability of ICANN. Qualified Applicant and Designated Bidder each understands, acknowledges and agrees that the Auction is a method of contention resolution contemplated by the gTLD Applicant Guidebook for Qualified Applicant's application and that, as between Qualified Applicant and ICANN, the provisions of Module 6: Top-Level Domain Application - Terms and Conditions of the Applicant Guidebook apply to the Auction. Without limiting the foregoing, Designated Bidder understands, acknowledges and agrees that it is participating in the Auction as an authorized agent of Qualified Applicant and its rights and remedies with respect to ICANN are limited to the same extent that Qualified Applicant's rights and remedies are limited by the provisions of Module 6: Top-Level Domain Application - Terms and Conditions of the Applicant Guidebook.

ARTICLE 5

TERMINATION

Section 5.1 Termination. This Bidder Agreement shall terminate 90 days after notice of termination is provided by either Party; provided, however, that the provisions of Section 4.2 (Indemnification), Section 6.1 (Confidentiality), Section 7.1 (Survival; Successors or Assigns), Section 7.3 (Notices), and Section 7.8 (Governing Law) shall survive termination of this Bidder Agreement.

ARTICLE 6

CONFIDENTIALITY

Section 6.1 Confidentiality. Except as otherwise stated in this Bidder Agreement, each Party agrees, to maintain the confidentiality of any confidential and proprietary information received by it from the other Party pursuant to this Bidder Agreement, including, without limitation, any Account Information or any material nonpublic information ("**Confidential Information**"); provided, however, that Confidential Information shall not include any information that: (a) is or becomes generally available to the public other than as a result of a disclosure by the receiving Party or its representatives; (b) is already in the receiving Party's possession, provided that such information is not subject to a contractual, legal or fiduciary obligation of confidentiality for the benefit of another; or (c) becomes available to the receiving Party on a non-confidential basis from a source not bound by a contractual, legal or fiduciary obligation to keep such information confidential for the benefit of another. The foregoing will not prohibit either Party from disclosing Confidential Information: to the extent it is required to do so by applicable law so long as the Party, prior to disclosure that is legally required, provides the Party with written notice of the Confidential Information to be disclosed and takes appropriate steps to preserve the confidentiality of such information to the extent reasonably practicable; to its affiliates, attorneys, accountants, consultants, and other professionals bound by similar confidentiality obligations. Bids in the Auction shall be deemed Confidential Information; however, the Auction Manager shall be permitted to disclose bids or bidding information to ICANN during the Auction only if reasonably necessary to inform ICANN of a potential pending dispute requiring resolution or input, and to disclose bids or bidding information publicly after the conclusion of the Auction to the extent permitted by and pursuant to the Auction Rules. Notwithstanding the above, the Auction Manager is expressly permitted to share with the Bidder such other information as may be provided or set forth in the Auction Rules.

ARTICLE 7

MISCELLANEOUS

Section 7.1 Survival; Successors and Assigns. All representations, warranties, covenants, indemnities and other provisions made by the parties shall be considered to have been relied upon by the parties, shall be true and correct as of the date hereof, and shall survive the execution, delivery, and performance of this Bidder Agreement. This Bidder Agreement, including the declarations, acknowledgments, guarantees and indemnities contained in this Bidder Agreement, shall inure to the benefit of, be binding upon and be enforceable by and against the parties and their respective successors and permitted assigns.

Section 7.2 Interpretation; Severability. The Bidder intends for this Bidder Agreement to comply with applicable state and federal laws. If any term or provision hereof is illegal or invalid for any reason whatsoever, such provisions will be replaced with a valid provision that as closely as possible resembles the purposes and intents of the invalid provision or, if not possible, will be severed from this Bidder Agreement, and such invalid or unenforceable provision will not affect the enforceability or validity of the remainder of this Bidder Agreement.

Section 7.3 Notices. All notices, requests, demands, and other communications required under this Bidder Agreement shall be in writing, in English, and shall be delivered by electronic transmission with written confirmation of receipt via RPost or a similar service that authenticates email delivery or via acknowledgement from the recipient, or via fax. If notice is given to a Bidder, it shall be delivered to the email address or fax number for such Bidder as provided by the Bidder to the Auction Manager. It shall be the responsibility of the Bidders to notify the Auction Manager of any changes in name, address or contact information.

Section 7.4 Entire Agreement. This Bidder Agreement, including the Bidder Form and Bidder Designation Form attached hereto and made a part hereof, sets forth the entire agreement and understanding of the parties related to the Auction.

Section 7.5 Amendment. This Bidder Agreement may be amended, modified, superseded, rescinded, or canceled only by a written instrument executed by the Auction Manager and Bidder.

Section 7.6 Auction Rules. ICANN shall be entitled, in its sole reasonable discretion, to amend the Auction Rules for any Auction at any time at least fifteen (15) days prior to that Auction. ICANN will inform the Bidder of such changes via electronic written notice and the changes will be effective immediately. Such amendments will be published to the ICANN website. If any dispute or disagreement arises in connection with the Auction Rules, including the interpretation or application of the Auction Rules, or the form, content, validity or time of receipt of any Bid, ICANN's decision shall be final and binding.

Section 7.7 Waivers. The failure of any party to this Bidder Agreement at any time or times to require performance of any provision under this Bidder Agreement shall in no manner affect the right at a later time to enforce the same performance. A waiver by any party to this Bidder Agreement of any such condition or breach of any term, covenant, representation, or warranty contained in this Bidder Agreement, in any one or more instances, will neither be construed as a further or continuing waiver of any such condition or breach nor a waiver of any other condition or breach of any other term, covenant, representation, or warranty contained in this Bidder Agreement.

Section 7.8 Governing Law. This Bidder Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, United States of America, excluding any choice of law provisions.

Section 7.9 Jurisdiction. Subject to Section 8.2 on arbitration, the Bidder and the Auction Manager irrevocably and unconditionally submit to and accept the exclusive jurisdiction of the federal and state courts located in the State of Delaware for any action, suit, or proceeding arising out of or based upon this Bidder Agreement or any matter relating to it, and waive any objection that it may have to the laying of venue in any such court or that such court is an inconvenient forum or does not have personal jurisdiction over it.

Section 7.10 Third Party Beneficiary. ICANN is an intended third party beneficiary of this Bidder Agreement entitled to enforce this Bidder Agreement against the Bidder and the Auction Manager as if ICANN was a direct party to this Bidder Agreement.

Section 7.11 Execution in Counterparts. This Bidder Agreement may be executed in counterparts. All executed counterparts constitute one document.

ARTICLE 8

DISPUTE RESOLUTION

Section 8.1 Mediation. In the event of any dispute arising under or in connection with this Bidder Agreement, before either party may initiate arbitration pursuant to Section 8.2 below, the Auction Manager and the Bidder must attempt to resolve the dispute through mediation in accordance with the following terms and conditions:

- (a) - a party shall submit a dispute to mediation by written notice to the other party. The mediation shall be conducted by a single mediator selected by the parties. If the parties cannot agree on a mediator within fifteen (15) calendar days of delivery of written notice pursuant to this Section 8.1, the parties will promptly select a mutually acceptable mediation provider entity, which entity shall, as soon as practicable following such entity's selection, designate a mediator, who is a licensed attorney with general knowledge of contract law and, to the extent necessary to mediate the particular dispute, general knowledge of the gTLD Program. Any mediator must confirm in writing that he or she is not, and will not become during the term of

the mediation, an employee, partner, executive officer, director, or security holder of ICANN, the Auction Manager or the Bidder. If such confirmation is not provided by the appointed mediator, then a replacement mediator shall be appointed pursuant to this Section 8.1(a);


- (b) - the mediator shall conduct the mediation in accordance with the rules and procedures that he or she determines following consultation with the parties. The parties shall discuss the dispute in good faith and attempt, with the mediator's assistance, to reach an amicable resolution of the dispute. The mediation shall be treated as a settlement discussion and shall therefore be confidential and may not be used against either party in any later proceeding relating to the dispute, including any arbitration pursuant to Section 8.2. The mediator may not testify for either party in any later proceeding relating to the dispute;
- (c) - each party shall bear its own costs in the mediation. The parties shall share equally the fees and expenses of the mediator. Each party shall treat information received from the other party pursuant to the mediation that is appropriately marked as confidential (as required by Article 6) as Confidential Information of such other party in accordance with Article 6.
- (d) - if the parties have engaged in good faith participation in the mediation but have not resolved the dispute for any reason, either party or the mediator may terminate the mediation at any time and the dispute can then proceed to arbitration pursuant to Section 8.2 below. If the parties have not resolved the dispute for any reason by the date that is ninety (90) calendar days following the date of the notice delivered pursuant to Section 8.1(a), the mediation shall automatically terminate (unless extended by agreement of the parties) and the dispute can then proceed to arbitration pursuant to Section 8.2 below.

Section 8.2 Arbitration. Disputes arising under or in connection with this Bidder Agreement that are not resolved pursuant to Section 8.1, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in the State of Delaware. Any arbitration will be in front of a single arbitrator, unless the parties agree in writing to a greater number of arbitrators in which event the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. Each party shall treat information received from the other party pursuant to the arbitration that is appropriately marked as confidential (as required by Article 6) as Confidential Information of such other party in accordance with Article 6. In any litigation involving the Auction Manager concerning this Bidder Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in the State of Delaware; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction. The provisions for arbitration set forth herein shall be in lieu of any other procedure for the determination of controversies between the


Parties to this Agreement or any claim by such Party against any other such Party arising thereunder and the Parties agree not to invoke the intervention of the courts of Delaware or any other jurisdiction in relation to the appointment of the arbitrators, procedures adopted by or proceedings at the sitting of the arbitral tribunal in any dispute.

IN WITNESS WHEREOF, this Bidder Agreement has been duly executed by

Qualified Applicant

Name of Entity	Ruby Glen, LLC
Type of Entity (e.g. Corporation)	Limited Liability Company
Jurisdiction of incorporation or organization	Delaware. http://delcode.delaware.gov/title6/c018/sc01/index.shtml
TIN, corporate registration no., or equivalent	5119775
Address	155 108th Avenue NE, Suite 510 Bellevue, Washington 98004 US
Phone Number	+1 424 254 8537
Name of Authorized Representative	Jonathon Nevett
Title	Manager of its Sole Member
Signature	
Date (DD-MM-YYYY)	24-05-2016

Designated Bidder

Name of Entity	Covered TLD, LLC
Type of Entity (e.g. Corporation)	LLC
Jurisdiction of incorporation or organization	Delaware
TIN, corporate registration no., or equivalent	45-4347053
Address	10500 NE 8th St. Ste. 350 Bellevue, Washington 98004 United States
Phone Number	+1.703.930.5158
Name of Authorized Representative	Jonathon Nevett
Title	Manager
Signature	
Date (DD-MM-YYYY)	24-05-2016

ICANN gTLD Auction Bidder Agreement

IN WITNESS WHEREOF, this Bidder Agreement has been duly executed by

POWER AUCTIONS LLC

Shawn Williams
Name

Accounting manager
Title

Shawn Willi
Signature

6/6/16
Date

EXHIBIT C-5

gTLD Applicant Guidebook

Version 2012-06-04



4 June 2012

Preamble

New gTLD Program Background

New gTLDs have been in the forefront of ICANN's agenda since its creation. The new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS.

Currently the namespace consists of 22 gTLDs and over 250 ccTLDs operating on various models. Each of the gTLDs has a designated "registry operator" and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in that TLD. The gTLDs are served by over 900 registrars, who interact with registrants to perform domain name registration and other related services. The new gTLD program will create a means for prospective registry operators to apply for new gTLDs, and create new options for consumers in the market. When the program launches its first application round, ICANN expects a diverse set of applications for new gTLDs, including IDNs, creating significant potential for new uses and benefit to Internet users across the globe.

The program has its origins in carefully deliberated policy development work by the ICANN community. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations. Representatives from a wide variety of stakeholder groups—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008. A thorough brief to the policy process and outcomes can be found at <http://gnso.icann.org/issues/new-gtlds>.

ICANN's work next focused on implementation: creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval. This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook. In parallel, ICANN has established the resources needed to successfully launch and operate the program. This process concluded with the decision by the ICANN Board of Directors in June 2011 to launch the New gTLD Program.

For current information, timelines and activities related to the New gTLD Program, please go to <http://www.icann.org/en/topics/new-gtld-program.htm>.



gTLD Applicant Guidebook

(v. 2012-06-04)

Module 1

4 June 2012

Module 1

Introduction to the gTLD Application Process

This module gives applicants an overview of the process for applying for a new generic top-level domain, and includes instructions on how to complete and submit an application, the supporting documentation an applicant must submit with an application, the fees required, and when and how to submit them.

This module also describes the conditions associated with particular types of applications, and the stages of the application life cycle.

Prospective applicants are encouraged to read and become familiar with the contents of this entire module, as well as the others, before starting the application process to make sure they understand what is required of them and what they can expect at each stage of the application evaluation process.

For the complete set of the supporting documentation and more about the origins, history and details of the policy development background to the New gTLD Program, please see <http://gnso.icann.org/issues/new-gtlds/>.

This Applicant Guidebook is the implementation of Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.

1.1 Application Life Cycle and Timelines

This section provides a description of the stages that an application passes through once it is submitted. Some stages will occur for all applications submitted; others will only occur in specific circumstances. Applicants should be aware of the stages and steps involved in processing applications received.

1.1.1 Application Submission Dates

The user registration and application submission periods open at **00:01 UTC 12 January 2012**.

The user registration period closes at **23:59 UTC 29 March 2012**. New users to TAS will not be accepted beyond this

time. Users already registered will be able to complete the application submission process.

Applicants should be aware that, due to required processing steps (i.e., online user registration, application submission, fee submission, and fee reconciliation) and security measures built into the online application system, it might take substantial time to perform all of the necessary steps to submit a complete application. Accordingly, applicants are encouraged to submit their completed applications and fees as soon as practicable after the Application Submission Period opens. Waiting until the end of this period to begin the process may not provide sufficient time to submit a complete application before the period closes. Accordingly, new user registrations will not be accepted after the date indicated above.

The application submission period closes at **23:59 UTC 12 April 2012**.

To receive consideration, all applications must be submitted electronically through the online application system by the close of the application submission period.

An application will not be considered, in the absence of exceptional circumstances, if:

- It is received after the close of the application submission period.
- The application form is incomplete (either the questions have not been fully answered or required supporting documents are missing). Applicants will not ordinarily be permitted to supplement their applications after submission.
- The evaluation fee has not been paid by the deadline. Refer to Section 1.5 for fee information.

ICANN has gone to significant lengths to ensure that the online application system will be available for the duration of the application submission period. In the event that the system is not available, ICANN will provide alternative instructions for submitting applications on its website.

1.1.2 Application Processing Stages

This subsection provides an overview of the stages involved in processing an application submitted to ICANN. Figure 1-1 provides a simplified depiction of the process. The shortest and most straightforward path is marked with bold lines, while certain stages that may or may not be

applicable in any given case are also shown. A brief description of each stage follows.

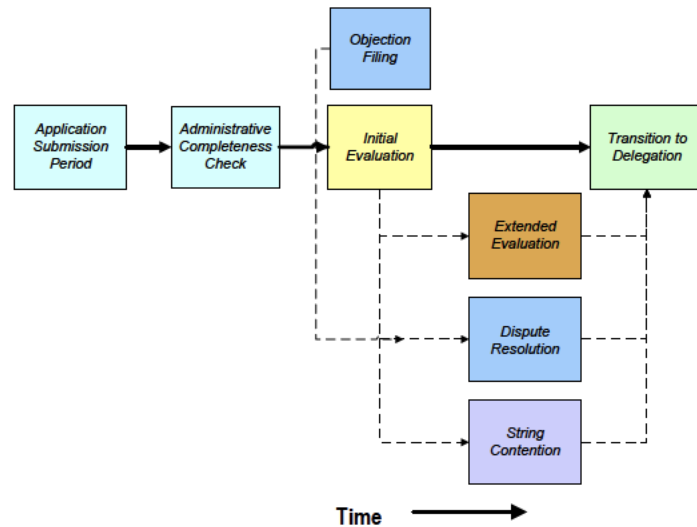


Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.

1.1.2.1 Application Submission Period

At the time the application submission period opens, those wishing to submit new gTLD applications can become registered users of the TLD Application System (TAS).

After completing the user registration, applicants will supply a deposit for each requested application slot (see section 1.4), after which they will receive access to the full application form. To complete the application, users will answer a series of questions to provide general information, demonstrate financial capability, and demonstrate technical and operational capability. The supporting documents listed in subsection 1.2.2 of this module must also be submitted through the online application system as instructed in the relevant questions.

Applicants must also submit their evaluation fees during this period. Refer to Section 1.5 of this module for additional information about fees and payments.

Each application slot is for one gTLD. An applicant may submit as many applications as desired; however, there is no means to apply for more than one gTLD in a single application.

Following the close of the application submission period, ICANN will provide applicants with periodic status updates on the progress of their applications.

1.1.2.2 Administrative Completeness Check

Immediately following the close of the application submission period, ICANN will begin checking all applications for completeness. This check ensures that:

- All mandatory questions are answered;
- Required supporting documents are provided in the proper format(s); and
- The evaluation fees have been received.

ICANN will post the public portions of all applications considered complete and ready for evaluation within two weeks of the close of the application submission period. Certain questions relate to internal processes or information: applicant responses to these questions will not be posted. Each question is labeled in the application form as to whether the information will be posted. See posting designations for the full set of questions in the attachment to Module 2.

The administrative completeness check is expected to be completed for all applications in a period of approximately 8 weeks, subject to extension depending on volume. In the event that all applications cannot be processed within this period, ICANN will post updated process information and an estimated timeline.

1.1.2.3 Comment Period

Public comment mechanisms are part of ICANN's policy development, implementation, and operational processes. As a private-public partnership, ICANN is dedicated to: preserving the operational security and stability of the Internet, promoting competition, achieving broad representation of global Internet communities, and developing policy appropriate to its mission through bottom-up, consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion.

ICANN will open a comment period (the Application Comment period) at the time applications are publicly posted on ICANN's website (refer to subsection 1.1.2.2). This period will allow time for the community to review and submit comments on posted application materials

(referred to as “application comments.”) The comment forum will require commenters to associate comments with specific applications and the relevant panel. Application comments received within a 60-day period from the posting of the application materials will be available to the evaluation panels performing the Initial Evaluation reviews. This period is subject to extension, should the volume of applications or other circumstances require. **To be considered by evaluators, comments must be received in the designated comment forum within the stated time period.**

Evaluators will perform due diligence on the application comments (i.e., determine their relevance to the evaluation, verify the accuracy of claims, analyze meaningfulness of references cited) and take the information provided in these comments into consideration. In cases where consideration of the comments has impacted the scoring of the application, the evaluators will seek clarification from the applicant. Statements concerning consideration of application comments that have impacted the evaluation decision will be reflected in the evaluators’ summary reports, which will be published at the end of Extended Evaluation.

Comments received after the 60-day period will be stored and available (along with comments received during the comment period) for other considerations, such as the dispute resolution process, as described below.

In the new gTLD application process, all applicants should be aware that that comment fora are a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications. Anyone may submit a comment in a public comment forum.

Comments and the Formal Objection Process: A distinction should be made between application comments, which may be relevant to ICANN’s task of determining whether applications meet the established criteria, and formal objections that concern matters outside those evaluation criteria. The formal objection process was created to allow a full and fair consideration of objections based on certain limited grounds outside ICANN’s evaluation of applications on their merits (see subsection 3.2).

Public comments will not be considered as formal objections. Comments on matters associated with formal objections will not be considered by panels during Initial Evaluation. These comments will be available to and may

be subsequently considered by an expert panel during a dispute resolution proceeding (see subsection 1.1.2.9). However, in general, application comments have a very limited role in the dispute resolution process.

String Contention: Comments designated for the Community Priority Panel, as relevant to the criteria in Module 4, may be taken into account during a Community Priority Evaluation.

Government Notifications: Governments may provide a notification using the application comment forum to communicate concerns relating to national laws. However, a government's notification of concern will not in itself be deemed to be a formal objection. A notification by a government does not constitute grounds for rejection of a gTLD application. A government may elect to use this comment mechanism to provide such a notification, in addition to or as an alternative to the GAC Early Warning procedure described in subsection 1.1.2.4 below.

Governments may also communicate directly to applicants using the contact information posted in the application, e.g., to send a notification that an applied-for gTLD string might be contrary to a national law, and to try to address any concerns with the applicant.

General Comments: A general public comment forum will remain open through all stages of the evaluation process, to provide a means for the public to bring forward any other relevant information or issues.

1.1.2.4 GAC Early Warning

Concurrent with the 60-day comment period, ICANN's Governmental Advisory Committee (GAC) may issue a GAC Early Warning notice concerning an application. This provides the applicant with an indication that the application is seen as potentially sensitive or problematic by one or more governments.

The GAC Early Warning is a notice only. It is not a formal objection, nor does it directly lead to a process that can result in rejection of the application. However, a GAC Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of GAC Advice on New gTLDs (see subsection 1.1.2.7) or of a formal objection (see subsection 1.1.2.6) at a later stage in the process.

A GAC Early Warning typically results from a notice to the GAC by one or more governments that an application might be problematic, e.g., potentially violate national law or raise sensitivities. A GAC Early Warning may be issued for any reason.¹ The GAC may then send that notice to the Board – constituting the GAC Early Warning. ICANN will notify applicants of GAC Early Warnings as soon as practicable after receipt from the GAC. The GAC Early Warning notice may include a nominated point of contact for further information.

GAC consensus is not required for a GAC Early Warning to be issued. Minimally, the GAC Early Warning must be provided in writing to the ICANN Board, and be clearly labeled as a GAC Early Warning. This may take the form of an email from the GAC Chair to the ICANN Board. For GAC Early Warnings to be most effective, they should include the reason for the warning and identify the objecting countries.

Upon receipt of a GAC Early Warning, the applicant may elect to withdraw the application for a partial refund (see subsection 1.5.1), or may elect to continue with the application (this may include meeting with representatives from the relevant government(s) to try to address the concern). To qualify for the refund described in subsection 1.5.1, the applicant must provide notification to ICANN of its election to withdraw the application within 21 calendar days of the date of GAC Early Warning delivery to the applicant.

To reduce the possibility of a GAC Early Warning, all applicants are encouraged to identify potential sensitivities in advance of application submission, and to work with the relevant parties (including governments) beforehand to mitigate concerns related to the application.

1.1.2.5 Initial Evaluation

Initial Evaluation will begin immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation. At the beginning of this period, background screening on the applying entity and the individuals named in the application will be conducted. Applications

¹ While definitive guidance has not been issued, the GAC has indicated that strings that could raise sensitivities include those that "purport to represent or that embody a particular group of people or interests based on historical, cultural, or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non-exhaustive)" and "those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse."

must pass this step in conjunction with the Initial Evaluation reviews.

There are two main elements of the Initial Evaluation:

1. String reviews (concerning the applied-for gTLD string). String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS, including problems caused by similarity to existing TLDs or reserved names.
2. Applicant reviews (concerning the entity applying for the gTLD and its proposed registry services). Applicant reviews include a determination of whether the applicant has the requisite technical, operational, and financial capabilities to operate a registry.

By the conclusion of the Initial Evaluation period, ICANN will post notice of all Initial Evaluation results. Depending on the volume of applications received, such notices may be posted in batches over the course of the Initial Evaluation period.

The Initial Evaluation is expected to be completed for all applications in a period of approximately 5 months. If the volume of applications received significantly exceeds 500, applications will be processed in batches and the 5-month timeline will not be met. The first batch will be limited to 500 applications and subsequent batches will be limited to 400 to account for capacity limitations due to managing extended evaluation, string contention, and other processes associated with each previous batch.

If batching is required, a secondary time-stamp process will be employed to establish the batches. (Batching priority will not be given to an application based on the time at which the application was submitted to ICANN, nor will batching priority be established based on a random selection method.)

The secondary time-stamp process will require applicants to obtain a time-stamp through a designated process which will occur after the close of the application submission period. The secondary time stamp process will occur, if required, according to the details to be published on ICANN's website. (Upon the Board's approval of a final designation of the operational details of the "secondary timestamp" batching process, the final plan will be added as a process within the Applicant Guidebook.)

If batching is required, the String Similarity review will be completed on all applications prior to the establishment of evaluation priority batches. For applications identified as part of a contention set, the entire contention set will be kept together in the same batch.

If batches are established, ICANN will post updated process information and an estimated timeline.

Note that the processing constraints will limit delegation rates to a steady state even in the event of an extremely high volume of applications. The annual delegation rate will not exceed 1,000 per year in any case, no matter how many applications are received.²

1.1.2.6 *Objection Filing*

Formal objections to applications can be filed on any of four enumerated grounds, by parties with standing to object. The objection filing period will open after ICANN posts the list of complete applications as described in subsection 1.1.2.2, and will last for approximately 7 months.

Objectors must file such formal objections directly with dispute resolution service providers (DRSPs), not with ICANN. The objection filing period will close following the end of the Initial Evaluation period (refer to subsection 1.1.2.5), with a two-week window of time between the posting of the Initial Evaluation results and the close of the objection filing period. Objections that have been filed during the objection filing period will be addressed in the dispute resolution stage, which is outlined in subsection 1.1.2.9 and discussed in detail in Module 3.

All applicants should be aware that third parties have the opportunity to file objections to any application during the objection filing period. Applicants whose applications are the subject of a formal objection will have an opportunity to file a response according to the dispute resolution service provider's rules and procedures. An applicant wishing to file a formal objection to another application that has been submitted would do so within the objection filing period, following the objection filing procedures in Module 3.

Applicants are encouraged to identify possible regional, cultural, property interests, or other sensitivities regarding TLD strings and their uses before applying and, where

² See "Delegation Rate Scenarios for New gTLDs" at <http://icann.org/en/topics/new-gtlds/delegation-rate-scenarios-new-gtlds-06oct10-en.pdf> for additional discussion.

possible, consult with interested parties to mitigate any concerns in advance.

1.1.2.7 Receipt of GAC Advice on New gTLDs

The GAC may provide public policy advice directly to the ICANN Board on any application. The procedure for GAC Advice on New gTLDs described in Module 3 indicates that, to be considered by the Board during the evaluation process, the GAC Advice on New gTLDs must be submitted by the close of the objection filing period. A GAC Early Warning is not a prerequisite to use of the GAC Advice process.

If the Board receives GAC Advice on New gTLDs stating that it is the consensus of the GAC that a particular application should not proceed, this will create a strong presumption for the ICANN Board that the application should not be approved. If the Board does not act in accordance with this type of advice, it must provide rationale for doing so.

See Module 3 for additional detail on the procedures concerning GAC Advice on New gTLDs.

1.1.2.8 Extended Evaluation

Extended Evaluation is available only to certain applicants that do not pass Initial Evaluation.

Applicants failing certain elements of the Initial Evaluation can request an Extended Evaluation. If the applicant does not pass Initial Evaluation and does not expressly request an Extended Evaluation, the application will proceed no further. The Extended Evaluation period allows for an additional exchange of information between the applicant and evaluators to clarify information contained in the application. The reviews performed in Extended Evaluation do not introduce additional evaluation criteria.

An application may be required to enter an Extended Evaluation if one or more proposed registry services raise technical issues that might adversely affect the security or stability of the DNS. The Extended Evaluation period provides a time frame for these issues to be investigated. Applicants will be informed if such a review is required by the end of the Initial Evaluation period.

Evaluators and any applicable experts consulted will communicate the conclusions resulting from the additional review by the end of the Extended Evaluation period.

At the conclusion of the Extended Evaluation period, ICANN will post summary reports, by panel, from the Initial and Extended Evaluation periods.

If an application passes the Extended Evaluation, it can then proceed to the next relevant stage. If the application does not pass the Extended Evaluation, it will proceed no further.

The Extended Evaluation is expected to be completed for all applications in a period of approximately 5 months, though this timeframe could be increased based on volume. In this event, ICANN will post updated process information and an estimated timeline.

1.1.2.9 Dispute Resolution

Dispute resolution applies only to applicants whose applications are the subject of a formal objection.

Where formal objections are filed and filing fees paid during the objection filing period, independent dispute resolution service providers (DRSPs) will initiate and conclude proceedings based on the objections received. The formal objection procedure exists to provide a path for those who wish to object to an application that has been submitted to ICANN. Dispute resolution service providers serve as the fora to adjudicate the proceedings based on the subject matter and the needed expertise. Consolidation of objections filed will occur where appropriate, at the discretion of the DRSP.

As a result of a dispute resolution proceeding, either the applicant will prevail (in which case the application can proceed to the next relevant stage), or the objector will prevail (in which case either the application will proceed no further or the application will be bound to a contention resolution procedure). In the event of multiple objections, an applicant must prevail in all dispute resolution proceedings concerning the application to proceed to the next relevant stage. Applicants will be notified by the DRSP(s) of the results of dispute resolution proceedings.

Dispute resolution proceedings, where applicable, are expected to be completed for all applications within approximately a 5-month time frame. In the event that volume is such that this timeframe cannot be accommodated, ICANN will work with the dispute resolution service providers to create processing procedures and post updated timeline information.

1.1.2.10 String Contention

String contention applies only when there is more than one qualified application for the same or similar gTLD strings.

String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

Applicants are encouraged to resolve string contention cases among themselves prior to the string contention resolution stage. In the absence of resolution by the contending applicants, string contention cases are resolved either through a community priority evaluation (if a community-based applicant elects it) or through an auction.

In the event of contention between applied-for gTLD strings that represent geographic names, the parties may be required to follow a different process to resolve the contention. See subsection 2.2.1.4 of Module 2 for more information.

Groups of applied-for strings that are either identical or similar are called contention sets. All applicants should be aware that if an application is identified as being part of a contention set, string contention resolution procedures will not begin until all applications in the contention set have completed all aspects of evaluation, including dispute resolution, if applicable.

To illustrate, as shown in Figure 1-2, Applicants A, B, and C all apply for .EXAMPLE and are identified as a contention set. Applicants A and C pass Initial Evaluation, but Applicant B does not. Applicant B requests Extended Evaluation. A third party files an objection to Applicant C’s application, and Applicant C enters the dispute resolution process. Applicant A must wait to see whether Applicants B and C successfully complete the Extended Evaluation and dispute resolution phases, respectively, before it can proceed to the string contention resolution stage. In this example, Applicant B passes the Extended Evaluation, but Applicant C does not prevail in the dispute resolution proceeding. String contention resolution then proceeds between Applicants A and B.

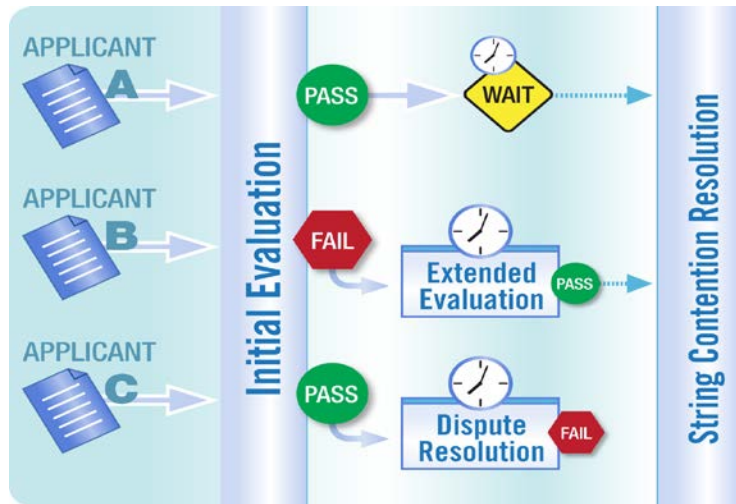


Figure 1-2 – All applications in a contention set must complete all previous evaluation and dispute resolution stages before string contention resolution can begin.

Applicants prevailing in a string contention resolution procedure will proceed toward delegation of the applied-for gTLDs.

String contention resolution for a contention set is estimated to take from 2.5 to 6 months to complete. The time required will vary per case because some contention cases may be resolved in either a community priority evaluation or an auction, while others may require both processes.

1.1.2.11 Transition to Delegation

Applicants successfully completing all the relevant stages outlined in this subsection 1.1.2 are required to carry out a series of concluding steps before delegation of the applied-for gTLD into the root zone. These steps include execution of a registry agreement with ICANN and completion of a pre-delegation technical test to validate information provided in the application.

Following execution of a registry agreement, the prospective registry operator must complete technical set-up and show satisfactory performance on a set of technical tests before delegation of the gTLD into the root zone may be initiated. If the pre-delegation testing requirements are not satisfied so that the gTLD can be delegated into the root zone within the time frame specified in the registry agreement, ICANN may in its sole and absolute discretion elect to terminate the registry agreement.

Once all of these steps have been successfully completed, the applicant is eligible for delegation of its applied-for gTLD into the DNS root zone.

It is expected that the transition to delegation steps can be completed in approximately 2 months, though this could take more time depending on the applicant's level of preparedness for the pre-delegation testing and the volume of applications undergoing these steps concurrently.

1.1.3 Lifecycle Timelines

Based on the estimates for each stage described in this section, the lifecycle for a straightforward application could be approximately 9 months, as follows:

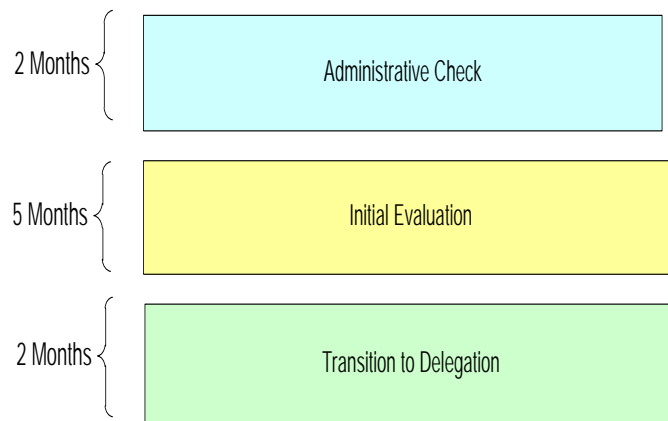


Figure 1-3 – A straightforward application could have an approximate 9-month lifecycle.

The lifecycle for a highly complex application could be much longer, such as 20 months in the example below:

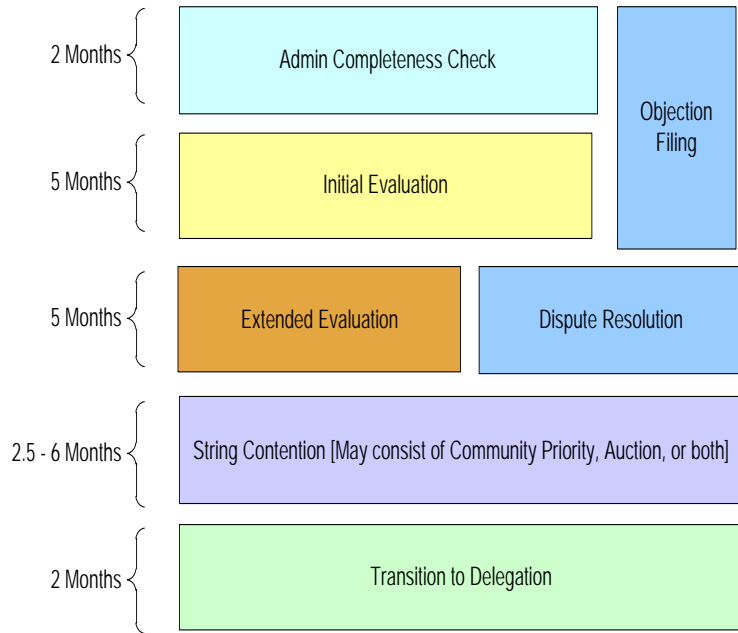


Figure 1-4 – A complex application could have an approximate 20-month lifecycle.

1.1.4 Posting Periods

The results of application reviews will be made available to the public at various stages in the process, as shown below.

Period	Posting Content
During Administrative Completeness Check	Public portions of all applications (posted within 2 weeks of the start of the Administrative Completeness Check).
End of Administrative Completeness Check	Results of Administrative Completeness Check.
GAC Early Warning Period	GAC Early Warnings received.
During Initial Evaluation	Status updates for applications withdrawn or ineligible for further review. Contention sets resulting from String Similarity review.

Period	Posting Content
End of Initial Evaluation	Application status updates with all Initial Evaluation results.
GAC Advice on New gTLDs	GAC Advice received.
End of Extended Evaluation	Application status updates with all Extended Evaluation results. Evaluation summary reports from the Initial and Extended Evaluation periods.
During Objection Filing/Dispute Resolution	Information on filed objections and status updates available via Dispute Resolution Service Provider websites. Notice of all objections posted by ICANN after close of objection filing period.
During Contention Resolution (Community Priority Evaluation)	Results of each Community Priority Evaluation posted as completed.
During Contention Resolution (Auction)	Results from each auction posted as completed.
Transition to Delegation	Registry Agreements posted when executed. Pre-delegation testing status updated.

1.1.5 Sample Application Scenarios

The following scenarios briefly show a variety of ways in which an application may proceed through the evaluation process. The table that follows exemplifies various processes and outcomes. This is not intended to be an exhaustive list of possibilities. There are other possible combinations of paths an application could follow.

Estimated time frames for each scenario are also included, based on current knowledge. Actual time frames may vary depending on several factors, including the total number

of applications received by ICANN during the application submission period. It should be emphasized that most applications are expected to pass through the process in the shortest period of time, i.e., they will not go through extended evaluation, dispute resolution, or string contention resolution processes. Although most of the scenarios below are for processes extending beyond nine months, it is expected that most applications will complete the process within the nine-month timeframe.

Scenario Number	Initial Evaluation	Extended Evaluation	Objection(s) Filed	String Contention	Approved for Delegation Steps	Estimated Elapsed Time
1	Pass	N/A	None	No	Yes	9 months
2	Fail	Pass	None	No	Yes	14 months
3	Pass	N/A	None	Yes	Yes	11.5 – 15 months
4	Pass	N/A	Applicant prevails	No	Yes	14 months
5	Pass	N/A	Objector prevails	N/A	No	12 months
6	Fail	Quit	N/A	N/A	No	7 months
7	Fail	Fail	N/A	N/A	No	12 months
8	Fail	Pass	Applicant prevails	Yes	Yes	16.5 – 20 months
9	Fail	Pass	Applicant prevails	Yes	No	14.5 – 18 months

Scenario 1 – Pass Initial Evaluation, No Objection, No Contention – In the most straightforward case, the application passes Initial Evaluation and there is no need for an Extended Evaluation. No objections are filed during the objection period, so there is no dispute to resolve. As there is no contention for the applied-for gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD. Most applications are expected to complete the process within this timeframe.

Scenario 2 – Extended Evaluation, No Objection, No Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. As with Scenario 1, no objections are filed

during the objection period, so there is no dispute to resolve. As there is no contention for the gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

Scenario 3 – Pass Initial Evaluation, No Objection, Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. No objections are filed during the objection period, so there is no dispute to resolve. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, the application prevails in the contention resolution, so the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

Scenario 4 – Pass Initial Evaluation, Win Objection, No Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing (refer to Module 3, Objection Procedures). The objection is heard by a dispute resolution service provider panel that finds in favor of the applicant. The applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

Scenario 5 – Pass Initial Evaluation, Lose Objection – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection period, multiple objections are filed by one or more objectors with standing for one or more of the four enumerated objection grounds. Each objection is heard by a dispute resolution service provider panel. In this case, the panels find in favor of the applicant for most of the objections, but one finds in favor of the objector. As one of the objections has been upheld, the application does not proceed.

Scenario 6 – Fail Initial Evaluation, Applicant Withdraws – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant decides to withdraw the application rather than continuing with Extended Evaluation. The application does not proceed.

Scenario 7 – Fail Initial Evaluation, Fail Extended Evaluation -- In this case, the application fails one or more aspects of the Initial Evaluation. The applicant requests Extended Evaluation for the appropriate elements. However, the

application fails Extended Evaluation also. The application does not proceed.

Scenario 8 – Extended Evaluation, Win Objection, Pass Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing. The objection is heard by a dispute resolution service provider panel that finds in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, the applicant prevails over other applications in the contention resolution procedure, the applicant can enter into a registry agreement, and the application can proceed toward delegation of the applied-for gTLD.

Scenario 9 – Extended Evaluation, Objection, Fail Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing. The objection is heard by a dispute resolution service provider that finds in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, another applicant prevails in the contention resolution procedure, and the application does not proceed.

Transition to Delegation – After an application has successfully completed Initial Evaluation, and other stages as applicable, the applicant is required to complete a set of steps leading to delegation of the gTLD, including execution of a registry agreement with ICANN, and completion of pre-delegation testing. Refer to Module 5 for a description of the steps required in this stage.

1.1.6 Subsequent Application Rounds

ICANN's goal is to launch subsequent gTLD application rounds as quickly as possible. The exact timing will be based on experiences gained and changes required after this round is completed. The goal is for the next application round to begin within one year of the close of the application submission period for the initial round.

ICANN has committed to reviewing the effects of the New gTLD Program on the operations of the root zone system after the first application round, and will defer the delegations in a second application round until it is determined that the delegations resulting from the first round did not jeopardize root zone system security or stability.

It is the policy of ICANN that there be subsequent application rounds, and that a systemized manner of applying for gTLDs be developed in the long term.

1.2 Information for All Applicants

1.2.1 Eligibility

Established corporations, organizations, or institutions in good standing may apply for a new gTLD. Applications from individuals or sole proprietorships will not be considered. Applications from or on behalf of yet-to-be-formed legal entities, or applications presupposing the future formation of a legal entity (for example, a pending Joint Venture) will not be considered.

ICANN has designed the New gTLD Program with multiple stakeholder protection mechanisms. Background screening, features of the gTLD Registry Agreement, data and financial escrow mechanisms are all intended to provide registrant and user protections.

The application form requires applicants to provide information on the legal establishment of the applying entity, as well as the identification of directors, officers, partners, and major shareholders of that entity. The names and positions of individuals included in the application will be published as part of the application; other information collected about the individuals will not be published.

Background screening at both the entity level and the individual level will be conducted for all applications to confirm eligibility. This inquiry is conducted on the basis of the information provided in questions 1-11 of the application form. ICANN may take into account information received from any source if it is relevant to the criteria in this section. If requested by ICANN, all applicants will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct background screening activities.

ICANN will perform background screening in only two areas: (1) General business diligence and criminal history; and (2) History of cybersquatting behavior. The criteria used for criminal history are aligned with the “crimes of trust” standard sometimes used in the banking and finance industry.

In the absence of exceptional circumstances, applications from any entity with or including any individual with convictions or decisions of the types listed in (a) – (m) below will be automatically disqualified from the program.

- a. within the past ten years, has been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that ICANN deems as the substantive equivalent of any of these;
- b. within the past ten years, has been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of the funds of others;
- c. within the past ten years has been convicted of any willful tax-related fraud or willful evasion of tax liabilities;
- d. within the past ten years has been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative;
- e. has ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes;
- f. has ever been convicted of any crime involving the use of a weapon, force, or the threat of force;
- g. has ever been convicted of any violent or sexual offense victimizing children, the

elderly, or individuals with disabilities;

- h. has ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988³;
- i. has ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols)^{4,5};
- j. has been convicted, within the respective timeframes, of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes above (i.e., within the past 10 years for crimes listed in (a) - (d) above, or ever for the crimes listed in (e) - (i) above);
- k. has entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents), within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (a) - (d) above, or ever for the crimes listed in (e) - (i) above);
- l. is the subject of a disqualification imposed by ICANN and in effect at the time the application is considered;
- m. has been involved in a pattern of adverse, final decisions indicating that the applicant

³ <http://www.unodc.org/unodc/en/treaties/illicit-traffic.html>

⁴ <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>

⁵ It is recognized that not all countries have signed on to the UN conventions referenced above. These conventions are being used solely for identification of a list of crimes for which background screening will be performed. It is not necessarily required that an applicant would have been convicted pursuant to the UN convention but merely convicted of a crime listed under these conventions, to trigger these criteria.

or individual named in the application was engaged in cybersquatting as defined in the Uniform Domain Name Dispute Resolution Policy (UDRP), the Anti-Cybersquatting Consumer Protection Act (ACPA), or other equivalent legislation, or was engaged in reverse domain name hijacking under the UDRP or bad faith or reckless disregard under the ACPA or other equivalent legislation. Three or more such decisions with one occurring in the last four years will generally be considered to constitute a pattern.

- n. fails to provide ICANN with the identifying information necessary to confirm identity at the time of application or to resolve questions of identity during the background screening process;
- o. fails to provide a good faith effort to disclose all relevant information relating to items (a) – (m).

Background screening is in place to protect the public interest in the allocation of critical Internet resources, and ICANN reserves the right to deny an otherwise qualified application based on any information identified during the background screening process. For example, a final and legally binding decision obtained by a national law enforcement or consumer protection authority finding that the applicant was engaged in fraudulent and deceptive commercial practices as defined in the Organization for Economic Co-operation and Development (OECD) Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders⁶ may cause an application to be rejected. ICANN may also contact the applicant with additional questions based on information obtained in the background screening process.

All applicants are required to provide complete and detailed explanations regarding any of the above events as part of the application. Background screening information will not be made publicly available by ICANN.

Registrar Cross-Ownership -- ICANN-accredited registrars are eligible to apply for a gTLD. However, all gTLD registries

⁶ http://www.oecd.org/document/56/0,3746,en_2649_34267_2515000_1_1_1_1.00.html

are required to abide by a Code of Conduct addressing, *inter alia*, non-discriminatory access for all authorized registrars. ICANN reserves the right to refer any application to the appropriate competition authority relative to any cross-ownership issues.

Legal Compliance -- ICANN must comply with all U.S. laws, rules, and regulations. One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC's List of Specially Designated Nationals and Blocked Persons (the SDN List). ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. government authorization or exemption. ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List. In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs, but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license.

1.2.2 Required Documents

All applicants should be prepared to submit the following documents, which are required to accompany each application:

1. **Proof of legal establishment** – Documentation of the applicant's establishment as a specific type of entity in accordance with the applicable laws of its jurisdiction.
2. **Financial statements** – Applicants must provide audited or independently certified financial statements for the most recently completed fiscal year for the applicant. In some cases, unaudited financial statements may be provided.

As indicated in the relevant questions, supporting documentation should be submitted in the original language. English translations are not required.

All documents must be valid at the time of submission. Refer to the Evaluation Criteria, attached to Module 2, for additional details on the requirements for these documents.

Some types of supporting documentation are required only in certain cases:

1. **Community endorsement** – If an applicant has designated its application as community-based (see section 1.2.3), it will be asked to submit a written endorsement of its application by one or more established institutions representing the community it has named. An applicant may submit written endorsements from multiple institutions. If applicable, this will be submitted in the section of the application concerning the community-based designation.

At least one such endorsement is required for a complete application. The form and content of the endorsement are at the discretion of the party providing the endorsement; however, the letter must identify the applied-for gTLD string and the applying entity, include an express statement of support for the application, and supply the contact information of the entity providing the endorsement.

Written endorsements from individuals need not be submitted with the application, but may be submitted in the application comment forum.

2. **Government support or non-objection** – If an applicant has applied for a gTLD string that is a geographic name (as defined in this Guidebook), the applicant is required to submit documentation of support for or non-objection to its application from the relevant governments or public authorities. Refer to subsection 2.2.1.4 for more information on the requirements for geographic names. If applicable, this will be submitted in the geographic names section of the application.
3. **Documentation of third-party funding commitments** – If an applicant lists funding from third parties in its application, it must provide evidence of commitment by the party committing the funds. If applicable, this will be submitted in the financial section of the application.

1.2.3 Community-Based Designation

All applicants are required to designate whether their application is **community-based**.

1.2.3.1 Definitions

For purposes of this Applicant Guidebook, a **community-based gTLD** is a gTLD that is operated for the benefit of a clearly delineated community. Designation or non-

designation of an application as community-based is entirely at the discretion of the applicant. Any applicant may designate its application as community-based; however, each applicant making this designation is asked to substantiate its status as representative of the community it names in the application by submission of written endorsements in support of the application. Additional information may be requested in the event of a community priority evaluation (refer to section 4.2 of Module 4). An applicant for a community-based gTLD is expected to:

1. Demonstrate an ongoing relationship with a clearly delineated community.
2. Have applied for a gTLD string strongly and specifically related to the community named in the application.
3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD, including appropriate security verification procedures, commensurate with the community-based purpose it has named.
4. Have its application endorsed in writing by one or more established institutions representing the community it has named.

For purposes of differentiation, an application that has not been designated as community-based will be referred to hereinafter in this document as a **standard application**. A standard gTLD can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement. A standard applicant may or may not have a formal relationship with an exclusive registrant or user population. It may or may not employ eligibility or use restrictions. Standard simply means here that the applicant has not designated the application as community-based.

1.2.3.2 Implications of Application Designation

Applicants should understand how their designation as community-based or standard will affect application processing at particular stages, and, if the application is successful, execution of the registry agreement and subsequent obligations as a gTLD registry operator, as described in the following paragraphs.

Objection / Dispute Resolution – All applicants should understand that a formal objection may be filed against any application on community grounds, even if the applicant has not designated itself as community-based or

declared the gTLD to be aimed at a particular community. Refer to Module 3, Objection Procedures.

String Contention – Resolution of string contention may include one or more components, depending on the composition of the contention set and the elections made by community-based applicants.

- A **settlement between the parties** can occur at any time after contention is identified. The parties will be encouraged to meet with an objective to settle the contention. Applicants in contention always have the opportunity to resolve the contention voluntarily, resulting in the withdrawal of one or more applications, before reaching the contention resolution stage.
- A **community priority evaluation** will take place only if a community-based applicant in a contention set elects this option. All community-based applicants in a contention set will be offered this option in the event that there is contention remaining after the applications have successfully completed all previous evaluation stages.
- An **auction** will result for cases of contention not resolved by community priority evaluation or agreement between the parties. Auction occurs as a contention resolution means of last resort. If a community priority evaluation occurs but does not produce a clear winner, an auction will take place to resolve the contention.

Refer to Module 4, String Contention Procedures, for detailed discussions of contention resolution procedures.

Contract Execution and Post-Delegation – A community-based applicant will be subject to certain post-delegation contractual obligations to operate the gTLD in a manner consistent with the restrictions associated with its community-based designation. Material changes to the contract, including changes to the community-based nature of the gTLD and any associated provisions, may only be made with ICANN's approval. The determination of whether to approve changes requested by the applicant will be at ICANN's discretion. Proposed criteria for approving such changes are the subject of policy discussions.

Community-based applications are intended to be a narrow category, for applications where there are

unambiguous associations among the applicant, the community served, and the applied-for gTLD string. Evaluation of an applicant's designation as community-based will occur only in the event of a contention situation that results in a community priority evaluation. However, any applicant designating its application as community-based will, if the application is approved, be bound by the registry agreement to implement the community-based restrictions it has specified in the application. This is true even if there are no contending applicants.

1.2.3.3 Changes to Application Designation

An applicant may not change its designation as standard or community-based once it has submitted a gTLD application for processing.

1.2.4 Notice concerning Technical Acceptance Issues with New gTLDs

All applicants should be aware that approval of an application and entry into a registry agreement with ICANN do not guarantee that a new gTLD will immediately function throughout the Internet. Past experience indicates that network operators may not immediately fully support new top-level domains, even when these domains have been delegated in the DNS root zone, since third-party software modification may be required and may not happen immediately.

Similarly, software applications sometimes attempt to validate domain names and may not recognize new or unknown top-level domains. ICANN has no authority or ability to require that software accept new top-level domains, although it does prominently publicize which top-level domains are valid and has developed a basic tool to assist application providers in the use of current root-zone data.

ICANN encourages applicants to familiarize themselves with these issues and account for them in their startup and launch plans. Successful applicants may find themselves expending considerable efforts working with providers to achieve acceptance of their new top-level domains.

Applicants should review <http://www.icann.org/en/topics/TLD-acceptance/> for background. IDN applicants should also review the material concerning experiences with IDN test strings in the root zone (see <http://idn.icann.org/>).

1.2.5 Notice concerning TLD Delegations

ICANN is only able to create TLDs as delegations in the DNS root zone, expressed using NS records with any corresponding DS records and glue records. There is no policy enabling ICANN to place TLDs as other DNS record types (such as A, MX, or DNAME records) in the root zone.

1.2.6 Terms and Conditions

All applicants must agree to a standard set of Terms and Conditions for the application process. The Terms and Conditions are available in Module 6 of this guidebook.

1.2.7 Notice of Changes to Information

If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.

ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.

Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.

1.2.8 Voluntary Designation for High Security Zones

An ICANN stakeholder group has considered development of a possible special designation for "High Security Zone Top Level Domains" ("HSTLDs"). The group's Final Report can be found at <http://www.icann.org/en/topics/new-gtlds/hstld-final-report-11mar11-en.pdf>.

The Final Report may be used to inform further work. ICANN will support independent efforts toward developing voluntary high-security TLD designations, which may be available to gTLD applicants wishing to pursue such designations.

1.2.9 Security and Stability

Root Zone Stability: There has been significant study, analysis, and consultation in preparation for launch of the

New gTLD Program, indicating that the addition of gTLDs to the root zone will not negatively impact the security or stability of the DNS.

It is estimated that 200-300 TLDs will be delegated annually, and determined that in no case will more than 1000 new gTLDs be added to the root zone in a year. The delegation rate analysis, consultations with the technical community, and anticipated normal operational upgrade cycles all lead to the conclusion that the new gTLD delegations will have no significant impact on the stability of the root system. Modeling and reporting will continue during, and after, the first application round so that root-scaling discussions can continue and the delegation rates can be managed as the program goes forward.

All applicants should be aware that delegation of any new gTLDs is conditional on the continued absence of significant negative impact on the security or stability of the DNS and the root zone system (including the process for delegating TLDs in the root zone). In the event that there is a reported impact in this regard and processing of applications is delayed, the applicants will be notified in an orderly and timely manner.

1.2.10 Resources for Applicant Assistance

A variety of support resources are available to gTLD applicants. Financial assistance will be available to a limited number of eligible applicants. To request financial assistance, applicants must submit a separate financial assistance application in addition to the gTLD application form.

To be eligible for consideration, all financial assistance applications must be received by **23:59 UTC 12 April 2012**. Financial assistance applications will be evaluated and scored against pre-established criteria.

In addition, ICANN maintains a webpage as an informational resource for applicants seeking assistance, and organizations offering support.

See <http://newgtlds.icann.org/applicants/candidate-support> for details on these resources.

1.2.11 Updates to the Applicant Guidebook

As approved by the ICANN Board of Directors, this Guidebook forms the basis of the New gTLD Program. ICANN reserves the right to make reasonable updates and

changes to the Applicant Guidebook at any time, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process. Any such updates or revisions will be posted on ICANN's website.

1.3 Information for Internationalized Domain Name Applicants

Some applied-for gTLD strings are expected to be Internationalized Domain Names (IDNs). IDNs are domain names including characters used in the local representation of languages not written with the basic Latin alphabet (a - z), European-Arabic digits (0 - 9), and the hyphen (-). As described below, IDNs require the insertion of A-labels into the DNS root zone.

1.3.1 IDN-Specific Requirements

An applicant for an IDN string must provide information indicating compliance with the IDNA protocol and other technical requirements. The IDNA protocol and its documentation can be found at <http://icann.org/en/topics/idn/rfcs.htm>.

Applicants must provide applied-for gTLD strings in the form of both a **U-label** (the IDN TLD in local characters) and an **A-label**.

An A-label is the ASCII form of an IDN label. Every IDN A-label begins with the IDNA ACE prefix, "xn--", followed by a string that is a valid output of the Punycode algorithm, making a maximum of 63 total ASCII characters in length. The prefix and string together must conform to all requirements for a label that can be stored in the DNS including conformance to the LDH (host name) rule described in RFC 1034, RFC 1123, and elsewhere.

A U-label is the Unicode form of an IDN label, which a user expects to see displayed in applications.

For example, using the current IDN test string in Cyrillic script, the U-label is <испытание> and the A-label is <xn--80akhbyknj4f>. An A-label must be capable of being produced by conversion from a U-label and a U-label must be capable of being produced by conversion from an A-label.

Applicants for IDN gTLDs will also be required to provide the following at the time of the application:

1. Meaning or restatement of string in English. The applicant will provide a short description of what the string would mean or represent in English.
2. Language of label (ISO 639-1). The applicant will specify the language of the applied-for gTLD string, both according to the ISO codes for the representation of names of languages, and in English.
3. Script of label (ISO 15924). The applicant will specify the script of the applied-for gTLD string, both according to the ISO codes for the representation of names of scripts, and in English.
4. Unicode code points. The applicant will list all the code points contained in the U-label according to its Unicode form.
5. Applicants must further demonstrate that they have made reasonable efforts to ensure that the encoded IDN string does not cause any rendering or operational problems. For example, problems have been identified in strings with characters of mixed right-to-left and left-to-right directionality when numerals are adjacent to the path separator (i.e., the dot).⁷

If an applicant is applying for a string with known issues, it should document steps that will be taken to mitigate these issues in applications. While it is not possible to ensure that all rendering problems are avoided, it is important that as many as possible are identified early and that the potential registry operator is aware of these issues. Applicants can become familiar with these issues by understanding the IDNA protocol (see <http://www.icann.org/en/topics/idn/rfcs.htm>), and by active participation in the IDN wiki (see <http://idn.icann.org/>) where some rendering problems are demonstrated.

6. **[Optional]** - Representation of label in phonetic alphabet. The applicant may choose to provide its applied-for gTLD string notated according to the International Phonetic Alphabet (<http://www.langsci.ucl.ac.uk/ipa/>). Note that this information will not be evaluated or scored. The information, if provided, will be used as a guide to ICANN in responding to inquiries or speaking of the application in public presentations.

⁷ See examples at <http://stupid.domain.name/node/683>

1.3.2 IDN Tables

An IDN table provides the list of characters eligible for registration in domain names according to the registry's policy. It identifies any multiple characters that are considered equivalent for domain name registration purposes ("variant characters"). Variant characters occur where two or more characters can be used interchangeably.

Examples of IDN tables can be found in the Internet Assigned Numbers Authority (IANA) IDN Repository at <http://www.iana.org/procedures/idn-repository.html>.

In the case of an application for an IDN gTLD, IDN tables must be submitted for the language or script for the applied-for gTLD string (the "top level tables"). IDN tables must also be submitted for each language or script in which the applicant intends to offer IDN registrations at the second or lower levels.

Each applicant is responsible for developing its IDN Tables, including specification of any variant characters. Tables must comply with ICANN's IDN Guidelines⁸ and any updates thereto, including:

- Complying with IDN technical standards.
- Employing an inclusion-based approach (i.e., code points not explicitly permitted by the registry are prohibited).
- Defining variant characters.
- Excluding code points not permissible under the guidelines, e.g., line-drawing symbols, pictographic dingbats, structural punctuation marks.
- Developing tables and registration policies in collaboration with relevant stakeholders to address common issues.
- Depositing IDN tables with the IANA Repository for IDN Practices (once the TLD is delegated).

An applicant's IDN tables should help guard against user confusion in the deployment of IDN gTLDs. Applicants are strongly urged to consider specific linguistic and writing system issues that may cause problems when characters are used in domain names, as part of their work of defining variant characters.

⁸ See <http://www.icann.org/en/topics/idn/implementation-guidelines.htm>

To avoid user confusion due to differing practices across TLD registries, it is recommended that applicants cooperate with TLD operators that offer domain name registration with the same or visually similar characters.

As an example, languages or scripts are often shared across geographic boundaries. In some cases, this can cause confusion among the users of the corresponding language or script communities. Visual confusion can also exist in some instances between different scripts (for example, Greek, Cyrillic and Latin).

Applicants will be asked to describe the process used in developing the IDN tables submitted. ICANN may compare an applicant's IDN table with IDN tables for the same languages or scripts that already exist in the IANA repository or have been otherwise submitted to ICANN. If there are inconsistencies that have not been explained in the application, ICANN may ask the applicant to detail the rationale for differences. For applicants that wish to conduct and review such comparisons prior to submitting a table to ICANN, a table comparison tool will be available.

ICANN will accept the applicant's IDN tables based on the factors above.

Once the applied-for string has been delegated as a TLD in the root zone, the applicant is required to submit IDN tables for lodging in the IANA Repository of IDN Practices. For additional information, see existing tables at <http://iana.org/domains/idn-tables/>, and submission guidelines at <http://iana.org/procedures/idn-repository.html>.

1.3.3 IDN Variant TLDs

A variant TLD string results from the substitution of one or more characters in the applied-for gTLD string with variant characters based on the applicant's top level tables.

Each application contains one applied-for gTLD string. The applicant may also declare any variant strings for the TLD in its application. However, no variant gTLD strings will be delegated through the New gTLD Program until variant management solutions are developed and implemented.⁹ Declaring variant strings is informative only and will not imply any right or claim to the declared variant strings.

⁹ The ICANN Board directed that work be pursued on variant management in its resolution on 25 Sep 2010, <http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.5>.

When a variant delegation process is established, applicants may be required to submit additional information such as implementation details for the variant TLD management mechanism, and may need to participate in a subsequent evaluation process, which could contain additional fees and review steps.

The following scenarios are possible during the gTLD evaluation process:

- a. Applicant declares variant strings to the applied-for gTLD string in its application. If the application is successful, the applied-for gTLD string will be delegated to the applicant. The declared variant strings are noted for future reference. These declared variant strings will not be delegated to the applicant along with the applied-for gTLD string, nor will the applicant have any right or claim to the declared variant strings.

Variant strings listed in successful gTLD applications will be tagged to the specific application and added to a "Declared Variants List" that will be available on ICANN's website. A list of pending (i.e., declared) variant strings from the IDN ccTLD Fast Track is available at <http://icann.org/en/topics/idn/fast-track/string-evaluation-completion-en.htm>.

ICANN may perform independent analysis on the declared variant strings, and will not necessarily include all strings listed by the applicant on the Declared Variants List.

- b. Multiple applicants apply for strings that are identified by ICANN as variants of one another. These applications will be placed in a contention set and will follow the contention resolution procedures in Module 4.
- c. Applicant submits an application for a gTLD string and does not indicate variants to the applied-for gTLD string. ICANN will not identify variant strings unless scenario (b) above occurs.

Each variant string declared in the application must also conform to the string requirements in section 2.2.1.3.2.

Variant strings declared in the application will be reviewed for consistency with the top-level tables submitted in the application. Should any declared variant strings not be

based on use of variant characters according to the submitted top-level tables, the applicant will be notified and the declared string will no longer be considered part of the application.

Declaration of variant strings in an application does not provide the applicant any right or reservation to a particular string. Variant strings on the Declared Variants List may be subject to subsequent additional review per a process and criteria to be defined.

It should be noted that while variants for second and lower-level registrations are defined freely by the local communities without any ICANN validation, there may be specific rules and validation criteria specified for variant strings to be allowed at the top level. It is expected that the variant information provided by applicants in the first application round will contribute to a better understanding of the issues and assist in determining appropriate review steps and fee levels going forward.

1.4 Submitting an Application

Applicants may complete the application form and submit supporting documents using ICANN's TLD Application System (TAS). To access the system, each applicant must first register as a TAS user.

As TAS users, applicants will be able to provide responses in open text boxes and submit required supporting documents as attachments. Restrictions on the size of attachments as well as the file formats are included in the instructions on the TAS site.

Except where expressly provided within the question, all application materials must be submitted in English.

ICANN will not accept application forms or supporting materials submitted through other means than TAS (that is, hard copy, fax, email), unless such submission is in accordance with specific instructions from ICANN to applicants.

1.4.1 Accessing the TLD Application System

The TAS site will be accessible from the New gTLD webpage (<http://www.icann.org/en/topics/new-gtld-program.htm>), and will be highlighted in communications regarding the opening of the application submission period. Users of TAS will be expected to agree to a standard set of terms of use

including user rights, obligations, and restrictions in relation to the use of the system.

1.4.1.1 User Registration

TAS user registration (creating a TAS user profile) requires submission of preliminary information, which will be used to validate the identity of the parties involved in the application. An overview of the information collected in the user registration process is below:

No.	Questions
1	Full legal name of Applicant
2	Principal business address
3	Phone number of Applicant
4	Fax number of Applicant
5	Website or URL, if applicable
6	Primary Contact: Name, Title, Address, Phone, Fax, Email
7	Secondary Contact: Name, Title, Address, Phone, Fax, Email
8	Proof of legal establishment
9	Trading, subsidiary, or joint venture information
10	Business ID, Tax ID, VAT registration number, or equivalent of Applicant
11	Applicant background: previous convictions, cybersquatting activities
12	Deposit payment confirmation and payer information

A subset of identifying information will be collected from the entity performing the user registration, in addition to the applicant information listed above. The registered user could be, for example, an agent, representative, or

employee who would be completing the application on behalf of the applicant.

The registration process will require the user to request the desired number of application slots. For example, a user intending to submit five gTLD applications would complete five application slot requests, and the system would assign the user a unique ID number for each of the five applications.

Users will also be required to submit a deposit of USD 5,000 per application slot. This deposit amount will be credited against the evaluation fee for each application. The deposit requirement is in place to help reduce the risk of frivolous access to the online application system.

After completing the registration, TAS users will receive access enabling them to enter the rest of the application information into the system. Application slots will be populated with the registration information provided by the applicant, which may not ordinarily be changed once slots have been assigned.

No new user registrations will be accepted after **23:59 UTC 29 March 2012**.

ICANN will take commercially reasonable steps to protect all applicant data submitted from unauthorized access, but cannot warrant against the malicious acts of third parties who may, through system corruption or other means, gain unauthorized access to such data.

1.4.1.2 Application Form

Having obtained the requested application slots, the applicant will complete the remaining application questions. An overview of the areas and questions contained in the form is shown here:

No.	Application and String Information
12	Payment confirmation for remaining evaluation fee amount
13	Applied-for gTLD string
14	IDN string information, if applicable
15	IDN tables, if applicable

16	Mitigation of IDN operational or rendering problems, if applicable
17	Representation of string in International Phonetic Alphabet (Optional)
18	Mission/purpose of the TLD
19	Is the application for a community-based TLD?
20	If community based, describe elements of community and proposed policies
21	Is the application for a geographic name? If geographic, documents of support required
22	Measures for protection of geographic names at second level
23	Registry Services: name and full description of all registry services to be provided
	Technical and Operational Questions (External)
24	Shared registration system (SRS) performance
25	EPP
26	Whois
27	Registration life cycle
28	Abuse prevention & mitigation
29	Rights protection mechanisms
30(a)	Security
	Technical and Operational Questions (Internal)
30(b)	Security
31	Technical overview of proposed registry
32	Architecture

33	Database capabilities
34	Geographic diversity
35	DNS service compliance
36	IPv6 reachability
37	Data backup policies and procedures
38	Escrow
39	Registry continuity
40	Registry transition
41	Failover testing
42	Monitoring and fault escalation processes
43	DNSSEC
44	IDNs (Optional)
	Financial Questions
45	Financial statements
46	Projections template: costs and funding
47	Costs: setup and operating
48	Funding and revenue
49	Contingency planning: barriers, funds, volumes
50	Continuity: continued operations instrument

1.4.2 Customer Service during the Application Process

Assistance will be available to applicants throughout the application process via the Applicant Service Center (ASC). The ASC will be staffed with customer service agents

to answer questions relating to the New gTLD Program, the application process, and TAS.

1.4.3 Backup Application Process

If the online application system is not available, ICANN will provide alternative instructions for submitting applications.

1.5 Fees and Payments

This section describes the fees to be paid by the applicant. Payment instructions are also included here.

1.5.1 gTLD Evaluation Fee

The gTLD evaluation fee is required from all applicants. This fee is in the amount of USD 185,000. The evaluation fee is payable in the form of a 5,000 deposit submitted at the time the user requests an application slot within TAS, and a payment of the remaining 180,000 submitted with the full application. ICANN will not begin its evaluation of an application unless it has received the full gTLD evaluation fee by **23:59 UTC 12 April 2012**.

The gTLD evaluation fee is set to recover costs associated with the new gTLD program. The fee is set to ensure that the program is fully funded and revenue neutral and is not subsidized by existing contributions from ICANN funding sources, including generic TLD registries and registrars, ccTLD contributions and RIR contributions.

The gTLD evaluation fee covers all required reviews in Initial Evaluation and, in most cases, any required reviews in Extended Evaluation. If an extended Registry Services review takes place, an additional fee will be incurred for this review (see section 1.5.2). There is no additional fee to the applicant for Extended Evaluation for geographic names, technical and operational, or financial reviews.

Refunds -- In certain cases, refunds of a portion of the evaluation fee may be available for applications that are withdrawn before the evaluation process is complete. An applicant may request a refund at any time until it has executed a registry agreement with ICANN. The amount of the refund will depend on the point in the process at which the withdrawal is requested, as follows:

Refund Available to Applicant	Percentage of Evaluation Fee	Amount of Refund
Within 21 calendar days of a GAC Early	80%	USD 148,000

Refund Available to Applicant	Percentage of Evaluation Fee	Amount of Refund
Warning		
After posting of applications until posting of Initial Evaluation results	70%	USD 130,000
After posting Initial Evaluation results	35%	USD 65,000
After the applicant has completed Dispute Resolution, Extended Evaluation, or String Contention Resolution(s)	20%	USD 37,000
After the applicant has entered into a registry agreement with ICANN		None

Thus, any applicant that has not been successful is eligible for at least a 20% refund of the evaluation fee if it withdraws its application.

An applicant that wishes to withdraw an application must initiate the process through TAS. Withdrawal of an application is final and irrevocable. Refunds will only be issued to the organization that submitted the original payment. All refunds are paid by wire transfer. Any bank transfer or transaction fees incurred by ICANN, or any unpaid evaluation fees, will be deducted from the amount paid. Any refund paid will be in full satisfaction of ICANN's obligations to the applicant. The applicant will have no entitlement to any additional amounts, including for interest or currency exchange rate changes.

Note on 2000 proof-of-concept round applicants -- Participants in ICANN's proof-of-concept application process in 2000 may be eligible for a credit toward the evaluation fee. The credit is in the amount of USD 86,000 and is subject to:

- submission of documentary proof by the applicant that it is the same entity, a successor in interest to the same entity, or an affiliate of the same entity that applied previously;
- a confirmation that the applicant was not awarded any TLD string pursuant to the 2000 proof-of-concept application round and that the applicant has no legal claims arising from the 2000 proof-of-concept process; and
- submission of an application, which may be modified from the application originally submitted in 2000, for the same TLD string that such entity applied for in the 2000 proof-of-concept application round.

Each participant in the 2000 proof-of-concept application process is eligible for at most one credit. A maximum of one credit may be claimed for any new gTLD application submitted according to the process in this guidebook. Eligibility for this credit is determined by ICANN.

1.5.2 Fees Required in Some Cases

Applicants may be required to pay additional fees in certain cases where specialized process steps are applicable. Those possible additional fees¹⁰ include:

- **Registry Services Review Fee** – If applicable, this fee is payable for additional costs incurred in referring an application to the Registry Services Technical Evaluation Panel (RSTEP) for an extended review. Applicants will be notified if such a fee is due. The fee for a three-member RSTEP review team is anticipated to be USD 50,000. In some cases, five-member panels might be required, or there might be increased scrutiny at a greater cost. The amount of the fee will cover the cost of the RSTEP review. In the event that reviews of proposed registry services can be consolidated across multiple applications or applicants, ICANN will apportion the fees in an equitable manner. In every case, the applicant will be advised of the cost before initiation of the review. Refer to subsection 2.2.3 of Module 2 on Registry Services review.

¹⁰ The estimated fee amounts provided in this section 1.5.2 will be updated upon engagement of panel service providers and establishment of fees.

- **Dispute Resolution Filing Fee** – This amount must accompany any filing of a formal objection and any response that an applicant files to an objection. This fee is payable directly to the applicable dispute resolution service provider in accordance with the provider’s payment instructions. ICANN estimates that filing fees could range from approximately USD 1,000 to USD 5,000 (or more) per party per proceeding. Refer to the appropriate provider for the relevant amount. Refer to Module 3 for dispute resolution procedures.
- **Advance Payment of Costs** – In the event of a formal objection, this amount is payable directly to the applicable dispute resolution service provider in accordance with that provider’s procedures and schedule of costs. Ordinarily, both parties in the dispute resolution proceeding will be required to submit an advance payment of costs in an estimated amount to cover the entire cost of the proceeding. This may be either an hourly fee based on the estimated number of hours the panelists will spend on the case (including review of submissions, facilitation of a hearing, if allowed, and preparation of a decision), or a fixed amount. In cases where disputes are consolidated and there are more than two parties involved, the advance payment will occur according to the dispute resolution service provider’s rules.

The prevailing party in a dispute resolution proceeding will have its advance payment refunded, while the non-prevailing party will not receive a refund and thus will bear the cost of the proceeding. In cases where disputes are consolidated and there are more than two parties involved, the refund of fees will occur according to the dispute resolution service provider’s rules.

ICANN estimates that adjudication fees for a proceeding involving a fixed amount could range from USD 2,000 to USD 8,000 (or more) per proceeding. ICANN further estimates that an hourly rate based proceeding with a one-member panel could range from USD 32,000 to USD 56,000 (or more) and with a three-member panel it could range from USD 70,000 to USD 122,000 (or more). These estimates may be lower if the panel does not call for written submissions beyond the objection and response, and does not allow a hearing. Please

refer to the appropriate provider for the relevant amounts or fee structures.

- **Community Priority Evaluation Fee** – In the event that the applicant participates in a community priority evaluation, this fee is payable as a deposit in an amount to cover the cost of the panel's review of that application (currently estimated at USD 10,000). The deposit is payable to the provider appointed to handle community priority evaluations. Applicants will be notified if such a fee is due. Refer to Section 4.2 of Module 4 for circumstances in which a community priority evaluation may take place. An applicant who scores at or above the threshold for the community priority evaluation will have its deposit refunded.

ICANN will notify the applicants of due dates for payment in respect of additional fees (if applicable). This list does not include fees (annual registry fees) that will be payable to ICANN following execution of a registry agreement.

1.5.3 Payment Methods

Payments to ICANN should be submitted by **wire transfer**. Instructions for making a payment by wire transfer will be available in TAS.¹¹

Payments to Dispute Resolution Service Providers should be submitted in accordance with the provider's instructions.

1.5.4 Requesting a Remittance Form

The TAS interface allows applicants to request issuance of a remittance form for any of the fees payable to ICANN. This service is for the convenience of applicants that require an invoice to process payments.

1.6 Questions about this Applicant Guidebook

For assistance and questions an applicant may have in the process of completing the application form, applicants should use the customer support resources available via the ASC. Applicants who are unsure of the information being sought in a question or the parameters for acceptable documentation are encouraged to communicate these questions through the appropriate

¹¹ Wire transfer is the preferred method of payment as it offers a globally accessible and dependable means for international transfer of funds. This enables ICANN to receive the fee and begin processing applications as quickly as possible.

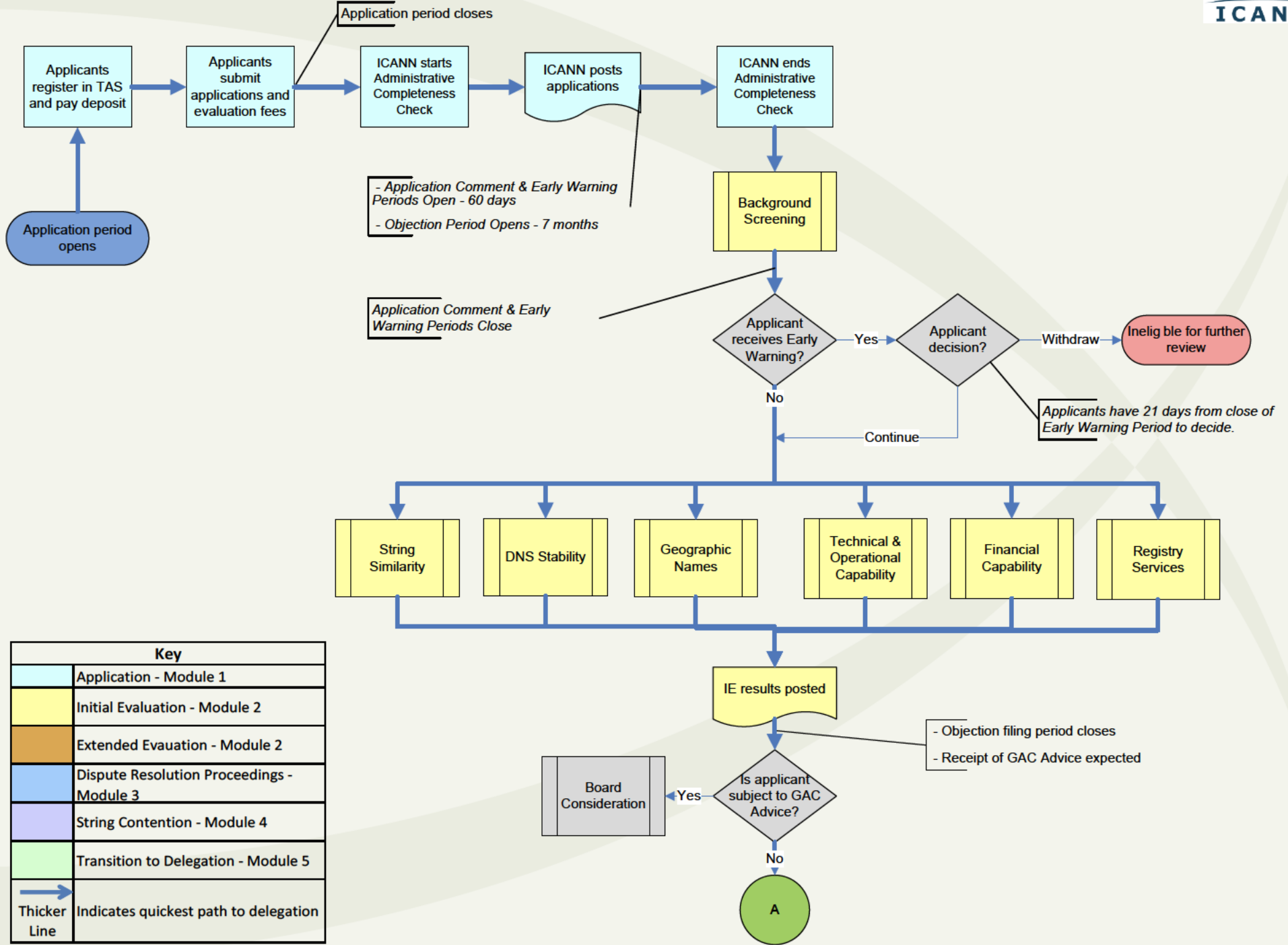
support channels before the application is submitted. This helps avoid the need for exchanges with evaluators to clarify information, which extends the timeframe associated with processing the application.

Currently, questions may be submitted via <newgtld@icann.org>. To provide all applicants equitable access to information, ICANN will make all questions and answers publicly available.

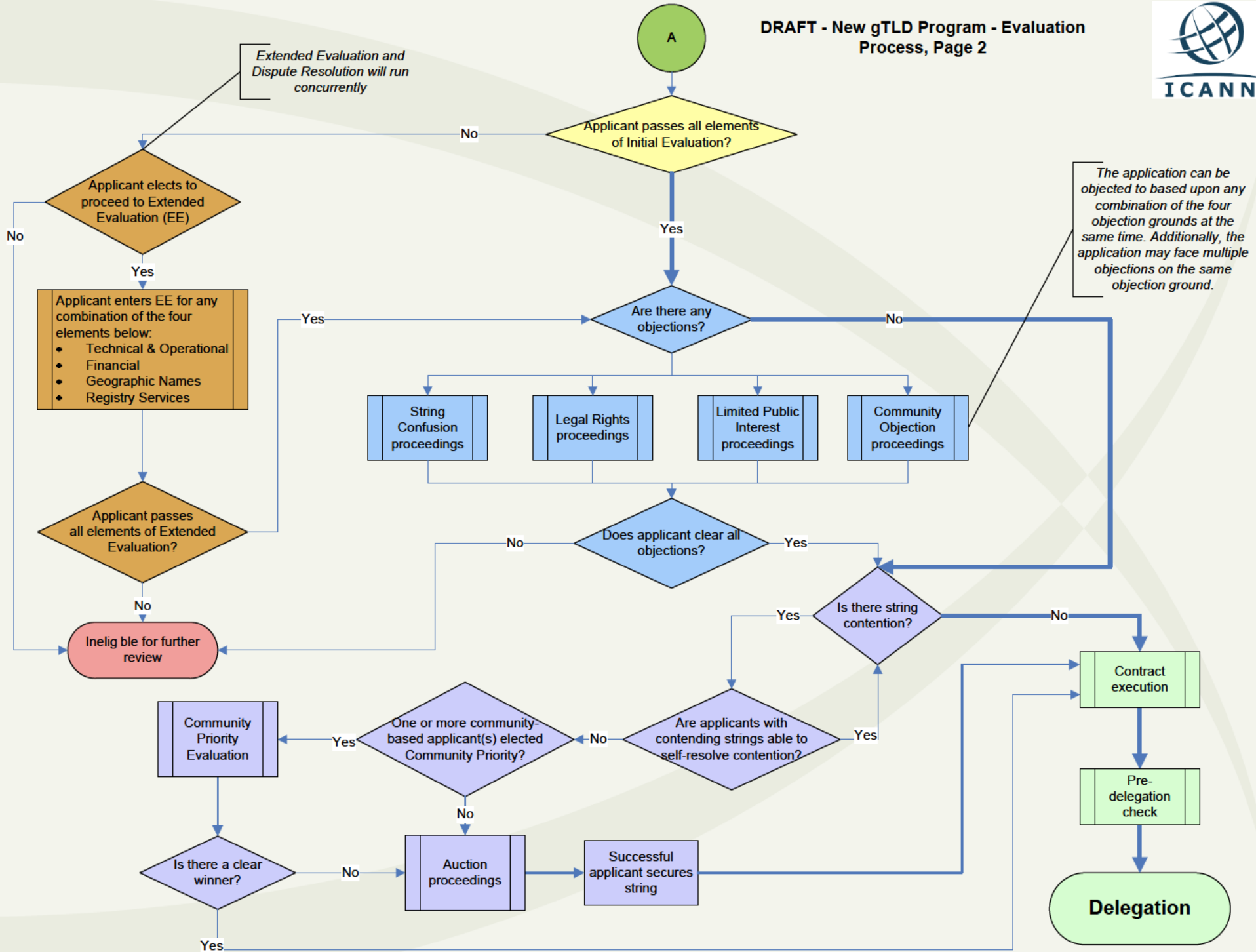
All requests to ICANN for information about the process or issues surrounding preparation of an application must be submitted to the ASC. ICANN will not grant requests from applicants for personal or telephone consultations regarding the preparation of an application. Applicants that contact ICANN for clarification about aspects of the application will be referred to the ASC.

Answers to inquiries will only provide clarification about the application forms and procedures. ICANN will not provide consulting, financial, or legal advice.

DRAFT - New gTLD Program - Evaluation Process



Key	
	Application - Module 1
	Initial Evaluation - Module 2
	Extended Evaluation - Module 2
	Dispute Resolution Proceedings - Module 3
	String Contention - Module 4
	Transition to Delegation - Module 5
	Indicates quickest path to delegation





gTLD Applicant Guidebook

(v. 2012-06-04)

Module 2

4 June 2012

Module 2

Evaluation Procedures

This module describes the evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation. All applicants will undergo an Initial Evaluation and those that do not pass all elements may request Extended Evaluation.

The first, required evaluation is the **Initial Evaluation**, during which ICANN assesses an applied-for gTLD string, an applicant's qualifications, and its proposed registry services.

The following assessments are performed in the **Initial Evaluation**:

- String Reviews
 - String similarity
 - Reserved names
 - DNS stability
 - Geographic names
- Applicant Reviews
 - Demonstration of technical and operational capability
 - Demonstration of financial capability
 - Registry services reviews for DNS stability issues

An application must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.

Extended Evaluation may be applicable in cases in which an applicant does not pass the Initial Evaluation. See Section 2.3 below.

2.1 Background Screening

Background screening will be conducted in two areas:

- (a) General business diligence and criminal history; and
- (b) History of cybersquatting behavior.

The application must pass both background screening areas to be eligible to proceed. Background screening results are evaluated according to the criteria described in section 1.2.1. Due to the potential sensitive nature of the material, applicant background screening reports will not be published.

The following sections describe the process ICANN will use to perform background screening.

2.1.1 General business diligence and criminal history

Applying entities that are publicly traded corporations listed and in good standing on any of the world's largest 25 stock exchanges (as listed by the World Federation of Exchanges) will be deemed to have passed the general business diligence and criminal history screening. The largest 25 will be based on the domestic market capitalization reported at the end of the most recent calendar year prior to launching each round.¹

Before an entity is listed on an exchange, it must undergo significant due diligence including an investigation by the exchange, regulators, and investment banks. As a publicly listed corporation, an entity is subject to ongoing scrutiny from shareholders, analysts, regulators, and exchanges. All exchanges require monitoring and disclosure of material information about directors, officers, and other key personnel, including criminal behavior. In totality, these requirements meet or exceed the screening ICANN will perform.

For applicants not listed on one of these exchanges, ICANN will submit identifying information for the entity, officers, directors, and major shareholders to an international background screening service. The service provider(s) will use the criteria listed in section 1.2.1 and return results that match these criteria. Only publicly available information will be used in this inquiry.

ICANN is in discussions with INTERPOL to identify ways in which both organizations can collaborate in background screenings of individuals, entities and their identity documents consistent with both organizations' rules and regulations. Note that the applicant is expected to disclose potential problems in meeting the criteria in the application, and provide any clarification or explanation at the time of application submission. Results returned from

¹ See <http://www.world-exchanges.org/statistics/annual/2010/equity-markets/domestic-market-capitalization>

the background screening process will be matched with the disclosures provided by the applicant and those cases will be followed up to resolve issues of discrepancies or potential false positives.

If no hits are returned, the application will generally pass this portion of the background screening.

2.1.2 History of cybersquatting

ICANN will screen applicants against UDRP cases and legal databases as financially feasible for data that may indicate a pattern of cybersquatting behavior pursuant to the criteria listed in section 1.2.1.

The applicant is required to make specific declarations regarding these activities in the application. Results returned during the screening process will be matched with the disclosures provided by the applicant and those instances will be followed up to resolve issues of discrepancies or potential false positives.

If no hits are returned, the application will generally pass this portion of the background screening.

2.2 Initial Evaluation

The Initial Evaluation consists of two types of review. Each type is composed of several elements.

String review: The first review focuses on the applied-for gTLD string to test:

- Whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion;
- Whether the applied-for gTLD string might adversely affect DNS security or stability; and
- Whether evidence of requisite government approval is provided in the case of certain geographic names.

Applicant review: The second review focuses on the applicant to test:

- Whether the applicant has the requisite technical, operational, and financial capability to operate a registry; and
- Whether the registry services offered by the applicant might adversely affect DNS security or stability.

2.2.1 String Reviews

In the Initial Evaluation, ICANN reviews every applied-for gTLD string. Those reviews are described in greater detail in the following subsections.

2.2.1.1 String Similarity Review

This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.

Note: In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

The visual similarity check that occurs during Initial Evaluation is intended to augment the objection and dispute resolution process (see Module 3, Dispute Resolution Procedures) that addresses all types of similarity.

This similarity review will be conducted by an independent String Similarity Panel.

2.2.1.1.1 Reviews Performed

The String Similarity Panel’s task is to identify visual string similarities that would create a probability of user confusion.

The panel performs this task of assessing similarities that would lead to user confusion in four sets of circumstances, when comparing:

- Applied-for gTLD strings against existing TLDs and reserved names;
- Applied-for gTLD strings against other applied-for gTLD strings;
- Applied-for gTLD strings against strings requested as IDN ccTLDs; and
- Applied-for 2-character IDN gTLD strings against:
 - Every other single character.
 - Any other 2-character ASCII string (to protect possible future ccTLD delegations).

Similarity to Existing TLDs or Reserved Names – This review involves cross-checking between each applied-for string and the lists of existing TLD strings and Reserved Names to determine whether two strings are so similar to one another that they create a probability of user confusion.

In the simple case in which an applied-for gTLD string is identical to an existing TLD or reserved name, the online application system will not allow the application to be submitted.

Testing for identical strings also takes into consideration the code point variants listed in any relevant IDN table. For example, protocols treat equivalent labels as alternative forms of the same label, just as “foo” and “Foo” are treated as alternative forms of the same label (RFC 3490).

All TLDs currently in the root zone can be found at <http://iana.org/domains/root/db/>.

IDN tables that have been submitted to ICANN are available at <http://www.iana.org/domains/idn-tables/>.

Similarity to Other Applied-for gTLD Strings (String Contention Sets) – All applied-for gTLD strings will be reviewed against one another to identify any similar strings. In performing this review, the String Similarity Panel will create contention sets that may be used in later stages of evaluation.

A contention set contains at least two applied-for strings identical or similar to one another. Refer to Module 4, String Contention Procedures, for more information on contention sets and contention resolution.

ICANN will notify applicants who are part of a contention set as soon as the String Similarity review is completed. (This provides a longer period for contending applicants to reach their own resolution before reaching the contention resolution stage.) These contention sets will also be published on ICANN’s website.

Similarity to TLD strings requested as IDN ccTLDs -- Applied-for gTLD strings will also be reviewed for similarity to TLD strings requested in the IDN ccTLD Fast Track process (see <http://www.icann.org/en/topics/idn/fast-track/>). Should a conflict with a prospective fast-track IDN ccTLD be identified, ICANN will take the following approach to resolving the conflict.

If one of the applications has completed its respective process before the other is lodged, that TLD will be delegated. A gTLD application that has successfully completed all relevant evaluation stages, including dispute resolution and string contention, if applicable, and is eligible for entry into a registry agreement will be considered complete, and therefore would not be disqualified by a newly-filed IDN ccTLD request. Similarly, an IDN ccTLD request that has completed evaluation (i.e., is validated) will be considered complete and therefore would not be disqualified by a newly-filed gTLD application.

In the case where neither application has completed its respective process, where the gTLD application does not have the required approval from the relevant government or public authority, a validated request for an IDN ccTLD will prevail and the gTLD application will not be approved. The term “validated” is defined in the IDN ccTLD Fast Track Process Implementation, which can be found at <http://www.icann.org/en/topics/idn>.

In the case where a gTLD applicant has obtained the support or non-objection of the relevant government or public authority, but is eliminated due to contention with a string requested in the IDN ccTLD Fast Track process, a full refund of the evaluation fee is available to the applicant if the gTLD application was submitted prior to the publication of the ccTLD request.

Review of 2-character IDN strings — In addition to the above reviews, an applied-for gTLD string that is a 2-character IDN string is reviewed by the String Similarity Panel for visual similarity to:

- a) Any one-character label (in any script), and
- b) Any possible two-character ASCII combination.

An applied-for gTLD string that is found to be too similar to a) or b) above will not pass this review.

2.2.1.1.2 Review Methodology

The String Similarity Panel is informed in part by an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs and reserved names. The score will provide one objective measure for consideration by the panel, as part of the process of identifying strings likely to result in user confusion. In general, applicants should expect that a higher visual similarity score suggests a higher probability

that the application will not pass the String Similarity review. However, it should be noted that the score is only indicative and that the final determination of similarity is entirely up to the Panel's judgment.

The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes.² Applicants will have the ability to test their strings and obtain algorithmic results through the application system prior to submission of an application.

The algorithm supports the common characters in Arabic, Chinese, Cyrillic, Devanagari, Greek, Japanese, Korean, and Latin scripts. It can also compare strings in different scripts to each other.

The panel will also take into account variant characters, as defined in any relevant language table, in its determinations. For example, strings that are not visually similar but are determined to be variant TLD strings based on an IDN table would be placed in a contention set. Variant TLD strings that are listed as part of the application will also be subject to the string similarity analysis.³

The panel will examine all the algorithm data and perform its own review of similarities between strings and whether they rise to the level of string confusion. In cases of strings in scripts not yet supported by the algorithm, the panel's assessment process is entirely manual.

The panel will use a common standard to test for whether string confusion exists, as follows:

Standard for String Confusion – String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

2.2.1.1.3 Outcomes of the String Similarity Review

An application that fails the String Similarity review due to similarity to an existing TLD will not pass the Initial Evaluation,

² See <http://icann.sword-group.com/algorithm/>

³ In the case where an applicant has listed Declared Variants in its application (see subsection 1.3.3), the panel will perform an analysis of the listed strings to confirm that the strings are variants according to the applicant's IDN table. This analysis may include comparison of applicant IDN tables with other existing tables for the same language or script, and forwarding any questions to the applicant.

and no further reviews will be available. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.

An application that passes the String Similarity review is still subject to objection by an existing TLD operator or by another gTLD applicant in the current application round. That process requires that a string confusion objection be filed by an objector having the standing to make such an objection. Such category of objection is not limited to visual similarity. Rather, confusion based on any type of similarity (including visual, aural, or similarity of meaning) may be claimed by an objector. Refer to Module 3, Dispute Resolution Procedures, for more information about the objection process.

An applicant may file a formal objection against another gTLD application on string confusion grounds. Such an objection may, if successful, change the configuration of the preliminary contention sets in that the two applied-for gTLD strings will be considered in direct contention with one another (see Module 4, String Contention Procedures). The objection process will not result in removal of an application from a contention set.

2.2.1.2 *Reserved Names and Other Unavailable Strings*

Certain names are not available as gTLD strings, as detailed in this section.

2.2.1.2.1 *Reserved Names*

All applied-for gTLD strings are compared with the list of top-level Reserved Names to ensure that the applied-for gTLD string does not appear on that list.

Top-Level Reserved Names List

<i>AFRNIC</i>	<i>IANA-SERVERS</i>	<i>NRO</i>
<i>ALAC</i>	<i>ICANN</i>	<i>RFC-EDITOR</i>
<i>APNIC</i>	<i>IESG</i>	<i>RIPE</i>
<i>ARIN</i>	<i>IETF</i>	<i>ROOT-SERVERS</i>
<i>ASO</i>	<i>INTERNIC</i>	<i>RSSAC</i>
<i>CCNSO</i>	<i>INVALID</i>	<i>SSAC</i>
<i>EXAMPLE*</i>	<i>IRTF</i>	<i>TEST*</i>
<i>GAC</i>	<i>ISTF</i>	<i>TLD</i>

<i>GNSO</i>	<i>LACNIC</i>	<i>WHOIS</i>
<i>GTLD-SERVERS</i>	<i>LOCAL</i>	<i>WWW</i>
<i>IAB</i>	<i>LOCALHOST</i>	
<i>IANA</i>	<i>NIC</i>	
<p>*Note that in addition to the above strings, ICANN will reserve translations of the terms "test" and "example" in multiple languages. The remainder of the strings are reserved only in the form included above.</p>		

If an applicant enters a Reserved Name as its applied-for gTLD string, the application system will recognize the Reserved Name and will not allow the application to be submitted.

In addition, applied-for gTLD strings are reviewed during the String Similarity review to determine whether they are similar to a Reserved Name. An application for a gTLD string that is identified as too similar to a Reserved Name will not pass this review.

2.2.1.2.2 *Declared Variants*

Names appearing on the Declared Variants List (see section 1.3.3) will be posted on ICANN's website and will be treated essentially the same as Reserved Names, until such time as variant management solutions are developed and variant TLDs are delegated. That is, an application for a gTLD string that is identical or similar to a string on the Declared Variants List will not pass this review.

2.2.1.2.3 *Strings Ineligible for Delegation*

The following names are prohibited from delegation as gTLDs in the initial application round. Future application rounds may differ according to consideration of further policy advice.

These names are not being placed on the Top-Level Reserved Names List, and thus are not part of the string similarity review conducted for names on that list. Refer to subsection 2.2.1.1: where applied-for gTLD strings are reviewed for similarity to existing TLDs and reserved names, the strings listed in this section are not reserved names and accordingly are not incorporated into this review.

Applications for names appearing on the list included in this section will not be approved.

International Olympic Committee		
OLYMPIC	OLYMPIAD	OLYMPIQUE
OLYMPIADE	OLYMPISCH	OLÍMPICO
OLIMPÍADA	أولمبي	أولمبياد
奥林匹克	奥林匹亚	奥林匹克
奧林匹亞	Ολυμπιακοί	Ολυμπιάδα
올림픽	올림픽아드	Олимпийский
Олимпиада		
International Red Cross and Red Crescent Movement		
REDCROSS	REDCRESCENT	REDCRYSTAL
REDLIONANDSUN	MAGENDDAVIDADOM	REDSTAROFDAVID
CROIXROUGE	CROIX-ROUGE	CROISSANTROUGE
CROISSANT-ROUGE	CRISTALROUGE	CRISTAL-ROUGE
מגן דוד אדום	CRUZROJA	MEDIALUNAROJA
CRISTALROJO	Красный Крест	Красный Полумесяц
Красный Кристалл	رمح ألابي لصل	لاله ارمح ألابي
ءارمحل ءقرو لبل	الكريستلة الحمراء	紅十字
紅十字	紅新月	紅新月
紅水晶	紅水晶	

2.2.1.3 DNS Stability Review

This review determines whether an applied-for gTLD string might cause instability to the DNS. In all cases, this will involve a review for conformance with technical and other requirements for gTLD strings (labels). In some exceptional cases, an extended review may be necessary to investigate possible technical stability problems with the applied-for gTLD string.

Note: All applicants should recognize issues surrounding invalid TLD queries at the root level of the DNS.

Any new TLD registry operator may experience unanticipated queries, and some TLDs may experience a non-trivial load of unanticipated queries. For more information, see the Security and Stability Advisory Committee (SSAC)'s report on this topic at <http://www.icann.org/en/committees/security/sac045.pdf>. Some publicly available statistics are also available at <http://stats.l.root-servers.org/>.

ICANN will take steps to alert applicants of the issues raised in SAC045, and encourage the applicant to prepare to minimize the possibility of operational difficulties that would pose a stability or availability problem for its registrants and users. However, this notice is merely an advisory to applicants and is not part of the evaluation, unless the string raises significant security or stability issues as described in the following section.

2.2.1.3.1 DNS Stability: String Review Procedure

New gTLD labels must not adversely affect the security or stability of the DNS. During the Initial Evaluation period, ICANN will conduct a preliminary review on the set of applied-for gTLD strings to:

- ensure that applied-for gTLD strings comply with the requirements provided in section 2.2.1.3.2, and
- determine whether any strings raise significant security or stability issues that may require further review.

There is a very low probability that extended analysis will be necessary for a string that fully complies with the string requirements in subsection 2.2.1.3.2 of this module. However, the string review process provides an additional safeguard if unanticipated security or stability issues arise concerning an applied-for gTLD string.

In such a case, the DNS Stability Panel will perform an extended review of the applied-for gTLD string during the Initial Evaluation period. The panel will determine whether the string fails to comply with relevant standards or creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, and will report on its findings.

If the panel determines that the string complies with relevant standards and does not create the conditions

described above, the application will pass the DNS Stability review.

If the panel determines that the string does not comply with relevant technical standards, or that it creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, the application will not pass the Initial Evaluation, and no further reviews are available. In the case where a string is determined likely to cause security or stability problems in the DNS, the applicant will be notified as soon as the DNS Stability review is completed.

2.2.1.3.2 *String Requirements*

ICANN will review each applied-for gTLD string to ensure that it complies with the requirements outlined in the following paragraphs.

If an applied-for gTLD string is found to violate any of these rules, the application will not pass the DNS Stability review. No further reviews are available.

Part I -- Technical Requirements for all Labels (Strings) – The technical requirements for top-level domain labels follow.

- 1.1 The ASCII label (i.e., the label as transmitted on the wire) must be valid as specified in technical standards *Domain Names: Implementation and Specification* (RFC 1035), and *Clarifications to the DNS Specification* (RFC 2181) and any updates thereto. This includes the following:
 - 1.1.1 The label must have no more than 63 characters.
 - 1.1.2 Upper and lower case characters are treated as identical.
- 1.2 The ASCII label must be a valid host name, as specified in the technical standards *DOD Internet Host Table Specification* (RFC 952), *Requirements for Internet Hosts — Application and Support* (RFC 1123), and *Application Techniques for Checking and Transformation of Names* (RFC 3696), *Internationalized Domain Names in Applications (IDNA)*(RFCs 5890-5894), and any updates thereto. This includes the following:
 - 1.2.1 The ASCII label must consist entirely of letters (alphabetic characters a-z), or

- 1.2.2 The label must be a valid IDNA A-label (further restricted as described in Part II below).

Part II -- Requirements for Internationalized Domain Names

– These requirements apply only to prospective top-level domains that contain non-ASCII characters. Applicants for these internationalized top-level domain labels are expected to be familiar with the Internet Engineering Task Force (IETF) IDNA standards, Unicode standards, and the terminology associated with Internationalized Domain Names.

- 2.1 The label must be an A-label as defined in IDNA, converted from (and convertible to) a U-label that is consistent with the definition in IDNA, and further restricted by the following, non-exhaustive, list of limitations:
 - 2.1.1 Must be a valid A-label according to IDNA.
 - 2.1.2 The derived property value of all codepoints used in the U-label, as defined by IDNA, must be PVALID or CONTEXT (accompanied by unambiguous contextual rules).⁴
 - 2.1.3 The general category of all codepoints, as defined by IDNA, must be one of (Li, Lo, Lm, Mn, Mc).
 - 2.1.4 The U-label must be fully compliant with Normalization Form C, as described in *Unicode Standard Annex #15: Unicode Normalization Forms*. See also examples in <http://unicode.org/faq/normalization.html>.
 - 2.1.5 The U-label must consist entirely of characters with the same directional property, or fulfill the requirements of the Bidi rule per RFC 5893.
- 2.2 The label must meet the relevant criteria of the ICANN *Guidelines for the Implementation of Internationalised Domain Names*. See <http://www.icann.org/en/topics/idn/implementation>

⁴ It is expected that conversion tools for IDNA will be available before the Application Submission period begins, and that labels will be checked for validity under IDNA. In this case, labels valid under the previous version of the protocol (IDNA2003) but not under IDNA will not meet this element of the requirements. Labels that are valid under both versions of the protocol will meet this element of the requirements. Labels valid under IDNA but not under IDNA2003 may meet the requirements; however, applicants are strongly advised to note that the duration of the transition period between the two protocols cannot presently be estimated nor guaranteed in any specific timeframe. The development of support for IDNA in the broader software applications environment will occur gradually. During that time, TLD labels that are valid under IDNA, but not under IDNA2003, will have limited functionality.

[n-guidelines.htm](#). This includes the following, non-exhaustive, list of limitations:

- 2.2.1 All code points in a single label must be taken from the same script as determined by the Unicode Standard Annex #24: Unicode Script Property (See <http://www.unicode.org/reports/tr24/>).
- 2.2.2 Exceptions to 2.2.1 are permissible for languages with established orthographies and conventions that require the commingled use of multiple scripts. However, even with this exception, visually confusable characters from different scripts will not be allowed to co-exist in a single set of permissible code points unless a corresponding policy and character table are clearly defined.

Part III - Policy Requirements for Generic Top-Level

Domains – These requirements apply to all prospective top-level domain strings applied for as gTLDs.

- 3.1 Applied-for gTLD strings in ASCII must be composed of three or more visually distinct characters. Two-character ASCII strings are not permitted, to avoid conflicting with current and future country codes based on the ISO 3166-1 standard.
- 3.2 Applied-for gTLD strings in IDN scripts must be composed of two or more visually distinct characters in the script, as appropriate.⁵ Note, however, that a two-character IDN string will not be approved if:
 - 3.2.1 It is visually similar to any one-character label (in any script); or
 - 3.2.2 It is visually similar to any possible two-character ASCII combination.

See the String Similarity review in subsection 2.2.1.1 for additional information on this requirement.

⁵ Note that the Joint ccNSO-GNSO IDN Working Group (JIG) has made recommendations that this section be revised to allow for single-character IDN gTLD labels. See the JIG Final Report at <http://gns0.icann.org/drafts/jig-final-report-30mar11-en.pdf>. Implementation models for these recommendations are being developed for community discussion.

2.2.1.4 Geographic Names Review

Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments or public authorities in geographic names. The requirements and procedure ICANN will follow in the evaluation process are described in the following paragraphs. Applicants should review these requirements even if they do not believe their intended gTLD string is a geographic name. All applied-for gTLD strings will be reviewed according to the requirements in this section, regardless of whether the application indicates it is for a geographic name.

2.2.1.4.1 Treatment of Country or Territory Names⁶

Applications for strings that are country or territory names will not be approved, as they are not available under the New gTLD Program in this application round. A string shall be considered to be a country or territory name if:

- i. it is an alpha-3 code listed in the ISO 3166-1 standard.
- ii. it is a long-form name listed in the ISO 3166-1 standard, or a translation of the long-form name in any language.
- iii. it is a short-form name listed in the ISO 3166-1 standard, or a translation of the short-form name in any language.
- iv. it is the short- or long-form name association with a code that has been designated as “exceptionally reserved” by the ISO 3166 Maintenance Agency.
- v. it is a separable component of a country name designated on the “Separable Country Names List,” or is a translation of a name appearing on the list, in any language. See the Annex at the end of this module.
- vi. it is a permutation or transposition of any of the names included in items (i) through (v). Permutations include removal of spaces, insertion of punctuation, and addition or

⁶ Country and territory names are excluded from the process based on advice from the Governmental Advisory Committee in recent communiqués providing interpretation of Principle 2.2 of the GAC Principles regarding New gTLDs to indicate that strings which are a meaningful representation or abbreviation of a country or territory name should be handled through the forthcoming ccPDP, and other geographic strings could be allowed in the gTLD space if in agreement with the relevant government or public authority.

removal of grammatical articles like “the.” A transposition is considered a change in the sequence of the long or short-form name, for example, “RepublicCzech” or “IslandsCayman.”

- vii. it is a name by which a country is commonly known, as demonstrated by evidence that the country is recognized by that name by an intergovernmental or treaty organization.

2.2.1.4.2 *Geographic Names Requiring Government Support*

The following types of applied-for strings are considered geographic names and must be accompanied by documentation of support or non-objection from the relevant governments or public authorities:

1. An application for any string that is a representation, in any language, of the capital city name of any country or territory listed in the ISO 3166-1 standard.
2. An application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city name.

City names present challenges because city names may also be generic terms or brand names, and in many cases city names are not unique. Unlike other types of geographic names, there are no established lists that can be used as objective references in the evaluation process. Thus, city names are not universally protected. However, the process does provide a means for cities and applicants to work together where desired.

An application for a city name will be subject to the geographic names requirements (i.e., will require documentation of support or non-objection from the relevant governments or public authorities) if:

- (a) It is clear from applicant statements within the application that the applicant will use the TLD primarily for purposes associated with the city name; and

- (b) The applied-for string is a city name as listed on official city documents.⁷
3. An application for any string that is an exact match of a *sub-national place name*, such as a county, province, or state, listed in the ISO 3166-2 standard.
 4. An application for a string listed as a UNESCO region⁸ or appearing on the “Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings” list.⁹

In the case of an application for a string appearing on either of the lists above, documentation of support will be required from at least 60% of the respective national governments in the region, and there may be no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the continent or the region.

Where the 60% rule is applied, and there are common regions on both lists, the regional composition contained in the “Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings” takes precedence.

An applied-for gTLD string that falls into any of 1 through 4 listed above is considered to represent a geographic name. In the event of any doubt, it is in the applicant’s interest to consult with relevant governments and public authorities and enlist their support or non-objection prior to submission of the application, in order to preclude possible objections and pre-address any ambiguities concerning the string and applicable requirements.

Strings that include but do not match a geographic name (as defined in this section) will not be considered geographic names as defined by section 2.2.1.4.2, and therefore will not require documentation of government support in the evaluation process.

⁷ City governments with concerns about strings that are duplicates, nicknames or close renderings of a city name should not rely on the evaluation process as the primary means of protecting their interests in a string. Rather, a government may elect to file a formal objection to an application that is opposed by the relevant community, or may submit its own application for the string.

⁸ See <http://www.unesco.org/new/en/unesco/worldwide/>.

⁹ See <http://unstats.un.org/unsd/methods/m49/m49regin.htm>.

For each application, the Geographic Names Panel will determine which governments are relevant based on the inputs of the applicant, governments, and its own research and analysis. In the event that there is more than one relevant government or public authority for the applied-for gTLD string, the applicant must provide documentation of support or non-objection from all the relevant governments or public authorities. It is anticipated that this may apply to the case of a sub-national place name.

It is the applicant's responsibility to:

- identify whether its applied-for gTLD string falls into any of the above categories; and
- identify and consult with the relevant governments or public authorities; and
- identify which level of government support is required.

Note: the level of government and which administrative agency is responsible for the filing of letters of support or non-objection is a matter for each national administration to determine. Applicants should consult within the relevant jurisdiction to determine the appropriate level of support.

The requirement to include documentation of support for certain applications does not preclude or exempt applications from being the subject of objections on community grounds (refer to subsection 3.1.1 of Module 3), under which applications may be rejected based on objections showing substantial opposition from the targeted community.

2.2.1.4.3 Documentation Requirements

The documentation of support or non-objection should include a signed letter from the relevant government or public authority. Understanding that this will differ across the respective jurisdictions, the letter could be signed by the minister with the portfolio responsible for domain name administration, ICT, foreign affairs, or the Office of the Prime Minister or President of the relevant jurisdiction; or a senior representative of the agency or department responsible for domain name administration, ICT, foreign affairs, or the Office of the Prime Minister. To assist the applicant in determining who the relevant government or public authority may be for a potential geographic name, the applicant may wish to consult with the relevant

Governmental Advisory Committee (GAC) representative.¹⁰

The letter must clearly express the government's or public authority's support for or non-objection to the applicant's application and demonstrate the government's or public authority's understanding of the string being requested and its intended use.

The letter should also demonstrate the government's or public authority's understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available, i.e., entry into a registry agreement with ICANN requiring compliance with consensus policies and payment of fees. (See Module 5 for a discussion of the obligations of a gTLD registry operator.)

A sample letter of support is available as an attachment to this module.

Applicants and governments may conduct discussions concerning government support for an application at any time. Applicants are encouraged to begin such discussions at the earliest possible stage, and enable governments to follow the processes that may be necessary to consider, approve, and generate a letter of support or non-objection.

It is important to note that a government or public authority is under no obligation to provide documentation of support or non-objection in response to a request by an applicant.

It is also possible that a government may withdraw its support for an application at a later time, including after the new gTLD has been delegated, if the registry operator has deviated from the conditions of original support or non-objection. Applicants should be aware that ICANN has committed to governments that, in the event of a dispute between a government (or public authority) and a registry operator that submitted documentation of support from that government or public authority, **ICANN will comply with a legally binding order** from a court in the jurisdiction of the government or public authority that has given support to an application.

2.2.1.4.4 Review Procedure for Geographic Names

A Geographic Names Panel (GNP) will determine whether each applied-for gTLD string represents a geographic

¹⁰ See <https://gacweb.icann.org/display/gacweb/GAC+Members>

name, and verify the relevance and authenticity of the supporting documentation where necessary.

The GNP will review all applications received, not only those where the applicant has noted its applied-for gTLD string as a geographic name. For any application where the GNP determines that the applied-for gTLD string is a country or territory name (as defined in this module), the application will not pass the Geographic Names review and will be denied. No additional reviews will be available.

For any application where the GNP determines that the applied-for gTLD string is not a geographic name requiring government support (as described in this module), the application will pass the Geographic Names review with no additional steps required.

For any application where the GNP determines that the applied-for gTLD string is a geographic name requiring government support, the GNP will confirm that the applicant has provided the required documentation from the relevant governments or public authorities, and that the communication from the government or public authority is legitimate and contains the required content. ICANN may confirm the authenticity of the communication by consulting with the relevant diplomatic authorities or members of ICANN's Governmental Advisory Committee for the government or public authority concerned on the competent authority and appropriate point of contact within their administration for communications.

The GNP may communicate with the signing entity of the letter to confirm their intent and their understanding of the terms on which the support for an application is given.

In cases where an applicant has not provided the required documentation, the applicant will be contacted and notified of the requirement, and given a limited time frame to provide the documentation. If the applicant is able to provide the documentation before the close of the Initial Evaluation period, and the documentation is found to meet the requirements, the applicant will pass the Geographic Names review. If not, the applicant will have additional time to obtain the required documentation; however, if the applicant has not produced the required documentation by the required date (at least 90 calendar days from the date of notice), the application will be considered incomplete and will be ineligible for further review. The applicant may reapply in subsequent application rounds, if desired, subject to the fees and requirements of the specific application rounds.

If there is more than one application for a string representing a certain geographic name as described in this section, and the applications have requisite government approvals, the applications will be suspended pending resolution by the applicants. If the applicants have not reached a resolution by either the date of the end of the application round (as announced by ICANN), or the date on which ICANN opens a subsequent application round, whichever comes first, the applications will be rejected and applicable refunds will be available to applicants according to the conditions described in section 1.5.

However, in the event that a contention set is composed of multiple applications with documentation of support from the same government or public authority, the applications will proceed through the contention resolution procedures described in Module 4 when requested by the government or public authority providing the documentation.

If an application for a string representing a geographic name is in a contention set with applications for similar strings that have not been identified as geographical names, the string contention will be resolved using the string contention procedures described in Module 4.

2.2.2 Applicant Reviews

Concurrent with the applied-for gTLD string reviews described in subsection 2.2.1, ICANN will review the applicant's technical and operational capability, its financial capability, and its proposed registry services. Those reviews are described in greater detail in the following subsections.

2.2.2.1 Technical/Operational Review

In its application, the applicant will respond to a set of questions (see questions 24 – 44 in the Application Form) intended to gather information about the applicant's technical capabilities and its plans for operation of the proposed gTLD.

Applicants are not required to have deployed an actual gTLD registry to pass the Technical/Operational review. It will be necessary, however, for an applicant to demonstrate a clear understanding and accomplishment of some groundwork toward the key technical and operational aspects of a gTLD registry operation. Subsequently, each applicant that passes the technical evaluation and all other steps will be required to complete

a pre-delegation technical test prior to delegation of the new gTLD. Refer to Module 5, Transition to Delegation, for additional information.

2.2.2.2 Financial Review

In its application, the applicant will respond to a set of questions (see questions 45-50 in the Application Form) intended to gather information about the applicant's financial capabilities for operation of a gTLD registry and its financial planning in preparation for long-term stability of the new gTLD.

Because different registry types and purposes may justify different responses to individual questions, evaluators will pay particular attention to the consistency of an application across all criteria. For example, an applicant's scaling plans identifying system hardware to ensure its capacity to operate at a particular volume level should be consistent with its financial plans to secure the necessary equipment. That is, the evaluation criteria scale with the applicant plans to provide flexibility.

2.2.2.3 Evaluation Methodology

Dedicated technical and financial evaluation panels will conduct the technical/operational and financial reviews, according to the established criteria and scoring mechanism included as an attachment to this module. These reviews are conducted on the basis of the information each applicant makes available to ICANN in its response to the questions in the Application Form.

The evaluators may request clarification or additional information during the Initial Evaluation period. For each application, clarifying questions will be consolidated and sent to the applicant from each of the panels. The applicant will thus have an opportunity to clarify or supplement the application in those areas where a request is made by the evaluators. These communications will occur via TAS. Unless otherwise noted, such communications will include a 2-week deadline for the applicant to respond. Any supplemental information provided by the applicant will become part of the application.

It is the applicant's responsibility to ensure that the questions have been fully answered and the required documentation is attached. Evaluators are entitled, but not obliged, to request further information or evidence from an applicant, and are not obliged to take into account any information or evidence that is not made

available in the application and submitted by the due date, unless explicitly requested by the evaluators.

2.2.3 Registry Services Review

Concurrent with the other reviews that occur during the Initial Evaluation period, ICANN will review the applicant's proposed registry services for any possible adverse impact on security or stability. The applicant will be required to provide a list of proposed registry services in its application.

2.2.3.1 Definitions

Registry services are defined as:

1. operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry zone servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by the registry agreement;
2. other products or services that the registry operator is required to provide because of the establishment of a consensus policy; and
3. any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator.

Proposed registry services will be examined to determine if they might raise significant stability or security issues. Examples of services proposed by existing registries can be found at <http://www.icann.org/en/registries/rsep/>. In most cases, these proposed services successfully pass this inquiry.

Registry services currently provided by gTLD registries can be found in registry agreement appendices. See <http://www.icann.org/en/registries/agreements.htm>.

A full definition of registry services can be found at <http://www.icann.org/en/registries/rsep/rsep.html>.

For purposes of this review, security and stability are defined as follows:

Security – an effect on security by the proposed registry service means (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or

resources on the Internet by systems operating in accordance with all applicable standards.

Stability – an effect on stability means that the proposed registry service (1) does not comply with applicable relevant standards that are authoritative and published by a well-established, recognized, and authoritative standards body, such as relevant standards-track or best current practice RFCs sponsored by the IETF, or (2) creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant standards-track or best current practice RFCs and relying on registry operator’s delegation information or provisioning services.

2.2.3.2 Customary Services

The following registry services are customary services offered by a registry operator:

- Receipt of data from registrars concerning registration of domain names and name servers
- Dissemination of TLD zone files
- Dissemination of contact or other information concerning domain name registrations (e.g., port-43 WHOIS, Web-based Whois, RESTful Whois)
- DNS Security Extensions

The applicant must describe whether any of these registry services are intended to be offered in a manner unique to the TLD.

Any additional registry services that are unique to the proposed gTLD registry should be described in detail. Directions for describing the registry services are provided at http://www.icann.org/en/registries/rsep/rrs_sample.html.

2.2.3.3 TLD Zone Contents

ICANN receives a number of inquiries about use of various record types in a registry zone, as entities contemplate different business and technical models. Permissible zone contents for a TLD zone are:

- Apex SOA record.
- Apex NS records and in-bailiwick glue for the TLD’s DNS servers.

- NS records and in-bailiwick glue for DNS servers of registered names in the TLD.
- DS records for registered names in the TLD.
- Records associated with signing the TLD zone (i.e., RRSIG, DNSKEY, NSEC, and NSEC3).

An applicant wishing to place any other record types into its TLD zone should describe in detail its proposal in the registry services section of the application. This will be evaluated and could result in an extended evaluation to determine whether the service would create a risk of a meaningful adverse impact on security or stability of the DNS. Applicants should be aware that a service based on use of less-common DNS resource records in the TLD zone, even if approved in the registry services review, might not work as intended for all users due to lack of application support.

2.2.3.4 Methodology

Review of the applicant's proposed registry services will include a preliminary determination of whether any of the proposed registry services could raise significant security or stability issues and require additional consideration.

If the preliminary determination reveals that there may be significant security or stability issues (as defined in subsection 2.2.3.1) surrounding a proposed service, the application will be flagged for an extended review by the Registry Services Technical Evaluation Panel (RSTEP), see <http://www.icann.org/en/registries/rsep/rstep.html>. This review, if applicable, will occur during the Extended Evaluation period (refer to Section 2.3).

In the event that an application is flagged for extended review of one or more registry services, an additional fee to cover the cost of the extended review will be due from the applicant. Applicants will be advised of any additional fees due, which must be received before the additional review begins.

2.2.4 Applicant's Withdrawal of an Application

An applicant who does not pass the Initial Evaluation may withdraw its application at this stage and request a partial refund (refer to subsection 1.5 of Module 1).

2.3 *Extended Evaluation*

An applicant may request an Extended Evaluation if the application has failed to pass the Initial Evaluation elements concerning:

- Geographic names (refer to subsection 2.2.1.4). There is no additional fee for an extended evaluation in this instance.
- Demonstration of technical and operational capability (refer to subsection 2.2.2.1). There is no additional fee for an extended evaluation in this instance.
- Demonstration of financial capability (refer to subsection 2.2.2.2). There is no additional fee for an extended evaluation in this instance.
- Registry services (refer to subsection 2.2.3). Note that this investigation incurs an additional fee (the Registry Services Review Fee) if the applicant wishes to proceed. See Section 1.5 of Module 1 for fee and payment information.

An Extended Evaluation does not imply any change of the evaluation criteria. The same criteria used in the Initial Evaluation will be used to review the application in light of clarifications provided by the applicant.

From the time an applicant receives notice of failure to pass the Initial Evaluation, eligible applicants will have 15 calendar days to submit to ICANN the Notice of Request for Extended Evaluation. If the applicant does not explicitly request the Extended Evaluation (and pay an additional fee in the case of a Registry Services inquiry) the application will not proceed.

2.3.1 *Geographic Names Extended Evaluation*

In the case of an application that has been identified as a geographic name requiring government support, but where the applicant has not provided sufficient evidence of support or non-objection from all relevant governments or public authorities by the end of the Initial Evaluation period, the applicant has additional time in the Extended Evaluation period to obtain and submit this documentation.

If the applicant submits the documentation to the Geographic Names Panel by the required date, the GNP will perform its review of the documentation as detailed in

section 2.2.1.4. If the applicant has not provided the documentation by the required date (at least 90 calendar days from the date of the notice), the application will not pass the Extended Evaluation, and no further reviews are available.

2.3.2 Technical/Operational or Financial Extended Evaluation

The following applies to an Extended Evaluation of an applicant's technical and operational capability or financial capability, as described in subsection 2.2.2.

An applicant who has requested Extended Evaluation will again access the online application system (TAS) and clarify its answers to those questions or sections on which it received a non-passing score (or, in the case of an application where individual questions were passed but the total score was insufficient to pass Initial Evaluation, those questions or sections on which additional points are possible). The answers should be responsive to the evaluator report that indicates the reasons for failure, or provide any amplification that is not a material change to the application. Applicants may not use the Extended Evaluation period to substitute portions of new information for the information submitted in their original applications, i.e., to materially change the application.

An applicant participating in an Extended Evaluation on the Technical / Operational or Financial reviews will have the option to have its application reviewed by the same evaluation panelists who performed the review during the Initial Evaluation period, or to have a different set of panelists perform the review during Extended Evaluation.

The Extended Evaluation allows an additional exchange of information between the evaluators and the applicant to further clarify information contained in the application. This supplemental information will become part of the application record. Such communications will include a deadline for the applicant to respond.

ICANN will notify applicants at the end of the Extended Evaluation period as to whether they have passed. If an application passes Extended Evaluation, it continues to the next stage in the process. If an application does not pass Extended Evaluation, it will proceed no further. No further reviews are available.

2.3.3 Registry Services Extended Evaluation

This section applies to Extended Evaluation of registry services, as described in subsection 2.2.3.

If a proposed registry service has been referred to the Registry Services Technical Evaluation Panel (RSTEP) for an extended review, the RSTEP will form a review team of members with the appropriate qualifications.

The review team will generally consist of three members, depending on the complexity of the registry service proposed. In a 3-member panel, the review could be conducted within 30 to 45 calendar days. In cases where a 5-member panel is needed, this will be identified before the extended evaluation starts. In a 5-member panel, the review could be conducted in 45 calendar days or fewer.

The cost of an RSTEP review will be covered by the applicant through payment of the Registry Services Review Fee. Refer to payment procedures in section 1.5 of Module 1. The RSTEP review will not commence until payment has been received.

If the RSTEP finds that one or more of the applicant's proposed registry services may be introduced without risk of a meaningful adverse effect on security or stability, these services will be included in the applicant's registry agreement with ICANN. If the RSTEP finds that the proposed service would create a risk of a meaningful adverse effect on security or stability, the applicant may elect to proceed with its application without the proposed service, or withdraw its application for the gTLD. In this instance, an applicant has 15 calendar days to notify ICANN of its intent to proceed with the application. If an applicant does not explicitly provide such notice within this time frame, the application will proceed no further.

2.4 Parties Involved in Evaluation

A number of independent experts and groups play a part in performing the various reviews in the evaluation process. A brief description of the various panels, their evaluation roles, and the circumstances under which they work is included in this section.

2.4.1 Panels and Roles

The **String Similarity Panel** will assess whether a proposed gTLD string creates a probability of user confusion due to similarity with any reserved name, any existing TLD, any requested IDN ccTLD, or any new gTLD string applied for in the current application round. This occurs during the String Similarity review in Initial Evaluation. The panel may also review IDN tables submitted by applicants as part of its work.

The **DNS Stability Panel** will determine whether a proposed string might adversely affect the security or stability of the DNS. This occurs during the DNS Stability String review in Initial Evaluation.

The **Geographic Names Panel** will review each application to determine whether the applied-for gTLD represents a geographic name, as defined in this guidebook. In the event that the string is a geographic name requiring government support, the panel will ensure that the required documentation is provided with the application and verify that the documentation is from the relevant governments or public authorities and is authentic.

The **Technical Evaluation Panel** will review the technical components of each application against the criteria in the Applicant Guidebook, along with proposed registry operations, in order to determine whether the applicant is technically and operationally capable of operating a gTLD registry as proposed in the application. This occurs during the Technical/Operational reviews in Initial Evaluation, and may also occur in Extended Evaluation if elected by the applicant.

The **Financial Evaluation Panel** will review each application against the relevant business, financial and organizational criteria contained in the Applicant Guidebook, to determine whether the applicant is financially capable of maintaining a gTLD registry as proposed in the application. This occurs during the Financial review in Initial Evaluation, and may also occur in Extended Evaluation if elected by the applicant.

The **Registry Services Technical Evaluation Panel (RSTEP)** will review proposed registry services in the application to determine if they pose a risk of a meaningful adverse impact on security or stability. This occurs, if applicable, during the Extended Evaluation period.

Members of all panels are required to abide by the established Code of Conduct and Conflict of Interest guidelines included in this module.

2.4.2 Panel Selection Process

ICANN has selected qualified third-party providers to perform the various reviews, based on an extensive selection process.¹¹ In addition to the specific subject matter expertise required for each panel, specified qualifications are required, including:

- The provider must be able to convene – or have the capacity to convene - globally diverse panels and be able to evaluate applications from all regions of the world, including applications for IDN gTLDs.
- The provider should be familiar with the IETF IDNA standards, Unicode standards, relevant RFCs and the terminology associated with IDNs.
- The provider must be able to scale quickly to meet the demands of the evaluation of an unknown number of applications. At present it is not known how many applications will be received, how complex they will be, and whether they will be predominantly for ASCII or non-ASCII gTLDs.
- The provider must be able to evaluate the applications within the required timeframes of Initial and Extended Evaluation.

2.4.3 Code of Conduct Guidelines for Panelists

The purpose of the New gTLD Program (“Program”) Code of Conduct (“Code”) is to prevent real and apparent conflicts of interest and unethical behavior by any Evaluation Panelist (“Panelist”).

Panelists shall conduct themselves as thoughtful, competent, well prepared, and impartial professionals throughout the application process. Panelists are expected to comply with equity and high ethical standards while assuring the Internet community, its constituents, and the public of objectivity, integrity, confidentiality, and credibility. Unethical actions, or even the appearance of compromise, are not acceptable. Panelists are expected

¹¹ <http://newgtlds.icann.org/about/evaluation-panels-selection-process>

to be guided by the following principles in carrying out their respective responsibilities. This Code is intended to summarize the principles and nothing in this Code should be considered as limiting duties, obligations or legal requirements with which Panelists must comply.

Bias -- Panelists shall:

- not advance personal agendas or non-ICANN approved agendas in the evaluation of applications;
- examine facts as they exist and not be influenced by past reputation, media accounts, or unverified statements about the applications being evaluated;
- exclude themselves from participating in the evaluation of an application if, to their knowledge, there is some predisposing factor that could prejudice them with respect to such evaluation; and
- exclude themselves from evaluation activities if they are philosophically opposed to or are on record as having made generic criticism about a specific type of applicant or application.

Compensation/Gifts -- Panelists shall not request or accept any compensation whatsoever or any gifts of substance from the Applicant being reviewed or anyone affiliated with the Applicant. (Gifts of substance would include any gift greater than USD 25 in value).

If the giving of small tokens is important to the Applicant's culture, Panelists may accept these tokens; however, the total of such tokens must not exceed USD 25 in value. If in doubt, the Panelist should err on the side of caution by declining gifts of any kind.

Conflicts of Interest -- Panelists shall act in accordance with the "New gTLD Program Conflicts of Interest Guidelines" (see subsection 2.4.3.1).

Confidentiality -- Confidentiality is an integral part of the evaluation process. Panelists must have access to sensitive information in order to conduct evaluations. Panelists must maintain confidentiality of information entrusted to them by ICANN and the Applicant and any other confidential information provided to them from whatever source,

except when disclosure is legally mandated or has been authorized by ICANN. "Confidential information" includes all elements of the Program and information gathered as part of the process – which includes but is not limited to: documents, interviews, discussions, interpretations, and analyses – related to the review of any new gTLD application.

Affirmation -- All Panelists shall read this Code prior to commencing evaluation services and shall certify in writing that they have done so and understand the Code.

2.4.3.1 Conflict of Interest Guidelines for Panelists

It is recognized that third-party providers may have a large number of employees in several countries serving numerous clients. In fact, it is possible that a number of Panelists may be very well known within the registry / registrar community and have provided professional services to a number of potential applicants.

To safeguard against the potential for inappropriate influence and ensure applications are evaluated in an objective and independent manner, ICANN has established detailed Conflict of Interest guidelines and procedures that will be followed by the Evaluation Panelists. To help ensure that the guidelines are appropriately followed ICANN will:

- Require each Evaluation Panelist (provider and individual) to acknowledge and document understanding of the Conflict of Interest guidelines.
- Require each Evaluation Panelist to disclose all business relationships engaged in at any time during the past six months.
- Where possible, identify and secure primary and backup providers for evaluation panels.
- In conjunction with the Evaluation Panelists, develop and implement a process to identify conflicts and re-assign applications as appropriate to secondary or contingent third party providers to perform the reviews.

Compliance Period -- All Evaluation Panelists must comply with the Conflict of Interest guidelines beginning with the opening date of the Application Submission period and ending with the public announcement by ICANN of the

final outcomes of all the applications from the Applicant in question.

Guidelines -- The following guidelines are the minimum standards with which all Evaluation Panelists must comply. It is recognized that it is impossible to foresee and cover all circumstances in which a potential conflict of interest might arise. In these cases the Evaluation Panelist should evaluate whether the existing facts and circumstances would lead a reasonable person to conclude that there is an actual conflict of interest.

Evaluation Panelists and Immediate Family Members:

- Must not be under contract, have or be included in a current proposal to provide Professional Services for or on behalf of the Applicant during the Compliance Period.
- Must not currently hold or be committed to acquire any interest in a privately-held Applicant.
- Must not currently hold or be committed to acquire more than 1% of any publicly listed Applicant's outstanding equity securities or other ownership interests.
- Must not be involved or have an interest in a joint venture, partnership or other business arrangement with the Applicant.
- Must not have been named in a lawsuit with or against the Applicant.
- Must not be a:
 - Director, officer, or employee, or in any capacity equivalent to that of a member of management of the Applicant;
 - Promoter, underwriter, or voting trustee of the Applicant; or
 - Trustee for any pension or profit-sharing trust of the Applicant.

Definitions--

Evaluation Panelist: An Evaluation Panelist is any individual associated with the review of an application. This includes

any primary, secondary, and contingent third party Panelists engaged by ICANN to review new gTLD applications.

Immediate Family Member: Immediate Family Member is a spouse, spousal equivalent, or dependent (whether or not related) of an Evaluation Panelist.

Professional Services: include, but are not limited to legal services, financial audit, financial planning / investment, outsourced services, consulting services such as business / management / internal audit, tax, information technology, registry / registrar services.

2.4.3.2 Code of Conduct Violations

Evaluation panelist breaches of the Code of Conduct, whether intentional or not, shall be reviewed by ICANN, which may make recommendations for corrective action, if deemed necessary. Serious breaches of the Code may be cause for dismissal of the person, persons or provider committing the infraction.

In a case where ICANN determines that a Panelist has failed to comply with the Code of Conduct, the results of that Panelist's review for all assigned applications will be discarded and the affected applications will undergo a review by new panelists.

Complaints about violations of the Code of Conduct by a Panelist may be brought to the attention of ICANN via the public comment and applicant support mechanisms, throughout the evaluation period. Concerns of applicants regarding panels should be communicated via the defined support channels (see subsection 1.4.2). Concerns of the general public (i.e., non-applicants) can be raised via the public comment forum, as described in Module 1.

2.4.4 Communication Channels

Defined channels for technical support or exchanges of information with ICANN and with evaluation panels are available to applicants during the Initial Evaluation and Extended Evaluation periods. Contacting individual ICANN staff members, Board members, or individuals engaged by ICANN to perform an evaluation role in order to lobby for a particular outcome or to obtain confidential information about applications under review is not appropriate. In the interests of fairness and equivalent treatment for all applicants, any such individual contacts will be referred to the appropriate communication channels.

DRAFT - New gTLD Program – Initial Evaluation and Extended Evaluation



Application is confirmed as complete and ready for evaluation during Administrative Completeness Check

Background Screening
Third-party provider reviews applicant's background.

Initial Evaluation – String Review

Initial Evaluation – Applicant Review

String Similarity
String Similarity Panel reviews applied-for strings to ensure they are not too similar to existing TLDs or Reserved Names.

DNS Stability
All strings reviewed and in extraordinary cases, DNS Stability Panel may perform extended review for possible technical stability issues.

Geographic Names
Geographic Names Panel determines if applied-for string is geographic name requiring government support.

Technical and Operational Capability
Technical and Operational panel reviews applicant's answers to questions and supporting documentation.

Financial Capability
Financial panel reviews applicant's answers to questions and supporting documentation.

Registry Services
Preliminary review of applicant's registry services and referral to RSTEP for further review during Extended Evaluation where necessary

Panel compares all applied-for strings and creates contention sets.

Panel confirms supporting documentation where required.

ICANN will seek to publish contention sets prior to publication of full IE results.

Does applicant pass all elements of Initial Evaluation?

Applicant elects to pursue **Extended Evaluation**?

Extended Evaluation process

Applicant continues to subsequent steps.

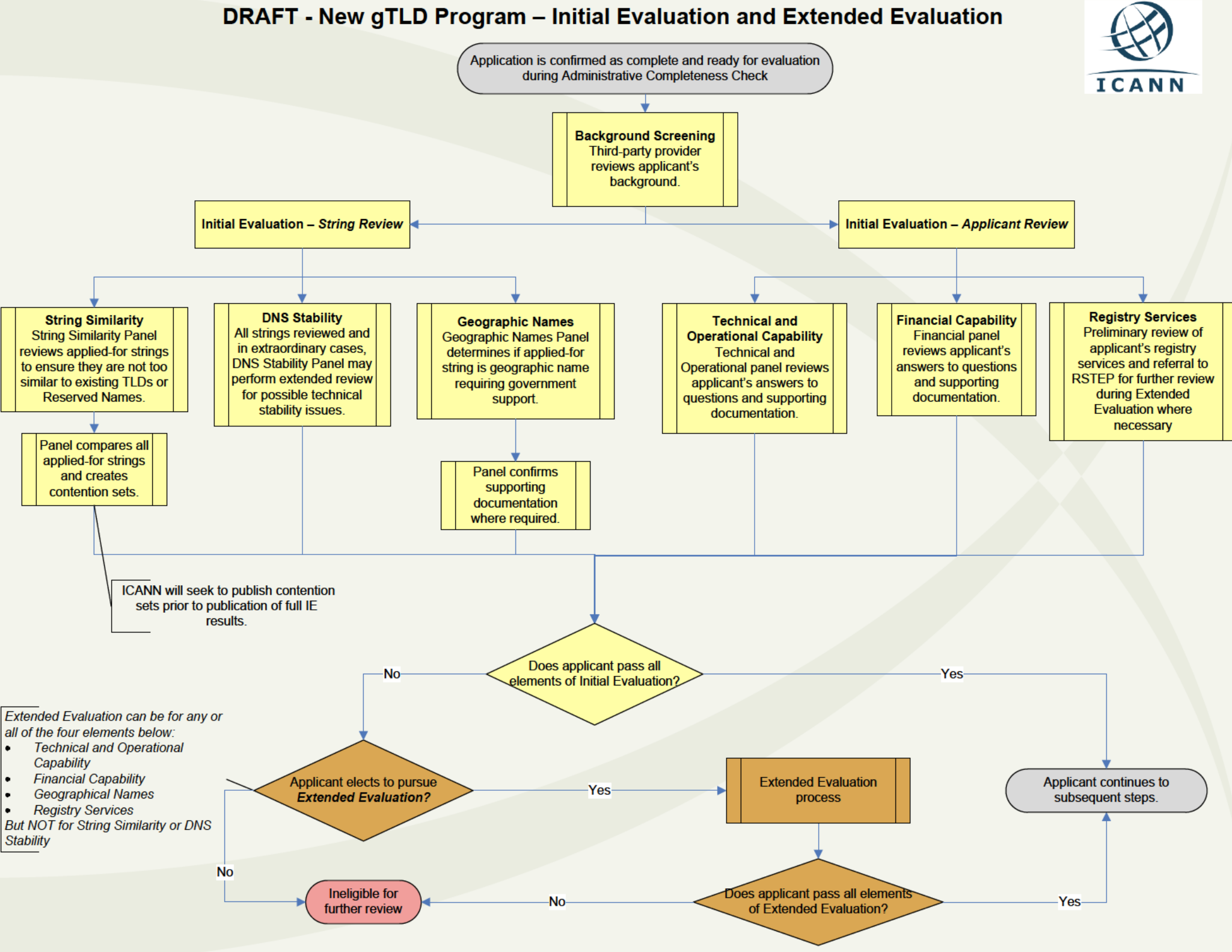
Ineligible for further review

Does applicant pass all elements of Extended Evaluation?

Extended Evaluation can be for any or all of the four elements below:

- Technical and Operational Capability
- Financial Capability
- Geographical Names
- Registry Services

But NOT for String Similarity or DNS Stability



Annex: Separable Country Names List

gTLD application restrictions on country or territory names are tied to listing in property fields of the ISO 3166-1 standard. Notionally, the ISO 3166-1 standard has an “English short name” field which is the common name for a country and can be used for such protections; however, in some cases this does not represent the common name. This registry seeks to add additional protected elements which are derived from definitions in the ISO 3166-1 standard. An explanation of the various classes is included below.

Separable Country Names List

Code	English Short Name	Cl.	Separable Name
ax	Åland Islands	B1	Åland
as	American Samoa	C	Tutuila
		C	Swain's Island
ao	Angola	C	Cabinda
ag	Antigua and Barbuda	A	Antigua
		A	Barbuda
		C	Redonda Island
au	Australia	C	Lord Howe Island
		C	Macquarie Island
		C	Ashmore Island
		C	Cartier Island
		C	Coral Sea Islands
bo	Bolivia, Plurinational State of	B1	Bolivia
bq	Bonaire, Sint Eustatius and Saba	A	Bonaire
		A	Sint Eustatius
		A	Saba
ba	Bosnia and Herzegovina	A	Bosnia
		A	Herzegovina
br	Brazil	C	Fernando de Noronha Island
		C	Martim Vaz Islands
		C	Trinidad Island
io	British Indian Ocean Territory	C	Chagos Archipelago
		C	Diego Garcia
bn	Brunei Darussalam	B1	Brunei
		C	Negara Brunei Darussalam
cv	Cape Verde	C	São Tiago
		C	São Vicente
ky	Cayman Islands	C	Grand Cayman
cl	Chile	C	Easter Island
		C	Juan Fernández Islands
		C	Sala y Gómez Island
		C	San Ambrosio Island
		C	San Félix Island
cc	Cocos (Keeling) Islands	A	Cocos Islands
		A	Keeling Islands
co	Colombia	C	Malpelo Island
		C	San Andrés Island
		C	Providencia Island
km	Comoros	C	Anjouan
		C	Grande Comore
		C	Mohéli
ck	Cook Islands	C	Rarotonga
cr	Costa Rica	C	Coco Island
ec	Ecuador	C	Galápagos Islands
gq	Equatorial Guinea	C	Annobón Island
		C	Bioko Island

		C	Rio Muni
fk	Falkland Islands (Malvinas)	B1	Falkland Islands
		B1	Malvinas
fo	Faroe Islands	A	Faroe
fj	Fiji	C	Vanua Levu
		C	Viti Levu
		C	Rotuma Island
pf	French Polynesia	C	Austral Islands
		C	Gambier Islands
		C	Marquesas Islands
		C	Society Archipelago
		C	Tahiti
		C	Tuamotu Islands
		C	Clipperton Island
tf	French Southern Territories	C	Amsterdam Islands
		C	Crozet Archipelago
		C	Kerguelen Islands
		C	Saint Paul Island
gr	Greece	C	Mount Athos
		B1	**
gd	Grenada	C	Southern Grenadine Islands
		C	Carriacou
gp	Guadeloupe	C	la Désirade
		C	Marie-Galante
		C	les Saintes
hm	Heard Island and McDonald Islands	A	Heard Island
		A	McDonald Islands
va	Holy See (Vatican City State)	A	Holy See
		A	Vatican
hn	Honduras	C	Swan Islands
in	India	C	Amindivi Islands
		C	Andaman Islands
		C	Laccadive Islands
		C	Minicoy Island
		C	Nicobar Islands
ir	Iran, Islamic Republic of	B1	Iran
ki	Kiribati	C	Gilbert Islands
		C	Tarawa
		C	Banaba
		C	Line Islands
		C	Kiritimati
		C	Phoenix Islands
		C	Abariringa
		C	Enderbury Island
kp	Korea, Democratic People's Republic of	C	North Korea
kr	Korea, Republic of	C	South Korea
la	Lao People's Democratic Republic	B1	Laos
mk	Macedonia, the Former Yugoslav Republic of	B1	**
my	Malaysia	C	Sabah
		C	Sarawak
mh	Marshall Islands	C	Jaluit
			Kwajalein
			Majuro
mu	Mauritius	C	Agalega Islands
		C	Cargados Carajos Shoals
		C	Rodrigues Island
fm	Micronesia, Federated States of	B1	Micronesia

		C	Caroline Islands (see also pw)
		C	Chuuk
		C	Kosrae
		C	Pohnpei
		C	Yap
md	Moldova, Republic of	B1	Moldova
		C	Moldava
nc	New Caledonia	C	Loyalty Islands
mp	Northern Mariana Islands	C	Mariana Islands
		C	Saipan
om	Oman	C	Musandam Peninsula
pw	Palau	C	Caroline Islands (see also fm)
		C	Babelthuap
ps	Palestinian Territory, Occupied	B1	Palestine
pg	Papua New Guinea	C	Bismarck Archipelago
		C	Northern Solomon Islands
		C	Bougainville
pn	Pitcairn	C	Ducie Island
		C	Henderson Island
		C	Oeno Island
re	Réunion	C	Bassas da Índia
		C	Europa Island
		C	Glorioso Island
		C	Juan de Nova Island
		C	Tromelin Island
ru	Russian Federation	B1	Russia
		C	Kaliningrad Region
sh	Saint Helena, Ascension, and Tristan de Cunha	A	Saint Helena
		A	Ascension
		A	Tristan de Cunha
		C	Gough Island
		C	Tristan de Cunha Archipelago
kn	Saint Kitts and Nevis	A	Saint Kitts
		A	Nevis
pm	Saint Pierre and Miquelon	A	Saint Pierre
		A	Miquelon
vc	Saint Vincent and the Grenadines	A	Saint Vincent
		A	The Grenadines
		C	Northern Grenadine Islands
		C	Bequia
		C	Saint Vincent Island
ws	Samoa	C	Savai'i
		C	Upolu
st	Sao Tome and Principe	A	Sao Tome
		A	Principe
sc	Seychelles	C	Mahé
		C	Aldabra Islands
		C	Amirante Islands
		C	Cosmoledo Islands
		C	Farquhar Islands
sb	Solomon Islands	C	Santa Cruz Islands
		C	Southern Solomon Islands
		C	Guadalcanal
za	South Africa	C	Marion Island
		C	Prince Edward Island
gs	South Georgia and the South Sandwich Islands	A	South Georgia
		A	South Sandwich Islands

sj	Svalbard and Jan Mayen	A	Svalbard
		A	Jan Mayen
		C	Bear Island
sy	Syrian Arab Republic	B1	Syria
tw	Taiwan, Province of China	B1	Taiwan
		C	Penghu Islands
		C	Pescadores
tz	Tanzania, United Republic of	B1	Tanzania
tl	Timor-Leste	C	Oecussi
to	Tonga	C	Tongatapu
tt	Trinidad and Tobago	A	Trinidad
		A	Tobago
tc	Turks and Caicos Islands	A	Turks Islands
		A	Caicos Islands
tv	Tuvalu	C	Fanafuti
ae	United Arab Emirates	B1	Emirates
us	United States	B2	America
um	United States Minor Outlying Islands	C	Baker Island
		C	Howland Island
		C	Jarvis Island
		C	Johnston Atoll
		C	Kingman Reef
		C	Midway Islands
		C	Palmyra Atoll
		C	Wake Island
		C	Navassa Island
vu	Vanuatu	C	Efate
		C	Santo
ve	Venezuela, Bolivarian Republic of	B1	Venezuela
		C	Bird Island
vg	Virgin Islands, British	B1	Virgin Islands
		C	Anegada
		C	Jost Van Dyke
		C	Tortola
		C	Virgin Gorda
vi	Virgin Islands, US	B1	Virgin Islands
		C	Saint Croix
		C	Saint John
		C	Saint Thomas
wf	Wallis and Futuna	A	Wallis
		A	Futuna
		C	Hoorn Islands
		C	Wallis Islands
		C	Uvea
ye	Yemen	C	Socotra Island

Maintenance

A Separable Country Names Registry will be maintained and published by ICANN Staff.

Each time the ISO 3166-1 standard is updated with a new entry, this registry will be reappraised to identify if the changes to the standard warrant changes to the entries in this registry. Appraisal will be based on the criteria listing in the "Eligibility" section of this document.

Codes reserved by the ISO 3166 Maintenance Agency do not have any implication on this registry, only entries derived from normally assigned codes appearing in ISO 3166-1 are eligible.

If an ISO code is struck off the ISO 3166-1 standard, any entries in this registry deriving from that code must be struck.

Eligibility

Each record in this registry is derived from the following possible properties:

- Class A:** The ISO 3166-1 English Short Name is comprised of multiple, separable parts whereby the country is comprised of distinct sub-entities. Each of these separable parts is eligible in its own right for consideration as a country name. For example, "Antigua and Barbuda" is comprised of "Antigua" and "Barbuda."
- Class B:** The ISO 3166-1 English Short Name (1) or the ISO 3166-1 English Full Name (2) contains additional language as to the type of country the entity is, which is often not used in common usage when referencing the country. For example, one such short name is "The Bolivarian Republic of Venezuela" for a country in common usage referred to as "Venezuela."
- ** Macedonia is a separable name in the context of this list; however, due to the ongoing dispute listed in UN documents between the Hellenic Republic (Greece) and the Former Yugoslav Republic of Macedonia over the name, no country will be afforded attribution or rights to the name "Macedonia" until the dispute over the name has been resolved. See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/240/37/IMG/N9324037.pdf>.
- Class C:** The ISO 3166-1 Remarks column containing synonyms of the country name, or sub-national entities, as denoted by "often referred to as," "includes", "comprises", "variant" or "principal islands".

In the first two cases, the registry listing must be directly derivative from the English Short Name by excising words and articles. These registry listings do not include vernacular or other non-official terms used to denote the country.

Eligibility is calculated in class order. For example, if a term can be derived both from Class A and Class C, it is only listed as Class A.

Attachment to Module 2

Sample Letter of Government Support

[This letter should be provided on official letterhead]

ICANN
Suite 330, 4676 Admiralty Way
Marina del Rey, CA 90292

Attention: New gTLD Evaluation Process

Subject: Letter for support for [TLD requested]

This letter is to confirm that [government entity] fully supports the application for [TLD] submitted to ICANN by [applicant] in the New gTLD Program. As the [Minister/Secretary/position] I confirm that I have the authority of the [x government/public authority] to be writing to you on this matter. [Explanation of government entity, relevant department, division, office, or agency, and what its functions and responsibilities are]

The gTLD will be used to [explain your understanding of how the name will be used by the applicant. This could include policies developed regarding who can register a name, pricing regime and management structures.] [Government/public authority/department] has worked closely with the applicant in the development of this proposal.

The [x government/public authority] supports this application, and in doing so, understands that in the event that the application is successful, [applicant] will be required to enter into a Registry Agreement with ICANN. In doing so, they will be required to pay fees to ICANN and comply with consensus policies developed through the ICANN multi-stakeholder policy processes.

[Government / public authority] further understands that, in the event of a dispute between [government/public authority] and the applicant, ICANN will comply with a legally binding order from a court in the jurisdiction of [government/public authority].

[Optional] This application is being submitted as a community-based application, and as such it is understood that the Registry Agreement will reflect the community restrictions proposed in the application. In the event that we believe the registry is not complying with these restrictions, possible avenues of recourse include the Registry Restrictions Dispute Resolution Procedure.

[Optional] I can advise that in the event that this application is successful [government/public authority] will enter into a separate agreement with the applicant. This agreement will outline the conditions under which we support them in the operation of the TLD, and circumstances under which we would withdraw that support. ICANN will not be a party to this agreement, and enforcement of this agreement lies fully with [government/public authority].

[Government / public authority] understands that the Geographic Names Panel engaged by ICANN will, among other things, conduct due diligence on the authenticity of this documentation. I would request that if additional information is required during this process, that [name and contact details] be contacted in the first instance.

Thank you for the opportunity to support this application.

Yours sincerely

Signature from relevant government/public authority

Attachment to Module 2

Evaluation Questions and Criteria

Since ICANN was founded in 1998 as a not-for-profit, multi-stakeholder organization, one of its key mandates has been to promote competition in the domain name market. ICANN's mission specifically calls for the corporation to maintain and build on processes that will ensure competition and consumer interests – without compromising Internet security and stability. This includes the consideration and implementation of new gTLDs. It is ICANN's goal to make the criteria and evaluation as objective as possible.

While new gTLDs are viewed by ICANN as important to fostering choice, innovation and competition in domain registration services, the decision to launch these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community.

Any public or private sector organization can apply to create and operate a new gTLD. However the process is not like simply registering or buying a second-level domain name. Instead, the application process is to evaluate and select candidates capable of running a registry, a business that manages top level domains such as, for example, .COM or .INFO. Any successful applicant will need to meet published operational and technical criteria in order to preserve Internet stability and interoperability.

I. Principles of the Technical and Financial New gTLD Evaluation Criteria

- Principles of conservatism. This is the first round of what is to be an ongoing process for the introduction of new TLDs, including Internationalized Domain Names. Therefore, the criteria in this round require applicants to provide a thorough and thoughtful analysis of the technical requirements to operate a registry and the proposed business model.
- The criteria and evaluation should be as objective as possible.
 - With that goal in mind, an important objective of the new TLD process is to diversify the namespace, with different registry business models and target audiences. In some cases, criteria that are objective, but that ignore the differences in business models and target audiences of new registries, will tend to make the process exclusionary. For example, the business model for a registry targeted to a small community need not possess the same robustness in funding and technical infrastructure as a registry intending to compete with large gTLDs. Therefore purely objective criteria such as a requirement for a certain amount of cash on hand will not provide for the flexibility to consider different business models. The process must provide for an objective evaluation framework, but allow for adaptation according to the differing models applicants will present. Within that framework, applicant responses will be evaluated against the criteria in light of the proposed model.
 - Therefore the criteria should be flexible: able to scale with the overall business approach, providing that the planned approach is consistent and coherent, and can withstand highs and lows.

- Criteria can be objective in areas of registrant protection, for example:
 - Providing for funds to continue operations in the event of a registry failure.
 - Adherence to data escrow, registry failover, and continuity planning requirements.
- The evaluation must strike the correct balance between establishing the business and technical competence of the applicant to operate a registry (to serve the interests of registrants), while not asking for the detailed sort of information or making the judgment that a venture capitalist would. ICANN is not seeking to certify business success but instead seeks to encourage innovation while providing certain safeguards for registrants.
- New registries must be added in a way that maintains DNS stability and security. Therefore, ICANN asks several questions so that the applicant can demonstrate an understanding of the technical requirements to operate a registry. ICANN will ask the applicant to demonstrate actual operational technical compliance prior to delegation. This is in line with current prerequisites for the delegation of a TLD.
- Registrant protection is emphasized in both the criteria and the scoring. Examples of this include asking the applicant to:
 - Plan for the occurrence of contingencies and registry failure by putting in place financial resources to fund the ongoing resolution of names while a replacement operator is found or extended notice can be given to registrants,
 - Demonstrate a capability to understand and plan for business contingencies to afford some protections through the marketplace,
 - Adhere to DNS stability and security requirements as described in the technical section, and
 - Provide access to the widest variety of services.

II. Aspects of the Questions Asked in the Application and Evaluation Criteria

The technical and financial questions are intended to inform and guide the applicant in aspects of registry start-up and operation. The established registry operator should find the questions straightforward while inexperienced applicants should find them a natural part of planning.

Evaluation and scoring (detailed below) will emphasize:

- How thorough are the answers? Are they well thought through and do they provide a sufficient basis for evaluation?
- Demonstration of the ability to operate and fund the registry on an ongoing basis:
 - Funding sources to support technical operations in a manner that ensures stability and security and supports planned expenses,
 - Resilience and sustainability in the face of ups and downs, anticipation of contingencies,
 - Funding to carry on operations in the event of failure.

- Demonstration that the technical plan will likely deliver on best practices for a registry and identification of aspects that might raise DNS stability and security issues.
- Ensures plan integration, consistency and compatibility (responses to questions are not evaluated individually but in comparison to others):
 - Funding adequately covers technical requirements,
 - Funding covers costs,
 - Risks are identified and addressed, in comparison to other aspects of the plan.

III. Scoring

Evaluation

- The questions, criteria, scoring and evaluation methodology are to be conducted in accordance with the principles described earlier in section I. With that in mind, globally diverse evaluation panelists will staff evaluation panels. The diversity of evaluators and access to experts in all regions of the world will ensure application evaluations take into account cultural, technical and business norms in the regions from which applications originate.
- Evaluation teams will consist of two independent panels. One will evaluate the applications against the financial criteria. The other will evaluate the applications against the technical & operational criteria. Given the requirement that technical and financial planning be well integrated, the panels will work together and coordinate information transfer where necessary. Other relevant experts (e.g., technical, audit, legal, insurance, finance) in pertinent regions will provide advice as required.
- Precautions will be taken to ensure that no member of the Evaluation Teams will have any interest or association that may be viewed as a real or potential conflict of interest with an applicant or application. All members must adhere to the Code of Conduct and Conflict of Interest guidelines that are found in Module 2.
- Communications between the evaluation teams and the applicants will be through an online interface. During the evaluation, evaluators may pose a set of clarifying questions to an applicant, to which the applicant may respond through the interface.

Confidentiality: ICANN will post applications after the close of the application submission period. The application form notes which parts of the application will be posted.

Scoring

- Responses will be evaluated against each criterion. A score will be assigned according to the scoring schedule linked to each question or set of questions. In several questions, 1 point is the maximum score that may be awarded. In several other questions, 2 points are awarded for a response that exceeds requirements, 1 point is awarded for a response that meets requirements and 0 points are awarded for a response that fails to meet requirements. Each question must receive at least a score of "1," making each a "pass/fail" question.
- In the Continuity question in the financial section(see Question #50), up to 3 points are awarded if an applicant provides, at the application stage, a financial instrument that will guarantee ongoing registry operations in the event of a business failure. This extra

point can serve to guarantee passing the financial criteria for applicants who score the minimum passing score for each of the individual criteria. The purpose of this weighting is to reward applicants who make early arrangements for the protection of registrants and to accept relatively riskier business plans where registrants are protected.

- There are 21 Technical & Operational questions. Each question has a criterion and scoring associated with it. The scoring for each is 0, 1, or 2 points as described above. One of the questions (IDN implementation) is optional. Other than the optional questions, all Technical & Operational criteria must be scored a 1 or more or the application will fail the evaluation.
- The total technical score must be equal to or greater than 22 for the application to pass. That means the applicant can pass by:
 - Receiving a 1 on all questions, including the optional question, and a 2 on at least one mandatory question; or
 - Receiving a 1 on all questions, excluding the optional question and a 2 on at least two mandatory questions.

This scoring methodology requires a minimum passing score for each question and a slightly higher average score than the per question minimum to pass.

- There are six Financial questions and six sets of criteria that are scored by rating the answers to one or more of the questions. For example, the question concerning registry operation costs requires consistency between the technical plans (described in the answers to the Technical & Operational questions) and the costs (described in the answers to the costs question).
- The scoring for each of the Financial criteria is 0, 1 or 2 points as described above with the exception of the Continuity question, for which up to 3 points are possible. All questions must receive at least a 1 or the application will fail the evaluation.
- The total financial score on the six criteria must be 8 or greater for the application to pass. That means the applicant can pass by:
 - Scoring a 3 on the continuity criteria, or
 - Scoring a 2 on any two financial criteria.
- Applications that do not pass Initial Evaluation can enter into an extended evaluation process as described in Module 2. The scoring is the same.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
Applicant Information	1	Full legal name of the Applicant (the established entity that would enter into a Registry Agreement with ICANN)	Y	Responses to Questions 1 - 12 are required for a complete application. Responses are not scored.			
	2	Address of the principal place of business of the Applicant. This address will be used for contractual purposes. No Post Office boxes are allowed.	Y				
	3	Phone number for the Applicant's principal place of business.	Y				
	4	Fax number for the Applicant's principal place of business.	Y				
	5	Website or URL, if applicable.	Y				
Primary Contact for this Application	6	Name	Y	The primary contact is the individual designated with the primary responsibility for management of the application, including responding to tasks in the TLD Application System (TAS) during the various application phases. Both contacts listed should also be prepared to receive inquiries from the public.			
		Title	Y				
		Date of birth	N				
		Country of birth	N				
		Address	N				
		Phone number	Y				
		Fax number	Y				
		Email address	Y				
Secondary Contact for this Application	7	Name	Y	The secondary contact is listed in the event the primary contact is unavailable to continue with the application process.			
		Title	Y				
		Date of birth	N				
		Country of birth	N				
		Address	N				
		Phone number	Y				
		Fax number	Y				

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		Email address	Y				
Proof of Legal Establishment	8	(a) Legal form of the Applicant. (e.g., partnership, corporation, non-profit institution).	Y				
		(b) State the specific national or other jurisdiction that defines the type of entity identified in 8(a).	Y	In the event of questions regarding proof of establishment, the applicant may be asked for additional details, such as the specific national or other law applying to this type of entity			
		(c) Attach evidence of the applicant's establishment as the type of entity identified in Question 8(a) above, in accordance with the applicable laws identified in Question 8(b).	Y	Applications without valid proof of legal establishment will not be evaluated further. Supporting documentation for proof of legal establishment should be submitted in the original language.			
	9	(a) If the applying entity is publicly traded, provide the exchange and symbol.	Y				
		(b) If the applying entity is a subsidiary, provide the parent company.	Y				
		(c) If the applying entity is a joint venture, list all joint venture partners.	Y				
	10	Business ID, Tax ID, VAT registration number, or equivalent of the Applicant.	N				
Applicant Background	11	(a) Enter the full name, date and country of birth, contact information (permanent residence), and position of all directors (i.e., members of the applicant's Board of Directors, if applicable).	Partial	<p>Applicants should be aware that the names and positions of the individuals listed in response to this question will be published as part of the application. The contact information listed for individuals is for identification purposes only and will not be published as part of the application.</p> <p>Background checks may be conducted on individuals named in the applicant's response to question 11. Any material misstatement or misrepresentation (or omission of material information) may cause the application to be rejected.</p> <p>The applicant certifies that it has obtained permission for the posting of the names and positions of individuals included in this application.</p>			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(b) Enter the full name, date and country of birth, contact information (permanent residence), and position of all officers and partners. Officers are high-level management officials of a corporation or business, for example, a CEO, vice president, secretary, chief financial officer. Partners would be listed in the context of a partnership or other such form of legal entity.	Partial				
		(c) Enter the full name and contact information of all shareholders holding at least 15% of shares, and percentage held by each. For a shareholder entity, enter the principal place of business. For a shareholder individual, enter the date and country of birth and contact information (permanent residence).	Partial				
		(d) For an applying entity that does not have directors, officers, partners, or shareholders, enter the full name, date and country of birth, contact information (permanent residence), and position of all individuals having overall legal or executive responsibility for the applying entity.	Partial				
		(e) Indicate whether the applicant or any of the individuals named above: <ul style="list-style-type: none"> i. within the past ten years, has been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that is the substantive equivalent of any of these; ii. within the past ten years, has been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of funds of others; iii. within the past ten years has been convicted of any willful tax-related fraud or willful evasion of tax liabilities; iv. within the past ten years has been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative; 	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>v. has ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes;</p> <p>vi. has ever been convicted of any crime involving the use of a weapon, force, or the threat of force;</p> <p>vii. has ever been convicted of any violent or sexual offense victimizing children, the elderly, or individuals with disabilities;</p> <p>viii. has ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988;</p> <p>ix. has ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols);</p> <p>x. has been convicted, within the respective timeframes, of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes (i.e., within the past 10 years for crimes listed in (i) - (iv) above, or ever for the crimes listed in (v) - (ix) above);</p> <p>xi. has entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents) within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (i) - (iv) above, or ever for the crimes listed in (v) - (ix) above);</p> <p>xii. is the subject of a disqualification imposed by ICANN and in effect at the time of this application.</p> <p>If any of the above events have occurred, please provide details.</p>					

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(f) Indicate whether the applicant or any of the individuals named above have been involved in any decisions indicating that the applicant or individual named in the application was engaged in cybersquatting, as defined in the Uniform Domain Name Dispute Resolution Policy (UDRP), Anti-cybersquatting Consumer Protection Act (ACPA), or other equivalent legislation, or was engaged in reverse domain name hijacking under the UDRP or bad faith or reckless disregard under the ACPA or equivalent legislation.	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook for details.			
		(g) Disclose whether the applicant or any of the individuals named above has been involved in any administrative or other legal proceeding in which allegations of intellectual property infringement relating to registration or use of a domain name have been made. Provide an explanation related to each such instance.	N	ICANN may deny an otherwise qualified application based on the background screening process. See section 1.2.1 of the guidebook for details.			
		(h) Provide an explanation for any additional background information that may be found concerning the applicant or any individual named in the application, which may affect eligibility, including any criminal convictions not identified above.	N				
Evaluation Fee	12	(a) Enter the confirmation information for payment of the evaluation fee (e.g., wire transfer confirmation number).	N	<p>The evaluation fee is paid in the form of a deposit at the time of user registration, and submission of the remaining amount at the time the full application is submitted. The information in question 12 is required for each payment.</p> <p>The full amount in USD must be received by ICANN. Applicant is responsible for all transaction fees and exchange rate fluctuation.</p> <p>Fedwire is the preferred wire mechanism; SWIFT is also acceptable. ACH is not recommended as these funds will take longer to clear and could affect timing of the application processing.</p>			
		(b) Payer name	N				
		(c) Payer address	N				

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		(d) Wiring bank	N				
		(e) Bank address	N				
		(f) Wire date	N				
Applied-for gTLD string	13	Provide the applied-for gTLD string. If applying for an IDN, provide the U-label.	Y	Responses to Questions 13-17 are not scored, but are used for database and validation purposes. The U-label is an IDNA-valid string of Unicode characters, including at least one non-ASCII character.			
	14	(a) If applying for an IDN, provide the A-label (beginning with "xn--").	Y				
		(b) If an IDN, provide the meaning, or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.	Y				
		(c) If an IDN, provide the language of the label (both in English and as referenced by ISO-639-1).	Y				
		(d) If an IDN, provide the script of the label (both in English and as referenced by ISO 15924).	Y				
		(e) If an IDN, list all code points contained in the U-label according to Unicode form.	Y	For example, the string "HELLO" would be listed as U+0048 U+0065 U+006C U+006C U+0066.			
	15	(a) If an IDN, upload IDN tables for the proposed registry. An IDN table must include: <ol style="list-style-type: none"> 1. the applied-for gTLD string relevant to the tables, 2. the script or language designator (as defined in BCP 47), 3. table version number, 4. effective date (DD Month YYYY), and 5. contact name, email address, and phone number. <p>Submission of IDN tables in a standards-based format is encouraged.</p>	Y	In the case of an application for an IDN gTLD, IDN tables must be submitted for the language or script for the applied-for gTLD string. IDN tables must also be submitted for each language or script in which the applicant intends to offer IDN registrations at the second level (see question 44). IDN tables should be submitted in a machine-readable format. The model format described in Section 5 of RFC 4290 would be ideal. The format used by RFC 3743 is an acceptable alternative. Variant generation algorithms that are more complex (such as those with contextual			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				rules) and cannot be expressed using these table formats should be specified in a manner that could be re-implemented programmatically by ICANN. Ideally, for any complex table formats, a reference code implementation should be provided in conjunction with a description of the generation rules.			
		(b) Describe the process used for development of the IDN tables submitted, including consultations and sources used.	Y				
		(c) List any variants to the applied-for gTLD string according to the relevant IDN tables.	Y	Variant TLD strings will not be delegated as a result of this application. Variant strings will be checked for consistency and, if the application is approved, will be entered on a Declared IDN Variants List to allow for future allocation once a variant management mechanism is established for the top level. Inclusion of variant TLD strings in this application is for information only and confers no right or claim to these strings upon the applicant.			
	16	Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.	Y				
	17	OPTIONAL. Provide a representation of the label according to the International Phonetic Alphabet (http://www.langsci.ucl.ac.uk/ipa/).	Y	If provided, this information will be used as a guide to ICANN in communications regarding the application.			
Mission/Purpose	18	(a) Describe the mission/purpose of your proposed gTLD.	Y	The information gathered in response to Question 18 is intended to inform the post-launch review of the New gTLD Program, from the perspective of assessing the relative costs and benefits achieved in the expanded gTLD space. For the application to be considered complete, answers to this section must be fulsome and sufficiently quantitative and detailed to inform future study on plans vs. results.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				<p>The New gTLD Program will be reviewed, as specified in section 9.3 of the Affirmation of Commitments. This will include consideration of the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion.</p> <p>The information gathered in this section will be one source of input to help inform this review. This information is not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored.</p> <p>An applicant wishing to designate this application as community-based should ensure that these responses are consistent with its responses for question 20 below.</p>			
		(b) How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?	Y	<p>Answers should address the following points:</p> <ul style="list-style-type: none"> i. What is the goal of your proposed gTLD in terms of areas of specialty, service levels, or reputation? ii. What do you anticipate your proposed gTLD will add to the current space, in terms of competition, differentiation, or innovation? iii. What goals does your proposed gTLD have in terms of user experience? iv. Provide a complete description of the applicant's intended registration policies in support of the goals listed above. v. Will your proposed gTLD impose any measures for 			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				<p>protecting the privacy or confidential information of registrants or users? If so, please describe any such measures.</p> <p>Describe whether and in what ways outreach and communications will help to achieve your projected benefits.</p>			
	18	(c) What operating rules will you adopt to eliminate or minimize social costs (e.g., time or financial resource costs, as well as various types of consumer vulnerabilities)? What other steps will you take to minimize negative consequences/costs imposed upon consumers?	Y	<p>Answers should address the following points:</p> <ul style="list-style-type: none"> i. How will multiple applications for a particular domain name be resolved, for example, by auction or on a first-come/first-serve basis? ii. Explain any cost benefits for registrants you intend to implement (e.g., advantageous pricing, introductory discounts, bulk registration discounts). iii. Note that the Registry Agreement requires that registrars be offered the option to obtain initial domain name registrations for periods of one to ten years at the discretion of the registrar, but no greater than ten years. Additionally, the Registry Agreement requires advance written notice of price increases. Do you intend to make contractual commitments to registrants regarding the magnitude of price escalation? If so, please describe your plans. 			
Community-based Designation	19	Is the application for a community-based TLD?	Y	There is a presumption that the application is a standard application (as defined in the Applicant Guidebook) if this question is left unanswered.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				The applicant's designation as standard or community-based cannot be changed once the application is submitted.			
	20	(a) Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to this question. The name of the community does not have to be formally adopted for the application to be designated as community-based.	Y	<p>Descriptions should include:</p> <ul style="list-style-type: none"> • How the community is delineated from Internet users generally. Such descriptions may include, but are not limited to, the following: membership, registration, or licensing processes, operation in a particular industry, use of a language. • How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required. • When the community was established, including the date(s) of formal organization, if any, as well as a description of community activities to date. • The current estimated size of the community, both as to membership and geographic extent. 		<p>Responses to Question 20 will be regarded as firm commitments to the specified community and reflected in the Registry Agreement, provided the application is successful.</p> <p>Responses are not scored in the Initial Evaluation. Responses may be scored in a community priority evaluation, if applicable. Criteria and scoring methodology for the community priority evaluation are described in Module 4 of the Applicant Guidebook.</p>	
		(b) Explain the applicant's relationship to the community identified in 20(a).	Y	<p>Explanations should clearly state:</p> <ul style="list-style-type: none"> • Relations to any community organizations. • Relations to the community and its constituent parts/groups. • Accountability mechanisms of the applicant to the community. 			
		(c) Provide a description of the community-based purpose of the applied-for gTLD.	Y	<p>Descriptions should include:</p> <ul style="list-style-type: none"> • Intended registrants in the TLD. • Intended end-users of the TLD. • Related activities the applicant has carried out or intends to carry out in service of this purpose. • Explanation of how the purpose is of a lasting nature. 			
		(d) Explain the relationship between the applied-for gTLD string and the community identified in 20(a).	Y	<p>Explanations should clearly state:</p> <ul style="list-style-type: none"> • relationship to the established name, if any, of the community. 			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				<ul style="list-style-type: none"> relationship to the identification of community members. any connotations the string may have beyond the community. 			
		(e) Provide a complete description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD. Policies and enforcement mechanisms are expected to constitute a coherent set.	Y	<p>Descriptions should include proposed policies, if any, on the following:</p> <ul style="list-style-type: none"> Eligibility: who is eligible to register a second-level name in the gTLD, and how will eligibility be determined. Name selection: what types of second-level names may be registered in the gTLD. Content/Use: what restrictions, if any, the registry operator will impose on how a registrant may use its registered name. Enforcement: what investigation practices and mechanisms exist to enforce the policies above, what resources are allocated for enforcement, and what appeal mechanisms are available to registrants. 			
		(f) Attach any written endorsements for the application from established institutions representative of the community identified in 20(a). An applicant may submit written endorsements by multiple institutions, if relevant to the community.	Y	<p>At least one such endorsement is required for a complete application. The form and content of the endorsement are at the discretion of the party providing the endorsement; however, the letter must identify the applied-for gTLD string and the applying entity, include an express statement support for the application, and the supply the contact information of the entity providing the endorsement.</p> <p>Endorsements from institutions not mentioned in the response to 20(b) should be accompanied by a clear description of each such institution's relationship to the community.</p> <p>Endorsements presented as supporting documentation for this question should be submitted in the original language.</p>			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
Geographic Names	21	(a) Is the application for a geographic name?	Y	<p>An applied-for gTLD string is considered a geographic name requiring government support if it is: (a) the capital city name of a country or territory listed in the ISO 3166-1 standard; (b) a city name, where it is clear from statements in the application that the applicant intends to use the gTLD for purposes associated with the city name; (c) a sub-national place name listed in the ISO 3166-2 standard; or (d) a name listed as a UNESCO region or appearing on the "Composition of macro geographic (continental) or regions, geographic sub-regions, and selected economic and other groupings" list. See Module 2 for complete definitions and criteria.</p> <p>An application for a country or territory name, as defined in the Applicant Guidebook, will not be approved.</p>			
		(b) If a geographic name, attach documentation of support or non-objection from all relevant governments or public authorities.	N	<p>See the documentation requirements in Module 2 of the Applicant Guidebook.</p> <p>Documentation presented in response to this question should be submitted in the original language.</p>			
Protection of Geographic Names	22	Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD. This should include any applicable rules and procedures for reservation and/or release of such names.	Y	<p>Applicants should consider and describe how they will incorporate Governmental Advisory Committee (GAC) advice in their management of second-level domain name registrations. See "Principles regarding New gTLDs" at https://gacweb.icann.org/display/GACADV/New+gTLDs.</p> <p>For reference, applicants may draw on existing methodology developed for the reservation and release of country names in the .INFO top-level domain. See the Dot Info Circular at https://gacweb.icann.org/display/GACADV/New+gTLDs.</p> <p>Proposed measures will be posted for public comment as part of the application. However, note that procedures for release of geographic names at the second level</p>			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				must be separately approved according to Specification 5 of the Registry Agreement. That is, approval of a gTLD application does not constitute approval for release of any geographic names under the Registry Agreement. Such approval must be granted separately by ICANN.			
Registry Services	23	<p>Provide name and full description of all the Registry Services to be provided. Descriptions should include both technical and business components of each proposed service, and address any potential security or stability concerns.</p> <p>The following registry services are customary services offered by a registry operator:</p> <ul style="list-style-type: none"> A. Receipt of data from registrars concerning registration of domain names and name servers. B. Dissemination of TLD zone files. C. Dissemination of contact or other information concerning domain name registrations (e.g., port-43 WHOIS, Web-based Whois, RESTful Whois service). D. Internationalized Domain Names, where offered. E. DNS Security Extensions (DNSSEC). <p>The applicant must describe whether any of these registry services are intended to be offered in a manner unique to the TLD.</p> <p>Additional proposed registry services that are unique to the registry must also be described.</p>	Y	<p>Registry Services are defined as the following: (1) operations of the Registry critical to the following tasks: (i) the receipt of data from registrars concerning registrations of domain names and name servers; (ii) provision to registrars of status information relating to the zone servers for the TLD; (iii) dissemination of TLD zone files; (iv) operation of the Registry zone servers; and (v) dissemination of contact and other information concerning domain name server registrations in the TLD as required by the Registry Agreement; and (2) other products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy; (3) any other products or services that only a Registry Operator is capable of providing, by reason of its designation as the Registry Operator. A full definition of Registry Services can be found at http://www.icann.org/en/registries/rsep/rsep.html.</p> <p>Security: For purposes of this Applicant Guidebook, an effect on security by the proposed Registry Service means (1) the unauthorized disclosure, alteration, insertion or destruction of Registry Data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with applicable standards.</p> <p>Stability: For purposes of this Applicant Guidebook, an effect on stability shall mean that the proposed Registry Service (1) is not compliant with applicable relevant standards that are authoritative and published by a well-established, recognized and</p>		<p>Responses are not scored. A preliminary assessment will be made to determine if there are potential security or stability issues with any of the applicant's proposed Registry Services. If any such issues are identified, the application will be referred for an extended review. See the description of the Registry Services review process in Module 2 of the Applicant Guidebook. Any information contained in the application may be considered as part of the Registry Services review. If its application is approved, applicant may engage in only those registry services defined in the application, unless a new request is submitted to ICANN in accordance with the Registry Agreement.</p>	

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
				authoritative standards body, such as relevant Standards-Track or Best Current Practice RFCs sponsored by the IETF, or (2) creates a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant Standards-Track or Best Current Practice RFCs and relying on Registry Operator's delegation information or provisioning.			
Demonstration of Technical & Operational Capability (External)	24	<p>Shared Registration System (SRS) Performance: describe</p> <ul style="list-style-type: none"> the plan for operation of a robust and reliable SRS. SRS is a critical registry function for enabling multiple registrars to provide domain name registration services in the TLD. SRS must include the EPP interface to the registry, as well as any other interfaces intended to be provided, if they are critical to the functioning of the registry. Please refer to the requirements in Specification 6 (section 1.2) and Specification 10 (SLA Matrix) attached to the Registry Agreement; and resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>A complete answer should include, but is not limited to:</p> <ul style="list-style-type: none"> A high-level SRS system description; Representative network diagram(s); Number of servers; Description of interconnectivity with other registry systems; Frequency of synchronization between servers; and Synchronization scheme (e.g., hot standby, cold standby). 	Y	<p>The questions in this section (24-44) are intended to give applicants an opportunity to demonstrate their technical and operational capabilities to run a registry. In the event that an applicant chooses to outsource one or more parts of its registry operations, the applicant should still provide the full details of the technical arrangements.</p> <p>Note that the resource plans provided in this section assist in validating the technical and operational plans as well as informing the cost estimates in the Financial section below.</p> <p>Questions 24-30(a) are designed to provide a description of the applicant's intended technical and operational approach for those registry functions that are outward-facing, i.e., interactions with registrars, registrants, and various DNS users. Responses to these questions will be published to allow review by affected parties.</p>	0-1	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> a plan for operating a robust and reliable SRS, one of the five critical registry functions; scalability and performance consistent with the overall business approach, and planned size of the registry; a technical plan that is adequately resourced in the planned costs detailed in the financial section; and evidence of compliance with Specification 6 (section 1.2) to the Registry Agreement. 	<p>1 - meets requirements: Response includes</p> <ol style="list-style-type: none"> An adequate description of SRS that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; Details of a well-developed plan to operate a robust and reliable SRS; SRS plans are sufficient to result in compliance with Specification 6 and Specification 10 to the Registry Agreement; SRS is consistent with the technical, operational and financial approach described in the application; and Demonstrates that adequate technical resources are already on hand, or committed or readily available to carry out this function. <p>0 - fails requirements: Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		A complete answer is expected to be no more than 5 pages. (As a guide, one page contains approximately 4000 characters).					
	25	<p>Extensible Provisioning Protocol (EPP): provide a detailed description of the interface with registrars, including how the applicant will comply with EPP in RFCs 3735 (if applicable), and 5730-5734.</p> <p>If intending to provide proprietary EPP extensions, provide documentation consistent with RFC 3735, including the EPP templates and schemas that will be used.</p> <p>Describe resourcing plans (number and description of personnel roles allocated to this area).</p> <p>A complete answer is expected to be no more than 5 pages. If there are proprietary EPP extensions, a complete answer is also expected to be no more than 5 pages per EPP extension.</p>	Y		0-1	<p>Complete answer demonstrates:</p> <p>(1) complete knowledge and understanding of this aspect of registry technical requirements;</p> <p>(2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry; and</p> <p>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section;</p> <p>(4) ability to comply with relevant RFCs;</p> <p>(5) if applicable, a well-documented implementation of any proprietary EPP extensions; and</p> <p>(6) if applicable, how proprietary EPP extensions are consistent with the registration lifecycle as described in Question 27.</p>	<p>1 - meets requirements: Response includes</p> <p>(1) Adequate description of EPP that substantially demonstrates the applicant's capability and knowledge required to meet this element;</p> <p>(2) Sufficient evidence that any proprietary EPP extensions are compliant with RFCs and provide all necessary functionalities for the provision of registry services;</p> <p>(3) EPP interface is consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(4) Demonstrates that technical resources are already on hand, or committed or readily available.</p> <p>0 - fails requirements: Does not meet all the requirements to score 1.</p>
	26	<p>Whois: describe</p> <ul style="list-style-type: none"> • how the applicant will comply with Whois specifications for data objects, bulk access, and lookups as defined in Specifications 4 and 10 to the Registry Agreement; • how the Applicant's Whois service will comply with RFC 3912; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>A complete answer should include, but is not limited to:</p>	Y	The Registry Agreement (Specification 4) requires provision of Whois lookup services for all names registered in the TLD. This is a minimum requirement. Provision for Searchable Whois as defined in the scoring column is a requirement for achieving a score of 2 points.	0-2	<p>Complete answer demonstrates:</p> <p>(1) complete knowledge and understanding of this aspect of registry technical requirements, (one of the five critical registry functions);</p> <p>(2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry;</p> <p>(3) a technical plan that is adequately resourced in the</p>	<p>2 – exceeds requirements: Response meets all the attributes for a score of 1 and includes:</p> <p>(1) A Searchable Whois service: Whois service includes web-based search capabilities by domain name, registrant name, postal address, contact names, registrar IDs, and Internet Protocol addresses without arbitrary limit. Boolean search capabilities may be offered. The service shall include appropriate precautions to avoid abuse of this feature (e.g., limiting access to legitimate authorized users), and the</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<ul style="list-style-type: none"> A high-level Whois system description; Relevant network diagram(s); IT and infrastructure resources (e.g., servers, switches, routers and other components); Description of interconnectivity with other registry systems; and Frequency of synchronization between servers. <p>To be eligible for a score of 2, answers must also include:</p> <ul style="list-style-type: none"> Provision for Searchable Whois capabilities; and A description of potential forms of abuse of this feature, how these risks will be mitigated, and the basis for these descriptions. <p>A complete answer is expected to be no more than 5 pages.</p>				<p>planned costs detailed in the financial section;</p> <p>(4) ability to comply with relevant RFCs;</p> <p>(5) evidence of compliance with Specifications 4 and 10 to the Registry Agreement; and</p> <p>(6) if applicable, a well-documented implementation of Searchable Whois.</p>	<p>application demonstrates compliance with any applicable privacy laws or policies.</p> <p>1 - meets requirements: Response includes</p> <p>(1) adequate description of Whois service that substantially demonstrates the applicant's capability and knowledge required to meet this element;</p> <p>(2) Evidence that Whois services are compliant with RFCs, Specifications 4 and 10 to the Registry Agreement, and any other contractual requirements including all necessary functionalities for user interface;</p> <p>(3) Whois capabilities consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(4) demonstrates an adequate level of resources that are already on hand or readily available to carry out this function.</p> <p>0 - fails requirements: Does not meet all the requirements to score 1.</p>
	27	<p>Registration Life Cycle: provide a detailed description of the proposed registration lifecycle for domain names in the proposed gTLD. The description must:</p> <ul style="list-style-type: none"> explain the various registration states as well as the criteria and procedures that are used to change state; describe the typical registration lifecycle of create/update/delete and all intervening steps such as pending, locked, expired, and transferred that may apply; clearly explain any time elements that are involved - for instance details of add-grace or redemption grace periods, or notice periods for renewals or transfers; and describe resourcing plans for this aspect of the criteria (number and 	Y		0-1	<p>Complete answer demonstrates:</p> <p>(1) complete knowledge and understanding of registration lifecycles and states;</p> <p>(2) consistency with any specific commitments made to registrants as adapted to the overall business approach for the proposed gTLD; and</p> <p>(3) the ability to comply with relevant RFCs.</p>	<p>1 - meets requirements: Response includes</p> <p>(1) An adequate description of the registration lifecycle that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;</p> <p>(2) Details of a fully developed registration life cycle with definition of various registration states, transition between the states, and trigger points;</p> <p>(3) A registration lifecycle that is consistent with any commitments to registrants and with technical, operational, and financial plans described in the application; and</p> <p>(4) Demonstrates an adequate level of</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>description of personnel roles allocated to this area).</p> <p>The description of the registration lifecycle should be supplemented by the inclusion of a state diagram, which captures definitions, explanations of trigger points, and transitions from state to state.</p> <p>If applicable, provide definitions for aspects of the registration lifecycle that are not covered by standard EPP RFCs.</p> <p>A complete answer is expected to be no more than 5 pages.</p>					<p>resources that are already on hand or committed or readily available to carry out this function.</p> <p>0 - fails requirements: Does not meet all the requirements to score 1.</p>
	28	<p>Abuse Prevention and Mitigation: Applicants should describe the proposed policies and procedures to minimize abusive registrations and other activities that have a negative impact on Internet users. A complete answer should include, but is not limited to:</p> <ul style="list-style-type: none"> • An implementation plan to establish and publish on its website a single abuse point of contact responsible for addressing matters requiring expedited attention and providing a timely response to abuse complaints concerning all names registered in the TLD through all registrars of record, including those involving a reseller; • Policies for handling complaints regarding abuse; • Proposed measures for removal of orphan glue records for names removed from the zone when provided with evidence in written form that the glue is present in connection with malicious conduct (see Specification 6); and • Resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>To be eligible for a score of 2, answers must include measures to promote Whois accuracy as well as measures from one other area as</p>	Y	Note that, while orphan glue often supports correct and ordinary operation of the DNS, registry operators will be required to take action to remove orphan glue records (as defined at http://www.icann.org/en/committees/security/sac048.pdf) when provided with evidence in written form that such records are present in connection with malicious conduct.	0-2	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> (1) Comprehensive abuse policies, which include clear definitions of what constitutes abuse in the TLD, and procedures that will effectively minimize potential for abuse in the TLD; (2) Plans are adequately resourced in the planned costs detailed in the financial section; (3) Policies and procedures identify and address the abusive use of registered names at startup and on an ongoing basis; and (4) When executed in accordance with the Registry Agreement, plans will result in compliance with contractual requirements. 	<p>2 – exceeds requirements: Response meets all the attributes for a score of 1 and includes:</p> <ol style="list-style-type: none"> (1) Details of measures to promote Whois accuracy, using measures specified here or other measures commensurate in their effectiveness; and (2) Measures from at least one additional area to be eligible for 2 points as described in the question. <p>1 - meets requirements Response includes:</p> <ol style="list-style-type: none"> (1) An adequate description of abuse prevention and mitigation policies and procedures that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Details of well-developed abuse policies and procedures; (3) Plans are sufficient to result in compliance with contractual requirements; (4) Plans are consistent with the technical, operational, and financial approach described in the application, and any commitments made to registrants; and (5) Demonstrates an adequate level of resources that are on hand, committed, or readily available to

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		<p>described below.</p> <ul style="list-style-type: none"> • Measures to promote Whois accuracy (can be undertaken by the registry directly or by registrars via requirements in the Registry-Registrar Agreement (RRA)) may include, but are not limited to: <ul style="list-style-type: none"> ○ Authentication of registrant information as complete and accurate at time of registration. Measures to accomplish this could include performing background checks, verifying all contact information of principals mentioned in registration data, reviewing proof of establishment documentation, and other means. ○ Regular monitoring of registration data for accuracy and completeness, employing authentication methods, and establishing policies and procedures to address domain names with inaccurate or incomplete Whois data; and ○ If relying on registrars to enforce measures, establishing policies and procedures to ensure compliance, which may include audits, financial incentives, penalties, or other means. Note that the requirements of the RAA will continue to apply to all ICANN-accredited registrars. • A description of policies and procedures that define malicious or abusive behavior, capture metrics, and establish Service Level Requirements for resolution, including service levels for responding to law enforcement requests. This may include rapid takedown or suspension systems and sharing information regarding malicious or abusive behavior with industry partners; • Adequate controls to ensure proper access to domain functions (can be undertaken by the registry directly or by 					<p>carry out this function. 0 – fails requirements Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>registrars via requirements in the Registry-Registrar Agreement (RRA)) may include, but are not limited to:</p> <ul style="list-style-type: none"> o Requiring multi-factor authentication (i.e., strong passwords, tokens, one-time passwords) from registrants to process update, transfers, and deletion requests; o Requiring multiple, unique points of contact to request and/or approve update, transfer, and deletion requests; and o Requiring the notification of multiple, unique points of contact when a domain has been updated, transferred, or deleted. <p>A complete answer is expected to be no more than 20 pages.</p>					
	29	<p>Rights Protection Mechanisms: Applicants must describe how their registry will comply with policies and practices that minimize abusive registrations and other activities that affect the legal rights of others, such as the Uniform Domain Name Dispute Resolution Policy (UDRP), Uniform Rapid Suspension (URS) system, and Trademark Claims and Sunrise services at startup.</p> <p>A complete answer should include:</p> <ul style="list-style-type: none"> • A description of how the registry operator will implement safeguards against allowing unqualified registrations (e.g., registrations made in violation of the registry's eligibility restrictions or policies), and reduce opportunities for behaviors such as phishing or pharming. At a minimum, the registry operator must offer a Sunrise period and a Trademark Claims service during the required time periods, and implement decisions rendered under the URS on an ongoing basis; and • A description of resourcing plans for the 	Y		0-2	<p>Complete answer describes mechanisms designed to:</p> <ul style="list-style-type: none"> (1) prevent abusive registrations, and (2) identify and address the abusive use of registered names on an ongoing basis. 	<p>2 - exceeds requirements: Response meets all attributes for a score of 1 and includes:</p> <ul style="list-style-type: none"> (1) Identification of rights protection as a core objective, supported by a well-developed plan for rights protection; and (2) Mechanisms for providing effective protections that exceed minimum requirements (e.g., RPMs in addition to those required in the registry agreement). <p>1 - meets requirements: Response includes</p> <ul style="list-style-type: none"> (1) An adequate description of RPMs that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) A commitment from the applicant to implement of rights protection mechanisms sufficient to comply with minimum requirements in Specification 7; (3) Plans that are sufficient to result in compliance with contractual requirements;

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</p> <p>To be eligible for a score of 2, answers must also include additional measures specific to rights protection, such as abusive use policies, takedown procedures, registrant pre-verification, or authentication procedures, or other covenants.</p> <p>A complete answer is expected to be no more than 10 pages.</p>					<p>(4) Mechanisms that are consistent with the technical, operational, and financial approach described in the application; and</p> <p>(5) Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function.</p> <p>0 - fails requirements: Does not meet all the requirements to score a 1.</p>
	30	<p>(a) Security Policy: provide a summary of the security policy for the proposed registry, including but not limited to:</p> <ul style="list-style-type: none"> • indication of any independent assessment reports demonstrating security capabilities, and provisions for periodic independent assessment reports to test security capabilities; • description of any augmented security levels or capabilities commensurate with the nature of the applied for gTLD string, including the identification of any existing international or industry relevant security standards the applicant commits to following (reference site must be provided); • list of commitments made to registrants concerning security levels. <p>To be eligible for a score of 2, answers must also include:</p> <ul style="list-style-type: none"> • Evidence of an independent assessment report demonstrating effective security controls (e.g., ISO 27001). <p>A summary of the above should be no more than 20 pages. Note that the complete security policy for the registry is required to be submitted in accordance with 30(b).</p>	Y	<p>Criterion 5 calls for security levels to be appropriate for the use and level of trust associated with the TLD string, such as, for example, financial services oriented TLDs. "Financial services" are activities performed by financial institutions, including: 1) the acceptance of deposits and other repayable funds; 2) lending; 3) payment and remittance services; 4) insurance or reinsurance services; 5) brokerage services; 6) investment services and activities; 7) financial leasing; 8) issuance of guarantees and commitments; 9) provision of financial advice; 10) portfolio management and advice; or 11) acting as a financial clearinghouse. Financial services is used as an example only; other strings with exceptional potential to cause harm to consumers would also be expected to deploy appropriate levels of security.</p>	0-2	<p>Complete answer demonstrates:</p> <p>(1) detailed description of processes and solutions deployed to manage logical security across infrastructure and systems, monitoring and detecting threats and security vulnerabilities and taking appropriate steps to resolve them;</p> <p>(2) security capabilities are consistent with the overall business approach and planned size of the registry;</p> <p>(3) a technical plan adequately resourced in the planned costs detailed in the financial section;</p> <p>(4) security measures are consistent with any commitments made to registrants regarding security levels; and</p> <p>(5) security measures are appropriate for the applied-for gTLD string (For example, applications for strings with unique trust implications, such as financial services-oriented strings, would be expected to provide a commensurate level of security).</p>	<p>2 - exceeds requirements: Response meets all attributes for a score of 1 and includes:</p> <p>(1) Evidence of highly developed and detailed security capabilities, with various baseline security levels, independent benchmarking of security metrics, robust periodic security monitoring, and continuous enforcement; and</p> <p>(2) an independent assessment report is provided demonstrating effective security controls are either in place or have been designed, and are commensurate with the applied-for gTLD string. (This could be ISO 27001 certification or other well-established and recognized industry certifications for the registry operation. If new independent standards for demonstration of effective security controls are established, such as the High Security Top Level Domain (HSTLD) designation, this could also be included. An illustrative example of an independent standard is the proposed set of requirements described in http://www.icann.org/en/correspondence/aba-bits-to-beckstrom-crocker-20dec11-en.pdf.)</p> <p>1 - meets requirements: Response includes:</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
							(1) Adequate description of security policies and procedures that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) A description of adequate security capabilities, including enforcement of logical access control, threat analysis, incident response and auditing. Ad-hoc oversight and governance and leading practices being followed; (3) Security capabilities consistent with the technical, operational, and financial approach as described in the application, and any commitments made to registrants; (4) Demonstrates that an adequate level of resources are on hand, committed or readily available to carry out this function; and (5) Proposed security measures are commensurate with the nature of the applied-for gTLD string. 0 - fails requirements: Does not meet all the requirements to score 1.
Demonstration of Technical & Operational Capability (Internal)	30	(b) Security Policy: provide the complete security policy and procedures for the proposed registry, including but not limited to: <ul style="list-style-type: none"> • system (data, server, application / services) and network access control, ensuring systems are maintained in a secure fashion, including details of how they are monitored, logged and backed up; • resources to secure integrity of updates between registry systems and nameservers, and between nameservers, if any; • independent assessment reports demonstrating security capabilities (submitted as attachments), if any; • provisioning and other measures that mitigate risks posed by denial of service attacks; • computer and network incident response 	N	Questions 30(b) – 44 are designed to provide a description of the applicant's intended technical and operational approach for those registry functions that are internal to the infrastructure and operations of the registry. To allow the applicant to provide full details and safeguard proprietary information, responses to these questions will not be published.			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>policies, plans, and processes;</p> <ul style="list-style-type: none"> plans to minimize the risk of unauthorized access to its systems or tampering with registry data; intrusion detection mechanisms, a threat analysis for the proposed registry, the defenses that will be deployed against those threats, and provision for periodic threat analysis updates; details for auditing capability on all network access; physical security approach; identification of department or group responsible for the registry's security organization; background checks conducted on security personnel; description of the main security threats to the registry operation that have been identified; and resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). 					
	31	<p>Technical Overview of Proposed Registry: provide a technical overview of the proposed registry.</p> <p>The technical plan must be adequately resourced, with appropriate expertise and allocation of costs. The applicant will provide financial descriptions of resources in the next section and those resources must be reasonably related to these technical requirements.</p> <p>The overview should include information on the estimated scale of the registry's technical operation, for example, estimates for the number of registration transactions and DNS queries per month should be provided for the first two years of operation.</p> <p>In addition, the overview should account for geographic dispersion of incoming network traffic such as DNS, Whois, and registrar transactions.</p>	N	To the extent this answer is affected by the applicant's intent to outsource various registry operations, the applicant should describe these plans (e.g., taking advantage of economies of scale or existing facilities). However, the response must include specifying the technical plans, estimated scale, and geographic dispersion as required by the question.	0-1	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> complete knowledge and understanding of technical aspects of registry requirements; an adequate level of resiliency for the registry's technical operations; consistency with planned or currently deployed technical/operational solutions; consistency with the overall business approach and planned size of the registry; adequate resourcing for technical plan in the 	<p>1 - meets requirements: Response includes:</p> <ol style="list-style-type: none"> A description that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; Technical plans consistent with the technical, operational, and financial approach as described in the application; Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function. <p>0 - fails requirements: Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>If the registry serves a highly localized registrant base, then traffic might be expected to come mainly from one area.</p> <p>This high-level summary should not repeat answers to questions below. Answers should include a visual diagram(s) to highlight dataflows, to provide context for the overall technical infrastructure. Detailed diagrams for subsequent questions should be able to map back to this high-level diagram(s). The visual diagram(s) can be supplemented with documentation, or a narrative, to explain how all of the Technical & Operational components conform.</p> <p>A complete answer is expected to be no more than 10 pages.</p>				planned costs detailed in the financial section; and (6) consistency with subsequent technical questions.	
	32	<p>Architecture: provide documentation for the system and network architecture that will support registry operations for the proposed scale of the registry. System and network architecture documentation must clearly demonstrate the applicant's ability to operate, manage, and monitor registry systems. Documentation should include multiple diagrams or other components including but not limited to:</p> <ul style="list-style-type: none"> • Detailed network diagram(s) showing the full interplay of registry elements, including but not limited to SRS, DNS, Whois, data escrow, and registry database functions; • Network and associated systems necessary to support registry operations, including: <ul style="list-style-type: none"> ▪ Anticipated TCP / IP addressing scheme, ▪ Hardware (i.e., servers, routers, networking components, virtual machines and key characteristics (CPU and RAM, Disk space, internal network connectivity, and make and model)), ▪ Operating system and versions, and ▪ Software and applications (with version information) necessary to support registry operations, management, and monitoring • General overview of capacity planning, including bandwidth allocation plans; • List of providers / carriers; and • Resourcing plans for the initial 	N		0-2	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> (1) detailed and coherent network architecture; (2) architecture providing resiliency for registry systems; (3) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; and (4) a technical plan that is adequately resourced in the planned costs detailed in the financial section. 	<p>2 - exceeds requirements: Response meets all attributes for a score of 1 and includes</p> <ol style="list-style-type: none"> (1) Evidence of highly developed and detailed network architecture that is able to scale well above stated projections for high registration volumes, thereby significantly reducing the risk from unexpected volume surges and demonstrates an ability to adapt quickly to support new technologies and services that are not necessarily envisaged for initial registry startup; and (2) Evidence of a highly available, robust, and secure infrastructure. <p>1 - meets requirements: Response includes</p> <ol style="list-style-type: none"> (1) An adequate description of the architecture that substantially demonstrates the applicant's capabilities and knowledge required to meet this element; (2) Plans for network architecture describe all necessary elements; (3) Descriptions demonstrate adequate network architecture providing robustness and security of the

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</p> <p>To be eligible for a score of 2, answers must also include evidence of a network architecture design that greatly reduces the risk profile of the proposed registry by providing a level of scalability and adaptability (e.g., protection against DDoS attacks) that far exceeds the minimum configuration necessary for the expected volume.</p> <p>A complete answer is expected to be no more than 10 pages.</p>					<p>registry;</p> <p>(4) Bandwidth and SLA are consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(5) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function.</p> <p>0 - fails requirements: Does not meet all the requirements to score 1.</p>
	33	<p>Database Capabilities: provide details of database capabilities including but not limited to:</p> <ul style="list-style-type: none"> • database software; • storage capacity (both in raw terms [e.g., MB, GB] and in number of registrations / registration transactions); • maximum transaction throughput (in total and by type of transaction); • scalability; • procedures for object creation, editing, and deletion, and user and credential management; • high availability; • change management procedures; • reporting capabilities; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>A registry database data model can be included to provide additional clarity to this response.</p> <p>Note: Database capabilities described should be in reference to registry services and not necessarily related support functions such as Personnel or Accounting, unless such services are inherently intertwined with the delivery of registry services.</p> <p>To be eligible for a score of 2, answers must also</p>	N		0-2	<p>Complete answer demonstrates:</p> <p>(1) complete knowledge and understanding of database capabilities to meet the registry technical requirements;</p> <p>(2) database capabilities consistent with the overall business approach and planned size of the registry; and</p> <p>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.</p>	<p>2 - exceeds requirements: Response meets all attributes for a score of 1 and includes</p> <p>(1) Highly developed and detailed description of database capabilities that are able to scale well above stated projections for high registration volumes, thereby significantly reducing the risk from unexpected volume surges and demonstrates an ability to adapt quickly to support new technologies and services that are not necessarily envisaged for registry startup; and</p> <p>(2) Evidence of comprehensive database capabilities, including high scalability and redundant database infrastructure, regularly reviewed operational and reporting procedures following leading practices.</p> <p>1 - meets requirements: Response includes</p> <p>(1) An adequate description of database capabilities that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;</p> <p>(2) Plans for database capabilities</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>include evidence of database capabilities that greatly reduce the risk profile of the proposed registry by providing a level of scalability and adaptability that far exceeds the minimum configuration necessary for the expected volume.</p> <p>A complete answer is expected to be no more than 5 pages.</p>					<p>describe all necessary elements;</p> <p>(3) Descriptions demonstrate adequate database capabilities, with database throughput, scalability, and database operations with limited operational governance;</p> <p>(4) Database capabilities are consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(5) Demonstrates that an adequate level of resources that are on hand, or committed or readily available to carry out this function.</p> <p>0 - fails requirements: Does not meet all the requirements to score 1.</p>
	34	<p>Geographic Diversity: provide a description of plans for geographic diversity of:</p> <p>a. name servers, and</p> <p>b. operations centers.</p> <p>Answers should include, but are not limited to:</p> <ul style="list-style-type: none"> the intended physical locations of systems, primary and back-up operations centers (including security attributes), and other infrastructure; any registry plans to use Anycast or other topological and geographical diversity measures, in which case, the configuration of the relevant service must be included; resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>To be eligible for a score of 2, answers must also include evidence of a geographic diversity plan that greatly reduces the risk profile of the proposed registry by ensuring the continuance of all vital business functions (as identified in the applicant's continuity plan in Question 39) in the event of a natural or other disaster) at the principal place of business or point of presence.</p>	N		0-2	<p>Complete answer demonstrates:</p> <p>(1) geographic diversity of nameservers and operations centers;</p> <p>(2) proposed geo-diversity measures are consistent with the overall business approach and planned size of the registry; and</p> <p>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.</p>	<p>2 - exceeds requirements: Response meets all attributes for a score of 1 and includes</p> <p>(1) Evidence of highly developed measures for geo-diversity of operations, with locations and functions to continue all vital business functions in the event of a natural or other disaster at the principal place of business or point of presence; and</p> <p>(2) A high level of availability, security, and bandwidth.</p> <p>1 - meets requirements: Response includes</p> <p>(1) An adequate description of Geographic Diversity that substantially demonstrates the applicant's capabilities and knowledge required to meet this element;</p> <p>(2) Plans provide adequate geo-diversity of name servers and operations to continue critical registry functions in the event of a temporary outage at the principal place of business or point of presence;</p> <p>(3) Geo-diversity plans are consistent</p>

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		A complete answer is expected to be no more than 5 pages.					with technical, operational, and financial approach as described in the application; and (4) Demonstrates adequate resources that are on hand, or committed or readily available to carry out this function. 0 - fails requirements: Does not meet all the requirements to score 1.
	35	<p>DNS Service: describe the configuration and operation of nameservers, including how the applicant will comply with relevant RFCs.</p> <p>All name servers used for the new gTLD must be operated in compliance with the DNS protocol specifications defined in the relevant RFCs, including but not limited to: 1034, 1035, 1982, 2181, 2182, 2671, 3226, 3596, 3597, 3901, 4343, and 4472.</p> <ul style="list-style-type: none"> • Provide details of the intended DNS Service including, but not limited to: A description of the DNS services to be provided, such as query rates to be supported at initial operation, and reserve capacity of the system. Describe how your nameserver update methods will change at various scales. Describe how DNS performance will change at various scales. • RFCs that will be followed – describe how services are compliant with RFCs and if these are dedicated or shared with any other functions (capacity/performance) or DNS zones. • The resources used to implement the services - describe complete server hardware and software, including network bandwidth and addressing plans for servers. Also include resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). • Demonstrate how the system will 	N	<p>Note that the use of DNS wildcard resource records as described in RFC 4592 or any other method or technology for synthesizing DNS resource records or using redirection within the DNS by the registry is prohibited in the Registry Agreement.</p> <p>Also note that name servers for the new gTLD must comply with IANA Technical requirements for authoritative name servers: http://www.iana.org/procedures/nameserver-requirements.html.</p>	0-1	<p>Complete answer demonstrates:</p> <p>(1) adequate description of configurations of nameservers and compliance with respective DNS protocol-related RFCs;</p> <p>(2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry;</p> <p>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section;</p> <p>(4) evidence of compliance with Specification 6 to the Registry Agreement; and</p> <p>(5) evidence of complete knowledge and understanding of requirements for DNS service, one of the five critical registry functions.</p>	<p>1 - meets requirements: Response includes:</p> <p>(1) Adequate description of DNS service that that substantially demonstrates the applicant's capability and knowledge required to meet this element;</p> <p>(2) Plans are sufficient to result in compliance with DNS protocols (Specification 6, section 1.1) and required performance specifications Specification 10, Service Level Matrix;</p> <p>(3) Plans are consistent with technical, operational, and financial approach as described in the application; and</p> <p>(4) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function.</p> <p>0 - fails requirements: Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>function - describe how the proposed infrastructure will be able to deliver the performance described in Specification 10 (section 2) attached to the Registry Agreement.</p> <p>Examples of evidence include:</p> <ul style="list-style-type: none"> • Server configuration standard (i.e., planned configuration). • Network addressing and bandwidth for query load and update propagation. • Headroom to meet surges. <p>A complete answer is expected to be no more than 10 pages.</p>					
	36	<p>IPv6 Reachability: provide a description of plans for providing IPv6 transport including, but not limited to:</p> <ul style="list-style-type: none"> • How the registry will support IPv6 access to Whois, Web-based Whois and any other Registration Data Publication Service as described in Specification 6 (section 1.5) to the Registry Agreement. • How the registry will comply with the requirement in Specification 6 for having at least two nameservers reachable over IPv6. • List all services that will be provided over IPv6, and describe the IPv6 connectivity and provider diversity that will be used. • Resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>A complete answer is expected to be no more than 5 pages.</p>	N	IANA nameserver requirements are available at http://www.iana.org/procedures/nameserver-requirements.html .	0-1	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) evidence of compliance with Specification 6 to the Registry Agreement. 	<p>1 - meets requirements: Response includes</p> <ol style="list-style-type: none"> (1) Adequate description of IPv6 reachability that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) A description of an adequate implementation plan addressing requirements for IPv6 reachability, indicating IPv6 reachability allowing IPv6 transport in the network over two independent IPv6 capable networks in compliance to IPv4 IANA specifications, and Specification 10; (3) IPv6 plans consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, committed or readily available to carry out this function. <p>0 - fails requirements: Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
	37	<p>Data Backup Policies & Procedures: provide</p> <ul style="list-style-type: none"> • details of frequency and procedures for backup of data, • hardware, and systems used for backup, data format, • data backup features, • backup testing procedures, • procedures for retrieval of data/rebuild of database, • storage controls and procedures, and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>A complete answer is expected to be no more than 5 pages.</p>	N		0-1	<p>Complete answer demonstrates:</p> <p>(1) detailed backup and retrieval processes deployed;</p> <p>(2) backup and retrieval process and frequency are consistent with the overall business approach and planned size of the registry; and</p> <p>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.</p>	<p>1 - meets requirements: Response includes</p> <p>(1) Adequate description of backup policies and procedures that substantially demonstrate the applicant's capabilities and knowledge required to meet this element;</p> <p>(2) A description of leading practices being or to be followed;</p> <p>(3) Backup procedures consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(4) Demonstrates an adequate level of resources that are on hand, or committed or readily available to carry out this function.</p> <p>0 - fails requirements: Does not meet all the requirements to score a 1.</p>
	38	<p>Data Escrow: describe</p> <ul style="list-style-type: none"> • how the applicant will comply with the data escrow requirements documented in the Registry Data Escrow Specification (Specification 2 of the Registry Agreement); and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>A complete answer is expected to be no more than 5 pages</p>	N		0-1	<p>Complete answer demonstrates:</p> <p>(1) complete knowledge and understanding of data escrow, one of the five critical registry functions;</p> <p>(2) compliance with Specification 2 of the Registry Agreement;</p> <p>(3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and</p> <p>(4) the escrow arrangement is consistent with the overall business approach and size/scope of the registry.</p>	<p>1 – meets requirements: Response includes</p> <p>(1) Adequate description of a Data Escrow process that substantially demonstrates the applicant's capability and knowledge required to meet this element;</p> <p>(2) Data escrow plans are sufficient to result in compliance with the Data Escrow Specification (Specification 2 to the Registry Agreement);</p> <p>(3) Escrow capabilities are consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(4) Demonstrates an adequate level of resources that are on hand, committed, or readily available to carry out this function.</p> <p>0 – fails requirements: Does not meet all the requirements to score a 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
	39	<p>Registry Continuity: describe how the applicant will comply with registry continuity obligations as described in Specification 6 (section 3) to the registry agreement. This includes conducting registry operations using diverse, redundant servers to ensure continued operation of critical functions in the case of technical failure.</p> <p>Describe resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).</p> <p>The response should include, but is not limited to, the following elements of the business continuity plan:</p> <ul style="list-style-type: none"> • Identification of risks and threats to compliance with registry continuity obligations; • Identification and definitions of vital business functions (which may include registry services beyond the five critical registry functions) versus other registry functions and supporting operations and technology; • Definitions of Recovery Point Objectives and Recovery Time Objective; and • Descriptions of testing plans to promote compliance with relevant obligations. <p>To be eligible for a score of 2, answers must also include:</p> <ul style="list-style-type: none"> • A highly detailed plan that provides for leading practice levels of availability; and • Evidence of concrete steps such as a contract with a backup provider (in addition to any currently designated service operator) or a maintained hot site. <p>A complete answer is expected to be no more than 15 pages.</p>	N	<p>For reference, applicants should review the ICANN gTLD Registry Continuity Plan at http://www.icann.org/en/registries/continuity/gtld-registry-continuity-plan-25apr09-en.pdf.</p> <p>A Recovery Point Objective (RPO) refers to the point in time to which data should be recovered following a business disruption or disaster. The RPO allows an organization to define a window of time before a disruption or disaster during which data may be lost and is independent of the time it takes to get a system back on-line. If the RPO of a company is two hours, then when a system is brought back on-line after a disruption/disaster, all data must be restored to a point within two hours before the disaster.</p> <p>A Recovery Time Objective (RTO) is the duration of time within which a process must be restored after a business disruption or disaster to avoid what the entity may deem as unacceptable consequences. For example, pursuant to the draft Registry Agreement DNS service must not be down for longer than 4 hours. At 4 hours ICANN may invoke the use of an Emergency Back End Registry Operator to take over this function. The entity may deem this to be an unacceptable consequence therefore they may set their RTO to be something less than 4 hours and would build continuity plans accordingly.</p> <p>Vital business functions are functions that are critical to the success of the operation. For example, if a registry operator provides an additional service beyond the five critical registry functions, that it deems as central to its TLD, or supports an operation that is central to the TLD, this might be identified as a vital business function.</p>	0-2	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> (1) detailed description showing plans for compliance with registry continuity obligations; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) evidence of compliance with Specification 6 to the Registry Agreement. 	<p>2 - exceeds requirements: Response meets all attributes for a score of 1 and includes:</p> <ol style="list-style-type: none"> (1) Highly developed and detailed processes for maintaining registry continuity; and (2) Evidence of concrete steps, such as a contract with a backup service provider or a maintained hot site. <p>1 - meets requirements: Response includes:</p> <ol style="list-style-type: none"> (1) Adequate description of a Registry Continuity plan that substantially demonstrates capability and knowledge required to meet this element; (2) Continuity plans are sufficient to result in compliance with requirements (Specification 6); (3) Continuity plans are consistent with the technical, operational, and financial approach as described in the application; and (4) Demonstrates an adequate level of resources that are on hand, committed readily available to carry out this function. <p>0 - fails requirements: Does not meet all the requirements to score a 1.</p>
	40	<p>Registry Transition: provide a Service Migration plan (as described in the Registry Transition Processes) that could be followed in the event</p>	N		0-1	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> (1) complete knowledge and 	<p>1 - meets requirements: Response includes</p> <ol style="list-style-type: none"> (1) Adequate description of a registry

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		<p>that it becomes necessary to permanently transition the proposed gTLD to a new operator. The plan must take into account, and be consistent with the vital business functions identified in the previous question.</p> <p>Elements of the plan may include, but are not limited to:</p> <ul style="list-style-type: none"> • Preparatory steps needed for the transition of critical registry functions; • Monitoring during registry transition and efforts to minimize any interruption to critical registry functions during this time; and • Contingency plans in the event that any part of the registry transition is unable to move forward according to the plan. <p>A complete answer is expected to be no more than 10 pages.</p>				<p>understanding of the Registry Transition Processes; and (2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry.</p>	<p>transition plan that substantially demonstrates the applicant's capability and knowledge required to meet this element;</p> <p>(2) A description of an adequate registry transition plan with appropriate monitoring during registry transition; and</p> <p>(3) Transition plan is consistent with the technical, operational, and financial approach as described in the application.</p> <p>0 - fails requirements: Does not meet all the requirements to score a 1.</p>
	41	<p>Failover Testing: provide</p> <ul style="list-style-type: none"> • a description of the failover testing plan, including mandatory annual testing of the plan. Examples may include a description of plans to test failover of data centers or operations to alternate sites, from a hot to a cold facility, registry data escrow testing, or other mechanisms. The plan must take into account and be consistent with the vital business functions identified in Question 39; and • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>The failover testing plan should include, but is not limited to, the following elements:</p> <ul style="list-style-type: none"> • Types of testing (e.g., walkthroughs, takedown of sites) and the frequency of testing; • How results are captured, what is done 	N		0-1	<p>Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan scope/scale consistent with the overall business approach and planned size of the registry; and (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section.</p>	<p>1 - meets requirements: Response includes</p> <p>(1) An adequate description of a failover testing plan that substantially demonstrates the applicant's capability and knowledge required to meet this element;</p> <p>(2) A description of an adequate failover testing plan with an appropriate level of review and analysis of failover testing results;</p> <p>(3) Failover testing plan is consistent with the technical, operational, and financial approach as described in the application; and</p> <p>(4) Demonstrates an adequate level of resources that are on hand, committed or readily available to carry out this function.</p> <p>0 - fails requirements Does not meet all the requirements to score a 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>with the results, and with whom results are shared;</p> <ul style="list-style-type: none"> • How test plans are updated (e.g., what triggers an update, change management processes for making updates); • Length of time to restore critical registry functions; • Length of time to restore all operations, inclusive of critical registry functions; and • Length of time to migrate from one site to another. <p>A complete answer is expected to be no more than 10 pages.</p>					
	42	<p>Monitoring and Fault Escalation Processes: provide</p> <ul style="list-style-type: none"> • a description of the proposed (or actual) arrangements for monitoring critical registry systems (including SRS, database systems, DNS servers, Whois service, network connectivity, routers and firewalls). This description should explain how these systems are monitored and the mechanisms that will be used for fault escalation and reporting, and should provide details of the proposed support arrangements for these registry systems. • resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>To be eligible for a score of 2, answers must also include:</p> <ul style="list-style-type: none"> • Meeting the fault tolerance / monitoring guidelines described • Evidence of commitment to provide a 24x7 fault response team. <p>A complete answer is expected to be no more than 10 pages.</p>	N		0-2	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; (3) a technical plan that is adequately resourced in the planned costs detailed in the financial section; and (4) consistency with the commitments made to registrants and registrars regarding system maintenance. 	<p>2 - exceeds requirements: Response meets all attributes for a score of 1 and includes</p> <ol style="list-style-type: none"> (1) Evidence showing highly developed and detailed fault tolerance/monitoring and redundant systems deployed with real-time monitoring tools / dashboard (metrics) deployed and reviewed regularly; (2) A high level of availability that allows for the ability to respond to faults through a 24x7 response team. <p>1 - meets requirements: Response includes</p> <ol style="list-style-type: none"> (1) Adequate description of monitoring and fault escalation processes that substantially demonstrates the applicant's capability and knowledge required to meet this element; (2) Evidence showing adequate fault tolerance/monitoring systems planned with an appropriate level of monitoring and limited periodic review being performed; (3) Plans are consistent with the technical, operational, and financial approach described in the application; and (4) Demonstrates an adequate level of resources that are on hand,

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							committed or readily available to carry out this function. 0 - fails requirements: Does not meet all the requirements to score 1.
	43	<p>DNSSEC: Provide</p> <ul style="list-style-type: none"> The registry's DNSSEC policy statement (DPS), which should include the policies and procedures the proposed registry will follow, for example, for signing the zone file, for verifying and accepting DS records from child domains, and for generating, exchanging, and storing keying material; Describe how the DNSSEC implementation will comply with relevant RFCs, including but not limited to: RFCs 4033, 4034, 4035, 5910, 4509, 4641, and 5155 (the latter will only be required if Hashed Authenticated Denial of Existence will be offered); and resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>A complete answer is expected to be no more than 5 pages. Note, the DPS is required to be submitted as part of the application</p>	N		0-1	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> complete knowledge and understanding of this aspect of registry technical requirements, one of the five critical registry functions; a technical plan scope/scale that is consistent with the overall business approach and planned size of the registry; a technical plan that is adequately resourced in the planned costs detailed in the financial section; and an ability to comply with relevant RFCs. 	<p>1 - meets requirements: Response includes</p> <ol style="list-style-type: none"> An adequate description of DNSSEC that substantially demonstrates the applicant's capability and knowledge required to meet this element; Evidence that TLD zone files will be signed at time of launch, in compliance with required RFCs, and registry offers provisioning capabilities to accept public key material from registrants through the SRS ; An adequate description of key management procedures in the proposed TLD, including providing secure encryption key management (generation, exchange, and storage); Technical plan is consistent with the technical, operational, and financial approach as described in the application; and Demonstrates an adequate level of resources that are already on hand, committed or readily available to carry out this function. <p>0 - fails requirements: Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
	44	<p>OPTIONAL. IDNs:</p> <ul style="list-style-type: none"> State whether the proposed registry will support the registration of IDN labels in the TLD, and if so, how. For example, explain which characters will be supported, and provide the associated IDN Tables with variant characters identified, along with a corresponding registration policy. This includes public interfaces to the databases such as Whois and EPP. Describe how the IDN implementation will comply with RFCs 5809-5893 as well as the ICANN IDN Guidelines at http://www.icann.org/en/topics/idn/implementation-guidelines.htm. Describe resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area). <p>A complete answer is expected to be no more than 10 pages plus attachments.</p>	N	<p>IDNs are an optional service at time of launch. Absence of IDN implementation or plans will not detract from an applicant's score. Applicants who respond to this question with plans for implementation of IDNs at time of launch will be scored according to the criteria indicated here.</p> <p>IDN tables should be submitted in a machine-readable format. The model format described in Section 5 of RFC 4290 would be ideal. The format used by RFC 3743 is an acceptable alternative. Variant generation algorithms that are more complex (such as those with contextual rules) and cannot be expressed using these table formats should be specified in a manner that could be re-implemented programmatically by ICANN. Ideally, for any complex table formats, a reference code implementation should be provided in conjunction with a description of the generation rules.</p>	0-1	<p>IDNs are an optional service. Complete answer demonstrates: (1) complete knowledge and understanding of this aspect of registry technical requirements; (2) a technical plan that is adequately resourced in the planned costs detailed in the financial section; (3) consistency with the commitments made to registrants and the technical, operational, and financial approach described in the application; (4) issues regarding use of scripts are settled and IDN tables are complete and publicly available; and (5) ability to comply with relevant RFCs.</p>	<p>1 - meets requirements for this optional element: Response includes</p> <ol style="list-style-type: none"> Adequate description of IDN implementation that substantially demonstrates the applicant's capability and knowledge required to meet this element; An adequate description of the IDN procedures, including complete IDN tables, compliance with IDNA/IDN guidelines and RFCs, and periodic monitoring of IDN operations; Evidence of ability to resolve rendering and known IDN issues or spoofing attacks; IDN plans are consistent with the technical, operational, and financial approach as described in the application; and Demonstrates an adequate level of resources that are on hand, committed readily available to carry out this function. <p>0 - fails requirements: Does not meet all the requirements to score a 1.</p>
Demonstration of Financial Capability	45	<p>Financial Statements: provide</p> <ul style="list-style-type: none"> audited or independently certified financial statements for the most recently completed fiscal year for the applicant, and audited or unaudited financial statements for the most recently ended interim financial period for the applicant for which this information may be released. <p>For newly-formed applicants, or where financial statements are not audited, provide:</p> <ul style="list-style-type: none"> the latest available unaudited financial statements; and an explanation as to why audited or independently certified financial statements are not available. <p>At a minimum, the financial statements should be provided for the legal entity listed as the applicant.</p>	N	<p>The questions in this section (45-50) are intended to give applicants an opportunity to demonstrate their financial capabilities to run a registry.</p> <p>Supporting documentation for this question should be submitted in the original language.</p>	0-1	<p>Audited or independently certified financial statements are prepared in accordance with International Financial Reporting Standards (IFRS) adopted by the International Accounting Standards Board (IASB) or nationally recognized accounting standards (e.g., GAAP). This will include a balance sheet and income statement reflecting the applicant's financial position and results of operations, a statement of shareholders equity/partner capital, and a cash flow statement. In the event the applicant is an entity newly formed for the purpose of applying for a gTLD and with little to no operating history</p>	<p>1 - meets requirements: Complete audited or independently certified financial statements are provided, at the highest level available in the applicant's jurisdiction. Where such audited or independently certified financial statements are not available, such as for newly-formed entities, the applicant has provided an explanation and has provided, at a minimum, unaudited financial statements.</p> <p>0 - fails requirements: Does not meet all the requirements to score 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>Financial statements are used in the analysis of projections and costs.</p> <p>A complete answer should include:</p> <ul style="list-style-type: none"> • balance sheet; • income statement; • statement of shareholders equity/partner capital; • cash flow statement, and • letter of auditor or independent certification, if applicable. 				(less than one year), the applicant must submit, at a minimum, pro forma financial statements including all components listed in the question. Where audited or independently certified financial statements are not available, applicant has provided an adequate explanation as to the accounting practices in its jurisdiction and has provided, at a minimum, unaudited financial statements.	
	46	<p>Projections Template: provide financial projections for costs and funding using Template 1, Most Likely Scenario (attached).</p> <p>Note, if certain services are outsourced, reflect this in the relevant cost section of the template.</p> <p>The template is intended to provide commonality among TLD applications and thereby facilitate the evaluation process.</p> <p>A complete answer is expected to be no more than 10 pages in addition to the template.</p>	N		0-1	<p>Applicant has provided a thorough model that demonstrates a sustainable business (even if break-even is not achieved through the first three years of operation).</p> <p>Applicant's description of projections development is sufficient to show due diligence.</p>	<p>1 - meets requirements:</p> <ol style="list-style-type: none"> (1) Financial projections adequately describe the cost, funding and risks for the application (2) Demonstrates resources and plan for sustainable operations; and (3) Financial assumptions about the registry operations, funding and market are identified, explained, and supported. <p>0 - fails requirements: Does not meet all of the requirements to score a 1.</p>
	47	<p>Costs and capital expenditures: in conjunction with the financial projections template, describe and explain:</p> <ul style="list-style-type: none"> • the expected operating costs and capital expenditures of setting up and operating the proposed registry; • any functions to be outsourced, as indicated in the cost section of the template, and the reasons for outsourcing; • any significant variances between years in any category of expected costs; and • a description of the basis / key assumptions including rationale for the costs provided in the projections template. This may include an 	N	This question is based on the template submitted in question 46.	0-2	<p>Costs identified are consistent with the proposed registry services, adequately fund technical requirements, and are consistent with proposed mission/purpose of the registry. Costs projected are reasonable for a registry of size and scope described in the application. Costs identified include the funding costs (interest expenses and fees) related to the continued operations instrument described in Question 50 below.</p>	<p>2 - exceeds requirements: Response meets all of the attributes for a score of 1 and:</p> <ol style="list-style-type: none"> (1) Estimated costs and assumptions are conservative and consistent with an operation of the registry volume/scope/size as described by the applicant; (2) Estimates are derived from actual examples of previous or existing registry operations or equivalent; and (3) Conservative estimates are based on those experiences and describe a range of anticipated costs and use the high end of those estimates.

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>executive summary or summary outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made.</p> <p>As described in the Applicant Guidebook, the information provided will be considered in light of the entire application and the evaluation criteria. Therefore, this answer should agree with the information provided in Template 1 to: 1) maintain registry operations, 2) provide registry services described above, and 3) satisfy the technical requirements described in the Demonstration of Technical & Operational Capability section. Costs should include both fixed and variable costs.</p> <p>To be eligible for a score of two points, answers must demonstrate a conservative estimate of costs based on actual examples of previous or existing registry operations with similar approach and projections for growth and costs or equivalent. Attach reference material for such examples.</p> <p>A complete answer is expected to be no more than 10 pages.</p>				<p>Key assumptions and their rationale are clearly described and may include, but are not limited to:</p> <ul style="list-style-type: none"> • Key components of capital expenditures; • Key components of operating costs, unit operating costs, headcount, number of technical/operating/equipment units, marketing, and other costs; and • Costs of outsourcing, if any. 	<p>1 - meets requirements:</p> <p>(1) Cost elements are reasonable and complete (i.e., cover all of the aspects of registry operations: registry services, technical requirements and other aspects as described by the applicant);</p> <p>(2) Estimated costs and assumptions are consistent and defensible with an operation of the registry volume/scope/size as described by the applicant; and</p> <p>(3) Projections are reasonably aligned with the historical financial statements provided in Question 45.</p> <p>0 - fails requirements: Does not meet all the requirements to score a 1.</p>
		<p>(b) Describe anticipated ranges in projected costs. Describe factors that affect those ranges.</p> <p>A complete answer is expected to be no more than 10 pages.</p>	N				
	48	<p>(a) Funding and Revenue: Funding can be derived from several sources (e.g., existing capital or proceeds/revenue from operation of the proposed registry).</p> <p>Describe:</p> <p>I) How existing funds will provide resources for both: a) start-up of operations, and b) ongoing operations;</p> <p>II) the revenue model including projections for transaction volumes and price (if the applicant does not intend to rely on registration revenue in order to cover the costs of the registry's</p>	N	Supporting documentation for this question should be submitted in the original language.	0-2	<p>Funding resources are clearly identified and adequately provide for registry cost projections. Sources of capital funding are clearly identified, held apart from other potential uses of those funds and available. The plan for transition of funding sources from available capital to revenue from operations (if applicable) is described.</p>	<p>2 - exceeds requirements:</p> <p>Response meets all the attributes for a score of 1 and</p> <p>(1) Existing funds (specifically all funds required for start-up) are quantified, on hand, segregated in an account available only to the applicant for purposes of the application only, ;</p> <p>(2) If on-going operations are to be at least partially resourced from existing funds (rather than revenue from on-going operations) that funding is segregated and</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>operation, it must clarify how the funding for the operation will be developed and maintained in a stable and sustainable manner);</p> <p>III) outside sources of funding (the applicant must, where applicable, provide evidence of the commitment by the party committing the funds). Secured vs unsecured funding should be clearly identified, including associated sources of funding (i.e., different types of funding, level and type of security/collateral, and key items) for each type of funding;</p> <p>IV) Any significant variances between years in any category of funding and revenue; and</p> <p>V) A description of the basis / key assumptions including rationale for the funding and revenue provided in the projections template. This may include an executive summary or summary outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made; and</p> <p>VI) Assurances that funding and revenue projections cited in this application are consistent with other public and private claims made to promote the business and generate support. To be eligible for a score of 2 points, answers must demonstrate:</p> <p>I) A conservative estimate of funding and revenue; and</p> <p>II) Ongoing operations that are not dependent on projected revenue.</p> <p>A complete answer is expected to be no more than 10 pages.</p>				<p>Outside sources of funding are documented and verified. Examples of evidence for funding sources include, but are not limited to:</p> <ul style="list-style-type: none"> • Executed funding agreements; • A letter of credit; • A commitment letter; or • A bank statement. <p>Funding commitments may be conditional on the approval of the application. Sources of capital funding required to sustain registry operations on an on-going basis are identified. The projected revenues are consistent with the size and projected penetration of the target markets.</p> <p>Key assumptions and their rationale are clearly described and address, at a minimum:</p> <ul style="list-style-type: none"> • Key components of the funding plan and their key terms; and • Price and number of registrations. 	<p>earmarked for this purpose only in an amount adequate for three years operation;</p> <p>(3) If ongoing operations are to be at least partially resourced from revenues, assumptions made are conservative and take into consideration studies, reference data, or other steps taken to develop the response and validate any assumptions made; and</p> <p>(4) Cash flow models are prepared which link funding and revenue assumptions to projected actual business activity.</p> <p>1 - meets requirements:</p> <p>(1) Assurances provided that materials provided to investors and/or lenders are consistent with the projections and assumptions included in the projections templates;</p> <p>(2) Existing funds (specifically all funds required for start-up) are quantified, committed, identified as available to the applicant;</p> <p>(3) If on-going operations are to be at least partially resourced from existing funds (rather than revenue from on-going operations) that funding is quantified and its sources identified in an amount adequate for three years operation;</p> <p>(4) If ongoing operations are to be at least partially resourced from revenues, assumptions made are reasonable and are directly related to projected business volumes, market size and penetration; and</p> <p>(5) Projections are reasonably aligned with the historical financial statements provided in Question 45.</p> <p>0 - fails requirements: Does not meet all the requirements to score a 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>(b) Describe anticipated ranges in projected funding and revenue. Describe factors that affect those ranges.</p> <p>A complete answer is expected to be no more than 10 pages.</p>	N				
	49	<p>(a) Contingency Planning: describe your contingency planning:</p> <ul style="list-style-type: none"> Identify any projected barriers/risks to implementation of the business approach described in the application and how they affect cost, funding, revenue, or timeline in your planning; Identify the impact of any particular regulation, law or policy that might impact the Registry Services offering; and Describe the measures to mitigate the key risks as described in this question. <p>A complete answer should include, for each contingency, a clear description of the impact to projected revenue, funding, and costs for the 3-year period presented in Template 1 (Most Likely Scenario).</p> <p>To be eligible for a score of 2 points, answers must demonstrate that action plans and operations are adequately resourced in the existing funding and revenue plan even if contingencies occur.</p> <p>A complete answer is expected to be no more than 10 pages.</p>	N		0-2	<p>Contingencies and risks are identified, quantified, and included in the cost, revenue, and funding analyses. Action plans are identified in the event contingencies occur. The model is resilient in the event those contingencies occur. Responses address the probability and resource impact of the contingencies identified.</p>	<p>2 - exceeds requirements: Response meets all attributes for a score of 1 and:</p> <ol style="list-style-type: none"> Action plans and operations are adequately resourced in the existing funding and revenue plan even if contingencies occur. <p>1 - meets requirements:</p> <ol style="list-style-type: none"> Model adequately identifies the key risks (including operational, business, legal, jurisdictional, financial, and other relevant risks); Response gives consideration to probability and resource impact of contingencies identified; and If resources are not available to fund contingencies in the existing plan, funding sources and a plan for obtaining them are identified. <p>0 - fails requirements: Does not meet all the requirements to score a 1.</p>
		<p>(b) Describe your contingency planning where funding sources are so significantly reduced that material deviations from the implementation model are required. In particular, describe:</p> <ul style="list-style-type: none"> how on-going technical requirements will be met; and what alternative funding can be reasonably raised at a later time. <p>Provide an explanation if you do not believe there is any chance of reduced funding.</p>	N				

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>Complete a financial projections template (Template 2, Worst Case Scenario)</p> <p>A complete answer is expected to be no more than 10 pages, in addition to the template.</p>					
		<p>(c) Describe your contingency planning where activity volumes so significantly exceed the high projections that material deviation from the implementation model are required. In particular, how will on-going technical requirements be met?</p> <p>A complete answer is expected to be no more than 10 pages.</p>	N				
	50	<p>(a) Provide a cost estimate for funding critical registry functions on an annual basis, and a rationale for these cost estimates commensurate with the technical, operational, and financial approach described in the application.</p> <p>The critical functions of a registry which must be supported even if an applicant's business and/or funding fails are:</p> <p>(1) DNS resolution for registered domain names</p> <p>Applicants should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics.</p> <p>(2) Operation of the Shared Registration System</p> <p>Applicants should consider ranges of volume of daily EPP transactions (e.g., 0-200K, 200K-2M, 2M+), the incremental costs associated with</p>	N	<p>Registrant protection is critical and thus new gTLD applicants are requested to provide evidence indicating that the critical functions will continue to be performed even if the registry fails. Registrant needs are best protected by a clear demonstration that the basic registry functions are sustained for an extended period even in the face of registry failure. Therefore, this section is weighted heavily as a clear, objective measure to protect and serve registrants.</p> <p>The applicant has two tasks associated with adequately making this demonstration of continuity for critical registry functions. First, costs for maintaining critical registrant protection functions are to be estimated (Part a). In evaluating the application, the evaluators will adjudge whether the estimate is reasonable given the systems architecture and overall business approach described elsewhere in the application.</p> <p>The Continuing Operations Instrument (COI) is invoked by ICANN if necessary to pay for an Emergency Back End Registry Operator (EBERO) to maintain the five critical registry functions for a period of three to five years. Thus, the cost estimates are tied to the cost for a third party to provide the functions, not</p>	0-3	<p>Figures provided are based on an accurate estimate of costs. Documented evidence or detailed plan for ability to fund on-going critical registry functions for registrants for a period of three years in the event of registry failure, default or until a successor operator can be designated. Evidence of financial wherewithal to fund this requirement prior to delegation. This requirement must be met prior to or concurrent with the execution of the Registry Agreement.</p>	<p>3 - exceeds requirements: Response meets all the attributes for a score of 1 and:</p> <p>(1) Financial instrument is secured and in place to provide for on-going operations for at least three years in the event of failure.</p> <p>1 - meets requirements:</p> <p>(1) Costs are commensurate with technical, operational, and financial approach as described in the application; and</p> <p>(2) Funding is identified and instrument is described to provide for on-going operations of at least three years in the event of failure.</p> <p>0 - fails requirements: Does not meet all the requirements to score a 1.</p>

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>increasing levels of such queries, and the ability to meet SLA performance metrics.</p> <p>(3) Provision of Whois service</p> <p>Applicants should consider ranges of volume of daily Whois queries (e.g., 0-100K, 100k-1M, 1M+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics for both web-based and port-43 services.</p> <p>(4) Registry data escrow deposits</p> <p>Applicants should consider administration, retention, and transfer fees as well as daily deposit (e.g., full or incremental) handling. Costs may vary depending on the size of the files in escrow (i.e., the size of the registry database).</p> <p>(5) Maintenance of a properly signed zone in accordance with DNSSEC requirements.</p> <p>Applicants should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics.</p> <p>List the estimated annual cost for each of these functions (specify currency used).</p> <p>A complete answer is expected to be no more than 10 pages.</p>		<p>to the applicant's actual in-house or subcontracting costs for provision of these functions.</p> <p>Refer to guidelines at http://www.icann.org/en/announcements/announcement-3-23dec11-en.htm regarding estimation of costs. However, the applicant must provide its own estimates and explanation in response to this question.</p>			
		<p>(b) Applicants must provide evidence as to how the funds required for performing these critical registry functions will be available and guaranteed to fund registry operations (for the protection of registrants in the new gTLD) for a</p>	N	<p>Second (Part b), methods of securing the funds required to perform those functions for at least three years are to be described by the applicant in accordance with the criteria below. Two types of instruments will fulfill</p>			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>minimum of three years following the termination of the Registry Agreement. ICANN has identified two methods to fulfill this requirement:</p> <p><u>(i) Irrevocable standby letter of credit (LOC)</u> issued by a reputable financial institution.</p> <ul style="list-style-type: none"> • The amount of the LOC must be equal to or greater than the amount required to fund the registry operations specified above for at least three years. In the event of a draw upon the letter of credit, the actual payout would be tied to the cost of running those functions. • The LOC must name ICANN or its designee as the beneficiary. Any funds paid out would be provided to the designee who is operating the required registry functions. • The LOC must have a term of at least five years from the delegation of the TLD. The LOC may be structured with an annual expiration date if it contains an evergreen provision providing for annual extensions, without amendment, for an indefinite number of periods until the issuing bank informs the beneficiary of its final expiration or until the beneficiary releases the LOC as evidenced in writing. If the expiration date occurs prior to the fifth anniversary of the delegation of the TLD, applicant will be required to obtain a replacement instrument. • The LOC must be issued by a reputable financial institution insured at the highest level in its jurisdiction. Documentation should indicate by whom the issuing institution is insured (i.e., as opposed to by whom the institution is rated). • The LOC will provide that ICANN or its designee shall be unconditionally entitled to a release of funds (full or partial) thereunder upon delivery of written notice by ICANN or its designee. • Applicant should attach an original copy of the executed letter of credit or a draft of the letter of credit containing the full terms and conditions. If not yet executed, the Applicant will be required to provide ICANN with an original copy of the executed LOC prior to or concurrent with the execution of the Registry Agreement. • The LOC must contain at least the following required elements: <ul style="list-style-type: none"> ○ Issuing bank and date of issue. ○ Beneficiary: ICANN / 4676 Admiralty 		<p>this requirement. The applicant must identify which of the two methods is being described. The instrument is required to be in place at the time of the execution of the Registry Agreement.</p> <p>Financial Institution Ratings: The instrument must be issued or held by a financial institution with a rating beginning with "A" (or the equivalent) by any of the following rating agencies: A.M. Best, Dominion Bond Rating Service, Egan-Jones, Fitch Ratings, Kroll Bond Rating Agency, Moody's, Morningstar, Standard & Poor's, and Japan Credit Rating Agency.</p> <p>If an applicant cannot access a financial institution with a rating beginning with "A," but a branch or subsidiary of such an institution exists in the jurisdiction of the applying entity, then the instrument may be issued by the branch or subsidiary or by a local financial institution with an equivalent or higher rating to the branch or subsidiary.</p> <p>If an applicant cannot access any such financial institutions, the instrument may be issued by the highest-rated financial institution in the national jurisdiction of the applying entity, if accepted by ICANN.</p> <p>Execution by ICANN: For any financial instruments that contemplate ICANN being a party, upon the written request of the applicant, ICANN may (but is not obligated to) execute such agreement prior to submission of the applicant's application if the agreement is on terms acceptable to ICANN. ICANN encourages applicants to deliver a written copy of any such agreement (only if it requires ICANN's signature) to ICANN as soon as possible to facilitate ICANN's review. If the financial instrument requires ICANN's signature, then the applicant will receive 3 points for question 50 (for the instrument being "secured and in place") only if ICANN executes the agreement prior to submission of the application. ICANN will determine, in</p>			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>Way, Suite 330 / Marina del Rey, CA 90292 / US, or its designee.</p> <ul style="list-style-type: none"> o Applicant's complete name and address. o LOC identifying number. o Exact amount in USD. o Expiry date. o Address, procedure, and required forms whereby presentation for payment is to be made. o Conditions: <ul style="list-style-type: none"> ▪ Partial drawings from the letter of credit may be made provided that such payment shall reduce the amount under the standby letter of credit. ▪ All payments must be marked with the issuing bank name and the bank's standby letter of credit number. ▪ LOC may not be modified, amended, or amplified by reference to any other document, agreement, or instrument. ▪ The LOC is subject to the International Standby Practices (ISP 98) International Chamber of Commerce (Publication No. 590), or to an alternative standard that has been demonstrated to be reasonably equivalent. <p>(ii) <u>A deposit into an irrevocable cash escrow account held by a reputable financial institution.</u></p> <ul style="list-style-type: none"> • The amount of the deposit must be equal to or greater than the amount required to fund registry operations for at least three years. • Cash is to be held by a third party financial institution which will not allow the funds to be commingled with the Applicant's operating funds or other funds and may only be accessed by ICANN or its designee if certain conditions are met. • The account must be held by a reputable financial institution insured at the highest level in its jurisdiction. Documentation should indicate by whom the issuing institution is insured (i.e., as opposed to by whom the institution is rated). • The escrow agreement relating to the escrow account will provide that ICANN or its designee shall be unconditionally entitled to a release of funds (full or partial) thereunder upon delivery of written notice by ICANN or its designee. • The escrow agreement must have a term 		<p>its sole discretion, whether to execute and become a party to a financial instrument.</p> <p>The financial instrument should be submitted in the original language.</p>			

	#	Question	Included in public posting	Notes	Scoring Range	Criteria	Scoring
		<p>of five years from the delegation of the TLD.</p> <ul style="list-style-type: none"> The funds in the deposit escrow account are not considered to be an asset of ICANN. Any interest earnings less bank fees are to accrue to the deposit, and will be paid back to the applicant upon liquidation of the account to the extent not used to pay the costs and expenses of maintaining the escrow. The deposit plus accrued interest, less any bank fees in respect of the escrow, is to be returned to the applicant if the funds are not used to fund registry functions due to a triggering event or after five years, whichever is greater. The Applicant will be required to provide ICANN an explanation as to the amount of the deposit, the institution that will hold the deposit, and the escrow agreement for the account at the time of submitting an application. Applicant should attach evidence of deposited funds in the escrow account, or evidence of provisional arrangement for deposit of funds. Evidence of deposited funds and terms of escrow agreement must be provided to ICANN prior to or concurrent with the execution of the Registry Agreement. 					

Instructions: TLD Applicant – Financial Projections

The application process requires the applicant to submit two cash basis Financial Projections.

The first projection (Template 1) should show the Financial Projections associated with the Most Likely scenario expected. This projection should include the forecasted registration volume, registration fee, and all costs and capital expenditures expected during the start-up period and during the first three years of operations. Template 1 relates to Question 46 (Projections Template) in the application.

We also ask that applicants show as a separate projection (Template 2) the Financial Projections associated with a realistic Worst Case scenario. Template 2 relates to Question 49 (Contingency Planning) in the application.

For each Projection prepared, please include Comments and Notes on the bottom of the projection (in the area provided) to provide those reviewing these projections with information regarding:

1. Assumptions used, significant variances in Operating Cash Flows and Capital Expenditures from year-to-year;
2. How you plan to fund operations;
3. Contingency planning

As you complete Template 1 and Template 2, please reference data points and/or formulas used in your calculations (where appropriate).

Section I – Projected Cash inflows and outflows

Projected Cash Inflows

Lines A and B. Provide the number of forecasted registrations and the registration fee for years 1, 2, and 3. Leave the *Start-up* column blank. The start-up period is for cash costs and capital expenditures only; there should be no cash projections input to this column.

Line C. Multiply lines A and B to arrive at the *Registration Cash Inflow* for line C.

Line D. Provide projected cash inflows from any other revenue source for years 1, 2, and 3. For any figures provided on line D, please disclose the source in the *Comments/Notes* box of Section I. Note, do not include funding in Line D as that is covered in Section VI.

Line E. Add lines C and D to arrive at the total cash inflow.

Projected Operating Cash Outflows

Start up costs - For all line items (F thru L) Please describe the total period of time this start-up cost is expected to cover in the *Comments/Notes* box.

Line F. Provide the projected labor costs for marketing, customer support, and technical support for start-up, year 1, year 2, and year 3. Note, other labor costs should be put in line *L (Other Costs)* and specify the type of labor and associated projected costs in the *Comments/Notes* box of this section.

Line G. *Marketing Costs* represent the amount spent on advertising, promotions, and other marketing activities. This amount should not include labor costs included in Marketing Labor (line *F*).

Lines H through K. Provide projected costs for facilities, G&A, interests and taxes, and Outsourcing for start-up as well as for years 1, 2, and 3. Be sure to list the type of activities that are being outsourced. You may combine certain activities from the same provider as long as an appropriate description of the services being combined is listed in the *Comments/Notes* box.

Line L. Provide any other projected operating costs for start-up, year 1, year 2, year 3. Be sure to specify the type of cost in the *Comments/Notes* box.

Line M. Add lines *F* through *L* to arrive at the total costs for line *M*.

Line N. Subtract line *E* from line *M* to arrive at the projected net operation number for line *N*.

Section IIa – Breakout of Fixed and Variable Operating Cash Outflows

Line A. Provide the projected variable operating cash outflows including labor and other costs that are not fixed in nature. Variable operating cash outflows are expenditures that fluctuate in relationship with increases or decreases in production or level of operations.

Line B. Provide the projected fixed operating cash outflows. Fixed operating cash outflows are expenditures that do not generally fluctuate in relationship with increases or decreases in production or level of operations. Such costs are generally necessary to be incurred in order to operate the base line operations of the organization or are expected to be incurred based on contractual commitments.

Line C – Add lines *A* and *B* to arrive at total Fixed and Variable Operating Cash Outflows for line *C*. This must equal Total Operating Cash Outflows from Section I, Line *M*.

Section IIb – Breakout of Critical Registry Function Operating Cash Outflows

Lines A – E. Provide the projected cash outflows for the five critical registry functions. If these functions are outsourced, the component of the outsourcing fee representing these functions must be separately identified and provided. These costs are based on the applicant's cost to manage these functions and should be calculated separately from the Continued Operations Instrument (COI) for Question 50.

Line F. If there are other critical registry functions based on the applicant's registry business model then the projected cash outflow for this function must be provided with a description added to the *Comment/Notes* box. This projected cash outflow may also be included in the 3-year reserve.

Line G. Add lines *A* through *F* to arrive at the Total Critical Registry Function Cash Outflows.

Section III – Projected Capital Expenditures

Lines A through C. Provide projected hardware, software, and furniture & equipment capital expenditures for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line D. Provide any projected capital expenditures as a result of outsourcing. This should be included for start-up and years 1, 2, and 3. Specify the type of expenditure and describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box of Section III.

Line E – Please describe “other” capital expenditures in the *Comments/Notes* box.

Line F. Add lines A through E to arrive at the Total Capital Expenditures.

Section IV – Projected Assets & Liabilities

Lines A through C. Provide projected cash, account receivables, and other current assets for start-up as well as for years 1, 2, and 3. For *Other Current Assets*, specify the type of asset and describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line D. Add lines A, B, C to arrive at the Total Current Assets.

Lines E through G. Provide projected accounts payable, short-term debt, and other current liabilities for start-up as well as for years 1, 2, and 3. For *Other Current Liabilities*, specify the type of liability and describe the total period of time the start-up up cost is expected to cover in the *Comments/Notes* box.

Line H. Ad lines E through G to arrive at the total current liabilities.

Lines I through K. Provide the projected fixed assets (PP&E), the 3-year reserve, and long-term assets for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line L. Ad lines I through K to arrive at the total long-term assets.

Line M. Provide the projected long-term debt for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box

Section V – Projected Cash Flow

Cash flow is driven by *Projected Net Operations* (Section I), *Projected Capital Expenditures* (Section III), and *Projected Assets & Liabilities* (Section IV).

Line A. Provide the projected net operating cash flows for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line B. Provide the projected capital expenditures for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box of Section V.

Lines C through F. Provide the projected change in non-cash current assets, total current liabilities, debt adjustments, and other adjustments for start-up as well as for years 1, 2, and 3. Please describe the total period of time the start-up cost is expected to cover in the *Comments/Notes* box.

Line G. Add lines A through F to arrive at the projected net cash flow for line H.

Section VI – Sources of Funds

Lines A & B. Provide projected funds from debt and equity at start-up. Describe the sources of debt and equity funding as well as the total period of time the start-up is expected to cover in the *Comments/Notes* box. Please also provide evidence the funding (e.g., letter of commitment).

Line C. Add lines A and B to arrive at the total sources of funds for line C.

General Comments – Regarding Assumptions Used, Significant Variances Between Years, etc.

Provide explanations for any significant variances between years (or expected in years beyond the timeframe of the template) in any category of costing or funding.

General Comments – Regarding how the Applicant Plans to Fund Operations

Provide general comments explaining how you will fund operations. Funding should be explained in detail in response to question 48.

General Comments – Regarding Contingencies

Provide general comments to describe your contingency planning. Contingency planning should be explained in detail in response to question 49.

Template 1 - Financial Projections: Most Likely						Comments / Notes
In local currency (unless noted otherwise)						Provide name of local currency used.
Sec.	Reference / Formula	Start-up Costs	Live / Operational			
			Year 1	Year 2	Year 3	
I) Projected Cash inflows and outflows						
A)	Forecasted registration volume					
B)	Registration fee					
C)	Registration cash inflows					
D)	Other cash inflows					
	E) Total Cash Inflows					
Projected Operating Cash Outflows						
F) Labor:						
i)	Marketing Labor					
ii)	Customer Support Labor					
iii)	Technical Labor					
G)	Marketing					
H)	Facilities					
I)	General & Administrative					
J)	Interest and Taxes					
K)	Outsourcing Operating Costs, if any (list the type of activities being outsourced):					
i)	(list type of activities being outsourced)					
ii)	(list type of activities being outsourced)					
iii)	(list type of activities being outsourced)					
iv)	(list type of activities being outsourced)					
v)	(list type of activities being outsourced)					
vi)	(list type of activities being outsourced)					
L)	Other Operating costs					
	M) Total Operating Cash Outflows					
	N) Projected Net Operating Cash flow					
IIa) Break out of Fixed and Variable Operating Cash Outflows						
A)	Total Variable Operating Costs					
B)	Total Fixed Operating Costs					
	C) Total Operating Cash Outflows					
		CHECK				
IIb) Break out of Critical Function Operating Cash Outflows						
A)	Operation of SRS					
B)	Provision of Whois					
C)	DNS Resolution for Registered Domain Names					
D)	Registry Data Escrow					
E)	Maintenance of Zone in accordance with DNSSEC					
	G) Total Critical Registry Function Cash Outflows					
	H) 3-year Total					
III) Projected Capital Expenditures						
A)	Hardware					
B)	Software					
C)	Furniture & Other Equipment					
D)	Outsourcing Capital Expenditures, if any (list the type of capital expenditures)					
i)						
ii)						
iii)						
iv)						
v)						
vi)						
E)	Other Capital Expenditures					
	F) Total Capital Expenditures					
IV) Projected Assets & Liabilities						
A) Cash						
B)	Accounts receivable					
C)	Other current assets					
	D) Total Current Assets					
E) Accounts payable						
F) Short-term Debt						
G)	Other Current Liabilities					
	H) Total Current Liabilities					
I) Total Property, Plant & Equipment (PP&E)						
J)	3-year Reserve					
K)	Other Long-term Assets					
	L) Total Long-term Assets					
M) Total Long-term Debt						
V) Projected Cash flow (excl. 3-year Reserve)						
A)	Net operating cash flows					
B)	Capital expenditures					
C)	Change in Non Cash Current Assets	n/a				
D)	Change in Total Current Liabilities					
E)	Debt Adjustments	n/a				
F)	Other Adjustments					
	H) Projected Net Cash flow					
VI) Sources of funds						
A) Debt:						
i)	On-hand at time of application					
ii)	Contingent and/or committed but not yet on-hand					
B) Equity:						
i)	On-hand at time of application					
ii)	Contingent and/or committed but not yet on-hand					
	C) Total Sources of funds					
General Comments (Notes Regarding Assumptions Used, Significant Variances Between Years, etc.):						
Comments regarding how the Applicant plans to Fund operations:						
General Comments regarding contingencies:						

Template 2 - Financial Projections: Worst Case						Comments / Notes
In local currency (unless noted otherwise)			Live / Operational			Provide name of local currency used.
Sec.	Reference / Formula	Start-up Costs	Year 1	Year 2	Year 3	
I)	Projected Cash inflows and outflows					
	A) Forecasted registration volume					
	B) Registration fee					
	C) Registration cash inflows					
	D) Other cash inflows					
	E) Total Cash Inflows					
	Projected Operating Cash Outflows					
	F) Labor:					
	i) Marketing Labor					
	ii) Customer Support Labor					
	iii) Technical Labor					
	G) Marketing					
	H) Facilities					
	I) General & Administrative					
	J) Interest and Taxes					
	K) Outsourcing Operating Costs, if any (list the type of activities being outsourced):					
	i) (list type of activities being outsourced)					
	ii) (list type of activities being outsourced)					
	iii) (list type of activities being outsourced)					
	iv) (list type of activities being outsourced)					
	v) (list type of activities being outsourced)					
	vi) (list type of activities being outsourced)					
	L) Other Operating costs					
	M) Total Operating Cash Outflows					
	N) Projected Net Operating Cash flow					
IIa)	Break out of Fixed and Variable Operating Cash Outflows					
	A) Total Variable Operating Costs					
	B) Total Fixed Operating Costs					
	C) Total Operating Cash Outflows					
		CHECK				
IIb)	Break out of Critical Function Operating Cash Outflows					
	A) Operation of SRS					
	B) Provision of Whois					
	C) DNS Resolution for Registered Domain Names					
	D) Registry Data Escrow					
	E) Maintenance of Zone in accordance with DNSSEC					
	G) Total Critical Registry Function Cash Outflows					
	H) 3-year Total					
III)	Projected Capital Expenditures					
	A) Hardware					
	B) Software					
	C) Furniture & Other Equipment					
	D) Outsourcing Capital Expenditures, if any (list the type of capital expenditures)					
	i)					
	ii)					
	iii)					
	iv)					
	v)					
	vi)					
	E) Other Capital Expenditures					
	F) Total Capital Expenditures					
IV)	Projected Assets & Liabilities					
	A) Cash					
	B) Accounts receivable					
	C) Other current assets					
	D) Total Current Assets					
	E) Accounts payable					
	F) Short-term Debt					
	G) Other Current Liabilities					
	H) Total Current Liabilities					
	I) Total Property, Plant & Equipment (PP&E)					
	J) 3-year Reserve					
	K) Other Long-term Assets					
	L) Total Long-term Assets					
	M) Total Long-term Debt					
V)	Projected Cash flow (excl. 3-year Reserve)					
	A) Net operating cash flows					
	B) Capital expenditures					
	C) Change in Non Cash Current Assets	n/a				
	D) Change in Total Current Liabilities					
	E) Debt Adjustments	n/a				
	F) Other Adjustments					
	G) Projected Net Cash flow					
VI)	Sources of funds					
	A) Debt:					
	i) On-hand at time of application					
	ii) Contingent and/or committed but not yet on-hand					
	B) Equity:					
	i) On-hand at time of application					
	ii) Contingent and/or committed but not yet on-hand					
	C) Total Sources of funds					
General Comments (Notes Regarding Assumptions Used, Significant Variances Between Years, etc.):						
Comments regarding how the Applicant plans to Fund operations:						
General Comments regarding contingencies:						



gTLD Applicant Guidebook

(v. 2012-06-04)

Module 3

4 June 2012

Module 3

Objection Procedures

This module describes two types of mechanisms that may affect an application:

- I. The procedure by which ICANN's Governmental Advisory Committee may provide GAC Advice on New gTLDs to the ICANN Board of Directors concerning a specific application. This module describes the purpose of this procedure, and how GAC Advice on New gTLDs is considered by the ICANN Board once received.
- II. The dispute resolution procedure triggered by a formal objection to an application by a third party. This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.

This module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination.

All applicants should be aware of the possibility that a formal objection may be filed against any application, and of the procedures and options available in the event of such an objection.

3.1 GAC Advice on New gTLDs

ICANN's Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.

GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns

raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors.

The GAC can provide advice on any application. For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period (see Module 1).

GAC Advice may take one of the following forms:

- I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.
- II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.
- III. The GAC advises ICANN that an application should not proceed unless remediated. This will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing the approval of one or more governments), that is implemented by the applicant.

Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will publish the Advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures. The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).

3.2 *Public Objection and Dispute Resolution Process*

The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts.

A formal objection can be filed only on four enumerated grounds, as described in this module. A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. Similarly, an objector accepts the applicability of this gTLD dispute resolution process by filing its objection.

As described in section 3.1 above, ICANN's Governmental Advisory Committee has a designated process for providing advice to the ICANN Board of Directors on matters affecting public policy issues, and these objection procedures would not be applicable in such a case. The GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.

3.2.1 *Grounds for Objection*

A formal objection may be filed on any one of the following four grounds:

String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications.

Legal Rights Objection – The applied-for gTLD string infringes the existing legal rights of the objector.

Limited Public Interest Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

The rationales for these objection grounds are discussed in the final report of the ICANN policy development process for new gTLDs. For more information on this process, see

<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>.

3.2.2 *Standing to Object*

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

Objection ground	Who may object
String confusion	Existing TLD operator or gTLD applicant in current round. In the case where an IDN ccTLD Fast Track request has been submitted before the public posting of gTLD applications received, and the Fast Track requestor wishes to file a string confusion objection to a gTLD application, the Fast Track requestor will be granted standing.
Legal rights	Rightsholders
Limited public interest	No limitations on who may file – however, subject to a “quick look” designed for early conclusion of frivolous and/or abusive objections
Community	Established institution associated with a clearly delineated community

3.2.2.1 *String Confusion Objection*

Two types of entities have standing to object:

- An existing TLD operator may file a string confusion objection to assert string confusion between an applied-for gTLD and the TLD that it currently operates.
- Any gTLD applicant in this application round may file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied, where string confusion between the two applicants has not already been found in the Initial Evaluation. That is, an applicant does not have standing to object to another application with which it is already in a contention set as a result of the Initial Evaluation.

In the case where an existing TLD operator successfully asserts string confusion with an applicant, the application will be rejected.

In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible

outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures). If an objection by one gTLD applicant to another gTLD application is unsuccessful, the applicants may both move forward in the process without being considered in direct contention with one another.

3.2.2.2 Legal Rights Objection

A rightsholder has standing to file a legal rights objection. The source and documentation of the existing legal rights the objector is claiming (which may include either registered or unregistered trademarks) are infringed by the applied-for gTLD must be included in the filing.

An intergovernmental organization (IGO) is eligible to file a legal rights objection if it meets the criteria for registration of a .INT domain name¹:

- a) An international treaty between or among national governments must have established the organization; and
- b) The organization that is established must be widely considered to have independent international legal personality and must be the subject of and governed by international law.

The specialized agencies of the UN and the organizations having observer status at the UN General Assembly are also recognized as meeting the criteria.

3.2.2.3 Limited Public Interest Objection

Anyone may file a Limited Public Interest Objection. Due to the inclusive standing base, however, objectors are subject to a "quick look" procedure designed to identify and eliminate frivolous and/or abusive objections. An objection found to be manifestly unfounded and/or an abuse of the right to object may be dismissed at any time.

A Limited Public Interest objection would be manifestly unfounded if it did not fall within one of the categories that have been defined as the grounds for such an objection (see subsection 3.5.3).

A Limited Public Interest objection that is manifestly unfounded may also be an abuse of the right to object. An objection may be framed to fall within one of the

¹ See also <http://www.iana.org/domains/int/policy/>.

accepted categories for Limited Public Interest objections, but other facts may clearly show that the objection is abusive. For example, multiple objections filed by the same or related parties against a single applicant may constitute harassment of the applicant, rather than a legitimate defense of legal norms that are recognized under general principles of international law. An objection that attacks the applicant, rather than the applied-for string, could be an abuse of the right to object.²

The quick look is the Panel's first task, after its appointment by the DRSP and is a review on the merits of the objection. The dismissal of an objection that is manifestly unfounded and/or an abuse of the right to object would be an Expert Determination, rendered in accordance with Article 21 of the New gTLD Dispute Resolution Procedure.

In the case where the quick look review does lead to the dismissal of the objection, the proceedings that normally follow the initial submissions (including payment of the full advance on costs) will not take place, and it is currently contemplated that the filing fee paid by the applicant would be refunded, pursuant to Procedure Article 14(e).

3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

² The jurisprudence of the European Court of Human Rights offers specific examples of how the term "manifestly ill-founded" has been interpreted in disputes relating to human rights. Article 35(3) of the European Convention on Human Rights provides: "The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application." The ECHR renders reasoned decisions on admissibility, pursuant to Article 35 of the Convention. (Its decisions are published on the Court's website <http://www.echr.coe.int>.) In some cases, the Court briefly states the facts and the law and then announces its decision, without discussion or analysis. E.g., Decision as to the Admissibility of Application No. 34328/96 by Egbert Peree against the Netherlands (1998). In other cases, the Court reviews the facts and the relevant legal rules in detail, providing an analysis to support its conclusion on the admissibility of an application. Examples of such decisions regarding applications alleging violations of Article 10 of the Convention (freedom of expression) include: *Décision sur la recevabilité de la requête no 65831/01 présentée par Roger Garaudy contre la France* (2003); *Décision sur la recevabilité de la requête no 65297/01 présentée par Eduardo Fernando Alves Costa contre le Portugal* (2004).

The jurisprudence of the European Court of Human Rights also provides examples of the abuse of the right of application being sanctioned, in accordance with ECHR Article 35(3). See, for example, *Décision partielle sur la recevabilité de la requête no 61164/00 présentée par Gérard Duringer et autres contre la France et de la requête no 18589/02 contre la France* (2003).

It is an established institution – Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community – Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.2.3 Dispute Resolution Service Providers

To trigger a dispute resolution proceeding, an objection must be filed by the posted deadline date, directly with the appropriate DRSP for each objection ground.

- The International Centre for Dispute Resolution has agreed to administer disputes brought pursuant to string confusion objections.
- The Arbitration and Mediation Center of the World Intellectual Property Organization has agreed to administer disputes brought pursuant to legal rights objections.

- The International Center of Expertise of the International Chamber of Commerce has agreed to administer disputes brought pursuant to Limited Public Interest and Community Objections.

ICANN selected DRSPs on the basis of their relevant experience and expertise, as well as their willingness and ability to administer dispute proceedings in the new gTLD Program. The selection process began with a public call for expressions of interest³ followed by dialogue with those candidates who responded. The call for expressions of interest specified several criteria for providers, including established services, subject matter expertise, global capacity, and operational capabilities. An important aspect of the selection process was the ability to recruit panelists who will engender the respect of the parties to the dispute.

3.2.4 Options in the Event of Objection

Applicants whose applications are the subject of an objection have the following options:

The applicant can work to reach a settlement with the objector, resulting in withdrawal of the objection or the application;

The applicant can file a response to the objection and enter the dispute resolution process (refer to Section 3.2); or

The applicant can withdraw, in which case the objector will prevail by default and the application will not proceed further.

If for any reason the applicant does not file a response to an objection, the objector will prevail by default.

3.2.5 Independent Objector

A formal objection to a gTLD application may also be filed by the Independent Objector (IO). The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.

In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Limited Public Interest and Community.

³ See <http://www.icann.org/en/announcements/announcement-21dec07.htm>.

Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.

Mandate and Scope - The IO may file objections against “highly objectionable” gTLD applications to which no objection has been filed. The IO is limited to filing two types of objections: (1) Limited Public Interest objections and (2) Community objections. The IO is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections (see subsection 3.1.2).

The IO may file a Limited Public Interest objection against an application even if a Community objection has been filed, and vice versa.

The IO may file an objection against an application, notwithstanding the fact that a String Confusion objection or a Legal Rights objection was filed.

Absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection has already been filed on the same ground.

The IO may consider public comment when making an independent assessment whether an objection is warranted. The IO will have access to application comments received during the comment period.

In light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.

Selection – The IO will be selected by ICANN, through an open and transparent process, and retained as an independent consultant. The Independent Objector will be an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant.

Although recommendations for IO candidates from the community are welcomed, the IO must be and remain independent and unaffiliated with any of the gTLD applicants. The various rules of ethics for judges and international arbitrators provide models for the IO to declare and maintain his/her independence.

The IO's (renewable) tenure is limited to the time necessary to carry out his/her duties in connection with a single round of gTLD applications.

Budget and Funding – The IO's budget would comprise two principal elements: (a) salaries and operating expenses, and (b) dispute resolution procedure costs – both of which should be funded from the proceeds of new gTLD applications.

As an objector in dispute resolution proceedings, the IO is required to pay filing and administrative fees, as well as advance payment of costs, just as all other objectors are required to do. Those payments will be refunded by the DRSP in cases where the IO is the prevailing party.

In addition, the IO will incur various expenses in presenting objections before DRSP panels that will not be refunded, regardless of the outcome. These expenses include the fees and expenses of outside counsel (if retained) and the costs of legal research or factual investigations.

3.3 *Filing Procedures*

The information included in this section provides a summary of procedures for filing:

- Objections; and
- Responses to objections.

For a comprehensive statement of filing requirements applicable generally, refer to the New gTLD Dispute Resolution Procedure ("Procedure") included as an attachment to this module. In the event of any discrepancy between the information presented in this module and the Procedure, the Procedure shall prevail.

Note that the rules and procedures of each DRSP specific to each objection ground must also be followed. See <http://newgtlds.icann.org/en/program-status/objection-dispute-resolution>.

3.3.1 *Objection Filing Procedures*

The procedures outlined in this subsection must be followed by any party wishing to file a formal objection to an application that has been posted by ICANN. Should an applicant wish to file a formal objection to another gTLD application, it would follow these same procedures.

- All objections must be filed electronically with the appropriate DRSP by the posted deadline date.

Objections will not be accepted by the DRSPs after this date.

- All objections must be filed in English.
- Each objection must be filed separately. An objector wishing to object to several applications must file a separate objection and pay the accompanying filing fees for each application that is the subject of an objection. If an objector wishes to object to an application on more than one ground, the objector must file separate objections and pay the accompanying filing fees for each objection ground.

Each objection filed by an objector must include:

- The name and contact information of the objector.
- A statement of the objector's basis for standing; that is, why the objector believes it meets the standing requirements to object.
- A description of the basis for the objection, including:
 - A statement giving the specific ground upon which the objection is being filed.
 - A detailed explanation of the validity of the objection and why it should be upheld.
- Copies of any documents that the objector considers to be a basis for the objection.

Objections are limited to 5000 words or 20 pages, whichever is less, excluding attachments.

An objector must provide copies of all submissions to the DRSP associated with the objection proceedings to the applicant.

The DRSP will publish, and regularly update a list on its website identifying all objections as they are filed. ICANN will post on its website a notice of all objections filed once the objection filing period has closed.

3.3.2 Objection Filing Fees

At the time an objection is filed, the objector is required to pay a filing fee in the amount set and published by the relevant DRSP. If the filing fee is not paid, the DRSP will

dismiss the objection without prejudice. See Section 1.5 of Module 1 regarding fees.

Funding from ICANN for objection filing fees, as well as for advance payment of costs (see subsection 3.4.7 below) is available to the At-Large Advisory Committee (ALAC). Funding for ALAC objection filing and dispute resolution fees is contingent on publication by ALAC of its approved process for considering and making objections. At a minimum, the process for objecting to a gTLD application will require: bottom-up development of potential objections, discussion and approval of objections at the Regional At-Large Organization (RALO) level, and a process for consideration and approval of the objection by the At-Large Advisory Committee.

Funding from ICANN for objection filing fees, as well as for advance payment of costs, is available to individual national governments in the amount of USD 50,000 with the guarantee that a minimum of one objection per government will be fully funded by ICANN where requested. ICANN will develop a procedure for application and disbursement of funds.

Funding available from ICANN is to cover costs payable to the dispute resolution service provider and made directly to the dispute resolution service provider; it does not cover other costs such as fees for legal advice.

3.3.3 Response Filing Procedures

Upon notification that ICANN has published the list of all objections filed (refer to subsection 3.3.1), the DRSPs will notify the parties that responses must be filed within 30 calendar days of receipt of that notice. DRSPs will not accept late responses. Any applicant that fails to respond to an objection within the 30-day response period will be in default, which will result in the objector prevailing.

- All responses must be filed in English.
- Each response must be filed separately. That is, an applicant responding to several objections must file a separate response and pay the accompanying filing fee to respond to each objection.
- Responses must be filed electronically.

Each response filed by an applicant must include:

- The name and contact information of the applicant.

- A point-by-point response to the claims made by the objector.
- Any copies of documents that it considers to be a basis for the response.

Responses are limited to 5000 words or 20 pages, whichever is less, excluding attachments.

Each applicant must provide copies of all submissions to the DRSP associated with the objection proceedings to the objector.

3.3.4 Response Filing Fees

At the time an applicant files its response, it is required to pay a filing fee in the amount set and published by the relevant DRSP, which will be the same as the filing fee paid by the objector. If the filing fee is not paid, the response will be disregarded, which will result in the objector prevailing.

3.4 Objection Processing Overview

The information below provides an overview of the process by which DRSPs administer dispute proceedings that have been initiated. For comprehensive information, please refer to the New gTLD Dispute Resolution Procedure (included as an attachment to this module).

3.4.1 Administrative Review

Each DRSP will conduct an administrative review of each objection for compliance with all procedural rules within 14 calendar days of receiving the objection. Depending on the number of objections received, the DRSP may ask ICANN for a short extension of this deadline.

If the DRSP finds that the objection complies with procedural rules, the objection will be deemed filed, and the proceedings will continue. If the DRSP finds that the objection does not comply with procedural rules, the DRSP will dismiss the objection and close the proceedings without prejudice to the objector's right to submit a new objection that complies with procedural rules. The DRSP's review or rejection of the objection will not interrupt the time limit for filing an objection.

3.4.2 Consolidation of Objections

Once the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections. The DRSP shall endeavor to decide upon

consolidation prior to issuing its notice to applicants that the response should be filed and, where appropriate, shall inform the parties of the consolidation in that notice.

An example of a circumstance in which consolidation might occur is multiple objections to the same application based on the same ground.

In assessing whether to consolidate objections, the DRSP will weigh the efficiencies in time, money, effort, and consistency that may be gained by consolidation against the prejudice or inconvenience consolidation may cause. The DRSPs will endeavor to have all objections resolved on a similar timeline. It is intended that no sequencing of objections will be established.

New gTLD applicants and objectors also will be permitted to propose consolidation of objections, but it will be at the DRSP's discretion whether to agree to the proposal.

ICANN continues to strongly encourage all of the DRSPs to consolidate matters whenever practicable.

3.4.3 *Mediation*

The parties to a dispute resolution proceeding are encouraged—but not required—to participate in mediation aimed at settling the dispute. Each DRSP has experts who can be retained as mediators to facilitate this process, should the parties elect to do so, and the DRSPs will communicate with the parties concerning this option and any associated fees.

If a mediator is appointed, that person may not serve on the panel constituted to issue an expert determination in the related dispute.

There are no automatic extensions of time associated with the conduct of negotiations or mediation. The parties may submit joint requests for extensions of time to the DRSP according to its procedures, and the DRSP or the panel, if appointed, will decide whether to grant the requests, although extensions will be discouraged. Absent exceptional circumstances, the parties must limit their requests for extension to 30 calendar days.

The parties are free to negotiate without mediation at any time, or to engage a mutually acceptable mediator of their own accord.

3.4.4 Selection of Expert Panels

A panel will consist of appropriately qualified experts appointed to each proceeding by the designated DRSP. Experts must be independent of the parties to a dispute resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence.

There will be one expert in proceedings involving a string confusion objection.

There will be one expert, or, if all parties agree, three experts with relevant experience in intellectual property rights disputes in proceedings involving an existing legal rights objection.

There will be three experts recognized as eminent jurists of international reputation, with expertise in relevant fields as appropriate, in proceedings involving a Limited Public Interest objection.

There will be one expert in proceedings involving a community objection.

Neither the experts, the DRSP, ICANN, nor their respective employees, directors, or consultants will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any proceeding under the dispute resolution procedures.

3.4.5 Adjudication

The panel may decide whether the parties shall submit any written statements in addition to the filed objection and response, and may specify time limits for such submissions.

In order to achieve the goal of resolving disputes rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the panel may require a party to produce additional evidence.

Disputes will usually be resolved without an in-person hearing. The panel may decide to hold such a hearing only in extraordinary circumstances.

3.4.6 Expert Determination

The DRSPs' final expert determinations will be in writing and will include:

- A summary of the dispute and findings;

- An identification of the prevailing party; and
- The reasoning upon which the expert determination is based.

Unless the panel decides otherwise, each DRSP will publish all decisions rendered by its panels in full on its website.

The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.

3.4.7 Dispute Resolution Costs

Before acceptance of objections, each DRSP will publish a schedule of costs or statement of how costs will be calculated for the proceedings that it administers under this procedure. These costs cover the fees and expenses of the members of the panel and the DRSP's administrative costs.

ICANN expects that string confusion and legal rights objection proceedings will involve a fixed amount charged by the panelists while Limited Public Interest and community objection proceedings will involve hourly rates charged by the panelists.

Within ten (10) calendar days of constituting the panel, the DRSP will estimate the total costs and request advance payment in full of its costs from both the objector and the applicant. Each party must make its advance payment within ten (10) calendar days of receiving the DRSP's request for payment and submit to the DRSP evidence of such payment. The respective filing fees paid by the parties will be credited against the amounts due for this advance payment of costs.

The DRSP may revise its estimate of the total costs and request additional advance payments from the parties during the resolution proceedings.

Additional fees may be required in specific circumstances; for example, if the DRSP receives supplemental submissions or elects to hold a hearing.

If an objector fails to pay these costs in advance, the DRSP will dismiss its objection and no fees paid by the objector will be refunded.

If an applicant fails to pay these costs in advance, the DSRP will sustain the objection and no fees paid by the applicant will be refunded.

After the hearing has taken place and the panel renders its expert determination, the DRSP will refund the advance payment of costs to the prevailing party.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts, and the public.

3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

3.5.2 Legal Rights Objection

In interpreting and giving meaning to GNSO Recommendation 3 (“Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law”), a DRSP panel of experts presiding over a legal rights objection will determine whether the potential use of the applied-for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector’s registered or unregistered trademark or service mark (“mark”) or IGO name or acronym (as identified in the treaty establishing the organization), or unjustifiably impairs the distinctive character or the reputation of the objector’s mark or IGO name or acronym, or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the objector’s mark or IGO name or acronym.

In the case where the objection is based on trademark rights, the panel will consider the following non-exclusive factors:

1. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound, or meaning, to the objector's existing mark.
2. Whether the objector's acquisition and use of rights in the mark has been bona fide.
3. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the gTLD, as the mark of the objector, of the applicant or of a third party.
4. Applicant's intent in applying for the gTLD, including whether the applicant, at the time of application for the gTLD, had knowledge of the objector's mark, or could not have reasonably been unaware of that mark, and including whether the applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.
5. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the gTLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by the objector of its mark rights.
6. Whether the applicant has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the gTLD by the applicant is consistent with such acquisition or use.
7. Whether and to what extent the applicant has been commonly known by the sign corresponding to the gTLD, and if so, whether any purported or likely use of the gTLD by the applicant is consistent therewith and bona fide.
8. Whether the applicant's intended use of the gTLD would create a likelihood of confusion with the objector's mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.

In the case where a legal rights objection has been filed by an IGO, the panel will consider the following non-exclusive factors:

1. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound or meaning, to the name or acronym of the objecting IGO;
2. Historical coexistence of the IGO and the applicant's use of a similar name or acronym. Factors considered may include:
 - a. Level of global recognition of both entities;
 - b. Length of time the entities have been in existence;
 - c. Public historical evidence of their existence, which may include whether the objecting IGO has communicated its name or abbreviation under Article 6^{ter} of the Paris Convention for the Protection of Industrial Property.
3. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the TLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise of the objecting IGO's name or acronym;
4. Whether and to what extent the applicant has been commonly known by the sign corresponding to the applied-for gTLD, and if so, whether any purported or likely use of the gTLD by the applicant is consistent therewith and bona fide; and
5. Whether the applicant's intended use of the applied-for gTLD would create a likelihood of confusion with the objecting IGO's name or acronym as to the source, sponsorship, affiliation, or endorsement of the TLD.

3.5.3 Limited Public Interest Objection

An expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.

Examples of instruments containing such general principles include:

- The Universal Declaration of Human Rights (UDHR)

- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- The International Convention on the Elimination of All Forms of Racial Discrimination
- Declaration on the Elimination of Violence against Women
- The International Covenant on Economic, Social, and Cultural Rights
- The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
- The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
- Slavery Convention
- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention on the Rights of the Child

Note that these are included to serve as examples, rather than an exhaustive list. It should be noted that these instruments vary in their ratification status. Additionally, states may limit the scope of certain provisions through reservations and declarations indicating how they will interpret and apply certain provisions. National laws not based on principles of international law are not a valid ground for a Limited Public Interest objection.

Under these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply.

The grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law are:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of

discrimination that violate generally accepted legal norms recognized under principles of international law;

- Incitement to or promotion of child pornography or other sexual abuse of children; or
- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

The panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Each of these tests is described in further detail below.

Community – The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;

- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition – The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be

balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment – The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

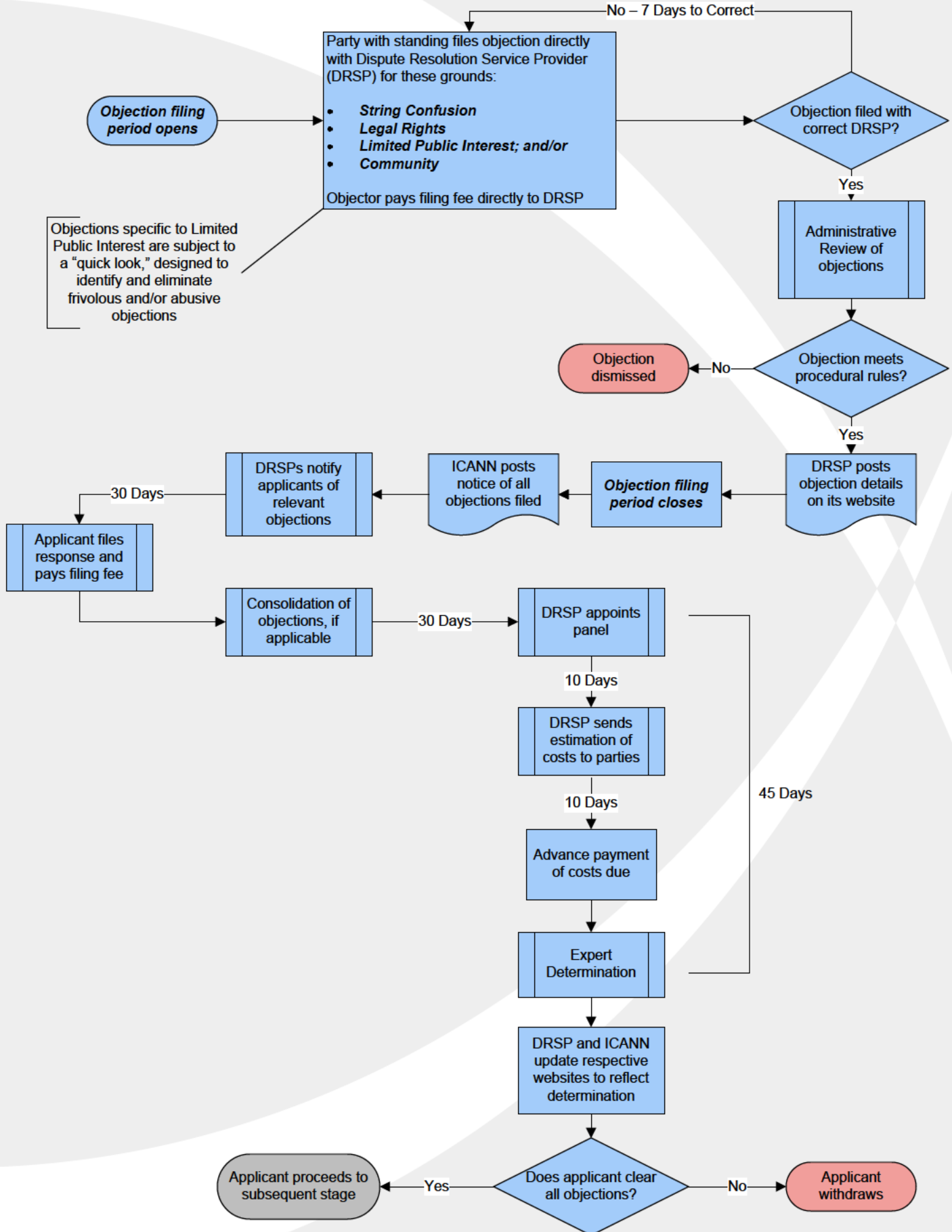
Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

DRAFT - New gTLD Program – Objection and Dispute Resolution



Attachment to Module 3

New gTLD Dispute Resolution Procedure

These Procedures were designed with an eye toward timely and efficient dispute resolution. As part of the New gTLD Program, these Procedures apply to all proceedings administered by each of the dispute resolution service providers (DRSP). Each of the DRSPs has a specific set of rules that will also apply to such proceedings.

NEW gTLD DISPUTE RESOLUTION PROCEDURE

Article 1. ICANN's New gTLD Program

- (a) The Internet Corporation for Assigned Names and Numbers ("ICANN") has implemented a program for the introduction of new generic Top-Level Domain Names ("gTLDs") in the internet. There will be a succession of rounds, during which applicants may apply for new gTLDs, in accordance with terms and conditions set by ICANN.
- (b) The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure (the "Procedure").
- (c) Dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider ("DRSP") in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).
- (d) By applying for a new gTLD, an applicant accepts the applicability of this Procedure and the applicable DRSP's Rules that are identified in Article 4(b); by filing an objection to a new gTLD, an objector accepts the applicability of this Procedure and the applicable DRSP's Rules that are identified in Article 4(b). The parties cannot derogate from this Procedure without the express approval of ICANN and from the applicable DRSP Rules without the express approval of the relevant DRSP.

Article 2. Definitions

- (a) The "Applicant" or "Respondent" is an entity that has applied to ICANN for a new gTLD and that will be the party responding to the Objection.
- (b) The "Objector" is one or more persons or entities who have filed an objection against a new gTLD for which an application has been submitted.
- (c) The "Panel" is the panel of Experts, comprising one or three "Experts," that has been constituted by a DRSP in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).
- (d) The "Expert Determination" is the decision upon the merits of the Objection that is rendered by a Panel in a proceeding conducted under this Procedure and the applicable DRSP Rules that are identified in Article 4(b).
- (e) The grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the Applicant Guidebook. Such grounds are identified in this Procedure, and are based upon the Final Report on the Introduction of New Generic Top-Level Domains, dated 7 August 2007, issued by the ICANN Generic Names Supporting Organization (GNSO), as follows:
 - (i) "String Confusion Objection" refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.
 - (ii) "Existing Legal Rights Objection" refers to the objection that the string comprising the potential new gTLD infringes the existing legal rights of others

that are recognized or enforceable under generally accepted and internationally recognized principles of law.

- (iii) "Limited Public Interest Objection" refers to the objection that the string comprising the potential new gTLD is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.
- (iv) "Community Objection" refers to the objection that there is substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted.
- (f) "DRSP Rules" are the rules of procedure of a particular DRSP that have been identified as being applicable to objection proceedings under this Procedure.

Article 3. Dispute Resolution Service Providers

The various categories of disputes shall be administered by the following DRSPs:

- (a) String Confusion Objections shall be administered by the International Centre for Dispute Resolution.
- (b) Existing Legal Rights Objections shall be administered by the Arbitration and Mediation Center of the World Intellectual Property Organization.
- (c) Limited Public Interest Objections shall be administered by the International Centre for Expertise of the International Chamber of Commerce.
- (d) Community Objections shall be administered by the International Centre for Expertise of the International Chamber of Commerce.

Article 4. Applicable Rules

- (a) All proceedings before the Panel shall be governed by this Procedure and by the DRSP Rules that apply to a particular category of objection. The outcome of the proceedings shall be deemed an Expert Determination, and the members of the Panel shall act as experts.
- (b) The applicable DRSP Rules are the following:
 - (i) For a String Confusion Objection, the applicable DRSP Rules are the ICDR Supplementary Procedures for ICANN's New gTLD Program.
 - (ii) For an Existing Legal Rights Objection, the applicable DRSP Rules are the WIPO Rules for New gTLD Dispute Resolution.
 - (iii) For a Limited Public Interest Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.
 - (iv) For a Community Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.
- (c) In the event of any discrepancy between this Procedure and the applicable DRSP Rules, this Procedure shall prevail.

- (d) The place of the proceedings, if relevant, shall be the location of the DRSP that is administering the proceedings.
- (e) In all cases, the Panel shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its position.

Article 5. Language

- (a) The language of all submissions and proceedings under this Procedure shall be English.
- (b) Parties may submit supporting evidence in its original language, provided and subject to the authority of the Panel to determine otherwise, that such evidence is accompanied by a certified or otherwise official English translation of all relevant text.

Article 6. Communications and Time Limits

- (a) All communications by the Parties with the DRSPs and Panels must be submitted electronically. A Party that wishes to make a submission that is not available in electronic form (e.g., evidentiary models) shall request leave from the Panel to do so, and the Panel, in its sole discretion, shall determine whether to accept the non-electronic submission.
- (b) The DRSP, Panel, Applicant, and Objector shall provide copies to one another of all correspondence (apart from confidential correspondence between the Panel and the DRSP and among the Panel) regarding the proceedings.
- (c) For the purpose of determining the date of commencement of a time limit, a notice or other communication shall be deemed to have been received on the day that it is transmitted in accordance with paragraphs (a) and (b) of this Article.
- (d) For the purpose of determining compliance with a time limit, a notice or other communication shall be deemed to have been sent, made or transmitted if it is dispatched in accordance with paragraphs (a) and (b) of this Article prior to or on the day of the expiration of the time limit.
- (e) For the purpose of calculating a period of time under this Procedure, such period shall begin to run on the day following the day when a notice or other communication is received.
- (f) Unless otherwise stated, all time periods provided in the Procedure are calculated on the basis of calendar days

Article 7. Filing of the Objection

- (a) A person wishing to object to a new gTLD for which an application has been submitted may file an objection ("Objection"). Any Objection to a proposed new gTLD must be filed before the published closing date for the Objection Filing period.
- (b) The Objection must be filed with the appropriate DRSP, using a model form made available by that DRSP, with copies to ICANN and the Applicant.
- (c) The electronic addresses for filing Objections (the specific addresses shall be made available once they are created by providers):
 - (i) A String Confusion Objection must be filed at: [●].

- (ii) An Existing Legal Rights Objection must be filed at: [●].
 - (iii) A Limited Public Interest Objection must be filed at: [●].
 - (iv) A Community Objection must be filed at: [●].
- (d) All Objections must be filed separately:
- (i) An Objector who wishes to object to an application on more than one ground must file separate objections with the appropriate DRSP(s).
 - (ii) An Objector who wishes to object to more than one gTLD must file separate objections to each gTLD with the appropriate DRSP(s).
- (e) If an Objection is filed with the wrong DRSP, that DRSP shall promptly notify the Objector of the error and that DRSP shall not process the incorrectly filed Objection. The Objector may then cure the error by filing its Objection with the correct DRSP within seven (7) days of receipt of the error notice, failing which the Objection shall be disregarded. If the Objection is filed with the correct DRSP within seven (7) days of receipt of the error notice but after the lapse of the time for submitting an Objection stipulation by Article 7(a) of this Procedure, it shall be deemed to be within this time limit.

Article 8. Content of the Objection

- (a) The Objection shall contain, *inter alia*, the following information:
- (i) The names and contact information (address, telephone number, email address, etc.) of the Objector;
 - (ii) A statement of the Objector's basis for standing; and
 - (iii) A description of the basis for the Objection, including:
 - (aa) A statement of the ground upon which the Objection is being filed, as stated in Article 2(e) of this Procedure;
 - (bb) An explanation of the validity of the Objection and why the objection should be upheld.
- (b) The substantive portion of the Objection shall be limited to 5,000 words or 20 pages, whichever is less, excluding attachments. The Objector shall also describe and provide copies of any supporting or official documents upon which the Objection is based.
- (c) At the same time as the Objection is filed, the Objector shall pay a filing fee in the amount set in accordance with the applicable DRSP Rules and include evidence of such payment in the Objection. In the event that the filing fee is not paid within ten (10) days of the receipt of the Objection by the DRSP, the Objection shall be dismissed without prejudice.

Article 9. Administrative Review of the Objection

- (a) The DRSP shall conduct an administrative review of the Objection for the purpose of verifying compliance with Articles 5-8 of this Procedure and the applicable DRSP Rules, and inform the Objector, the Applicant and ICANN of the result of its review within

fourteen (14) days of its receipt of the Objection. The DRSP may extend this time limit for reasons explained in the notification of such extension.

- (b) If the DRSP finds that the Objection complies with Articles 5-8 of this Procedure and the applicable DRSP Rules, the DRSP shall confirm that the Objection shall be registered for processing.
- (c) If the DRSP finds that the Objection does not comply with Articles 5-8 of this Procedure and the applicable DRSP Rules, the DRSP shall have the discretion to request that any administrative deficiencies in the Objection be corrected within five (5) days. If the deficiencies in the Objection are cured within the specified period but after the lapse of the time limit for submitting an Objection stipulated by Article 7(a) of this Procedure, the Objection shall be deemed to be within this time limit.
- (d) If the DRSP finds that the Objection does not comply with Articles 5-8 of this Procedure and the applicable DRSP Rules, and the deficiencies in the Objection are not corrected within the period specified in Article 9(c), the DRSP shall dismiss the Objection and close the proceedings, without prejudice to the Objector's submission of a new Objection that complies with this Procedure, provided that the Objection is filed within the deadline for filing such Objections. The DRSP's review of the Objection shall not interrupt the running of the time limit for submitting an Objection stipulated by Article 7(a) of this Procedure.
- (e) Immediately upon registering an Objection for processing, pursuant to Article 9(b), the DRSP shall post the following information about the Objection on its website: (i) the proposed string to which the Objection is directed; (ii) the names of the Objector and the Applicant; (iii) the grounds for the Objection; and (iv) the dates of the DRSP's receipt of the Objection.

Article 10. ICANN's Dispute Announcement

- (a) Within thirty (30) days of the deadline for filing Objections in relation to gTLD applications in a given round, ICANN shall publish a document on its website identifying all of the admissible Objections that have been filed (the "Dispute Announcement"). ICANN shall also directly inform each DRSP of the posting of the Dispute Announcement.
- (b) ICANN shall monitor the progress of all proceedings under this Procedure and shall take steps, where appropriate, to coordinate with any DRSP in relation to individual applications for which objections are pending before more than one DRSP.

Article 11. Response to the Objection

- (a) Upon receipt of the Dispute Announcement, each DRSP shall promptly send a notice to: (i) each Applicant for a new gTLD to which one or more admissible Objections have been filed with that DRSP; and (ii) the respective Objector(s).
- (b) The Applicant shall file a response to each Objection (the "Response"). The Response shall be filed within thirty (30) days of the transmission of the notice by the DRSP pursuant to Article 11(a).
- (c) The Response must be filed with the appropriate DRSP, using a model form made available by that DRSP, with copies to ICANN and the Objector.

- (d) The Response shall contain, inter alia, the following information:
 - (i) The names and contact information (address, telephone number, email address, etc.) of the Applicant; and
 - (ii) A point-by-point response to the statements made in the Objection.
- (e) The substantive portion of the Response shall be limited to 5,000 words or 20 pages, whichever is less, excluding attachments. The Applicant shall also describe and provide copies of any supporting or official documents upon which the Response is based.
- (f) At the same time as the Response is filed, the Applicant shall pay a filing fee in the amount set and published by the relevant DRSP (which shall be the same as the filing fee paid by the Objector) and include evidence of such payment in the Response. In the event that the filing fee is not paid within ten (10) days of the receipt of the Response by the DRSP, the Applicant shall be deemed to be in default, any Response disregarded and the Objection shall be deemed successful.
- (g) If the DRSP finds that the Response does not comply with Articles 11(c) and (d)(1) of this Procedure and the applicable DRSP Rules, the DRSP shall have the discretion to request that any administrative deficiencies in the Response be corrected within five (5) days. If the administrative deficiencies in the Response are cured within the specified period but after the lapse of the time limit for submitting a Response pursuant to this Procedure, the Response shall be deemed to be within this time limit.
- (g) If the Applicant fails to file a Response to the Objection within the 30-day time limit, the Applicant shall be deemed to be in default and the Objection shall be deemed successful. No fees paid by the Applicant will be refunded in case of default.

Article 12. Consolidation of Objections

- (a) The DRSP is encouraged, whenever possible and practicable, and as may be further stipulated in the applicable DRSP Rules, to consolidate Objections, for example, when more than one Objector has filed an Objection to the same gTLD on the same grounds. The DRSP shall endeavor to decide upon consolidation prior to issuing its notice pursuant to Article 11(a) and, where appropriate, shall inform the parties of the consolidation in that notice.
- (b) If the DRSP itself has not decided to consolidate two or more Objections, any Applicant or Objector may propose the consolidation of Objections within seven (7) days of the notice given by the DRSP pursuant to Article 11(a). If, following such a proposal, the DRSP decides to consolidate certain Objections, which decision must be made within 14 days of the notice given by the DRSP pursuant to Article 11(a), the deadline for the Applicant's Response in the consolidated proceeding shall be thirty (30) days from the Applicant's receipt of the DRSP's notice of consolidation.
- (c) In deciding whether to consolidate Objections, the DRSP shall weigh the benefits (in terms of time, cost, consistency of decisions, etc.) that may result from the consolidation against the possible prejudice or inconvenience that the consolidation may cause. The DRSP's determination on consolidation shall be final and not subject to appeal.
- (d) Objections based upon different grounds, as summarized in Article 2(e), shall not be consolidated.

Article 13. The Panel

- (a) The DRSP shall select and appoint the Panel of Expert(s) within thirty (30) days after receiving the Response.
- (b) Number and specific qualifications of Expert(s):
 - (i) There shall be one Expert in proceedings involving a String Confusion Objection.
 - (ii) There shall be one Expert or, if all of the Parties so agree, three Experts with relevant experience in intellectual property rights disputes in proceedings involving an Existing Legal Rights Objection.
 - (iii) There shall be three Experts recognized as eminent jurists of international reputation, one of whom shall be designated as the Chair. The Chair shall be of a nationality different from the nationalities of the Applicant and of the Objector, in proceedings involving a Limited Public Interest Objection.
 - (iv) There shall be one Expert in proceedings involving a Community Objection.
- (c) All Experts acting under this Procedure shall be impartial and independent of the parties. The applicable DRSP Rules stipulate the manner by which each Expert shall confirm and maintain their impartiality and independence.
- (d) The applicable DRSP Rules stipulate the procedures for challenging an Expert and replacing an Expert.
- (e) Unless required by a court of law or authorized in writing by the parties, an Expert shall not act in any capacity whatsoever, in any pending or future proceedings, whether judicial, arbitral or otherwise, relating to the matter referred to expert determination under this Procedure.

Article 14. Costs

- (a) Each DRSP shall determine the costs for the proceedings that it administers under this Procedure in accordance with the applicable DRSP Rules. Such costs shall cover the fees and expenses of the members of the Panel, as well as the administrative fees of the DRSP (the "Costs").
- (b) Within ten (10) days of constituting the Panel, the DRSP shall estimate the total Costs and request the Objector and the Applicant/Respondent each to pay in advance the full amount of the Costs to the DRSP. Each party shall make its advance payment of Costs within ten (10) days of receiving the DRSP's request for payment and submit to the DRSP evidence of such payment. The respective filing fees paid by the Parties shall be credited against the amounts due for this advance payment of Costs.
- (c) The DRSP may revise its estimate of the total Costs and request additional advance payments from the parties during the proceedings.
- (d) Failure to make an advance payment of Costs:
 - (i) If the Objector fails to make the advance payment of Costs, its Objection shall be dismissed and no fees that it has paid shall be refunded.

- (ii) If the Applicant fails to make the advance payment of Costs, the Objection will be deemed to have been sustained and no fees that the Applicant has paid shall be refunded.
- (e) Upon the termination of the proceedings, after the Panel has rendered its Expert Determination, the DRSP shall refund to the prevailing party, as determined by the Panel, its advance payment(s) of Costs.

Article 15. Representation and Assistance

- (a) The parties may be represented or assisted by persons of their choice.
- (b) Each party or party representative shall communicate the name, contact information and function of such persons to the DRSP and the other party (or parties in case of consolidation).

Article 16. Negotiation and Mediation

- (a) The parties are encouraged, but not required, to participate in negotiations and/or mediation at any time throughout the dispute resolution process aimed at settling their dispute amicably.
- (b) Each DRSP shall be able to propose, if requested by the parties, a person who could assist the parties as mediator.
- (c) A person who acts as mediator for the parties shall not serve as an Expert in a dispute between the parties under this Procedure or any other proceeding under this Procedure involving the same gTLD.
- (d) The conduct of negotiations or mediation shall not, *ipso facto*, be the basis for a suspension of the dispute resolution proceedings or the extension of any deadline under this Procedure. Upon the joint request of the parties, the DRSP or (after it has been constituted) the Panel may grant the extension of a deadline or the suspension of the proceedings. Absent exceptional circumstances, such extension or suspension shall not exceed thirty (30) days and shall not delay the administration of any other Objection.
- (e) If, during negotiations and/or mediation, the parties agree on a settlement of the matter referred to the DRSP under this Procedure, the parties shall inform the DRSP, which shall terminate the proceedings, subject to the parties' payment obligation under this Procedure having been satisfied, and inform ICANN and the parties accordingly.

Article 17. Additional Written Submissions

- (a) The Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions.
- (b) The time limits fixed by the Panel for additional written submissions shall not exceed thirty (30) days, unless the Panel, having consulted the DRSP, determines that exceptional circumstances justify a longer time limit.

Article 18. Evidence

In order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence.

Article 19. Hearings

- (a) Disputes under this Procedure and the applicable DRSP Rules will usually be resolved without a hearing.
- (b) The Panel may decide, on its own initiative or at the request of a party, to hold a hearing only in extraordinary circumstances.
- (c) In the event that the Panel decides to hold a hearing:
 - (i) The Panel shall decide how and where the hearing shall be conducted.
 - (ii) In order to expedite the proceedings and minimize costs, the hearing shall be conducted by videoconference if possible.
 - (iii) The hearing shall be limited to one day, unless the Panel decides, in exceptional circumstances, that more than one day is required for the hearing.
 - (iv) The Panel shall decide whether the hearing will be open to the public or conducted in private.

Article 20. Standards

- (a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN.
- (b) In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.
- (c) The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.

Article 21. The Expert Determination

- (a) The DRSP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel. In specific circumstances such as consolidated cases and in consultation with the DRSP, if significant additional documentation is requested by the Panel, a brief extension may be allowed.
- (b) The Panel shall submit its Expert Determination in draft form to the DRSP's scrutiny as to form before it is signed, unless such scrutiny is specifically excluded by the applicable DRSP Rules. The modifications proposed by the DRSP to the Panel, if any, shall address only the form of the Expert Determination. The signed Expert Determination shall be communicated to the DRSP, which in turn will communicate that Expert Determination to the Parties and ICANN.
- (c) When the Panel comprises three Experts, the Expert Determination shall be made by a majority of the Experts.

- (d) The Expert Determination shall be in writing, shall identify the prevailing party and shall state the reasons upon which it is based. The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules.
- (e) The Expert Determination shall state the date when it is made, and it shall be signed by the Expert(s). If any Expert fails to sign the Expert Determination, it shall be accompanied by a statement of the reason for the absence of such signature.
- (f) In addition to providing electronic copies of its Expert Determination, the Panel shall provide a signed hard copy of the Expert Determination to the DRSP, unless the DRSP Rules provide for otherwise.
- (g) Unless the Panel decides otherwise, the Expert Determination shall be published in full on the DRSP's website.

Article 22. Exclusion of Liability

In addition to any exclusion of liability stipulated by the applicable DRSP Rules, neither the Expert(s), nor the DRSP and its employees, nor ICANN and its Board members, employees and consultants shall be liable to any person for any act or omission in connection with any proceeding conducted under this Procedure.

Article 23. Modification of the Procedure

- (a) ICANN may from time to time, in accordance with its Bylaws, modify this Procedure.
- (b) The version of this Procedure that is applicable to a dispute resolution proceeding is the version that was in effect on the day when the relevant application for a new gTLD is submitted.



gTLD Applicant Guidebook

(v. 2012-06-04)

Module 4

4 June 2012

Module 4

String Contention Procedures

This module describes situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or
2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.

(In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.)

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.

Applications for identical gTLD strings will be automatically assigned to a contention set. For example, if Applicant A and Applicant B both apply for .TLDSTRING, they will be identified as being in a contention set. Such testing for identical strings also takes into consideration the code point variants listed in any relevant IDN table. That is, two or more applicants whose applied-for strings or designated variants are variant strings according to an IDN table submitted to ICANN would be considered in direct contention with one another. For example, if one applicant applies for string A and another applies for string B, and strings A and B are variant TLD strings as defined in Module 1, then the two applications are in direct contention.

The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets among applications that have direct or indirect contention relationships with one another.

Two strings are in **direct contention** if they are identical or similar to one another. More than two applicants might be represented in a direct contention situation: if four different applicants applied for the same gTLD string, they would all be in direct contention with one another.

Two strings are in **indirect contention** if they are both in direct contention with a third string, but not with one another. The example that follows explains direct and indirect contention in greater detail.

In Figure 4-1, Strings A and B are an example of direct contention. Strings C and G are an example of indirect contention. C and G both contend with B, but not with one another. The figure as a whole is one contention set. A contention set consists of all applications that are linked by string contention to one another, directly or indirectly.

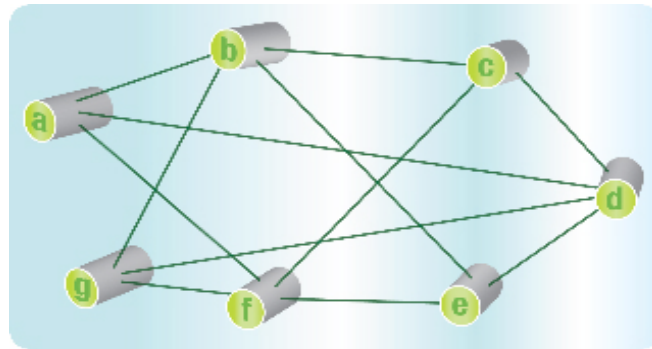


Figure 4-1 – This diagram represents one contention set, featuring both directly and indirectly contending strings.

While preliminary contention sets are determined during Initial Evaluation, the final configuration of the contention sets can only be established once the evaluation and dispute resolution process stages have concluded. This is because any application excluded through those processes might modify a contention set identified earlier.

A contention set may be augmented, split into two sets, or eliminated altogether as a result of an Extended Evaluation or dispute resolution proceeding. The composition of a contention set may also be modified as some applications may be voluntarily withdrawn throughout the process.

Refer to Figure 4-2: In contention set 1, applications D and G are eliminated. Application A is the only remaining application, so there is no contention left to resolve.

In contention set 2, all applications successfully complete Extended Evaluation and Dispute Resolution, so the original contention set remains to be resolved.

In contention set 3, application F is eliminated. Since application F was in direct contention with E and J, but E and J are not in contention with one other, the original contention set splits into two sets: one containing E and K in direct contention, and one containing I and J.

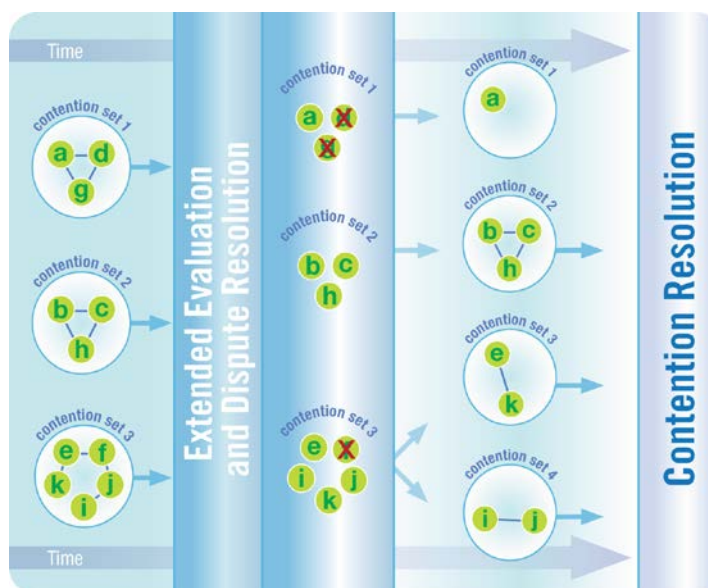


Figure 4-2 – Resolution of string contention cannot begin until all applicants within a contention set have completed all applicable previous stages.

The remaining contention cases must then be resolved through community priority evaluation or by other means, depending on the circumstances. In the string contention resolution stage, ICANN addresses each contention set to achieve an unambiguous resolution.

As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

4.1.2 Impact of String Confusion Dispute Resolution Proceedings on Contention Sets

If an applicant files a string confusion objection against another application (refer to Module 3), and the panel finds that user confusion is probable (that is, finds in favor of the objector), the two applications will be placed in direct contention with each other. Thus, the outcome of a dispute resolution proceeding based on a string confusion objection would be a new contention set structure for the relevant applications, augmenting the original contention set.

If an applicant files a string confusion objection against another application, and the panel finds that string

confusion does not exist (that is, finds in favor of the responding applicant), the two applications will not be considered in direct contention with one another.

A dispute resolution outcome in the case of a string confusion objection filed by another applicant will not result in removal of an application from a previously established contention set.

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications. An applicant may not resolve string contention by selecting a new string or by replacing itself with a joint venture. It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention. However, material changes in applications (for example, combinations of applicants to resolve contention) will require re-evaluation. This might require additional fees or evaluation in a subsequent application round. Applicants are encouraged to resolve contention by combining in a way that does not materially affect the remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation.

4.1.4 Possible Contention Resolution Outcomes

An application that has successfully completed all previous stages and is no longer part of a contention set due to changes in the composition of the contention set (as described in subsection 4.1.1) or self-resolution by applicants in the contention set (as described in subsection 4.1.3) may proceed to the next stage.

An application that prevails in a contention resolution procedure, either community priority evaluation or auction, may proceed to the next stage.

In some cases, an applicant who is not the outright winner of a string contention resolution process can still proceed. This situation is explained in the following paragraphs.

If the strings within a given contention set are all identical, the applications are in direct contention with each other and there can only be one winner that proceeds to the next step.

However, where there are both direct and indirect contention situations within a set, more than one string may survive the resolution.

For example, consider a case where string A is in contention with B, and B is in contention with C, but C is not in contention with A. If A wins the contention resolution procedure, B is eliminated but C can proceed since C is not in direct contention with the winner and both strings can coexist in the DNS without risk for confusion.

4.2 Community Priority Evaluation

Community priority evaluation will only occur if a community-based applicant selects this option. Community priority evaluation can begin once all applications in the contention set have completed all previous stages of the process.

The community priority evaluation is an independent analysis. Scores received in the applicant reviews are not carried forward to the community priority evaluation. Each application participating in the community priority evaluation begins with a score of zero.

4.2.1 Eligibility for Community Priority Evaluation

As described in subsection 1.2.3 of Module 1, all applicants are required to identify whether their application type is:

- Community-based; or
- Standard.

Applicants designating their applications as community-based are also asked to respond to a set of questions in the application form to provide relevant information if a community priority evaluation occurs.

Only community-based applicants are eligible to participate in a community priority evaluation.

At the start of the contention resolution stage, all community-based applicants within remaining contention sets will be notified of the opportunity to opt for a community priority evaluation via submission of a deposit by a specified date. Only those applications for which a deposit has been received by the deadline will be scored in the community priority evaluation. Following the evaluation, the deposit will be refunded to applicants that score 14 or higher.

Before the community priority evaluation begins, the applicants who have elected to participate may be asked to provide additional information relevant to the community priority evaluation.

4.2.2 Community Priority Evaluation Procedure

Community priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications. The panel's role is to determine whether any of the community-based applications fulfills the community priority criteria. Standard applicants within the contention set, if any, will not participate in the community priority evaluation.

If a single community-based application is found to meet the community priority criteria (see subsection 4.2.3 below), that applicant will be declared to prevail in the community priority evaluation and may proceed. If more than one community-based application is found to meet the criteria, the remaining contention between them will be resolved as follows:

- In the case where the applications are in indirect contention with one another (see subsection 4.1.1), they will both be allowed to proceed to the next stage. In this case, applications that are in direct contention with any of these community-based applications will be eliminated.
- In the case where the applications are in direct contention with one another, these applicants will proceed to an auction. If all parties agree and present a joint request, ICANN may postpone the auction for a three-month period while the parties attempt to reach a settlement before proceeding to auction. This is a one-time option; ICANN will grant no more than one such request for each set of contending applications.

If none of the community-based applications are found to meet the criteria, then all of the parties in the contention set (both standard and community-based applicants) will proceed to an auction.

Results of each community priority evaluation will be posted when completed.

Applicants who are eliminated as a result of a community priority evaluation are eligible for a partial refund of the gTLD evaluation fee (see Module 1).

4.2.3 Community Priority Evaluation Criteria

The Community Priority Panel will review and score the one or more community-based applications having elected the community priority evaluation against four criteria as listed below.

The scoring process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). This calls for a holistic approach, taking multiple criteria into account, as reflected in the process. The scoring will be performed by a panel and be based on information provided in the application plus other relevant information available (such as public information regarding the community represented). The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.

It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria below. Accordingly, a finding by the panel that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid.

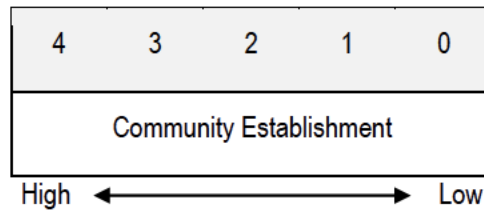
The sequence of the criteria reflects the order in which they will be assessed by the panel. The utmost care has been taken to avoid any “double-counting” - any negative aspect found in assessing an application for one criterion

should only be counted there and should not affect the assessment for other criteria.

An application must score at least 14 points to prevail in a community priority evaluation. The outcome will be determined according to the procedure described in subsection 4.2.2.

Criterion #1: Community Establishment (0-4 points)

A maximum of 4 points is possible on the Community Establishment criterion:



As measured by:

A. Delineation (2)

2	1	0
Clearly delineated, organized, and pre-existing community.	Clearly delineated and pre-existing community, but not fulfilling the requirements for a score of 2.	Insufficient delineation and pre-existence for a score of 1.

B. Extension (2)

2	1	0
Community of considerable size and longevity.	Community of either considerable size or longevity, but not fulfilling the requirements for a score of 2.	Community of neither considerable size nor longevity.

This section relates to the community as explicitly identified and defined according to statements in the application. (The implicit reach of the applied-for string is not

considered here, but taken into account when scoring Criterion #2, "Nexus between Proposed String and Community.")

Criterion 1 Definitions

- "Community" - Usage of the expression "community" has evolved considerably from its Latin origin – "communitas" meaning "fellowship" – while still implying more of cohesion than a mere commonality of interest. Notably, as "community" is used throughout the application, there should be:
(a) an awareness and recognition of a community among its members; (b) some understanding of the community's existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.
- "Delineation" relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low.
- "Pre-existing" means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007.
- "Organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.
- "Extension" relates to the dimensions of the community, regarding its number of members, geographical reach, and foreseeable activity lifetime, as further explained in the following.
- "Size" relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers - a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have "only" some hundred members although well spread over the globe, just to mention some examples - all these can be regarded as of "considerable size."

- "Longevity" means that the pursuits of a community are of a lasting, non-transient nature.

Criterion 1 Guidelines

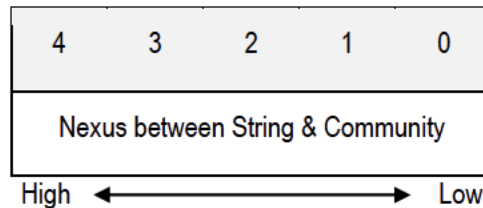
With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both "Delineation" and "Extension."

With respect to "Delineation," if an application satisfactorily demonstrates all three relevant parameters (delineation, pre-existing and organized), then it scores a 2.

With respect to "Extension," if an application satisfactorily demonstrates both community size and longevity, it scores a 2.

Criterion #2: Nexus between Proposed String and Community (0-4 points)

A maximum of 4 points is possible on the Nexus criterion:



As measured by:

A. Nexus (3)

3	2	0
The string matches the name of the community or is a well-known short-form or abbreviation of the community	String identifies the community, but does not qualify for a score of 3.	String nexus does not fulfill the requirements for a score of 2.

3	2	0
---	---	---

name.

B. Uniqueness (1)

1	0
---	---

String has no other significant meaning beyond identifying the community described in the application.

String does not fulfill the requirement for a score of 1.

This section evaluates the relevance of the string to the specific community that it claims to represent.

Criterion 2 Definitions

- "Name" of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.
- "Identify" means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.

Criterion 2 Guidelines

With respect to "Nexus," for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification / name of the community.

With respect to "Nexus," for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for ".TENNIS") then it would not qualify for a 2.

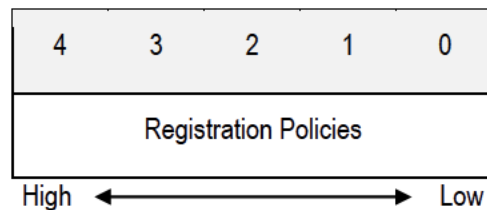
With respect to "Uniqueness," "significant meaning" relates to the public in general, with consideration of the community language context added.

"Uniqueness" will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrasing "...beyond identifying the community" in the score of 1 for "uniqueness" implies a requirement that the string does identify the community, i.e. scores 2 or 3 for "Nexus," in order to be eligible for a score of 1 for "Uniqueness."

It should be noted that "Uniqueness" is only about the *meaning* of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."

Criterion #3: Registration Policies (0-4 points)

A maximum of 4 points is possible on the Registration Policies criterion:



As measured by:

A. Eligibility (1)

1	0
Eligibility restricted to community members.	Largely unrestricted approach to eligibility.

B. Name selection (1)

1	0
Policies include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

C. Content and use (1)

1	0
Policies include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

D. Enforcement (1)

1	0
Policies include specific enforcement measures (e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms.	Policies do not fulfill the requirements for a score of 1.

This section evaluates the applicant's registration policies as indicated in the application. Registration policies are the conditions that the future registry will set for prospective registrants, i.e. those desiring to register second-level domain names under the registry.

Criterion 3 Definitions

- "Eligibility" means the qualifications that entities or individuals must have in order to be allowed as registrants by the registry.
- "Name selection" means the conditions that must be fulfilled for any second-level domain name to be deemed acceptable by the registry.
- "Content and use" means the restrictions stipulated by the registry as to the content provided in and the use of any second-level domain name in the registry.
- "Enforcement" means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

Criterion 3 Guidelines

With respect to "Eligibility," the limitation to community "members" can invoke a formal membership but can also be satisfied in other ways, depending on the structure and orientation of the community at hand. For example, for a geographic location community TLD, a limitation to members of the community can be achieved by requiring that the registrant's physical address is within the boundaries of the location.

With respect to "Name selection," "Content and use," and "Enforcement," scoring of applications against these sub-criteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.

Criterion #4: Community Endorsement (0-4 points)

4	3	2	1	0	
Community Endorsement					
High		←————→			Low

As measured by:

A. Support (2)

2	1	0
Applicant is, or has documented support from, the recognized community institution(s)/ member organization(s) or has otherwise documented authority to represent the community.	Documented support from at least one group with relevance, but insufficient support for a score of 2.	Insufficient proof of support for a score of 1.

B. Opposition (2)

2	1	0
No opposition of relevance.	Relevant opposition from one group of non-negligible size.	Relevant opposition from two or more groups of non-negligible size.

This section evaluates community support and/or opposition to the application. Support and opposition will be scored in relation to the communities explicitly addressed as stated in the application, with due regard for the communities implicitly addressed by the string.

Criterion 4 Definitions

- "Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by

the community members as representative of the community.

- "Relevance" and "relevant" refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied-for string would be considered relevant.

Criterion 4 Guidelines

With respect to "Support," it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations.

Also with respect to "Support," the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.

The applicant will score a 1 for "Support" if it does not have support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application. A 0 will be scored on "Support" if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community. It should be noted, however, that documented support from groups or communities that may be seen as implicitly addressed but have completely different orientations compared to the applicant community will not be required for a score of 2 regarding support.

To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.

When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed

in this context. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for “Opposition.” To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.

4.3 Auction: Mechanism of Last Resort

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

An auction will not take place to resolve contention in the case where the contending applications are for geographic names (as defined in Module 2). In this case, the applications will be suspended pending resolution by the applicants.

An auction will take place, where contention has not already been resolved, in the case where an application for a geographic name is in a contention set with applications for similar strings that have not been identified as geographic names.

In practice, ICANN expects that most contention cases will be resolved through other means before reaching the auction stage. However, there is a possibility that significant funding will accrue to ICANN as a result of one or more auctions.¹

¹ The purpose of an auction is to resolve contention in a clear, objective manner. It is planned that costs of the new gTLD program will offset by fees, so any funds coming from a last resort contention resolution mechanism such as auctions would result (after paying for the auction process) in additional funding. Any proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that supports directly ICANN's Mission and Core Values and also allows ICANN to maintain its not for profit status.

Possible uses of auction funds include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants (ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or establishment of a security fund to expand use of secure protocols, conduct research, and support standards development organizations in accordance with ICANN's security and stability mission.

4.3.1 Auction Procedures

An auction of two or more applications within a contention set is conducted as follows. The auctioneer successively increases the prices associated with applications within the contention set, and the respective applicants indicate their willingness to pay these prices. As the prices rise, applicants will successively choose to exit from the auction. When a sufficient number of applications have been eliminated so that no direct contentions remain (i.e., the remaining applications are no longer in contention with one another and all the relevant strings can be delegated as TLDs), the auction will be deemed to conclude. At the auction's conclusion, the applicants with remaining applications will pay the resulting prices and proceed toward delegation. This procedure is referred to as an "ascending-clock auction."

This section provides applicants an informal introduction to the practicalities of participation in an ascending-clock auction. It is intended only as a general introduction and is only preliminary. The detailed set of Auction Rules will be available prior to the commencement of any auction proceedings. If any conflict arises between this module and the auction rules, the auction rules will prevail.

For simplicity, this section will describe the situation where a contention set consists of two or more applications for identical strings.

All auctions will be conducted over the Internet, with participants placing their bids remotely using a web-based software system designed especially for auction. The auction software system will be compatible with current versions of most prevalent browsers, and will not require the local installation of any additional software.

Auction participants ("bidders") will receive instructions for access to the online auction site. Access to the site will be password-protected and bids will be encrypted through SSL. If a bidder temporarily loses connection to the Internet, that bidder may be permitted to submit its bids in a given auction round by fax, according to procedures described

The amount of funding resulting from auctions, if any, will not be known until all relevant applications have completed this step. Thus, a detailed mechanism for allocation of these funds is not being created at present. However, a process can be pre-established to enable community consultation in the event that such funds are collected. This process will include, at a minimum, publication of data on any funds collected, and public comment on any proposed models.

in the auction rules. The auctions will generally be conducted to conclude quickly, ideally in a single day.

The auction will be carried out in a series of auction rounds, as illustrated in Figure 4-3. The sequence of events is as follows:

1. For each auction round, the auctioneer will announce in advance: (1) the start-of-round price, (2) the end-of-round price, and (3) the starting and ending times of the auction round. In the first auction round, the start-of-round price for all bidders in the auction will be USD 0. In later auction rounds, the start-of-round price will be its end-of-round price from the previous auction round.

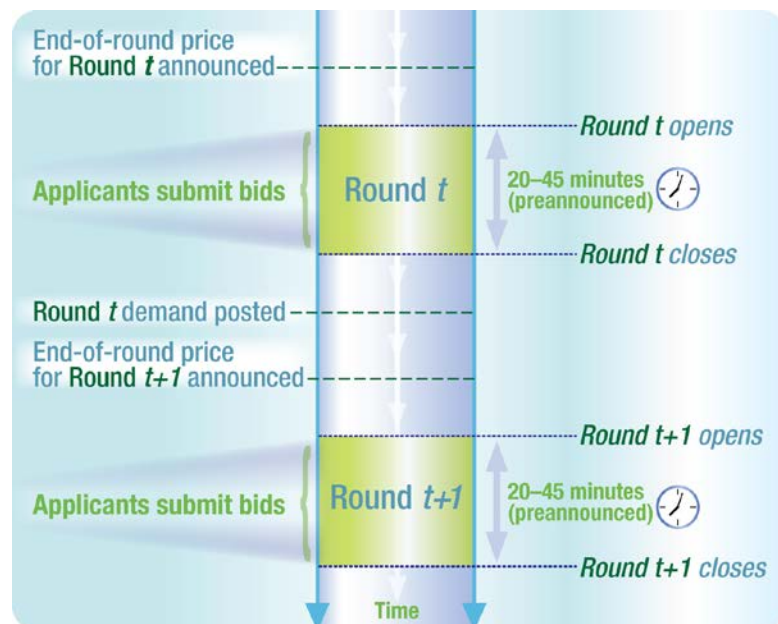


Figure 4-3 – Sequence of events during an ascending-clock auction.

2. During each auction round, bidders will be required to submit a bid or bids representing their willingness to pay within the range of intermediate prices between the start-of-round and end-of-round prices. In this way a bidder indicates its willingness to stay in the auction at all prices through and including the end-of-auction round price, or its wish to exit the auction at a price less than the end-of-auction round price, called the exit bid.
3. Exit is irrevocable. If a bidder exited the auction in a previous auction round, the bidder is not permitted to re-enter in the current auction round.

4. Bidders may submit their bid or bids at any time during the auction round.
5. Only bids that comply with all aspects of the auction rules will be considered valid. If more than one valid bid is submitted by a given bidder within the time limit of the auction round, the auctioneer will treat the last valid submitted bid as the actual bid.
6. At the end of each auction round, bids become the bidders' legally-binding offers to secure the relevant gTLD strings at prices up to the respective bid amounts, subject to closure of the auction in accordance with the auction rules. In later auction rounds, bids may be used to exit from the auction at subsequent higher prices.
7. After each auction round, the auctioneer will disclose the aggregate number of bidders remaining in the auction at the end-of-round prices for the auction round, and will announce the prices and times for the next auction round.
 - Each bid should consist of a single price associated with the application, and such price must be greater than or equal to the start-of-round price.
 - If the bid amount is strictly less than the end-of-round price, then the bid is treated as an exit bid at the specified amount, and it signifies the bidder's binding commitment to pay up to the bid amount if its application is approved.
 - If the bid amount is greater than or equal to the end-of-round price, then the bid signifies that the bidder wishes to remain in the auction at all prices in the current auction round, and it signifies the bidder's binding commitment to pay up to the end-of-round price if its application is approved. Following such bid, the application cannot be eliminated within the current auction round.
 - To the extent that the bid amount exceeds the end-of-round price, then the bid is also treated as a proxy bid to be carried forward to the next auction round. The bidder will be permitted to change the proxy bid amount in the next auction round, and the amount of the proxy bid will not constrain the bidder's ability to submit any valid bid amount in the next auction round.

- No bidder is permitted to submit a bid for any application for which an exit bid was received in a prior auction round. That is, once an application has exited the auction, it may not return.
 - If no valid bid is submitted within a given auction round for an application that remains in the auction, then the bid amount is taken to be the amount of the proxy bid, if any, carried forward from the previous auction round or, if none, the bid is taken to be an exit bid at the start-of-round price for the current auction round.
8. This process continues, with the auctioneer increasing the price range for each given TLD string in each auction round, until there is one remaining bidder at the end-of-round price. After an auction round in which this condition is satisfied, the auction concludes and the auctioneer determines the clearing price. The last remaining application is deemed the successful application, and the associated bidder is obligated to pay the clearing price.

Figure 4-4 illustrates how an auction for five contending applications might progress.

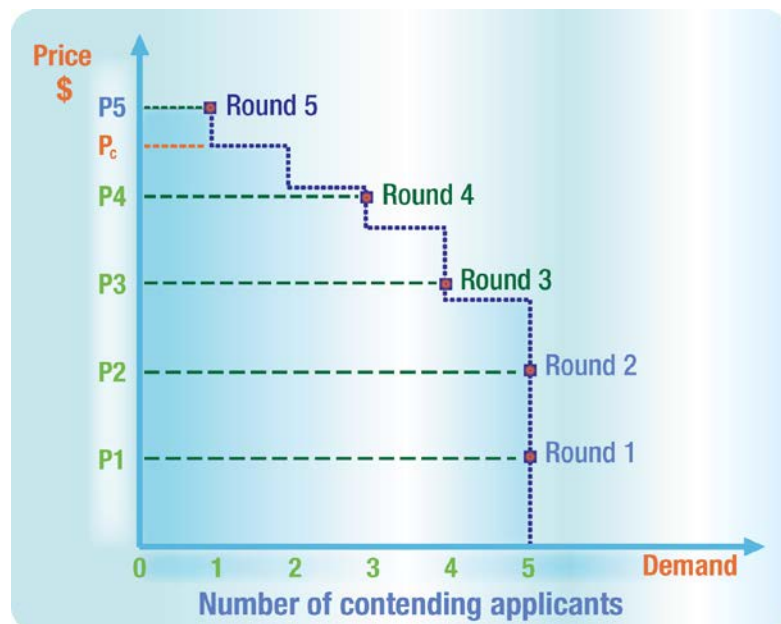


Figure 4-4 – Example of an auction for five mutually-contending applications.

- Before the first auction round, the auctioneer announces the end-of-round price P_1 .
- During Auction round 1, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least P_1 . Since the aggregate demand exceeds one, the auction proceeds to Auction round 2. The auctioneer discloses that five contending applications remained at P_1 and announces the end-of-round price P_2 .
- During Auction round 2, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least P_2 . The auctioneer discloses that five contending applications remained at P_2 and announces the end-of-round price P_3 .
- During Auction round 3, one of the bidders submits an exit bid at slightly below P_3 , while the other four bidders submit bids of at least P_3 . The auctioneer discloses that four contending applications remained at P_3 and announces the end-of-round price P_4 .
- During Auction round 4, one of the bidders submits an exit bid midway between P_3 and P_4 , while the other three remaining bidders submit bids of at least P_4 . The auctioneer discloses that three contending applications remained at P_4 and announces the end-of-auction round price P_5 .
- During Auction round 5, one of the bidders submits an exit bid at slightly above P_4 , and one of the bidders submits an exit bid at P_c midway between P_4 and P_5 . The final bidder submits a bid greater than P_c . Since the aggregate demand at P_5 does not exceed one, the auction concludes in Auction round 5. The application associated with the highest bid in Auction round 5 is deemed the successful application. The clearing price is P_c , as this is the lowest price at which aggregate demand can be met.

To the extent possible, auctions to resolve multiple string contention situations will be conducted simultaneously.

4.3.1.1 Currency

For bids to be comparable, all bids in the auction will be submitted in any integer (whole) number of US dollars.

4.3.1.2 Fees

A bidding deposit will be required of applicants participating in the auction, in an amount to be determined. The bidding deposit must be transmitted by wire transfer to a specified bank account specified by ICANN or its auction provider at a major international bank, to be received in advance of the auction date. The amount of the deposit will determine a bidding limit for each bidder: the bidding deposit will equal 10% of the bidding limit; and the bidder will not be permitted to submit any bid in excess of its bidding limit.

In order to avoid the need for bidders to pre-commit to a particular bidding limit, bidders may be given the option of making a specified deposit that will provide them with unlimited bidding authority for a given application. The amount of the deposit required for unlimited bidding authority will depend on the particular contention set and will be based on an assessment of the possible final prices within the auction.

All deposits from non-defaulting losing bidders will be returned following the close of the auction.

4.3.2 Winning Bid Payments

Any applicant that participates in an auction will be required to sign a bidder agreement that acknowledges its rights and responsibilities in the auction, including that its bids are legally binding commitments to pay the amount bid if it wins (i.e., if its application is approved), and to enter into the prescribed registry agreement with ICANN— together with a specified penalty for defaulting on payment of its winning bid or failing to enter into the required registry agreement.

The winning bidder in any auction will be required to pay the full amount of the final price within 20 business days of the end of the auction. Payment is to be made by wire transfer to the same international bank account as the bidding deposit, and the applicant's bidding deposit will be credited toward the final price.

In the event that a bidder anticipates that it would require a longer payment period than 20 business days due to verifiable government-imposed currency restrictions, the bidder may advise ICANN well in advance of the auction and ICANN will consider applying a longer payment period to all bidders within the same contention set.

Any winning bidder for whom the full amount of the final price is not received within 20 business days of the end of an auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that receipt of full payment is imminent.

Any winning bidder for whom the full amount of the final price is received within 20 business days of the end of an auction retains the obligation to execute the required registry agreement within 90 days of the end of auction. Such winning bidder who does not execute the agreement within 90 days of the end of the auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that execution of the registry agreement is imminent.

4.3.3 Post-Default Procedures

Once declared in default, any winning bidder is subject to immediate forfeiture of its position in the auction and assessment of default penalties. After a winning bidder is declared in default, the remaining bidders will receive an offer to have their applications accepted, one at a time, in descending order of their exit bids. In this way, the next bidder would be declared the winner subject to payment of its last bid price. The same default procedures and penalties are in place for any runner-up bidder receiving such an offer.

Each bidder that is offered the relevant gTLD will be given a specified period—typically, four business days—to respond as to whether it wants the gTLD. A bidder who responds in the affirmative will have 20 business days to submit its full payment. A bidder who declines such an offer cannot revert on that statement, has no further obligations in this context and will not be considered in default.

The penalty for defaulting on a winning bid will equal 10% of the defaulting bid.² Default penalties will be charged against any defaulting applicant's bidding deposit before the associated bidding deposit is returned.

² If bidders were given the option of making a specified deposit that provided them with unlimited bidding authority for a given application and if the winning bidder utilized this option, then the penalty for defaulting on a winning bid will be the lesser of the following: (1) 10% of the defaulting bid, or (2) the specified deposit amount that provided the bidder with unlimited bidding authority.

4.4 Contention Resolution and Contract Execution

An applicant that has been declared the winner of a contention resolution process will proceed by entering into the contract execution step. (Refer to section 5.1 of Module 5.)

If a winner of the contention resolution procedure has not executed a contract within 90 calendar days of the decision, ICANN has the right to deny that application and extend an offer to the runner-up applicant, if any, to proceed with its application. For example, in an auction, another applicant who would be considered the runner-up applicant might proceed toward delegation. This offer is at ICANN's option only. The runner-up applicant in a contention resolution process has no automatic right to an applied-for gTLD string if the first place winner does not execute a contract within a specified time. If the winning applicant can demonstrate that it is working diligently and in good faith toward successful completion of the steps necessary for entry into the registry agreement, ICANN may extend the 90-day period at its discretion. Runner-up applicants have no claim of priority over the winning application, even after what might be an extended period of negotiation.

DRAFT - New gTLD Program - String Contention

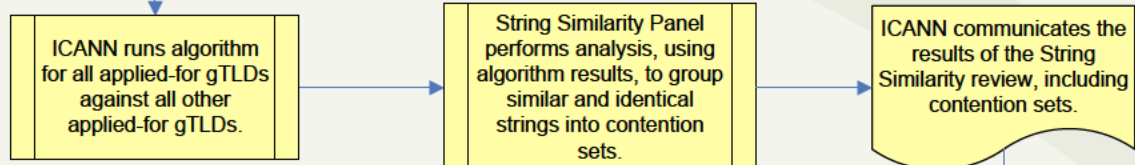


ICANN

Application/
Admin Check



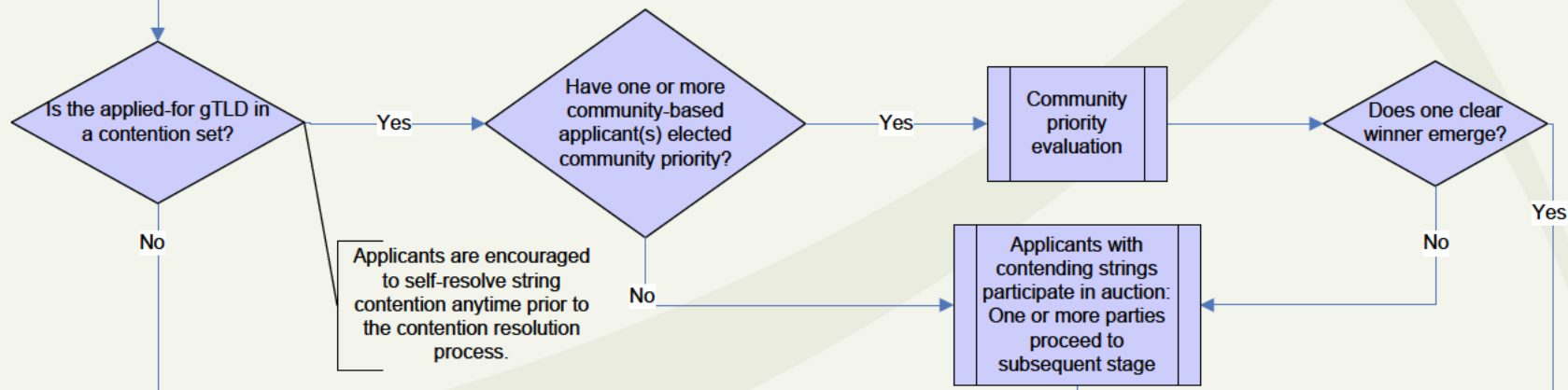
Initial Evaluation (IE)
String Review



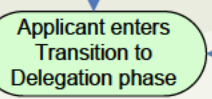
IE + EE
+ Dispute Res

IE, Extended Evaluation (EE), and Dispute Resolution continue. Some applications may not pass certain elements of the review process, **which may alter the contention sets.**

String Contention



Transition to
Delegation





gTLD Applicant Guidebook

(v. 2012-06-04)

Module 5

4 June 2012

Module 5

Transition to Delegation

This module describes the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone.

5.1 Registry Agreement

All applicants that have successfully completed the evaluation process—including, if necessary, the dispute resolution and string contention processes—are required to enter into a registry agreement with ICANN before proceeding to delegation.

After the close of each stage in the process, ICANN will send a notification to those successful applicants that are eligible for execution of a registry agreement at that time.

To proceed, applicants will be asked to provide specified information for purposes of executing the registry agreement:

1. Documentation of the applicant's continued operations instrument (see Specification 8 to the agreement).
2. Confirmation of contact information and signatory to the agreement.
3. Notice of any material changes requested to the terms of the agreement.
4. The applicant must report: (i) any ownership interest it holds in any registrar or reseller of registered names, (ii) if known, any ownership interest that a registrar or reseller of registered names holds in the applicant, and (iii) if the applicant controls, is controlled by, or is under common control with any registrar or reseller of registered names. ICANN retains the right to refer an application to a competition authority prior to entry into the registry agreement if it is determined that the registry-registrar cross-ownership

arrangements might raise competition issues. For this purpose "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

To ensure that an applicant continues to be a going concern in good legal standing, ICANN reserves the right to ask the applicant to submit additional updated documentation and information before entering into the registry agreement.

ICANN will begin processing registry agreements one month after the date of the notification to successful applicants. Requests will be handled in the order the complete information is received.

Generally, the process will include formal approval of the agreement without requiring additional Board review, so long as: the application passed all evaluation criteria; there are no material changes in circumstances; and there are no material changes to the base agreement. There may be other cases where the Board requests review of an application.

Eligible applicants are expected to have executed the registry agreement within nine (9) months of the notification date. Failure to do so may result in loss of eligibility, at ICANN's discretion. An applicant may request an extension of this time period for up to an additional nine (9) months if it can demonstrate, to ICANN's reasonable satisfaction, that it is working diligently and in good faith toward successfully completing the steps necessary for entry into the registry agreement.

The registry agreement can be reviewed in the attachment to this module. Certain provisions in the agreement are labeled as applicable to governmental and intergovernmental entities only. Private entities, even if supported by a government or IGO, would not ordinarily be eligible for these special provisions.

All successful applicants are expected to enter into the agreement substantially as written. Applicants may request and negotiate terms by exception; however, this extends

the time involved in executing the agreement. In the event that material changes to the agreement are requested, these must first be approved by the ICANN Board of Directors before execution of the agreement.

ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.

5.2 Pre-Delegation Testing

Each applicant will be required to complete pre-delegation technical testing as a prerequisite to delegation into the root zone. This pre-delegation test must be completed within the time period specified in the registry agreement.

The purpose of the pre-delegation technical test is to verify that the applicant has met its commitment to establish registry operations in accordance with the technical and operational criteria described in Module 2.

The test is also intended to indicate that the applicant can operate the gTLD in a stable and secure manner. All applicants will be tested on a pass/fail basis according to the requirements that follow.

The test elements cover both the DNS server operational infrastructure and registry system operations. In many cases the applicant will perform the test elements as instructed and provide documentation of the results to ICANN to demonstrate satisfactory performance. At ICANN's discretion, aspects of the applicant's self-certification documentation can be audited either on-site at the services delivery point of the registry or elsewhere as determined by ICANN.

5.2.1 Testing Procedures

The applicant may initiate the pre-delegation test by submitting to ICANN the Pre-Delegation form and accompanying documents containing all of the following information:

- All name server names and IPv4/IPv6 addresses to be used in serving the new TLD data;
- If using anycast, the list of names and IPv4/IPv6 unicast addresses allowing the identification of each individual server in the anycast sets;
- If IDN is supported, the complete IDN tables used in the registry system;
- A test zone for the new TLD must be signed at test time and the valid key-set to be used at the time of testing must be provided to ICANN in the documentation, as well as the TLD DNSSEC Policy Statement (DPS);
- The executed agreement between the selected escrow agent and the applicant; and
- Self-certification documentation as described below for each test item.

ICANN will review the material submitted and in some cases perform tests in addition to those conducted by the applicant. After testing, ICANN will assemble a report with the outcome of the tests and provide that report to the applicant.

Any clarification request, additional information request, or other request generated in the process will be highlighted and listed in the report sent to the applicant.

ICANN may request the applicant to complete load tests considering an aggregated load where a single entity is performing registry services for multiple TLDs.

Once an applicant has met all of the pre-delegation testing requirements, it is eligible to request delegation of its applied-for gTLD.

If an applicant does not complete the pre-delegation steps within the time period specified in the registry agreement, ICANN reserves the right to terminate the registry agreement.

5.2.2 Test Elements: DNS Infrastructure

The first set of test elements concerns the DNS infrastructure of the new gTLD. In all tests of the DNS infrastructure, all requirements are independent of whether IPv4 or IPv6 is used. All tests shall be done both over IPv4 and IPv6, with reports providing results according to both protocols.

UDP Support -- The DNS infrastructure to which these tests apply comprises the complete set of servers and network infrastructure to be used by the chosen providers to deliver DNS service for the new gTLD to the Internet. The documentation provided by the applicant must include the results from a system performance test indicating available network and server capacity and an estimate of expected capacity during normal operation to ensure stable service as well as to adequately address Distributed Denial of Service (DDoS) attacks.

Self-certification documentation shall include data on load capacity, latency and network reachability.

Load capacity shall be reported using a table, and a corresponding graph, showing percentage of queries responded against an increasing number of queries per second generated from local (to the servers) traffic generators. The table shall include at least 20 data points and loads of UDP-based queries that will cause up to 10% query loss against a randomly selected subset of servers within the applicant's DNS infrastructure. Responses must either contain zone data or be NXDOMAIN or NODATA responses to be considered valid.

Query latency shall be reported in milliseconds as measured by DNS probes located just outside the border routers of the physical network hosting the name servers, from a network topology point of view.

Reachability will be documented by providing information on the transit and peering arrangements for the DNS server locations, listing the AS numbers of the transit providers or peers at each point of presence and available bandwidth at those points of presence.

TCP support -- TCP transport service for DNS queries and responses must be enabled and provisioned for expected load. ICANN will review the capacity self-certification documentation provided by the applicant and will perform TCP reachability and transaction capability tests across a

randomly selected subset of the name servers within the applicant's DNS infrastructure. In case of use of anycast, each individual server in each anycast set will be tested.

Self-certification documentation shall include data on load capacity, latency and external network reachability.

Load capacity shall be reported using a table, and a corresponding graph, showing percentage of queries that generated a valid (zone data, NODATA, or NXDOMAIN) response against an increasing number of queries per second generated from local (to the name servers) traffic generators. The table shall include at least 20 data points and loads that will cause up to 10% query loss (either due to connection timeout or connection reset) against a randomly selected subset of servers within the applicant's DNS infrastructure.

Query latency will be reported in milliseconds as measured by DNS probes located just outside the border routers of the physical network hosting the name servers, from a network topology point of view.

Reachability will be documented by providing records of TCP-based DNS queries from nodes external to the network hosting the servers. These locations may be the same as those used for measuring latency above.

DNSSEC support -- Applicant must demonstrate support for EDNS(0) in its server infrastructure, the ability to return correct DNSSEC-related resource records such as DNSKEY, RRSIG, and NSEC/NSEC3 for the signed zone, and the ability to accept and publish DS resource records from second-level domain administrators. In particular, the applicant must demonstrate its ability to support the full life cycle of KSK and ZSK keys. ICANN will review the self-certification materials as well as test the reachability, response sizes, and DNS transaction capacity for DNS queries using the EDNS(0) protocol extension with the "DNSSEC OK" bit set for a randomly selected subset of all name servers within the applicant's DNS infrastructure. In case of use of anycast, each individual server in each anycast set will be tested.

Load capacity, query latency, and reachability shall be documented as for UDP and TCP above.

5.2.3 Test Elements: Registry Systems

As documented in the registry agreement, registries must provide support for EPP within their Shared Registration System, and provide Whois service both via port 43 and a web interface, in addition to support for the DNS. This section details the requirements for testing these registry systems.

System performance -- The registry system must scale to meet the performance requirements described in Specification 10 of the registry agreement and ICANN will require self-certification of compliance. ICANN will review the self-certification documentation provided by the applicant to verify adherence to these minimum requirements.

Whois support -- Applicant must provision Whois services for the anticipated load. ICANN will verify that Whois data is accessible over IPv4 and IPv6 via both TCP port 43 and via a web interface and review self-certification documentation regarding Whois transaction capacity. Response format according to Specification 4 of the registry agreement and access to Whois (both port 43 and via web) will be tested by ICANN remotely from various points on the Internet over both IPv4 and IPv6.

Self-certification documents shall describe the maximum number of queries per second successfully handled by both the port 43 servers as well as the web interface, together with an applicant-provided load expectation.

Additionally, a description of deployed control functions to detect and mitigate data mining of the Whois database shall be documented.

EPP Support -- As part of a shared registration service, applicant must provision EPP services for the anticipated load. ICANN will verify conformance to appropriate RFCs (including EPP extensions for DNSSEC). ICANN will also review self-certification documentation regarding EPP transaction capacity.

Documentation shall provide a maximum Transaction per Second rate for the EPP interface with 10 data points corresponding to registry database sizes from 0 (empty) to the expected size after one year of operation, as determined by applicant.

Documentation shall also describe measures taken to handle load during initial registry operations, such as a land-rush period.

IPv6 support -- The ability of the registry to support registrars adding, changing, and removing IPv6 DNS records supplied by registrants will be tested by ICANN. If the registry supports EPP access via IPv6, this will be tested by ICANN remotely from various points on the Internet.

DNSSEC support -- ICANN will review the ability of the registry to support registrars adding, changing, and removing DNSSEC-related resource records as well as the registry's overall key management procedures. In particular, the applicant must demonstrate its ability to support the full life cycle of key changes for child domains. Inter-operation of the applicant's secure communication channels with the IANA for trust anchor material exchange will be verified.

The practice and policy document (also known as the DNSSEC Policy Statement or DPS), describing key material storage, access and usage for its own keys is also reviewed as part of this step.

IDN support -- ICANN will verify the complete IDN table(s) used in the registry system. The table(s) must comply with the guidelines in <http://iana.org/procedures/idn-repository.html>.

Requirements related to IDN for Whois are being developed. After these requirements are developed, prospective registries will be expected to comply with published IDN-related Whois requirements as part of pre-delegation testing.

Escrow deposit -- The applicant-provided samples of data deposit that include both a full and an incremental deposit showing correct type and formatting of content will be reviewed. Special attention will be given to the agreement with the escrow provider to ensure that escrowed data can be released within 24 hours should it be necessary. ICANN may, at its option, ask an independent third party to demonstrate the reconstitutability of the registry from escrowed data. ICANN may elect to test the data release process with the escrow agent.

5.3 Delegation Process

Upon notice of successful completion of the ICANN pre-delegation testing, applicants may initiate the process for delegation of the new gTLD into the root zone database.

This will include provision of additional information and completion of additional technical steps required for delegation. Information about the delegation process is available at <http://iana.org/domains/root/>.

5.4 Ongoing Operations

An applicant that is successfully delegated a gTLD will become a “Registry Operator.” In being delegated the role of operating part of the Internet’s domain name system, the applicant will be assuming a number of significant responsibilities. ICANN will hold all new gTLD operators accountable for the performance of their obligations under the registry agreement, and it is important that all applicants understand these responsibilities.

5.4.1 What is Expected of a Registry Operator

The registry agreement defines the obligations of gTLD registry operators. A breach of the registry operator’s obligations may result in ICANN compliance actions up to and including termination of the registry agreement. Prospective applicants are encouraged to review the following brief description of some of these responsibilities.

Note that this is a non-exhaustive list provided to potential applicants as an introduction to the responsibilities of a registry operator. For the complete and authoritative text, please refer to the registry agreement.

A registry operator is obligated to:

Operate the TLD in a stable and secure manner. The registry operator is responsible for the entire technical operation of the TLD. As noted in RFC 1591¹:

“The designated manager must do a satisfactory job of operating the DNS service for the domain. That is, the actual management of the assigning of domain names, delegating subdomains and operating nameservers must be done with technical competence. This includes keeping

¹ See <http://www.rfc-editor.org/rfc/rfc1591.txt>

the central IR² (in the case of top-level domains) or other higher-level domain manager advised of the status of the domain, responding to requests in a timely manner, and operating the database with accuracy, robustness, and resilience.”

The registry operator is required to comply with relevant technical standards in the form of RFCs and other guidelines. Additionally, the registry operator must meet performance specifications in areas such as system downtime and system response times (see Specifications 6 and 10 of the registry agreement).

Comply with consensus policies and temporary policies.

gTLD registry operators are required to comply with consensus policies. Consensus policies may relate to a range of topics such as issues affecting interoperability of the DNS, registry functional and performance specifications, database security and stability, or resolution of disputes over registration of domain names.

To be adopted as a consensus policy, a policy must be developed by the Generic Names Supporting Organization (GNSO)³ following the process in Annex A of the ICANN Bylaws.⁴ The policy development process involves deliberation and collaboration by the various stakeholder groups participating in the process, with multiple opportunities for input and comment by the public, and can take significant time.

Examples of existing consensus policies are the Inter-Registrar Transfer Policy (governing transfers of domain names between registrars), and the Registry Services Evaluation Policy (establishing a review of proposed new registry services for security and stability or competition concerns), although there are several more, as found at <http://www.icann.org/en/general/consensus-policies.htm>.

gTLD registry operators are obligated to comply with both existing consensus policies and those that are developed in the future. Once a consensus policy has been formally adopted, ICANN will provide gTLD registry operators with notice of the requirement to implement the new policy and the effective date.

² IR is a historical reference to “Internet Registry,” a function now performed by ICANN.

³ <http://gns0.icann.org>

⁴ <http://www.icann.org/en/general/bylaws.htm#AnnexA>

In addition, the ICANN Board may, when required by circumstances, establish a temporary policy necessary to maintain the stability or security of registry services or the DNS. In such a case, all gTLD registry operators will be required to comply with the temporary policy for the designated period of time.

For more information, see Specification 1 of the registry agreement.

Implement start-up rights protection measures. The registry operator must implement, at a minimum, a Sunrise period and a Trademark Claims service during the start-up phases for registration in the TLD, as provided in the registry agreement. These mechanisms will be supported by the established Trademark Clearinghouse as indicated by ICANN.

The Sunrise period allows eligible rightsholders an early opportunity to register names in the TLD.

The Trademark Claims service provides notice to potential registrants of existing trademark rights, as well as notice to rightsholders of relevant names registered. Registry operators may continue offering the Trademark Claims service after the relevant start-up phases have concluded.

For more information, see Specification 7 of the registry agreement and the Trademark Clearinghouse model accompanying this module.

Implement post-launch rights protection measures. The registry operator is required to implement decisions made under the Uniform Rapid Suspension (URS) procedure, including suspension of specific domain names within the registry. The registry operator is also required to comply with and implement decisions made according to the Trademark Post-Delegation Dispute Resolution Policy (PDDRP).

The required measures are described fully in the URS and PDDRP procedures accompanying this module. Registry operators may introduce additional rights protection measures relevant to the particular gTLD.

Implement measures for protection of country and territory names in the new gTLD. All new gTLD registry operators are required to provide certain minimum protections for country and territory names, including an initial reservation requirement and establishment of applicable rules and

procedures for release of these names. The rules for release can be developed or agreed to by governments, the GAC, and/or approved by ICANN after a community discussion. Registry operators are encouraged to implement measures for protection of geographical names in addition to those required by the agreement, according to the needs and interests of each gTLD's particular circumstances. (See Specification 5 of the registry agreement).

Pay recurring fees to ICANN. In addition to supporting expenditures made to accomplish the objectives set out in ICANN's mission statement, these funds enable the support required for new gTLDs, including: contractual compliance, registry liaison, increased registrar accreditations, and other registry support activities. The fees include both a fixed component (USD 25,000 annually) and, where the TLD exceeds a transaction volume, a variable fee based on transaction volume. See Article 6 of the registry agreement.

Regularly deposit data into escrow. This serves an important role in registrant protection and continuity for certain instances where the registry or one aspect of the registry operations experiences a system failure or loss of data. (See Specification 2 of the registry agreement.)

Deliver monthly reports in a timely manner. A registry operator must submit a report to ICANN on a monthly basis. The report includes registrar transactions for the month and is used by ICANN for calculation of registrar fees. (See Specification 3 of the registry agreement.)

Provide Whois service. A registry operator must provide a publicly available Whois service for registered domain names in the TLD. (See Specification 4 of the registry agreement.)

Maintain partnerships with ICANN-accredited registrars. A registry operator creates a Registry-Registrar Agreement (RRA) to define requirements for its registrars. This must include certain terms that are specified in the Registry Agreement, and may include additional terms specific to the TLD. A registry operator must provide non-discriminatory access to its registry services to all ICANN-accredited registrars with whom it has entered into an RRA, and who are in compliance with the requirements. This includes providing advance notice of pricing changes to all

registrars, in compliance with the time frames specified in the agreement. (See Article 2 of the registry agreement.)

Maintain an abuse point of contact. A registry operator must maintain and publish on its website a single point of contact responsible for addressing matters requiring expedited attention and providing a timely response to abuse complaints concerning all names registered in the TLD through all registrars of record, including those involving a reseller. A registry operator must also take reasonable steps to investigate and respond to any reports from law enforcement, governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. (See Article 2 and Specification 6 of the registry agreement.)

Cooperate with contractual compliance audits. To maintain a level playing field and a consistent operating environment, ICANN staff performs periodic audits to assess contractual compliance and address any resulting problems. A registry operator must provide documents and information requested by ICANN that are necessary to perform such audits. (See Article 2 of the registry agreement.)

Maintain a Continued Operations Instrument. A registry operator must, at the time of the agreement, have in place a continued operations instrument sufficient to fund basic registry operations for a period of three (3) years. This requirement remains in place for five (5) years after delegation of the TLD, after which time the registry operator is no longer required to maintain the continued operations instrument. (See Specification 8 to the registry agreement.)

Maintain community-based policies and procedures. If the registry operator designated its application as community-based at the time of the application, the registry operator has requirements in its registry agreement to maintain the community-based policies and procedures it specified in its application. The registry operator is bound by the Registry Restrictions Dispute Resolution Procedure with respect to disputes regarding execution of its community-based policies and procedures. (See Article 2 to the registry agreement.)

Have continuity and transition plans in place. This includes performing failover testing on a regular basis. In the event that a transition to a new registry operator becomes necessary, the registry operator is expected to cooperate

by consulting with ICANN on the appropriate successor, providing the data required to enable a smooth transition, and complying with the applicable registry transition procedures. (See Articles 2 and 4 of the registry agreement.)

Make TLD zone files available via a standardized process.

This includes provision of access to the registry's zone file to credentialed users, according to established access, file, and format standards. The registry operator will enter into a standardized form of agreement with zone file users and will accept credential information for users via a clearinghouse. (See Specification 4 of the registry agreement.)

Implement DNSSEC. The registry operator is required to sign the TLD zone files implementing Domain Name System Security Extensions (DNSSEC) in accordance with the relevant technical standards. The registry must accept public key material from registrars for domain names registered in the TLD, and publish a DNSSEC Policy Statement describing key material storage, access, and usage for the registry's keys. (See Specification 6 of the registry agreement.)

5.4.2 What is Expected of ICANN

ICANN will continue to provide support for gTLD registry operators as they launch and maintain registry operations. ICANN's gTLD registry liaison function provides a point of contact for gTLD registry operators for assistance on a continuing basis.

ICANN's contractual compliance function will perform audits on a regular basis to ensure that gTLD registry operators remain in compliance with agreement obligations, as well as investigate any complaints from the community regarding the registry operator's adherence to its contractual obligations. See <http://www.icann.org/en/compliance/> for more information on current contractual compliance activities.

ICANN's Bylaws require ICANN to act in an open and transparent manner, and to provide equitable treatment among registry operators. ICANN is responsible for maintaining the security and stability of the global Internet, and looks forward to a constructive and cooperative relationship with future gTLD registry operators in furtherance of this goal.

Draft – New gTLD Program - Transition to Delegation

(Timeframes are estimates only)

Applicant Doc Prep 1 Month

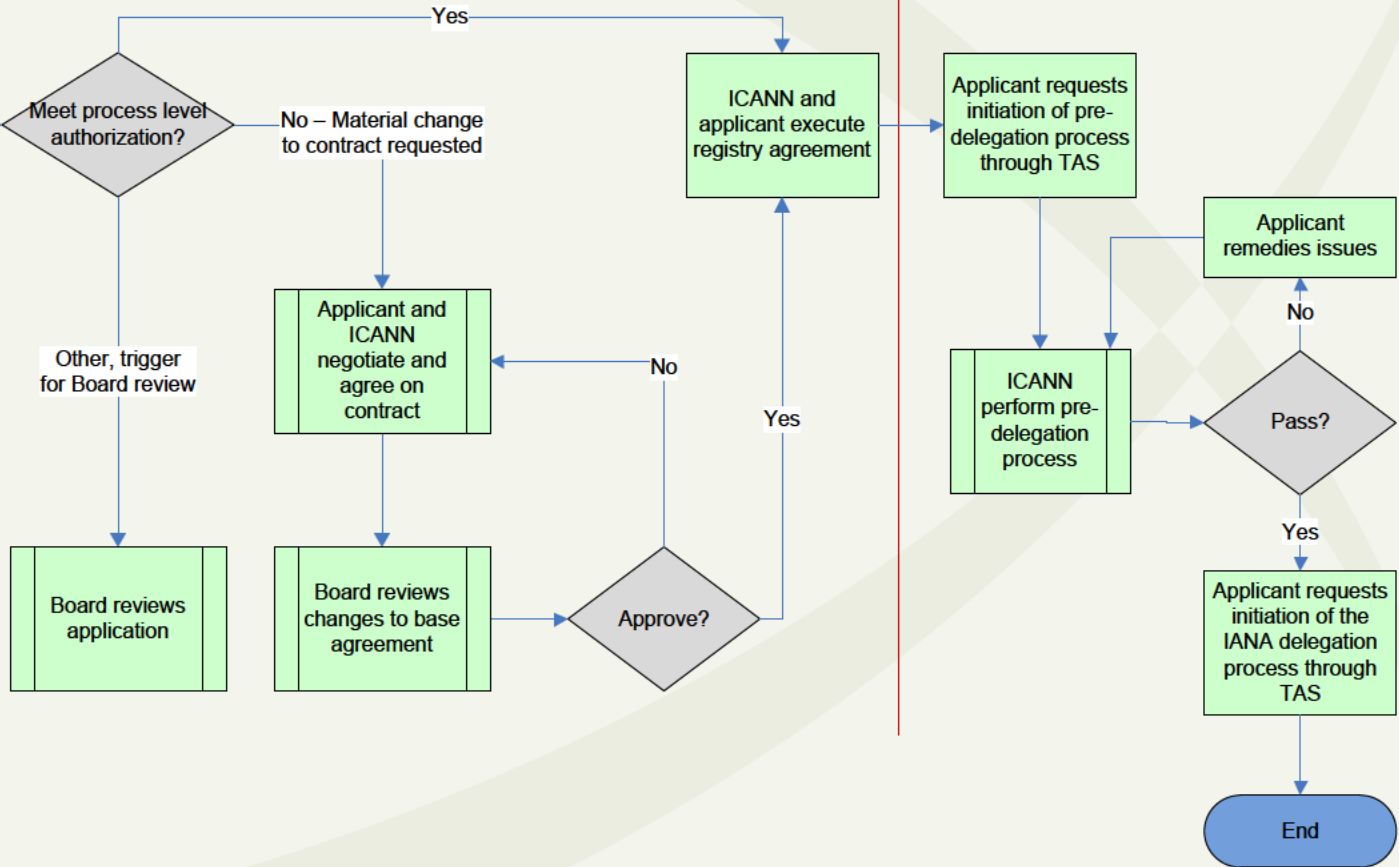
Contracting – 1 day to 9 months

Pre-Delegation Testing – 1 to 12 months

ICANN provides notice of eligibility to applicant

Applicant prepares documentation for contracting

- Includes:
- Material changes in circumstances
 - Continued Operations instrument
 - Designated contracting parties



New gTLD Agreement

This document contains the registry agreement associated with the Applicant Guidebook for New gTLDs.

Successful gTLD applicants would enter into this form of registry agreement with ICANN prior to delegation of the new gTLD. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process).

REGISTRY AGREEMENT

This REGISTRY AGREEMENT (this “Agreement”) is entered into as of _____ (the “Effective Date”) between Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation (“ICANN”), and _____, a _____ (“Registry Operator”).

ARTICLE 1.

DELEGATION AND OPERATION OF TOP-LEVEL DOMAIN; REPRESENTATIONS AND WARRANTIES

1.1 Domain and Designation. The Top-Level Domain to which this Agreement applies is _____ (the “TLD”). Upon the Effective Date and until the end of the Term (as defined in Section 4.1), ICANN designates Registry Operator as the registry operator for the TLD, subject to the requirements and necessary approvals for delegation of the TLD and entry into the root-zone.

1.2 Technical Feasibility of String. While ICANN has encouraged and will continue to encourage universal acceptance of all top-level domain strings across the Internet, certain top-level domain strings may encounter difficulty in acceptance by ISPs and webhosters and/or validation by web applications. Registry Operator shall be responsible for ensuring to its satisfaction the technical feasibility of the TLD string prior to entering into this Agreement.

1.3 Representations and Warranties.

(a) Registry Operator represents and warrants to ICANN as follows:

(i) all material information provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and such information or statements continue to be true and correct in all material respects as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN;

(ii) Registry Operator is duly organized, validly existing and in good standing under the laws of the jurisdiction set forth in the preamble hereto, and Registry Operator has all requisite power and authority and obtained all necessary approvals to enter into and duly execute and deliver this Agreement; and

(iii) Registry Operator has delivered to ICANN a duly executed instrument that secures the funds required to perform registry functions for the TLD in the event of the termination or expiration of this Agreement (the “Continued Operations Instrument”), and such instrument is a binding obligation of the parties thereto, enforceable against the parties thereto in accordance with its terms.

(b) ICANN represents and warrants to Registry Operator that ICANN is a nonprofit public benefit corporation duly organized, validly existing and in good standing under the laws of the State of California, United States of America. ICANN has all requisite power and authority and obtained all necessary corporate approvals to enter into and duly execute and deliver this Agreement.

ARTICLE 2.

COVENANTS OF REGISTRY OPERATOR

Registry Operator covenants and agrees with ICANN as follows:

2.1 Approved Services; Additional Services. Registry Operator shall be entitled to provide the Registry Services described in clauses (a) and (b) of the first paragraph of Section 2.1 in the specification at [*see specification 6*] (“Specification 6”) and such other Registry Services set forth on Exhibit A (collectively, the “Approved Services”). If Registry Operator desires to provide any Registry Service that is not an Approved Service or is a modification to an Approved Service (each, an “Additional Service”), Registry Operator shall submit a request for approval of such Additional Service pursuant to the Registry Services Evaluation Policy at <http://www.icann.org/en/registries/rsep/rsep.html>, as such policy may be amended from time to time in accordance with the bylaws of ICANN (as amended from time to time, the “ICANN Bylaws”) applicable to Consensus Policies (the “RSEP”). Registry Operator may offer Additional Services only with the written approval of ICANN, and, upon any such approval, such Additional Services shall be deemed Registry Services under this Agreement. In its reasonable discretion, ICANN may require an amendment to this Agreement reflecting the provision of any Additional Service which is approved pursuant to the RSEP, which amendment shall be in a form reasonably acceptable to the parties.

2.2 Compliance with Consensus Policies and Temporary Policies. Registry Operator shall comply with and implement all Consensus Policies and Temporary Policies found at <http://www.icann.org/general/consensus-policies.htm>, as of the Effective Date and as may in the future be developed and adopted in accordance with the ICANN Bylaws, provided such future Consensus Policies and Temporary Policies are adopted in accordance with the procedure and relate to those topics and subject to those limitations set forth at [*see specification 1*]* (“Specification 1”).

2.3 Data Escrow. Registry Operator shall comply with the registry data escrow procedures posted at [*see specification 2*]*.

2.4 Monthly Reporting. Within twenty (20) calendar days following the end of each calendar month, Registry Operator shall deliver to ICANN reports in the format posted in the specification at [*see specification 3*]*.

2.5 Publication of Registration Data. Registry Operator shall provide public access to registration data in accordance with the specification posted at [*see specification 4*]* (“Specification 4”).

2.6 Reserved Names. Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall comply with the restrictions on registration of character strings set forth at [*see specification 5*]* (“Specification 5”). Registry Operator may establish policies concerning the reservation or blocking of additional character strings within the TLD at its discretion. If Registry Operator is the registrant for any domain names in the Registry TLD (other than the Second-Level Reservations for Registry Operations from Specification 5), such registrations must be through an ICANN accredited registrar. Any such registrations will be considered Transactions (as defined in Section 6.1) for purposes of calculating the Registry-Level Transaction Fee to be paid to ICANN by Registry Operator pursuant to Section 6.1.

2.7 Registry Interoperability and Continuity. Registry Operator shall comply with the Registry Interoperability and Continuity Specifications as set forth in Specification 6.

* Final text will be posted on ICANN website; agreement reference to be replaced by hyperlink.

2.8 Protection of Legal Rights of Third Parties. Registry Operator must specify, and comply with, a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth in the specification at [*see specification 7*]* (“Specification 7”). Registry Operator may, at its election, implement additional protections of the legal rights of third parties. Any changes or modifications to the process and procedures required by Specification 7 following the Effective Date must be approved in advance by ICANN in writing. Registry Operator must comply with all remedies imposed by ICANN pursuant to Section 2 of Specification 7, subject to Registry Operator’s right to challenge such remedies as set forth in the applicable procedure described therein. Registry Operator shall take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. In responding to such reports, Registry Operator will not be required to take any action in contravention of applicable law.

2.9 Registrars.

(a) Registry Operator must use only ICANN accredited registrars in registering domain names. Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD; provided, that Registry Operator may establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. Registry Operator must use a uniform non-discriminatory agreement with all registrars authorized to register names in the TLD. Such agreement may be revised by Registry Operator from time to time; provided, however, that any such revisions must be approved in advance by ICANN.

(b) If Registry Operator (i) becomes an Affiliate or reseller of an ICANN accredited registrar, or (ii) subcontracts the provision of any Registry Services to an ICANN accredited registrar, registrar reseller or any of their respective Affiliates, then, in either such case of (i) or (ii) above, Registry Operator will give ICANN prompt notice of the contract, transaction or other arrangement that resulted in such affiliation, reseller relationship or subcontract, as applicable, including, if requested by ICANN, copies of any contract relating thereto; provided, that ICANN will not disclose such contracts to any third party other than relevant competition authorities. ICANN reserves the right, but not the obligation, to refer any such contract, transaction or other arrangement to relevant competition authorities in the event that ICANN determines that such contract, transaction or other arrangement might raise competition issues.

(c) For the purposes of this Agreement: (i) “Affiliate” means a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified, and (ii) “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

2.10 Pricing for Registry Services.

(a) With respect to initial domain name registrations, Registry Operator shall provide ICANN and each ICANN accredited registrar that has executed the registry-registrar agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying or other programs which had the effect of reducing the price charged to registrars, unless such refunds, rebates, discounts, product tying or other programs are of a limited

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duration that is clearly and conspicuously disclosed to the registrar when offered) of no less than thirty (30) calendar days. Registry Operator shall offer registrars the option to obtain initial domain name registrations for periods of one to ten years at the discretion of the registrar, but no greater than ten years.

(b) With respect to renewal of domain name registrations, Registry Operator shall provide ICANN and each ICANN accredited registrar that has executed the registry-registrar agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying, Qualified Marketing Programs or other programs which had the effect of reducing the price charged to registrars) of no less than one hundred eighty (180) calendar days. Notwithstanding the foregoing sentence, with respect to renewal of domain name registrations: (i) Registry Operator need only provide thirty (30) calendar days notice of any price increase if the resulting price is less than or equal to (A) for the period beginning on the Effective Date and ending twelve (12) months following the Effective Date, the initial price charged for registrations in the TLD, or (B) for subsequent periods, a price for which Registry Operator provided a notice pursuant to the first sentence of this Section 2.10(b) within the twelve (12) month period preceding the effective date of the proposed price increase; and (ii) Registry Operator need not provide notice of any price increase for the imposition of the Variable Registry-Level Fee set forth in Section 6.3. Registry Operator shall offer registrars the option to obtain domain name registration renewals at the current price (i.e. the price in place prior to any noticed increase) for periods of one to ten years at the discretion of the registrar, but no greater than ten years.

(c) In addition, Registry Operator must have uniform pricing for renewals of domain name registrations (“Renewal Pricing”). For the purposes of determining Renewal Pricing, the price for each domain registration renewal must be identical to the price of all other domain name registration renewals in place at the time of such renewal, and such price must take into account universal application of any refunds, rebates, discounts, product tying or other programs in place at the time of renewal. The foregoing requirements of this Section 2.10(c) shall not apply for (i) purposes of determining Renewal Pricing if the registrar has provided Registry Operator with documentation that demonstrates that the applicable registrant expressly agreed in its registration agreement with registrar to higher Renewal Pricing at the time of the initial registration of the domain name following clear and conspicuous disclosure of such Renewal Pricing to such registrant, and (ii) discounted Renewal Pricing pursuant to a Qualified Marketing Program (as defined below). The parties acknowledge that the purpose of this Section 2.10(c) is to prohibit abusive and/or discriminatory Renewal Pricing practices imposed by Registry Operator without the written consent of the applicable registrant at the time of the initial registration of the domain and this Section 2.10(c) will be interpreted broadly to prohibit such practices. For purposes of this Section 2.10(c), a “Qualified Marketing Program” is a marketing program pursuant to which Registry Operator offers discounted Renewal Pricing, provided that each of the following criteria is satisfied: (i) the program and related discounts are offered for a period of time not to exceed one hundred eighty (180) calendar days (with consecutive substantially similar programs aggregated for purposes of determining the number of calendar days of the program), (ii) all ICANN accredited registrars are provided the same opportunity to qualify for such discounted Renewal Pricing; and (iii) the intent or effect of the program is not to exclude any particular class(es) of registrations (e.g., registrations held by large corporations) or increase the renewal price of any particular class(es) of registrations. Nothing in this Section 2.10(c) shall limit Registry Operator’s obligations pursuant to Section 2.10(b).

(d) Registry Operator shall provide public query-based DNS lookup service for the TLD (that is, operate the Registry TLD zone servers) at its sole expense.

2.11 Contractual and Operational Compliance Audits.

* Final text will be posted on ICANN website; agreement reference to be replaced by hyperlink.

(a) ICANN may from time to time (not to exceed twice per calendar year) conduct, or engage a third party to conduct, contractual compliance audits to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement. Such audits shall be tailored to achieve the purpose of assessing compliance, and ICANN will (a) give reasonable advance notice of any such audit, which notice shall specify in reasonable detail the categories of documents, data and other information requested by ICANN, and (b) use commercially reasonable efforts to conduct such audit in such a manner as to not unreasonably disrupt the operations of Registry Operator. As part of such audit and upon request by ICANN, Registry Operator shall timely provide all responsive documents, data and any other information necessary to demonstrate Registry Operator's compliance with this Agreement. Upon no less than five (5) business days notice (unless otherwise agreed to by Registry Operator), ICANN may, as part of any contractual compliance audit, conduct site visits during regular business hours to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement.

(b) Any audit conducted pursuant to Section 2.11(a) will be at ICANN's expense, unless (i) Registry Operator (A) controls, is controlled by, is under common control or is otherwise Affiliated with, any ICANN accredited registrar or registrar reseller or any of their respective Affiliates, or (B) has subcontracted the provision of Registry Services to an ICANN accredited registrar or registrar reseller or any of their respective Affiliates, and, in either case of (A) or (B) above, the audit relates to Registry Operator's compliance with Section 2.14, in which case Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with the portion of the audit related to Registry Operator's compliance with Section 2.14, or (ii) the audit is related to a discrepancy in the fees paid by Registry Operator hereunder in excess of 5% to ICANN's detriment, in which case Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with the entirety of such audit. In either such case of (i) or (ii) above, such reimbursement will be paid together with the next Registry-Level Fee payment due following the date of transmittal of the cost statement for such audit.

(c) Notwithstanding Section 2.11(a), if Registry Operator is found not to be in compliance with its representations and warranties contained in Article 1 of this Agreement or its covenants contained in Article 2 of this Agreement in two consecutive audits conducted pursuant to this Section 2.11, ICANN may increase the number of such audits to one per calendar quarter.

(d) Registry Operator will give ICANN immediate notice of the commencement of any of the proceedings referenced in Section 4.3(d) or the occurrence of any of the matters specified in Section 4.3(f).

2.12 Continued Operations Instrument. Registry Operator shall comply with the terms and conditions relating to the Continued Operations Instrument set forth in the specification at [*see specification 8*].

2.13 Emergency Transition. Registry Operator agrees that in the event that any of the registry functions set forth in Section 6 of Specification 10 fails for a period longer than the emergency threshold for such function set forth in Section 6 of Specification 10, ICANN may designate an emergency interim registry operator of the registry for the TLD (an "Emergency Operator") in accordance with ICANN's registry transition process (available at _____) (as the same may be amended from time to time, the "Registry Transition Process") until such time as Registry Operator has demonstrated to ICANN's reasonable satisfaction that it can resume operation of the registry for the TLD without the reoccurrence of such failure. Following such demonstration, Registry Operator may transition back into operation of the registry for the TLD pursuant to the procedures set out in the Registry Transition Process,

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provided that Registry Operator pays all reasonable costs incurred (i) by ICANN as a result of the designation of the Emergency Operator and (ii) by the Emergency Operator in connection with the operation of the registry for the TLD, which costs shall be documented in reasonable detail in records that shall be made available to Registry Operator. In the event ICANN designates an Emergency Operator pursuant to this Section 2.13 and the Registry Transition Process, Registry Operator shall provide ICANN or any such Emergency Operator with all data (including the data escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such Emergency Operator. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event that an Emergency Operator is designated pursuant to this Section 2.13. In addition, in the event of such failure, ICANN shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable.

2.14 Registry Code of Conduct. In connection with the operation of the registry for the TLD, Registry Operator shall comply with the Registry Code of Conduct as set forth in the specification at [*see specification 9*].

2.15 Cooperation with Economic Studies. If ICANN initiates or commissions an economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters, Registry Operator shall reasonably cooperate with such study, including by delivering to ICANN or its designee conducting such study all data reasonably necessary for the purposes of such study requested by ICANN or its designee, provided, that Registry Operator may withhold any internal analyses or evaluations prepared by Registry Operator with respect to such data. Any data delivered to ICANN or its designee pursuant to this Section 2.15 shall be fully aggregated and anonymized by ICANN or its designee prior to any disclosure of such data to any third party.

2.16 Registry Performance Specifications. Registry Performance Specifications for operation of the TLD will be as set forth in the specification at [*see specification 10*]*. Registry Operator shall comply with such Performance Specifications and, for a period of at least one year, shall keep technical and operational records sufficient to evidence compliance with such specifications for each calendar year during the Term.

2.17 Personal Data. Registry Operator shall (i) notify each ICANN-accredited registrar that is a party to the registry-registrar agreement for the TLD of the purposes for which data about any identified or identifiable natural person (“Personal Data”) submitted to Registry Operator by such registrar is collected and used under this Agreement or otherwise and the intended recipients (or categories of recipients) of such Personal Data, and (ii) require such registrar to obtain the consent of each registrant in the TLD for such collection and use of Personal Data. Registry Operator shall take reasonable steps to protect Personal Data collected from such registrar from loss, misuse, unauthorized disclosure, alteration or destruction. Registry Operator shall not use or authorize the use of Personal Data in a way that is incompatible with the notice provided to registrars.

2.18 [Note: For Community-Based TLDs Only] Obligations of Registry Operator to TLD Community. Registry Operator shall establish registration policies in conformity with the application submitted with respect to the TLD for: (i) naming conventions within the TLD, (ii) requirements for registration by members of the TLD community, and (iii) use of registered domain names in conformity with the stated purpose of the community-based TLD. Registry Operator shall operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD. Registry Operator shall establish procedures for the enforcement of registration policies for the TLD, and resolution of disputes concerning compliance with TLD registration

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policies, and shall enforce such registration policies. Registry Operator agrees to implement and be bound by the Registry Restrictions Dispute Resolution Procedure as set forth at [*insert applicable URL*] with respect to disputes arising pursuant to this Section 2.18.]

ARTICLE 3.

COVENANTS OF ICANN

ICANN covenants and agrees with Registry Operator as follows:

3.1 Open and Transparent. Consistent with ICANN’s expressed mission and core values, ICANN shall operate in an open and transparent manner.

3.2 Equitable Treatment. ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause.

3.3 TLD Nameservers. ICANN will use commercially reasonable efforts to ensure that any changes to the TLD nameserver designations submitted to ICANN by Registry Operator (in a format and with required technical elements specified by ICANN at <http://www.iana.org/domains/root/> will be implemented by ICANN within seven (7) calendar days or as promptly as feasible following technical verifications.

3.4 Root-zone Information Publication. ICANN’s publication of root-zone contact information for the TLD will include Registry Operator and its administrative and technical contacts. Any request to modify the contact information for the Registry Operator must be made in the format specified from time to time by ICANN at <http://www.iana.org/domains/root/>.

3.5 Authoritative Root Database. To the extent that ICANN is authorized to set policy with regard to an authoritative root server system, ICANN shall use commercially reasonable efforts to (a) ensure that the authoritative root will point to the top-level domain nameservers designated by Registry Operator for the TLD, (b) maintain a stable, secure, and authoritative publicly available database of relevant information about the TLD, in accordance with ICANN publicly available policies and procedures, and (c) coordinate the Authoritative Root Server System so that it is operated and maintained in a stable and secure manner; provided, that ICANN shall not be in breach of this Agreement and ICANN shall have no liability in the event that any third party (including any governmental entity or internet service provider) blocks or restricts access to the TLD in any jurisdiction.

ARTICLE 4.

TERM AND TERMINATION

4.1 Term. The term of this Agreement will be ten years from the Effective Date (as such term may be extended pursuant to Section 4.2, the “Term”).

4.2 Renewal.

(a) This Agreement will be renewed for successive periods of ten years upon the expiration of the initial Term set forth in Section 4.1 and each successive Term, unless:

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(i) Following notice by ICANN to Registry Operator of a fundamental and material breach of Registry Operator's covenants set forth in Article 2 or breach of its payment obligations under Article 6 of this Agreement, which notice shall include with specificity the details of the alleged breach, and such breach has not been cured within thirty (30) calendar days of such notice, (A) an arbitrator or court has finally determined that Registry Operator has been in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (B) Registry Operator has failed to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court; or

(ii) During the then current Term, Registry Operator shall have been found by an arbitrator (pursuant to Section 5.2 of this Agreement) on at least three (3) separate occasions to have been in fundamental and material breach (whether or not cured) of Registry Operator's covenants set forth in Article 2 or breach of its payment obligations under Article 6 of this Agreement.

(b) Upon the occurrence of the events set forth in Section 4.2(a) (i) or (ii), the Agreement shall terminate at the expiration of the then current Term.

4.3 Termination by ICANN.

(a) ICANN may, upon notice to Registry Operator, terminate this Agreement if: (i) Registry Operator fails to cure (A) any fundamental and material breach of Registry Operator's representations and warranties set forth in Article 1 or covenants set forth in Article 2, or (B) any breach of Registry Operator's payment obligations set forth in Article 6 of this Agreement, each within thirty (30) calendar days after ICANN gives Registry Operator notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court has finally determined that Registry Operator is in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (iii) Registry Operator fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

(b) ICANN may, upon notice to Registry Operator, terminate this Agreement if Registry Operator fails to complete all testing and procedures (identified by ICANN in writing to Registry Operator prior to the date hereof) for delegation of the TLD into the root zone within twelve (12) months of the Effective Date. Registry Operator may request an extension for up to additional twelve (12) months for delegation if it can demonstrate, to ICANN's reasonable satisfaction, that Registry Operator is working diligently and in good faith toward successfully completing the steps necessary for delegation of the TLD. Any fees paid by Registry Operator to ICANN prior to such termination date shall be retained by ICANN in full.

(c) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator fails to cure a material breach of Registry Operator's obligations set forth in Section 2.12 of this Agreement within thirty (30) calendar days of delivery of notice of such breach by ICANN, or if the Continued Operations Instrument is not in effect for greater than sixty (60) consecutive calendar days at any time following the Effective Date, (ii) an arbitrator or court has finally determined that Registry Operator is in material breach of such covenant, and (iii) Registry Operator fails to cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

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(d) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator makes an assignment for the benefit of creditors or similar act, (ii) attachment, garnishment or similar proceedings are commenced against Registry Operator, which proceedings are a material threat to Registry Operator's ability to operate the registry for the TLD, and are not dismissed within sixty (60) days of their commencement, (iii) a trustee, receiver, liquidator or equivalent is appointed in place of Registry Operator or maintains control over any of Registry Operator's property, (iv) execution is levied upon any property of Registry Operator, (v) proceedings are instituted by or against Registry Operator under any bankruptcy, insolvency, reorganization or other laws relating to the relief of debtors and such proceedings are not dismissed within thirty (30) days of their commencement, or (vi) Registry Operator files for protection under the United States Bankruptcy Code, 11 U.S.C. Section 101 et seq., or a foreign equivalent or liquidates, dissolves or otherwise discontinues its operations or the operation of the TLD.

(e) ICANN may, upon thirty (30) calendar days' notice to Registry Operator, terminate this Agreement pursuant to Section 2 of Specification 7, subject to Registry Operator's right to challenge such termination as set forth in the applicable procedure described therein.

(f) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator knowingly employs any officer that is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such officer is not terminated within thirty (30) calendar days of Registry Operator's knowledge of the foregoing, or (ii) any member of Registry Operator's board of directors or similar governing body is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such member is not removed from Registry Operator's board of directors or similar governing body within thirty (30) calendar days of Registry Operator's knowledge of the foregoing.

(g) *[Applicable to intergovernmental organizations or governmental entities only.]*
ICANN may terminate this Agreement pursuant to Section 7.14.

4.4 Termination by Registry Operator.

(a) Registry Operator may terminate this Agreement upon notice to ICANN if, (i) ICANN fails to cure any fundamental and material breach of ICANN's covenants set forth in Article 3, within thirty (30) calendar days after Registry Operator gives ICANN notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court has finally determined that ICANN is in fundamental and material breach of such covenants, and (iii) ICANN fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

(b) Registry Operator may terminate this Agreement for any reason upon one hundred eighty (180) calendar day advance notice to ICANN.

4.5 Transition of Registry upon Termination of Agreement. Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, Registry Operator shall provide ICANN or any successor registry operator that may be designated by ICANN for the TLD in accordance with this Section 4.5 with all data (including the data

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escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process; provided, however, that if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) transitioning operation of the TLD is not necessary to protect the public interest, then ICANN may not transition operation of the TLD to a successor registry operator upon the expiration or termination of this Agreement without the consent of Registry Operator (which shall not be unreasonably withheld, conditioned or delayed). For the avoidance of doubt, the foregoing sentence shall not prohibit ICANN from delegating the TLD pursuant to a future application process for the delegation of top-level domains, subject to any processes and objection procedures instituted by ICANN in connection with such application process intended to protect the rights of third parties. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable, regardless of the reason for termination or expiration of this Agreement.

[Alternative Section 4.5 Transition of Registry upon Termination of Agreement text for intergovernmental organizations or governmental entities or other special circumstances:

“Transition of Registry upon Termination of Agreement. Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, in connection with ICANN's designation of a successor registry operator for the TLD, Registry Operator and ICANN agree to consult each other and work cooperatively to facilitate and implement the transition of the TLD in accordance with this Section 4.5. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process. In the event ICANN determines to transition operation of the TLD to a successor registry operator, upon Registry Operator's consent (which shall not be unreasonably withheld, conditioned or delayed), Registry Operator shall provide ICANN or such successor registry operator for the TLD with any data regarding operations of the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator in addition to data escrowed in accordance with Section 2.3 hereof. In the event that Registry Operator does not consent to provide such data, any registry data related to the TLD shall be returned to Registry Operator, unless otherwise agreed upon by the parties. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable, regardless of the reason for termination or expiration of this Agreement.”]

4.6 Effect of Termination. Upon any expiration of the Term or termination of this Agreement, the obligations and rights of the parties hereto shall cease, provided that such expiration or termination of this Agreement shall not relieve the parties of any obligation or breach of this Agreement accruing prior to such expiration or termination, including, without limitation, all accrued payment obligations arising under Article 6. In addition, Article 5, Article 7, Section 2.12, Section 4.5, and this

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Section 4.6 shall survive the expiration or termination of this Agreement. For the avoidance of doubt, the rights of Registry Operator to operate the registry for the TLD shall immediately cease upon any expiration of the Term or termination of this Agreement.

ARTICLE 5.

DISPUTE RESOLUTION

5.1 Cooperative Engagement. Before either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator, following initiation of communications by either party, must attempt to resolve the dispute by engaging in good faith discussion over a period of at least fifteen (15) calendar days.

5.2 Arbitration. Disputes arising under or in connection with this Agreement, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Los Angeles County, California. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, or (ii) the parties agree in writing to a greater number of arbitrators. In either case of clauses (i) or (ii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Los Angeles County, California; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

[Alternative **Section 5.2 Arbitration** text for intergovernmental organizations or governmental entities or other special circumstances:

“Arbitration. Disputes arising under or in connection with this Agreement, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Geneva, Switzerland, unless another location is mutually agreed upon by Registry Operator and ICANN. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, or (ii) the parties agree in writing to a greater number of arbitrators. In either case of clauses (i) or (ii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the

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arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Geneva, Switzerland, unless an another location is mutually agreed upon by Registry Operator and ICANN; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction."}]

5.3 Limitation of Liability. ICANN's aggregate monetary liability for violations of this Agreement will not exceed an amount equal to the Registry-Level Fees paid by Registry Operator to ICANN within the preceding twelve-month period pursuant to this Agreement (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any). Registry Operator's aggregate monetary liability to ICANN for breaches of this Agreement will be limited to an amount equal to the fees paid to ICANN during the preceding twelve-month period (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any), and punitive and exemplary damages, if any, awarded in accordance with Section 5.2. In no event shall either party be liable for special, punitive, exemplary or consequential damages arising out of or in connection with this Agreement or the performance or nonperformance of obligations undertaken in this Agreement, except as provided in Section 5.2. Except as otherwise provided in this Agreement, neither party makes any warranty, express or implied, with respect to the services rendered by itself, its servants or agents, or the results obtained from their work, including, without limitation, any implied warranty of merchantability, non-infringement or fitness for a particular purpose.

5.4 Specific Performance. Registry Operator and ICANN agree that irreparable damage could occur if any of the provisions of this Agreement was not performed in accordance with its specific terms. Accordingly, the parties agree that they each shall be entitled to seek from the arbitrator specific performance of the terms of this Agreement (in addition to any other remedy to which each party is entitled).

ARTICLE 6.

FEES

6.1 Registry-Level Fees. Registry Operator shall pay ICANN a Registry-Level Fee equal to (i) the Registry Fixed Fee of US\$6,250 per calendar quarter and (ii) the Registry-Level Transaction Fee. The Registry-Level Transaction Fee will be equal to the number of annual increments of an initial or renewal domain name registration (at one or more levels, and including renewals associated with transfers from one ICANN-accredited registrar to another, each a "Transaction"), during the applicable calendar quarter multiplied by US\$0.25; provided, however that the Registry-Level Transaction Fee shall not apply until and unless more than 50,000 Transactions have occurred in the TLD during any calendar quarter or any four calendar quarter period (the "Transaction Threshold") and shall apply to each Transaction that occurred during each quarter in which the Transaction Threshold has been met, but shall not apply to each quarter in which the Transaction Threshold has not been met. Registry Operator shall pay the Registry-

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Level Fees on a quarterly basis by the 20th day following the end of each calendar quarter (i.e., on April 20, July 20, October 20 and January 20 for the calendar quarters ending March 31, June 30, September 30 and December 31) of the year to an account designated by ICANN.

6.2 Cost Recovery for RSTEP. Requests by Registry Operator for the approval of Additional Services pursuant to Section 2.1 may be referred by ICANN to the Registry Services Technical Evaluation Panel ("RSTEP") pursuant to that process at <http://www.icann.org/en/registries/rsep/>. In the event that such requests are referred to RSTEP, Registry Operator shall remit to ICANN the invoiced cost of the RSTEP review within ten (10) business days of receipt of a copy of the RSTEP invoice from ICANN, unless ICANN determines, in its sole and absolute discretion, to pay all or any portion of the invoiced cost of such RSTEP review.

6.3 Variable Registry-Level Fee.

(a) If the ICANN accredited registrars (as a group) do not approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for any ICANN fiscal year, upon delivery of notice from ICANN, Registry Operator shall pay to ICANN a Variable Registry-Level Fee, which shall be paid on a fiscal quarter basis, and shall accrue as of the beginning of the first fiscal quarter of such ICANN fiscal year. The fee will be calculated and invoiced by ICANN on a quarterly basis, and shall be paid by Registry Operator within sixty (60) calendar days with respect to the first quarter of such ICANN fiscal year and within twenty (20) calendar days with respect to each remaining quarter of such ICANN fiscal year, of receipt of the invoiced amount by ICANN. The Registry Operator may invoice and collect the Variable Registry-Level Fees from the registrars who are party to a registry-registrar agreement with Registry Operator (which agreement may specifically provide for the reimbursement of Variable Registry-Level Fees paid by Registry Operator pursuant to this Section 6.3); provided, that the fees shall be invoiced to all ICANN accredited registrars if invoiced to any. The Variable Registry-Level Fee, if collectible by ICANN, shall be an obligation of Registry Operator and shall be due and payable as provided in this Section 6.3 irrespective of Registry Operator's ability to seek and obtain reimbursement of such fee from registrars. In the event ICANN later collects variable accreditation fees for which Registry Operator has paid ICANN a Variable Registry-Level Fee, ICANN shall reimburse the Registry Operator an appropriate amount of the Variable Registry-Level Fee, as reasonably determined by ICANN. If the ICANN accredited registrars (as a group) do approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for a fiscal year, ICANN shall not be entitled to a Variable-Level Fee hereunder for such fiscal year, irrespective of whether the ICANN accredited registrars comply with their payment obligations to ICANN during such fiscal year.

(b) The amount of the Variable Registry-Level Fee will be specified for each registrar, and may include both a per-registrar component and a transactional component. The per-registrar component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year. The transactional component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year but shall not exceed US\$0.25 per domain name registration (including renewals associated with transfers from one ICANN-accredited registrar to another) per year.

6.4 Adjustments to Fees. Notwithstanding any of the fee limitations set forth in this Article 6, commencing upon the expiration of the first year of this Agreement, and upon the expiration of each year thereafter during the Term, the then current fees set forth in Section 6.1 and Section 6.3 may be

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adjusted, at ICANN's discretion, by a percentage equal to the percentage change, if any, in (i) the Consumer Price Index for All Urban Consumers, U.S. City Average (1982-1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics, or any successor index (the "CPI") for the month which is one (1) month prior to the commencement of the applicable year, over (ii) the CPI published for the month which is one (1) month prior to the commencement of the immediately prior year. In the event of any such increase, ICANN shall provide notice to Registry Operator specifying the amount of such adjustment. Any fee adjustment under this Section 6.4 shall be effective as of the first day of the year in which the above calculation is made.

6.5 Additional Fee on Late Payments. For any payments thirty (30) calendar days or more overdue under this Agreement, Registry Operator shall pay an additional fee on late payments at the rate of 1.5% per month or, if less, the maximum rate permitted by applicable law.

ARTICLE 7.

MISCELLANEOUS

7.1 Indemnification of ICANN.

(a) Registry Operator shall indemnify and defend ICANN and its directors, officers, employees, and agents (collectively, "Indemnitees") from and against any and all third-party claims, damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to indemnify or defend any Indemnitee to the extent the claim, damage, liability, cost or expense arose: (i) due to the actions or omissions of ICANN, its subcontractors, panelists or evaluators specifically related to and occurring during the registry TLD application process (other than actions or omissions requested by or for the benefit of Registry Operator), or (ii) due to a breach by ICANN of any obligation contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court or arbitrator.

[Alternative **Section 7.1(a)** text for intergovernmental organizations or governmental entities:

"Registry Operator shall use its best efforts to cooperate with ICANN in order to ensure that ICANN does not incur any costs associated with claims, damages, liabilities, costs and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to provide such cooperation to the extent the claim, damage, liability, cost or expense arose due to a breach by ICANN of any of its obligations contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any

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litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court or arbitrator.”]

(b) For any claims by ICANN for indemnification whereby multiple registry operators (including Registry Operator) have engaged in the same actions or omissions that gave rise to the claim, Registry Operator’s aggregate liability to indemnify ICANN with respect to such claim shall be limited to a percentage of ICANN’s total claim, calculated by dividing the number of total domain names under registration with Registry Operator within the TLD (which names under registration shall be calculated consistently with Article 6 hereof for any applicable quarter) by the total number of domain names under registration within all top level domains for which the registry operators thereof are engaging in the same acts or omissions giving rise to such claim. For the purposes of reducing Registry Operator’s liability under Section 7.1(a) pursuant to this Section 7.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN’s reasonable satisfaction, such other registry operators’ culpability for such actions or omissions. For the avoidance of doubt, in the event that a registry operator is engaged in the same acts or omissions giving rise to the claims, but such registry operator(s) do not have the same or similar indemnification obligations to ICANN as set forth in Section 7.1(a) above, the number of domains under management by such registry operator(s) shall nonetheless be included in the calculation in the preceding sentence. [*Note: This Section 7.1(b) is inapplicable to intergovernmental organizations or governmental entities.*]

7.2 Indemnification Procedures. If any third-party claim is commenced that is indemnified under Section 7.1 above, ICANN shall provide notice thereof to Registry Operator as promptly as practicable. Registry Operator shall be entitled, if it so elects, in a notice promptly delivered to ICANN, to immediately take control of the defense and investigation of such claim and to employ and engage attorneys reasonably acceptable to ICANN to handle and defend the same, at Registry Operator’s sole cost and expense, provided that in all events ICANN will be entitled to control at its sole cost and expense the litigation of issues concerning the validity or interpretation of ICANN’s policies, Bylaws or conduct. ICANN shall cooperate, at Registry Operator’s cost and expense, in all reasonable respects with Registry Operator and its attorneys in the investigation, trial, and defense of such claim and any appeal arising therefrom, and may, at its own cost and expense, participate, through its attorneys or otherwise, in such investigation, trial and defense of such claim and any appeal arising therefrom. No settlement of a claim that involves a remedy affecting ICANN other than the payment of money in an amount that is fully indemnified by Registry Operator will be entered into without the consent of ICANN. If Registry Operator does not assume full control over the defense of a claim subject to such defense in accordance with this Section 7.2, ICANN will have the right to defend the claim in such manner as it may deem appropriate, at the cost and expense of Registry Operator and Registry Operator shall cooperate in such defense. [*Note: This Section 7.2 is inapplicable to intergovernmental organizations or governmental entities.*]

7.3 Defined Terms. For purposes of this Agreement, unless such definitions are amended pursuant to a Consensus Policy at a future date, in which case the following definitions shall be deemed amended and restated in their entirety as set forth in such Consensus Policy, Security and Stability shall be defined as follows:

(a) For the purposes of this Agreement, an effect on “Security” shall mean (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

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(b) For purposes of this Agreement, an effect on “Stability” shall refer to (1) lack of compliance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice Requests for Comments (“RFCs”) sponsored by the Internet Engineering Task Force; or (2) the creation of a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems operating in accordance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice RFCs, and relying on Registry Operator's delegated information or provisioning of services.

7.4 No Offset. All payments due under this Agreement will be made in a timely manner throughout the Term and notwithstanding the pendency of any dispute (monetary or otherwise) between Registry Operator and ICANN.

7.5 Change in Control; Assignment and Subcontracting. Neither party may assign this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld. Notwithstanding the foregoing, ICANN may assign this Agreement in conjunction with a reorganization or re-incorporation of ICANN to another nonprofit corporation or similar entity organized in the same legal jurisdiction in which ICANN is currently organized for the same or substantially the same purposes. For purposes of this Section 7.5, a direct or indirect change of control of Registry Operator or any material subcontracting arrangement with respect to the operation of the registry for the TLD shall be deemed an assignment. ICANN shall be deemed to have reasonably withheld its consent to any such a direct or indirect change of control or subcontracting arrangement in the event that ICANN reasonably determines that the person or entity acquiring control of Registry Operator or entering into such subcontracting arrangement (or the ultimate parent entity of such acquiring or subcontracting entity) does not meet the ICANN-adopted registry operator criteria or qualifications then in effect. In addition, without limiting the foregoing, Registry Operator must provide no less than thirty (30) calendar days advance notice to ICANN of any material subcontracting arrangements, and any agreement to subcontract portions of the operations of the TLD must mandate compliance with all covenants, obligations and agreements by Registry Operator hereunder, and Registry Operator shall continue to be bound by such covenants, obligations and agreements. Without limiting the foregoing, Registry Operator must also provide no less than thirty (30) calendar days advance notice to ICANN prior to the consummation of any transaction anticipated to result in a direct or indirect change of control of Registry Operator. Such change of control notification shall include a statement that affirms that the ultimate parent entity of the party acquiring such control meets the ICANN-adopted specification or policy on registry operator criteria then in effect, and affirms that Registry Operator is in compliance with its obligations under this Agreement. Within thirty (30) calendar days of such notification, ICANN may request additional information from Registry Operator establishing compliance with this Agreement, in which case Registry Operator must supply the requested information within fifteen (15) calendar days. If ICANN fails to expressly provide or withhold its consent to any direct or indirect change of control of Registry Operator or any material subcontracting arrangement within thirty (30) (or, if ICANN has requested additional information from Registry Operator as set forth above, sixty (60)) calendar days of the receipt of written notice of such transaction from Registry Operator, ICANN shall be deemed to have consented to such transaction. In connection with any such transaction, Registry Operator shall comply with the Registry Transition Process.

7.6 Amendments and Waivers.

(a) If ICANN determines that an amendment to this Agreement (including to the Specifications referred to herein) and all other registry agreements between ICANN and the Applicable

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Registry Operators (the “Applicable Registry Agreements”) is desirable (each, a “Special Amendment”), ICANN may submit a Special Amendment for approval by the Applicable Registry Operators pursuant to the process set forth in this Section 7.6, provided that a Special Amendment is not a Restricted Amendment (as defined below). Prior to submitting a Special Amendment for such approval, ICANN shall first consult in good faith with the Working Group (as defined below) regarding the form and substance of a Special Amendment. The duration of such consultation shall be reasonably determined by ICANN based on the substance of the Special Amendment. Following such consultation, ICANN may propose the adoption of a Special Amendment by publicly posting such amendment on its website for no less than thirty (30) calendar days (the “Posting Period”) and providing notice of such amendment by ICANN to the Applicable Registry Operators in accordance with Section 7.8. ICANN will consider the public comments submitted on a Special Amendment during the Posting Period (including comments submitted by the Applicable Registry Operators).

(b) If, within two (2) calendar years of the expiration of the Posting Period (the “Approval Period”), (i) the ICANN Board of Directors approves a Special Amendment (which may be in a form different than submitted for public comment) and (ii) such Special Amendment receives Registry Operator Approval (as defined below), such Special Amendment shall be deemed approved (an “Approved Amendment”) by the Applicable Registry Operators (the last date on which such approvals are obtained is herein referred to as the “Amendment Approval Date”) and shall be effective and deemed an amendment to this Agreement upon sixty (60) calendar days notice from ICANN to Registry Operator (the “Amendment Effective Date”). In the event that a Special Amendment is not approved by the ICANN Board of Directors or does not receive Registry Operator Approval within the Approval Period, the Special Amendment will have no effect. The procedure used by ICANN to obtain Registry Operator Approval shall be designed to document the written approval of the Applicable Registry Operators, which may be in electronic form.

(c) During the thirty (30) calendar day period following the Amendment Approval Date, Registry Operator (so long as it did not vote in favor of the Approved Amendment) may apply in writing to ICANN for an exemption from the Approved Amendment (each such request submitted by Registry Operator hereunder, an “Exemption Request”). Each Exemption Request will set forth the basis for such request and provide detailed support for an exemption from the Approved Amendment. An Exemption Request may also include a detailed description and support for any alternatives to, or a variation of, the Approved Amendment proposed by such Registry Operator. An Exemption Request may only be granted upon a clear and convincing showing by Registry Operator that compliance with the Approved Amendment conflicts with applicable laws or would have a material adverse effect on the long-term financial condition or results of operations of Registry Operator. No Exemption Request will be granted if ICANN determines, in its reasonable discretion, that granting such Exemption Request would be materially harmful to registrants or result in the denial of a direct benefit to registrants. Within ninety (90) calendar days of ICANN’s receipt of an Exemption Request, ICANN shall either approve (which approval may be conditioned or consist of alternatives to or a variation of the Approved Amendment) or deny the Exemption Request in writing, during which time the Approved Amendment will not amend this Agreement; provided, that any such conditions, alternatives or variations shall be effective and, to the extent applicable, will amend this Agreement as of the Amendment Effective Date. If the Exemption Request is approved by ICANN, the Approved Amendment will not amend this Agreement. If such Exemption Request is denied by ICANN, the Approved Amendment will amend this Agreement as of the Amendment Effective Date (or, if such date has passed, such Approved Amendment shall be deemed effective immediately on the date of such denial), provided that Registry Operator may, within thirty (30) calendar days following receipt of ICANN’s determination, appeal ICANN’s decision to deny the Exemption Request pursuant to the dispute resolution procedures set forth in Article 5. The Approved

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Amendment will be deemed not to have amended this Agreement during the pendency of the dispute resolution process. For avoidance of doubt, only Exemption Requests submitted by Registry Operator that are approved by ICANN pursuant to this Section 7.6(c) or through an arbitration decision pursuant to Article 5 shall exempt Registry Operator from any Approved Amendment, and no exemption request granted to any other Applicable Registry Operator (whether by ICANN or through arbitration) shall have any effect under this Agreement or exempt Registry Operator from any Approved Amendment.

(d) Except as set forth in this Section 7.6, no amendment, supplement or modification of this Agreement or any provision hereof shall be binding unless executed in writing by both parties, and nothing in this Section 7.6 shall restrict ICANN and Registry Operator from entering into bilateral amendments and modifications to this Agreement negotiated solely between the two parties. No waiver of any provision of this Agreement shall be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement or failure to enforce any of the provisions hereof shall be deemed or shall constitute a waiver of any other provision hereof, nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided. For the avoidance of doubt, nothing in this Section 7.6 shall be deemed to limit Registry Operator's obligation to comply with Section 2.2.

(e) For purposes of this Section 7.6, the following terms shall have the following meanings:

(i) "Applicable Registry Operators" means, collectively, the registry operators of the top-level domains party to a registry agreement that contains a provision similar to this Section 7.6, including Registry Operator.

(ii) "Registry Operator Approval" means the receipt of each of the following: (A) the affirmative approval of the Applicable Registry Operators whose payments to ICANN accounted for two-thirds of the total amount of fees (converted to U.S. dollars, if applicable) paid to ICANN by all the Applicable Registry Operators during the immediately previous calendar year pursuant to the Applicable Registry Agreements, and (B) the affirmative approval of a majority of the Applicable Registry Operators at the time such approval is obtained. For avoidance of doubt, with respect to clause (B), each Applicable Registry Operator shall have one vote for each top-level domain operated by such Registry Operator pursuant to an Applicable Registry Agreement.

(iii) "Restricted Amendment" means the following: (i) an amendment of Specification 1, (ii) except to the extent addressed in Section 2.10 hereof, an amendment that specifies the price charged by Registry Operator to registrars for domain name registrations, (iii) an amendment to the definition of Registry Services as set forth in the first paragraph of Section 2.1 of Specification 6, or (iv) an amendment to the length of the Term.

(iv) "Working Group" means representatives of the Applicable Registry Operators and other members of the community that ICANN appoints, from time to time, to serve as a working group to consult on amendments to the Applicable Registry Agreements (excluding bilateral amendments pursuant to Section 7.6(d)).

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7.7 No Third-Party Beneficiaries. This Agreement will not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.

7.8 General Notices. Except for notices pursuant to Section 7.6, all notices to be given under or in relation to this Agreement will be given either (i) in writing at the address of the appropriate party as set forth below or (ii) via facsimile or electronic mail as provided below, unless that party has given a notice of change of postal or email address, or facsimile number, as provided in this agreement. All notices under Section 7.6 shall be given by both posting of the applicable information on ICANN's web site and transmission of such information to Registry Operator by electronic mail. Any change in the contact information for notice below will be given by the party within thirty (30) calendar days of such change. Notices, designations, determinations, and specifications made under this Agreement will be in the English language. Other than notices under Section 7.6, any notice required by this Agreement will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via facsimile or by electronic mail, upon confirmation of receipt by the recipient's facsimile machine or email server, provided that such notice via facsimile or electronic mail shall be followed by a copy sent by regular postal mail service within two (2) business days. Any notice required by Section 7.6 will be deemed to have been given when electronically posted on ICANN's website and upon confirmation of receipt by the email server. In the event other means of notice become practically achievable, such as notice via a secure website, the parties will work together to implement such notice means under this Agreement.

If to ICANN, addressed to:
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina Del Rey, California 90292
Telephone: 1-310-823-9358
Facsimile: 1-310-823-8649
Attention: President and CEO

With a Required Copy to: General Counsel
Email: (As specified from time to time.)

If to Registry Operator, addressed to:

[_____]
[_____]
[_____]

Telephone:
Facsimile:
Attention:

With a Required Copy to:
Email: (As specified from time to time.)

7.9 Entire Agreement. This Agreement (including those specifications and documents incorporated by reference to URL locations which form a part of it) constitutes the entire agreement of the parties hereto pertaining to the operation of the TLD and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, between the parties on that subject.

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7.10 English Language Controls. Notwithstanding any translated version of this Agreement and/or specifications that may be provided to Registry Operator, the English language version of this Agreement and all referenced specifications are the official versions that bind the parties hereto. In the event of any conflict or discrepancy between any translated version of this Agreement and the English language version, the English language version controls. Notices, designations, determinations, and specifications made under this Agreement shall be in the English language.

7.11 Ownership Rights. Nothing contained in this Agreement shall be construed as establishing or granting to Registry Operator any property ownership rights or interests in the TLD or the letters, words, symbols or other characters making up the TLD string.

7.12 Severability. This Agreement shall be deemed severable; the invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of the balance of this Agreement or of any other term hereof, which shall remain in full force and effect. If any of the provisions hereof are determined to be invalid or unenforceable, the parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible.

7.13 Court Orders. ICANN will respect any order from a court of competent jurisdiction, including any orders from any jurisdiction where the consent or non-objection of the government was a requirement for the delegation of the TLD. Notwithstanding any other provision of this Agreement, ICANN's implementation of any such order will not be a breach of this Agreement.

[Note: The following section is applicable to intergovernmental organizations or governmental entities only.]

7.14 Special Provision Relating to Intergovernmental Organizations or Governmental Entities.

(a) ICANN acknowledges that Registry Operator is an entity subject to public international law, including international treaties applicable to Registry Operator (such public international law and treaties, collectively hereinafter the “Applicable Laws”). Nothing in this Agreement and its related specifications shall be construed or interpreted to require Registry Operator to violate Applicable Laws or prevent compliance therewith. The Parties agree that Registry Operator’s compliance with Applicable Laws shall not constitute a breach of this Agreement.

(b) In the event Registry Operator reasonably determines that any provision of this Agreement and its related specifications, or any decisions or policies of ICANN referred to in this Agreement, including but not limited to Temporary Policies and Consensus Policies (such provisions, specifications and policies, collectively hereinafter, “ICANN Requirements”), may conflict with or violate Applicable Law (hereinafter, a “Potential Conflict”), Registry Operator shall provide detailed notice (a “Notice”) of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy. In the event Registry Operator determines that there is Potential Conflict between a proposed Applicable Law and any ICANN Requirement, Registry Operator shall provide detailed Notice of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy.

(c) As soon as practicable following such review, the parties shall attempt to resolve the Potential Conflict by cooperative engagement pursuant to the procedures set forth in Section 5.1. In

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addition, Registry Operator shall use its best efforts to eliminate or minimize any impact arising from such Potential Conflict between Applicable Laws and any ICANN Requirement. If, following such cooperative engagement, Registry Operator determines that the Potential Conflict constitutes an actual conflict between any ICANN Requirement, on the one hand, and Applicable Laws, on the other hand, then ICANN shall waive compliance with such ICANN Requirement (provided that the parties shall negotiate in good faith on a continuous basis thereafter to mitigate or eliminate the effects of such non-compliance on ICANN), unless ICANN reasonably and objectively determines that the failure of Registry Operator to comply with such ICANN Requirement would constitute a threat to the Security and Stability of Registry Services, the Internet or the DNS (hereinafter, an “ICANN Determination”). Following receipt of notice by Registry Operator of such ICANN Determination, Registry Operator shall be afforded a period of ninety (90) calendar days to resolve such conflict with an Applicable Law. If the conflict with an Applicable Law is not resolved to ICANN’s complete satisfaction during such period, Registry Operator shall have the option to submit, within ten (10) calendar days thereafter, the matter to binding arbitration as defined in subsection (d) below. If during such period, Registry Operator does not submit the matter to arbitration pursuant to subsection (d) below, ICANN may, upon notice to Registry Operator, terminate this Agreement with immediate effect.

(d) If Registry Operator disagrees with an ICANN Determination, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2, except that the sole issue presented to the arbitrator for determination will be whether or not ICANN reasonably and objectively reached the ICANN Determination. For the purposes of such arbitration, ICANN shall present evidence to the arbitrator supporting the ICANN Determination. If the arbitrator determines that ICANN did not reasonably and objectively reach the ICANN Determination, then ICANN shall waive Registry Operator’s compliance with the subject ICANN Requirement. If the arbitrators or pre-arbitral referee, as applicable, determine that ICANN did reasonably and objectively reach the ICANN Determination, then, upon notice to Registry Operator, ICANN may terminate this Agreement with immediate effect.

(e) Registry Operator hereby represents and warrants that, to the best of its knowledge as of the date of execution of this Agreement, no existing ICANN Requirement conflicts with or violates any Applicable Law.

(f) Notwithstanding any other provision of this Section 7.14, following an ICANN Determination and prior to a finding by an arbitrator pursuant to Section 7.14(d) above, ICANN may, subject to prior consultations with Registry Operator, take such reasonable technical measures as it deems necessary to ensure the Security and Stability of Registry Services, the Internet and the DNS. These reasonable technical measures shall be taken by ICANN on an interim basis, until the earlier of the date of conclusion of the arbitration procedure referred to in Section 7.14(d) above or the date of complete resolution of the conflict with an Applicable Law. In case Registry Operator disagrees with such technical measures taken by ICANN, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2 above, during which process ICANN may continue to take such technical measures. In the event that ICANN takes such measures, Registry Operator shall pay all costs incurred by ICANN as a result of taking such measures. In addition, in the event that ICANN takes such measures, ICANN shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable.

* * * * *

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

By: _____
[_____] President and CEO

Date:

[Registry Operator]

By: _____
[_____] _____
[_____]

Date:

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EXHIBIT A

Approved Services

SPECIFICATION 1

CONSENSUS POLICIES AND TEMPORARY POLICIES SPECIFICATION

1. Consensus Policies.

- 1.1. “*Consensus Policies*” are those policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 1.2 of this document. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time in accordance with the process set forth therein.
- 1.2. Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including the operators of gTLDs. Consensus Policies shall relate to one or more of the following:
 - 1.2.1. issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or Domain Name System (“DNS”);
 - 1.2.2. functional and performance specifications for the provision of Registry Services;
 - 1.2.3. Security and Stability of the registry database for the TLD;
 - 1.2.4. registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars;
 - 1.2.5. resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or
 - 1.2.6. restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.
- 1.3. Such categories of issues referred to in Section 1.2 shall include, without limitation:
 - 1.3.1. principles for allocation of registered names in the TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);
 - 1.3.2. prohibitions on warehousing of or speculation in domain names by registries or registrars;
 - 1.3.3. reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration); and
 - 1.3.4. maintenance of and access to accurate and up-to-date information concerning domain name registrations; and procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD affected by such a suspension or termination.
- 1.4. In addition to the other limitations on Consensus Policies, they shall not:

- 1.4.1. prescribe or limit the price of Registry Services;
 - 1.4.2. modify the terms or conditions for the renewal or termination of the Registry Agreement;
 - 1.4.3. modify the limitations on Temporary Policies (defined below) or Consensus Policies;
 - 1.4.4. modify the provisions in the registry agreement regarding fees paid by Registry Operator to ICANN; or
 - 1.4.5. modify ICANN's obligations to ensure equitable treatment of registry operators and act in an open and transparent manner.
2. **Temporary Policies.** Registry Operator shall comply with and implement all specifications or policies established by the Board on a temporary basis, if adopted by the Board by a vote of at least two-thirds of its members, so long as the Board reasonably determines that such modifications or amendments are justified and that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the stability or security of Registry Services or the DNS ("*Temporary Policies*").
- 2.1. Such proposed specification or policy shall be as narrowly tailored as feasible to achieve those objectives. In establishing any Temporary Policy, the Board shall state the period of time for which the Temporary Policy is adopted and shall immediately implement the Consensus Policy development process set forth in ICANN's Bylaws.
 - 2.1.1. ICANN shall also issue an advisory statement containing a detailed explanation of its reasons for adopting the Temporary Policy and why the Board believes such Temporary Policy should receive the consensus support of Internet stakeholders.
 - 2.1.2. If the period of time for which the Temporary Policy is adopted exceeds 90 days, the Board shall reaffirm its temporary adoption every 90 days for a total period not to exceed one year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy. If the one year period expires or, if during such one year period, the Temporary Policy does not become a Consensus Policy and is not reaffirmed by the Board, Registry Operator shall no longer be required to comply with or implement such Temporary Policy.
3. **Notice and Conflicts.** Registry Operator shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Policy in which to comply with such policy or specification, taking into account any urgency involved. In the event of a conflict between Registry Services and Consensus Policies or any Temporary Policy, the Consensus Policies or Temporary Policy shall control, but only with respect to subject matter in conflict.

SPECIFICATION 2

DATA ESCROW REQUIREMENTS

Registry Operator will engage an independent entity to act as data escrow agent (“*Escrow Agent*”) for the provision of data escrow services related to the Registry Agreement. The following Technical Specifications set forth in Part A, and Legal Requirements set forth in Part B, will be included in any data escrow agreement between Registry Operator and the Escrow Agent, under which ICANN must be named a third-party beneficiary. In addition to the following requirements, the data escrow agreement may contain other provisions that are not contradictory or intended to subvert the required terms provided below.

PART A – TECHNICAL SPECIFICATIONS

1. **Deposits.** There will be two types of Deposits: Full and Differential. For both types, the universe of Registry objects to be considered for data escrow are those objects necessary in order to offer all of the approved Registry Services.
 - 1.1 “**Full Deposit**” will consist of data that reflects the state of the registry as of 00:00:00 UTC on each Sunday.
 - 1.2 “**Differential Deposit**” means data that reflects all transactions that were not reflected in the last previous Full or Differential Deposit, as the case may be. Each Differential Deposit will contain all database transactions since the previous Deposit was completed as of 00:00:00 UTC of each day, but Sunday. Differential Deposits must include complete Escrow Records as specified below that were not included or changed since the most recent full or Differential Deposit (i.e., newly added or modified domain names).

2. **Schedule for Deposits.** Registry Operator will submit a set of escrow files on a daily basis as follows:
 - 2.1 Each Sunday, a Full Deposit must be submitted to the Escrow Agent by 23:59 UTC.
 - 2.2 The other six days of the week, the corresponding Differential Deposit must be submitted to Escrow Agent by 23:59 UTC.

3. **Escrow Format Specification.**
 - 3.1 **Deposit’s Format.** Registry objects, such as domains, contacts, name servers, registrars, etc. will be compiled into a file constructed as described in draft-arias-noguchi-registry-data-escrow, see [1]. The aforementioned document describes some elements as optional; Registry Operator will include those elements in the Deposits if they are available. Registry Operator will use the draft version available at the time of signing the Agreement, if not already an RFC. Once the specification is published as an RFC, Registry Operator will implement that specification, no later than 180 days after. UTF-8 character encoding will be used.

 - 3.2 **Extensions.** If a Registry Operator offers additional Registry Services that require submission of additional data, not included above, additional “extension schemas” shall be defined in a case by case base to represent that data. These “extension schemas” will be specified as described in [1]. Data related to the “extensions schemas” will be included in the deposit file described in section 3.1. ICANN and the respective Registry shall work together to agree on such new objects’ data escrow specifications.

4. **Processing of Deposit files.** The use of compression is recommended in order to reduce electronic data transfer times, and storage capacity requirements. Data encryption will be used to ensure the privacy of registry escrow data. Files processed for compression and encryption will be in the binary OpenPGP format as per OpenPGP Message Format - RFC 4880, see [2]. Acceptable algorithms for Public-key cryptography, Symmetric-key cryptography, Hash and Compression are those enumerated in RFC 4880, not marked as deprecated in OpenPGP IANA Registry, see [3], that are also royalty-free. The process to follow for a data file in original text format is:
- (1) The file should be compressed. The suggested algorithm for compression is ZIP as per RFC 4880.
 - (2) The compressed data will be encrypted using the escrow agent's public key. The suggested algorithms for Public-key encryption are Elgamal and RSA as per RFC 4880. The suggested algorithms for Symmetric-key encryption are TripleDES, AES128 and CAST5 as per RFC 4880.
 - (3) The file may be split as necessary if, once compressed and encrypted is larger than the file size limit agreed with the escrow agent. Every part of a split file, or the whole file if split is not used, will be called a processed file in this section.
 - (4) A digital signature file will be generated for every processed file using the Registry's private key. The digital signature file will be in binary OpenPGP format as per RFC 4880 [2], and will not be compressed or encrypted. The suggested algorithms for Digital signatures are DSA and RSA as per RFC 4880. The suggested algorithm for Hashes in Digital signatures is SHA256.
 - (5) The processed files and digital signature files will then be transferred to the Escrow Agent through secure electronic mechanisms, such as, SFTP, SCP, HTTPS file upload, etc. as agreed between the Escrow Agent and the Registry Operator. Non-electronic delivery through a physical medium such as CD-ROMs, DVD-ROMs, or USB storage devices may be used if authorized by ICANN.
 - (6) The Escrow Agent will then validate every (processed) transferred data file using the procedure described in section 8.
5. **File Naming Conventions.** Files will be named according to the following convention: {gTLD}_{YYYY-MM-DD}_{type}_S{#}_R{rev}.{ext} where:
- 5.1 {gTLD} is replaced with the gTLD name; in case of an IDN-TLD, the ASCII-compatible form (A-Label) must be used;
 - 5.2 {YYYY-MM-DD} is replaced by the date corresponding to the time used as a timeline watermark for the transactions; i.e. for the Full Deposit corresponding to 2009-08-02T00:00Z, the string to be used would be "2009-08-02";
 - 5.3 {type} is replaced by:
 - (1) "full", if the data represents a Full Deposit;
 - (2) "diff", if the data represents a Differential Deposit;
 - (3) "thin", if the data represents a Bulk Registration Data Access file, as specified in section 3 of Specification 4;
 - 5.4 {#} is replaced by the position of the file in a series of files, beginning with "1"; in case of a lone file, this must be replaced by "1".
 - 5.5 {rev} is replaced by the number of revision (or resend) of the file beginning with "0";
 - 5.6 {ext} is replaced by "sig" if it is a digital signature file of the quasi-homonymous file. Otherwise it is replaced by "ryde".

6. **Distribution of Public Keys.** Each of Registry Operator and Escrow Agent will distribute its public key to the other party (Registry Operator or Escrow Agent, as the case may be) via email to an email address to be specified. Each party will confirm receipt of the other party's public key with a reply email, and the distributing party will subsequently reconfirm the authenticity of the key transmitted via offline methods, like in person meeting, telephone, etc. In this way, public key transmission is authenticated to a user able to send and receive mail via a mail server operated by the distributing party. Escrow Agent, Registry and ICANN will exchange keys by the same procedure.
7. **Notification of Deposits.** Along with the delivery of each Deposit, Registry Operator will deliver to Escrow Agent and to ICANN a written statement (which may be by authenticated e-mail) that includes a copy of the report generated upon creation of the Deposit and states that the Deposit has been inspected by Registry Operator and is complete and accurate. Registry Operator will include the Deposit's "id" and "resend" attributes in its statement. The attributes are explained in [1].
8. **Verification Procedure.**
 - (1) The signature file of each processed file is validated.
 - (2) If processed files are pieces of a bigger file, the latter is put together.
 - (3) Each file obtained in the previous step is then decrypted and uncompressed.
 - (4) Each data file contained in the previous step is then validated against the format defined in [1].
 - (5) If [1] includes a verification process, that will be applied at this step.
If any discrepancy is found in any of the steps, the Deposit will be considered incomplete.
9. **References.**
 - [1] Domain Name Data Escrow Specification (work in progress), <http://tools.ietf.org/html/draft-arias-noguchi-registry-data-escrow>
 - [2] OpenPGP Message Format, <http://www.rfc-editor.org/rfc/rfc4880.txt>
 - [3] OpenPGP parameters, <http://www.iana.org/assignments/pgp-parameters/pgp-parameters.xhtml>

PART B – LEGAL REQUIREMENTS

1. **Escrow Agent.** Prior to entering into an escrow agreement, the Registry Operator must provide notice to ICANN as to the identity of the Escrow Agent, and provide ICANN with contact information and a copy of the relevant escrow agreement, and all amendment thereto. In addition, prior to entering into an escrow agreement, Registry Operator must obtain the consent of ICANN to (a) use the specified Escrow Agent, and (b) enter into the form of escrow agreement provided. ICANN must be expressly designated a third-party beneficiary of the escrow agreement. ICANN reserves the right to withhold its consent to any Escrow Agent, escrow agreement, or any amendment thereto, all in its sole discretion.
2. **Fees.** Registry Operator must pay, or have paid on its behalf, fees to the Escrow Agent directly. If Registry Operator fails to pay any fee by the due date(s), the Escrow Agent will give ICANN written notice of such non-payment and ICANN may pay the past-due fee(s) within ten business days after receipt of the written notice from Escrow Agent. Upon payment of the past-due fees by ICANN, ICANN shall have a claim for such amount against Registry Operator, which Registry Operator shall be required to submit to ICANN together with the next fee payment due under the Registry Agreement.
3. **Ownership.** Ownership of the Deposits during the effective term of the Registry Agreement shall remain with Registry Operator at all times. Thereafter, Registry Operator shall assign any such ownership rights (including intellectual property rights, as the case may be) in such Deposits to ICANN. In the event that during the term of the Registry Agreement any Deposit is released from escrow to ICANN, any intellectual property rights held by Registry Operator in the Deposits will automatically be licensed on a non-exclusive, perpetual, irrevocable, royalty-free, paid-up basis to ICANN or to a party designated in writing by ICANN.
4. **Integrity and Confidentiality.** Escrow Agent will be required to (i) hold and maintain the Deposits in a secure, locked, and environmentally safe facility, which is accessible only to authorized representatives of Escrow Agent, (ii) protect the integrity and confidentiality of the Deposits using commercially reasonable measures and (iii) keep and safeguard each Deposit for one year. ICANN and Registry Operator will be provided the right to inspect Escrow Agent's applicable records upon reasonable prior notice and during normal business hours. Registry Operator and ICANN will be provided with the right to designate a third-party auditor to audit Escrow Agent's compliance with the technical specifications and maintenance requirements of this Specification 2 from time to time.

If Escrow Agent receives a subpoena or any other order from a court or other judicial tribunal pertaining to the disclosure or release of the Deposits, Escrow Agent will promptly notify the Registry Operator and ICANN unless prohibited by law. After notifying the Registry Operator and ICANN, Escrow Agent shall allow sufficient time for Registry Operator or ICANN to challenge any such order, which shall be the responsibility of Registry Operator or ICANN; provided, however, that Escrow Agent does not waive its rights to present its position with respect to any such order. Escrow Agent will cooperate with the Registry Operator or ICANN to support efforts to quash or limit any subpoena, at such party's expense. Any party requesting additional assistance shall pay Escrow Agent's standard charges or as quoted upon submission of a detailed request.

5. **Copies.** Escrow Agent may be permitted to duplicate any Deposit, in order to comply with the terms and provisions of the escrow agreement.
6. **Release of Deposits.** Escrow Agent will make available for electronic download (unless otherwise requested) to ICANN or its designee, within twenty-four hours, at the Registry Operator's expense, all Deposits in Escrow Agent's possession in the event that the Escrow Agent receives a request from Registry Operator to effect such delivery to ICANN, or receives one of the following written notices by ICANN stating that:
- 6.1 the Registry Agreement has expired without renewal, or been terminated; or
 - 6.2 ICANN failed, with respect to (a) any Full Deposit or (b) five Differential Deposits within any calendar month, to receive, within five calendar days after the Deposit's scheduled delivery date, notification of receipt from Escrow Agent; (x) ICANN gave notice to Escrow Agent and Registry Operator of that failure; and (y) ICANN has not, within seven calendar days after such notice, received notice from Escrow Agent that the Deposit has been received; or
 - 6.3 ICANN has received notification from Escrow Agent of failed verification of a Full Deposit or of failed verification of five Differential Deposits within any calendar month and (a) ICANN gave notice to Registry Operator of that receipt; and (b) ICANN has not, within seven calendar days after such notice, received notice from Escrow Agent of verification of a remediated version of such Full Deposit or Differential Deposit; or
 - 6.4 Registry Operator has: (i) ceased to conduct its business in the ordinary course; or (ii) filed for bankruptcy, become insolvent or anything analogous to any of the foregoing under the laws of any jurisdiction anywhere in the world; or
 - 6.5 Registry Operator has experienced a failure of critical registry functions and ICANN has asserted its rights pursuant to Section 2.13 of the Registry Agreement; or
 - 6.6 a competent court, arbitral, legislative, or government agency mandates the release of the Deposits to ICANN.

Unless Escrow Agent has previously released the Registry Operator's Deposits to ICANN or its designee, Escrow Agent will deliver all Deposits to ICANN upon termination of the Registry Agreement or the Escrow Agreement.

7. **Verification of Deposits.**
- 7.1 Within twenty-four hours after receiving each Deposit or corrected Deposit, Escrow Agent must verify the format and completeness of each Deposit and deliver to ICANN a copy of the verification report generated for each Deposit. Reports will be delivered electronically, as specified from time to time by ICANN.
 - 7.2 If Escrow Agent discovers that any Deposit fails the verification procedures, Escrow Agent must notify, either by email, fax or phone, Registry Operator and ICANN of such nonconformity within twenty-four hours after receiving the non-conformant Deposit. Upon notification of such verification failure, Registry Operator must begin developing modifications, updates, corrections, and other fixes of the Deposit necessary for the Deposit to pass the verification procedures and deliver such fixes to Escrow Agent as promptly as possible.
8. **Amendments.** Escrow Agent and Registry Operator shall amend the terms of the Escrow Agreement to conform to this Specification 2 within ten (10) calendar days of any amendment or modification to this Specification 2. In the event of a conflict between this Specification 2 and the Escrow Agreement, this Specification 2 shall control.
9. **Indemnity.** Registry Operator shall indemnify and hold harmless Escrow Agent and each of its directors, officers, agents, employees, members, and stockholders ("Escrow Agent Indemnitees")

absolutely and forever from and against any and all claims, actions, damages, suits, liabilities, obligations, costs, fees, charges, and any other expenses whatsoever, including reasonable attorneys' fees and costs, that may be asserted by a third party against any Escrow Agent Indemnitees in connection with the Escrow Agreement or the performance of Escrow Agent or any Escrow Agent Indemnitees thereunder (with the exception of any claims based on the misrepresentation, negligence, or misconduct of Escrow Agent, its directors, officers, agents, employees, contractors, members, and stockholders). Escrow Agent shall indemnify and hold harmless Registry Operator and ICANN, and each of their respective directors, officers, agents, employees, members, and stockholders ("Indemnitees") absolutely and forever from and against any and all claims, actions, damages, suits, liabilities, obligations, costs, fees, charges, and any other expenses whatsoever, including reasonable attorneys' fees and costs, that may be asserted by a third party against any Indemnitee in connection with the misrepresentation, negligence or misconduct of Escrow Agent, its directors, officers, agents, employees and contractors.

SPECIFICATION 3

FORMAT AND CONTENT FOR REGISTRY OPERATOR MONTHLY REPORTING

Registry Operator shall provide one set of monthly reports per gTLD to _____ with the following content. ICANN may request in the future that the reports be delivered by other means and using other formats. ICANN will use reasonable commercial efforts to preserve the confidentiality of the information reported until three months after the end of the month to which the reports relate.

1. Per-Registrar Transactions Report. This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named “gTLD-transactions-yyyymm.csv”, where “gTLD” is the gTLD name; in case of an IDN-TLD, the A-label shall be used; “yyyymm” is the year and month being reported. The file shall contain the following fields per registrar:

Field #	Field Name	Description
01	registrar-name	registrar's full corporate name as registered with IANA
02	iana-id	http://www.iana.org/assignments/registrar-ids
03	total-domains	total domains under sponsorship
04	total-nameservers	total name servers registered for TLD
05	net-adds-1-yr	number of domains successfully registered with an initial term of one year (and not deleted within the add grace period)
06	net-adds-2-yr	number of domains successfully registered with an initial term of two years (and not deleted within the add grace period)
07	net-adds-3-yr	number of domains successfully registered with an initial term of three years (and not deleted within the add grace period)
08	net-adds-4-yr	number of domains successfully registered with an initial term of four years (and not deleted within the add grace period)
09	net-adds-5-yr	number of domains successfully registered with an initial term of five years (and not deleted within the add grace period)
10	net-adds-6-yr	number of domains successfully registered with an initial term of six years (and not deleted within the add grace period)
11	net-adds-7-yr	number of domains successfully registered with an initial term of seven years (and not deleted within the add grace period)

12	net-adds-8-yr	number of domains successfully registered with an initial term of eight years (and not deleted within the add grace period)
13	net-adds-9-yr	number of domains successfully registered with an initial term of nine years (and not deleted within the add grace period)
14	net-adds-10-yr	number of domains successfully registered with an initial term of ten years (and not deleted within the add grace period)
15	net-renews-1-yr	number of domains successfully renewed either automatically or by command with a new renewal period of one year (and not deleted within the renew grace period)
16	net-renews-2-yr	number of domains successfully renewed either automatically or by command with a new renewal period of two years (and not deleted within the renew grace period)
17	net-renews-3-yr	number of domains successfully renewed either automatically or by command with a new renewal period of three years (and not deleted within the renew grace period)
18	net-renews-4-yr	number of domains successfully renewed either automatically or by command with a new renewal period of four years (and not deleted within the renew grace period)
19	net-renews-5-yr	number of domains successfully renewed either automatically or by command with a new renewal period of five years (and not deleted within the renew grace period)
20	net-renews-6-yr	number of domains successfully renewed either automatically or by command with a new renewal period of six years (and not deleted within the renew grace period)
21	net-renews-7-yr	number of domains successfully renewed either automatically or by command with a new renewal period of seven years (and not deleted within the renew grace period)
22	net-renews-8-yr	number of domains successfully renewed either automatically or by command with a new renewal period of eight years (and not deleted within the renew grace period)
23	net-renews-9-yr	number of domains successfully renewed either

		automatically or by command with a new renewal period of nine years (and not deleted within the renew grace period)
24	net-renews-10-yr	number of domains successfully renewed either automatically or by command with a new renewal period of ten years (and not deleted within the renew grace period)
25	transfer-gaining-successful	transfers initiated by this registrar that were ack'd by the other registrar – either by command or automatically
26	transfer-gaining-nacked	transfers initiated by this registrar that were n'acked by the other registrar
27	transfer-losing-successful	transfers initiated by another registrar that this registrar ack'd – either by command or automatically
28	transfer-losing-nacked	transfers initiated by another registrar that this registrar n'acked
29	transfer-disputed-won	number of transfer disputes in which this registrar prevailed
30	transfer-disputed-lost	number of transfer disputes this registrar lost
31	transfer-disputed-nodecision	number of transfer disputes involving this registrar with a split or no decision
32	deleted-domains-grace	domains deleted within the add grace period
33	deleted-domains-nograce	domains deleted outside the add grace period
34	restored-domains	domain names restored from redemption period
35	restored-noreport	total number of restored names for which the registrar failed to submit a restore report
36	agp-exemption-requests	total number of AGP (add grace period) exemption requests
37	agp-exemptions-granted	total number of AGP (add grace period) exemption requests granted
38	agp-exempted-domains	total number of names affected by granted AGP (add grace period) exemption requests
39	attempted-adds	number of attempted (successful and failed) domain name create commands

The first line shall include the field names exactly as described in the table above as a “header line” as described in section 2 of RFC 4180. The last line of each report shall include totals for each column across all registrars; the first field of this line shall read “Totals” while the second field shall be left empty in that line. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

2. Registry Functions Activity Report. This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named “gTLD-activity-yyyymm.csv”, where “gTLD” is the gTLD name; in case of an IDN-TLD, the A-label shall be used; “yyyymm” is the year and month being reported. The file shall contain the following fields:

Field #	Field Name	Description
01	operational-registrars	number of operational registrars at the end of the reporting period
02	ramp-up-registrars	number of registrars that have received a password for access to OT&E at the end of the reporting period
03	pre-ramp-up-registrars	number of registrars that have requested access, but have not yet entered the ramp-up period at the end of the reporting period
04	zfa-passwords	number of active zone file access passwords at the end of the reporting period
05	whois-43-queries	number of WHOIS (port-43) queries responded during the reporting period
06	web-whois-queries	number of Web-based Whois queries responded during the reporting period, not including searchable Whois
07	searchable-whois-queries	number of searchable Whois queries responded during the reporting period, if offered
08	dns-udp-queries-received	number of DNS queries received over UDP transport during the reporting period
09	dns-udp-queries-responded	number of DNS queries received over UDP transport that were responded during the reporting period
10	dns-tcp-queries-received	number of DNS queries received over TCP transport during the reporting period
11	dns-tcp-queries-responded	number of DNS queries received over TCP transport that were responded during the reporting period
12	srs-dom-check	number of SRS (EPP and any other interface) domain name “check” requests responded during the reporting period
13	srs-dom-create	number of SRS (EPP and any other interface) domain name “create” requests responded during the reporting period
14	srs-dom-delete	number of SRS (EPP and any other interface) domain name “delete” requests responded during the reporting period
15	srs-dom-info	number of SRS (EPP and any other interface) domain name “info” requests responded during the reporting period
16	srs-dom-renew	number of SRS (EPP and any other interface) domain name

		“renew” requests responded during the reporting period
17	srs-dom-rgp-restore-report	number of SRS (EPP and any other interface) domain name RGP “restore” requests responded during the reporting period
18	srs-dom-rgp-restore-request	number of SRS (EPP and any other interface) domain name RGP “restore” requests delivering a restore report responded during the reporting period
19	srs-dom-transfer-approve	number of SRS (EPP and any other interface) domain name “transfer” requests to approve transfers responded during the reporting period
20	srs-dom-transfer-cancel	number of SRS (EPP and any other interface) domain name “transfer” requests to cancel transfers responded during the reporting period
21	srs-dom-transfer-query	number of SRS (EPP and any other interface) domain name “transfer” requests to query about a transfer responded during the reporting period
22	srs-dom-transfer-reject	number of SRS (EPP and any other interface) domain name “transfer” requests to reject transfers responded during the reporting period
23	srs-dom-transfer-request	number of SRS (EPP and any other interface) domain name “transfer” requests to request transfers responded during the reporting period
24	srs-dom-update	number of SRS (EPP and any other interface) domain name “update” requests (not including RGP restore requests) responded during the reporting period
25	srs-host-check	number of SRS (EPP and any other interface) host “check” requests responded during the reporting period
26	srs-host-create	number of SRS (EPP and any other interface) host “create” requests responded during the reporting period
27	srs-host-delete	number of SRS (EPP and any other interface) host “delete” requests responded during the reporting period
28	srs-host-info	number of SRS (EPP and any other interface) host “info” requests responded during the reporting period
29	srs-host-update	number of SRS (EPP and any other interface) host “update” requests responded during the reporting period
30	srs-cont-check	number of SRS (EPP and any other interface) contact “check” requests responded during the reporting period
31	srs-cont-create	number of SRS (EPP and any other interface) contact “create” requests responded during the reporting period

32	srs-cont-delete	number of SRS (EPP and any other interface) contact “delete” requests responded during the reporting period
33	srs-cont-info	number of SRS (EPP and any other interface) contact “info” requests responded during the reporting period
34	srs-cont-transfer-approve	number of SRS (EPP and any other interface) contact “transfer” requests to approve transfers responded during the reporting period
35	srs-cont-transfer-cancel	number of SRS (EPP and any other interface) contact “transfer” requests to cancel transfers responded during the reporting period
36	srs-cont-transfer-query	number of SRS (EPP and any other interface) contact “transfer” requests to query about a transfer responded during the reporting period
37	srs-cont-transfer-reject	number of SRS (EPP and any other interface) contact “transfer” requests to reject transfers responded during the reporting period
38	srs-cont-transfer-request	number of SRS (EPP and any other interface) contact “transfer” requests to request transfers responded during the reporting period
39	srs-cont-update	number of SRS (EPP and any other interface) contact “update” requests responded during the reporting period

The first line shall include the field names exactly as described in the table above as a “header line” as described in section 2 of RFC 4180. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

SPECIFICATION 4

SPECIFICATION FOR REGISTRATION DATA PUBLICATION SERVICES

1. **Registration Data Directory Services.** Until ICANN requires a different protocol, Registry Operator will operate a WHOIS service available via port 43 in accordance with RFC 3912, and a web-based Directory Service at <whois.nic.TLD> providing free public query-based access to at least the following elements in the following format. ICANN reserves the right to specify alternative formats and protocols, and upon such specification, the Registry Operator will implement such alternative specification as soon as reasonably practicable.

1.1. The format of responses shall follow a semi-free text format outline below, followed by a blank line and a legal disclaimer specifying the rights of Registry Operator, and of the user querying the database.

1.2. Each data object shall be represented as a set of key/value pairs, with lines beginning with keys, followed by a colon and a space as delimiters, followed by the value.

1.3. For fields where more than one value exists, multiple key/value pairs with the same key shall be allowed (for example to list multiple name servers). The first key/value pair after a blank line should be considered the start of a new record, and should be considered as identifying that record, and is used to group data, such as hostnames and IP addresses, or a domain name and registrant information, together.

1.4. Domain Name Data:

1.4.1. **Query format:** whois EXAMPLE.TLD

1.4.2. **Response format:**

```

Domain Name: EXAMPLE.TLD
Domain ID: D1234567-TLD
WHOIS Server: whois.example.tld
Referral URL: http://www.example.tld
Updated Date: 2009-05-29T20:13:00Z
Creation Date: 2000-10-08T00:45:00Z
Registry Expiry Date: 2010-10-08T00:44:59Z
Sponsoring Registrar: EXAMPLE REGISTRAR LLC
Sponsoring Registrar IANA ID: 5555555
Domain Status: clientDeleteProhibited
Domain Status: clientRenewProhibited
Domain Status: clientTransferProhibited
Domain Status: serverUpdateProhibited
Registrant ID: 5372808-ERL
Registrant Name: EXAMPLE REGISTRANT
Registrant Organization: EXAMPLE ORGANIZATION
Registrant Street: 123 EXAMPLE STREET
Registrant City: ANYTOWN
Registrant State/Province: AP
Registrant Postal Code: A1A1A1
Registrant Country: EX

```

Registrant Phone: +1.5555551212
Registrant Phone Ext: 1234
Registrant Fax: +1.5555551213
Registrant Fax Ext: 4321
Registrant Email: EMAIL@EXAMPLE.TLD
Admin ID: 5372809-ERL
Admin Name: EXAMPLE REGISTRANT ADMINISTRATIVE
Admin Organization: EXAMPLE REGISTRANT ORGANIZATION
Admin Street: 123 EXAMPLE STREET
Admin City: ANYTOWN
Admin State/Province: AP
Admin Postal Code: A1A1A1
Admin Country: EX
Admin Phone: +1.5555551212
Admin Phone Ext: 1234
Admin Fax: +1.5555551213
Admin Fax Ext:
Admin Email: EMAIL@EXAMPLE.TLD
Tech ID: 5372811-ERL
Tech Name: EXAMPLE REGISTRAR TECHNICAL
Tech Organization: EXAMPLE REGISTRAR LLC
Tech Street: 123 EXAMPLE STREET
Tech City: ANYTOWN
Tech State/Province: AP
Tech Postal Code: A1A1A1
Tech Country: EX
Tech Phone: +1.1235551234
Tech Phone Ext: 1234
Tech Fax: +1.5555551213
Tech Fax Ext: 93
Tech Email: EMAIL@EXAMPLE.TLD
Name Server: NS01.EXAMPLEREGISTRAR.TLD
Name Server: NS02.EXAMPLEREGISTRAR.TLD
DNSSEC: signedDelegation
DNSSEC: unsigned
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.5. Registrar Data:

1.5.1. **Query format:** whois "registrar Example Registrar, Inc."

1.5.2. **Response format:**

Registrar Name: Example Registrar, Inc.
Street: 1234 Admiralty Way
City: Marina del Rey
State/Province: CA
Postal Code: 90292
Country: US
Phone Number: +1.3105551212
Fax Number: +1.3105551213

Email: registrar@example.tld
 WHOIS Server: whois.example-registrar.tld
 Referral URL: http://www.example-registrar.tld
 Admin Contact: Joe Registrar
 Phone Number: +1.3105551213
 Fax Number: +1.3105551213
 Email: joeregistrar@example-registrar.tld
 Admin Contact: Jane Registrar
 Phone Number: +1.3105551214
 Fax Number: +1.3105551213
 Email: janeregistrar@example-registrar.tld
 Technical Contact: John Geek
 Phone Number: +1.3105551215
 Fax Number: +1.3105551216
 Email: johngeek@example-registrar.tld
 >>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.6. Nameserver Data:

1.6.1. **Query format:** whois "NS1.EXAMPLE.TLD" or whois "nameserver (IP Address)"

1.6.2. **Response format:**

Server Name: NS1.EXAMPLE.TLD
 IP Address: 192.0.2.123
 IP Address: 2001:0DB8::1
 Registrar: Example Registrar, Inc.
 WHOIS Server: whois.example-registrar.tld
 Referral URL: http://www.example-registrar.tld
 >>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.7. The format of the following data fields: domain status, individual and organizational names, address, street, city, state/province, postal code, country, telephone and fax numbers, email addresses, date and times should conform to the mappings specified in EPP RFCs 5730-5734 so that the display of this information (or values return in WHOIS responses) can be uniformly processed and understood.

1.8. **Searchability.** Offering searchability capabilities on the Directory Services is optional but if offered by the Registry Operator it shall comply with the specification described in this section.

1.8.1. Registry Operator will offer searchability on the web-based Directory Service.

1.8.2. Registry Operator will offer partial match capabilities, at least, on the following fields: domain name, contacts and registrant's name, and contact and registrant's postal address, including all the sub-fields described in EPP (e.g., street, city, state or province, etc.).

1.8.3. Registry Operator will offer exact-match capabilities, at least, on the following fields: registrar id, name server name, and name server's IP address (only applies to IP addresses stored by the registry, i.e., glue records).

1.8.4. Registry Operator will offer Boolean search capabilities supporting, at least, the following logical operators to join a set of search criteria: AND, OR, NOT.

1.8.5. Search results will include domain names matching the search criteria.

1.8.6. Registry Operator will: 1) implement appropriate measures to avoid abuse of this feature (e.g., permitting access only to legitimate authorized users); and 2) ensure the feature is in compliance with any applicable privacy laws or policies.

2. Zone File Access

2.1. Third-Party Access

2.1.1. **Zone File Access Agreement.** Registry Operator will enter into an agreement with any Internet user that will allow such user to access an Internet host server or servers designated by Registry Operator and download zone file data. The agreement will be standardized, facilitated and administered by a Centralized Zone Data Access Provider (the “CZDA Provider”). Registry Operator will provide access to zone file data per Section 2.1.3 and do so using the file format described in Section 2.1.4. Notwithstanding the foregoing, (a) the CZDA Provider may reject the request for access of any user that does not satisfy the credentialing requirements in Section 2.1.2 below; (b) Registry Operator may reject the request for access of any user that does not provide correct or legitimate credentials under Section 2.1.2 or where Registry Operator reasonably believes will violate the terms of Section 2.1.5. below; and, (c) Registry Operator may revoke access of any user if Registry Operator has evidence to support that the user has violated the terms of Section 2.1.5.

2.1.2. **Credentialing Requirements.** Registry Operator, through the facilitation of the CZDA Provider, will request each user to provide it with information sufficient to correctly identify and locate the user. Such user information will include, without limitation, company name, contact name, address, telephone number, facsimile number, email address, and the Internet host machine name and IP address.

2.1.3. **Grant of Access.** Each Registry Operator will provide the Zone File FTP (or other Registry supported) service for an ICANN-specified and managed URL (specifically, <TLD>.zda.icann.org where <TLD> is the TLD for which the registry is responsible) for the user to access the Registry’s zone data archives. Registry Operator will grant the user a non-exclusive, non-transferable, limited right to access Registry Operator’s Zone File FTP server, and to transfer a copy of the top-level domain zone files, and any associated cryptographic checksum files no more than once per 24 hour period using FTP, or other data transport and access protocols that may be prescribed by ICANN. For every zone file access server, the zone files are in the top-level directory called <zone>.zone.gz, with <zone>.zone.gz.md5 and <zone>.zone.gz.sig to verify downloads. If the Registry Operator also provides historical data, it will use the naming pattern <zone>-yyyymmdd.zone.gz, etc.

2.1.4. **File Format Standard.** Registry Operator will provide zone files using a sub-format of the standard Master File format as originally defined in RFC 1035, Section 5, including all the records present in the actual zone used in the public DNS. Sub-format is as follows:

1. Each record must include all fields in one line as: <domain-name> <TTL> <class> <type> <RDATA>.
2. Class and Type must use the standard mnemonics and must be in lower case.

3. TTL must be present as a decimal integer.
4. Use of /X and /DDD inside domain names is allowed.
5. All domain names must be in lower case.
6. Must use exactly one tab as separator of fields inside a record.
7. All domain names must be fully qualified.
8. No \$ORIGIN directives.
9. No use of "@" to denote current origin.
10. No use of "blank domain names" at the beginning of a record to continue the use of the domain name in the previous record.
11. No \$INCLUDE directives.
12. No \$TTL directives.
13. No use of parentheses, e.g., to continue the list of fields in a record across a line boundary.
14. No use of comments.
15. No blank lines.
16. The SOA record should be present at the top and (duplicated at) the end of the zone file.
17. With the exception of the SOA record, all the records in a file must be in alphabetical order.
18. One zone per file. If a TLD divides its DNS data into multiple zones, each goes into a separate file named as above, with all the files combined using tar into a file called <tld>.zone.tar.

2.1.5. Use of Data by User. Registry Operator will permit user to use the zone file for lawful purposes; provided that, (a) user takes all reasonable steps to protect against unauthorized access to and use and disclosure of the data, and (b) under no circumstances will Registry Operator be required or permitted to allow user to use the data to, (i) allow, enable, or otherwise support the transmission by e-mail, telephone, or facsimile of mass unsolicited, commercial advertising or solicitations to entities other than user's own existing customers, or (ii) enable high volume, automated, electronic processes that send queries or data to the systems of Registry Operator or any ICANN-accredited registrar.

2.1.6. Term of Use. Registry Operator, through CZDA Provider, will provide each user with access to the zone file for a period of not less than three (3) months. Registry Operator will allow users to renew their Grant of Access.

2.1.7. No Fee for Access. Registry Operator will provide, and CZDA Provider will facilitate, access to the zone file to user at no cost.

2.2 Co-operation

2.2.1. Assistance. Registry Operator will co-operate and provide reasonable assistance to ICANN and the CZDA Provider to facilitate and maintain the efficient access of zone file data by permitted users as contemplated under this Schedule.

2.3 ICANN Access. Registry Operator shall provide bulk access to the zone files for the TLD to ICANN or its designee on a continuous basis in the manner ICANN may reasonably specify from time to time.

2.4 Emergency Operator Access. Registry Operator shall provide bulk access to the zone files for the TLD to the Emergency Operators designated by ICANN on a continuous basis in the manner ICANN may reasonably specify from time to time.

3. Bulk Registration Data Access to ICANN

3.1. Periodic Access to Thin Registration Data. In order to verify and ensure the operational stability of Registry Services as well as to facilitate compliance checks on accredited registrars, Registry Operator will provide ICANN on a weekly basis (the day to be designated by ICANN) with up-to-date Registration Data as specified below. Data will include data committed as of 00:00:00 UTC on the day previous to the one designated for retrieval by ICANN.

3.1.1. Contents. Registry Operator will provide, at least, the following data for all registered domain names: domain name, domain name repository object id (roid), registrar id (IANA ID), statuses, last updated date, creation date, expiration date, and name server names. For sponsoring registrars, at least, it will provide: registrar name, registrar repository object id (roid), hostname of registrar Whois server, and URL of registrar.

3.1.2. Format. The data will be provided in the format specified in Specification 2 for Data Escrow (including encryption, signing, etc.) but including only the fields mentioned in the previous section, i.e., the file will only contain Domain and Registrar objects with the fields mentioned above. Registry Operator has the option to provide a full deposit file instead as specified in Specification 2.

3.1.3. Access. Registry Operator will have the file(s) ready for download as of 00:00:00 UTC on the day designated for retrieval by ICANN. The file(s) will be made available for download by SFTP, though ICANN may request other means in the future.

3.2. Exceptional Access to Thick Registration Data. In case of a registrar failure, de-accreditation, court order, etc. that prompts the temporary or definitive transfer of its domain names to another registrar, at the request of ICANN, Registry Operator will provide ICANN with up-to-date data for the domain names of the losing registrar. The data will be provided in the format specified in Specification 2 for Data Escrow. The file will only contain data related to the domain names of the losing registrar. Registry Operator will provide the data within 2 business days. Unless otherwise agreed by Registry Operator and ICANN, the file will be made available for download by ICANN in the same manner as the data specified in Section 3.1. of this Specification.

SPECIFICATION 5

SCHEDULE OF RESERVED NAMES AT THE SECOND LEVEL IN GTLD REGISTRIES

Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall reserve (i.e., Registry Operator shall not register, delegate, use or otherwise make available such labels to any third party, but may register such labels in its own name in order to withhold them from delegation or use) names formed with the following labels from initial (i.e. other than renewal) registration within the TLD:

1. **Example. The label “EXAMPLE”** shall be reserved at the second level and at all other levels within the TLD at which Registry Operator makes registrations.
2. **Two-character labels.** All two-character labels shall be initially reserved. The reservation of a two-character label string may be released to the extent that Registry Operator reaches agreement with the government and country-code manager. The Registry Operator may also propose release of these reservations based on its implementation of measures to avoid confusion with the corresponding country codes.
3. **Tagged Domain Names.** Labels may only include hyphens in the third and fourth position if they represent valid internationalized domain names in their ASCII encoding (for example "xn--ndk061n").
4. **Second-Level Reservations for Registry Operations.** The following names are reserved for use in connection with the operation of the registry for the TLD. Registry Operator may use them, but upon conclusion of Registry Operator's designation as operator of the registry for the TLD they shall be transferred as specified by ICANN: NIC, WWW, IRIS and WHOIS.
5. **Country and Territory Names.** The country and territory names contained in the following internationally recognized lists shall be initially reserved at the second level and at all other levels within the TLD at which the Registry Operator provides for registrations:
 - 5.1. the short form (in English) of all country and territory names contained on the ISO 3166-1 list, as updated from time to time, including the European Union, which is exceptionally reserved on the ISO 3166-1 list, and its scope extended in August 1999 to any application needing to represent the name European Union
<http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm#EU>;
 - 5.2. the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and
 - 5.3. the list of United Nations member states in 6 official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names;

provided, that the reservation of specific country and territory names may be released to the extent that Registry Operator reaches agreement with the applicable government(s), provided, further, that

Registry Operator may also propose release of these reservations, subject to review by ICANN's Governmental Advisory Committee and approval by ICANN.

SPECIFICATION 6

REGISTRY INTEROPERABILITY AND CONTINUITY SPECIFICATIONS

1. Standards Compliance

1.1. **DNS.** Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF) including all successor standards, modifications or additions thereto relating to the DNS and name server operations including without limitation RFCs 1034, 1035, 1982, 2181, 2182, 2671, 3226, 3596, 3597, 4343, and 5966.

1.2. **EPP.** Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF) including all successor standards, modifications or additions thereto relating to the provisioning and management of domain names using the Extensible Provisioning Protocol (EPP) in conformance with RFCs 5910, 5730, 5731, 5732, 5733 and 5734. If Registry Operator implements Registry Grace Period (RGP), it will comply with RFC 3915 and its successors. If Registry Operator requires the use of functionality outside the base EPP RFCs, Registry Operator must document EPP extensions in Internet-Draft format following the guidelines described in RFC 3735. Registry Operator will provide and update the relevant documentation of all the EPP Objects and Extensions supported to ICANN prior to deployment.

1.3. **DNSSEC.** Registry Operator shall sign its TLD zone files implementing Domain Name System Security Extensions (“DNSSEC”). During the Term, Registry Operator shall comply with RFCs 4033, 4034, 4035, 4509 and their successors, and follow the best practices described in RFC 4641 and its successors. If Registry Operator implements Hashed Authenticated Denial of Existence for DNS Security Extensions, it shall comply with RFC 5155 and its successors. Registry Operator shall accept public-key material from child domain names in a secure manner according to industry best practices. Registry shall also publish in its website the DNSSEC Practice Statements (DPS) describing critical security controls and procedures for key material storage, access and usage for its own keys and secure acceptance of registrants’ public-key material. Registry Operator shall publish its DPS following the format described in “DPS-framework” (currently in draft format, see <http://tools.ietf.org/html/draft-ietf-dnsop-dnssec-dps-framework>) within 180 days after the “DPS-framework” becomes an RFC.

1.4. **IDN.** If the Registry Operator offers Internationalized Domain Names (“IDNs”), it shall comply with RFCs 5890, 5891, 5892, 5893 and their successors. Registry Operator shall comply with the ICANN IDN Guidelines at <http://www.icann.org/en/topics/idn/implementation-guidelines.htm>, as they may be amended, modified, or superseded from time to time. Registry Operator shall publish and keep updated its IDN Tables and IDN Registration Rules in the IANA Repository of IDN Practices as specified in the ICANN IDN Guidelines.

1.5. **IPv6.** Registry Operator shall be able to accept IPv6 addresses as glue records in its Registry System and publish them in the DNS. Registry Operator shall offer public IPv6 transport for, at least, two of the Registry’s name servers listed in the root zone with the corresponding IPv6 addresses registered with IANA. Registry Operator should follow “DNS IPv6 Transport Operational Guidelines” as described in BCP 91 and the recommendations and considerations described in RFC 4472. Registry Operator shall offer public IPv6 transport for its Registration Data Publication Services as defined in Specification 4 of this Agreement; e.g. Whois (RFC 3912), Web based Whois. Registry Operator shall offer public IPv6 transport for its Shared Registration System (SRS) to any Registrar, no later than six months after receiving the first request in writing from a gTLD accredited Registrar willing to operate with the SRS over IPv6.

2. Registry Services

2.1. **Registry Services.** “Registry Services” are, for purposes of the Registry Agreement, defined as the following: (a) those services that are operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry DNS servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by this Agreement; (b) other products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy as defined in Specification 1; (c) any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator; and (d) material changes to any Registry Service within the scope of (a), (b) or (c) above.

2.2. **Wildcard Prohibition.** For domain names which are either not registered, or the registrant has not supplied valid records such as NS records for listing in the DNS zone file, or their status does not allow them to be published in the DNS, the use of DNS wildcard Resource Records as described in RFCs 1034 and 4592 or any other method or technology for synthesizing DNS Resources Records or using redirection within the DNS by the Registry is prohibited. When queried for such domain names the authoritative name servers must return a “Name Error” response (also known as NXDOMAIN), RCODE 3 as described in RFC 1035 and related RFCs. This provision applies for all DNS zone files at all levels in the DNS tree for which the Registry Operator (or an affiliate engaged in providing Registration Services) maintains data, arranges for such maintenance, or derives revenue from such maintenance.

3. Registry Continuity

3.1. **High Availability.** Registry Operator will conduct its operations using network and geographically diverse, redundant servers (including network-level redundancy, end-node level redundancy and the implementation of a load balancing scheme where applicable) to ensure continued operation in the case of technical failure (widespread or local), or an extraordinary occurrence or circumstance beyond the control of the Registry Operator.

3.2. **Extraordinary Event.** Registry Operator will use commercially reasonable efforts to restore the critical functions of the registry within 24 hours after the termination of an extraordinary event beyond the control of the Registry Operator and restore full system functionality within a maximum of 48 hours following such event, depending on the type of critical function involved. Outages due to such an event will not be considered a lack of service availability.

3.3. **Business Continuity.** Registry Operator shall maintain a business continuity plan, which will provide for the maintenance of Registry Services in the event of an extraordinary event beyond the control of the Registry Operator or business failure of Registry Operator, and may include the designation of a Registry Services continuity provider. If such plan includes the designation of a Registry Services continuity provider, Registry Operator shall provide the name and contact information for such Registry Services continuity provider to ICANN. In the case of an extraordinary event beyond the control of the Registry Operator where the Registry Operator cannot be contacted, Registry Operator consents that ICANN may contact the designated Registry Services continuity provider, if one exists. Registry Operator shall conduct Registry Services Continuity testing at least once per year.

4. Abuse Mitigation

4.1. **Abuse Contact.** Registry Operator shall provide to ICANN and publish on its website its accurate contact details including a valid email and mailing address as well as a primary contact for handling inquiries related to malicious conduct in the TLD, and will provide ICANN with prompt notice of any changes to such contact details.

4.2. **Malicious Use of Orphan Glue Records.** Registry Operators shall take action to remove orphan glue records (as defined at <http://www.icann.org/en/committees/security/sac048.pdf>) when provided with evidence in written form that such records are present in connection with malicious conduct.

5. Supported Initial and Renewal Registration Periods

5.1. **Initial Registration Periods.** Initial registrations of registered names may be made in the registry in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, initial registrations of registered names may not exceed ten (10) years.

5.2. **Renewal Periods.** Renewal of registered names may be made in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, renewal of registered names may not extend their registration period beyond ten (10) years from the time of the renewal.

SPECIFICATION 7

MINIMUM REQUIREMENTS FOR RIGHTS PROTECTION MECHANISMS

1. **Rights Protection Mechanisms.** Registry Operator shall implement and adhere to any rights protection mechanisms (“RPMs”) that may be mandated from time to time by ICANN. In addition to such RPMs, Registry Operator may develop and implement additional RPMs that discourage or prevent registration of domain names that violate or abuse another party’s legal rights. Registry Operator will include all ICANN mandated and independently developed RPMs in the registry-registrar agreement entered into by ICANN-accredited registrars authorized to register names in the TLD. Registry Operator shall implement in accordance with requirements established by ICANN each of the mandatory RPMs set forth in the Trademark Clearinghouse (posted at [url to be inserted when final Trademark Clearinghouse is adopted]), which may be revised by ICANN from time to time. Registry Operator shall not mandate that any owner of applicable intellectual property rights use any other trademark information aggregation, notification, or validation service in addition to or instead of the ICANN-designated Trademark Clearinghouse.

2. **Dispute Resolution Mechanisms.** Registry Operator will comply with the following dispute resolution mechanisms as they may be revised from time to time:

- a. the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) and the Registration Restriction Dispute Resolution Procedure (RRDRP) adopted by ICANN (posted at [urls to be inserted when final procedure is adopted]). Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Registry Agreement) following a determination by any PDDRP or RRDRP panel and to be bound by any such determination; and
- b. the Uniform Rapid Suspension system (“URS”) adopted by ICANN (posted at [url to be inserted]), including the implementation of determinations issued by URS examiners.

SPECIFICATION 8

CONTINUED OPERATIONS INSTRUMENT

1. The Continued Operations Instrument shall (a) provide for sufficient financial resources to ensure the continued operation of the critical registry functions related to the TLD set forth in Section [__] of the Applicant Guidebook posted at [url to be inserted upon finalization of Applicant Guidebook] (which is hereby incorporated by reference into this Specification 8) for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6th) anniversary of the Effective Date, and (b) be in the form of either (i) an irrevocable standby letter of credit, or (ii) an irrevocable cash escrow deposit, each meeting the requirements set forth in Section [__] of the Applicant Guidebook posted at [url to be inserted upon finalization of Applicant Guidebook] (which is hereby incorporated by reference into this Specification 8). Registry Operator shall use its best efforts to take all actions necessary or advisable to maintain in effect the Continued Operations Instrument for a period of six (6) years from the Effective Date, and to maintain ICANN as a third party beneficiary thereof. Registry Operator shall provide to ICANN copies of all final documents relating to the Continued Operations Instrument and shall keep ICANN reasonably informed of material developments relating to the Continued Operations Instrument. Registry Operator shall not agree to, or permit, any amendment of, or waiver under, the Continued Operations Instrument or other documentation relating thereto without the prior written consent of ICANN (such consent not to be unreasonably withheld). The Continued Operations Instrument shall expressly state that ICANN may access the financial resources of the Continued Operations Instrument pursuant to Section 2.13 or Section 4.5 [*insert for government entity*: or Section 7.14] of the Registry Agreement.

2. If, notwithstanding the use of best efforts by Registry Operator to satisfy its obligations under the preceding paragraph, the Continued Operations Instrument expires or is terminated by another party thereto, in whole or in part, for any reason, prior to the sixth anniversary of the Effective Date, Registry Operator shall promptly (i) notify ICANN of such expiration or termination and the reasons therefor and (ii) arrange for an alternative instrument that provides for sufficient financial resources to ensure the continued operation of the Registry Services related to the TLD for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date (an “Alternative Instrument”). Any such Alternative Instrument shall be on terms no less favorable to ICANN than the Continued Operations Instrument and shall otherwise be in form and substance reasonably acceptable to ICANN.

3. Notwithstanding anything to the contrary contained in this Specification 8, at any time, Registry Operator may replace the Continued Operations Instrument with an alternative

instrument that (i) provides for sufficient financial resources to ensure the continued operation of the Registry Services related to the TLD for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date, and (ii) contains terms no less favorable to ICANN than the Continued Operations Instrument and is otherwise in form and substance reasonably acceptable to ICANN. In the event Registry Operation replaces the Continued Operations Instrument either pursuant to paragraph 2 or this paragraph 3, the terms of this Specification 8 shall no longer apply with respect to the original Continuing Operations Instrument, but shall thereafter apply with respect to such replacement instrument(s).

SPECIFICATION 9

Registry Operator Code of Conduct

1. In connection with the operation of the registry for the TLD, Registry Operator will not, and will not allow any parent, subsidiary, Affiliate, subcontractor or other related entity, to the extent such party is engaged in the provision of Registry Services with respect to the TLD (each, a “Registry Related Party”), to:
 - a. directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems and related registry services, unless comparable opportunities to qualify for such preferences or considerations are made available to all registrars on substantially similar terms and subject to substantially similar conditions;
 - b. register domain names in its own right, except for names registered through an ICANN accredited registrar that are reasonably necessary for the management, operations and purpose of the TLD, provided, that Registry Operator may reserve names from registration pursuant to Section 2.6 of the Registry Agreement;
 - c. register names in the TLD or sub-domains of the TLD based upon proprietary access to information about searches or resolution requests by consumers for domain names not yet registered (commonly known as, "front-running");
 - d. allow any Affiliated registrar to disclose user data to Registry Operator or any Registry Related Party, except as necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such user data on substantially similar terms and subject to substantially similar conditions; or
 - e. disclose confidential registry data or confidential information about its Registry Services or operations to any employee of any DNS services provider, except as necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such confidential registry data or confidential information on substantially similar terms and subject to substantially similar conditions.
2. If Registry Operator or a Registry Related Party also operates as a provider of registrar or registrar-reseller services, Registry Operator will, or will cause such Registry Related Party to, ensure that such services are offered through a legal entity separate from Registry Operator, and maintain separate books of accounts with respect to its registrar or registrar-reseller operations.
3. Registry Operator will conduct internal reviews at least once per calendar year to

- ensure compliance with this Code of Conduct. Within twenty (20) calendar days following the end of each calendar year, Registry Operator will provide the results of the internal review, along with a certification executed by an executive officer of Registry Operator certifying as to Registry Operator's compliance with this Code of Conduct, via email to an address to be provided by ICANN. (ICANN may specify in the future the form and contents of such reports or that the reports be delivered by other reasonable means.) Registry Operator agrees that ICANN may publicly post such results and certification.
4. Nothing set forth herein shall: (i) limit ICANN from conducting investigations of claims of Registry Operator's non-compliance with this Code of Conduct; or (ii) provide grounds for Registry Operator to refuse to cooperate with ICANN investigations of claims of Registry Operator's non-compliance with this Code of Conduct.
 5. Nothing set forth herein shall limit the ability of Registry Operator or any Registry Related Party, to enter into arms-length transactions in the ordinary course of business with a registrar or reseller with respect to products and services unrelated in all respects to the TLD.
 6. Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.

SPECIFICATION 10

REGISTRY PERFORMANCE SPECIFICATIONS

1. Definitions

- 1.1. **DNS.** Refers to the Domain Name System as specified in RFCs 1034, 1035, and related RFCs.
- 1.2. **DNSSEC proper resolution.** There is a valid DNSSEC chain of trust from the root trust anchor to a particular domain name, e.g., a TLD, a domain name registered under a TLD, etc.
- 1.3. **EPP.** Refers to the Extensible Provisioning Protocol as specified in RFC 5730 and related RFCs.
- 1.4. **IP address.** Refers to IPv4 or IPv6 addresses without making any distinction between the two. When there is need to make a distinction, IPv4 or IPv6 is used.
- 1.5. **Probes.** Network hosts used to perform (DNS, EPP, etc.) tests (see below) that are located at various global locations.
- 1.6. **RDDS.** Registration Data Directory Services refers to the collective of WHOIS and Web-based WHOIS services as defined in Specification 4 of this Agreement.
- 1.7. **RTT.** Round-Trip Time or **RTT** refers to the time measured from the sending of the first bit of the first packet of the sequence of packets needed to make a request until the reception of the last bit of the last packet of the sequence needed to receive the response. If the client does not receive the whole sequence of packets needed to consider the response as received, the request will be considered unanswered.
- 1.8. **SLR.** Service Level Requirement is the level of service expected for a certain parameter being measured in a Service Level Agreement (SLA).

2. Service Level Agreement Matrix

	Parameter	SLR (monthly basis)
DNS	DNS service availability	0 min downtime = 100% availability
	DNS name server availability	≤ 432 min of downtime (≈ 99%)
	TCP DNS resolution RTT	≤ 1500 ms, for at least 95% of the queries
	UDP DNS resolution RTT	≤ 500 ms, for at least 95% of the queries
	DNS update time	≤ 60 min, for at least 95% of the probes
RDDS	RDDS availability	≤ 864 min of downtime (≈ 98%)
	RDDS query RTT	≤ 2000 ms, for at least 95% of the queries
	RDDS update time	≤ 60 min, for at least 95% of the probes
EPP	EPP service availability	≤ 864 min of downtime (≈ 98%)
	EPP session-command RTT	≤ 4000 ms, for at least 90% of the commands
	EPP query-command RTT	≤ 2000 ms, for at least 90% of the commands
	EPP transform-command RTT	≤ 4000 ms, for at least 90% of the commands

Registry Operator is encouraged to do maintenance for the different services at the times and dates of statistically lower traffic for each service. However, note that there is no provision for planned outages or similar; any downtime, be it for maintenance or due to system failures, will be noted simply as downtime and counted for SLA purposes.

3. DNS

- 3.1. **DNS service availability.** Refers to the ability of the group of listed-as-authoritative name servers of a particular domain name (e.g., a TLD), to answer DNS queries from DNS probes. For the service to be considered available at a particular moment, at least, two of the delegated name servers registered in the DNS must have successful results from “**DNS tests**” to each of their public-DNS registered “**IP addresses**” to which the name server resolves. If 51% or more of the DNS testing probes see the service as unavailable during a given time, the DNS service will be considered unavailable.
- 3.2. **DNS name server availability.** Refers to the ability of a public-DNS registered “**IP address**” of a particular name server listed as authoritative for a domain name, to answer DNS queries from an Internet user. All the public DNS-registered “**IP address**” of all name servers of the domain name being monitored shall be tested individually. If 51% or more of the DNS testing probes get undefined/unanswered results from “**DNS tests**” to a name server “**IP address**” during a given time, the name server “**IP address**” will be considered unavailable.
- 3.3. **UDP DNS resolution RTT.** Refers to the **RTT** of the sequence of two packets, the UDP DNS query and the corresponding UDP DNS response. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.
- 3.4. **TCP DNS resolution RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the DNS response for only one DNS query. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.
- 3.5. **DNS resolution RTT.** Refers to either “**UDP DNS resolution RTT**” or “**TCP DNS resolution RTT**”.
- 3.6. **DNS update time.** Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, until the name servers of the parent domain name answer “**DNS queries**” with data consistent with the change made. This only applies for changes to DNS information.
- 3.7. **DNS test.** Means one non-recursive DNS query sent to a particular “**IP address**” (via UDP or TCP). If DNSSEC is offered in the queried DNS zone, for a query to be considered answered, the signatures must be positively verified against a corresponding DS record published in the parent zone or, if the parent is not signed, against a statically configured Trust Anchor. The answer to the query must contain the corresponding information from the Registry System, otherwise the query will be considered unanswered. A query with a “**DNS resolution RTT**” 5 times higher than the corresponding **SLR**, will be considered unanswered. The possible results to a DNS test are: a number in milliseconds corresponding to the “**DNS resolution RTT**” or, undefined/unanswered.
- 3.8. **Measuring DNS parameters.** Every minute, every DNS probe will make an UDP or TCP “**DNS test**” to each of the public-DNS registered “**IP addresses**” of the name servers of the domain

name being monitored. If a “**DNS test**” result is undefined/unanswered, the tested IP will be considered unavailable from that probe until it is time to make a new test.

3.9. **Collating the results from DNS probes.** The minimum number of active testing probes to consider a measurement valid is 20 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

3.10. **Distribution of UDP and TCP queries.** DNS probes will send UDP or TCP “**DNS test**” approximating the distribution of these queries.

3.11. **Placement of DNS probes.** Probes for measuring DNS parameters shall be placed as near as possible to the DNS resolvers on the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

4. **RDDS**

4.1. **RDDS availability.** Refers to the ability of all the RDDS services for the TLD, to respond to queries from an Internet user with appropriate data from the relevant Registry System. If 51% or more of the RDDS testing probes see any of the RDDS services as unavailable during a given time, the RDDS will be considered unavailable.

4.2. **WHOIS query RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the WHOIS response. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

4.3. **Web-based-WHOIS query RTT.** Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the HTTP response for only one HTTP request. If Registry Operator implements a multiple-step process to get to the information, only the last step shall be measured. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

4.4. **RDDS query RTT.** Refers to the collective of “**WHOIS query RTT**” and “**Web-based-WHOIS query RTT**”.

4.5. **RDDS update time.** Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, host or contact, up until the servers of the RDDS services reflect the changes made.

4.6. **RDDS test.** Means one query sent to a particular “**IP address**” of one of the servers of one of the RDDS services. Queries shall be about existing objects in the Registry System and the responses must contain the corresponding information otherwise the query will be considered unanswered. Queries with an **RTT** 5 times higher than the corresponding SLR will be considered as unanswered. The possible results to an RDDS test are: a number in milliseconds corresponding to the **RTT** or undefined/unanswered.

4.7. **Measuring RDDS parameters.** Every 5 minutes, RDDS probes will select one IP address from all the public-DNS registered “**IP addresses**” of the servers for each RDDS service of the TLD being monitored and make an “**RDDS test**” to each one. If an “**RDDS test**” result is

undefined/unanswered, the corresponding RDDS service will be considered as unavailable from that probe until it is time to make a new test.

4.8. **Collating the results from RDDS probes.** The minimum number of active testing probes to consider a measurement valid is 10 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

4.9. **Placement of RDDS probes.** Probes for measuring RDDS parameters shall be placed inside the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

5. **EPP**

5.1. **EPP service availability.** Refers to the ability of the TLD EPP servers as a group, to respond to commands from the Registry accredited Registrars, who already have credentials to the servers. The response shall include appropriate data from the Registry System. An EPP command with “**EPP command RTT**” 5 times higher than the corresponding SLR will be considered as unanswered. If 51% or more of the EPP testing probes see the EPP service as unavailable during a given time, the EPP service will be considered unavailable.

5.2. **EPP session-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a session command plus the reception of the EPP response for only one EPP session command. For the login command it will include packets needed for starting the TCP session. For the logout command it will include packets needed for closing the TCP session. EPP session commands are those described in section 2.9.1 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.3. **EPP query-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a query command plus the reception of the EPP response for only one EPP query command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP query commands are those described in section 2.9.2 of EPP RFC 5730. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

5.4. **EPP transform-command RTT.** Refers to the **RTT** of the sequence of packets that includes the sending of a transform command plus the reception of the EPP response for only one EPP transform command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP transform commands are those described in section 2.9.3 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.5. **EPP command RTT.** Refers to “**EPP session-command RTT**”, “**EPP query-command RTT**” or “**EPP transform-command RTT**”.

5.6. **EPP test.** Means one EPP command sent to a particular “**IP address**” for one of the EPP servers. Query and transform commands, with the exception of “create”, shall be about existing objects in the Registry System. The response shall include appropriate data from the Registry System. The possible results to an EPP test are: a number in milliseconds corresponding to the “**EPP command RTT**” or undefined/unanswered.

5.7. **Measuring EPP parameters.** Every 5 minutes, EPP probes will select one “IP address“ of the EPP servers of the TLD being monitored and make an “EPP test”; every time they should alternate between the 3 different types of commands and between the commands inside each category. If an “EPP test” result is undefined/unanswered, the EPP service will be considered as unavailable from that probe until it is time to make a new test.

5.8. **Collating the results from EPP probes.** The minimum number of active testing probes to consider a measurement valid is 5 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

5.9. **Placement of EPP probes.** Probes for measuring EPP parameters shall be placed inside or close to Registrars points of access to the Internet across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

6. **Emergency Thresholds**

The following matrix presents the Emergency Thresholds that, if reached by any of the services mentioned above for a TLD, would cause the Emergency Transition of the Critical Functions as specified in Section 2.13. of this Agreement.

Critical Function	Emergency Threshold
DNS service (all servers)	4-hour downtime / week
DNSSEC proper resolution	4-hour downtime / week
EPP	24-hour downtime / week
RDDS (WHOIS/Web-based WHOIS)	24-hour downtime / week
Data Escrow	Breach of the Registry Agreement caused by missing escrow deposits as described in Specification 2, Part B, Section 6.

7. **Emergency Escalation**

Escalation is strictly for purposes of notifying and investigating possible or potential issues in relation to monitored services. The initiation of any escalation and the subsequent cooperative investigations do not in themselves imply that a monitored service has failed its performance requirements.

Escalations shall be carried out between ICANN and Registry Operators, Registrars and Registry Operator, and Registrars and ICANN. Registry Operators and ICANN must provide said emergency operations departments. Current contacts must be maintained between ICANN and Registry Operators and published to Registrars, where relevant to their role in escalations, prior to any processing of an Emergency Escalation by all related parties, and kept current at all times.

7.1. **Emergency Escalation initiated by ICANN**

Upon reaching 10% of the Emergency thresholds as described in Section 6, ICANN’s emergency operations will initiate an Emergency Escalation with the relevant Registry Operator. An Emergency Escalation consists of the following minimum elements: electronic (i.e., email or SMS) and/or voice contact notification to the Registry Operator’s emergency operations department with detailed information concerning the issue being escalated, including evidence of monitoring failures, cooperative trouble-shooting of the monitoring failure between ICANN staff and the Registry Operator, and the

commitment to begin the process of rectifying issues with either the monitoring service or the service being monitoring.

7.2. Emergency Escalation initiated by Registrars

Registry Operator will maintain an emergency operations departments prepared to handle emergency requests from registrars. In the event that a registrar is unable to conduct EPP transactions with the Registry because of a fault with the Registry Service and is unable to either contact (through ICANN mandated methods of communication) the Registry Operator, or the Registry Operator is unable or unwilling to address the fault, the registrar may initiate an Emergency Escalation to the emergency operations department of ICANN. ICANN then may initiate an Emergency Escalation with the Registry Operator as explained above.

7.3. Notifications of Outages and Maintenance

In the event that a Registry Operator plans maintenance, they will provide related notice to the ICANN emergency operations department, at least, 24 hours ahead of that maintenance. ICANN's emergency operations department will note planned maintenance times, and suspend Emergency Escalation services for the monitored services during the expected maintenance outage period.

If Registry Operator declares an outage, as per their contractual obligations with ICANN, on services under SLA and performance requirements, it will notify the ICANN emergency operations department. During that declared outage, ICANN's emergency operations department will note and suspend Emergency Escalation services for the monitored services involved.

8. Covenants of Performance Measurement

- 8.1. **No interference.** Registry Operator shall not interfere with measurement **Probes**, including any form of preferential treatment of the requests for the monitored services. Registry Operator shall respond to the measurement tests described in this Specification as it would do with any other request from Internet users (for DNS and RDDS) or registrars (for EPP).
- 8.2. **ICANN testing registrar.** Registry Operator agrees that ICANN will have a testing registrar used for purposes of measuring the **SLRs** described above. Registry Operator agrees to not provide any differentiated treatment for the testing registrar other than no billing of the transactions. ICANN shall not use the registrar for registering domain names (or other registry objects) for itself or others, except for the purposes of verifying contractual compliance with the conditions described in this Agreement.

TRADEMARK CLEARINGHOUSE
4 JUNE 2012

1. PURPOSE OF CLEARINGHOUSE

- 1.1 The Trademark Clearinghouse is a central repository for information to be authenticated, stored, and disseminated, pertaining to the rights of trademark holders. ICANN will enter into an arms-length contract with service provider or providers, awarding the right to serve as a Trademark Clearinghouse Service Provider, i.e., to accept, authenticate, validate and facilitate the transmission of information related to certain trademarks.
- 1.2 The Clearinghouse will be required to separate its two primary functions: (i) authentication and validation of the trademarks in the Clearinghouse; and (ii) serving as a database to provide information to the new gTLD registries to support pre-launch Sunrise or Trademark Claims Services. Whether the same provider could serve both functions or whether two providers will be determined in the tender process.
- 1.3 The Registry shall only need to connect with one centralized database to obtain the information it needs to conduct its Sunrise or Trademark Claims Services regardless of the details of the Trademark Clearinghouse Service Provider's contract(s) with ICANN.
- 1.4 Trademark Clearinghouse Service Provider may provide ancillary services, as long as those services and any data used for those services are kept separate from the Clearinghouse database.
- 1.5 The Clearinghouse database will be a repository of authenticated information and disseminator of the information to a limited number of recipients. Its functions will be performed in accordance with a limited charter, and will not have any discretionary powers other than what will be set out in the charter with respect to authentication and validation. The Clearinghouse administrator(s) cannot create policy. Before material changes are made to the Clearinghouse functions, they will be reviewed through the ICANN public participation model.
- 1.6 Inclusion in the Clearinghouse is not proof of any right, nor does it create any legal rights. Failure to submit trademarks into the Clearinghouse should not be perceived to be lack of vigilance by trademark holders or a waiver of any rights, nor can any negative influence be drawn from such failure.

2. SERVICE PROVIDERS

- 2.1 The selection of Trademark Clearinghouse Service Provider(s) will be subject to predetermined criteria, but the foremost considerations will be the ability to store, authenticate, validate and disseminate the data at the highest level of technical stability

and security without interference with the integrity or timeliness of the registration process or registry operations.

2.2 Functions – Authentication/Validation; Database Administration. Public commentary has suggested that the best way to protect the integrity of the data and to avoid concerns that arise through sole-source providers would be to separate the functions of database administration and data authentication/validation.

2.2.1 One entity will authenticate registrations ensuring the word marks qualify as registered or are court-validated word marks or word marks that are protected by statute or treaty. This entity would also be asked to ensure that proof of use of marks is provided, which can be demonstrated by furnishing a signed declaration and one specimen of current use.

2.2.2 The second entity will maintain the database and provide Sunrise and Trademark Claims Services (described below).

2.3 Discretion will be used, balancing effectiveness, security and other important factors, to determine whether ICANN will contract with one or two entities - one to authenticate and validate, and the other to, administer in order to preserve integrity of the data.

2.4 Contractual Relationship.

2.4.1 The Clearinghouse shall be separate and independent from ICANN. It will operate based on market needs and collect fees from those who use its services. ICANN may coordinate or specify interfaces used by registries and registrars, and provide some oversight or quality assurance function to ensure rights protection goals are appropriately met.

2.4.2 The Trademark Clearinghouse Service Provider(s) (authenticator/validator and administrator) will be selected through an open and transparent process to ensure low costs and reliable, consistent service for all those utilizing the Clearinghouse services.

2.4.3 The Service Provider(s) providing the authentication of the trademarks submitted into the Clearinghouse shall adhere to rigorous standards and requirements that would be specified in an ICANN contractual agreement.

2.4.4 The contract shall include service level requirements, customer service availability (with the goal of seven days per week, 24 hours per day, 365 days per year), data escrow requirements, and equal access requirements for all persons and entities required to access the Trademark Clearinghouse database.

- 2.4.5 To the extent practicable, the contract should also include indemnification by Service Provider for errors such as false positives for participants such as Registries, ICANN, Registrants and Registrars.
- 2.5. Service Provider Requirements. The Clearinghouse Service Provider(s) should utilize regional marks authentication service providers (whether directly or through sub-contractors) to take advantage of local experts who understand the nuances of the trademark in question. Examples of specific performance criteria details in the contract award criteria and service-level-agreements are:
 - 2.5.1 provide 24 hour accessibility seven days a week (database administrator);
 - 2.5.2 employ systems that are technically reliable and secure (database administrator);
 - 2.5.3 use globally accessible and scalable systems so that multiple marks from multiple sources in multiple languages can be accommodated and sufficiently cataloged (database administrator and validator);
 - 2.5.4 accept submissions from all over the world - the entry point for trademark holders to submit their data into the Clearinghouse database could be regional entities or one entity;
 - 2.5.5 allow for multiple languages, with exact implementation details to be determined;
 - 2.5.6 provide access to the Registrants to verify and research Trademark Claims Notices;
 - 2.5.7 have the relevant experience in database administration, validation or authentication, as well as accessibility to and knowledge of the various relevant trademark laws (database administrator and authenticator); and
 - 2.5.8 ensure through performance requirements, including those involving interface with registries and registrars, that neither domain name registration timeliness, nor registry or registrar operations will be hindered (database administrator).

3. CRITERIA FOR TRADEMARK INCLUSION IN CLEARINGHOUSE

- 3.1 The trademark holder will submit to one entity – a single entity for entry will facilitate access to the entire Clearinghouse database. If regional entry points are used, ICANN will publish an information page describing how to locate regional submission points. Regardless of the entry point into the Clearinghouse, the authentication procedures established will be uniform.
- 3.2 The standards for inclusion in the Clearinghouse are:
 - 3.2.1 Nationally or regionally registered word marks from all jurisdictions.
 - 3.2.2 Any word mark that has been validated through a court of law or other judicial proceeding.

- 3.2.3 Any word mark protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion.
 - 3.2.4 Other marks that constitute intellectual property.
 - 3.2.5 Protections afforded to trademark registrations do not extend to applications for registrations, marks within any opposition period or registered marks that were the subject of successful invalidation, cancellation or rectification proceedings.
- 3.3 The type of data supporting entry of a registered word mark into the Clearinghouse must include a copy of the registration or the relevant ownership information, including the requisite registration number(s), the jurisdictions where the registrations have issued, and the name of the owner of record.
- 3.4 Data supporting entry of a judicially validated word mark into the Clearinghouse must include the court documents, properly entered by the court, evidencing the validation of a given word mark.
- 3.5 Data supporting entry into the Clearinghouse of word marks protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion, must include a copy of the relevant portion of the statute or treaty and evidence of its effective date.
- 3.6 Data supporting entry into the Clearinghouse of marks that constitute intellectual property of types other than those set forth in sections 3.2.1-3.2.3 above shall be determined by the registry operator and the Clearinghouse based on the services any given registry operator chooses to provide.
- 3.7 Registrations that include top level extensions such as “icann.org” or “.icann” as the word mark will not be permitted in the Clearinghouse regardless of whether that mark has been registered or it has been otherwise validated or protected (e.g., if a mark existed for icann.org or .icann, neither will not be permitted in the Clearinghouse).
- 3.8 All mark holders seeking to have their marks included in the Clearinghouse will be required to submit a declaration, affidavit, or other sworn statement that the information provided is true and current and has not been supplied for an improper purpose. The mark holder will also be required to attest that it will keep the information supplied to the Clearinghouse current so that if, during the time the mark is included in the Clearinghouse, a registration gets cancelled or is transferred to another entity, or in the case of a court- or Clearinghouse-validated mark the holder abandons use of the mark, the mark holder has an affirmative obligation to notify the Clearinghouse. There will be penalties for failing to keep information current. Moreover, it is anticipated that there will be a process whereby registrations can be

removed from the Clearinghouse if it is discovered that the marks are procured by fraud or if the data is inaccurate.

- 3.9 As an additional safeguard, the data will have to be renewed periodically by any mark holder wishing to remain in the Clearinghouse. Electronic submission should facilitate this process and minimize the cost associated with it. The reason for periodic authentication is to streamline the efficiencies of the Clearinghouse and the information the registry operators will need to process and limit the marks at issue to the ones that are in use.

4. USE OF CLEARINGHOUSE DATA

- 4.1 All mark holders seeking to have their marks included in the Clearinghouse will have to consent to the use of their information by the Clearinghouse. However, such consent would extend only to use in connection with the stated purpose of the Trademark Clearinghouse Database for Sunrise or Trademark Claims services. The reason for such a provision would be to presently prevent the Clearinghouse from using the data in other ways without permission. There shall be no bar on the Trademark Clearinghouse Service Provider or other third party service providers providing ancillary services on a non-exclusive basis.
- 4.2 In order not to create a competitive advantage, the data in the Trademark Clearinghouse should be licensed to competitors interested in providing ancillary services on equal and non-discriminatory terms and on commercially reasonable terms if the mark holders agree. Accordingly, two licensing options will be offered to the mark holder: (a) a license to use its data for all required features of the Trademark Clearinghouse, with no permitted use of such data for ancillary services either by the Trademark Clearinghouse Service Provider or any other entity; or (b) license to use its data for the mandatory features of the Trademark Clearinghouse and for any ancillary uses reasonably related to the protection of marks in new gTLDs, which would include a license to allow the Clearinghouse to license the use and data in the Trademark Clearinghouse to competitors that also provide those ancillary services. The specific implementation details will be determined, and all terms and conditions related to the provision of such services shall be included in the Trademark Clearinghouse Service Provider's contract with ICANN and subject to ICANN review.
- 4.3 Access by a prospective registrant to verify and research Trademark Claims Notices shall not be considered an ancillary service, and shall be provided at no cost to the Registrant. Misuse of the data by the service providers would be grounds for immediate termination.

5. DATA AUTHENTICATION AND VALIDATION GUIDELINES

- 5.1 One core function for inclusion in the Clearinghouse would be to authenticate that the data meets certain minimum criteria. As such, the following minimum criteria are suggested:
- 5.1.1 An acceptable list of data authentication sources, i.e. the web sites of patent and trademark offices throughout the world, third party providers who can obtain information from various trademark offices;
 - 5.1.2 Name, address and contact information of the applicant is accurate, current and matches that of the registered owner of the trademarks listed;
 - 5.1.3 Electronic contact information is provided and accurate;
 - 5.1.4 The registration numbers and countries match the information in the respective trademark office database for that registration number.
- 5.2 For validation of marks by the Clearinghouse that were not protected via a court, statute or treaty, the mark holder shall be required to provide evidence of use of the mark in connection with the bona fide offering for sale of goods or services prior to application for inclusion in the Clearinghouse. Acceptable evidence of use will be a signed declaration and a single specimen of current use, which might consist of labels, tags, containers, advertising, brochures, screen shots, or something else that evidences current use.

6. MANDATORY RIGHTS PROTECTION MECHANISMS

All new gTLD registries will be required to use the Trademark Clearinghouse to support its pre-launch or initial launch period rights protection mechanisms (RPMs). These RPMs, at a minimum, must consist of a Trademark Claims service and a Sunrise process.

- 6.1 Trademark Claims service
- 6.1.1 New gTLD Registry Operators must provide Trademark Claims services during an initial launch period for marks in the Trademark Clearinghouse. This launch period must occur for at least the first 60 days that registration is open for general registration.
 - 6.1.2 A Trademark Claims service is intended to provide clear notice to the prospective registrant of the scope of the mark holder's rights in order to minimize the chilling effect on registrants (Trademark Claims Notice). A form that describes the required elements is attached. The specific statement by

prospective registrant warrants that: (i) the prospective registrant has received notification that the mark(s) is included in the Clearinghouse; (ii) the prospective registrant has received and understood the notice; and (iii) to the best of the prospective registrant's knowledge, the registration and use of the requested domain name will not infringe on the rights that are the subject of the notice.

- 6.1.3 The Trademark Claims Notice should provide the prospective registrant access to the Trademark Clearinghouse Database information referenced in the Trademark Claims Notice to enhance understanding of the Trademark rights being claimed by the trademark holder. These links (or other sources) shall be provided in real time without cost to the prospective registrant. Preferably, the Trademark Claims Notice should be provided in the language used for the rest of the interaction with the registrar or registry, but it is anticipated that at the very least in the most appropriate UN-sponsored language (as specified by the prospective registrant or registrar/registry).
- 6.1.4 If the domain name is registered in the Clearinghouse, the registrar (again through an interface with the Clearinghouse) will promptly notify the mark holders(s) of the registration after it is effectuated.
- 6.1.5 The Trademark Clearinghouse Database will be structured to report to registries when registrants are attempting to register a domain name that is considered an "Identical Match" with the mark in the Clearinghouse. "Identical Match" means that the domain name consists of the complete and identical textual elements of the mark. In this regard: (a) spaces contained within a mark that are either replaced by hyphens (and vice versa) or omitted; (b) only certain special characters contained within a trademark are spelled out with appropriate words describing it (@ and &); (c) punctuation or special characters contained within a mark that are unable to be used in a second-level domain name may either be (i) omitted or (ii) replaced by spaces, hyphens or underscores and still be considered identical matches; and (d) no plural and no "marks contained" would qualify for inclusion.

6.2 Sunrise service

- 6.2.1 Sunrise registration services must be offered for a minimum of 30 days during the pre-launch phase and notice must be provided to all trademark holders in the Clearinghouse if someone is seeking a sunrise registration. This notice will be provided to holders of marks in the Clearinghouse that are an Identical Match to the name to be registered during Sunrise.
- 6.2.2 Sunrise Registration Process. For a Sunrise service, sunrise eligibility requirements (SERs) will be met as a minimum requirement, verified by Clearinghouse data, and

incorporate a Sunrise Dispute Resolution Policy (SDRP).

- 6.2.3 The proposed SERs include: (i) ownership of a mark (that satisfies the criteria in section 7.2 below), (ii) optional registry elected requirements re: international class of goods or services covered by registration; (iii) representation that all provided information is true and correct; and (iv) provision of data sufficient to document rights in the trademark.
- 6.2.4 The proposed SDRP must allow challenges based on at least the following four grounds: (i) at time the challenged domain name was registered, the registrant did not hold a trademark registration of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; (ii) the domain name is not identical to the mark on which the registrant based its Sunrise registration; (iii) the trademark registration on which the registrant based its Sunrise registration is not of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; or (iv) the trademark registration on which the domain name registrant based its Sunrise registration did not issue on or before the effective date of the Registry Agreement and was not applied for on or before ICANN announced the applications received.
- 6.2.5 The Clearinghouse will maintain the SERs, validate and authenticate marks, as applicable, and hear challenges.

7. PROTECTION FOR MARKS IN CLEARINGHOUSE

The scope of registered marks that must be honored by registries in providing Trademarks Claims services is broader than those that must be honored by registries in Sunrise services.

- 7.1 For Trademark Claims services - Registries must recognize and honor all word marks that have been or are: (i) nationally or regionally registered; (ii) court-validated; or (iii) specifically protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion. No demonstration of use is required.
- 7.2 For Sunrise services - Registries must recognize and honor all word marks: (i) nationally or regionally registered and for which proof of use – which can be a declaration and a single specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse; or (ii) that have been court-validated; or (iii) that are specifically protected by a statute or treaty currently in effect and that was in effect on or before 26 June 2008.

8. COSTS OF CLEARINGHOUSE

Costs should be completely borne by the parties utilizing the services. Trademark holders will pay to register the Clearinghouse, and registries will pay for Trademark Claims and Sunrise services. Registrars and others who avail themselves of Clearinghouse services will pay the Clearinghouse directly.

TRADEMARK NOTICE

[In English and the language of the registration agreement]

You have received this Trademark Notice because you have applied for a domain name which matches at least one trademark record submitted to the Trademark Clearinghouse.

You may or may not be entitled to register the domain name depending on your intended use and whether it is the same or significantly overlaps with the trademarks listed below.

Your rights to register this domain name may or may not be protected as noncommercial use or "fair use" by the laws of your country. [in bold italics or all caps]

Please read the trademark information below carefully, including the trademarks, jurisdictions, and goods and service for which the trademarks are registered. Please be aware that not all jurisdictions review trademark applications closely, so some of the trademark information below may exist in a national or regional registry which does not conduct a thorough or substantive review of trademark rights prior to registration.

If you have questions, you may want to consult an attorney or legal expert on trademarks and intellectual property for guidance.

If you continue with this registration, you represent that, you have received and you understand this notice and to the best of your knowledge, your registration and use of the requested domain name will not infringe on the trademark rights listed below.

The following [number] Trademarks are listed in the Trademark Clearinghouse:

1. Mark: Jurisdiction: Goods: [click here for more if maximum character count is exceeded] International Class of Goods and Services or Equivalent if applicable: Trademark Registrant: Trademark Registrant Contact:

[with links to the TM registrations as listed in the TM Clearinghouse]

2. Mark: Jurisdiction: Goods: [click here for more if maximum character count is exceeded] International Class of Goods and Services or Equivalent if applicable: Trademark Registrant:

Trademark Registrant Contact:

***** [with links to the TM registrations as listed in the TM Clearinghouse]

X. 1. Mark: Jurisdiction: Goods: [click here for more if maximum character count is exceeded] International Class of Goods and Services or Equivalent if applicable: Trademark Registrant: Trademark Registrant Contact:

**UNIFORM RAPID SUSPENSION SYSTEM (“URS”)
4 JUNE 2012**

DRAFT PROCEDURE

1. Complaint

1.1 Filing the Complaint

- a) Proceedings are initiated by electronically filing with a URS Provider a Complaint outlining the trademark rights and the actions complained of entitling the trademark holder to relief.
- b) Each Complaint must be accompanied by the appropriate fee, which is under consideration. The fees will be non-refundable.
- c) One Complaint is acceptable for multiple related companies against one Registrant, but only if the companies complaining are related. Multiple Registrants can be named in one Complaint only if it can be shown that they are in some way related. There will not be a minimum number of domain names imposed as a prerequisite to filing.

1.2 Contents of the Complaint

The form of the Complaint will be simple and as formulaic as possible. There will be a Form Complaint. The Form Complaint shall include space for the following:

- 1.2.1 Name, email address and other contact information for the Complaining Party (Parties).
- 1.2.2 Name, email address and contact information for any person authorized to act on behalf of Complaining Parties.
- 1.2.3 Name of Registrant (i.e. relevant information available from Whois) and Whois listed available contact information for the relevant domain name(s).
- 1.2.4 The specific domain name(s) that are the subject of the Complaint. For each domain name, the Complainant shall include a copy of the currently available Whois information and a description and copy, if available, of the offending portion of the website content associated with each domain name that is the subject of the Complaint.
- 1.2.5 The specific trademark/service marks upon which the Complaint is based and pursuant to which the Complaining Parties are asserting their rights to them, for which goods and in connection with what services.
- 1.2.6 A statement of the grounds upon which the Complaint is based setting forth facts showing that the Complaining Party is entitled to relief, namely:

1.2.6.1. that the registered domain name is identical or confusingly similar to a word mark: (i) for which the Complainant holds a valid national or regional registration and that is in current use; or (ii) that has been validated through court proceedings; or (iii) that is specifically protected by a statute or treaty in effect at the time the URS complaint is filed.

- a. Use can be shown by demonstrating that evidence of use – which can be a declaration and one specimen of current use in commerce - was submitted to, and validated by, the Trademark Clearinghouse)
- b. Proof of use may also be submitted directly with the URS Complaint.

and

1.2.6.2. that the Registrant has no legitimate right or interest to the domain name; and

1.2.6.3. that the domain was registered and is being used in bad faith.

A non-exclusive list of circumstances that demonstrate bad faith registration and use by the Registrant include:

- a. Registrant has registered or acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of documented out-of pocket costs directly related to the domain name; or
- b. Registrant has registered the domain name in order to prevent the trademark holder or service mark from reflecting the mark in a corresponding domain name, provided that Registrant has engaged in a pattern of such conduct; or
- c. Registrant registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- d. By using the domain name Registrant has intentionally attempted to attract for commercial gain, Internet users to Registrant's web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of Registrant's web site or location or of a product or service on that web site or location.

1.2.7 A box in which the Complainant may submit up to 500 words of explanatory free form text.

1.2.8. An attestation that the Complaint is not being filed for any improper basis and that there is a sufficient good faith basis for filing the Complaint.

2. Fees

2.1 URS Provider will charge fees to the Complainant. Fees are thought to be in the range of USD 300 per proceeding, but will ultimately be set by the Provider.

2.2 Complaints listing fifteen (15) or more disputed domain names registered by the same registrant will be subject to a Response Fee which will be refundable to the prevailing party. Under no circumstances shall the Response Fee exceed the fee charged to the Complainant.

3. Administrative Review

3.1 Complaints will be subjected to an initial administrative review by the URS Provider for compliance with the filing requirements. This is a review to determine that the Complaint contains all of the necessary information, and is not a determination as to whether a *prima facie* case has been established.

3.2 The Administrative Review shall be conducted within two (2) business days of submission of the Complaint to the URS Provider.

3.3 Given the rapid nature of this Procedure, and the intended low level of required fees, there will be no opportunity to correct inadequacies in the filing requirements.

3.4 If a Complaint is deemed non-compliant with filing requirements, the Complaint will be dismissed without prejudice to the Complainant filing a new complaint. The initial filing fee shall not be refunded in these circumstances.

4. Notice and Locking of Domain

4.1 Upon completion of the Administrative Review, the URS Provider must immediately notify the registry operator (via email) ("Notice of Complaint") after the Complaint has been deemed compliant with the filing requirements. Within 24 hours of receipt of the Notice of Complaint from the URS Provider, the registry operator shall "lock" the domain, meaning the registry shall restrict all changes to the registration data, including transfer and deletion of the domain names, but the name will continue to resolve. The registry operator will notify the URS Provider immediately upon locking the domain name ("Notice of Lock").

4.2 Within 24 hours after receiving Notice of Lock from the registry operator, the URS Provider shall notify the Registrant of the Complaint, sending a hard copy of the Notice of Complaint to the addresses listed in the Whois contact information, and providing an electronic copy of the Complaint, advising of the locked status, as well as the potential

effects if the Registrant fails to respond and defend against the Complaint. Notices must be clear and understandable to Registrants located globally. The Notice of Complaint shall be in English and translated by the Provider into the predominant language used in the registrant's country or territory.

- 4.3 All Notices to the Registrant shall be sent through email, fax (where available) and postal mail. The Complaint and accompanying exhibits, if any, shall be served electronically.
- 4.4 The URS Provider shall also electronically notify the registrar of record for the domain name at issue via the addresses the registrar has on file with ICANN.

5. The Response

- 5.1 A Registrant will have 14 calendar days from the date the URS Provider sent its Notice of Complaint to the Registrant to electronically file a Response with the URS Provider. Upon receipt, the Provider will electronically send a copy of the Response, and accompanying exhibits, if any, to the Complainant.
- 5.2 No filing fee will be charged if the Registrant files its Response prior to being declared in default or not more than thirty (30) days following a Determination. For Responses filed more than thirty (30) days after a Determination, the Registrant should pay a reasonable non-refundable fee for re-examination, plus a Response Fee as set forth in section 2.2 above if the Complaint lists twenty-six (26) or more disputed domain names against the same registrant. The Response Fee will be refundable to the prevailing party.
- 5.3 Upon request by the Registrant, a limited extension of time to respond may be granted by the URS Provider if there is a good faith basis for doing so. In no event shall the extension be for more than seven (7) calendar days.
- 5.4 The Response shall be no longer than 2,500 words, excluding attachments, and the content of the Response should include the following:
 - 5.4.1 Confirmation of Registrant data.
 - 5.4.2 Specific admission or denial of each of the grounds upon which the Complaint is based.
 - 5.4.3 Any defense which contradicts the Complainant's claims.
 - 5.4.4 A statement that the contents are true and accurate.
- 5.5 In keeping with the intended expedited nature of the URS and the remedy afforded to a successful Complainant, affirmative claims for relief by the Registrant will not be permitted except for an allegation that the Complainant has filed an abusive Complaint.
- 5.6 Once the Response is filed, and the URS Provider determines that the Response is compliant with the filing requirements of a Response (which shall be on the same day),

the Complaint, Response and supporting materials will immediately be sent to a qualified Examiner, selected by the URS Provider, for review and Determination. All materials submitted are considered by the Examiner.

- 5.7 The Response can contain any facts refuting the claim of bad faith registration by setting out any of the following circumstances:
- 5.7.1 Before any notice to Registrant of the dispute, Registrant's use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or
 - 5.7.2 Registrant (as an individual, business or other organization) has been commonly known by the domain name, even if Registrant has acquired no trademark or service mark rights; or
 - 5.7.3 Registrant is making a legitimate or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

Such claims, if found by the Examiner to be proved based on its evaluation of all evidence, shall result in a finding in favor of the Registrant.

- 5.8 The Registrant may also assert Defenses to the Complaint to demonstrate that the Registrant's use of the domain name is not in bad faith by showing, for example, one of the following:
- 5.8.1 The domain name is generic or descriptive and the Registrant is making fair use of it.
 - 5.8.2 The domain name sites are operated solely in tribute to or in criticism of a person or business that is found by the Examiner to be fair use.
 - 5.8.3 Registrant's holding of the domain name is consistent with an express term of a written agreement entered into by the disputing Parties and that is still in effect.
 - 5.8.4 The domain name is not part of a wider pattern or series of abusive registrations because the Domain Name is of a significantly different type or character to other domain names registered by the Registrant.
- 5.9 Other factors for the Examiner to consider:
- 5.9.1 Trading in domain names for profit, and holding a large portfolio of domain names, are of themselves not indicia of bad faith under the URS. Such conduct, however, may be abusive in a given case depending on the circumstances of the dispute. The Examiner must review each case on its merits.
 - 5.9.2 Sale of traffic (i.e. connecting domain names to parking pages and earning click-per-view revenue) does not in and of itself constitute bad faith under the URS.

Such conduct, however, may be abusive in a given case depending on the circumstances of the dispute. The Examiner will take into account:

5.9.2.1. the nature of the domain name;

5.9.2.2. the nature of the advertising links on any parking page associated with the domain name; and

5.9.2.3. that the use of the domain name is ultimately the Registrant's responsibility.

6. Default

- 6.1 If at the expiration of the 14-day answer period (or extended period if granted), the Registrant does not submit an answer, the Complaint proceeds to Default.
- 6.2 In either case, the Provider shall provide Notice of Default via email to the Complainant and Registrant, and via mail and fax to Registrant. During the Default period, the Registrant will be prohibited from changing content found on the site to argue that it is now a legitimate use and will also be prohibited from changing the Whois information.
- 6.3 All Default cases proceed to Examination for review on the merits of the claim.
- 6.4 If after Examination in Default cases, the Examiner rules in favor of Complainant, Registrant shall have the right to seek relief from Default via de novo review by filing a Response at any time up to six months after the date of the Notice of Default. The Registrant will also be entitled to request an extension of an additional six months if the extension is requested before the expiration of the initial six-month period.
- 6.5 If a Response is filed after: (i) the Respondent was in Default (so long as the Response is filed in accordance with 6.4 above); and (ii) proper notice is provided in accordance with the notice requirements set forth above, the domain name shall again resolve to the original IP address as soon as practical, but shall remain locked as if the Response had been filed in a timely manner before Default. The filing of a Response after Default is not an appeal; the case is considered as if responded to in a timely manner.
- 6.5 If after Examination in Default case, the Examiner rules in favor of Registrant, the Provider shall notify the Registry Operator to unlock the name and return full control of the domain name registration to the Registrant.

7. Examiners

- 7.1 One Examiner selected by the Provider will preside over a URS proceeding.
- 7.2 Examiners should have demonstrable relevant legal background, such as in trademark law, and shall be trained and certified in URS proceedings. Specifically, Examiners shall be provided with instructions on the URS elements and defenses and how to conduct the examination of a URS proceeding.

- 7.3 Examiners used by any given URS Provider shall be rotated to the extent feasible to avoid “forum or examiner shopping.” URS Providers are strongly encouraged to work equally with all certified Examiners, with reasonable exceptions (such as language needs, non-performance, or malfeasance) to be determined on a case by case analysis.

8. Examination Standards and Burden of Proof

- 8.1 The standards that the qualified Examiner shall apply when rendering its Determination are whether:
- 8.1.2 The registered domain name is identical or confusingly similar to a word mark: (i) for which the Complainant holds a valid national or regional registration and that is in current use; or (ii) that has been validated through court proceedings; or (iii) that is specifically protected by a statute or treaty currently in effect and that was in effect at the time the URS Complaint is filed; and
- 8.1.2.1 Use can be shown by demonstrating that evidence of use – which can be a declaration and one specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse.
- 8.1.2.2 Proof of use may also be submitted directly with the URS Complaint.
- 8.1.2 The Registrant has no legitimate right or interest to the domain name; and
- 8.1.3 The domain was registered and is being used in a bad faith.
- 8.2 The burden of proof shall be clear and convincing evidence.
- 8.3 For a URS matter to conclude in favor of the Complainant, the Examiner shall render a Determination that there is no genuine issue of material fact. Such Determination may include that: (i) the Complainant has rights to the name; and (ii) the Registrant has no rights or legitimate interest in the name. This means that the Complainant must present adequate evidence to substantiate its trademark rights in the domain name (e.g., evidence of a trademark registration and evidence that the domain name was registered and is being used in bad faith in violation of the URS).
- 8.4 If the Examiner finds that the Complainant has not met its burden, or that genuine issues of material fact remain in regards to any of the elements, the Examiner will reject the Complaint under the relief available under the URS. That is, the Complaint shall be dismissed if the Examiner finds that evidence was presented or is available to the Examiner to indicate that the use of the domain name in question is a non-infringing use or fair use of the trademark.
- 8.5 Where there is any genuine contestable issue as to whether a domain name registration and use of a trademark are in bad faith, the Complaint will be denied, the URS proceeding will be terminated without prejudice, e.g., a UDRP, court proceeding or

another URS may be filed. The URS is not intended for use in any proceedings with open questions of fact, but only clear cases of trademark abuse.

- 8.6 To restate in another way, if the Examiner finds that all three standards are satisfied by clear and convincing evidence and that there is no genuine contestable issue, then the Examiner shall issue a Determination in favor of the Complainant. If the Examiner finds that any of the standards have not been satisfied, then the Examiner shall deny the relief requested, thereby terminating the URS proceeding without prejudice to the Complainant to proceed with an action in court of competent jurisdiction or under the UDRP.

9. Determination

- 9.1 There will be no discovery or hearing; the evidence will be the materials submitted with the Complaint and the Response, and those materials will serve as the entire record used by the Examiner to make a Determination.
- 9.2 If the Complainant satisfies the burden of proof, the Examiner will issue a Determination in favor of the Complainant. The Determination will be published on the URS Provider's website. However, there should be no other preclusive effect of the Determination other than the URS proceeding to which it is rendered.
- 9.3 If the Complainant does not satisfy the burden of proof, the URS proceeding is terminated and full control of the domain name registration shall be returned to the Registrant.
- 9.4 Determinations resulting from URS proceedings will be published by the service provider in a format specified by ICANN.
- 9.5 Determinations shall also be emailed by the URS Provider to the Registrant, the Complainant, the Registrar, and the Registry Operator, and shall specify the remedy and required actions of the registry operator to comply with the Determination.
- 9.6 To conduct URS proceedings on an expedited basis, examination should begin immediately upon the earlier of the expiration of a fourteen (14) day Response period (or extended period if granted), or upon the submission of the Response. A Determination shall be rendered on an expedited basis, with the stated goal that it be rendered within three (3) business days from when Examination began. Absent extraordinary circumstances, however, Determinations must be issued no later than five (5) days after the Response is filed. Implementation details will be developed to accommodate the needs of service providers once they are selected. (The tender offer for potential service providers will indicate that timeliness will be a factor in the award decision.)

10. Remedy

- 10.1 If the Determination is in favor of the Complainant, the decision shall be immediately transmitted to the registry operator.

- 10.2 Immediately upon receipt of the Determination, the registry operator shall suspend the domain name, which shall remain suspended for the balance of the registration period and would not resolve to the original web site. The nameservers shall be redirected to an informational web page provided by the URS Provider about the URS. The URS Provider shall not be allowed to offer any other services on such page, nor shall it directly or indirectly use the web page for advertising purposes (either for itself or any other third party). The Whois for the domain name shall continue to display all of the information of the original Registrant except for the redirection of the nameservers. In addition, the Whois shall reflect that the domain name will not be able to be transferred, deleted or modified for the life of the registration.
- 10.3 There shall be an option for a successful Complainant to extend the registration period for one additional year at commercial rates.
- 10.4 No other remedies should be available in the event of a Determination in favor of the Complainant.

11. Abusive Complaints

- 11.1 The URS shall incorporate penalties for abuse of the process by trademark holders.
- 11.2 In the event a party is deemed to have filed two (2) abusive Complaints, or one (1) “deliberate material falsehood,” that party shall be barred from utilizing the URS for one-year following the date of issuance of a Determination finding a complainant to have: (i) filed its second abusive complaint; or (ii) filed a deliberate material falsehood.
- 11.3 A Complaint may be deemed abusive if the Examiner determines:
 - 11.3.1 it was presented solely for improper purpose such as to harass, cause unnecessary delay, or needlessly increase the cost of doing business; and
 - 11.3.2 (i) the claims or other assertions were not warranted by any existing law or the URS standards; or (ii) the factual contentions lacked any evidentiary support
- 11.4 An Examiner may find that Complaint contained a deliberate material falsehood if it contained an assertion of fact, which at the time it was made, was made with the knowledge that it was false and which, if true, would have an impact on the outcome on the URS proceeding.
- 11.5 Two findings of “deliberate material falsehood” shall permanently bar the party from utilizing the URS.
- 11.6 URS Providers shall be required to develop a process for identifying and tracking barred parties, and parties whom Examiners have determined submitted abusive complaints or deliberate material falsehoods.

- 11.7 The dismissal of a complaint for administrative reasons or a ruling on the merits, in itself, shall not be evidence of filing an abusive complaint.
- 11.8 A finding that filing of a complaint was abusive or contained a deliberate materially falsehood can be appealed solely on the grounds that an Examiner abused his/her discretion, or acted in an arbitrary or capricious manner.

12. Appeal

- 12.1 Either party shall have a right to seek a de novo appeal of the Determination based on the existing record within the URS proceeding for a reasonable fee to cover the costs of the appeal. An appellant must identify the specific grounds on which the party is appealing, including why the appellant claims the Examiner's Determination was incorrect.
- 12.2 The fees for an appeal shall be borne by the appellant. A limited right to introduce new admissible evidence that is material to the Determination will be allowed upon payment of an additional fee, provided the evidence clearly pre-dates the filing of the Complaint. The Appeal Panel, to be selected by the Provider, may request, in its sole discretion, further statements or documents from either of the Parties.
- 12.3 Filing an appeal shall not change the domain name's resolution. For example, if the domain name no longer resolves to the original nameservers because of a Determination in favor of the Complainant, the domain name shall continue to point to the informational page provided by the URS Provider. If the domain name resolves to the original nameservers because of a Determination in favor of the registrant, it shall continue to resolve during the appeal process.
- 12.4 An appeal must be filed within 14 days after a Determination is issued and any Response must be filed 14 days after an appeal is filed.
- 12.5 If a respondent has sought relief from Default by filing a Response within six months (or the extended period if applicable) of issuance of initial Determination, an appeal must be filed within 14 days from date the second Determination is issued and any Response must be filed 14 days after the appeal is filed.
- 12.6 Notice of appeal and findings by the appeal panel shall be sent by the URS Provider via e-mail to the Registrant, the Complainant, the Registrar, and the Registry Operator.
- 12.7 The Providers' rules and procedures for appeals, other than those stated above, shall apply.

13. Other Available Remedies

The URS Determination shall not preclude any other remedies available to the appellant, such as UDRP (if appellant is the Complainant), or other remedies as may be available in a court of competition jurisdiction. A URS Determination for or against a party shall not prejudice the

party in UDRP or any other proceedings.

14. Review of URS

A review of the URS procedure will be initiated one year after the first Examiner Determination is issued. Upon completion of the review, a report shall be published regarding the usage of the procedure, including statistical information, and posted for public comment on the usefulness and effectiveness of the procedure.

TRADEMARK POST-DELEGATION DISPUTE RESOLUTION PROCEDURE (TRADEMARK PDDRP)
4 JUNE 2012

1. Parties to the Dispute

The parties to the dispute will be the trademark holder and the gTLD registry operator. ICANN shall not be a party.

2. Applicable Rules

2.1 This procedure is intended to cover Trademark post-delegation dispute resolution proceedings generally. To the extent more than one Trademark PDDRP provider ("Provider") is selected to implement the Trademark PDDRP, each Provider may have additional rules that must be followed when filing a Complaint. The following are general procedures to be followed by all Providers.

2.2 In the Registry Agreement, the registry operator agrees to participate in all post-delegation procedures and be bound by the resulting Determinations.

3. Language

3.1 The language of all submissions and proceedings under the procedure will be English.

3.2 Parties may submit supporting evidence in their original language, provided and subject to the authority of the Expert Panel to determine otherwise, that such evidence is accompanied by an English translation of all relevant text.

4. Communications and Time Limits

4.1 All communications with the Provider must be submitted electronically.

4.2 For the purpose of determining the date of commencement of a time limit, a notice or other communication will be deemed to have been received on the day that it is transmitted to the appropriate contact person designated by the parties.

4.3 For the purpose of determining compliance with a time limit, a notice or other communication will be deemed to have been sent, made or transmitted on the day that it is dispatched.

4.4 For the purpose of calculating a period of time under this procedure, such period will begin to run on the day following the date of receipt of a notice or other communication.

4.5 All references to day limits shall be considered as calendar days unless otherwise specified.

5. Standing

- 5.1 The mandatory administrative proceeding will commence when a third-party complainant (“Complainant”) has filed a Complaint with a Provider asserting that the Complainant is a trademark holder (which may include either registered or unregistered marks as defined below) claiming that one or more of its marks have been infringed, and thereby the Complainant has been harmed, by the registry operator’s manner of operation or use of the gTLD.
- 5.2 Before proceeding to the merits of a dispute, and before the Respondent is required to submit a substantive Response, or pay any fees, the Provider shall appoint a special one-person Panel to perform an initial “threshold” review (“Threshold Review Panel”).

6. Standards

For purposes of these standards, “registry operator” shall include entities directly or indirectly controlling, controlled by or under common control with a registry operator, whether by ownership or control of voting securities, by contract or otherwise where ‘control’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether by ownership or control of voting securities, by contract or otherwise.

6.1 Top Level:

A complainant must assert and prove, by clear and convincing evidence, that the registry operator’s affirmative conduct in its operation or use of its gTLD string that is identical or confusingly similar to the complainant’s mark, causes or materially contributes to the gTLD doing one of the following:

(a) taking unfair advantage of the distinctive character or the reputation of the complainant’s mark; or

(b) impairing the distinctive character or the reputation of the complainant’s mark; or

(c) creating a likelihood of confusion with the complainant’s mark.

An example of infringement at the top-level is where a TLD string is identical to a trademark and then the registry operator holds itself out as the beneficiary of the mark.

6.2 Second Level

Complainants are required to prove, by clear and convincing evidence that, through the registry operator’s affirmative conduct:

(a) there is a substantial pattern or practice of specific bad faith intent by the registry operator to profit from the sale of trademark infringing domain names; and

(b) the registry operator's bad faith intent to profit from the systematic registration of domain names within the gTLD that are identical or confusingly similar to the complainant's mark, which:

(i) takes unfair advantage of the distinctive character or the reputation of the complainant's mark; or

(ii) impairs the distinctive character or the reputation of the complainant's mark, or

(iii) creates a likelihood of confusion with the complainant's mark.

In other words, it is not sufficient to show that the registry operator is on notice of possible trademark infringement through registrations in the gTLD. The registry operator is not liable under the PDDRP solely because: (i) infringing names are in its registry; or (ii) the registry operator knows that infringing names are in its registry; or (iii) the registry operator did not monitor the registrations within its registry.

A registry operator is not liable under the PDDRP for any domain name registration that: (i) is registered by a person or entity that is unaffiliated with the registry operator; (ii) is registered without the direct or indirect encouragement, inducement, initiation or direction of any person or entity affiliated with the registry operator; and (iii) provides no direct or indirect benefit to the registry operator other than the typical registration fee (which may include other fees collected incidental to the registration process for value added services such as enhanced registration security).

An example of infringement at the second level is where a registry operator has a pattern or practice of actively and systematically encouraging registrants to register second level domain names and to take unfair advantage of the trademark to the extent and degree that bad faith is apparent. Another example of infringement at the second level is where a registry operator has a pattern or practice of acting as the registrant or beneficial user of infringing registrations, to monetize and profit in bad faith.

7. Complaint

7.1 Filing:

The Complaint will be filed electronically. Once the Administrative Review has been completed and the Provider deems the Complaint to be in compliance, the Provider will electronically serve the Complaint and serve a paper notice on the registry operator that is the subject of the Complaint ("Notice of Complaint") consistent with the contact information listed in the Registry Agreement.

7.2 Content:

7.2.1 The name and contact information, including address, phone, and email address, of the Complainant, and, to the best of Complainant's knowledge, the name and address of the current owner of the registration.

- 7.2.2 The name and contact information, including address, phone, and email address of any person authorized to act on behalf of Complainant.
- 7.2.3 A statement of the nature of the dispute, and any relevant evidence, which shall include:
- (a) The particular legal rights claim being asserted, the marks that form the basis for the dispute and a short and plain statement of the basis upon which the Complaint is being filed.
 - (b) A detailed explanation of how the Complainant's claim meets the requirements for filing a claim pursuant to that particular ground or standard.
 - (c) A detailed explanation of the validity of the Complaint and why the Complainant is entitled to relief.
 - (d) A statement that the Complainant has at least 30 days prior to filing the Complaint notified the registry operator in writing of: (i) its specific concerns and specific conduct it believes is resulting in infringement of Complainant's trademarks and (ii) its willingness to meet to resolve the issue.
 - (e) An explanation of how the mark is used by the Complainant (including the type of goods/services, period and territory of use – including all on-line usage) or otherwise protected by statute, treaty or has been validated by a court or the Clearinghouse.
 - (f) Copies of any documents that the Complainant considers to evidence its basis for relief, including evidence of current use of the Trademark at issue in the Complaint and domain name registrations.
 - (g) A statement that the proceedings are not being brought for any improper purpose.
 - (h) A statement describing how the registration at issue has harmed the trademark owner.
- 7.3 Complaints will be limited 5,000 words and 20 pages, excluding attachments, unless the Provider determines that additional material is necessary.
- 7.4 At the same time the Complaint is filed, the Complainant will pay a non-refundable filing fee in the amount set in accordance with the applicable Provider rules. In the event that the filing fee is not paid within 10 days of the receipt of the Complaint by the Provider, the Complaint will be dismissed without prejudice.

8. Administrative Review of the Complaint

- 8.1 All Complaints will be reviewed by the Provider within five (5) business days of submission to the Provider to determine whether the Complaint contains all necessary information and complies with the procedural rules.
- 8.2 If the Provider finds that the Complaint complies with procedural rules, the Complaint will be deemed filed, and the proceedings will continue to the Threshold Review. If the Provider finds that the Complaint does not comply with procedural rules, it will electronically notify the Complainant of such non-compliance and provide the Complainant five (5) business days to submit an amended Complaint. If the Provider does not receive an amended Complaint within the five (5) business days provided, it will dismiss the Complaint and close the proceedings without prejudice to the Complainant's submission of a new Complaint that complies with procedural rules. Filing fees will not be refunded.
- 8.3 If deemed compliant, the Provider will electronically serve the Complaint on the registry operator and serve the Notice of Complaint consistent with the contact information listed in the Registry Agreement.

9. Threshold Review

- 9.1 Provider shall establish a Threshold Review Panel, consisting of one panelist selected by the Provider, for each proceeding within five (5) business days after completion of Administrative Review and the Complaint has been deemed compliant with procedural rules.
- 9.2 The Threshold Review Panel shall be tasked with determining whether the Complainant satisfies the following criteria:
 - 9.2.1 The Complainant is a holder of a word mark that: (i) is nationally or regionally registered and that is in current use; or (ii) has been validated through court proceedings; or (iii) that is specifically protected by a statute or treaty at the time the PDDRP complaint is filed;
 - 9.2.1.1 Use can be shown by demonstrating that evidence of use – which can be a declaration and one specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse
 - 9.2.1.2 Proof of use may also be submitted directly with the Complaint.
 - 9.2.2 The Complainant has asserted that it has been materially harmed as a result of trademark infringement;
 - 9.2.3 The Complainant has asserted facts with sufficient specificity that, if everything the Complainant asserted is true, states a claim under the Top Level Standards herein
OR

The Complainant has asserted facts with sufficient specificity that, if everything the Complainant asserted is true, states a claim under the Second Level Standards herein;

9.2.4 The Complainant has asserted that: (i) at least 30 days prior to filing the Complaint the Complainant notified the registry operator in writing of its specific concerns and specific conduct it believes is resulting in infringement of Complainant's trademarks, and its willingness to meet to resolve the issue; (ii) whether the registry operator responded to the Complainant's notice of specific concerns; and (iii) if the registry operator did respond, that the Complainant attempted to engage in good faith discussions to resolve the issue prior to initiating the PDDRP.

9.3 Within ten (10) business days of date Provider served Notice of Complaint, the registry operator shall have the opportunity, but is not required, to submit papers to support its position as to the Complainant's standing at the Threshold Review stage. If the registry operator chooses to file such papers, it must pay a filing fee.

9.4 If the registry operator submits papers, the Complainant shall have ten (10) business days to submit an opposition.

9.5 The Threshold Review Panel shall have ten (10) business days from due date of Complainant's opposition or the due date of the registry operator's papers if none were filed, to issue Threshold Determination.

9.6 Provider shall electronically serve the Threshold Determination on all parties.

9.7 If the Complainant has not satisfied the Threshold Review criteria, the Provider will dismiss the proceedings on the grounds that the Complainant lacks standing and declare that the registry operator is the prevailing party.

9.8 If the Threshold Review Panel determines that the Complainant has standing and satisfied the criteria then the Provider will commence the proceedings on the merits.

10. Response to the Complaint

10.1 The registry operator must file a Response to each Complaint within forty-five (45) days after the date of the Threshold Review Panel Declaration.

10.2 The Response will comply with the rules for filing of a Complaint and will contain the name and contact information for the registry operator, as well as a point-by-point response to the statements made in the Complaint.

10.3 The Response must be filed with the Provider and the Provider must serve it upon the Complainant in electronic form with a hard-copy notice that it has been served.

- 10.4 Service of the Response will be deemed effective, and the time will start to run for a Reply, upon confirmation that the electronic Response and hard-copy notice of the Response was sent by the Provider to the addresses provided by the Complainant.
- 10.5 If the registry operator believes the Complaint is without merit, it will affirmatively plead in its Response the specific grounds for the claim.

11. Reply

- 11.1 The Complainant is permitted ten (10) days from Service of the Response to submit a Reply addressing the statements made in the Response showing why the Complaint is not “without merit.” A Reply may not introduce new facts or evidence into the record, but shall only be used to address statements made in the Response. Any new facts or evidence introduced in a Response shall be disregarded by the Expert Panel.
- 11.2 Once the Complaint, Response and Reply (as necessary) are filed and served, a Panel will be appointed and provided with all submissions.

12. Default

- 12.1 If the registry operator fails to respond to the Complaint, it will be deemed to be in default.
- 12.2 Limited rights to set aside the finding of default will be established by the Provider, but in no event will they be permitted absent a showing of good cause to set aside the finding of default.
- 12.3 The Provider shall provide notice of Default via email to the Complainant and registry operator.
- 12.4 All Default cases shall proceed to Expert Determination on the merits.

13. Expert Panel

- 13.1 The Provider shall establish an Expert Panel within 21 days after receiving the Reply, or if no Reply is filed, within 21 days after the Reply was due to be filed.
- 13.2 The Provider shall appoint a one-person Expert Panel, unless any party requests a three- member Expert Panel. No Threshold Panel member shall serve as an Expert Panel member in the same Trademark PDDRP proceeding.
- 13.3 In the case where either party requests a three-member Expert Panel, each party (or each side of the dispute if a matter has been consolidated) shall select an Expert and the two selected Experts shall select the third Expert Panel member. Such selection shall be made pursuant to the Providers rules or procedures. Trademark PDDRP panelists within a Provider shall be rotated to the extent feasible.

- 13.4 Expert Panel member must be independent of the parties to the post-delegation challenge. Each Provider will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing a panelist for lack of independence.

14. Costs

- 14.1 The Provider will estimate the costs for the proceedings that it administers under this procedure in accordance with the applicable Provider rules. Such costs will be estimated to cover the administrative fees of the Provider, the Threshold Review Panel and the Expert Panel, and are intended to be reasonable.
- 14.2 The Complainant shall be required to pay the filing fee as set forth above in the “Complaint” section, and shall be required to submit the full amount of the Provider estimated administrative fees, the Threshold Review Panel fees and the Expert Panel fees at the outset of the proceedings. Fifty percent of that full amount shall be in cash (or cash equivalent) to cover the Complainant’s share of the proceedings and the other 50% shall be in either cash (or cash equivalent), or in bond, to cover the registry operator’s share if the registry operator prevails.
- 14.3 If the Panel declares the Complainant to be the prevailing party, the registry operator is required to reimburse Complainant for all Panel and Provider fees incurred. Failure to do shall be deemed a violation of the Trademark PDDRP and a breach of the Registry Agreement, subject to remedies available under the Agreement up to and including termination.

15. Discovery

- 15.1 Whether and to what extent discovery is allowed is at the discretion of the Panel, whether made on the Panel’s own accord, or upon request from the Parties.
- 15.2 If permitted, discovery will be limited to that for which each Party has a substantial need.
- 15.3 In extraordinary circumstances, the Provider may appoint experts to be paid for by the Parties, request live or written witness testimony, or request limited exchange of documents.
- 15.4 At the close of discovery, if permitted by the Expert Panel, the Parties will make a final evidentiary submission, the timing and sequence to be determined by the Provider in consultation with the Expert Panel.

16. Hearings

- 16.1 Disputes under this Procedure will be resolved without a hearing unless either party requests a hearing or the Expert Panel determines on its own initiative that one is necessary.

- 16.2 If a hearing is held, videoconferences or teleconferences should be used if at all possible. If not possible, then the Expert Panel will select a place for hearing if the Parties cannot agree.
- 16.3 Hearings should last no more than one day, except in the most extraordinary circumstances.
- 16.4 All dispute resolution proceedings will be conducted in English.

17. Burden of Proof

The Complainant bears the burden of proving the allegations in the Complaint; the burden must be by clear and convincing evidence.

18. Remedies

- 18.1 Since registrants are not a party to the action, a recommended remedy cannot take the form of deleting, transferring or suspending registrations (except to the extent registrants have been shown to be officers, directors, agents, employees, or entities under common control with a registry operator).
- 18.2 Recommended remedies will not include monetary damages or sanctions to be paid to any party other than fees awarded pursuant to section 14.
- 18.3 The Expert Panel may recommend a variety of graduated enforcement tools against the registry operator if it the Expert Panel determines that the registry operator is liable under this Trademark PDDRP, including:
 - 18.3.1 Remedial measures for the registry to employ to ensure against allowing future infringing registrations, which may be in addition to what is required under the registry agreement, except that the remedial measures shall not:
 - (a) Require the Registry Operator to monitor registrations not related to the names at issue in the PDDRP proceeding; or
 - (b) Direct actions by the registry operator that are contrary to those required under the Registry Agreement;
 - 18.3.2 Suspension of accepting new domain name registrations in the gTLD until such time as the violation(s) identified in the Determination is(are) cured or a set period of time;

OR,

- 18.3.3 In extraordinary circumstances where the registry operator acted with malice, providing for the termination of a Registry Agreement.

- 18.4 In making its recommendation of the appropriate remedy, the Expert Panel will consider the ongoing harm to the Complainant, as well as the harm the remedies will create for other, unrelated, good faith domain name registrants operating within the gTLD.
- 18.5 The Expert Panel may also determine whether the Complaint was filed “without merit,” and, if so, award the appropriate sanctions on a graduated scale, including:
 - 18.5.1 Temporary bans from filing Complaints;
 - 18.5.2 Imposition of costs of registry operator, including reasonable attorney fees; and
 - 18.5.3 Permanent bans from filing Complaints after being banned temporarily.
- 18.6 Imposition of remedies shall be at the discretion of ICANN, but absent extraordinary circumstances, those remedies will be in line with the remedies recommended by the Expert Panel.

19. The Expert Panel Determination

- 19.1 The Provider and the Expert Panel will make reasonable efforts to ensure that the Expert Determination is issued within 45 days of the appointment of the Expert Panel and absent good cause, in no event later than 60 days after the appointment of the Expert Panel.
- 19.2 The Expert Panel will render a written Determination. The Expert Determination will state whether or not the Complaint is factually founded and provide the reasons for that Determination. The Expert Determination should be publicly available and searchable on the Provider’s web site.
- 19.3 The Expert Determination may further include a recommendation of specific remedies. Costs and fees to the Provider, to the extent not already paid, will be paid within thirty (30) days of the Expert Panel’s Determination.
- 19.4 The Expert Determination shall state which party is the prevailing party.
- 19.5 While the Expert Determination that a registry operator is liable under the standards of the Trademark PDDRP shall be taken into consideration, ICANN will have the authority to impose the remedies, if any, that ICANN deems appropriate given the circumstances of each matter.

20. Appeal of Expert Determination

- 20.1 Either party shall have a right to seek a de novo appeal of the Expert Determination of liability or recommended remedy based on the existing record within the Trademark PDDRP proceeding for a reasonable fee to cover the costs of the appeal.
- 20.2 An appeal must be filed with the Provider and served on all parties within 20 days after an Expert Determination is issued and a response to the appeal must be filed within 20

days after the appeal. Manner and calculation of service deadlines shall in consistent with those set forth in Section 4 above, "Communication and Time Limits."

- 20.3 A three-member Appeal Panel is to be selected by the Provider, but no member of the Appeal Panel shall also have been an Expert Panel member.
- 20.4 The fees for an appeal in the first instance shall be borne by the appellant.
- 20.5 A limited right to introduce new admissible evidence that is material to the Determination will be allowed upon payment of an additional fee, provided the evidence clearly pre-dates the filing of the Complaint.
- 20.6 The Appeal Panel may request at its sole discretion, further statements or evidence from any party regardless of whether the evidence pre-dates the filing of the Complaint if the Appeal Panel determines such evidence is relevant.
- 20.7 The prevailing party shall be entitled to an award of costs of appeal.
- 20.8 The Providers rules and procedures for appeals, other than those stated above, shall apply.

21. Challenge of a Remedy

- 21.1 ICANN shall not implement a remedy for violation of the Trademark PDDRP for at least 20 days after the issuance of an Expert Determination, providing time for an appeal to be filed.
- 21.2 If an appeal is filed, ICANN shall stay its implementation of a remedy pending resolution of the appeal.
- 21.3 If ICANN decides to implement a remedy for violation of the Trademark PDDRP, ICANN will wait ten (10) business days (as observed in the location of its principal office) after notifying the registry operator of its decision. ICANN will then implement the decision unless it has received from the registry operator during that ten (10) business-day period official documentation that the registry operator has either: (a) commenced a lawsuit against the Complainant in a court of competent jurisdiction challenging the Expert Determination of liability against the registry operator, or (b) challenged the intended remedy by initiating dispute resolution under the provisions of its Registry Agreement. If ICANN receives such documentation within the ten (10) business day period, it will not seek to implement the remedy in furtherance of the Trademark PDDRP until it receives: (i) evidence of a resolution between the Complainant and the registry operator; (ii) evidence that registry operator's lawsuit against Complainant has been dismissed or withdrawn; or (iii) a copy of an order from the dispute resolution provider selected pursuant to the Registry Agreement dismissing the dispute against ICANN whether by reason of agreement of the parties or upon determination of the merits.

- 21.4 The registry operator may challenge ICANN's imposition of a remedy imposed in furtherance of an Expert Determination that the registry operator is liable under the PDDRP, to the extent a challenge is warranted, by initiating dispute resolution under the provisions of its Registry Agreement. Any arbitration shall be determined in accordance with the parties' respective rights and duties under the Registry Agreement. Neither the Expert Determination nor the decision of ICANN to implement a remedy is intended to prejudice the registry operator in any way in the determination of the arbitration dispute. Any remedy involving a termination of the Registry Agreement must be according to the terms and conditions of the termination provision of the Registry Agreement.
- 21.5 Nothing herein shall be deemed to prohibit ICANN from imposing remedies at any time and of any nature it is otherwise entitled to impose for a registry operator's non-compliance with its Registry Agreement.

22. Availability of Court or Other Administrative Proceedings

- 22.1 The Trademark PDDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of an Expert Determination as to liability.
- 22.2 In those cases where a Party submits documented proof to the Provider that a Court action involving the same Parties, facts and circumstances as the Trademark PDDRP was instituted prior to the filing date of the Complaint in the Trademark PDDRP, the Provider shall suspend or terminate the Trademark PDDRP.

REGISTRY RESTRICTIONS DISPUTE RESOLUTION PROCEDURE (RRDRP)¹
4 JUNE 2012

1. Parties to the Dispute

The parties to the dispute will be the harmed established institution and the gTLD registry operator. ICANN shall not be a party.

2. Applicable Rules

2.1 This procedure is intended to cover these dispute resolution proceedings generally. To the extent more than one RRDRP provider (“Provider”) is selected to implement the RRDRP, each Provider may have additional rules and procedures that must be followed when filing a Complaint. The following are the general procedure to be followed by all Providers.

2.2 In any new community-based gTLD registry agreement, the registry operator shall be required to agree to participate in the RRDRP and be bound by the resulting Determinations.

3. Language

3.1 The language of all submissions and proceedings under the procedure will be English.

3.2 Parties may submit supporting evidence in their original language, provided and subject to the authority of the RRDRP Expert Panel to determine otherwise, that such evidence is accompanied by an English translation of all relevant text.

4. Communications and Time Limits

4.1 All communications with the Provider must be filed electronically.

4.2 For the purpose of determining the date of commencement of a time limit, a notice or other communication will be deemed to have been received on the day that it is transmitted to the appropriate contact person designated by the parties.

4.3 For the purpose of determining compliance with a time limit, a notice or other communication will be deemed to have been sent, made or transmitted on the day that it is dispatched.

¹ Initial complaints that a Registry has failed to comply with registration restrictions shall be processed through a Registry Restriction Problem Report System (RRPRS) using an online form similar to the Whois Data Problem Report System (WDPRS) at InterNIC.net. A nominal processing fee could serve to decrease frivolous complaints. The registry operator shall receive a copy of the complaint and will be required to take reasonable steps to investigate (and remedy if warranted) the reported non-compliance. The Complainant will have the option to escalate the complaint in accordance with this RRDRP, if the alleged non-compliance continues. Failure by the Registry to address the complaint to complainant’s satisfaction does not itself give the complainant standing to file an RRDRP complaint.

- 4.4 For the purpose of calculating a period of time under this procedure, such period will begin to run on the day following the date of receipt of a notice or other communication.
- 4.5 All references to day limits shall be considered as calendar days unless otherwise specified.

5. Standing

- 5.1 The mandatory administrative proceeding will commence when a third-party complainant (“Complainant”) has filed a Complaint with a Provider asserting that the Complainant is a harmed established institution as a result of the community-based gTLD registry operator not complying with the registration restrictions set out in the Registry Agreement.
- 5.2 Established institutions associated with defined communities are eligible to file a community objection. The “defined community” must be a community related to the gTLD string in the application that is the subject of the dispute. To qualify for standing for a community claim, the Complainant must prove both: it is an established institution, and has an ongoing relationship with a defined community that consists of a restricted population that the gTLD supports.
- 5.3 Complainants must have filed a claim through the Registry Restriction Problem Report System (RRPRS) to have standing to file an RRDRP.
- 5.4 The Panel will determine standing and the Expert Determination will include a statement of the Complainant’s standing.

6. Standards

- 6.1 For a claim to be successful, the claims must prove that:
 - 6.1.1 The community invoked by the objector is a defined community;
 - 6.1.2 There is a strong association between the community invoked and the gTLD label or string;
 - 6.1.3 The TLD operator violated the terms of the community-based restrictions in its agreement;
 - 6.1.4 There is a measureable harm to the Complainant and the community named by the objector.

7. Complaint

- 7.1 Filing:

The Complaint will be filed electronically. Once the Administrative Review has been completed and the Provider deems the Complaint to be in compliance, the Provider will electronically serve the Complaint and serve a hard copy and fax notice on the registry operator consistent with the contact information listed in the Registry Agreement.

7.2 Content:

- 7.2.1 The name and contact information, including address, phone, and email address, of the Complainant, the registry operator and, to the best of Complainant's knowledge, the name and address of the current owner of the registration.
- 7.2.2 The name and contact information, including address, phone, and email address of any person authorized to act on behalf of Complainant.
- 7.2.3 A statement of the nature of the dispute, which must include:
 - 7.2.3.1 The particular registration restrictions in the Registry Agreement with which the registry operator is failing to comply; and
 - 7.2.3.2 A detailed explanation of how the registry operator's failure to comply with the identified registration restrictions has caused harm to the complainant.
- 7.2.4 A statement that the proceedings are not being brought for any improper purpose.
- 7.2.5 A statement that the Complainant has filed a claim through the RRPRS and that the RRPRS process has concluded.
- 7.2.6 A statement that Complainant has not filed a Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) complaint relating to the same or similar facts or circumstances.

7.3 Complaints will be limited to 5,000 words and 20 pages, excluding attachments, unless the Provider determines that additional material is necessary.

7.4 Any supporting documents should be filed with the Complaint.

7.5 At the same time the Complaint is filed, the Complainant will pay a filing fee in the amount set in accordance with the applicable Provider rules. In the event that the filing fee is not paid within 10 days of the receipt of the Complaint by the Provider, the Complaint will be dismissed without prejudice to the Complainant to file another complaint.

8. Administrative Review of the Complaint

8.1 All Complaints will be reviewed within five (5) business days of submission by panelists designated by the applicable Provider to determine whether the Complainant has complied with the procedural rules.

- 8.2 If the Provider finds that the Complaint complies with procedural rules, the Complaint will be deemed filed, and the proceedings will continue. If the Provider finds that the Complaint does not comply with procedural rules, it will electronically notify the Complainant of such non-compliance and provide the Complainant five (5) business days to submit an amended Complaint. If the Provider does not receive an amended Complaint within the five (5) business days provided, it will dismiss the Complaint and close the proceedings without prejudice to the Complainant's submission of a new Complaint that complies with procedural rules. Filing fees will not be refunded if the Complaint is deemed not in compliance.
- 8.3 If deemed compliant, the Provider will electronically serve the Complaint on the registry operator and serve a paper notice on the registry operator that is the subject of the Complaint consistent with the contact information listed in the Registry Agreement.

9. Response to the Complaint

- 9.1 The registry operator must file a response to each Complaint within thirty (30) days of service the Complaint.
- 9.2 The Response will comply with the rules for filing of a Complaint and will contain the names and contact information for the registry operator, as well as a point by point response to the statements made in the Complaint.
- 9.3 The Response must be electronically filed with the Provider and the Provider must serve it upon the Complainant in electronic form with a hard-copy notice that it has been served.
- 9.4 Service of the Response will be deemed effective, and the time will start to run for a Reply, upon electronic transmission of the Response.
- 9.5 If the registry operator believes the Complaint is without merit, it will affirmatively plead in its Response the specific grounds for the claim.
- 9.6 At the same time the Response is filed, the registry operator will pay a filing fee in the amount set in accordance with the applicable Provider rules. In the event that the filing fee is not paid within ten (10) days of the receipt of the Response by the Provider, the Response will be deemed improper and not considered in the proceedings, but the matter will proceed to Determination.

10 Reply

- 10.1 The Complainant is permitted ten (10) days from Service of the Response to submit a Reply addressing the statements made in the Response showing why the Complaint is not "without merit." A Reply may not introduce new facts or evidence into the record, but shall only be used to address statements made in the Response. Any new facts or evidence introduced in a Response shall be disregarded by the Expert Panel.
- 10.2 Once the Complaint, Response and Reply (as necessary) are filed and served, a Panel will be appointed and provided with all submissions.

11. Default

- 11.1 If the registry operator fails to respond to the Complaint, it will be deemed to be in default.
- 11.2 Limited rights to set aside the finding of default will be established by the Provider, but in no event will it be permitted absent a showing of good cause to set aside the finding of Default.
- 11.3 The Provider shall provide Notice of Default via email to the Complainant and registry operator.
- 11.4 All Default cases shall proceed to Expert Determination on the merits.

12. Expert Panel

- 12.1 The Provider shall select and appoint a single-member Expert Panel within (21) days after receiving the Reply, or if no Reply is filed, within 21 days after the Reply was due to be filed.
- 12.2 The Provider will appoint a one-person Expert Panel unless any party requests a three-member Expert Panel.
- 12.3 In the case where either party requests a three-member Expert Panel, each party (or each side of the dispute if a matter has been consolidated) shall select an Expert and the two selected Experts shall select the third Expert Panel member. Such selection shall be made pursuant to the Provider's rules or procedures. RRDRP panelists within a Provider shall be rotated to the extent feasible.
- 12.4 Expert Panel members must be independent of the parties to the post-delegation challenge. Each Provider will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an Expert for lack of independence.

13. Costs

- 13.1 The Provider will estimate the costs for the proceedings that it administers under this procedure in accordance with the applicable Provider Rules. Such costs will cover the administrative fees, including the Filing and Response Fee, of the Provider, and the Expert Panel fees, and are intended to be reasonable.
- 13.2 The Complainant shall be required to pay the Filing fee as set forth above in the "Complaint" section, and shall be required to submit the full amount of the other Provider-estimated administrative fees, including the Response Fee, and the Expert Panel fees at the outset of the proceedings. Fifty percent of that full amount shall be in cash (or cash equivalent) to cover the Complainant's share of the proceedings and the other 50% shall be in either cash (or cash equivalent), or in bond, to cover the registry operator's share if the registry operator prevails.

- 13.3 If the Panel declares the Complainant to be the prevailing party, the registry operator is required to reimburse Complainant for all Panel and Provider fees incurred, including the Filing Fee. Failure to do so shall be deemed a violation of the RRDRP and a breach of the Registry Agreement, subject to remedies available under the Agreement up to and including termination.
- 13.4 If the Panel declares the registry operator to be the prevailing party, the Provider shall reimburse the registry operator for its Response Fee.

14. Discovery/Evidence

- 14.1 In order to achieve the goal of resolving disputes rapidly and at a reasonable cost, discovery will generally not be permitted. In exceptional cases, the Expert Panel may require a party to provide additional evidence.
- 14.2 If permitted, discovery will be limited to that for which each Party has a substantial need.
- 14.3 Without a specific request from the Parties, but only in extraordinary circumstances, the Expert Panel may request that the Provider appoint experts to be paid for by the Parties, request live or written witness testimony, or request limited exchange of documents.

15. Hearings

- 15.1 Disputes under this RRDRP will usually be resolved without a hearing.
- 15.2 The Expert Panel may decide on its own initiative, or at the request of a party, to hold a hearing. However, the presumption is that the Expert Panel will render Determinations based on written submissions and without a hearing.
- 15.3 If a request for a hearing is granted, videoconferences or teleconferences should be used if at all possible. If not possible, then the Expert Panel will select a place for hearing if the parties cannot agree.
- 15.4 Hearings should last no more than one day, except in the most exceptional circumstances.
- 15.5 If the Expert Panel grants one party's request for a hearing, notwithstanding the other party's opposition, the Expert Panel is encouraged to apportion the hearing costs to the requesting party as the Expert Panel deems appropriate.
- 15.6 All dispute resolution proceedings will be conducted in English.

16. Burden of Proof

The Complainant bears the burden of proving its claim; the burden should be by a preponderance of the evidence.

17. Recommended Remedies

- 17.1 Since registrants of domain names registered in violation of the agreement restriction are not a party to the action, a recommended remedy cannot take the form of deleting, transferring or suspending registrations that were made in violation of the agreement restrictions (except to the extent registrants have been shown to be officers, directors, agents, employees, or entities under common control with a registry operator).
- 17.2 Recommended remedies will not include monetary damages or sanctions to be paid to any party other than fees awarded pursuant to section 13.
- 17.3 The Expert Panel may recommend a variety of graduated enforcement tools against the registry operator if the Expert Panel determines that the registry operator allowed registrations outside the scope of its promised limitations, including:
- 17.3.1 Remedial measures, which may be in addition to requirements under the registry agreement, for the registry to employ to ensure against allowing future registrations that do not comply with community-based limitations; except that the remedial measures shall not:
- (a) Require the registry operator to monitor registrations not related to the names at issue in the RRDRP proceeding, or
 - (b) direct actions by the registry operator that are contrary to those required under the registry agreement
- 17.3.2 Suspension of accepting new domain name registrations in the gTLD until such time as the violation(s) identified in the Determination is(are) cured or a set period of time;
- OR,
- 17.3.3 In extraordinary circumstances where the registry operator acted with malice providing for the termination of a registry agreement.
- 17.3 In making its recommendation of the appropriate remedy, the Expert Panel will consider the ongoing harm to the Complainant, as well as the harm the remedies will create for other, unrelated, good faith domain name registrants operating within the gTLD.

18. The Expert Determination

- 18.1 The Provider and the Expert Panel will make reasonable efforts to ensure that the Expert Determination is rendered within 45 days of the appointment of the Expert Panel and absent good cause, in no event later than 60 days after the appointment of the Expert Panel.
- 18.2 The Expert Panel will render a written Determination. The Expert Determination will state whether or not the Complaint is factually founded and provide the reasons for its

Determination. The Expert Determination should be publicly available and searchable on the Provider's web site.

- 18.3 The Expert Determination may further include a recommendation of specific remedies. Costs and fees to the Provider, to the extent not already paid, will be paid within thirty (30) days of the Expert Determination.
- 18.4 The Expert Determination shall state which party is the prevailing party.
- 18.5 While the Expert Determination that a community-based restricted gTLD registry operator was not meeting its obligations to police the registration and use of domains within the applicable restrictions shall be considered, ICANN shall have the authority to impose the remedies ICANN deems appropriate, given the circumstances of each matter.

19. Appeal of Expert Determination

- 19.1 Either party shall have a right to seek a de novo appeal of the Expert Determination based on the existing record within the RDRP proceeding for a reasonable fee to cover the costs of the appeal.
- 19.2 An appeal must be filed with the Provider and served on all parties within 20 days after an Expert Determination is issued and a response to the appeal must be filed within 20 days after the appeal. Manner and calculation of service deadlines shall in consistent with those set forth in Section 4 above, "Communication and Time Limits."
- 19.3 A three-member Appeal Panel is to be selected by the Provider, but no member of the Appeal Panel shall also have been an Expert Panel member.
- 19.4 The fees for an appeal in the first instance shall be borne by the appellant.
- 19.5 A limited right to introduce new admissible evidence that is material to the Determination will be allowed upon payment of an additional fee, provided the evidence clearly pre-dates the filing of the Complaint.
- 19.6 The Appeal Panel may request at its sole discretion, further statements or evidence from any party regardless of whether the evidence pre-dates the filing of the Complaint if the Appeal Panel determines such evidence is relevant.
- 19.7 The prevailing party shall be entitled to an award of costs of appeal.
- 19.8 The Providers rules and procedures for appeals, other than those stated above, shall apply.

20. Breach

- 20.1 If the Expert determines that the registry operator is in breach, ICANN will then proceed to notify the registry operator that it is in breach. The registry operator will be given the opportunity to cure the breach as called for in the Registry Agreement.

- 20.2 If registry operator fails to cure the breach then both parties are entitled to utilize the options available to them under the registry agreement, and ICANN may consider the recommended remedies set forth in the Expert Determination when taking action.
- 20.3 Nothing herein shall be deemed to prohibit ICANN from imposing remedies at any time and of any nature it is otherwise entitled to impose for a registry operator's non-compliance with its Registry Agreement.

21. Availability of Court or Other Administrative Proceedings

- 21.1 The RRDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of an Expert Determination as to liability.
- 21.2 The parties are encouraged, but not required to participate in informal negotiations and/or mediation at any time throughout the dispute resolution process but the conduct of any such settlement negotiation is not, standing alone, a reason to suspend any deadline under the proceedings.



gTLD Applicant Guidebook

(v. 2012-06-04)

Module 6

4 June 2012

Module 6

Top-Level Domain Application - Terms and Conditions

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.
2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.
3. Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more

gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.
5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's or an ICANN Affiliated Party's consideration of the application, and any approval rejection or withdrawal of the application; and/or (b) ICANN's or an ICANN Affiliated Party's reliance on information provided by applicant in the application.

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.
7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other

materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion. Applicant acknowledges that ICANN will handle personal information collected in accordance with its gTLD Program privacy statement <http://newgtlds.icann.org/en/applicants/agb/program-privacy>, which is incorporated herein by this reference. If requested by ICANN, Applicant will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct these background screening activities. In addition, Applicant acknowledges that to allow ICANN to conduct thorough background screening investigations:
 - a. Applicant may be required to provide documented consent for release of records to ICANN by organizations or government agencies;
 - b. Applicant may be required to obtain specific government records directly and supply those records to ICANN for review;
 - c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization;

- d. Applicant may be requested to supply certain information in the original language as well as in English.
9. Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.
10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.
11. Applicant authorizes ICANN to:
 - a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;
 - b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.

12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.
13. Applicant understands that ICANN has a long-standing relationship with Jones Day, an international law firm, and that ICANN intends to continue to be represented by Jones Day throughout the application process and the resulting delegation of TLDs. ICANN does not know whether any particular applicant is or is not a client of Jones Day. To the extent that Applicant is a Jones Day client, by submitting this application, Applicant agrees to execute a waiver permitting Jones Day to represent ICANN adverse to Applicant in the matter. Applicant further agrees that by submitting its Application, Applicant is agreeing to execute waivers or take similar reasonable actions to permit other law and consulting firms retained by ICANN in connection with the review and evaluation of its application to represent ICANN adverse to Applicant in the matter.
14. ICANN reserves the right to make reasonable updates and changes to this applicant guidebook and to the application process, including the process for withdrawal of applications, at any time by posting notice of such updates and changes to the ICANN website, including as the possible result of new policies that might be adopted or advice to ICANN from ICANN advisory committees during the course of the application process. Applicant acknowledges that ICANN may make such updates and changes and agrees that its application will be subject to any such updates and changes. In the event that Applicant has completed and submitted its application prior to

such updates or changes and Applicant can demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN will work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for Applicant to the extent possible consistent with ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems.

EXHIBIT C-6

MEMORANDUM OF UNDERSTANDING BETWEEN
THE U.S. DEPARTMENT OF COMMERCE
AND
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

I. PARTIES

This document constitutes an agreement between the U.S. Department of Commerce (DOC or USG) and the Internet Corporation for Assigned Names and Numbers (ICANN), a not-for-profit corporation.

II. PURPOSE

A. Background

On July 1, 1997, as part of the Administration's Framework for Global Electronic Commerce, the President directed the Secretary of Commerce to privatize the management of the domain name system (DNS) in a manner that increases competition and facilitates international participation in its management.

On June 5, 1998, the DOC published its Statement of Policy, *Management of Internet Names and Addresses*, 63 Fed. Reg. 31741(1998) (Statement of Policy). The Statement of Policy addressed the privatization of the technical management of the DNS in a manner that allows for the development of robust competition in the management of Internet names and addresses. In the Statement of Policy, the DOC stated its intent to enter an agreement with a not-for-profit entity to establish a process to transition current U.S. Government management of the DNS to such an entity based on the principles of stability, competition, bottom-up coordination, and representation.

B. Purpose

Before making a transition to private sector DNS management, the DOC requires assurances that the private sector has the capability and resources to assume the important responsibilities related to the technical management of the DNS. To secure these assurances, the Parties will collaborate on this DNS Project (DNS Project). In the DNS Project, the Parties will jointly design, develop, and test the mechanisms, methods, and procedures that should be in place and the steps necessary to transition management responsibility for DNS functions now performed by, or on behalf of, the U.S. Government to a private-sector not-for-profit entity. Once testing is successfully completed, it is contemplated that management of the DNS will be transitioned to the mechanisms, methods, and procedures designed and developed in the DNS Project.

In the DNS Project, the parties will jointly design, develop, and test the mechanisms, methods, and procedures to carry out the following DNS management functions:

- a. Establishment of policy for and direction of the allocation of IP number blocks;
- b. Oversight of the operation of the authoritative root server system;
- c. Oversight of the policy for determining the circumstances under which new top level domains would be added to the root system;
- d. Coordination of the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet; and
- e. Other activities necessary to coordinate the specified DNS management functions, as agreed by the Parties.

The Parties will jointly design, develop, and test the mechanisms, methods, and procedures that will achieve the transition without disrupting the functional operation of the Internet. The Parties will also prepare a joint DNS Project Report that documents the conclusions of the design, development, and testing.

DOC has determined that this project can be done most effectively with the participation of ICANN. ICANN has a stated purpose to perform the described coordinating functions for Internet names and addresses and is the organization that best demonstrated that it can accommodate the broad and diverse interest groups that make up the Internet community.

C. The Principles

The Parties will abide by the following principles:

1. Stability

This Agreement promotes the stability of the Internet and allows the Parties to plan for a deliberate move from the existing structure to a private-sector structure without disruption to the functioning of the DNS. The Agreement calls for the design, development, and testing of a new management system that will not harm current functional operations.

2. Competition

This Agreement promotes the management of the DNS in a manner that will permit market mechanisms to support competition and consumer choice in the technical management of the DNS. This competition will lower costs, promote innovation, and enhance user choice and satisfaction.

3. Private, Bottom-Up Coordination

This Agreement is intended to result in the design, development, and testing of a private coordinating process that is flexible and able to move rapidly enough to meet the changing needs of the Internet and of Internet users. This Agreement is intended to foster the development of a private sector management system that, as far as possible, reflects a system of bottom-up management.

4. Representation.

This Agreement promotes the technical management of the DNS in a manner that reflects the global and functional diversity of Internet users and their needs. This Agreement is intended to promote the design, development, and testing of mechanisms to solicit public input, both domestic and international, into a private-sector decision making process. These mechanisms will promote the flexibility needed to adapt to changes in the composition of the Internet user community and their needs.

III. AUTHORITIES

A. DOC has authority to participate in the DNS Project with ICANN under the following authorities:

- (1) 15 U.S.C. § 1525, the DOC's Joint Project Authority, which provides that the DOC may enter into joint projects with nonprofit, research, or public organizations on matters of mutual interest, the cost of which is equitably apportioned;
- (2) 15 U.S.C. § 1512, the DOC's authority to foster, promote, and develop foreign and domestic commerce;
- (3) 47 U.S.C. § 902, which specifically authorizes the National Telecommunications and Information Administration (NTIA) to coordinate the telecommunications activities of the Executive Branch and assist in the formulation of policies and standards for those activities including, but not limited to, considerations of interoperability, privacy, security, spectrum use, and emergency readiness;
- (4) Presidential Memorandum on Electronic Commerce, 33 Weekly Comp. Presidential Documents 1006 (July 1, 1997), which directs the Secretary of Commerce to transition DNS management to the private sector; and
- (5) Statement of Policy, *Management of Internet Names and Addresses*, (63 Fed. Reg. 31741(1998) (Attachment A), which describes the manner in which the Department of Commerce will transition DNS management to the private sector.

B. ICANN has the authority to participate in the DNS Project, as evidenced in its Articles of Incorporation (Attachment B) and Bylaws (Attachment C). Specifically, ICANN has stated that its business purpose is to:

- (i) coordinate the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet;
- (ii) perform and oversee functions related to the coordination of the Internet Protocol (IP) address space;
- (iii) perform and oversee functions related to the coordination of the Internet domain name system, including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system;
- (iv) oversee operation of the authoritative Internet DNS root server system; and
- (v) engage in any other related lawful activity in furtherance of Items (i) through (iv).

IV. MUTUAL INTEREST OF THE PARTIES

Both DOC and ICANN have a mutual interest in a transition that ensures that future technical management of the DNS adheres to the principles of stability, competition, coordination, and representation as published in the Statement of Policy. ICANN has declared its commitment to these principles in its Bylaws. This Agreement is essential for the DOC to ensure continuity and stability in the performance of technical management of the DNS now performed by, or on behalf of, the U.S. Government. Together, the Parties will collaborate on the DNS Project to achieve the transition without disruption.

V. RESPONSIBILITIES OF THE PARTIES

A. General.

1. The Parties agree to jointly participate in the DNS Project for the design, development, and testing of the mechanisms, methods and procedures that should be in place for the private sector to manage the functions delineated in the Statement of Policy in a transparent, non-arbitrary, and reasonable manner.
2. The Parties agree that the mechanisms, methods, and procedures developed under the DNS Project will ensure that private-sector technical management of the DNS shall not apply standards, policies, procedures or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause and will ensure sufficient appeal procedures for adversely affected members of the Internet community.
3. Before the termination of this Agreement, the Parties will collaborate on a DNS Project Report that will document ICANN's test of the policies and procedures designed and developed pursuant to this Agreement.
4. The Parties agree to execute the following responsibilities in accordance with the Principles and Purpose of this Agreement as set forth in section II.

B. DOC. The DOC agrees to perform the following activities and provide the following resources in support of the DNS Project:

1. Provide expertise and advice on existing DNS management functions.
2. Provide expertise and advice on methods and administrative procedures for conducting open, public proceedings concerning policies and procedures that address the technical management of the DNS.
3. Identify with ICANN the necessary software, databases, know-how, other equipment, and intellectual property necessary to design, develop, and test methods and procedures of the DNS Project.
4. Participate, as necessary, in the design, development, and testing of the methods and procedures of the DNS Project to ensure continuity including coordination between ICANN and Network Solutions, Inc.
5. Collaborate on a study on the design, development, and testing of a process for making the management of the root server system more robust and secure. This aspect of the DNS Project will address:
 - a. Operational requirements of root name servers, including host hardware capacities, operating system and name server software versions, network connectivity, and physical environment.
 - b. Examination of the security aspects of the root name server system and review of the number, location, and distribution of root name servers considering the total system performance, robustness, and reliability.
 - c. Development of operational procedures for the root server system, including formalization of contractual relationships under which root servers throughout the world are operated.
6. Consult with the international community on aspects of the DNS Project.
7. Provide general oversight of activities conducted pursuant to this Agreement.
8. Maintain oversight of the technical management of DNS functions currently performed either directly, or subject to agreements with the U.S. Government, until such time as further agreement(s) are arranged as necessary, for the private sector to undertake management of specific DNS technical management functions.

C. ICANN. ICANN agrees to perform the following activities and provide the following resources in support of the DNS Project and further agrees to undertake the following activities pursuant to its procedures as set forth in Attachment B (Articles of Incorporation) and Attachment C (By-Laws), as they may be revised from time to time in conformity with the DNS Project:

1. Provide expertise and advice on private sector functions related to technical management of the DNS such as the policy and direction of the allocation of IP number blocks and coordination of the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet.
2. Collaborate on the design, development and testing of procedures by which members of the Internet community adversely affected by decisions that are in conflict with the bylaws of the organization can seek external review of such decisions by a neutral third party.
3. Collaborate on the design, development, and testing of a plan for introduction of competition in domain name registration services, including:
 - a. Development of procedures to designate third parties to participate in tests conducted pursuant to this Agreement.

- b. Development of an accreditation procedure for registrars and procedures that subject registrars to consistent requirements designed to promote a stable and robustly competitive DNS, as set forth in the Statement of Policy.
 - c. Identification of the software, databases, know-how, intellectual property, and other equipment necessary to implement the plan for competition;
4. Collaborate on written technical procedures for operation of the primary root server including procedures that permit modifications, additions or deletions to the root zone file.
5. Collaborate on a study and process for making the management of the root server system more robust and secure. This aspect of the Project will address:
 - a. Operational requirements of root name servers, including host hardware capacities, operating system and name server software versions, network connectivity, and physical environment.
 - b. Examination of the security aspects of the root name server system and review of the number, location, and distribution of root name servers considering the total system performance; robustness, and reliability.
 - c. Development of operational procedures for the root system, including formalization of contractual relationships under which root servers throughout the world are operated.
6. Collaborate on the design, development and testing of a process for affected parties to participate in the formulation of policies and procedures that address the technical management of the Internet. This process will include methods for soliciting, evaluating and responding to comments in the adoption of policies and procedures.
7. Collaborate on the development of additional policies and procedures designed to provide information to the public.
8. Collaborate on the design, development, and testing of appropriate membership mechanisms that foster accountability to and representation of the global and functional diversity of the Internet and its users, within the structure of private- sector DNS management organization.
9. Collaborate on the design, development and testing of a plan for creating a process that will consider the possible expansion of the number of gTLDs. The designed process should consider and take into account the following:
 - a. The potential impact of new gTLDs on the Internet root server system and Internet stability.
 - b. The creation and implementation of minimum criteria for new and existing gTLD registries.
 - c. Potential consumer benefits/costs associated with establishing a competitive environment for gTLD registries.
 - d. Recommendations regarding trademark/domain name policies set forth in the Statement of Policy; recommendations made by the World Intellectual Property Organization (WIPO) concerning: (i) the development of a uniform approach to resolving trademark/domain name disputes involving cyberpiracy; (ii) a process for protecting famous trademarks in the generic top level domains; (iii) the effects of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders; and recommendations made by other independent organizations concerning trademark/domain name issues.
10. Collaborate on other activities as appropriate to fulfill the purpose of this Agreement, as agreed by the Parties.

D. Prohibitions.

1. ICANN shall not act as a domain name Registry or Registrar or IP Address Registry in competition with entities affected by the plan developed under this Agreement. Nothing, however, in this Agreement is intended to prevent ICANN or the USG from taking reasonable steps that are necessary to protect the operational stability of the Internet in the event of the financial failure of a Registry or Registrar or other emergency.
2. Neither Party, either in the DNS Project or in any act related to the DNS Project, shall act unjustifiably or arbitrarily to injure particular persons or entities or particular categories of persons or entities.
3. Both Parties shall act in a non-arbitrary and reasonable manner with respect to design, development, and testing of the DNS Project and any other activity related to the DNS Project.

VI. EQUITABLE APPORTIONMENT OF COSTS

The costs of this activity are equitably apportioned, and each party shall bear the costs of its own activities under this Agreement. This Agreement contemplates no transfer of funds between the Parties. Each Party's estimated costs for the first six months of this Agreement are attached hereto. The Parties shall review these estimated costs in light of actual expenditures at the completion of the first six month period and will ensure costs will be equitably apportioned.

VII. PERIOD OF AGREEMENT AND MODIFICATION/TERMINATION

This Agreement will become effective when signed by all parties. The Agreement will terminate on September 30, 2000, but may be amended at any time by mutual agreement of the parties. Either party may terminate this Agreement by providing one hundred twenty (120) days written notice to the other party. In the event this Agreement is terminated, each party shall be solely responsible for the payment of any expenses it has incurred. This Agreement is subject to the availability of funds.

Joe Sims
Counsel to ICANN
Jones, Day, Reavis & Pogue
1450 G Street N.W.
Washington, D.C. 20005-2088

J. Beckwith Burr
Associate Administrator, NTIA
U.S. Department of Commerce
Washington, D.C. 20230

PARTIES ESTIMATED SIX MONTH COSTS

A. ICANN

Costs to be borne by ICANN over the first six months of this Agreement include: development of Accreditation Guidelines for Registries; review of Technical Specifications for Shared Registries; formation and operation of Government, Root Server, Membership and Independent Review Advisor Committees; advice on formation of and review of applications for recognition by Supporting Organizations; promulgation of conflicts of interest policies; review and adoption of At-Large membership and elections processes and independent review procedures, etc; quarterly regular Board meetings and associated costs (including open forums, travel, staff support and communications infrastructure); travel, administrative support and infrastructure for additional open forums to be determined; internal executive, technical and administrative costs; legal and other professional services; and related other costs. The estimated six month budget (subject to change and refinement over time) is \$750,000 - 1 million.

B. DOC

Costs to be borne by DOC over the first six months of this Agreement include: maintenance of DNS technical management functions currently performed by, or subject to agreements with, the U.S. Government, expertise and advice on existing DNS management functions; expertise and advice on administrative procedures; examination and review of the security aspects of the Root Server System (including travel and technical expertise); consultations with the international community on aspects of the DNS Project (including travel and communications costs); general oversight of activities conducted pursuant to the Agreement; staff support equal to half-time dedication of 4-5 full time employees, travel, administrative support, communications and related other costs. The estimate six month budget (subject to change and refinement over time) is \$250,000 - \$350,000.

Comments concerning the layout, construction and functionality of this site should be sent to webmaster@icann.org.

Page Updated 31-December-99.

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EXHIBIT C-7



New gTLD Program Explanatory Memorandum Resolving String Contention A Complete Lifecycle Including String Contention Resolution

Date of Publication:

18 February 2009

Background - New gTLD Program

Since ICANN was founded ten years ago as a not-for-profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, one of its foundational principles, recognized by the United States and other governments, has been to promote competition in the domain-name marketplace while ensuring Internet security and stability. The expansion will allow for more innovation, choice and change to the Internet's addressing system, now constrained by only 21 generic top-level domain names. In a world with 1.5 billion Internet users—and growing—diversity, choice and competition are key to the continued success and reach of the global network.

The decision to launch these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community. Representatives from a wide variety of stakeholders—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—completed its policy development work on new gTLDs and approved a set of recommendations. Contributing to this policy work were ICANN's Governmental Advisory Committee (GAC), At-Large Advisory Committee (ALAC), Country Code Names Supporting Organization (ccNSO) and Security and Stability Advisory Committee (SSAC). The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008 at the ICANN meeting in Paris. A thorough brief to the policy process and outcomes can be found at <http://gns0.icann.org/issues/new-gtlds/>.

This paper is part of a series of papers that will serve as explanatory memoranda published by ICANN to assist the Internet community to better understand the Request for Proposal (RFP), also known as *applicant guidebook*. A public comment period for the RFP will allow for detailed review and input to be made by the Internet community. Those comments will then be used to revise the documents in preparation of a final RFP. ICANN will release the final RFP in the first half of 2009. For current information, timelines and activities related to the New gTLD Program, please go to <http://www.icann.org/en/topics/new-gtld-program.htm>.

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

Summary of Key Points in this Paper

- This paper provides a summary of the string contention process.
- A detailed explanation is provided of how confusingly similar applied-for gTLDs are identified and how they are grouped together into contention sets.
- A detailed explanation is provided of how string contention is resolved when there is one or more community based applicants in a contention set.
- As a last resort, contention that is not resolved through negotiation among parties or by comparative evaluation must be resolved by other means.

Chapter 1: Introduction

For the introduction of new gTLDs, the Generic Names Supporting Organization (GNSO) has recommended that:

Strings must not be confusingly similar to an existing top-level domain or a Reserved Name. (Recommendation 2, http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm#_ftn26)

The string contention lifecycle was developed to address this concern. There are two main components of string contention. The first involves identifying gTLD strings that are likely to deceive or cause user confusion in relation to existing TLDs or Reserved Names. In addition, proposed gTLDs in a given round must not be likely to deceive or cause user confusion in relation to each other. The identification of applied-for gTLDs that are confusingly similar gives way to the second component of string contention, which is the resolution of the string contention.

This paper will provide detailed descriptions of the distinct aspects of the string contention lifecycle. This paper is divided into five sections:

1. **String Contention Overview** – Provides a summary of the string contention process.
2. **Process Flow** – Provides a graphical representation of the string contention process.
3. **Contention Set Handling** – Provides a detailed explanation of how confusingly similar applied-for gTLDs are identified and how they are grouped together into contention sets.
4. **Comparative Evaluation** – Provides a detailed explanation of how string contention is resolved when there is one or more community based applicants in a contention set.
5. **Auction** – As a last resort, contention that is not resolved through negotiation

among parties or by comparative evaluation must be resolved by other means. The GNSO policy recommendations call for an “efficient” means of resolution. While it is not yet settled, one of those means might be an auction. ICANN commissioned an experienced provider to develop an auction methodology that is described below.

Chapter 2: String Contention Overview

Introduction

This chapter summarizes how string contention between applications in the upcoming New gTLD round will be identified, handled and resolved using foreseen contention resolution methods. More in-depth information is available in three separate papers introduced in the text.

1. String confusion and string contention

In the application process step for the round, each applicant will enter its proposed gTLD string. It is possible that strings proposed by different applicants will be identical or confusingly similar. In such situations, choices must be made between applications in order to prevent that gTLDs causing user confusion are allowed to coexist in the Domain Name System.

Applications with identical strings will be directly identified by an algorithm in the software system supporting the application process. The algorithm will score similarities between strings for each pair of applications, as a partial guidance for determination of the likelihood of string confusion.

String confusion is deemed to occur if a string so nearly resembles another visually that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable consumer. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

Two applications are in direct string contention if their proposed strings are identical or so similar that string confusion would occur if both were to be delegated as TLDs. More than two applications might be involved in a direct contention situation: if four applications feature identical strings, they will all be in direct contention with one another.

Two applications are in indirect string contention if they are both in direct string contention with a third application, but not with one another.

2. Determination of string contention and establishment of contention sets

In the Initial Evaluation process step, a Panel will examine all applied-for strings for string similarity. This Panel determines whether the strings proposed in two applications are so similar that they are in direct string contention. Such a determination, based on human judgment assisted by criteria and algorithm outcomes, is performed for each pair of applications. When all applications have been checked in this way, the outcome is a matrix of direct string contentions between pairs of applications. Applications without any string contention can proceed without further action, but contention must be resolved for all others.

Contention sets are established among applications that are directly or indirectly linked by string contention. A contention set consists of at least two applications, but may involve more applications and have complex link structures. A number of such contention sets may be found in an application round. The final contention sets can only be established once the Extended Evaluation and Objection process steps have been concluded for the applications involved, since some applications may be excluded in

those steps, thereby modifying an earlier identified contention set. A contention set could, for example, be split it into two sets or be eliminated altogether as a consequence.

In the Objections process step, any applicant may also file a string confusion objection to assert string confusion between its string and the string of another application. If the objection is upheld by the panel adjudicating the objection, the applications are deemed to be in direct string contention and the relevant contention sets are modified accordingly.

In Chapter 4, *Contention Set Handling*, the establishment and further handling of contention sets is explained in more detail.

3. Contention resolution methods

Once the final contention sets are established they must be resolved. The first option to do that is through **voluntary agreements** between the applicants concerned. Applicants in contention are encouraged to reach a settlement or agreement that results in resolution of the contention. This may occur at any stage of the process, once ICANN has posted the applications received. Applicants may not resolve string contention by selecting a new string, or replacing the formal applicant by a joint venture. It is understood that joint ventures may result from self-resolution of string contention by applicants. Material changes in applications (that result from say, combinations to resolve contention) will require re-evaluation. This might require additional fees or evaluation in a subsequent round.

If not achieved by voluntary means, string contention will be resolved through comparative evaluation or auction, depending on the case at hand. Each contention set will be addressed in its entirety in order to achieve a clear resolution of the string contention.

3.1 Comparative evaluation

Comparative evaluation will only be used if at least one of the applications involved is *community-based and has expressed preference for comparative evaluation*. Moreover, only an application fulfilling those criteria is eligible to be determined a clear winner of a comparative evaluation. The comparative evaluation is an independent analysis and the scores received in the technical and business operational reviews are not brought into this evaluation.

Applicants designating their applications as community-based will be asked to respond to a set of questions during the application phase to provide relevant information for a comparative evaluation case. Before the comparative evaluation begins, all applicants in the contention set may be asked to provide additional information of relevance. A community-based applicant who elects comparative evaluation may be asked to furnish additional information at this stage to substantiate its status.

A panel will review and score the community-based applications that have elected comparative evaluation against the following criteria:

- Nexus between Proposed String and Community
- Dedicated Registration Policies

- Community Establishment
- Community Endorsement

If one application is found to be a clear winner, which means that it is the only one to pass the scoring threshold for winning, the application proceeds to the next step and its direct contenders are eliminated. For complex contention sets, there may even be more than one clear winner which can proceed to the next step, provided that they are not in direct string contention. There may also be “lucky losers” among the remaining contenders, for which the outcome has happened to resolve their string contentions. Potential remaining contenders with unresolved string contentions between them will be brought into a residual contention set to be resolved by auction.

If none of the applications is found to be a clear winner, the full contention set will be resolved through auction.

In case a comparative evaluation results in more than one winner in direct contention, an auction between the winners will be undertaken to resolve which one will be granted a gTLD.

In Chapter 5, *Comparative Evaluation*, the procedure for comparative evaluation and its potential outcomes are explained in further detail.

3.2 Auction

ICANN examined a number of potential mechanisms for resolving string contention in the event that the contention cannot be resolved by the means made available that are described elsewhere in this paper: comparative evaluation and agreement among the contending parties. Several mechanisms were considered for this “last resort” contention resolution tool including: selection by chance, comparative evaluation, selection by best terms and auctions. As described later in this document and more fully in other explanatory memoranda, auctions appear to be the best means of resolving contention among competing applications as a mechanism of last resort. Resolution of string contention through auction will occur for certain cases of contention sets not resolved or eligible for comparative evaluation. Auctions will only be used only in cases where:

- There is string contention and those who are in contention successfully complete all evaluations,
- Contending applicants elect not to use comparative evaluation, did not have comparative evaluation available, or in certain cases where comparative evaluation occurred and did not provide a clear winner, and
- Contending applicants have not resolved the contention among themselves.

The purpose of an auction is to resolve contention in a clear, objective manner. Proceeds from auctions will be reserved and earmarked until the uses of the proceeds are determined. It is planned that costs of the new gTLD program will offset by fees, so any funds coming from a last resort contention resolution mechanism such as auctions would result (after paying for the auction process) in additional revenue stream. Therefore, consideration of a last resort contention mechanism should include the uses of funds. Funds must be earmarked separately and used in a manner that supports directly ICANN’s Mission and Core Values and also maintains its not for profit status.

Possible uses include: reduction in application fees or grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, creating a registry continuity fund for the protection of registrants (ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or a security fund to expand use of secure protocols, conduct research and support standards development organizations in accordance with ICANN's security and stability mission.

Further detail on the potential uses of funds will be provided with the proposed budget for the new gTLD process and updated Applicant Guidebook materials.

The foreseen procedure is an ascending-clock auction with successive rounds for increasing price brackets. This implies that applications will exit successively as the bidding level in a round exceeds their respective exit bids.

All auctions will be conducted over the Internet, with bidders placing their bids remotely using a web-based software system. The auction will be carried out in a series of auction rounds with defined starting and ending prices for each round. Exit is irrevocable, meaning that an application that has exited in a previous auction round is not permitted to re-enter a subsequent round. At the end of each round, the contention situations are reviewed and the auction stops when there is no further contention to resolve. This may imply that more than one application may remain as winners. The winners pay the closing bid and proceed to the next step. Special rules apply, should a winning application default in its obligation to pay the closing bid.

As in comparative evaluations, potential "lucky loser" situations may occur in auctions. In such cases, any residual contention situations are possible to resolve based on the exit bids for the applications concerned.

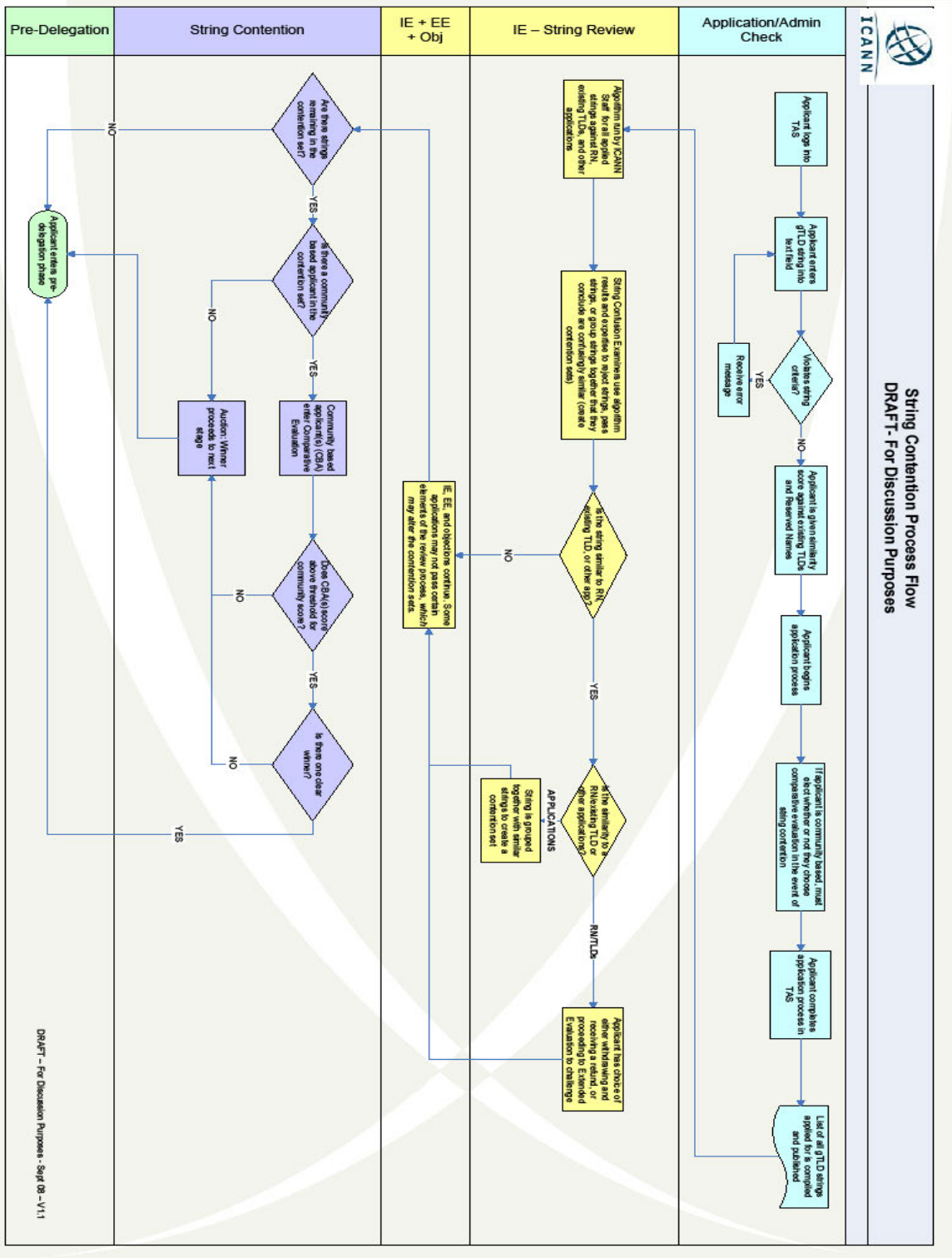
The paper *Auction Design for Resolving Contention for New gTLDs* describes the auction model and its potential outcomes in further detail.

4. Resolution outcomes

Regarding the outcomes for both contention resolution methods, a basic principle is that any application with no string contention situation left to resolve is allowed to proceed, even if it is not an outright winner.

If the strings within a contention set are all identical, the applications are in direct contention with each other and there can only be one winner that proceeds to the next step. However, in a contention set there may be both direct and indirect contention situations and the indirect contention situations may be linked in complex ways. For such contention sets, there may be more than one application that passes contention resolution, as outright winners and/or as "lucky losers". A simple such example is that string A is in contention with B, which in turn is in contention with C, although C is not in contention with A. If A wins the contention, B is eliminated but C survives since C is not in direct contention with the winner and both strings can coexist as gTLDs. The overall outcome of contention resolution will thus depend on the actual topology of the contention set at hand as well as on which application(s) win(s) the contention.

Chapter 3: Process Flow



Draft—for discussion only—please refer to disclaimer on the title page of this document.

Chapter 4: Contention Set Handling

Summary

Contention sets are groups of applications that feature identical or confusingly similar strings. A String Similarity Panel determines whether the strings proposed in two applications are so similar that they would result in detrimental user confusion if allowed to coexist in the Domain Name System. Such a determination, based on human judgment assisted by criteria and algorithm outcomes, is performed for each pair of applications. When all applications have been checked in this way, the outcome is a number of direct contention relationships between pairs of applications. Applications without any such contention relationships do not need further steps from this perspective, but cases of contention must be resolved for all others. The next step is that contention sets are established among applications that are directly or indirectly linked by contention relationships. A contention set consists of at least two applications, but may involve more applications and have complex link structures. The number of contention sets found in an application round will thus depend on the contention relationships and how the applications are linked by them.

The final contention sets can only be established once the extended evaluation and objection process steps have been concluded for the applications involved, since some applications may be excluded in those steps. The remaining contention sets must then be resolved; through comparative evaluation and/or auction. In this processing, each contention set is addressed in its entirety in order to achieve a non-ambiguous resolution of the contentions.

This paper describes the establishment and handling of contention sets in hypothetical situations, provides two examples of contention sets as well as how these contention sets would be resolved. The paper elaborates on resolution through comparative evaluation as well as auction for both examples given. A main conclusion drawn is that the overall outcome of the contention resolution will depend on the actual topology of the contention set at hand as well as on which application wins the contention. Resolution of a contention set may result in multiple “winners” and also “lucky losers” that all may proceed to delegation.

1. Establishment of contention sets

Contention sets are sets of applications featuring identical or confusingly similar strings, as established by the String Similarity Panel, based on algorithm outcomes, criteria and human judgment. Let’s assume that there are 10 applications in total, “a” - “k” and that the algorithm has scored the pair-wise similarity between their proposed TLD strings as shown in Table 1 below (assuming an algorithm threshold at 60%, meaning that scores below 60% come out as zeroes). Scores in the example are illustrative only and not indicative of any string confusion threshold to be applied by ICANN.

Table 1. Hypothetical similarity scores

Application	a	B	c	d	e	f	g	i	j	k
A		73%	0	93%	0	98%	0	70%	0	0
B	73%		88%	0	85%	0	93%	0	0	0
C	0	88%		99%	75%	72%	0	0	0	0
d	93%	0	99%		93%	0	88%	0	0	0
e	0	85%	75%	93%		85%	0	62%	0	0
f	98%	0	72%	0	85%		80%	0	0	0
g	0	93%	0	88%	0	80%		0	0	0
i	70%	0	0	0	62%	0	0		87%	0
j	0	0	0	0	0	0	0	87%		80%
k	0	0	0	0	0	0	0	0	80%	

Note that the similarity scores are commutative, thus if “a” is 97% similar to “b”, then “b” is 97% similar to “a” and the table shows mirror symmetry around the diagonal.

Guided by the scores above, the String Similarity Panel inspects all string pairs with scores above a certain percentage threshold (TBD), applies criteria and decides whether each string pair is confusingly similar. The outcome is shown in Table 2 below, where “1” in a cell of the table indicates that the corresponding strings are in contention (identical or confusingly similar) while a “0” indicates no contention situation for that particular string pair. In reality, the contention cases are expected to be fewer and simpler than illustrated here - this hypothetical case is exaggerated on purpose to illustrate complexities.



String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable consumer. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

Note 1

Table 2. String contentions

Application	a	b	c	d	e	F	g	i	j	k
a		1	0	1	0	1	0	0	0	0
b	1		1	0	1	0	1	0	0	0
c	0	1		1	0	1	0	0	0	0
d	1	0	1		1	0	1	0	0	0
e	0	1	0	1		1	0	0	0	0
f	1	0	1	0	1		1	0	0	0
g	0	1	0	1	0	1		0	0	0
i	0	0	0	0	0	0	0		1	0
j	0	0	0	0	0	0	0	1		1
k	0	0	0	0	0	0	0	0	1	

In this case, for example, the applications c and d are in string contention (denoted by a "1"), while those of c and e are not ("0"). The output from the String Similarity Panel is presented in such a format, covering all pairs of proposed strings, to facilitate the establishment of contention sets. Note that the Panel has found "a" to be in contention with "b", in spite of a lower score (73 %) than for "c" versus "e" (75 %), although the latter are deemed to be not in contention. Again, this is for illustration purposes only and not to be taken as indicative of any importance of these imaginary percentage values.

None of the applications has only zeroes in its row (and its column). Such a situation would indicate that there is no contention situation to resolve and that the application could proceed directly to the next step. In the present hypothetical case, all applications have at least one "1" in their rows and must be brought into contention sets. A contention set consists of all applications that are linked by string contention to one another, directly or indirectly.

Contention sets can be established manually with relative ease in a table like the one above, by applying "highlighter pen recursion" (in practice, the contention sets will be established using a software program). In this case there are two contention sets; a simple set with the three applications i, j and k, and a more complex set consisting of a, b, c, d, e, f and g. The set i-k is easy to identify in the table; i and k are both in contention with j, but not with each other. The complex contention set a-g needs a closer look, though. To identify that one, proceed like this:

1. Mark the first column where a "1" appears, in yellow below
2. For each "1" in that column, mark the corresponding row in blue-green
3. For each "1" in each of these rows, mark the corresponding column, unless marked already, in red
4. For each "1" in each of these columns, mark the corresponding row unless marked already (etc, alternating between rows and columns in this way until no further steps required). In this case, they are all marked already, meaning that the contention set is exhausted and consists of the applications that have either a column or a row marked. (Note that the "1"s in the columns b, d, f and rows a, c, e, g just replicate what has already been found!)

Table 3. Finding contention set a-g

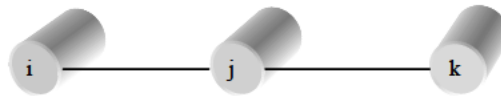
Application	a	b	c	d	e	f	g	i	j	k
a		1	0	1	0	1	0	0	0	0
b	1		1	0	1	0	1	0	0	0
c	0	1		1	0	1	0	0	0	0
d	1	0	1		1	0	1	0	0	0
e	0	1	0	1		1	0	0	0	0
f	1	0	1	0	1		1	0	0	0
g	0	1	0	1	0	1		0	0	0
i	0	0	0	0	0	0	0		1	0
j	0	0	0	0	0	0	0	1		1
k	0	0	0	0	0	0	0	0	1	

This set can be brought into a table of its own to get a more focused view, see below:

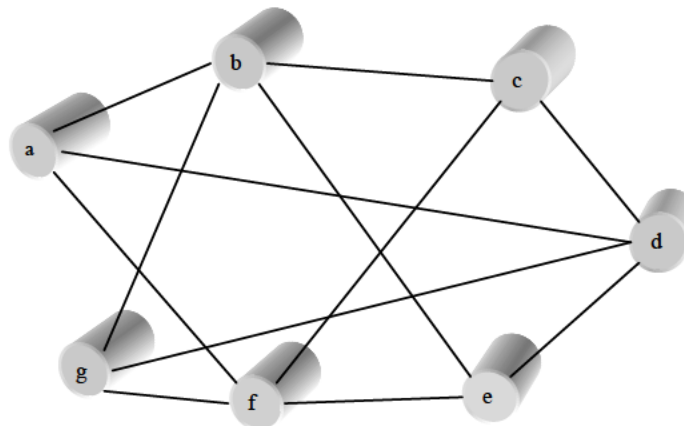
Table 4. Contention set a-g

Application	a	b	c	D	e	f	g
a		1	0	1	0	1	0
b	1		1	0	1	0	1
c	0	1		1	0	1	0
d	1	0	1		1	0	1
e	0	1	0	1		1	0
f	1	0	1	0	1		1
g	0	1	0	1	0	1	

In order to get a visual image of the contention situations, the sets can be illustrated graphically as follows, with the applications as nodes and connector lines showing the contention situations:



The "simple" contention set i - k



The "complex" contention set a - g

The latter is a "meshed" contention set where each application happens to be in contention with three or four others, although none is in contention with every other application.

2. Handling the “simple” contention set i-k

2.1 Comparative evaluation

Comparative evaluation only occurs if at least one of the contending applications is community-based and has expressed preference for comparative evaluation. Moreover, only an application fulfilling those criteria is eligible to be elected a clear winner of a comparative evaluation. In a case when the applications in the contention set all fulfill these criteria, there are three principally different outcomes:

- Where application j is a clear winner (in green), both i and k are eliminated (red), as illustrated below:



- Where application i is a clear winner, j is eliminated, so k would also survive (grey) since there is no contention situation left following the elimination of j :



A variant of this type of outcome would occur if k is a clear winner, j is eliminated and i survives.

- Where none of the community-based applications in the contention set is found to be a clear winner, the full contention set continues to an auction process to resolve the contention.

2.2 Auction

For resolution of the contention set through auction, it should first be noted that the anticipated procedure is an ascending-clock auction, which implies that applications exit successively as the bidding level in a round exceeds their respective exit bids. In contention resolution through auction, the first two outcomes mentioned above are the only possibilities; either j wins, eliminating both the others, or one of the other applications (i or k) wins, eliminating j and saving the other (k or i, respectively) since there is no contention situation left when j is out. More in detail, the auction process with ascending-clock rounds will have the effect of first eliminating one contender when the auction reaches the first exit bid. If that resolves all contention situation (as is the case if the bid level exceeds the exit bid of j), the auction stops, both remaining contenders i and k pay the same “closing bid” (bid level at the time contention is eliminated) and proceed to the next step. Conversely, if contention remains (as is the case if i exits first) the auction continues until the bid level exceeds the exit bid of one of the remaining contenders. If that one is k, j remains as the sole winner, pays the closing bid and proceeds to the next

step. If j is the one exiting first of the two, k is the winner, pays the closing bid and proceeds to the next step. Moreover, i survives due to lack of contention with k, pays his exit bid and proceeds to the next step.

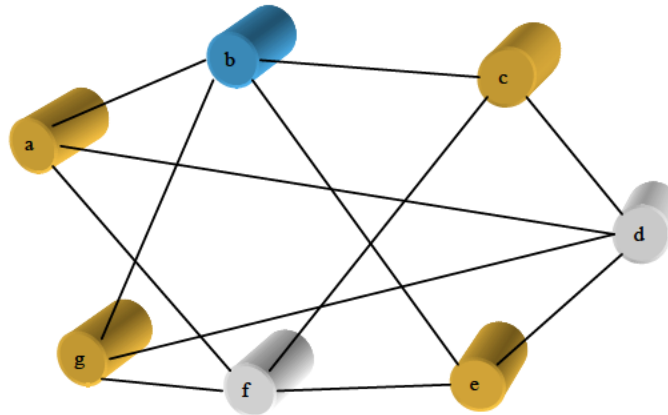
Thus, regardless of whether comparative evaluation or auction is applied to resolve the contention, the overall outcome will depend not only on which application wins but also on the topology of the contention set to be resolved, provided any application with no contention situation left to resolve is allowed to survive, even if it is not the outright winner.

3. Handling of the “complex” contention set a - g

For the “complex” contention set, let’s first consider some potential cases for comparative evaluation.

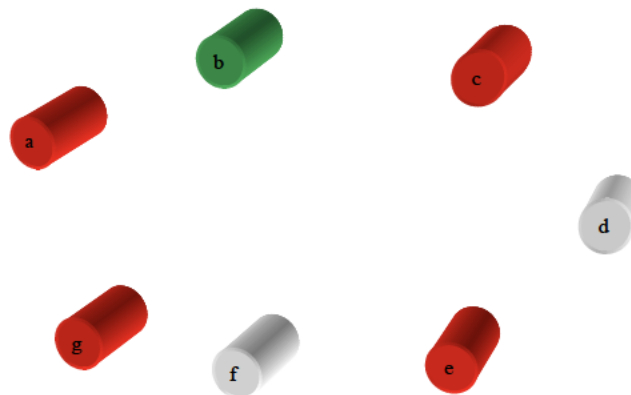
3.1 One community application

Let’s assume that “b” is a community-based application and that the applicant has opted for comparative evaluation. All the others are “open” applications (or community-based applications not opting for comparative evaluation). The comparative evaluation should focus on b (blue) and those in contention with b, notably a, c, e and g (orange).



Different outcomes of the comparative evaluation will play out as follows:

- If b wins (green) the comparative evaluation, a, c, e and g are rejected (red), as illustrated below:



With b accepted and a, c, e and g disappearing, all the previous contention relationships have been resolved. It follows that d and f would survive and proceed to the next step, without any further steps in this regard.

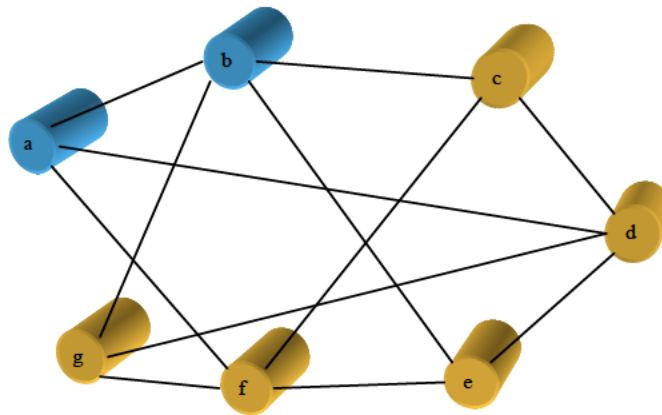
- The alternative is that "b" is not a clear winner. The consequence of that situation is that the contention set in its entirety will be resolved through an auction.

3.2 Two community applications

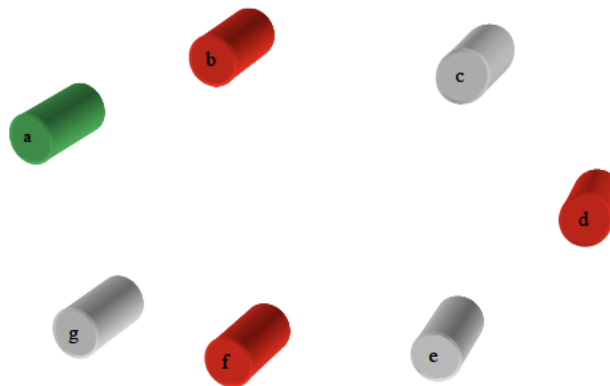
Assume that the contention set contains two community applications and both have requested comparative evaluation. There are two cases to analyze depending on whether these applications are in direct contention or not.

3.2.1 Direct contention

Assuming that "a" and "b" are the community applications (blue), all the others will be in contention (orange) with either or both, as follows:



It is then reasonable to handle the situation by including all in the comparative evaluation at the same time. Regardless of whether "a" or "b" is found to be a clear winner, all the others would seem to lose at first sight. However, among those there will be some that are not in contention with the winner and could coexist with it. Say that "a" wins, then "b", "f" and "d" would be eliminated (red), while "g", "e" and "c" would survive (grey) since they have no remaining contention situations.

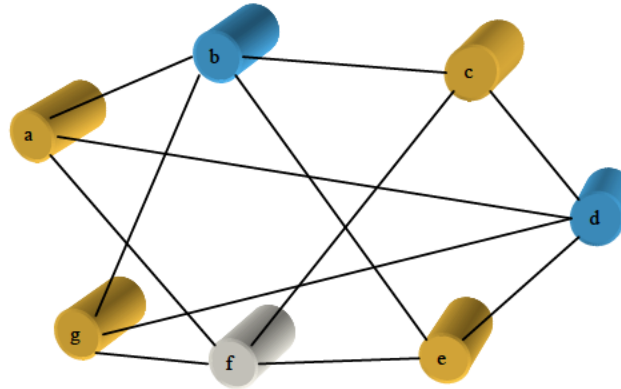


It is also possible that both a and b score above the threshold value for winning the comparative evaluation. In such a case, the contention will be resolved thru an auction between a and b, with subsequent review of the full contention set resulting in a final outcome like the one illustrated above.

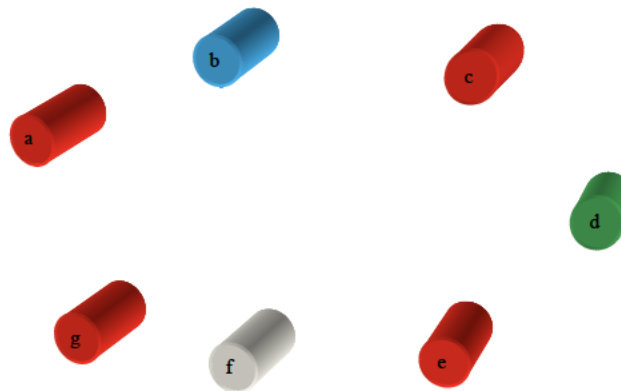
If neither a nor b score above the required threshold for winning, the full contention set will proceed to auction for resolution.

3.2.2 No direct contention

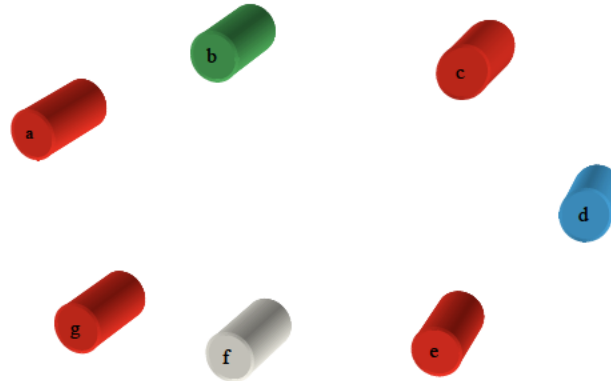
With b and d as the community applications, there is no contention between the two, but all the others except "f" have contention with either or both, as illustrated below:



Since b and d could coexist if they both would survive resolution of the contentions, there is a rationale for regarding this situation as two direct contention sets to resolve with two comparative evaluations, one for "d" and those in direct contention with "d", and one for "b" and its direct contenders. Say that the "d" set is evaluated first and that d wins, then a, c, e and g are rejected, all contentions are resolved and "b" survives as well as "f" with no need for further steps, as follows:



If "d" doesn't win, the set is left unchanged and comparative evaluation for "b" is undertaken. If "b" wins that one, "a", "c", "e" and "g" are eliminated while both "d" and "f" survive, without remaining contention, as follows:

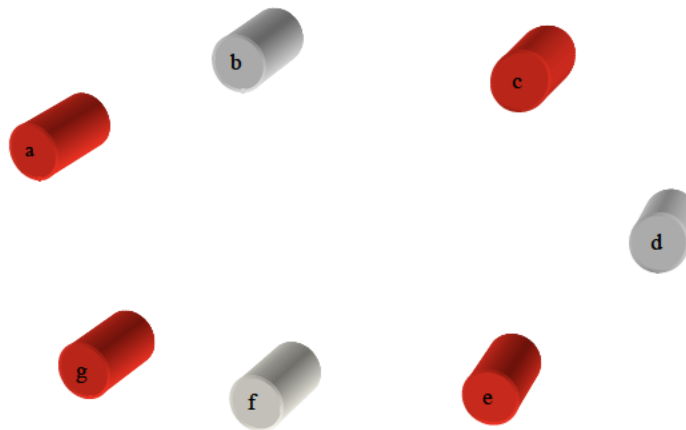


If “b” is not deemed a clear winner either, the whole contention set will be resolved through an auction process.

Note that whether the “b” contention or “d” contention is addressed first will not affect the outcome.

3.3 Auction

In an auction for the “complex” contention set, the whole set is participating and one or more winners emerge. As mentioned earlier, an ascending-clock auction implies that applications exit successively as the bidding level in a round exceeds their respective exit bids. For each bidding round when one or more applications have exited, the remaining contention situations are reviewed and the auction process stops as soon as all contention situations have been resolved. Suppose that the auction has reached a point where a, c, e and g have exited (red) and the situation is as follows:



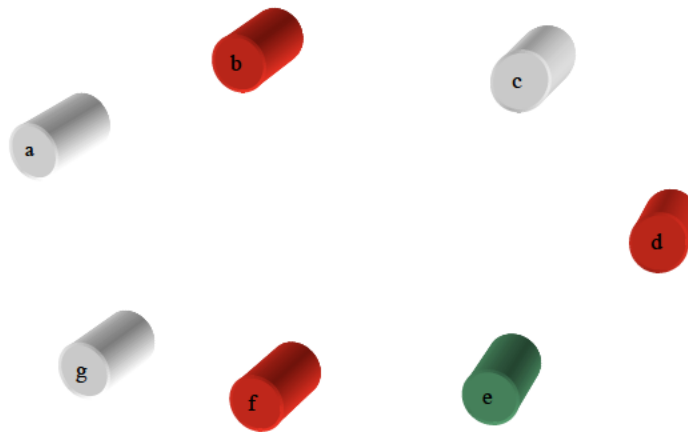
There are no more contention situations left for b, d and f. They all pay the same closing bid (equal to the bidding level at the time when the contentions are finally resolved) and proceed to the next step.

With a complex contention set, the effect of applications exiting in a successive manner may also result in survival of some applications that have exited early, depending on which application(s) win(s) and the topology of the contention set. Assume that f exits first, and then a, c, e and g. By then, all contentions are resolved; b and d are winners,

pay the closing bid and proceed to the next step. However, the final outcome will be the same as for the graph above; a, c, e and g are eliminated since they are in direct contention with either or both of the winners, but f has no direct contention with any of the winners and will survive, so f pays its exit bid and proceeds to the next step.

Regardless of which the winners are, there will be applications among those exiting early that have no contention situation with the winners and would survive—and there may also be remaining contentions to resolve among such “lucky losers”. Such residual contentions could be resolved by comparing the exit bids among the “lucky losers”, appointing a winner among them (and if necessary by repeating that process until all contentions are effectively resolved).

If, for example, e wins overall, the situation is as follows:



So, b, d and f are eliminated, and thereby the contention situations for a, c and g are eliminated as well, meaning that they survive, regardless of when and in which sequence they exited the auction.

As for the “simple” contention set, although even more obvious for this “complex” case, the overall outcome will depend on both who wins and on the topology of the contention set, provided those ending up without contention are allowed to survive, in spite of not being the overall winners.

4. Conclusion

Resolution of complex contention sets, either through comparative evaluation or auction, may result in multiple winners that have no direct contention relationships between them. They can thus all proceed to delegation.

A comparative evaluation where (at least) one clear winner is found may also result in certain other applications surviving as well, as “lucky losers”, since each of them individually could coexist in the DNS with the winner(s). Such surviving applications may have residual contention cases between them that need to be resolved through auction. Conversely, if no clear winner is found, the full contention set will have to be resolved through auction. The same kind of potential “lucky loser” situations may occur in

auctions, where any residual contention situations are possible to resolve based on the exit bids for the applications concerned.

Provided that it is deemed acceptable to allow those applications to survive which have no contention situations left to resolve, which seems reasonable, the overall outcome of the contention resolution will depend not only on which application wins, but also on the actual topology of the contention set at hand.

A special case occurs if a comparative evaluation results in multiple winners in direct contention. Such cases will be resolved thru auction among the winners.

Chapter 5: Comparative Evaluation/New gTLDs

5.1 Background

Comparative evaluation is foreseen to play an important role as selection method in a particular case for new gTLD applications, notably to resolve string contention (defined below) in a case when at least one application is community-based and has explicitly opted for comparative evaluation as the method to resolve string contention. The basis for this approach is found in Implementation Guideline F in the GNSO's New gTLD Final Report:

"If there is contention for strings, applicants may:

i) resolve contention between them within a pre-established timeframe

ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and;

iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels."

String contention occurs when the strings of two or more applications are identical or found to be so similar that delegation of both will create a threat of user confusion. Applications in string contention are aggregated into contention sets during Initial Evaluation. As a first option, it is foreseen that applicants with applications in string contention may negotiate among themselves to resolve the contention voluntarily, through withdrawal of one or more applications without material changes of any application. If contention remains after all other stages have been completed, the first method available to resolve contention (in cases where there are one or more community-based applicants) will be comparative evaluation. This paper provides considerations and describes the approach for processing comparative evaluations in the given context.

5.2 Considerations

As stated above, the GNSO Final Report advises that some preference be given to community-based applications in string contention cases. The chosen comparative evaluation approach features criteria to validate the relevance of the community-based designation as a prerequisite for such a preference to be given.

The applicant will designate the application as open or community-based at the time of application. If it makes a designation as community-based, the applicant will be asked to respond to a set of questions to demonstrate that the application is intended for and supported by the relevant community. The applicant will also be asked whether a comparative evaluation is the preferred method to resolve any string contention the application may encounter. Comparative evaluation will take place if one or more community-based applications in a contention set features such a preference. The comparative evaluation process will include all the applications in the relevant contention set. Applicants might be asked to furnish additional information before the comparative evaluation to substantiate community representation.

If successful in a comparative evaluation, an applicant with a community-based application will be constrained in the operation of the TLD to serve that community, according to provisions incorporated into the registry agreement between ICANN and the registry operator.

The comparative evaluation process requires a clear objective outcome and is designed to avoid the effects of subjective aspects by focusing on situations where the benefits of one of the applicants clearly outweigh the other contenders. Therefore, a comparative evaluation that does not produce a clear winner will be declared inconclusive. The string contention will then be settled thru an auction. It should be noted that a comparative evaluation for a contention set with complex topology may result in more than one winner that all can proceed to delegation, provided they are not in direct contention. In case there are multiple winners in direct contention, an auction between the winners will be held to finally resolve the contention.

5.3 Procedure

- 1 In the application phase, each applicant that declares its gTLD application as community-based also expresses any preference for comparative evaluation, should string contention arise. Applicants become aware of identical or confusingly similar strings once the entire group of applications received is posted.
- 2 Formal objections may be filed once the applications are posted.



Note 2

Prior to any comparative evaluation taking place, communities also have the opportunity to formally object to applications that might inappropriately apply for a TLD string that constitutes the name of the respective community. Given that a community-based applicant may use that opportunity to oppose a potential string contender rather than await resolution by comparative evaluation, the standards of the objection procedure and comparative evaluation are logically consistent so that, where appropriate, they will provide consistent outcomes for each given case.

3. During the Initial Evaluation period, the analysis of the String Similarity Panel results in contention sets. These contention sets are published at the conclusion of Initial Evaluation.
4. Some applications may not pass Initial or Extended Evaluation and would be eliminated during these stages. Some applications may not prevail in a dispute resolution proceeding and would be eliminated during this stage. Some contention sets may be resolved through voluntary agreement among applicants.
5. At the start of the Contention Resolution stage, contention sets are re-configured among the applications that have passed all previous stages. For all contention sets where there is a community-based application with preference for comparative evaluation, the comparative evaluation starts.
6. For each direct contention subset within the contention set, a panel appointed by the comparative evaluation provider will review and score the one or more community-based applications with preference for comparative evaluation against the following criteria:
 - a. **Nexus between proposed string and community**

4 = String is strongly associated with the community or community institution and has no other significant associations.

3 = String is clearly associated with the community but also has other associations.

2 = String is relevant to the community but also has other well-known associations.

1 = The string, although relevant to the community, primarily has wider associations.

0 = The nexus between string and community does not fulfill the requirement for scoring 1.

In detail, the nexus between string and community will be given:

- a score from 3, for strong association with the community, to 0, for insufficient association with the community.
- a score of 1 for absence of other associations to the string, i.e., that the string is unique to this community, and a score of 0 if the string is known to also be a label for other communities.

b. Dedicated registration policies

4 = Registration eligibility is strictly limited to members of the pre-established community identified in the application. Registration policies also include name selection and other requirements consistent with the articulated scope and community-based nature of the TLD. Proposed policies include specific enforcement measures including investigation practices, penalties, takedown procedures and appeal mechanisms.

3 = Registration eligibility is predominantly available to members of the pre-established community identified in the application, and also permits people or groups formally associated with the community to register. Policies include most elements for a high score but one element is missing.

2 = Registration eligibility is predominantly available to members of the pre-established community identified in the application, and also permits people or groups informally associated with the community to register. Policies include some elements for the high score but more than one element is missing.

1 = Registration eligibility is encouraged or facilitated for members of the pre-established community identified in the application, and also permits others to register. Policies include only one of the elements for high score.

0 = The registration policies do not fulfill the requirements for scoring 1

In detail, the registration policies will be given:

- a score from 2 for eligibility restricted to community members, to 0 for a largely unrestricted approach to eligibility.
- a score of 1 for clear rules concerning name selection and other requirements for registered names of relevance to the community addressed, and a score of 0 for absence of rules concerning name selection and other requirements for registered names, or rules that are insufficient or lack relevance.

- a score of 1 for satisfactory enforcement measures and a score of 0 for absence of enforcement measures or measures that are insufficient.

c. Community establishment

4 = Clearly identified, organized and pre-established community of considerable size and longevity.

3= The community addressed fulfills all but one of the requirements for a high score.

2 =The community addressed fulfills more than one of the requirements for a high score, but fails on two or more requirements..

1 = The community addressed fulfills only one of the requirements for a high score.

0 = The community addressed does not fulfill any of the requirements for a high score.

In detail, the community establishment will be given:

- a score from 2, for a clearly identified, organized and pre-established community, to 0 for a community lacking clear identification, organization and establishment history
- a score from 2 for a community of considerable size and longevity, to 0 for a community of very limited size and longevity

d. Community endorsement

4 = Application from, or endorsement by, a recognized community institution, or application endorsed by member organizations.

3 = Endorsement by most groups with apparent relevance, but unclear if the whole community is supportive.

2 = Endorsement by groups with apparent relevance, but also some opposition from groups with apparent relevance.

1 = Assorted endorsement by groups of unknown relevance, but also clear opposition from groups with apparent relevance.

0 = Limited endorsement by groups of unknown relevance. Strong opposition from groups with apparent relevance.

In detail, the community endorsement will be given:

- a score from 2 for clear and documented support, to 0 for no or limited endorsement of uncertain relevance
- a score from 2 for no opposition of relevance, to 0 for strong and relevant opposition

If no application scores 14 or more, there will not be a clear winner. If only one application scores 14 or more, it will be declared the winner.

If more than one application scores 14 or more and they are not in direct contention they will be declared winners and can all proceed toward delegation. If they are in direct contention, an auction among these applications will be held to resolve the contention, unless they address the

same community and one application clearly has the support of the majority of that community, in which case this application is declared the sole winner.

7. Following the comparative evaluation described above, ICANN will review the results and reconfigure the contention set as needed. For remaining direct contention subsets involving any community-based application that has elected comparative evaluation, the same procedure described in Step 6 occurs. If none such are left in the contention set, remaining applications in contention will proceed to a subsequent contention resolution process. Applications with no contention remaining will then be able to proceed toward delegation.

Chapter 6: Auction

Auction Design for Resolving Contention for New gTLDs

10 September 2008 (Updated 25 January 2009)

Executive Summary

Auctions are the contention resolution mechanism of last resort. Auctions will only be used only in cases where:

- There is string contention and those who are in contention successfully complete all evaluations,
- Contending applicants elect not to use comparative evaluation, did not have comparative evaluation available, or comparative evaluation did not provide a clear winner, and
- Contending applicants have not resolved the contention among themselves.

The purpose of an auction is to resolve contention in a clear, objective manner. Proceeds from auctions will be reserved until the uses of the proceeds are determined through a community consultation. The proceeds will not go into ICANN's general expense budget but will be separately earmarked.

This paper describes a proposed auction design for resolving contention among competing applicants for new generic TLD strings. The following features are present in this design:

- Simultaneous ascending-clock auctions with discrete rounds and irrevocable exit;
- Contending (identical or confusingly-similar) strings give rise to a "graph" structure;
- An applicant needs to continue to bid until all applications with which it contends have exited;
- Information is provided as to the number of competing applications remaining after each round, but not their identities; and
- Bids need to be legally-binding commitments and, to that end, bidding deposits are required.

6.1 Background

ICANN is preparing implementation plans for the new gTLD process. Staff is working from the GNSO New gTLD recommendations and input from Internet community to guide the implementation. This document has been prepared by Power Auctions LLC, auction design consultant retained by ICANN, in close consultation with ICANN staff.



The current document has the sole purpose of recommending an auction design for resolving contention among competing applicants for new generic TLD strings, and it does not provide any recommendation of auction design for any other purpose.

Draft—for discussion only—please refer to disclaimer on the title page of this document.

Note 3

A separate but related document, “Economic Case for Auctions in New gTLDs” (8 August 2008, see <http://www.icann.org/en/topics/economic-case-auctions-08aug08-en.pdf>) describes the rationale for using auctions as a tie-breaking mechanism for resolving contention among competing applicants for new generic TLD strings. The current document describes specific aspects of the auction model that is proposed.

This document does not describe any potential use of funds resulting from an auction process. A separate document, including a proposed budget for the new gTLD process, will describe potential uses of funds.

6.2 Triggering of the auction process

Two applications that survive ICANN’s evaluation process will be said to *in contention* with each other if the generic TLD strings that they propose are identical or “confusingly similar” to one another. A surviving application for a new gTLD will be subject to auction only in the event that it is in contention with another surviving application.

A successful community-based application is in contention with one or more other applications, the community-based application may request that it and the contending application(s) be subject to a comparative evaluation process instead of an auction. However, in the event that the evaluator for ICANN determines that there is unlikely to be an adequate basis for selecting one of these applications over the other(s), then these applications will also be entered into the auction process.

6.3 Consideration of the available auction models

Power Auctions LLC, as auction consultant for ICANN, began its analysis by reviewing the available auction models. The basic alternatives considered were:



For a longer review of the available auction models, see: “Auctions (Theory),” New Palgrave Dictionary of Economics, Second Edition (2008) (Lawrence M. Ausubel), downloadable at <http://www.powerauction.com/docs/auction-theory-new-palgrave.pdf>.

Note 4

- First-price auction: Bidders submit sealed bids, in advance of a deadline; the highest bidder wins the item and pays the amount of its bid.
- Second-price auction: Bidders submit sealed bids, in advance of a deadline; the highest bidder wins the item and pays the amount bid by the second-highest bidder.
- Ascending-bid auction: Bidders dynamically submit bids at successively higher bids; the final bidder wins the item and pays the price at which it became the final bidder.
- Dutch auction: The auctioneer starts at a high price and announces successively lower prices, until some bidder expresses its willingness to purchase the item by bidding; the first bidder to bid wins the item, and pays the current price at the time of its bid.

Generally, the second-price auction and ascending-bid auction are regarded as

enabling the simplest bidding strategies for bidders and as leading to the efficient auction outcome. In particular, if bidders have pure private values for a single item being auctioned, the optimal bidding strategy in either is simply to “bid what the item is worth to you.” Since achieving an efficient allocation of new gTLD applications, rather than maximizing revenues, is a principal objective of ICANN, second-price or ascending-bid auctions are the natural choices for auctions of new gTLDs.

By contrast, the formulation of a bidding strategy in a first-price auction is relatively complex. The bidder, in addition to assessing what the item is worth to it, must assess the competitive situation and then “shade” its bid accordingly. In addition, bidders tend particularly to dislike bidding in first-price auctions in which, for reasons of transparency, the amounts of the losing bids are revealed after the auction. A bidder in a first-price auction will feel particularly foolish if, for example, it submits a winning bid of \$250,000 whereas the second-highest submitted bid was \$50,000. It will be evident to all parties that a bid of \$50,001 was sufficient to win and that the bidder “overbid” by \$200,000. Each of these difficulties can be avoided by using a second-price or ascending-bid auction instead.

It is well understood that the Dutch auction is strategically equivalent to the first-price auction. Its only advantage is that the losing bids are never submitted and so their amounts never become known, avoiding the last problem described in the previous paragraph. However, as in the first-price auction, the formulation of bidding strategy is relatively complex and the auction is less likely to produce the efficient allocation, again favoring a choice of a second-price or ascending-bid auction.



See “Counterspeculation, Auctions and Competitive Sealed Tenders,” *Journal of Finance* 16, pp. 8-37, (1961) (William Vickrey).

Note 5

For resolving contention among competing applicants for new gTLD strings, the ascending-bid auction offers three decisive advantages over the second-price auction. First, ascending-bid auctions offer the greatest transparency and, by contrast, sealed-bid auctions are comparatively opaque. Second, in explaining why ascending-bid auctions are quite prevalent while second-price auctions are comparatively rare, it has been observed that bidders will be reluctant to reveal their private values truthfully in an auction if either there may be cheating by the auctioneer or there will be subsequent auctions or negotiations in which the information revealed can be used against them. By contrast, an ascending-bid auction avoids these problems, as it does not require the high-value bidder to reveal its value—the bidding stops as soon as the second-highest bidder exits. Third, the ascending-bid auction format scales particularly well to a simultaneous auction of multiple items, which is discussed further in the next section.



See “Why Are Vickrey Auctions Rare?” *Journal of Political Economy*, 98(1), pp. 94–109 (1990) (Michael H. Rothkopf, Thomas J. Teisberg, and Edward P. Kahn).

Note 6

6.4 Ascending-clock auction structure, generally

We recommend that the ascending-clock auction be the basic component of the

auction design. The ascending-clock auction is a particular version of the ascending-bid auction recommended in Section 3. In an ascending-clock auction, the auctioneer starts at a low price and announces successively higher prices. At every price (or range of prices), each bidder is asked to indicate its willingness to purchase the item. The price continues to rise so long as two or more bidders indicate interest. The auction concludes at the first price such that fewer than two bidders indicate interest, and the item is awarded at this final price.



Note 7

For background information on ascending-clock auctions in theory and practice, see the Auctions (Theory) entry of the New Palgrave Dictionary of Economics, referenced in footnote 2, and “Auctioning Many Divisible Goods,” *Journal of the European Economic Association*, Vol. 2: No. 2-3, pp. 480-493 (April-May 2004) (Lawrence M. Ausubel and Peter Cramton), downloadable at <http://www.powerauction.com/docs/auctioning-many-divisible-goods.pdf>

Thus, an ascending-clock auction is similar to the standard Sotheby’s or eBay auction, except that the pace of the auction is not driven by prices that bidders propose. Rather, the auctioneer announces prices (or ranges of prices) that increase over time, and bidders’ responses are limited to indicating whether they are “in” or “out” at the announced prices. This design is increasingly being used in auctions of high-valued items, and it has several strengths.

First, it is well suited to an Internet auction with discrete bidding rounds, where no advantage is given to submitting bids at the latest possible moment (“bid-sniping”) or at the earliest possible moment. This provides bidders with adequate time to make reasonably considered decisions in bidding for high-valued items and it avoids favoring bidders in any particular time zone.

Second, the auction can then employ the following “activity rule”: a bidder needs to have been “in” at early prices in the auction in order to continue to stay “in” at later prices. (In other words, exit from the auction is irrevocable.) Bidders are informed of the number of contending applications that have remained “in” after each round, but not their identities; with the specified activity rule, this demand information has real significance, as a competitor who has exited the auction cannot later re-enter.

Third, the auctioneer has the ability to pace the speed at which prices increase. This facet has greatest importance if related items are auctioned simultaneously, as their prices can then be paced to increase together in relation to the level of demand.



Note 8

The reason why information is provided about the number of contending applications that have remained “in”, but not the identities of the remaining applications, is that it strikes an appropriate balance, providing bidders with the numbers information that will be most useful to them during the auction, but without providing the information about remaining bidders’ identities that would most facilitate collusion.

Indeed, it is proposed that, as much as possible, the auctions for various contending applications occur simultaneously. This has the advantage of providing bidders with information about the level of demand for other new gTLDs—and hence the value of a new gTLD—while the auction is still in progress. One of the benefits of the auction process is that it will generate information concerning the value of new gTLDs; some of this information will effectively become available to participants during the auction and it will be useful to them in making their subsequent decisions in the auction. Moreover, as will be discussed below, it is essential that a given application be auctioned simultaneously

with all other contending applications—as well as simultaneously with all applications that are in contention with any contending application, etc.



Note 9

For example, if there are four contending applications for .market and three contending applications for .store, we suggest that, to the extent reasonably feasible, the auctions for .market and for .store occur simultaneously and that information concerning the progress of each of these auctions be provided to participants in the other auctions. The benefit of the simultaneity is that it would enable participants in each of these auctions to gain additional information about the value of new gTLDs *in general*, which should assist the participants in deciding how high they should bid.

6.5 Additional aspects of the recommended ascending-clock auction structure

6.5.1 Intra-round bidding

In the simplest description of an ascending-clock auction structure, the auctioneer announces a single price associated with each round and bidders indicate whether they are “in” or “out” at that price. For example, the price for Round 1 might be \$50,000 and the price for Round 2 might be \$100,000. Since price ascends in discrete steps, this introduces a reasonable likelihood of ties. For example, Bidders A and B might both indicate that they are “in” at \$50,000, but “out” at \$100,000.

The performance of this auction model can be drastically improved using a technique known as **intra-round bidding**. The technique adds very little to the complexity of the auction, while increasing the ability of applicants to express their valuations in the auction and reducing the probability of ties. Each round of the auction has a “Start-of-Round Price” and an “End-of-Round Price”, and bidders indicate whether they are “in” or “out” at all prices within that range. For example, in Round 1, the Start-of-Round Price might be \$0 and the End-of-Round Price might be \$50,000; while in Round 2, the Start-of-Round Price might be \$50,000 and the End-of-Round Price might be \$100,000. Assuming that a bidder stayed “in” for Round 1, it has the following alternatives available in Round 2:

- It may stay “in” through the End-of-Round Price for the current round (i.e. \$100,000); or
- It may submit an “exit bid” (a number strictly between \$50,000 and \$100,000).

As an example, Bidder A might submit an exit bid of \$83,000, while Bidder B might submit an exit bid of \$92,500. If these are the only two bidders, then \$83,000 is the first price at which fewer than two bidders remain. Thus, the auction ends and Bidder B wins the item, at a final price of \$83,000.

If instead, both Bidders indicate that they are “in” through \$100,000, then the auction progresses to Round 3. The Start-of-Round Price for Round 3 equals the End-of-Round Price for Round 2, while the Auctioneer announces an End-of-Round Price of perhaps \$150,000 for Round 3.

Ties remain possible, but now become extremely unlikely. In order to avoid any possibility of a tie, bidders will be randomly assigned “priority numbers” before the auction. In the unlikely event that all of the remaining bidders submit identical exit bids, the winner will be deemed to be the exiting bidder with the highest priority number. Of course, any

bidder can avoid having the priority numbers determine whether it wins by judicious choice of its exit bid, for example by submitting an exit bid of an odd amount such as \$83,017 instead of using a round number such as \$83,000.

As in the basic description of the ascending-clock auction, the Auctioneer announces after each round the number of bidders who remained "in" at the End-of-Round Price, but not their identities. Exit is irrevocable; a bidder who submits an exit bid in Round 2 can no longer participate if the auction progresses to Round 3.

6.5.2 Bidding units (currency)

In order for bids to be comparable, given currency fluctuations, it is necessary for all bids in the auction to be submitted in a single currency. Given that the application fee will be stated in US dollars, the currency for all bids in the auction will also be US dollars. Bids may be submitted in any integer (whole) number of US dollars.

6.5.3 Post-default procedure

If full payment of the final price is not received from the winning bidder within 10 business days after the conclusion of the auction, or if the winning bidder fails to enter into the prescribed registry agreement with ICANN, the winning bidder will be subject to being declared in default. Once declared in default, the winning bidder will be subject to immediate forfeiture of its position in the auction and assessment of the default penalties. After a winning bidder is declared in default, the relevant gTLD would be offered to other bidders, one at a time, in descending order of their exit bids.

6.6 Practicalities of participation in an ascending-clock auction

This section will provide an informal introduction, from the applicant's perspective, to the practicalities of participation in an ascending-clock auction. Please note that it is intended only as a general introduction and it is only preliminary.

The auction will be conducted over the Internet, with bidders placing their bids remotely using a web-based software system designed for the auction. Auction participants will receive instructions for access to the online auction site. The auction software system will be compatible with current prevalent Internet browsers, and will not require the local installation of any additional software. Access to the site will be password-protected and bids will be encrypted via SSL. The auction will generally be conducted in such a way as to conclude quickly, ideally in a single day.

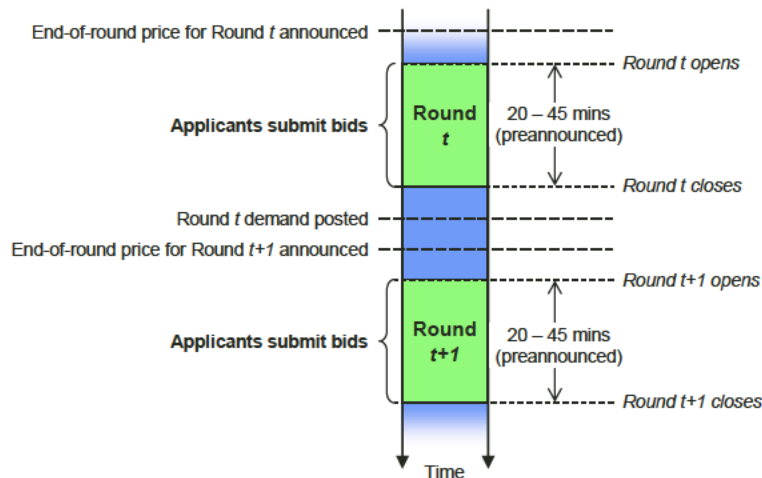
The auction will be carried out in a series of auction rounds. The sequence of events will be as follows:

- For each round, the auctioneer will announce in advance: (i) the Start-of-Round Price; (ii) the End-of-Round Price; and (iii) the starting and ending times of the round. In the first round, the Start-of-Round Price for all applications in the auction will be \$0 US; in subsequent rounds, the Start-of-Round Price will be its End-of-Round Price from the previous round.
- The End-of-Round Price will be set in relation to the number of contending applications and the configuration of the "graph" (see following sections) of contentions.
- During each round, applicants will be required to submit bid(s) concerning their

willingness to pay within the range of intermediate prices between the Start-of-Round and End-of-Round Prices. In this manner, an applicant may indicate its willingness to “stay in” the auction at all prices through and including the End-of-Round Price, or its wish to exit the auction at a price less than the End-of-Round Price (“exit bid”).

- Exit is irrevocable. If an application exited the auction in a previous round, the application is not permitted to re-enter in the current round.
- Applicants may submit their bid(s) at any time during the round.
- After each round, the auctioneer will disclose the aggregate number of contending applications that remained in the auction at the End-of-Round Prices for the round, and will announce the prices and times for the next round.

The sequence of events during the auction is illustrated as follows:



In each round, a bid is required to be submitted for each application remaining in the auction. The bid indicates the applicant’s demand for the application at all prices between the Start-of-Round and End-of-Round Prices, as follows:

- Each bid consists of a single price associated with the application, such price required to be greater than or equal to the Start-of-Round Price.
- If the bid amount is strictly less than the End-of-Round Price, then the bid is treated as an exit bid at the specified amount, and it signifies the applicant’s binding commitment to pay up to the bid amount if its application is approved.
- If the bid amount is greater than or equal to the End-of-Round Price, then the bid signifies that the applicant wishes to remain in the auction at all prices in the current round, and it signifies the applicant’s binding commitment to pay up to the End-of-Round Price if its application is approved. Following such bid, there is no possibility of the application being eliminated within the current round.
- To the extent that the bid amount exceeds the End-of-Round Price, then the bid is also treated as a proxy bid that will be carried forward to the next round. The

applicant will be permitted to change the proxy bid amount in the next round; and the amount of the proxy bid will not constrain the applicant's ability to submit any valid bid amount in the next round.

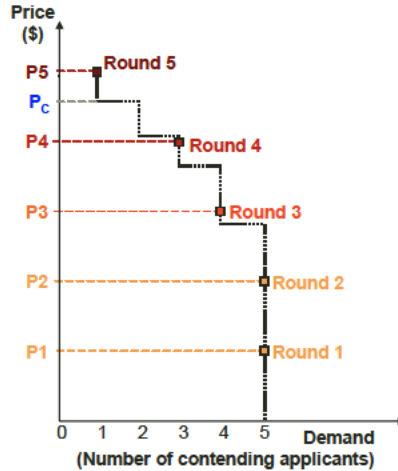
- The bid amount for an application is not permitted to exceed the financial limit established for the application, such limit based on the financial deposit received from the respective applicant in accordance with the Auction Rules.
- A bid is not permitted to be submitted for any application for which an exit bid was received in a prior round.
- If no valid bid is submitted within a given round for an application that remains in the auction, then the bid amount is taken to be the amount of the proxy bid (if any) carried forward from the previous round or, if none, the bid is taken to be an exit bid at the Start-of-Round Price for the current round.

This process continues, with the auctioneer increasing the price range associated with each given TLD string in each round, until there is at most one contending application at the end-of-round prices. After a round in which this condition is satisfied, the auction will conclude, and the auctioneer will determine the clearing price(s). The last remaining application(s) will be deemed the successful application(s), and the associated applicant(s) will be obligated to pay the clearing price(s).

In the case of n mutually-contending applications, the successful application and the clearing price are determined by the following process.

At the end of each round, the auction software aggregates the bids of individual applicants to determine the level of demand for a TLD string. If the number of remaining bidders exceeds one, applicants are notified of the aggregate demand at the End-of-Round Prices, and applicants are notified of the prices and timing details for the next round. If the aggregate demand is not greater than one, the auction software identifies the lowest price at which such an outcome occurs (i.e. the exit bid of the penultimate applicant). This price is deemed the clearing price, and the remaining application is deemed the successful application. In the unlikely event that all of the remaining applications exit at the clearing price, then the application exiting at the clearing price which has the highest priority number is deemed to be the successful application.

The diagram and description, below, illustrate how an auction for five (5) mutually-contending applications might progress:



- Before the first round, the Auctioneer announces the End-of-Round Price P1.
- During Round 1, a bid is submitted for each application. In the diagram shown, all five applicants submit bids of at least P1. Since the aggregate demand exceeds one, the auction proceeds to Round 2. The auctioneer discloses that five contending applications remained at P1 and announces the End-of-Round Price P2.
- During Round 2, a bid is submitted for each application. In the diagram shown, all five applicants submit bids of at least P2. The auctioneer discloses that five contending applications remained at P2 and announces the End-of-Round Price P3.
- During Round 3, one of the applicants submits an exit bid at slightly below P3, while the other four applicants submit bids of at least P3. The auctioneer discloses that four contending applications remained at P3 and announces the End-of-Round Price P4.
- During Round 4, one of the applicants submits an exit bid midway between P3 and P4, while the other three remaining applicants submit bids of at least P4. The auctioneer discloses that three contending applications remained at P4 and announces the End-of-Round Price P5.
- During Round 5, one of the applicants submits an exit bid at slightly above P4, and one of the applicants submits an exit bid at Pc (midway between P4 and P5). The final applicant submits a bid greater than Pc. Since the aggregate demand at P5 does not exceed one, the auction concludes in Round 5. The application associated with the highest bid in Round 5 is deemed the successful application. The clearing price is Pc, as this is the lowest price at which aggregate demand can be met.

The successful bidder will be offered the base registry agreement and a certain period of time to come to terms. If terms cannot be agreed, the agreement will be offered to the second place bidder.

EXHIBIT C-8

ICANN Board Rationales for the Approval of the Launch of the New gTLD Program

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1. ICANN Board Rationale for the Approval of the Launch of the New gTLD Program

1. ICANN Board Rationale for the Approval of the Launch of the New gTLD Program

I. WHY NEW gTLDs ARE BEING INTRODUCED

New gTLDs are being introduced because the community has asked for them. The launch of the new generic top-level domain (gTLD) program will allow for more innovation, choice and change to the Internet’s addressing system, now constrained by only 22 gTLDs. In a world with over 2 billion Internet users – and growing – diversity, choice and competition are key to the continued success and reach of the global network. New gTLDs will bring new protections to consumers (as well as brand holders and others) that do not exist today in the Domain Name System (DNS). Within this safer environment, community and cultural groups are already anticipating how they can bring their groups together in new and innovative ways. Companies and consumers that do not use the Latin alphabet will be brought online in their own scripts and languages. Industries and companies will have the opportunity to explore new ways to reach customers. The years of community work in planning have produced a robust implementation plan, and it is time to see that plan through to fruition.

II. FOLLOWING ICANN’S MISSION AND COMMUNITY DEVELOPED PROCESSES

A. Introduction of new TLDs is a core part of ICANN’s Mission

When ICANN was formed in 1998 as a not for profit, multi-stakeholder organization dedicated to coordinating the Internet’s addressing system, a purpose was to promote competition in the DNS marketplace, including by developing a process for the introduction of new generic top-level domains while ensuring internet security and stability. The introduction of new top-level domains into the DNS has thus been a fundamental part of ICANN’s mission from its inception, and was specified in ICANN’s Memorandum of Understanding and Joint Project Agreement with the U.S. Department of Commerce.¹

ICANN initially created significant competition at the registrar level, which has resulted in enormous benefits for consumers. ICANN’s community and Board has now turned its attention to fostering competition in the registry market. ICANN began this process with the “proof of concept” round for the addition of a limited number of new generic Top Level Domains (“gTLDs”) in 2000, and then permitted a limited number of additional “sponsored” TLDs in 2004-2005. These additions to the root demonstrated that TLDs could be added without adversely affecting the security and stability of the domain name system. Follow on economic studies indicated that, while benefits accruing from innovation are difficult to predict, that the introduction of new gTLDs will bring benefits in the form of increased competition, choice and new services to Internet users. The

¹ ICANN’s Bylaws articulate that the promotion of competition in the registration of domain names is one of ICANN’s core missions. See ICANN Bylaws, Article 1, Section 2.6.

studies also stated that taking steps to mitigate the possibility of rights infringement and other forms of malicious conduct would result in maximum net social benefits.

B. The Community Created a Policy Relating to the Introduction of new gTLDs

After an intensive policy development process, in August 2007, the Generic Names Supporting Organization issued a lengthy report in which it recommended that ICANN expand the number of gTLDs. See <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>. Contributing to this policy work were ICANN's Governmental Advisory Committee ("GAC"), At-Large Advisory Committee ("ALAC"), County Code Names Supporting Organization ("ccNSO") and Security and Stability Advisory Committee ("SSAC"). The policy development process culminated with Board approval in June 2008. See http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171.

III. COMMUNITY INVOLEMENT WAS KEY IN IMPLEMENTATION PLANNING

Since the June 2008 decision, the community has been hard at work creating, commenting on, and refining the implementation of this policy.

Seven versions of the Applicant Guidebook have been published. Fifty-eight explanatory memoranda have been produced. There have been nearly 50 new gTLD-related public comment sessions, over these documents as well as a variety of excerpts and working group reports. Over 2,400 comments were received through those public comment fora, which have been summarized and analyzed, and considered in revisions to the new gTLD program. Over 1,350 pages of summary and analysis have been produced. The community has also participated in numerous workshops and sessions and open microphone public forums at ICANN meetings, providing additional suggestions for the improvement of the new gTLD program. ICANN has listened to all of these community comments in refining the program that is being approved today.

Nearly every ICANN Supporting Organization and Advisory Committee was represented in targeted community-based working groups or expert teams formed to address implementation issues. The GNSO and its component stakeholder groups and constituencies participated in all aspects of the implementation work arising out of its policy recommendations. The ccNSO was particularly active on issues relating to internationalized domain names (IDNs) and the treatment of geographical names in the new gTLD program.

ICANN's technical Advisory Committees provided direct input into the implementation work. For example, RSSAC and SSAC provided expert analysis that there is no expected significant impact of new gTLDs on the stability and scalability of the root server system.

ALAC members served on nearly every working group and team, and actively participated in all public comment fora, giving the world's Internet users a voice in implementation discussions.

IV. CONSULTATION WITH THE GAC LEAD TO IMPROVEMENTS

Under the ICANN Bylaws, the GAC has an assurance that the Board will take GAC advice into account. The Board, through an extensive and productive consultation process with the GAC, has considered the GAC's advice on the new gTLD program and resolved nearly all of the areas where there were likely differences between the GAC advice and the Board's positions.

The ICANN Board and the GAC held a landmark face-to-face consultation on 28 February – 1 March 2011 and subsequently exchanged written comments on various aspects of the new gTLD Program. On 15 April 2011, ICANN published a revised Applicant Guidebook, taking into account many compromises with the GAC as well as additional community comment. On 20 May 2011, the GAC and the ICANN Board convened another meeting by telephone, and continued working through the remaining differences between the Board and GAC positions. See <http://www.icann.org/en/announcements/announcement-22may11-en.htm>. On 26 May 2011, the GAC provided its comments on the 15 April 2011 Applicant Guidebook, and the GAC comments were taken into consideration in the production of the 30 May 2011 Applicant Guidebook.

On 19 June 2011, the ICANN Board and GAC engaged in a further consultation over the remaining areas where the Board's approval of the launch of the new gTLD program may not be consistent with GAC advice. At the beginning of the GAC consultation process, there were 12 issues under review by the GAC and the Board, with 80 separate sub-issues. The GAC and the Board have identified mutually acceptable solutions for nearly all of these sub-issues. Despite this great progress and the good faith participation of the GAC and the Board in the consultation process, a few areas remain where the GAC and the Board were not able to reach full agreement. The reasons why these items of GAC advice were not followed are set forth in responses to the GAC such as Board responses to item of GAC Advice.

V. MAJOR IMPLEMENTATION ISSUES HAVE BEEN THOROUGHLY CONSIDERED

The launch of the new gTLDs has involved the careful consideration of many complex issues. Four overarching issues, along with several other major substantive topics have been addressed through the new gTLD implementation work. Detailed rationale papers discussing the approval of the launch of the program as it relates to nine of those topics are included here. These nine topics are:

- Evaluation Process
- Fees
- Geographic Names
- Mitigating Malicious Conduct
- Objection Process
- Root Zone Scaling
- String Similarity and String Contention
- Trademark Protection.

Detailed rationales have already been produced and approved by the Board in support of its decisions relating to two other topics, Cross Ownership, at <http://www.icann.org/en/minutes/rationale-cross-ownership-21mar11-en.pdf> and Economic Studies, at <http://www.icann.org/en/minutes/rationale-economic-studies-21mar11-en.pdf>, each approved on 25 January 2011.

VI. CONCLUSION

The launch of the new gTLD program is in fulfillment of a core part of ICANN's Bylaws: the introduction of competition and consumer choice in the DNS. After the ICANN community created a policy recommendation on the expansion of the number of gTLDs, the community and ICANN have worked tirelessly to form an implementation plan. The program approved for launch today is robust and will provide new protections and opportunities within the DNS.

The launch of the new gTLD program does not signal the end of ICANN's or the community's work. Rather, the launch represents the beginning of new opportunities to better shape the further introduction of new gTLDs, based upon experience. After the launch of the first round of new gTLDs, a second application window will only be opened after ICANN completes a series of assessments and refinements – again with the input of the community. The Board looks forward to the continual community input on the further evolution of this program.

The Board relied on all members of the ICANN community for the years of competent and thorough work leading up to the launch of the new gTLD program. Within the implementation phase alone, the community has devoted tens of thousands of hours to this process, and has created a program that reflects the best thought of the community. This decision represents ICANN's continued adherence to its mandate to introduce competition in the DNS, and also represents the culmination of an ICANN community policy recommendation of how this can be achieved.

2. ICANN Board Rationale on the Evaluation Process Associated with the gTLD Program

2. ICANN Board Rationale on the Evaluation Process Associated with the gTLD Program

I. Introduction

Through the development of the new gTLD program, one of the areas that required significant focus is a process that allows for the evaluation of applications for new gTLDs. The Board determined that the evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

Following the policy advice of the GNSO, the key goal for the evaluation process was to establish criteria that are as objective and measurable as possible. ICANN worked through the challenge of creating criteria that are measurable, meaningful (i.e., indicative of the applicant's capability and not easily manipulated), and also flexible enough to facilitate a diverse applicant pool. In the end, ICANN has implemented a global, robust, consistent and efficient process that will allow any public or private sector organization to apply to create and operate a new gTLD.

II. Brief History of ICANN's Analysis of the Evaluation Process Associated with the gTLD Program

This section sets forth a brief history of the significant actions on the subject of the evaluation process associated with the gTLD program.

- In December 2005, the GNSO commenced a policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to stimulate competition further and for numerous other reasons.

- In August of 2007, the GNSO issued its final report regarding the introduction of new gTLDs.
<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>
- At the 2 November 2007 ICANN Board Meeting, the Board considered the GNSO's policy recommendation and passed a resolution requesting that ICANN staff continue working on the implementation analysis for the introduction of the new gTLD program and report back to the Board with a report on implementation issues.
<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>; http://www.icann.org/minutes/resolutions-02nov06.htm#_Toc89933880
- Starting with the November 2007 Board meeting, the Board began to consider issues related to the selection procedure for new gTLDs, including the need for the process to respect the principles of fairness, transparency and non-discrimination.
- On 20 November 2007, the Board discussed the need for a detailed and robust evaluation process, to allow applicants to understand what is expected of them in the process and to provide a roadmap. The process should include discussion of technical criteria, business and financial criteria, and other specifications. ICANN proceeded to work on the first draft of the anticipated request for proposals.
<http://www.icann.org/en/minutes/minutes-18dec07.htm>
- On 23 October 2008, ICANN posted the Draft Applicant Guidebook, including an outline of the evaluation procedures (incorporating both reviews of the applied-for gTLD string and of the applicant), as well as the intended application questions and scoring criteria. These were continually revised, updated, and posted for comment through successive drafts of the Guidebook.
<http://www.icann.org/en/topics/new-gtlds/comments-en.htm>

- Between June and September 2009, KPMG conducted a benchmarking study on ICANN’s behalf, with the objective of identifying benchmarks based on registry financial and operational data. The KPMG report on Benchmarking of Registry Operations (“KPMG Benchmarking Report”) was designed to be used as a reference point during the review of new gTLD applications.
- In February 2010, ICANN published an overview of the KPMG Benchmarking Report. This overview stated that ICANN commissioned the study to gather industry data on registry operations as part of the ongoing implementation of the evaluation criteria and procedures for the new gTLD program.
<http://icann.org/en/topics/new-gtlds/benchmarking-report-15feb10-en.pdf> [Rationale-all -final-20110609.doc](#)
- On 30 May 2011, ICANN posted the Applicant Guidebook for consideration by the Board. This lays out in full the proposed approach to the evaluation of gTLD applications.

III. Analysis and Consideration of the Evaluation Process

A. Policy Development Guidance

The GNSO’s advice included the following:

- The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.
- All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.
- Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.

- Applicants must be able to demonstrate their financial and organisational operational capability.
- There must be a clear and pre-published application process using objective and measurable criteria.

B. Implementation of Policy Principles

Publication of the Applicant Guidebook has included a process flowchart which maps out the different phases an application must go through, or may encounter, during the evaluation process. There are six major components to the process: (1) Application Submission/Background Screening; (2) Initial Evaluation; (3) Extended Evaluation; (4) Dispute Resolution; (5) String Contention and (6) Transition to Delegation. All applications must pass the Initial Evaluation to be eligible for approval.

The criteria and evaluation processes used in Initial Evaluation are designed to be as objective as possible. With that goal in mind, an important objective of the new TLD process is to diversify the namespace, with different registry business models and target audiences. In some cases, criteria that are objective, but that ignore the differences in business models and target audiences of new registries, will tend to make the process exclusionary. The Board determined that the process must provide for an objective evaluation framework, but also allow for adaptation according to the differing models applicants will present.

The Board set out to create an evaluation process that strikes a correct balance between establishing the business and technical competence of the applicant to operate a registry, while not asking for the detailed sort of information that a venture capitalist may request. ICANN is not seeking to certify business success but instead seeks to encourage innovation while providing certain safeguards for registrants.

Furthermore, new registries must be added in a way that maintains DNS stability and security. Therefore, ICANN has created an evaluation process that

asks several questions so that the applicant can demonstrate an understanding of the technical requirements to operate a registry.

After a gTLD application passes the financial and technical evaluations, the applicant will then be required to successfully complete a series of pre-delegation tests. These pre-delegation tests must be completed successfully within a specified period as a prerequisite for delegation into the root zone.

C. Public Comment

Comments from the community on successive drafts of the evaluation procedures, application questions, and scoring criteria were also considered by the Board. In particular, changes were made to provide greater clarity on the information being sought, and to more clearly distinguish between the minimum requirements and additional scoring levels.

There was feedback from some that the evaluation questions were more complicated or cumbersome than necessary, while others proposed that ICANN should set a higher bar and perform more stringent evaluation, particularly in certain areas such as security. ICANN has sought to consider and incorporate these comments in establishing a balanced approach that results in a rigorous evaluation process in line with ICANN's mission for what is to be the initial gTLD evaluation round. See <http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm>.

IV. The Board's Analysis of the Evaluation Process Associated with the gTLD Program

A. Who the Board Consulted Regarding the Evaluation Process

- Legal Counsel
- The GNSO stakeholder groups

- ICANN’s Governmental Advisory Committee
- The At-Large Advisory Committee
- Various consultants were engaged throughout the process to assist in developing a methodology that would meet the above goals. These included InterIsle, Deloitte, KPMG, Gilbert and Tobin, and others.
- All other Stakeholders and Community members through public comment forums and other methods of participation.

B. What Significant Non-Privileged Materials the Board Reviewed

- Public Comments;
<http://icann.org/en/topics/new-gtlds/comments-analysis-en.htm>
- Benchmarking of Registry Operations;
<http://icann.org/en/topics/new-gtlds/benchmarking-report-15feb10-en.pdf>

C. What Factors the Board Found to Be Significant

The Board considered a number of factors in its analysis of the evaluation process for the new gTLD program. The Board found the following factors to be significant:

- the principle that the Board should base its decision on solid factual investigation and expert consultation and study;
- the addition of new gTLDs to the root in order to stimulate competition at the registry level;
- the responsibility of ensuring that new gTLDs do not jeopardize the security or stability of the DNS;

- an established set of criteria that are as objective and measurable as possible;
- the selection of independent evaluation panels with sufficient expertise, resources and geographic diversity to review applications for the new gTLD program; and
- an evaluation and selection procedure for new gTLD registries that respects the principles of fairness, transparency and non-discrimination.

V. The Board's Reasons for Concluding the Evaluation Process was Appropriate for the gTLD Program

- The evaluation process allows for any public or private sector organization to apply to create and operate a new gTLD. However, the process is not like simply registering or buying a second-level domain. ICANN has developed an application process designed to evaluate and select candidates capable of running a registry. Any successful applicant will need to meet the published operational and technical criteria in order to ensure a preservation of internet stability and interoperability.
- ICANN's main goal for the evaluation process was to establish criteria that are as objective and measurable as possible while providing flexibility to address a wide range of business models. Following the policy advice, evaluating the public comments, and addressing concerns raised in discussions with the community, the Board decided on the proposed structure and procedures of the evaluation process to meet the goals established for the program.

3. ICANN Board Rationale on Fees Associated With the gTLD Program

3. ICANN Board Rationale on Fees Associated With the gTLD Program

I. Introduction

The launch of the new gTLD program is anticipated to result in improvements to consumer choice and competition in the DNS. However, there are important cost implications, both to ICANN as a corporate entity and to gTLD applicants who participate in the program. It is ICANN's policy, developed through its bottom-up, multi-stakeholder process, that the application fees associated with new gTLD applications should be designed to ensure that adequate resources exist to cover the total cost of administering the new gTLD process. <http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf>.

On 2 October 2009, the Board defined the directive approving the community's policy recommendations for the implementation of the new gTLD policy. That policy included that the implementation program should be fully self-funding. The Board has taken great care to estimate the costs with an eye toward ICANN's previous experience in TLD rounds, the best professional advice, and a detailed and thorough review of expected program costs. The new gTLD program requires a robust evaluation process to achieve its goals. This process has identifiable costs. The new gTLD implementation should be revenue neutral and existing ICANN activities regarding technical coordination of names, numbers and other identifiers should not cross-subsidize the new program. See <http://icann.org/en/topics/new-gtlds/cost-considerations-04oct09-en.pdf>

II. Brief History of ICANN's Analysis of Fees Associated with the gTLD Program

This section sets forth a brief history of the significant Board consideration on the subject of fees associated with the gTLD program.

- In December 2005 – September 2007, the GNSO conducted a rigorous policy development process to determine whether (and the

circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to stimulate competition further and for numerous other reasons and that evaluation fees should remain cost neutral to ICANN. The GNSO's Implementation Guideline B stated: "Application fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process."

- At the 2 November 2007 ICANN Board Meeting, the Board considered the GNSO's policy recommendation and passed a resolution requesting that ICANN staff continue working on the implementation analysis for the introduction of the new gTLD program and report back to the Board with a report on implementation issues.
<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>; http://www.icann.org/minutes/resolutions-02nov06.htm#_Toc89933880
- On 2 November 2007, the Board reviewed the ICANN Board or Committee Submission No. 2007-54 entitled Policy Development Process for the Delegation of New gTLDs. The submission discussed application fees and stated, "[a]pplication fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process. Application fees may differ for applicants."
<http://www.icann.org/en/minutes/minutes-18dec07.htm>.
- On 23 October 2008, ICANN published the initial draft version of the gTLD Applicant Guidebook, including an evaluation fee of USD 185,000 and an annual registry fee of USD 75,000.
<http://www.icann.org/en/topics/new-gtlds/comments-en.htm>
- At the 12 February 2009 Board Meeting, the ICANN Board discussed the new version of the Applicant Guidebook ("AGB"). The Board determined that the application fee should remain at the proposed fee of USD 185,000 but the annual minimum registry fee should be

reduced to USD 25,000, with a transaction fee at 25 cents per transaction. Analysis was conducted and budgets were provided to support the USD 185,000 fee. The decrease in of the registry fee to USD 25,000 was based on a level of effort to support registries.

<http://www.icann.org/en/minutes/minutes-12feb09.htm>

- On 6 March 2009, the Board reviewed ICANN Board Submission No. 2009-03-06-05 entitled Update on new gTLDs. The submission analyzed recent public comments and detailed how ICANN incorporated those comments and changes into the fee structure. It also pointed out that the annual registry fee was reduced to a baseline of USD 25,000 plus a per transaction fee of 25 cents once the registry has registered 50,000 names. Also, the submission highlighted a refund structure for the USD 185,000 evaluation fee, with a minimum 20% refund to all unsuccessful applicants, and higher percentages to applicants who withdraw earlier in the process.
- On 25 June, ICANN Published the New gTLD Program Explanatory Memorandum – New gTLD Budget which broke down the cost components of the USD 185,000 application fee.
<http://www.icann.org/en/topics/new-gtlds/new-gtld-budget-28may10-en.pdf>
- On 30 May 2011, ICANN posted a new version of the Applicant Guidebook, taking into account public comment and additional comments from the GAC.
<http://icann.org/en/topics/new-gtlds/comments-7-en.htm>

III. Major Principles Considered by the Board

A. Important Financial Considerations

The ICANN Board identified several financial considerations it deemed to be important in evaluating and deciding on a fee structure for the new gTLD program. On 23 October 2008, ICANN published an explanatory memorandum

describing its cost considerations and identified three themes which shaped the fee structure: (1) care and conservatism; (2) up-front payment/incremental consideration; and (3) fee levels and accessibility. See <http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf>.

1. Care and Conservatism

ICANN coordinates unique identifiers for the Internet, and particularly important for this context, directly contracts with generic top level domain registries, and cooperates with country code registries around the world in the interest of security, resiliency and stability of the DNS. There are more than 170,000,000 second-level domain registrations that provide for a richness of communication, education and commerce, and this web is reaching ever more people around the world. ICANN's system of contracts, enforcement and fees that supports this system, particularly for the 105,000,000 registrations in gTLDs, must not be put at risk. Therefore, the new gTLD must be fully self funding.

The principle of care and conservatism means that each element of the application process must stand up to scrutiny indicating that it will yield a result consistent with the community-developed policy. A robust evaluation process, including detailed reviews of the applied-for TLD string, the applying entity, the technical and financial plans, and the proposed registry services, is in place so that the security and stability of the DNS are not jeopardized. While the Board thoughtfully considered process and cost throughout the process design, cost-minimization is not the overriding objective. Rather, process fidelity is given priority.

2. Up-Front Payment/Incremental Consideration

ICANN will collect the entire application fee at the time an application is submitted. This avoids a situation where the applicant gets part way through the application process, then may not have the resources to continue. It also assures that all costs are covered. However, if the applicant elects to withdraw its application during the process, ICANN will refund a prorated amount of the fees to the applicant.

A uniform evaluation fee for all applicants provides cost certainty with respect to ICANN fees for all applicants. Further, it ensures there is no direct cost penalty to the applicant for going through a more complex application (except, when necessary, fees paid directly to a provider). A single fee, with graduated refunds, and with provider payments (e.g. dispute resolution providers) made directly to the provider where these costs are incurred seems to offer the right balance of certainty and fairness to all applicants.

3. Fee Levels and Accessibility

Members of the GNSO community recognized that new gTLD registry applicants would likely come forward with a variety of business plans and models appropriate to their own specific communities, and there was a commitment that the evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency, and non-discrimination.

Some community members expressed concern that financial requirements and fees might discourage applications from developing nations, or indigenous and minority peoples, who may have different sets of financial opportunities or capabilities relative to more highly developed regions of the world. The Board addressed these concerns with their “Application Support” program (which is discussed more in depth below).

B. Important Assumptions

In the explanatory memorandum on cost considerations published on 23 October 2008, ICANN identified the three assumptions on which it would rely in determining the fee structure for the program: (1) estimating methodology; (2) expected quantity of applications; and (3) the new gTLD program will be ongoing.

1. Estimating Methodology

Estimators for the various costs associated with the application evaluation strove to use a maximum-likelihood basis to estimate the costs. A detailed

approach was taken to get the best possible estimates. The evaluation process was divided into 6 phases, 24 major steps and 75 separate tasks. Twenty-seven separate possible outcomes were identified in the application process, probabilities were identified for reaching each of these states, and cost estimates were applied for each state. Estimates at this detailed level are likely to yield more accurate estimates than overview summary estimates.

Further, whenever possible, sensitivity analysis was applied to cost estimates. This means asking questions such as “How much would the total processing cost be if all applications went through the most complex path? Or “How much would the total processing cost be if all applications went through the simplest path?” Sensitivity analysis also helps to explore and understand the range of outcomes, and key decision points in the cost estimation mode.

2. Expected Quantity of Applications

While ICANN has asked constituents and experts, there is no sure way to estimate with certainty the number of new TLD applications that will be received. ICANN has based its estimates on an assumption of 500 applications in the first round. This volume assumption is based on several sources, including a report from a consulting economist, public estimates on the web, oral comments at public meetings and off-the-record comments by industry participants. While the volume assumption of 500 applications is consistent with many data points, there is no feasible way to make a certain prediction.

If there are substantially fewer than 500 applications, the financial risk is that ICANN would not recoup historical program development costs or fixed costs in the first round, and that higher fixed costs would drive the per unit application costs to be higher than forecast. Still, the total risk of a much smaller-than-anticipated round would be relatively low, since the number of applications would be low.

If there are substantially more than 500 applications, the risk is that application processing costs would again be higher than anticipated, as ICANN would need to bring in more outside resources to process applications in a timely

fashion, driving the variable processing costs higher. In this case, ICANN would be able to pay for these higher expected costs with greater-than-expected recovery of fixed cost components (historical program development and other fixed costs), thus at least ameliorating this element of risk.

3. The New gTLD Program Will Be Ongoing

ICANN’s goal is to launch subsequent gTLD application rounds as quickly as possible. The exact timing will be based on experiences gained and changes required after this round is completed. The goal is for the next application round to begin within one year of the close of the application submission period for the initial round.

It is reasonable to expect that various fees may be lower in subsequent application rounds, as ICANN processes are honed, and uncertainty is reduced.

C. Cost Elements Determined by the Board

1. Application Fee

The Board determined the application fee to be in the amount of USD 185,000. The application fee has been segregated into three main components: (a) Development Costs, (b) Risk Costs, and (c) Application Processing (see www.icann.org/en/topics/new-gtlds/cost-considerations-04oct09-en.pdf). The breakdown of each component is as follows (rounded):

Development Costs:	USD 27,000
Risk Costs:	USD 60,000
<u>Application Processing:</u>	<u>USD 98,000</u>
Application Fee:	USD 185,000

The application fee was also extrapolated and further analyzed under several assumptions including receiving 500 applications (see

www.icann.org/en/topics/new-gtlds/explanatory-memo-new-gtld-program-budget-22oct10-en.pdf).

a. Development Costs

These costs have two components:

i) Development costs which are the activities necessary to progress the implementation of the gTLD policy recommendations. This includes resolving open concerns, developing and completing the AGB, managing communication with the Internet community, designing and developing the processes and systems necessary to process applications in accordance with the final Guidebook, and undertaking the activities that have been deemed high risk or would require additional time to complete.

The costs associated with the Development Phase have been funded through normal ICANN budgetary process and the associated costs have been highlighted in ICANN's annual Operating Plan and Budget Documents

ii) Deployment costs which are the incremental steps necessary to complete the implementation of the application evaluation processes and system. Such costs require timing certainty and include the global communication campaign, on-boarding of evaluation panels, hiring of additional staff, payment of certain software licenses, and so on.

b. Risk Costs

These represent harder to predict costs and cover a number of risks that could occur during the program. Examples of such costs include variations between estimates and actual costs incurred or receiving a significantly low or high number of applications. ICANN engaged outside experts to assist with developing a risk framework and determining a quantifiable figure for the program.

c. Application Processing

Application Processing represents those costs necessary to accept and process new gTLD applications, conduct contract execution activities, and conduct pre-delegation checks of approved applicants prior to delegation into the root zone. Application processing costs consist of a variable and fixed costs.

Variable costs are those that vary depending on the number of applications that require a given task to be completed. Whereas fixed costs are necessary to manage the program and are not associated with an individual application.

The application fee is payable in the form of a USD 5,000 deposit submitted at the time the user requests application slots within the TLD Application System (“TAS”), and a payment of USD 180,000 submitted with the full application. See <http://icann.org/en/topics/new-gtlds/intro-clean-12nov10-en.pdf>.

2. Annual Registry Fee

ICANN’s Board has determined to place the Annual Registry Fee at a baseline of USD 25,000 plus a variable fee based on transaction volume where the TLD exceeds a defined transaction volume.

3. Refunds

In certain cases, refunds of a portion of the evaluation fee may be available for applications that are withdrawn before the evaluation process is complete. An applicant may request a refund at any time until it has executed a registry agreement with ICANN. The amount of the refund will depend on the point in the process at which the withdrawal is requested. Any applicant that has not been successful is eligible for, at a minimum, a 20% refund of the evaluation fee if it withdraws its application.

According to the AGB, the breakdown of possible refund scenarios is as follows:

Refund Available to Applicant	Percentage of Evaluation Fee	Amount of Refund
Within 21 calendar days of a GAC Early Warning	80%	USD 148,000
After posting of applications until posting of Initial Evaluations results	70%	USD 130,000
After posting Initial Evaluation Results	35%	USD 65,000
After the applicant has completed Dispute Resolution, Extended Evaluation, or String Contention Resolution(s)	20%	USD 37,000
After the applicant has registered into a registry agreement with ICANN		None

4. Application Support (JAS WG Charter)

As mentioned above, some community members expressed concerned that the financial requirements and fees might discourage applications from developing nations, or indigenous or minority peoples, who may have different financial opportunities. The Board addressed these concerns with their “Application Support” program, and recognized the importance of an inclusion in the new gTLD program by resolving that stakeholders work to “develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs.” See <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#20>.

In direct response to this Board resolution, the GNSO Council proposed a Joint SO/AC Working Group (“JAS WG”), composed by members of ICANN’s Supporting Organizations (“SOs”) and Advisory Committees (“ACs”), to look into applicant support for new gTLDs. See <https://st.icann.org/so-ac-new-gtld-wg/index.cgi>.

IV. The Board’s Analysis of Fees

A. Why the Board Addressed Fees

- ICANN’s mission statement and one of its founding principles is to promote user choice and competition. ICANN has created significant competition at the registrar level that has resulted in enormous benefits for consumers. To date, ICANN has not created meaningful competition at the registry level. Based upon the report and recommendation from the GNSO to introduce new gTLDs, the Board decided to proceed with the new gTLD program.
- While the primary implications of the new gTLD program relate to possible improvements in choice and competition as a result of new domain names, there are also important cost implications, both to the ICANN corporate entity and to gTLD applicants. The Board initially determined that the application fees associated with new gTLD applications should be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process.
- Both the Board and members of the community have commented on the application fee structure for the new gTLD program. From those comments the Board has determined that the new gTLD implementation should be fully self-funding and revenue neutral, and that existing ICANN activities regarding technical coordination of names, numbers, and other identifiers should not cross-subsidize the new program.

B. Who the Board Consulted Regarding Fees

- Legal Counsel
- The GNSO
- ICANN’s Supporting Organizations

- The ALAC
- The GAC
- Other ICANN Advisory Committees
- All other Stakeholders and Community members through public comment forums and other methods of participation.

C. Public Comments Considered by the Board

Over 1200 pages of feedback, from more than 300 entities, have been received since the first Draft AGB was published. The Board has analyzed and considered these comments in the context of the GNSO policy recommendations.. The Board received many comments on the fee structure, both the annual registry fee and application evaluation fee. Regarding the annual registry fee, the Board received comments stating that the annual minimum and percentage fee for registries was perceived by some to be too high.

Furthermore, the Board incorporated many suggestions from public comments pursuant to its JAS WG Application Support Program. <http://forum.icann.org/lists/soac-newgtldapsup-wg>.

D. What Factors the Board Found to Be Significant

The Board considered numerous factors in its analysis of fees. The Board found the following factors to be significant:

- The principle that the Board should base its decision on solid factual investigation and expert consultation and study;
- The addition of new gTLDs to the root in order to stimulate competition at the registry level;

- That the new gTLD implementation should be fully self funding and revenue neutral; and
- That existing ICANN activities regarding technical coordination of names, numbers, and other identifiers should not cross-subsidize the new program.
- That any revenue received in excess of costs be used in a manner consistent with community input.
- Evaluation fees will be re-evaluated after the first round and adjusted.

V. The Board's Reasons for Deciding the Proposed Fee Structure is Appropriate

While the primary implications of this new policy relate to possible improvements in choice and competition as a result of new domain names, there are also important cost implications, both to ICANN as a corporate entity and to gTLD applicants with regard to the implementation of the policy through the acceptance and processing of applications as set out in the policy adopted by the community and accepted by the Board.

After evaluating public comments, addressing initial concerns and carefully evaluating the twenty-seven separate possible outcomes that were identified in the application process, the Board decided on the proposed fee structure to ensure that the new gTLD implementation would be fully self-funding and revenue neutral.

4. ICANN Board Rationale on Geographic Names Associated with the gTLD Program

4. ICANN Board Rationale on Geographic Names Associated with the gTLD Program

I. Introduction

Through the development of the new gTLD program, one of the areas of interest to governments and other parties was the treatment of country/territory names and other geographic names. This area has been the subject of stakeholder input and discussion throughout the implementation process.

This memorandum focuses on the Board's consideration of the provisions for geographic names in the new gTLD program. The memorandum summarizes the Board's consideration of the issue, and the Board's rationale for implementing the new gTLD program containing the adopted measures on geographic names.

II. Brief History of ICANN's Consideration of Geographic Names Associated with The New gTLD Program

This section sets forth a brief history of significant actions on the subject of geographic names associated with the new gTLD program.

- In December 2005, the GNSO commenced a rigorous policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to further stimulate competition and for other reasons.
- On 28 March 2007, the GAC adopted principles to govern the introduction of new gTLDs (the "GAC Principles"). Sections 2.2 and 2.7 of the GAC Principles address geographic names issues at the top and second level.
 - 2.2 ICANN should avoid country, territory, or place names, and country, territory, or regional language or people descriptions, unless in agreement with the relevant governments or public authorities.
 - 2.7 Applicant registries for new gTLDs should pledge to: a) adopt, before the new gTLD is introduced, appropriate procedures for blocking, at no cost and upon demand of

governments, public authorities or IGOs, names with national or geographic significance at the second level of any new gTLD, and b) ensure procedures to allow governments, public authorities or IGOs to challenge abuses of names with national or geographic significance at the second level of any new gTLD.

http://gac.icann.org/system/files/gTLD_principles_0.pdf

- On 23 May 2007, the GNSO Reserved Names Working Group issued its final report. Recommendation 20 of the report stated that: (1) there should be no geographical reserved names; and (2) governments should protect their interests in certain names by raising objections on community grounds.
<http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm>
- On 8 August 2007, the GNSO issued its final report regarding the introduction of new gTLDs. Recommendation 20 of the report intended to provide protections for geographical names, stating that an application for a new gTLD should be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be targeted.
<http://GNSO.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>
- On 26 June 2008, the Board approved the GNSO's Recommendations for the introduction of new gTLDs and directed staff to develop an implementation plan.
<http://www.icann.org/en/minutes/resolutions-26jun08.htm>
- On 24 October 2008, ICANN published Version 1 of the new gTLD Applicant Guidebook ("Version 1"), which incorporated various concepts set forth in the GAC Principles. Version 1 required applications involving geographic names to be accompanied by documents of support or non-objection from the relevant government authority. Geographic names included country and territory names, sub-national names on the ISO 3166-2 list, city names (if the applicant was intending to leverage the city name), and names of continents and regions included on a UN-maintained

list. <http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>

- The 24 October 2008 posting also included an explanatory memorandum on the topic of geographical names, describing the various considerations used in arriving at the proposed approach. <http://www.icann.org/en/topics/new-gtlds/geographic-names-22oct08-en.pdf>
- On 28 December 2008, the ccNSO commented on Version 1. The ccNSO stated that (1) the restriction of protections for country/territory names to the 6 official United Nations languages needed to be amended to translation in any language; and (2) All country names and territory names should be ccTLDs – not gTLDs and should not be allowed until the IDN ccPDP process concluded. <http://forum.icann.org/lists/gtld-evaluation/msg00015.html>
- On 12 February 2009, the Board met to discuss: (1) proposed changes to Version 1; and (2) the implementation of policy recommendations given by the GAC and GNSO. <http://www.icann.org/en/minutes/minutes-12feb09.htm>
- On 18 February 2009, ICANN published an analysis of public comments received <http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>
- Also on 18 February 2009, ICANN published Version 2 of the new gTLD Applicant Guidebook (“Version 2”), which clarified the definition of geographic names set forth in Version 1. In addition, Version 2 expanded protection for country and territory names involving meaningful representations in any language, and augmented requirements for documentation of support or non-objection from relevant governments and public authorities. <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf>; <http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm>
- On 6 March 2009, the Board resolved that it was generally in agreement with Version 2 as it related to geographic names, but directed staff to revise the relevant portions of Version 2 to provide greater specificity on the scope of protection at the top level for the

names of countries and territories listed in the ISO 3166-1 standard. The Board also directed ICANN staff to send a letter to the GAC by 17 March 2009 identifying implementation issues that have been identified in association with the GAC's advice, in order to continue communications with the GAC to find a mutually acceptable solution.

<http://www.icann.org/en/minutes/resolutions-06mar09.htm>

- On 17 March 2009, Paul Twomey delivered a letter to Janis Karklins that: (1) outlined the Board's 6 March 2009 resolution; (2) stated that ICANN's treatment of geographic names provided a workable compromise between the GAC Principles and GNSO policy recommendations; and (3) sought advice to resolve implementation issues regarding the protection of geographic names at the second level. <http://www.icann.org/correspondence/twomey-to-karklins-17mar09-en.pdf>
- On 9 April 2009, the ccNSO commented on Version 2. The ccNSO reiterated that all country and territory names are ccTLDs – not gTLDs. <http://forum.icann.org/lists/2gtld-guide/pdfc3uGsuV7CG.pdf>
- On 24 April 2009, Janis Karklins delivered a letter to Paul Twomey stating that: (1) countries should not have to use objection process and should instead wait for the IDN ccTLD PDP to delegate country names; (2) the names contained on three lists be reserved at the second level at no cost for the government; and (3) ICANN should notify registries and request the suspension of any name if the government notifies ICANN that there was a misuse of a second level domain name. <http://www.icann.org/correspondence/karklins-to-twomey-24apr09.pdf>
- On 29 May 2009, Janis Karklins delivered a letter to Paul Twomey. The letter that stated that: (1) the proposed changes to Version 2 in relation to geographic names at the second level were acceptable to the GNSO; and (2) the GNSO and the GAC were not in agreement with regard to other issues relating to Geographic names at the top level. <http://www.icann.org/correspondence/karklins-to-twomey-29may09-en.pdf>

- On 31 May, 2009, ICANN published an analysis of the public comments received concerning draft version 2 of the Applicant Guidebook.
<http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>
- On 26 June 2009, the Board discussed proposed changes to the geographic names section of the Applicant Guidebook. These proposed changes were intended to provide greater specificity on the scope of protection at the top level for the names of countries and territories and greater specificity in the support requirements for continent or region names. The changes also provided additional guidance to applicants for determining the relevant government or public authority for the purpose of obtaining the required documentation.
<http://www.icann.org/en/minutes/resolutions-26jun09.htm>
- On 18 August 2009, Janis Karklins delivered a letter to Peter Dengate Thrush that stated that (1) strings that were a meaningful representation or abbreviation of a country name or territory name should not be allowed in the gTLD space; and (2) government or public authority should be able to initiate the redelegation process in limited circumstances.
<http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>
- On 22 September 2009, Peter Dengate-Thrush delivered a letter to Janis Karklins, responding to GAC comments on draft version 2 of the Applicant Guidebook and describing the rationale for the proposed treatment of country names, as well as the Board's general intention to provide clear rules for applicants where possible with reference to lists.
<http://www.icann.org/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf>
- On 04 October 2009, ICANN published Version 3 of the new gTLD Applicant Guidebook ("Version 3").
<http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-04oct09-en.pdf>
- On 21 November 2009, ccNSO delivered a letter to the Board, raising concerns about the treatment of country and territory

names. ccNSO also submitted these comments via public comments. <http://www.icann.org/correspondence/dispain-to-dengate-thrush-21nov09-en.pdf>

- On 15 February 2010, ICANN published an analysis of the public comments received. <http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>
- On 12 March 2010, the Board resolved that ICANN should consider whether the Registry Restrictions Dispute Resolution Procedure or a similar post-delegation dispute resolution procedure could be implemented for use by government supported TLD operators where the government withdraws its support of the TLD. <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>
- On 31 May 2010, ICANN published Version 4 of the new gTLD Applicant Guidebook (“Version 4”). Version 4 excluded country and territory names from the first gTLD application round, continuing with the existing definition of country and territory names in Version 3. <http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm>
- On 23 September 2010, Heather Dryden delivered a letter to Peter Dengate Thrush that stated that that Version 4 still did not take fully into consideration GAC’s concerns regarding the definition of country/territory names. <http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>
- On 25 September 2010, the Board met in Trondheim, Norway and decided: (1) not to include translations of the ISO 3166-1 sub-national place names in the Applicant Guidebook, and (2) to augment the definition of Continent or UN Regions in the Applicant Guidebook to include UNESCO’s regional classification list. At the same meeting, the Board resolved that ICANN staff should determine if the directions indicated by the Board regarding geographical names and other issues are consistent with GAC comments, and recommend any appropriate further action in light of GAC’s comments. <http://icann.org/en/minutes/resolutions-25sep10-en.htm>

- On 28 October, 2010, the Board discussed the scope, timing and logistics of a consultation needed with GAC regarding remaining geographic names issues in the new gTLD program. The Board agreed that staff should provide a paper on geographic names to GAC. <http://www.icann.org/en/minutes/prelim-report-28oct10-en.htm>
- On 12 November 2010, ICANN posted the proposed final version of the Applicant Guidebook (the “Proposed Final Guidebook”). <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf>
- On 23 February 2011, the GAC released its Indicative Scorecard on New gTLD Outstanding Issues. This scorecard included advice from the GAC on the topics of Post-Delegation Disputes and Use of Geographic Names. http://gac.icann.org/system/files/20110223_Scorecard_GAC_outstanding_issues_20110223.pdf
- On 28 February – 1 March 2011, the Board met with GAC representatives at a meeting in Brussels to discuss the issues raised by the GAC.
- On 4 March 2011, the Board published its notes on the GAC Indicative Scorecard. The Board provided an indication of whether each component of the GAC’s advice was consistent (fully or partially) or inconsistent with the Board’s position on each of the issues. <http://gac.icann.org/system/files/2011-03-04-ICANN-Board-Notes-Actionable-GAC-Scorecard.pdf>
- On 12 April 2011, the GAC published comments on the Board’s response to the GAC Scorecard. http://gac.icann.org/system/files/20110412_GAC_comments_on_the_Board_response_to_the_GAC_scorecard_0.pdf
- On 15 April 2011, ICANN posted a discussion draft of the Applicant Guidebook (the “Discussion Draft Guidebook”). This version expanded the definition of country names to include “a name by which a country is commonly known, as demonstrated by evidence that the country is recognized by that name by an intergovernmental or treaty organization” as well as providing clarification to applicants that in the event of a dispute between a

government (or public authority) and a registry operator that submitted documentation of support from that government or public authority, ICANN will comply with a legally binding order from a court in the jurisdiction of the government or public authority that has given support to an application.

<http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf>

- On 26 May 2011, the GAC provided comments on the 15 April 2011 Discussion Draft.
<http://gac.icann.org/system/files/GAC%20Comments%20on%20the%20new%20gTLDs%20-%2026%20May%202011.pdf>
- On 30 May 2011, ICANN posted another version of the Applicant Guidebook, taking into account public comment and the additional comment from the GAC. This version includes some clarifications but no significant changes from the 15 April 2011 Discussion Draft.
<http://icann.org/en/topics/new-gtlds/comments-7-en.htm>

III. The Board’s Analysis of Geographic Names Associated with the gTLD Program

A. Brief Introduction to Geographic Names

This section sets forth an overview of the treatment of geographic names in the Applicant Guidebook.

- Section 2.2.1.4 provides the following guidance for applications involving geographic names.
 - Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments or public authorities in geographic names.
 - Certain types of applied-for strings are considered geographical names and must be accompanied by documentation of support or non-objection from the relevant governments or public authorities. These include:

- An application for any string that is a representation, in any language, of the capital city name of any country or territory listed in the ISO 3166-1 standard;
 - An application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city name;
 - An application for any string that is an exact match of a sub-national place name, such as a county, province, or state, listed in the ISO 3166-2 standard; and
 - An application for a string which represents a continent or UN region appearing on the “Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings” list.
- Applications for strings that are country or territory names will not be approved, as they are not available under the new gTLD program in this application round.
 - The requirement to include documentation of support for certain applications does not preclude or exempt applications from being the subject of objections on community grounds, under which applications may be rejected based on objections showing substantial opposition from the targeted community.
- Section 2.3.1 of the Draft Discussion Guidebook provides additional guidance:
 - If an application has been identified as a geographic name requiring government support, but the applicant has not provided sufficient evidence of support or non-objection from all relevant governments or public authorities by the end of the initial evaluation period, the applicant will have additional time to obtain and submit this information in the extended evaluation period.

B. Why the Board Addressed Geographic Names

- The treatment of geographic names in the new gTLD space was an area of significant concern to many stakeholders.
- The Board received extensive advice from the GAC regarding the protection of geographic names.
- The GNSO, in its policy development work, balanced a number of stakeholder considerations in the formation of advice on the treatment of geographic names.
- The Board recognized that government stakeholders have important interests in protecting certain geographic names.
- The Board wished to create an appropriate balance between the interests of governments in protecting certain geographic names, and the multiple uses possible for various types of names in the namespace.

C. Who the Board Consulted

- Legal Counsel
- The GNSO
- The GAC
- The ALAC
- The ccNSO
- The SSAC
- All other Stakeholders and Community members through public comment forum and other methods of participation.

D. What Significant Non-Privileged Materials the Board Reviewed

- **Communications from GAC**

- On 28 March 2007, GAC adopted the GAC Principles
http://gac.icann.org/system/files/gTLD_principles_0.pdf
- On 31 October 2007, GAC issued a communiqué
<http://gac.icann.org/communiqués/gac-2007-communique-30>
- On 26 June 2008, GAC expressed concern to Board and GNSO that the GNSO proposals do not include provisions reflecting GAC Principles regarding new gTLDs
<http://www.icann.org/en/minutes/resolutions-26jun08.htm>
- On 8 September 2008, Paul Twomey participated in a conference call with the GAC to discuss treatment of GAC Principles
- On 2 October 2008, Paul Twomey delivered a letter to Janis Karklins
<http://www.icann.org/en/correspondence/twomey-to-karklins-02oct08.pdf>
- On 8 November 2008: GAC issued a communiqué
<http://gac.icann.org/communiqués/gac-2008-communique-33>
- On 4 March 2009, GAC issued a communiqué
<http://gac.icann.org/communiqués/gac-2009-communique-34>
- On 17 March 2009, Paul Twomey delivered a letter to Janis Karklins
<http://www.icann.org/correspondence/twomey-to-karklins-17mar09-en.pdf>
- On 24 April 2009, Janis Karklins delivered a letter to Paul Twomey
<http://www.icann.org/correspondence/karklins-to-twomey-24apr09.pdf>

- On 29 May 2009, Janis Karklins delivered a letter to Paul Twomey
<http://www.icann.org/correspondence/karklins-to-twomey-29may09-en.pdf>
 - On 24 June 2009, GAC issued a communiqué
<http://gac.icann.org/communiques/gac-2010-communique-38>
 - On 18 August 2009, Janis Karklins delivered a letter to Peter Dengate
<http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>
 - On 22 September 2009, Peter Dengate-Thrush delivered a letter to Janis Karklins
<http://www.icann.org/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf>
 - On 10 March 2010, Janis Karklins delivered a letter to Peter Dengate-Thrush
<http://www.icann.org/correspondence/karklins-to-dengate-thrush-10mar10-en.pdf>
 - On 23 September 2010, Heather Dryden delivered a letter to Peter Dengate-Thrush
<http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>
- On 23 February 2011, the GAC delivered its Indicative Scorecard on New gTLD Outstanding Issues
http://gac.icann.org/system/files/20110223_Scorecard_GAC_outstanding_issues_20110223.pdf

- **GNSO Policy Recommendations**

- On 23 May 2007, GNSO Reserved Names Working Group issued its final report

<http://gns0.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm>

- On 8 August 2007, GNSO issued its final report regarding the introduction of new gTLDs
<http://GNSO.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

- **ccNSO Comments**

- On 28 December 2008, ccNSO commented on Version 1
<http://forum.icann.org/lists/gtld-evaluation/msg00015.html>
- On 9 April 2009, ccNSO commented on Version 2
<http://forum.icann.org/lists/2gtld-guide/pdfc3uGsuV7CG.pdf>
- On 6 July 2009, ccNSO commented on an excerpt from Version 3
<http://forum.icann.org/lists/e-gtld-evaluation/msg00006.html>
- On 21 November 2009, ccNSO commented on Version 3 again <http://www.icann.org/correspondence/disspain-to-dengate-thrush-21nov09-en.pdf>

- **Public Comments**

- Comments from the community
<http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm>

E. What Concerns the Community Raised

- There is a need for clarification of the geographic names process in the Application Guidebook.
- The new gTLDs should respect the sensitivity regarding terms with national, cultural, geographic and religious significance.

- The enumerated grounds for objection might not provide sufficient grounds to safeguard the interest of national, local and municipal governments in the preservation of geographic names that apply to them.
- Delegation and registration of country and territory names is a matter of national sovereignty.
- There is concern over the fees involved in the dispute resolution process, particularly for governments.
- There is concern over perceived inconsistencies with the GNSO policy recommendations.

F. What Factors the Board Found to Be Significant

- The balance of retaining certainty for applicants and demonstrating flexibility in finding solutions;
- The goals of providing greater clarity for applicants and appropriate safeguards for governments and the broad community;
- The goal of providing greater protections for country and territory names, and greater specificity in the support requirements for the other geographic names;
- The goal of respecting the relevant government or public authority's sovereign rights and interests;
- The risk of causing confusion for potential applicants and others in the user community; and
- The risk of possible misuse of a country or territory name or the misappropriation of a community label.

G. The Board's Reasons For the Proposed Approach to Geographic Names

- ICANN's Core Values include introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

- The Board has accepted GAC advice to require government approval in the case of applications for certain geographic names.
- The Board intended to create a predictable, repeatable process for the evaluation of gTLD applications. Thus, to the extent possible, geographic names are defined with respect to pre-existing lists.
- The Board recognized that the community objection process recommended by the GNSO to address misappropriation of a community label would be an additional avenue available to governments to pursue a case where a name was not protected by reference to a list. The Board discussed this topic extensively with the GAC. As a result of the consultation on this and other topics, the Applicant Guidebook was revised to incorporate an Early Warning process which governments could use to flag concerns about a gTLD application at an early stage of the process. These procedures could also help address any concerns from governments about geographic names not already protected in the process.
- The Board also confirmed that the GAC has the ability to provide GAC Advice on New gTLDs concerning any application. Thus, governments would not be required to file objections and participate in the dispute resolution process, but rather, may raise their concerns via the GAC. This process could be used, for example, for governments to object to an application for a string considered by a government to be a geographic name.
- The formal objection and dispute resolution process does remain available to governments as an additional form of protection. Limited funding support from ICANN for objection filing fees and dispute resolution costs is available to governments.
- The Board adopted GAC recommendations for protections of geographic names in second-level registrations.

5. ICANN Board Rationale on the Risk of Increased Malicious Conduct Associated with the New gTLD Program

5. ICANN Board Rationale on the Risk of Increased Malicious Conduct Associated with the New gTLD Program

I. Introduction

Through the development of the new gTLD program and the numerous opportunities for public comment and receipt of community input on the new gTLD program, one of the issues that emerged as a commonly-raised concern was the potential for an increased risk of instances of malicious conduct associated with the introduction of New gTLDs. ICANN committed to (and remains committed to) addressing this issue. The Affirmation of Commitments of the United States Department of Commerce and ICANN includes the following provision:

ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation.

<http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>. These issues were not newly identified in the Affirmation of Commitments. From the outset, ICANN has sought to address these issues as it has prepared to implement the new gTLD program, and has mechanisms and processes designed to address this concern.

This memorandum focuses on the Board's consideration of the risk of a potential increase in malicious conduct associated with the introduction of new gTLDs. The memorandum summarizes: the Board's consideration of the issue, measures approved to mitigate instances of malicious conduct, and the Board's rationale for implementing the new gTLD program while adopting and implementing measures to mitigate that risk.

II. History of the Board's Consideration of Malicious Conduct

This section contains a brief history of significant actions taken by the ICANN Board to mitigate the potential for malicious conduct associated with the new gTLD program.

- On 26 June 2008, the Board adopted the Generic Names Supporting Organization's ("GNSO") policy recommendations for the introduction of new gTLDs, and directed ICANN staff to continue to develop a detailed implementation plan.
See Board Resolution at http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171; see Board Meeting Transcript at https://par.icann.org/files/paris/ParisBoardMeeting_26June08.txt
- On 16 May 2009, the Board participated in a workshop on issues related to the new gTLD program, including the security and stability of the Internet generally and the potential risk of malicious conduct in particular. [Rationale-all -final-20110609.doc](#)
- On 20 June 2009, the Board participated in another workshop on issues related to the new gTLD program, including the risk of malicious conduct on the Internet.
- On 26 June 2009, the Board resolved that new gTLDs be prohibited from using Domain Name System ("DNS") redirection and synthesized DNS responses; directed ICANN staff to amend the draft Applicant Guidebook accordingly; and further directed ICANN staff to educate the community about the harms associated with DNS redirection and synthesized DNS responses and how to stop them.
See Board Resolution at <https://icann.org/en/minutes/resolutions-26jun09.htm>; see Board Meeting Transcript at <http://syd.icann.org/files/meetings/sydney2009/transcript-board-meeting-26jun09-en.txt>
- During its study of malicious conduct, ICANN staff solicited and received comments from multiple outside sources, including the Anti Phishing Working Group (APWG), Registry Internet Safety Group (RISG), the Security and Stability Advisory Committee (SSAC), Computer Emergency Response Teams (CERTs) and members of the banking/financial and Internet security communities. These parties described several potential malicious conduct issues and encouraged ICANN to consider ways these might be addressed or mitigated in new gTLD registry agreements.
- On 1 October 2009, ICANN announced the launch of the Expedited Registry Security Request ("ERSR") process. ICANN intends that

gTLD registries will use the ERSR process for security incidents that require immediate action by the registry in order to avoid adverse effects upon DNS stability or security. The ERSR, a web-based submission procedure, reflects the result of a collaborative effort between ICANN and existing gTLD registries to develop a process for quick action in cases where gTLD registries: (1) inform ICANN of a present or imminent security threat to their TLD and/or the DNS; and (2) request a contractual waiver for actions they may take or already have taken to mitigate or eliminate the threat.

<http://www.icann.org/en/announcements/announcement-01oct09-en.htm>

- On 3 October 2009, ICANN published an Explanatory Memorandum on Mitigating Malicious Conduct, part of a series of documents published by ICANN to assist the global Internet community in understanding the development of the new gTLD program and the requirements and processes presented in the Applicant Guidebook. <https://icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-04oct09-en.pdf>
- On 24 November 2009, ICANN announced that it was soliciting members for two new temporary expert advisory groups to study issues related to the risk of malicious conduct: (1) the establishment of a high security TLD designation; and (2) centralized zone access. <https://icann.org/en/announcements/announcement-03dec09-en.htm>
- On 3 December 2009, ICANN announced that it had formed the High Security Zone Advisory Group and the Centralized Zone File Access Advisory Group. <http://www.icann.org/en/announcements/announcement-03dec09-en.htm>
- On 22 February 2010, ICANN published papers by the High Security Zone Advisory Committee and the Central File Access Advisory Committee and solicited public comments. As the result of the latter paper, a uniform method of accessing registry data is now incorporated into the Guidebook. <http://www.icann.org/en/announcements/announcement-22feb10-en.htm>

- On 28 May 2010, ICANN published an Updated Explanatory Memorandum of Mitigating Malicious Conduct. The paper described specific malicious conduct mitigation measures that were recommended by recognized experts in this area that were subsequently incorporated into the Applicant Guidebook.
<http://www.icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-memo-update-28may10-en.pdf>
- On 16 June 2010, ICANN solicited comments on the High Security Zone Advisory Committee's Policy Development Snapshot #2.
<http://www.icann.org/en/topics/new-gtlds/hstld-program-snapshot-2-16jun10-en.pdf>
- On 22 September 2010, ICANN published a Request for Information on the proposed High Security Zone program and requested that all submissions be made by 23 November 2010.
- On 23 September 2010, the GAC outlined to the Board its concerns and recommendations for the new gTLD program and its comments on version 4 of the Draft Applicant Guidebook.
<http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>
- On 24-25 September 2010, the Board participated in another workshop on issues related to the new gTLD program, including discussions on background screening, orphan glue records, and the High-Security Top-Level Domain (HSTLD) concept.
<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.8>
- On 12 November 2010, ICANN published a second Updated Explanatory Memorandum of Mitigating Malicious Conduct.
<https://icann.org/en/topics/new-gtlds/explanatory-memo-mitigating-malicious-conduct-12nov10-en.pdf>. This memo noted ICANN's adoption of the Zone File Access Advisory Group's [Strategy Proposal](#) for a recommendation to create a mechanism to support the centralization of access to zone-file records. This centralized approach is intended to streamline the access and approval process and standardize the format methodology for zone file consumers (e.g. anti-abuse and trademark protection organizations, researchers, academia, etc.). The Centralized Zone Data Access Provider pilot program was deployed for testing in June 2011 and a

production version program is anticipated to be deployed before any new gTLDs are delegated in the root. [Rationale-all -final-20110609.doc](#)

- On 9 December 2010, the GAC provided ICANN with a list of issues it considered to be “outstanding” and requiring further consideration, including consumer protection/the risk of malicious conduct.
http://gac.icann.org/system/files/Cartagena_Communique.pdf
- On 10 December 2010, the Board resolved that ICANN had addressed the issue of the risk of increased malicious conduct in new gTLDs by adopting and implementing various measures, including centralized zone file access. The Board further stated that these solutions reflected the negotiated position of the ICANN community, but that ICANN would continue to take into account public comment and the advice of the GAC.
See Board Resolution at <https://icann.org/en/minutes/resolutions-10dec10-en.htm>; see Board Meeting Minutes at <https://icann.org/en/minutes/minutes-10dec10-en.htm>
- On 21 February 2011, ICANN published a briefing paper on issues the GAC had identified as “outstanding” in September 2010, including certain issues related to the risk of increased malicious conduct.
<http://www.icann.org/en/announcements/announcement-6-21feb11-en.htm>
- On 28 February 2011 and 1 March 2011, the GAC and the Board conferred about remaining outstanding issues related to the new gTLD program, including certain issues related to the risk of increased malicious conduct.
<http://www.icann.org/en/announcements/announcement-23feb11-en.htm>
- On 4 March 2011, the Board published its comments on the GAC Scorecard.
<http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-04mar11-en.pdf>
- On 15 April 2011, ICANN posted a discussion draft of the Applicant Guidebook (the “Discussion Draft Guidebook”).

<http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf>

- On 26 May 2011, the GAC provided comments on the 15 April 2011 Discussion Draft.
<http://gac.icann.org/system/files/GAC%20Comments%20on%20the%20new%20gTLDs%20-%2026%20May%202011.pdf>
- The GAC-Board discussions resulted in additional forms of background checks and requirements for new registries to cooperate with law enforcement.
- On 30 May 2011, ICANN posted another version of the Applicant Guidebook, taking into account public comment and the additional comment from the GAC.
<http://icann.org/en/topics/new-gtlds/comments-7-en.htm>

III. The Board's Analysis of the Risk of Increased Malicious Conduct Associated with the New gTLD Program

A. Why the Board is Addressing This Issue Now

- ICANN's mission statement and one of its founding principles is to promote competition. The expansion of TLDs will allow for more innovation and choice in the Internet's addressing system. The ICANN Board seeks to implement the new gTLD program together with measures designed to mitigate the risk of increased malicious conduct on the Internet.
- ICANN committed to the U.S. Department of Commerce that it would address the risk of malicious conduct in new gTLDs prior to implementing the program.
- The ICANN Board is committed to making decisions based on solid factual investigation and expert analysis.

B. Who the Board Consulted

- The GNSO
- The GAC
- The At-Large Community and ALAC

- The ICANN Implementation Recommendation Team (“IRT”)
- The Anti-Phishing Working Group
<http://www.antiphishing.org/>
- The Registry Internet Safety Group
<http://registrysafety.org/website/>
- The ICANN Security and Stability Advisory Committee
<http://www.icann.org/en/committees/security/>
- Computer Emergency Response Teams (“CERTs”)
See, e.g., <http://www.us-cert.gov/>
- The ICANN Zone File Access Advisory Group
<http://www.icann.org/en/topics/new-gtlds/zone-file-access-en.htm>
- The ICANN High Security Zone TLD Advisory Group
<http://www.icann.org/en/topics/new-gtlds/hstld-program-en.htm>
- The Registration Abuse Policies Working Group
<https://st.icann.org/reg-abuse-wg/>
- The Registrar Stakeholder Group
<http://www.icannregistrars.org/>
- The Registries Stakeholder Group
<http://www.gtldregistries.org/>
- Members of the banking and financial community, including the BITS Fraud Reduction Program, the American Bankers Association, the Financial Services Information Sharing and Analysis Center (“FS-ISAC”), and the Financial Services Technology Consortium (“FSTC”)
See, e.g., www.icann.org/en/correspondence/bell-to-beckstrom-11aug09-en.pdf; and
<http://www.icann.org/en/correspondence/evanoff-to-beckstrom-13nov09-en.pdf>
- Members of the Internet security community, including the Worldwide Forum of Incident Response and Security Teams (“FIRST”), which consists of computer and network emergency response teams from 180 corporations, government bodies,

universities and other institutions spread across the Americas, Asia, Europe, and Oceania; as well as various law enforcement agencies

- Other stakeholders and members of the community
- Legal counsel

C. What Significant Non-Privileged Materials the Board Reviewed

- Reports and Comments from Committees and Stakeholders
 - Centralized Zone File Access:
 - 18 February 2010 gTLD Zone File Access in the Presence of Large Numbers of TLDs: Concept Paper <https://icann.org/en/topics/new-gtlds/zfa-concept-paper-18feb10-en.pdf>
 - 12 May 2010 gTLD Zone File Access For the Future: Strategy Proposal <http://www.icann.org/en/topics/new-gtlds/zfa-strategy-paper-12may10-en.pdf>
 - Wild Card Resource Records:
 - 10 November 2006 ICANN Security and Stability Advisory Committee Paper: Why TLDs Should Not Use Wild Card Resource Records <http://www.icann.org/en/committees/security/sac015.htm>
 - Phishing Attacks:
 - 26 May 2008 ICANN Security and Stability Advisory Committee Paper: Registrar Impersonation Phishing Attacks <http://www.atlarge.icann.org/files/atlarge/ssac-registrar-impersonation-24jun08.pdf>
 - 17 June 2009 Anti-Phishing Working Group Paper https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/potential_for_malicious_conduct:

[20090619162304-0-3550/original/DRAFT%20Potential%20malicious%20us-e%20issues%2020090617.pdf](https://www.icann.org/files/paris/PiscitelloNXDOMAIN.20090619162304-0-3550/original/DRAFT%20Potential%20malicious%20us-e%20issues%2020090617.pdf)

- DNS Response Modification:
 - 20 June 2008 ICANN Security and Stability Advisory Committee Paper: DNS Response Modification
<https://par.icann.org/files/paris/PiscitelloNXDOMAIN.pdf>
- Centralized Malicious Conduct Point of Contact:
 - 25 February 2009 ICANN Security and Stability Advisory Committee Paper: Registrar Abuse Point of Contact
<http://www.icann.org/en/committees/security/sac038.pdf>
- High Security Zone:
 - 18 November 2009 A Model for High Security Zone Verification Program: Draft Concept Paper
<https://icann.org/en/topics/new-gtlds/high-security-zone-verification-04oct09-en.pdf>
 - 17 February 2010 High Security Zone TLD: Draft Program Development Snapshot
<https://icann.org/en/topics/new-gtlds/hstld-program-snapshot-18feb10-en.pdf>
 - 13 April 2010 High Security TLD: Draft Program Development Snapshot
https://st.icann.org/hstld-advisory/index.cgi?hstld_program_development_snapshot_1
 - 16 June 2010 High Security Zone TLD: Draft Program Development Snapshot
<http://www.icann.org/en/topics/new-gtlds/hstld-program-snapshot-2-16jun10-en.pdf>
- Redirection and Synthesized Responses:

- 10 June 2001 ICANN Security and Stability Advisory Committee Paper: Recommendation to Prohibit Use of Redirection and Synthesized Responses (*i.e.*, Wildcarding) by New TLDs
<http://www.icann.org/en/committees/security/sac041.pdf>
- Thick vs. Thin WHOIS:
 - 30 May 2009 ICANN Explanatory Memorandum on Thick vs. Thin WHOIS for New gTLDs
<http://www.icann.org/en/topics/new-gtlds/thick-thin-whois-30may09-en.pdf>
- Trademark Protection:
 - 29 May 2009 Implementation Recommendation Team Final Draft Report to ICANN Board
<http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>
 - See the Board Rationale Memorandum on Trademark Protection for a more detailed summary of non-privileged materials the Board reviewed on this topic.
- Malicious Conduct Generally:
 - 15 April 2009 ICANN Plan for Enhancing Internet Security, Stability and Resiliency
<http://www.icann.org/en/topics/ssr/ssr-draft-plan-16may09-en.pdf>
 - 19 May 2009 Registry Internet Safety Group's Paper: Potential for Malicious Conduct in New TLDs
https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/potential_for_malicious_conduct:20090519220555-0-2071/original/RISG_Statement_on_New_TLDs-20090519.pdf
 - 19 August 2009 ICANN Security and Stability Advisory Committee Paper: Measures to Protect Domain

Registration Services Against Exploitation or Misuse
<http://www.icann.org/en/committees/security/sac040.pdf>

- 3 October 2009 ICANN’s Explanatory Memorandum on Mitigating Malicious Conduct
<https://icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-04oct09-en.pdf>
- 30 November 2009 Online Trust Alliance’s Comments on the New gTLD Program
<http://www.icann.org/en/correspondence/spiegle-to-pritz-30nov09-en.pdf>
- 28 May 2010 ICANN’s Updated Memorandum on Mitigating Malicious Conduct
<http://www.icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-memo-update-28may10-en.pdf>
- 29 May 2010 Registration Abuse Policies Working Group Final Report
<http://www.gnso.icann.org/issues/rap/rap-wg-final-report-29may10-en.pdf>
- 13 September 2010 ICANN’s Updated Plan for Enhancing Internet Security, Stability and Resiliency
<http://icann.org/en/topics/ssr/ssr-draft-plan-fy11-13sep10-en.pdf>
- 12 November 2010 ICANN’s Second Updated Memorandum on Mitigating Malicious Conduct
<https://icann.org/en/topics/new-gtlds/explanatory-memo-mitigating-malicious-conduct-12nov10-en.pdf>
- 21 February 2011 ICANN briefing paper on issues the GAC had identified as “outstanding” in September 2010, including certain issues related to the risk of increased malicious conduct
<http://www.icann.org/en/announcements/announcement-6-21feb11-en.htm>

- Comments from the Community

D. What Concerns the Community Raised

- There was concern expressed that the new gTLD program will lead to an expansion of crime on the Internet, including look-alike domains, drop catching, domain tasting, domain hijacking, malware distribution, identity theft and miscellaneous deceptive practices.
- Wrongdoers may apply to operate registries.
- Wrongdoers may exploit technical weaknesses in the Internet, including automated registration services.
- End user confusion about new gTLDs may lead to increased fraud. For example, end users may be confused about TLDs whose mere names raise expectations of security.
- Certain new gTLDs may not comply with some national laws.
- There is a need for an enhanced control framework for TLDs with intrinsic potential for abuse, including those involving e-service transactions requiring a high confidence infrastructure (such as electronic financial services or electronic voting) and those involving critical assets (such as energy infrastructures or medical services).
- There is a need for better and more efficient identification of domain name resellers.
- There is a need to ensure the integrity and utility of registry information.
- The new gTLD program should safeguard the privacy of personal and confidential information.
- New gTLDs may adversely affect trademark owners.
- ICANN and others should better enforce provisions in agreements with registries and registrars.
- ICANN should impose new requirements on TLD operators.

- There is a need for systemic processes to combat abuse on the Internet.

E. What Steps the Board Resolved to Take to Mitigate Malicious Conduct

The Board believes the following measures will greatly help to mitigate the risk of increasing malicious conduct arising from new gTLDs. ICANN has incorporated the majority of these measures in the current version of the Applicant Guidebook and/or the registry agreement, and its efforts to implement the remaining measures are ongoing.

<http://www.icann.org/en/topics/new-gtlds/dag-en.htm>

- Required vetting of registry operators: The application process includes standardized, thorough background and reference checks for companies and individuals (key officers) to mitigate the risk that known felons, members of criminal organizations or those with histories of bad business operations (including cybersquatting) will become involved in registry operations or gain ownership or proxy control of registries.
- Required demonstrations of plans for Domain Name System Security Extensions (“DNSSEC”) deployment: DNSSEC is designed to protect the Internet from most attacks, including DNS cache poisoning. It is a set of extensions to the DNS which provide: (1) origin authentication of DNS data; (2) data integrity; and (3) authenticated denial of existence.
- Prohibition on wildcarding: The prohibition on wildcarding bans DNS redirection and synthesized DNS responses to reduce the risk of DNS redirection to a malicious site.
- Required removal of orphan glue records: Removal of orphan glue records destroys potential name server “safe havens” that abusers can use to support criminal domain registrations. Registry operators will be required to remove orphan glue records when presented with evidence in written form that such records are present in connection with malicious conduct.
- Mandatory thick WHOIS records: Registry Operators must maintain and provide public access to registration data using a thick WHOIS data model. Thick WHOIS will help mitigate malicious conduct and

trademark abuse by ensuring greater accessibility and improved stability of records.

- Centralization of zone file access: Central coordination of zone file data will allow the anti-abuse community to efficiently obtain updates on new domains as they are created within each zone, and to reduce the time necessary to take corrective action within TLDs experiencing malicious activity. The program is designed to reduce differences in and complexities of contractual agreements, standardize approaches and improve security and access methods.
- Mandatory documentation of registry level abuse contacts and procedures: Registry operators will provide a single abuse point of contact for all domains within the TLD who is responsible for addressing and providing timely responses to abuse complaints received from recognized parties, such as registries, registrars, law enforcement organizations and recognized members of the anti-abuse community. Registries also must provide a description of their policies to combat abuse.
- Required participation in the Expedited Registry Security Request (“ERSR”) process: ICANN developed the ERSR process in consultation with registries, registrars and security experts, based on lessons learned in responding to the Conficker worm, to provide a process for registries to inform ICANN of a present or imminent “security situation” involving a gTLD and to request a contractual waiver for actions the registry might take or has taken to mitigate or eliminate the security concerns. “Security situation” means: (1) malicious activity involving the DNS of a scale and severity that threatens the systematic security, stability and resiliency of the DNS; (2) potential or actual unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards; or (3) potential or actual undesired consequences that may cause or threaten to cause a temporary or long-term failure of one or more of the critical functions of a gTLD registry as defined in ICANN’s gTLD Registry Continuity Plan.
- Framework for High Security Zones Verification: The concept of a voluntary verification program is a mechanism for TLDs that desire

to distinguish themselves as secure and trusted, by meeting additional requirements for establishing the accuracy of controls for the registry, registrar and registrant processing, as well as periodic independent audits. A draft framework was created by the HSTLD working group.. The working group’s Final Report may be used to inform further work. ICANN will support independent efforts toward developing voluntary high-security TLD designations, which may be available to gTLD applicants wishing to pursue such designations.

F. What Factors the Board Found to Be Significant

The Board considered numerous factors in its analysis of the potential for malicious conduct associated with the new gTLD program. The Board found the following factors to be significant:

- the principle that the Board should base Policy on solid factual investigation and expert analysis;
- whether new gTLDs would promote consumer welfare;
- certain measures intended to mitigate the risk of malicious conduct may raise implementation costs for new gTLD registries;
- the creation of new TLDs may provide an opportunity for ICANN to improve the quality of domain name registration and domain resolution services in a manner that limits opportunities for malicious conduct;
- most abuse takes place in larger registries because that is where abusive behavior “pays back,”; a more diverse gTLD landscape makes attacks less lucrative and effective;
- the risk of increasing exposure to litigation; and
- the lack of reported problems concerning increased criminal activity associated with ICANN’s previous introductions of new TLDs.

IV. The Board’s Reasons for Proceeding with the New gTLD Program While Implementing Measures to Mitigate the Risk of Malicious Conduct

- Modest additions to the root have demonstrated that additional TLDs can be added without adversely affecting the security and stability of the domain name system.
- ICANN’s “default” position should be for creating more competition as opposed to having rules that restrict the ability of Internet stakeholders to innovate. New gTLDs offer new and innovative opportunities to Internet stakeholders.
- Most abuse takes place in larger registries. A more diverse gTLD landscape makes attacks less lucrative and effective.
- New gTLD users might rely on search functions rather than typing a URL in an environment with many TLDs, lessening the effectiveness of forms of cyber-squatting.
- Brand owners might more easily create consumer awareness around their brands as a top-level name, reducing the effectiveness of phishing and other abuses.
- ICANN has worked with the community to address concerns relating to potential malicious conduct in the new gTLD space. New and ongoing work on these issues in the policy development arena may provide additional safeguards recommended as a result of the bottom-up process, and ICANN will continue to support these efforts.
- Data protection is best accomplished by data protection tools, including audits, contractual penalties such as contract termination, punitive damages, and costs of enforcement, as well as strong enforcement of rules.
- The measures adopted by ICANN, including centralized zone file access, and other mechanisms, address the principal concerns raised by stakeholders about the potential for proliferation of malicious conduct in the new gTLD space. A combination of verified security measures and the implementation of DNSSEC will

allow users to find and use more trusted DNS environments within the TLD market.

- Revised applicant procedures and agreements reflecting the measures to mitigate the risk of malicious conduct will permit ICANN to address certain risks of abuse contractually and also will permit ICANN to refer abuses to appropriate authorities. ICANN can amend contracts and the applicant guidebook to address harms that may arise as a direct or indirect result of the new gTLD program.

6. ICANN Board Rationale on Objection Process Associated with the New gTLD Program

6. ICANN Board Rationale on Objection Process Associated with the New gTLD Program

I. Introduction

Recommendation 12 of the Generic Names Supporting Organization (GNSO) Final Report on the Introduction of New gTLDs (<http://gnsso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>), and approved by the Board in June 2008 (http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171) states that, “[D]ispute resolution and challenge processes must be established prior to the start of the process.” Further, Implementation Guideline H, also set forth by the GNSO, states “External dispute providers will give decisions on objections.”

Based on the GNSO Policy and implementation planning, it was determined that four of the GNSO recommendations should serve as a basis for an objection process managed by external providers. Those include the following:

- (i) Recommendation 2 “Strings must not be confusingly similar to an existing top-level domain or a Reserved Name” (String Confusion Objection);
- (ii) Recommendation 3 “Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law” (Legal Rights Objection);
- (iii) Recommendation 6 “Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law” (Limited Public Interest Objection); and
- (iv) Recommendation 20 “An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted” (Community Objection).

Thus, a process allowing third parties to object to applications for new gTLDs on each the four grounds stated above was developed.²

Subsequent to the development and refinement of the original Objection Procedures based on the GNSO recommendations and set out in Module 3 of the Applicant Guidebook (see <http://www.icann.org/en/topics/new-gtlds/objection-procedures-clean-30may11-en.pdf>) a separate process has been established for the GAC. That process is also set out in Module 3 of the Applicant Guidebook. In short, there is now a formal process for the GAC to provide advice in relation to the approval of an application.

II. History of the Development of the Objection Processes and Procedures Associated with the New gTLD Program

This section sets forth a history of significant actions taken on the subject of the objection process associated with the new gTLD program.

- In December 2005, the GNSO commenced a rigorous policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to further stimulate competition and for numerous other reasons.
- In August 2007, the GNSO issued its final report regarding the introduction of new gTLDs. Recommendation 12 of the report (“Recommendation 12”) states that “[d]ispute resolution and challenge processes . . . must be established prior to the start of the process” and Implementation Guideline H states that “External dispute providers will give decisions on objections.” <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>
- In December 2007, ICANN posted a call for expressions of Interest from potential Dispute Resolution Service Providers (DSRP) for the new gTLD Program. <http://www.icann.org/en/announcements/announcement-21dec07.htm>

² The International Centre for Dispute Resolution (ICDR) has agreed to administer disputes brought pursuant to String Confusion Objections. The Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) has agreed to administer disputes brought pursuant to Legal Rights Objections. The International Center of Expertise of the International Chamber of Commerce (ICC) has agreed to administer disputes brought pursuant to Limited Public Interest and Community Objections.

- Throughout 2008, external dispute resolution service providers were evaluated and selected. As noted above in footnote 1, the ICDR will administer disputes brought pursuant to String Confusion Objections, WIPO will administer disputes brought pursuant to Legal Rights Objections and the ICC will administer disputes brought pursuant to Limited Public Interest and Community Objections.
- Also throughout 2008, ICANN conducted public consultations, as well as thorough and global research to help define the standing requirements and standards to be used by dispute resolution panels to resolve the disputes on the various Objection grounds.
- In October 2008, ICANN published draft version 1 of the Applicant Guidebook, including Module 3, which laid out the Dispute Resolution Procedures. At that same time, ICANN posted a paper for community discussion entitled “Morality and Public Order Objection Considerations in New gTLDs,” which summarized the implementation work that had been accomplished in response to Recommendation 6 (now called Limited Public Interest Objection).
<http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>
- In February 2009, the Board discussed who would have standing to object to an applied-for string on the basis of morality and public order. There was a sense that an objection-based dispute resolution process was the appropriate method for addressing possible disputes. There was also a sense that any injured party would have standing to object. Limiting standing to governments or other official bodies might not address the potential harm.
<http://www.icann.org/en/minutes/minutes-12feb09.htm>
- Also in February 2009, with the second draft version of the Applicant Guidebook, ICANN posted the separate “New gTLD Dispute Resolution Procedure”. <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedure-18feb09-en.pdf>
- Also in February 2009, ICANN posted a paper for community discussion entitled “Description of Independent Objector for the New gTLD Dispute Resolution Process,” which explored the potential benefits of

allowing an “Independent Objector” to object within the dispute resolution process.

<http://www.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf>

- In May 2009, along with revised excerpts of the Applicant Guidebook, ICANN posted a paper for community discussion entitled “Standards for Morality and Public Order Research,” which summarized the research relating to the development of standards for morality and public order (now Limited Public Interest) objections.
<http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>
- In May 2010, ICANN posted a paper entitled “‘Quick Look’ Procedure for Morality and Public Order Objections,” which summarized a procedure requested by community members by which morality and public order objections could be dismissed if they are determined to be “manifestly unfounded and/or an abuse of the right to object.”
<http://www.icann.org/en/topics/new-gtlds/morality-public-order-quick-look-28may10-en.pdf>
- In August 2010, Heather Dryden, Chair of the GAC, delivered a letter to Peter Dengate Thrush, Chairman of the Board, requesting that the proposed procedure for morality and public order objections be replaced with an alternative mechanism.
<http://www.icann.org/en/correspondence/gac-to-dengate-thrush-04aug10-en.pdf>
- Also in August 2010, the Board considered Submission No. 2010-08-05-15, which discussed the feedback received by the GAC with regard to the proposed procedure for morality and public order objections.
<http://www.icann.org/en/minutes/board-briefing-materials-2-05aug10-en.pdf>
- In September 2010, the cross-stakeholder group known as the New gTLD Recommendation 6 Cross-Community Working Group (“Rec6 CWG”) published a report on the Implementation of the Recommendation (the “Rec6 CWG report”). The report provided guidance to the Board with regard to procedures for addressing culturally objectionable and/or sensitive strings, while protecting internationally recognized freedom of expression rights. This report

was posted for public comment. [See link at http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm](http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm)

- Also in September 2010, the Board met in Trondheim, Norway and stated that they would “accept the [Rec6 CWG] recommendations that are not inconsistent with the existing process, as this can be achieved before the opening of the first gTLD application round, and [would] work to resolve any inconsistencies.” At the same meeting, the Board agreed that it had “ultimate responsibility for the new gTLD program ... however, [that it wished] to rely on the determination of experts on these issues.”
<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm>
- In October 2010, the Board again discussed the Rec6 CWG report, indicating that several of the working group recommendations could be included in the Guidebook for public discussion and that the working group recommendations should be discussed publicly at ICANN’s upcoming meeting in Cartagena.
<http://www.icann.org/en/minutes/resolutions-28oct10-en.htm>
- In November 2010, ICANN posted the proposed final version of the Applicant Guidebook (the “Proposed Final Guidebook”), which adopted several of the recommendations set forth in the Rec6 CWG report.
<http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf>
- Also in November 2010, ICANN posted an explanatory memorandum entitled “Limited Public Interest Objection,” which described the recommendations set forth in the Rec6 CWG report, ICANN’s responses to those recommendations and ICANN’s rationale for its responses.
<http://www.icann.org/en/topics/new-gtlds/explanatory-memorality-public-order-12nov10-en.pdf>
- In December 2010 in Cartagena, Columbia, the Board had two separate sessions with the Rec6 CWG to help achieve further understanding of the working group’s positions.
- On 23 February the GAC issued the “GAC indicative scorecard on new gTLD issues listed in the GAC Cartagena Communique” (“Scorecard”)

identifying the Objection Process as one of twelve areas for discussion.
<http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf>

- On 28 February and 1 March 2011, the Board and the GAC had a two-day consultation in Brussels, Belgium to discuss the issues raised in the Scorecard, including the suggestion that the GAC should not be subject to the Objection Procedures for Limited Public Interest Objections. Instead, a process was discussed by which the GAC could provide public policy advice on individual gTLD applications directly to the Board
- On 12 April 2011, the GAC issued “GAC comments on the ICANN’s Board’s response to the GAC Scorecard” that also addressed the Objection Procedures. <http://www.icann.org/en/topics/new-gtlds/gac-comments-board-response-gac-scorecard-12apr11-en.pdf>
- On April 15 2011, ICANN posted the April 2011 Discussion Draft of the Applicant Guidebook, containing a new “GAC Advice” section detailing the procedure by which the GAC could provide advice to the Board concerning gTLD applications. <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-redline-15apr11-en.pdf>
- Also on 15 April 2011, ICANN posted an Explanatory Memorandum entitled ‘GAC and Government Objections; Handling of Sensitive Strings; Early Warning’ to describe details of the new procedures. <http://www.icann.org/en/topics/new-gtlds/gac-objections-sensitive-strings-15apr11-en.pdf>
- [Also on 15 April 2011, ICANN posted](http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf) “Revised ICANN Notes on: the GAC New gTLDs Scorecard, and GAC Comments to Board Response” discussing its response to the GAC’s concerns on the Objection Process. <http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf>
- [On 20 May the Board and GAC had further consultations that included discussion on the Objection Process.](http://www.icann.org/en/topics/new-gtlds/transcript-board-gac-20may11-en.pdf) <http://www.icann.org/en/topics/new-gtlds/transcript-board-gac-20may11-en.pdf>

- [On 30 May, ICANN posted the current version of the Applicant Guidebook with additional refinements to the Objection Process as it relates to the GAC. http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm](http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm)
- [On 19 June 2011, the Board and the GAC had additional consultations.](#)

III. The Board’s Analysis of the Objection Process Associated with the New gTLD Program

A. Brief Introduction to the Objection Process

1. Brief Overview of the Objection Process for all except the GAC.

- The new gTLD process is an objection-based process, in which parties with standing may file with an identified independent dispute resolution provider a formal objection to an application on certain enumerated grounds (see footnote 1 for list of providers). The grounds for filing a formal objection to an application are:
 - the gTLD string is confusingly similar to an existing TLD or another applied-for gTLD string in the same round of applications (“String Confusion Objection”)
 - the gTLD string infringes the existing legal rights of the objector (“Legal Rights Objection”)
 - the gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law (“Limited Public Interest Objection”)
 - there is substantial opposition to the application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted (“Community Objection”).

<http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf>

- If the objectors have standing, their objections will be considered by a panel of qualified experts, that will issue a Determination.

- Specific standards under which each of the four types of objections will be evaluated are set forth in detail in Module 3 of the current Applicant Guidebook.
- There will be objection fees (fixed for String Confusion and Community Objections and hourly for Limited Public Interest and Community Objections) that will be refundable to the prevailing party.

2. Brief Overview of the GAC Advice Process.

- The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.
- For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period
- Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will publish the Advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.
- ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.
- The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).

B. Why the Board Addressed the Objection Process as it has

- The GNSO Policy Recommendations called for the creation of a dispute resolution or objection process in the new gTLD program.

- The GNSO also provided implementation guidelines suggesting that external dispute resolution providers should be utilized.
- A fully established objection process, with uniform standing requirements and standards available to the dispute resolution service providers, ensures that a reasonably objective process is in place. It further ensures that experts in dispute resolution make any determinations on the disputes after considering all of the evidence.
- A fully established dispute resolution process provides parties with a cost-effective alternative to initiating action in court, if there is a valid objection.
- The GAC advised the Board that it was not amendable to utilizing the standard Objection Process established for the new gTLD program. Accordingly, the Board worked closely with the GAC to develop a mutually acceptable “objection” mechanism, in the form of GAC Advice.

C. Who the Board Consulted

- Legal Counsel
- International arbitration experts
- Judges from various international tribunals such as the International Court of Justice
- Attorneys who practice in front of international tribunals such as the International Court of Justice
- The GNSO
- The GAC
- The ALAC
- The ccNSO
- The SSAC
- All other Stakeholders and Community Members

D. Significant Non-Privileged Materials the Board Reviewed

- GAC Principles Regarding New gTLDs.
http://gac.icann.org/system/files/gTLD_principles_0.pdf
- GNSO “Final Report – Introduction of new generic top-level domains.” <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>
- Report on Implementation of GNSO New GTLD Recommendation #6. See link to Report from <http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm>
- All materials related to the Board/GAC consultation. See <http://www.icann.org/en/topics/new-gtlds/related-en.htm>
- All relevant GAC letters and Communiqués. See <http://www.icann.org/en/correspondence/> and <http://gac.icann.org/communiqués>.
- Applicant Guidebook, related explanatory memoranda, other related documents and related comment summaries and analyses:
 - Each version of the Applicant Guidebook, including all ICANN created explanatory memoranda and the specific proposals for trademark protections, along with numerous pages of public comment summaries and analysis related to the Objection Procedures. See (i) <http://www.icann.org/en/topics/new-gtlds/comments-en.htm>; (ii) <http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm#expmem>; (iii) <http://www.icann.org/en/topics/new-gtlds/comments-en.htm>; (iv) <http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm>; (v) <http://www.icann.org/en/topics/new-gtlds/gns0-consultations-reports-en.htm>; (vi) <http://www.icann.org/en/announcements/announcement-4-15feb10-en.htm>; (vii) <http://www.icann.org/en/topics/new-gtlds/summaries-4-en.htm>; (viii) <http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm>; (ix)

<http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm>; (x) <http://www.icann.org/en/topics/new-gtlds/dag-en.htm>; (xi) <http://www.icann.org/en/topics/new-gtlds/comments-6-en.htm>; and (xii) <http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm>

E. Significant Concerns the Community Raised

- What will be done if there is an application for a highly objectionable name, but there are no objectors within the process?
- There is a need for clarification on what type of string would be considered to be “contrary to generally accepted legal norms relating to morality and public order . . . recognized under international principles of law.”
- Are the standards set out for each objection appropriate?
- How will fees be determined?
- Will ICANN fund certain stakeholders’ objections?
- Should it be a dispute process rather than a mere objection process?
- Are the independent dispute resolution providers the rights ones to handle the specific objections?
- Neither Governments nor the GAC should be required to utilize the Objection Procedures.

F. Factors the Board Found to Be Significant

- The Dispute Resolution Process is designed to protect certain interests and rights, those interests identified by the GNSO in their policy recommendations that were approved by the ICANN Board.
- The Dispute Resolution Process will be more cost effective and efficient than judicial proceedings. Fees will be paid directly to the dispute resolution providers.

- The Dispute Resolution Process should be independent as possible so that the applicants, the community and ICANN have the benefit of neutral expert opinion.
- It is critical to address risk to the established processes and to ICANN by providing a path for considering controversial applications that might otherwise result in litigation or attacks to the process or to the ICANN model.
- Governments have a particular interest in having an unencumbered process to provide advice to the Board without having to utilize the formal independent objection process.

G. The Board’s Reasons for Supporting the Two-pronged Objection Process Established for the New gTLD Program

- The Dispute Resolution Process complies with the policy guidance provided by the GNSO.
- The Dispute Resolution Process provides a clear, predictable path for objections and objectors.
- The Dispute Resolution Process provides clear standards that will lead to predictable, consistent results.
- The Dispute Resolution Process provides for an independent analysis of a dispute.
- The Dispute Resolution Process provides a bright line between public comment and a formal objection process so parties understand the manner in which a challenge to a particular application should be brought (a lesson learned from previous rounds).
- The Dispute Resolution Process appropriately limits the role for the Board.
- The Dispute Resolution Process limits involvement to those who truly have a valid objection.
- The Dispute Resolution Process provides for a more efficient and cost effective approach to dispute resolution than judicial proceedings.

- The Dispute Resolution Process, which provide for an “Independent Objector” to object is an important step to achieving the goal of independence and ensuring the objectionable strings are challenged.
- The GAC Advice process provides an avenue for the GAC to provide public policy advice to the Board on individual applications in a relatively timely fashion and consistent manner.
- The GAC Advice process was developed after close consultations with the GAC and provides a prescribed manner and time frame in which the Board will be able to consider GAC advice with respect to a particular string or applicant.

7. ICANN Board Rationale on Root Zone Scaling in the New gTLD Program

7. ICANN Board Rationale on Root Zone Scaling in the New gTLD Program

I. Introduction

When ICANN was formed in 1998 as a not for profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, its primary purpose was to promote competition in the domain name system ("DNS") marketplace while ensuring internet security and stability. ICANN's Bylaws and other foundational documents articulate that the promotion of competition in the registration of domain names is one of ICANN's core missions. See ICANN Bylaws, Article 1, Section 2.6.

One part of this mission is fostering competition by allowing additional Top Level Domains ("TLDs") to be created. ICANN began this process with the "proof of concept" round for a limited number of new gTLDs in 2000, and then permitted a limited number of additional "sponsored" TLDs in 2004-2005. These additions to the root demonstrated that TLDs could be added without adversely affecting the security and stability of the domain name system.

After an extensive policy development process, in August 2007, the GNSO issued a lengthy report in which it recommended that ICANN permit a significant expansion in the number of new gTLDs. The report recognized that the introduction of new gTLDs would require the expansion of the top-level DNS zone in the DNS hierarchy known as the DNS root zone ("root zone"). This expansion of the root zone, along with ICANN's recent and concurrent implementation of other changes to the root of the DNS, caused some members of the community to ask ICANN to review how the expansion of the root zone could impact root zone stability. <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>.

Between 2004 and 2010, the root of the DNS underwent significant changes, both in content as well as support infrastructure. These changes included the addition of Internationalized Domain Names ("IDNs") to the root, the deployment of IPv6 and implementation of Domain Name System Security

Extensions (“DNSSEC”). The broad scope of these changes was unprecedented. Now with new gTLDs on the horizon, further substantive changes in the root of the DNS are expected.

In response to comments from members of the community, ICANN commissioned a number of studies to address the capacity and scaling of the root server system with the goal of ensuring the stable and secure addition of new gTLDs. The studies improved ICANN’s understanding of the scalability of the root zone as it pertains to new gTLDs, and they reinforced confidence in the technical capability and stability of the root zone at the projected expansion rates. The studies also helped to inform and improve ICANN’s approach to monitoring the scalability and stability of the root zone.

II. Brief History of ICANN’s Consideration of Root Zone Scaling Associated with the New gTLD Program

This section sets forth a brief history of significant Board actions on the subject of root zone scaling associated with the new gTLD program.

- In December 2005, the GNSO commenced a rigorous policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to further stimulate competition and for numerous other reasons.
- At the 2 November 2007 ICANN Board Meeting, the Board considered the GNSO’s policy recommendation and passed a resolution requesting that ICANN staff continue working on the implementation analysis for the introduction of the new gTLD program and report back to the Board with a report on implementation issues.
<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>; http://www.icann.org/minutes/resolutions-02nov06.htm#_Toc89933880

- On 6 February 2008, ICANN published a paper entitled DNS Stability: The Effect of New Generic Top Level Domains on the Internet Domain Name System which addressed TLD Strings, technical stability and the capacity of the root zone.

<http://www.icann.org/en/topics/dns-stability-draft-paper-06feb08.pdf>
- On 6 February 2008, in response to ICANN’s publication of the paper entitled DNS Stability: The Effect of New Generic Top Level Domains in the Internet Domain System, the Board requested public comments and community feedback regarding technical issues relevant to the addition of new gTLDs. The Board also requested guidance on how best to facilitate transparency in implementing the recommendations of the paper.

<http://www.icann.org/en/announcements/announcement-06feb08.htm>
- In February 2009, the Board resolved that the Security and Stability Advisory Committee (“SSAC”) and the DNS Root Server System Advisory Committee (“RSSAC”) should jointly conduct a study analyzing the aggregate impact of the proposed implementation of various changes to the root zone and any potential effects on the security and stability within the DNS root server system. These changes include the still-recent addition of IPv6 access to the root servers, the planned addition of IDNs at the root level, signing the root zone with DNSSEC, and the provisioning of new country code IDN TLDs and new gTLDs.
- On 7 September 2009, the Root Zone Scaling Team (“RSST”) released its study entitled Scaling the Root.

<http://www.icann.org/en/committees/dns-root/root-scaling-study-report-31aug09-en.pdf>
- On 17 September 2009, the DNS Operations Analysis and Research Center (“DNS-OARC”) released the “L” Root Study entitled Root Zone Augmentation and Impact Analysis.

<http://www.icann.org/en/topics/ssr/root-zone-augmentation-analysis-17sep09-en.pdf>

- On 29 September 2009, the Netherlands Organization for Applied Scientific Research (“TNO”) released a report directed by the RSST to develop a quantitative model of the DNS Root Server System to analyze the impact of the addition of new gTLDs, IDN TLDs, IPv6 and DNSSEC. That study is entitled Root Scaling Study: Description of the DNS Root Scaling Model. <http://www.icann.org/en/committees/dns-root/root-scaling-model-description-29sep09-en.pdf>
- On 14 October 2009, the Chair of the Internet Architecture Board (“IAB”), Olaf Kolkman, sent a letter to ICANN’s Board in response to the publication of the RSST Study. He stated that the report’s recommendations were accurate and that security, stability and resiliency are the most important properties of the system and they need to continue to be monitored and safeguarded by ICANN. <http://www.icann.org/en/correspondence/kolkman-to-ceo-board-14oct09-en.pdf>
- On 3 March 2010, ICANN released its Draft Delegation Rate Scenarios for New gTLDs, laying out the plan for limiting delegation rates and outlining expected demand for new gTLDs based on: (1) current participation in the new gTLD process; (2) brand and famous mark holders; and (3) regional, national and other geographic regions that are not currently participating. <http://www.icann.org/en/announcements/announcement-03mar10-en.htm>
- On 25 September 2010, the Board adopted a resolution approving a model and a rationale for the maximum rate of applications. It set the number at 1,000 applications per year. The Board noted that the initial survey of the root server operator’s ability to support growth was successful and directed ICANN staff to revisit that estimate on a regular basis. The Board directed ICANN to consult with root zone operators

to define, monitor and publish data on root zone stability.

<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.3>

- On 6 October 2010, ICANN released its Delegation Rate Scenarios for New gTLDs, laying out in final form the plan for limiting delegation rates for new gTLDs.
- On 5 November 2010, the ICANN Board received a letter from the Chair of ICANN's Board Risk Committee, Bruce Tonkin, stating that the Risk Committee is seeking advice from RSSAC on the capability of the root server system to support the planned introduction of new gTLDs in 2011/2012.
<http://www.icann.org/en/correspondence/tonkin-to-murai-05nov10-en.pdf>
- On 25 November 2010, the ICANN Board received a letter from the Chair of RSSAC, Jun Murai, stating that the recent successful implementation of DNSSEC in the root zone was a good example of how to proceed with new capabilities. He further stated that in the case of the proposed gradual expansion of no more than 1,000 new gTLD entries per year for the next several years, the RSSAC expected the system to remain stable and robust.
<http://www.icann.org/en/correspondence/murai-to-board-25nov10-en.pdf>
- On 10 December 2010, the Board indicated that the overarching issue of root zone scaling had been addressed through expert consultation and study. The studies indicate that rate-limited addition of TLDs can be implemented without any expected impact on the stability of the root zone system. The Board also agreed to implement communications and monitoring systems to oversee the new gTLD program.
<http://www.icann.org/en/minutes/minutes-10dec10-en.htm>

III. Major Root Zone Scaling Studies Commissioned by the Board

On 3 February 2009, the ICANN Board unanimously directed the RSSAC and SSAC to jointly study “the impact to security and stability within the DNS root server system of [the IPv6, IDN TLDs, DNSSEC and new gTLDs] proposed implementations.” The Board resolution stated that the joint studies should: (1) address the implications of the initial implementation of these changes occurring during a compressed time period; (2) address the capacity and scaling of the root server system to address a wide range of technical challenges and operational demands that might emerge as part of the implementation of proposed changes; and (3) ensure that the process for establishing the study terms, design and implementation will address technical and operational concerns regarding expanding the DNS root zone. <http://www.icann.org/en/minutes/minutes-03feb09.htm>.

In response to the Board’s 3 February 2009 Resolution, ICANN commissioned two studies. The “L” Root Study focused on the impact of the scaling of the root on one server. The RSST Study modeled the processes in the root management system and analyzed the results of scaling the system.

The studies made important observations about possible limits to the root system, including limits to the pace of scaling and limitations other than purely technical, e.g. in processing TLD applications through ICANN, NTIA and VeriSign. Neither study found meaningful technical limitations in system scaling. The RSST Study recommended ongoing system modeling and monitoring, and encouraged improved communication with ICANN staff on gTLD forecasts and plans. To follow up on the RSST Study, the TNO put together a modeling contribution in conjunction with the RSST Study to transform the information and findings in the RSST Study into a quantitative model and simulation software.

A. The “L” Root Study

The DNS-OARC released the “L” Root Study on 17 September 2009. The DNS-OARC conducted the study pursuant to a contract with ICANN. The study focused specifically on the impact of adding IPv6, DNSSEC and new TLDs to a laboratory simulation of the “L” Root Server. See

<http://www.icann.org/en/topics/ssr/root-zone-augmentation-analysis-17sep09-en.pdf>.

The DNS-OARC performed a number of simulations and measurements with BIND and NSD server software and varying zone sizes to better understand how the new gTLD program changes may affect the performance of, and resource requirements for, the root DNS server infrastructure. The analysis looked at five key areas that would have an impact on operations: (1) zone size; (2) name server reload and restart times; (3) DNS response latency; (4) inter-nameserver bandwidth utilization; and (5) potential increases in Transmission Control Protocol usage.

The “L” Root Study concluded that at least that one root server could easily handle both the deployment of the new technologies as well as the new gTLD program.

B. The RSST Study

The RSST released their study on 7 September 2009. It undertook to determine if, how, and to what extent “scaling the root” will affect the management and operation of the root system. The RSST Study considered the “L” Root Study as part of its input and outsourced the development of a simulation of root management processes and conducted interviews with root server operators, IANA staff, VeriSign, NTIA and others. The RSST Study reviewed the impact on the root servers, and on the provisioning systems that lead up to the root zone being propagated to the root servers. See <http://www.icann.org/en/topics/ssr/root-zone-augmentation-analysis-17sep09-en.pdf>.

The study provided qualitative and quantitative models of the root system that show how the root zone’s different parts are related and how the root zone responds to changes in the parameters that define its environment. The RSST Study’s conclusions assume that the estimate of less than 1,000 new gTLDs being added to the root zone per year is accurate. The study also assumes that other parameters relating to the management of the DNS root will not be substantively

altered. With these assumptions in mind, the RSST Study concluded that normal operational upgrade cycles and resource allocations will be sufficient to ensure that scaling the root, both in terms of new technologies as well as new content, will have no significant impact on the stability of the root system.

The principal results of the study are qualitative and quantitative models. These models enable the static simulation of popular “what-if” scenarios—*e.g.*, “what would happen if the size of the root zone increased by three orders of magnitude (assuming that everything in the system remained as it is today)?”—but also a far more useful dynamic analysis of the way in which the system responds and adapts to changes in the DNS environment over time. The analysis allows the community to anticipate the consequences of scaling the root, identify and recognize “early warning signs” of system stress, and plan ahead for any mitigating steps that may be necessary to keep the system running smoothly if and when signs of stress appear. The RSST Study also recommended that the Board call on ICANN’s staff to take on a monitoring role in collaboration with other system partners as an element of the new gTLD program rollout.

C. The TNO Report

To follow up on the RSST Study, the TNO put together a modeling contribution in conjunction with the RSST Study to transform the information and findings in the RSST Study into a quantitative model and simulation software. The TNO Report was able to simulate several cases for the purpose of model validation and to illustrate typical use of the simulation model. More specifically, this study was directed by the RSST to apply quantitative modeling expertise to develop a quantitative model of the DNS Root Server System to analyze ways it responds to the addition of new gTLDs, IDN TLDs, IPv6 and DNSSEC. The TNO suggested that the model be fine-tuned as the new gTLD program is implemented, and that the model be used as a tool by ICANN in order to give ICANN more accurate boundaries for the scalability of the root. See <http://www.icann.org/en/committees/dns-root/root-scaling-model-description-29sep09-en.pdf>.

IV. The Board’s Analysis of Root Zone Scaling

A. Why the Board Commissioned Studies on Root Zone Scaling

- ICANN’s mission statement and one of its founding principles is to promote user choice and competition. ICANN has created significant competition at the registrar level that has resulted in enormous benefits for consumers. To date, ICANN has not created meaningful competition at the registry level. Based upon the report and recommendation from the GNSO to introduce new gTLDs, the Board decided to proceed with the new gTLD program.
- Both the Board and members of the community have commented that the introduction of new gTLDs would require the expansion of the root zone and could impact root zone stability. To address these comments, on 3 February 2009, the Board adopted a resolution approving the SSAC/RSSAC Stability Studies which led to the commissioning of the “L” Root Study and RSST Study.

B. Who the Board Consult Regarding Root Zone Scaling

- Legal Counsel
- The GNSO
- The GAC
- DNS-OARC
- The SSAC
- The RSSAC
- The TNO

- All other Stakeholders and Community members through public comment forum and other methods of participation.

C. What Significant Non-Privileged Materials the Board Reviewed

In evaluating the issue of root zone scaling, the ICANN Board reviewed various materials to determine the stability of the root zone: (1) Deployment Experience; (2) Studies and Models; and (3) Public Comments.

1. Deployment Experience

In order to determine the stability of the root zone with the implementation of the new gTLD program, the Board closely evaluated the impact of the significant changes that had already been implemented or were in the process of being implemented into the root zone. Since February 2008, there have been significant additions to the root zone with the adoption and implementation of IDNs, IPv6 and DNSSEC. In fact, during the period between July 2004 when the first IPv6 addresses were added to the root zone for TLD name servers, until July 2010 when the root was DNSSEC-signed and Delegation Signer Records were inserted, the root DNS service continued with no reported or publicly visible degradation of service. The Board evaluated the impact of each individual addition to the root zone to date, and determined that the addition of IPv6 to the root system, IDN TLDs and the deployment of DNSSEC had no significant harmful effects that were observed by or reported to ICANN’s Board. Below is a timeline of the various additions to the root zone since July 2004:

Date	Technology	Event
July 2004	IPv6	First IPv6 addresses added to the root zone for top-level domains (KR and JP).
November 2005	DNSSEC	First top-level domain (.SE) signed.
June 2007	DNSSEC	IANA DNSSEC-signed root test bed made available.

August 2007	IDNs	Test IDN top-level domains added to the root.
February 2008	IPv6, gTLDs	First IPv6 addresses added for root servers (A, F, J, K, L and M). A limit of a maximum of less than 1,000 new gTLDs per year is derived from estimates of gTLD processing times.
January 2010	DNSSEC	Deliberately Unvalidatable Root Zone (DURZ) published on first root server ("L").
May 2010	IDNs, DNSSEC	First production IDNs added to the root (for Egypt, Saudi Arabia and United Arab Emirates). DURZ deployed on all 13 root servers.
June 2010	DNSSEC	First DS records are published in the root zone (for .UK and .BR).
July 2010	DNSSEC	Root is DNSSEC-signed and the root trust anchor is published.

<http://icann.org/en/topics/new-gtlds/summary-of-impact-root-zone-scaling-06oct10-en.pdf>

The deployment of new technologies continues without any significant impact to root zone stability. Deployment of IPv6 in the root, which began in 2004, caused no significant harmful effects. Insertion of IDNs into the root in 2007 similarly was a non-event from the perspective of stability of the DNS, and deployment of DNSSEC in the root starting in January 2010 resulted in no observable or reported negative consequences. The empirical data drawn from the deployment of these new technologies can be used to validate the observations. Furthermore, the Board looked at this data, and the continued stability of the root zone throughout the implementation of these programs, as a demonstration that the introduction of the new gTLD program at the proposed max rate of 1,000 applications per year would similarly not impact the stability of the root zone.

2. Studies and Models

As previously mentioned, the ICANN Board commissioned two studies in order to analyze any impact the new gTLD program might have on the root zone. Both of these studies took a different approach to evaluate the possible impact the new gTLD program might have on root zone stability. Along with the TNO Report, the studies concluded that if the proposed new gTLD program is implemented pursuant to the adopted model of a maximum of 1,000 applications per year, the program will have no significant impact on the stability of the root system.

3. Public Comments and the Board's Response

Throughout the Board's analysis of the new gTLD program, in particular with respect to its possible impact to root zone stability, the Board considered public comments made by individuals both in public comment forums and in direct response to the release of the two root zone stability studies. The universe of comments pertaining to root zone scaling is still available. See <http://forum.icann.org/lists/scaling/index.html>.

The ICANN Board's responses to those comments made in response to the RSST Study were published for the public. See <http://icann.org/en/committees/dns-root/summary-analysis-root-scaling-study-tor-04oct09-en.pdf>.

D. What Factors the Board Found to Be Significant

The Board considered numerous factors in its analysis of root zone scaling. The Board found the following factors to be significant:

- the principle that the Board should base its decision on solid factual investigation and expert consultation and study;
- the addition of new gTLDs to the root in order to stimulate competition at the registry level;
- the stable and secure addition of addition of new gTLDs to the DNS;

- the continued security, stability and resiliency of the root zone; and
- the continued monitoring of the root zone system.

V. The Board’s Reasons for Concluding the Introduction of New gTLDs Will Not Harm the Root Zone

The overarching issue of root zone scaling has been addressed through conversations with the public, expert consultation and expert analysis of the impact of the new gTLD program. These studies, consultations and interactions with the community facilitated the Board’s study of the possible impacts the introduction of new gTLDs may have on root zone stability. The Board concluded that the additional gTLDs may be delegated without any significant impact on the stability of the root zone system.

The Board will continue to closely monitor the stability of the root zone and will call on its staff to take on a monitoring regime along with other system partners as an element of the new gTLD program roll-out. Furthermore, the Board will ensure that ICANN staff and system partners establish effective communication channels with root zone operators and RSSAC to ensure a timely response to any changes in the root zone environment.

8. ICANN Board Rationale on String Similarity and String Contention Associated with the gTLD Program

8. ICANN Board Rationale on String Similarity and String Contention Associated with the gTLD Program

I. Introduction

Through the development of the new gTLD program, the Board has given consideration to issues of potential user confusion resulting from the delegation of many similar TLD strings, as well as to creating procedures for resolving contention cases (i.e., where there is more than one qualified applicant for a TLD).

The foundational policy guidance for the program contains the principle that strings likely to cause user confusion should be avoided. Additionally, policy guidance recommended that there should be a preference for community applications in contention situations.

This memorandum focuses on the Board's review of these issues in implementing these principles in the new gTLD program. The memorandum summarizes the Board's consideration of these issues, and the Board's rationale for implementing the new gTLD program with the provisions on string contention and string similarity.

II. Brief History of ICANN's Analysis of String Similarity and String Contention Associated With the gTLD Program

This section sets forth a brief history of significant actions on the subject of string contention associated with the new gTLD program.

- In December 2005, the GNSO commenced a rigorous policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to further stimulate competition and for other reasons.
- In February 2007, Bruce Tonkin sent an email to the GNSO Council, describing the type of contention resolution methods under discussion for the gTLD process, including self-resolution, among the parties, third-party mediation, a bidding process, auctions, and testing for community affiliations.

<http://forum.icann.org/lists/gtld-council/msg00358.html>;
<http://forum.icann.org/lists/gtld-council/msg00359.html>

- In March 2007, the Governmental Advisory Committee issued its GAC Principles regarding New gTLDs. This included: 2.4: In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains, no two letter gTLDs should be introduced.
http://gac.icann.org/system/files/gTLD_principles_0.pdf
- In August 2007, the GNSO issued its final report regarding the introduction of new gTLDs, including Recommendation 2, which stated that “strings must not be confusingly similar to an existing top-level domain or a Reserved Name.”
<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>
- The GNSO’s Final Report also included Implementation Guideline F, which stated: If there is contention for strings, applicants may: i) resolve contention between them within a pre-established timeframe; ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and; iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.
- In March 2008, ICANN reported on preliminary work with SWORD to develop a potential algorithm that could help to automate the process for assessing similarity among proposed and existing TLD strings. <http://www.icann.org/en/minutes/prelim-report-27mar08.htm>
- On 26 June 2008, the Board adopted the Generic Names Supporting Organization’s (“GNSO”) policy recommendations for the introduction of new gTLDs, and directed ICANN staff to continue to develop a detailed implementation plan.
See Board Resolution at
<http://www.icann.org/en/minutes/resolutions->

[26jun08.htm# Toc76113171](#); see Board Meeting Transcript at https://par.icann.org/files/paris/ParisBoardMeeting_26June08.txt

- In August 2008, ICANN considered the use of auctions as a tie-breaking mechanism within the new gTLD process. <https://www.icann.org/en/topics/new-gtlds/program-updates-2008.htm>
- Also in August 2008, ICANN posted a paper for community discussion, entitled “The Economic Case for Auctions,” which explores the potential benefits of auctions as a tie-breaking mechanism. <https://www.icann.org/en/topics/economic-case-auctions-08aug08-en.pdf>
- Also in August 2008, ICANN considered the use of a string similarity algorithm to help automate the process for assessing similarity among the proposed and existing TLD strings. SWORD completed a beta algorithm and reviewed several test cases with ICANN staff to refine the parameters and discuss how the algorithm could be successfully integrated as a tool to help implement the GNSO's recommendation that new gTLD strings should not result in user confusion. <https://www.icann.org/en/topics/new-gtlds/program-updates-2008.htm>; <http://www.icann.org/en/announcements/announcement-08aug08-en.htm>
- In October 2008, the Board passed a resolution, authorizing the CEO, COO and/or General Counsel of ICANN to enter into an agreement for algorithm related services with SWORD. <https://www.icann.org/en/minutes/prelim-report-01oct08.htm>
- On 24 October 2008, ICANN published Version 1 of the new gTLD Applicant Guidebook (“Version 1”), as well as an explanatory memorandum, “Resolving String Contention,” <http://www.icann.org/en/topics/new-gtlds/string-contention-22oct08-en.pdf>, describing the reasons for the contention procedures found in the draft Guidebook. The Guidebook included a preliminary establishment of contention sets based on similarity between strings, opportunities for applicants to self-resolve such contention, a comparative evaluation process, and an objective

mechanism as a last resort.

<http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>

- These procedures have been continually revised, updated, and posted for comment through successive drafts of the Guidebook. In February 2009, auctions were identified as an objective mechanism of last resort for resolving string contention, included in an updated memorandum, <http://www.icann.org/en/topics/new-gtlds/string-contention-18feb09-en.pdf>, and beginning in draft version 2 of the Guidebook. <http://www.icann.org/en/topics/new-gtlds/draft-string-contention-clean-18feb09-en.pdf>
- Comments on successive drafts of the Guidebook expressed a desire for greater clarity around the standards to be used for comparative evaluation, including requests for examples of applications that would and would not meet the threshold. In response to these comments, ICANN developed detailed explanatory notes for each of the scoring criteria to give additional guidance to applicants. These were included beginning in draft version 3 of the Guidebook. <http://www.icann.org/en/topics/new-gtlds/draft-string-contention-clean-04oct09-en.pdf>
- In May 2010, ICANN issued draft version 4 of the Guidebook. The comparative evaluation was renamed the Community Priority Evaluation, to more accurately convey the purpose and nature of the evaluation (i.e., not comparing applicants to one another but comparing each against a common set of criteria). Version 4 also included definitions for terms used in the explanatory notes as well as clarifications and expanded guidance in several areas. <http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm>
- In June 2010, the GNSO Council and the Registries Stakeholder Group requested that exceptions be granted from findings of confusing similarity. The reason for granting an exception would be that a string pair that was found to be confusingly similar constituted a case of "non-detrimental confusion." <http://gns0.icann.org/mailling-lists/archives/council/msg09379.html>; <http://forum.icann.org/lists/string-similarity->

[amendment/msg00002.html](#);
<http://www.icann.org/en/minutes/board-briefing-materials-1-25sep10-en.pdf>

- In September 2010, the Board discussed the subject of string similarity and resolved to encourage policy development as needed to consider any exceptions from findings of confusing similarity.
<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.4>
- On 30 May 2011, ICANN posted the Applicant Guidebook for consideration by the Board.
<http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm>

III. The Board's Analysis of String Similarity and String Contention

A. Brief Introduction to String Similarity and String Contention

1. String Similarity

This section sets forth an overview of the string similarity determination:

- What is the Concern over String Similarity?
 - The Board determined that delegating highly similar TLDs in the new gTLD program created the threat of detrimental user confusion.
- How Is It Determined that String Similarity Exists?
 - The preliminary similarity review will be conducted by a panel of String Similarity Examiners, who will use the following standard to test for whether string confusion exists:

String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

- The examination will be informed by human judgment assisted by criteria and an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs. <http://icann.sword-group.com/algorithm/>
- What Happens Once the Determination is Made that String Similarity Exists?
 - In the simple case in which an applied-for TLD string is identical to an existing TLD, the application system will not allow the application to be submitted.
 - An application that fails the string confusion review and is found too similar to an existing TLD string will not pass the Initial Evaluation stage of the evaluation process, and no further reviews will be available.
 - An application that passes the string similarity review in the Initial Evaluation is still subject to challenge regarding string similarity in the current application round. That process requires that a specific string similarity objection be filed by an objector having the standing to make such an objection. Such category of objection is not limited to visual similarity. Rather, confusion based on any type of similarity may be claimed by an objector, visual, phonetic, and semantic similarity.
 - An application that passes the string similarity review and is not subject to a string confusion objection would proceed to the next relevant stage of the process.

2. String Contention

This section sets forth an overview of the string contention process:

- What is String Contention?
 - String contention is said to occur when the strings of two or more applications are identical or found to be so similar that delegation of both will create a threat of user confusion.
- What Components Are Involved in the String Contention Process?

- Identifying gTLD strings that are likely to deceive or cause user confusion in relation to either existing TLDs or reserved names or applied-for gTLDs; and
- Resolving the string contention.
- How is a Contention Set Identified?
 - In the initial evaluation of an applied for gTLD, a string similarity panel, using the procedures described above, will determine whether two or more applications for gTLDs are in direct string contention. The applications that are determined to be in direct string contention will be marked for later resolution of the contention and proceed to the subsequent process steps. Applications that are not part of a contention set can proceed to the next stage of the evaluation process without further action.
 - Applications are in direct string contention if their proposed strings are identical or so similar that string confusion would occur if both were to be delegated as TLDs. The determination is based on human judgment assisted by an algorithmic test performed on applications.
 - Two applications are in indirect string contention if they are both in direct string contention with a third application, but not with each other.
 - During the objection process, an applicant may file a string confusion objection to assert string confusion. If the objection is upheld by the panel adjudicating the objection, the applications will be deemed to be in a direct string contention and the relevant contention sets will be modified accordingly.
 - The final contention sets are established once the extended evaluation and objection process have been concluded, because some applications may be excluded in those steps.
- How is a Contention Set Resolved?

- Voluntary settlements or agreements can occur between applications that result in the withdrawal of one or more applications. These can occur at any stage of the process, once ICANN has posted the applications received. However, material changes to an application may require a re-evaluation.
- Community priority evaluation can be used only if at least one of the applications involved is community-based and has expressed a preference for community priority evaluation. A panel will receive and score the community-based applications against the established criteria for: (1) community establishment; (2) nexus between the proposed string and community; (3) dedicated registration policies; and (4) community endorsement. If one application is a “clear winner” (i.e., meets the community priority criteria), the application proceeds to the next step and its direct contenders are eliminated. If there is no “clear winner,” the contention set will be resolved through negotiation between the parties or auction. It may occur that more than one application meets the community priority criteria, in which case time will be allowed for resolving the remaining contention by either applicant withdrawing, otherwise an auction between those applicants will resolve the contention.
- A community application that prevails in a community priority evaluation eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria. Arriving at the best outcome in a contention situation requires careful balancing of several variables, and this is the reason that a number of factors are included in the analysis.
- Auction is available as a last resort mechanism for resolving string contention when (1) contending applicants successfully complete all evaluations; (2) contending applicants elect not to use community priority evaluation, were not eligible for community priority evaluation, or

community priority evaluation did not provide a “clear winner”; and (3) contending applications have not resolved the contention among themselves.

B. Why The Board Addressed String Similarity and String Contention

- The new gTLD program will increase the number of domain names available, implying a risk that “confusingly” similar strings will appear.
- It is in the interests of consumer confidence and security to protect against the threat of user confusion and to avoid increasing opportunities for bad faith entities who wish to defraud users.
- Measures should be in place to protect internet users from the potential harm in delegating confusingly similar strings in the new gTLD program.
- The Board wants to create greater certainty in the domain name marketplace by crafting a fair and practical approach on how to identify and how best to resolve contention sets.
- The Board adopted the GNSO policy recommendations, including the implementation guideline implying that a community-based TLD application could be given a priority in cases of contention.

C. Who the Board Consulted

- Legal Counsel
- The GNSO
- The GAC
- The ALAC
- The ccNSO
- The SSAC
- All other Stakeholders and Community members through public comment forum and other methods of participation.

D. What Significant Non-Privileged Materials the Board Reviewed

- **GNSO Policy Recommendations**
 - Recommendation 2: Strings must not be confusingly similar to an existing top-level domain or a Reserved Name
<http://GNSO.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>
 - Implementation Guideline F: If there is contention for strings, applicants may:
 - i) resolve contention between them within a pre-established timeframe
 - ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and
 - iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.
- **GAC Principles**
 - Recommendation 2.4: In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains, no two letter gTLDs should be introduced
http://gac.icann.org/system/files/gTLD_principles_0.pdf
- **Comments from the Community**
 - <http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm>

E. What Concerns the Community Raised

- There is a need for clarification on the definition of “confusing similarity.”
- There are questions about the definitions for “standard” vs. “community-based” TLD types.
- There is a need for objective procedures and criteria for the community priority evaluation.

- A special form of resolution should be considered for a contention set involving two community-based applicants of equal strength, so that such a contention set is not required to go to auction.
- There is concern over using the auction process (and the receipt of auction proceeds) as a means to resolve contention for TLDs.
- There is concern that the string similarity algorithm only accounts for visual similarity, and does not accurately gauge the human reaction of confusion.
- Proceeds from auctions may be used for the benefit of the DNS and be spent through creation of a foundation that includes oversight by the community.

F. What Factors the Board Found to Be Significant

- There should be a consistent and predictable model for the resolution of contention among applicants for gTLD strings;
- The process should be kept as straightforward as possible to avoid unnecessary risks;
- There is potential harm in confusingly similar TLD strings that extends not only to the interests of existing TLD operators, but also to Internet users; and
- The protections set forth in the current string similarity process will safeguard both user and operator interests;

IV. The Board’s Reasons for Supporting the String Contention Process Contemplated in the new gTLD Program

- The Algorithm is a tool to aid the string similarity analysis.
 - The algorithm will be a consistent and predicable tool to inform the string confusion element of the new gTLD program. The algorithm will provide guidance to applicants and evaluators;
 - The role of the algorithm is primarily indicative; it is intended to provide informational data to the panel of examiners and expedite their review.

- The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes
- Human judgment will be the determining factor in the final decisions regarding confusing similarity for all proposed strings.
- Contending applicants should be given the opportunity to settle contention among themselves – this will result in innovative and economic solutions.
- The community priority evaluation stage of the string contention process features sufficient criteria to: (a) validate the designation given to community-based applications; and (b) assess a preference for community-based applications in a contention set. Both the GNSO Final Report and GAC Principles encourage the special consideration of applications that are supported by communities. <http://GNSO.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>; http://gac.icann.org/system/files/gTLD_principles_0.pdf
- The GAC Principle that two-letter TLDs should not be delegated to avoid confusion with ccTLDs was adopted.
- There are advantages to an auction as a resolution mechanism of last resort.
 - It is an objective test; other means are subjective and might give unfair results, are unpredictable, and might be subject to abuses.
 - It assures the round will finish in a timely way.
 - It is thought that few auctions will actually occur. A negotiated settlement will be a lower-cost solution for the parties than an auction. The availability of auctions will encourage parties to settle. Even if there are proceeds from auctions, these will be expended in a process that includes independent oversight.
 - Ascending clock auctions typically employ an “activity rule,” where a bidder needs to have been “in” at early prices in the auction in order to continue to stay “in” at later prices. This is useful because in an ascending clock auction, bidders are

informed of the number of contending applications that have remained “in” after each round, but not their identities. With the specified activity rule, this demand information has real significance, as a competitor who has exited the auction cannot later re-enter.

- The auctioneer in ascending clock auctions has the ability to pace the speed at which prices increase. This facet has greatest importance if related items are auctioned simultaneously, as their prices can then be paced to increase together in relation to the level of demand. This has the advantage of providing bidders with information about the level of demand for other new gTLDs—and hence the value of a new gTLD—while the auction is still in progress.

9. ICANN Board Rationale On Trademark Protection in the New gTLD Program

9. ICANN Board Rationale On Trademark Protection in the New gTLD Program

I. Introduction

One of ICANN’s core values is “[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.” <http://www.icann.org/en/general/bylaws.htm>. In furtherance of this core value, ICANN is committed to ensuring that the concerns of all community members, including trademark holders, are considered and addressed to the extent practicable before launching the new generic top level domain (“gTLD”) program.

ICANN has long recognized the importance of ensuring that the introduction of new gTLDs is conducted consistently with the protection of the rights of trademark holders, communities and other rights holders from abusive registration and infringement. In each previous expansion to the domain name system (“DNS”), the protection of legal rights of third parties was a feature of the application and evaluation process. For the new gTLD Program, ICANN has sought input from numerous stakeholders, including trademark holders, trademark lawyers, businesses, other constituencies and governments, to devise a multi-layered approach to protecting the rights of third parties. The approach includes a pre-delegation dispute resolution process for protecting existing legal rights at the top level. Also included in this approach are numerous rights protection mechanisms at the second level such as: (i) the establishment of a trademark clearinghouse to support both sunrise and trademark claims processes, a trademark post-delegation dispute resolution procedure (PDDRP), the Uniform Rapid Suspension System (URS) and the requirement for registries to maintain a thick Whois database. Of course, also available to all is the existing, long-standing and tested Uniform Domain Name Dispute Resolution Policy (UDRP).

II. History of the Board's Consideration of Trademark Protection

This section contains a brief history of significant actions taken to address trademark protection in the new gTLD program.

- On 1 February 2007, the Generic Names Supporting Organization (“GNSO”) Council approved a request to form a Working Group on

Protecting the Rights of Others.

<http://gns0.icann.org/meetings/minutes-gns0-01feb07.html>

- On 15 March 2007, the GNSO Council ratified a Statement of Work for the newly-formed GNSO Working Group on Protecting the Rights of Others. <http://gns0.icann.org/meetings/minutes-gns0-15mar07.html>
- On 26 June 2007, the GNSO Working Group on Protecting the Rights of Others published its Final Report. gns0.icann.org/drafts/pro-wg-final-report-26jun07.pdf
- On 8 August 2008, the GNSO issues its “Final Report – Introduction of New Generic Top-Level Domains,” including a recommendation that “Strings must not infringe the existing legal rights of others”. <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>
- On 21 December 2007, ICANN requested “expressions of interest from potential dispute resolution service providers for the new gTLD program.” <http://www.icann.org/en/topics/drsp-call-for-expressions-of-interest.pdf>
- On 26 June 2008, the Board adopted the GNSO’s Policy recommendations for the introduction of new gTLDs. See Board Resolution at http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171; see Board Meeting Transcript at https://par.icann.org/files/paris/ParisBoardMeeting_26June08.txt
- On 22 October 2008, ICANN published an Explanatory Memorandum on Protection of Rights of Others in New gTLDs and solicited comments. <http://www.icann.org/en/topics/new-gtlds/protection-rights-22oct08-en.pdf>
- After receiving significant community input, on 6 March 2009, the Board recognized trademark protection in the new gTLD program as an issue requiring additional input and analysis, the resolution of which would benefit the new gTLD program. The Board requested that the GNSO’s Intellectual Property Constituency convene an Implementation Recommendation Team (“IRT”) to solicit input,

analyze the issue, and prepare draft and final reports.

<http://www.icann.org/en/minutes/resolutions-06mar09.htm#07>

- On 24 April 2009, the IRT published its Preliminary Report for public comment.
<http://www.icann.org/en/topics/new-gtlds/irt-draft-report-trademark-protection-24apr09-en.pdf>; see public comments at <http://forum.icann.org/lists/irt-draft-report/>
- On 16 May 2009, the Board participated in a workshop on issues related to the new gTLD program, including trademark protections in particular.
- On 29 May 2009, the IRT published its Final Report and an “Open Letter from the IRT Introducing our Work.” ICANN and the IRT recognized that a significant intersection exists in between strategies to facilitate trademark protection and strategies to mitigate the risk of increased malicious conduct on the Internet.
<http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>
- On 20 June 2009, the Board participated in another workshop on issues related to the new gTLD program, including trademark protection.
- On 21 June 2009, the IRT presented its Final Report to the ICANN Board at the ICANN Sydney Open Meeting and provided briefings to the GNSO, interested constituencies and others.
<http://syd.icann.org/full-sched>
- On 26 June 2009, the Board acknowledged and thanked the IRT for its “intensive engagement” and its “detailed and articulate proposals.”
<http://www.icann.org/en/minutes/resolutions-26jun09.htm>
- Also on 26 June 2009, the Board acknowledged that ICANN staff had posted material on the new Draft Applicant Guidebook for public comment; thanked the community; and requested that all further comments be submitted by the close of the comment period on 20 July 2009. The Board also requested that the ICANN staff prepare a comprehensive set of implementation documents before the Board’s meeting on 30 October 2009. See Board

Resolution at <https://icann.org/en/minutes/resolutions-26jun09.htm>; see Board Meeting Transcript at <http://syd.icann.org/files/meetings/sydney2009/transcript-board-meeting-26jun09-en.txt>

- On 12 September 2009, the Board continued its discussion about trademark protection in new gTLDs at a Board Retreat.
- On 12 October 2009, the Board sent a letter to the GNSO, requesting that it review trademark protection policy for the new gTLD program as described in the Draft Applicant Guidebook and accompanying memoranda, including the proposals for a Trademark Clearinghouse and a Uniform Rapid Suspension System. <http://www.gnso.icann.org/correspondence/beckstrom-to-gnso-council-12oct09-en.pdf>
- On 28 October 2009, the GNSO adopted a resolution creating the Special Trademarks Issues review team (“STI”), which included representatives from each stakeholder group, the At-Large community, nominating committee appointees, and the Governmental Advisory Committee (“GAC”). <http://gnso.icann.org/resolutions/#200910>
- On 30 October 2009, the Board issued a resolution encouraging additional comments on the Draft Applicant Guidebook and new gTLD program. See Board Resolution at <https://icann.org/en/minutes/resolutions-30oct09-en.htm>; see Board Meeting Transcript at <https://icann.org/en/minutes/index-2009.htm>
- On 11 December 2009, the STI published its Report. See link to Report in <http://gnso.icann.org/resolutions/#200912>
- On 18 December 2009, the GNSO unanimously approved the recommendations contained in the STI’s report. <http://gnso.icann.org/resolutions/#200912>
- On 15 February 2010, ICANN published for public comment proposals for trademark protection in the new gTLD program, including the Trademark Clearinghouse, a Uniform Rapid Suspension System, and a post-delegation dispute resolution procedure.

<http://www.icann.org/en/announcements/announcement-4-15feb10-en.htm>

- On 10 March 2010, the GAC outlined to the Board some concerns and recommendations for the new gTLD program and its comments on version 3 of the Draft Applicant Guidebook.
<http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-10mar10-en.pdf>
- On 12 March 2010, the Board acknowledged the community recommendations for trademark protections in the new gTLD program, including the development of a Trademark Clearinghouse and a Uniform Rapid Suspension System; resolved that the proposals for both be incorporated into version 4 of the Draft Applicant Guidebook; and directed ICANN staff to review any additional comments and develop final versions of the proposals for inclusion in the Draft Applicant Guidebook.
<http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>
- Also on 12 March 2010, the Board approved the concept of a post-delegation dispute resolution procedure; and directed ICANN staff to review any additional comments and synthesize them, as appropriate, into a final draft procedure, and include the procedure in version 4 of the Draft Applicant Guidebook.
<http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>
- On 28 May 2010, in response to further comments from the community, ICANN published for public comment revised proposals for the Trademark Clearinghouse, Uniform Rapid Suspension System, and a post-delegation dispute resolution procedure.
<http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm>
- On 5 August 2010, the Board responded to the GAC's comments on version 3 of the Draft Applicant Guidebook and described the steps it took to protect trademarks in version 4 of the Draft Applicant Guidebook.
<http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-05aug10-en.pdf>
- On 23 September 2010, the GAC outlined to the Board its concerns and recommendations for the new gTLD program and its comments on version 4 of the Draft Applicant Guidebook.

<http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>

- On 24-25 September 2010, the Board participated in another workshop on issues related to the new gTLD program, including trademark protections and passed some resolutions specifically addressing trademark protections.
<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6>
- On 12 November 2010, ICANN posted for public comment version 5 of the Draft Applicant Guidebook, incorporating a number of protections for the rights of others, and a series of papers explaining certain aspects of the current proposals for the Trademark Clearinghouse, the Uniform Rapid Suspension System and related comments and analysis.
<http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf>
- On 10 December 2010, the Board resolved that ICANN had addressed the issue of trademark protection in new gTLDs by adopting and implementing various measures, including the establishment of a Trademark Clearinghouse, the Uniform Rapid Suspension System and the Post-Delegation Dispute Resolution Procedure. The Board further stated that these solutions reflected the negotiated position of the ICANN community, but that ICANN would continue to take into account public comment and the advice of the GAC.
See Board Resolution at <https://icann.org/en/minutes/resolutions-10dec10-en.htm>; see Board Meeting Minutes at <https://icann.org/en/minutes/minutes-10dec10-en.htm>
- On 21 February 2011, ICANN published numerous briefing papers on the trademark issues the GAC had identified as “outstanding” in September 2010.
<http://www.icann.org/en/announcements/announcement-6-21feb11-en.htm>
- On 23 February 2011, the GAC issued its “Indicative Scorecard” which included 30 specific recommendations relating to trademark protections on which it intended to consult with the.

<http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf>

- On 28 February 2011 and 1 March 2011, the GAC and the Board participated in a special two-day consultation to address the remaining outstanding issues related to the new gTLD program, including certain issues related to trademark protection.
<http://www.icann.org/en/announcements/announcement-23feb11-en.htm>
- On 4 March 2011, the Board published its comments on the GAC Scorecard.
<http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-04mar11-en.pdf>
- On 15 April 2011, ICANN published an Explanatory Memorandum on Trademark Protection in the new gTLD program.
<http://www.icann.org/en/topics/new-gtlds/trademark-protection-claims-use-15apr11-en.pdf>
- Also on 15 April 2011, ICANN posted for comment version 6 of the Draft Applicant Guidebook, incorporating additional protections for the rights of others.
<http://www.icann.org/en/topics/new-gtlds/comments-6-en.htm>
- Also on 15 April 2011, ICANN issued “Revised ICANN Notes on: the GAC New gTLDs Scorecard, and GAC Comments to Board Response”
<http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf>
- On 19 April 2011, the GAC issued “Remaining points of difference between the ICANN Board and the Governmental Advisory Committee on New gTLD Rights Protection Mechanisms”
http://gac.icann.org/system/files/20110419-GAC_comments_on_NewgTLD_Rights_Protection.pdf
- On 26 May 2011, the GAC issued “GAC comments on the Applicant Guidebook (April 15th, 2011 version)”
<http://www.icann.org/en/topics/new-gtlds/gac-comments-new-gtlds-26may11-en.pdf>

- On 30 May 2011, ICANN posted the current version of the Applicant Guidebook.
<http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm>

III. The Board’s Analysis of Trademark Protection in the New gTLD Program

A. Why the Board is Addressing This Issue Now

- ICANN’s mission statement and one of its founding principles is to promote competition. The expansion of gTLDs will allow for more innovation and choice in the Internet’s addressing system. The ICANN Board seeks to implement the new gTLD program together with measures designed to protect the rights of others on the Internet.
<http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>
- The Board endorsed GNSO policy recommendation states that gTLD strings should not infringe the rights of others. The Board took that recommendation as an emphasis on the need to protect intellectual property rights.
- ICANN committed to the Internet community and governments, including the U.S. Department of Commerce that it would address trademark protection in new gTLDs prior to implementing the program.
- The ICANN Board is committed to making decisions based on solid factual investigation and expert analysis.

B. Who the Board Consulted

- The GNSO
<http://gns0.icann.org/>
- The GAC
<http://gac.icann.org/>
- The ICANN Implementation Recommendation Team (“IRT”)
https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark_protection:20090407232008-0-9336/original/IRT-Directory.pdf

- The GNSO’s Special Trademark Issues Working Team (“STI”)
- The At-Large Advisory Committee (“ALAC”) <http://www.icann.org/en/committees/alac/>
- All other stakeholders and members of the community
- Legal counsel

C. What Significant Non-Privileged Materials the Board Reviewed

- In addition to all public comments received on all versions of the Applicant Guidebook, as well as all relevant GAC Communiqués (see <http://gac.icann.org/communiques>), the ICANN Board reviewed the following reports from Stakeholders:
 - 1 June 2007 GNSO Working Group on Protecting the Rights of Others’ Final Report <http://www.gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf>
 - 8 August 2007 GNSO Final Report – Introduction of New Generic Top Level Domains. <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>
 - 24 April 2009 IRT Draft Report and Public Comment Summary <http://forum.icann.org/lists/irt-draft-report/pdfuyqR57X82f.pdf>
 - 24 April 2009 IRT Preliminary Report, and public comment thereon <http://www.icann.org/en/topics/new-gtlds/irt-draft-report-trademark-protection-24apr09-en.pdf>; see public comments at <http://forum.icann.org/lists/irt-draft-report/>
 - 29 May 2009 IRT Final Report <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>
 - 29 May 2009 Implementation Recommendation Team Final Draft Report to ICANN Board

<http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>

- 4 October 2009 ICANN Comment and Analysis on IRT Report: Post-Delegation Dispute Mechanism and Other Topics
<http://www.icann.org/en/topics/new-gtlds/summary-analysis-irt-final-report-04oct09-en.pdf>
- 11 December 2009, STI Report
See link to Report in
<http://gnso.icann.org/resolutions/#200912>
- 12 December 2009 letter from the members of the former IRT to ICANN unanimously supporting the work of the STI process and recommendations concerning a trademark clearinghouse and a mandatory Uniform Rapid Suspension system
<http://www.icann.org/en/correspondence/irt-group-to-dengate-thrush-15dec09-en.pdf>
- 23 February 2011 GAC “Indicative Scorecard”
<http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf>
- 19 April 2011 GAC issued “Remaining points of difference between the ICANN Board and the Governmental Advisory Committee on New gTLD Rights Protection Mechanisms”
http://gac.icann.org/system/files/20110419-GAC_comments_on_NewgTLD_Rights_Protection.pdf
- 26 May 2011, the GAC issued “GAC comments on the Applicant Guidebook (April 15th, 2011 version)”
<http://www.icann.org/en/topics/new-gtlds/gac-comments-new-gtlds-26may11-en.pdf>
- ICANN prepared materials
 - Each version of the Applicant Guidebook, including all ICANN created explanatory memoranda and the specific proposals for trademark protections, along with hundreds of pages of public comment summaries and analysis related to trademark protections.
(i) <http://www.icann.org/en/topics/new-gtlds/comments->

[en.htm](http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm#expmem); (ii) <http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm#expmem>; (iii) <http://www.icann.org/en/topics/new-gtlds/comments-e-en.htm>; (iv) <http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm>; (v) <http://www.icann.org/en/topics/new-gtlds/gnso-consultations-reports-en.htm>; (vi) <http://www.icann.org/en/announcements/announcement-4-15feb10-en.htm>; (vii) <http://www.icann.org/en/topics/new-gtlds/summaries-4-en.htm>; (viii) <http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm>; (ix) <http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm>; (x) <http://www.icann.org/en/topics/new-gtlds/dag-en.htm>; (xi) <http://www.icann.org/en/topics/new-gtlds/comments-6-en.htm>; and (xii) <http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm>

D. What Concerns the Community Raised

- There is a need for adequate protection of intellectual property rights in new and existing gTLDs.
- If the introduction of new gTLDs leads to increased malicious conduct on the Internet, then trademark owners may pay a disproportionate percentage of costs associated with enforcing standards of behavior.
- Defensive domain name registrations in new gTLDs generate substantial costs for trademark owners.
- Registry behavior may cause or materially contribute to trademark abuse, whether through a TLD or through domain name registrations in the TLD.
- Legal rights that a party seeks to protect through Rights Protection Mechanisms should be capable of being authenticated, at least if the authenticity of such rights is challenged.

- Administrative dispute resolution procedures provide trademark owners with relatively swift and inexpensive alternatives to arbitration and litigation.
- Recurring sanctions may not be a sufficient remedy for wrongful conduct; suspension and termination may be necessary remedies.
- Policies developed to prevent and remedy trademark abuses in the DNS are expected to build upon the framework of existing intellectual property laws to minimize burdens on trademark owners and contribute to the orderly functioning of the DNS.
- The introduction of new gTLDs may lead to consumer confusion if one trademark owner registers its mark in one gTLD while another registers an identical or similar mark in another gTLD. To the extent that Internet users are unable (or become unaccustomed) to associate one mark with a specific business origin, the distinctive character of the mark will be diluted.

E. What Steps ICANN Has Taken or Is Taking to Protect the Rights of Others in New gTLDs

The Board believes the following measures will significantly help to protect the rights of others on the Internet. ICANN has incorporated the majority of these measures into the current version of the Applicant Guidebook and the registry agreement, and its efforts to implement the remaining measures are ongoing:

- Pre-delegation objection procedures.
- Mandatory publication by new gTLDs of policy statements on rights protection mechanisms, including measures that discourage registration of domain names that infringe intellectual property rights, reservation of specific names to prevent inappropriate name registrations, minimization of abusive registrations, compliance with applicable trademark and anti-cyber squatting legislation, protections for famous name and trademark owners and other measures.
- Mandatory maintenance of thick Whois records to ensure greater accessibility and improved stability of records.

- The establishment of a Trademark Clearinghouse as a central repository for rights information, creating efficiencies for trademark holders, registries, and registrars
- The requirement for all new registries to offer both a Trademarks Claims service and a Sunrise period.
- Post-delegation dispute resolution procedures that allow rights holders to address infringing activity by a registry operator that may be taking place after delegation.
- Implementation of the Uniform Rapid Suspension System that provides a streamline, lower-cost mechanism to suspend infringing names
- The continued application of the Uniform Domain Name Dispute Resolution Policy on all new gTLDs.

F. What Factors the Board Found to Be Significant

The Board considered numerous factors in its analysis of trademark protection in the new gTLD program. The Board found the following factors to be significant:

- The GNSO’s Working Group on Protecting the Rights of Others was not able to reach consensus on “best practices” for Rights Protection Mechanisms;
- While economic studies revealed that there will be both benefits and cost to trademark holders associated with new gTLDs, no determination could be made that the costs outweigh the benefits.
- New gTLDs would promote consumer welfare.
- The availability and efficacy of dispute resolution mechanisms and appropriately-designed modifications of ICANN procedures for protecting intellectual property.
- The need for dispute resolution mechanisms to be comprehensive enough to expand with the addition of new gTLDs.

- The need to balance the protection of trademark rights with the practical interests of compliant registry operators to minimize operational burdens and the legitimate expectations of good faith domain name registrants.
- The risk of increasing exposure of participants to litigation.
- The lack of reported problems with ICANN’s previous introductions of new TLDs.

IV. The Board’s Reasons for Proceeding to Launch the New gTLD Program While Implementing Measures to Protect Trademarks and Other Rights

- ICANN’s “default” position should be for creating more competition as opposed to having rules that restrict the ability of Internet stakeholders to innovate.
- New gTLDs offer new and innovative opportunities to Internet stakeholders.
- Brand owners might more easily create consumer awareness around their brands as a top-level name, reducing the effectiveness of phishing and other abuses.
- Revised applicant procedures and agreements reflecting the measures to mitigate the risk of malicious conduct will permit ICANN to address certain risks of abuse contractually and also will permit ICANN to refer abuses to appropriate authorities. ICANN can amend contracts and the applicant guidebook to address harms that may arise as a direct or indirect result of the new gTLD program.
- ICANN has addressed the principal concerns raised by stakeholders about the potential for proliferation of malicious conduct in the new gTLD space by implementing measures to mitigate that risk, including centralized zone file access, a high security TLD designation and other mechanisms. A combination of verified security measures and the implementation of DNSSEC will allow users to find and use more trusted DNS environments within the TLD market.
- ICANN has addressed the principal concerns raised by stakeholders about the protection of trademarks in the new gTLD space by

implementing other measures to enhance protections for trademarks and other rights, including pre-delegation dispute resolution procedures, a trademark clearinghouse, and post-delegation dispute resolution procedures.

- To the extent that there are costs to trademark owners or others, ICANN has worked with the community to address those concerns, and ICANN pledges to continue that effort.

EXHIBIT C-9

Economic Case for Auctions in New gTLDs

8 August 2008

Executive Summary

There are two lines of argument for auctions as the tie-breaking mechanism for resolving contention among competing applicants for new generic TLD strings. First, auctions accomplish the goal of allocative efficiency: putting scarce resources into the hands of those who value them the most. In particular:

- Applicants whose true intentions or abilities are to serve many users would be able to justify higher bids than applicants who will serve few users;
- Applicants capable of providing high-quality service at low cost would be able to justify higher bids than low-quality, high-cost applicants; and
- Applicants who intend to develop the gTLD immediately would be able to justify higher bids than applicants whose purpose is to hold the gTLD, unused, for speculative purposes.

Second, while auctions are not perfectly aligned with ICANN's objectives, alternative allocation mechanisms such as comparative evaluations and lotteries inherently have much more severe limitations and defects, as evidenced by the historical record and by the abandonment of these alternatives in other communications areas.

ICANN intends to use auctions in the new gTLD process as a tie-breaking mechanism, not the primary allocation mechanism, for the resolution of string contention among competing new gTLD applicants for identical or similar strings. Auction would be the final means of settling any contention cases that have not been resolved at any of the previous stages in the process.

1. Background

ICANN is preparing implementation plans for the new gTLD process. Staff is working from the GNSO New gTLD recommendations and input from Internet community to guide the implementation. This memo has been prepared with the assistance of Power Auctions LLC, which has been retained for assistance in auction design.

In 2004, the Organization for Economic Cooperation and Development (OECD) released a paper on "Generic Top Level Domain Names: Market Development and Allocation Issues" (see <http://www.oecd.org/dataoecd/56/34/32996948.pdf>). The OECD paper described allocation methods for gTLD strings, including auction and comparative evaluation. The OECD paper concluded: "On balance the economic arguments favour the use of auctions in some form, where scarcity exists, in relation to the goals set by ICANN for allocation procedures. They are particularly strong in relation to allocation decisions concerning to existing resources and where a 'tie-breaker' is needed during a comparative selection procedure for a new resource. In all cases, the best elements of comparative selection procedures could still be incorporated, at a prequalification stage for registries, using straightforward, transparent, and objective procedures that preserve the stability of the Internet" (pp. 51-52).

The paper acknowledged that comparative evaluation may have the advantage of providing equity for new gTLD applicants, and permits the inclusion of broader objectives in the new gTLD selection process. However, it also noted that comparative evaluation lacks transparency and relies on subjective judgment in the determination of a winner for a proposed gTLD string.

By contrast, auctions provide objectivity and transparency: “Auctions rely on relatively simple and transparent rules that apply to all participants. As such they are fair and transparent. Given that bids are observable and verifiable by a court or any third party, the final allocation is less likely to be legally contested relative to a comparative selection procedure” (see page 42).

The OECD paper highlighted both that auctions are effective for determining the market value and that auctions are advantageous even if revenue maximization is not a primary objective. “Economic theory and experience suggest that auctions are one of the best available mechanisms for realising the true market value of a resource, as the price is decided by those with the best knowledge of the market. In the context of the TLD market the benefits auctions can bring, in this respect, largely depend on the objectives that are set by ICANN.” It continued: “As a notfor-profit organisation, revenue maximisation may not, in fact, be an objective ICANN sets for itself. The value of any new gTLD may, for example, be impacted by the number of other gTLDs that ICANN chooses to make available. ICANN may decide that the increasing the number of new gTLDs can provide greater competition, choice and innovation and give higher priority to meeting those objectives than to revenue maximisation. This does not, however, negate the benefit an auction can yield in terms of determining the value of a resource or in being a tool for efficient allocation” (p. 44).

An additional resource available to ICANN is “An Economic Analysis of Domain Name Policy,” Hastings Communication and Entertainment Law Journal (2003) (by Karl M. Manheim and Lawrence B. Solum) (see <http://law.bepress.com/sandiegolwps/le/art1>). This paper argues that the root is an economically scarce resource, that ICANN should allow a market to develop in top-level domains, and that the market should serve the public interest. It should be noted that TLDs are not necessarily a scarce resource.

Manheim and Solum compare management of the Internet’s system of unique identifiers to telecommunications spectrum and licensing of spectrum in the United States by the Federal Communications Commission (FCC). “Compared to spectrum auctions, we believe gTLD auctions will be relatively simple, both in concept and operation. Nonetheless, we think actual auction design should be worked out by ICANN to assure compatibility with technical standards and to maximize economic efficiency” (pp. 416-417).

Manheim and Solum conclude: “When auctions were first proposed to the FCC, they were dismissed out of hand as “too academic” and ridiculed as “of the realm in which it is merely the fashion of economists to amuse themselves.” The same attitude can be found in many of the objections to gTLD auctions espoused by defenders of the status quo. Just as, over time, auctions have become accepted as means for allocating economically scarce spectrum and telephony resources, we believe they will become seen as the best means for expanding the TLD name space. Indeed, the case for auctioning new gTLDs is compelling” (p. 449).

2. Auctions accomplish the goal of allocative efficiency

Auctions are well suited to accomplishing the goal of *allocative efficiency*: putting scarce resources into the hands of those who value them the most. As such, the results of auctions tend to create greater social value than alternative allocation mechanisms. For example, suppose that one applicant for a gTLD has the true intention and capability of serving many users, while a second applicant has in mind a narrow application that would serve only a few limited interests. The first applicant would generally be able to justify a higher bid for the gTLD than the second applicant; consequently, the first applicant would be likely to win the gTLD in an auction. By contrast, in a comparative evaluation, the second applicant might be able to win the

gTLD if it were more persuasive (or hired the more effective consultant or lobbyist); and in a lottery, the two applicants are by definition equally likely to win. Similarly, an auction process would tend to favor a high-quality, low-cost applicant over a low-quality, high-cost applicant. And an applicant who intends to develop the gTLD immediately would be able to justify a higher bid than an applicant whose purpose is to hold the gTLD, unused, for speculative purposes.

Largely for similar reasons, governments began 15 years ago to allocate telecommunications licenses by auction. In 1993, the US Congress authorized the Federal Communications Commission (FCC) to allocate mobile telephone licenses by auction; and in 1997, it extended this authorization to use auctions for resolving competing applications for radio and TV licenses. Moreover, auctions for allocating radio spectrum have been a truly global phenomenon. They have been used in New Zealand since 1990 and in Australia since 1993; and they have been adopted subsequently in the UK, Germany, Austria, Netherlands, Switzerland, India, Hong Kong, Singapore, Nigeria, Canada, Mexico, Brazil, and Trinidad and Tobago (to provide only a partial list).

The key benefits of a well-designed auction mechanism include the following:

- Transparent and objective means for determining a winner
- Efficient allocation – puts gTLD strings in the hands of those who value them the most and will put them to use (Note - ICANN intends to use auctions as a tiebreaking mechanism, not as the primary allocation mechanism.)
- Efficient process – fully dynamic auction, concludes in one day to one week
- Revenue maximization (with possible options for ensuring that “deepest pockets” do not always win auction) *Note that revenue maximization is not one of ICANN’s goals with the new gTLD process.

Of course, no allocation mechanism will perfectly address needs for transparency, objectivity and scalability, and auctions have received severe criticism in some contexts. For example, the European Telecommunications Network Operators’ Association (ETNO) all but blamed the European UMTS/3G spectrum auctions of 2000 and the subsequent collapse of the telecommunications sector: “The auction process appears to be particularly inappropriate when considering innovative technologies and new markets ... the whole sector has been seriously destabilised and the launch of new services delayed.”¹ ETNO argues that beauty contests are preferable to auctions.²

The timing of the European spectrum auctions coincided with the NASDAQ stock market peak. Given that telecom firms operating outside of Europe or outside the wireless sector suffered similar drops in stock prices as European wireless operators and given the similarly-timed bursting of the “dot-com” bubble, it is more reasonable to view the high European spectrum auction prices as a symptom of the bubble rather than as a cause of its collapse. Oxford University Professor Paul Klemperer has noted: “In retrospect, of course, the licenses look expensive. But in retrospect, shares or houses sometimes look expensive. Like any other

¹ See ETNO Reflection Document Commenting on Auctions and Beauty Contests, Dec. 2004; available at <http://www.etno.eu/Portals/34/ETNO Documents/Information Society i2010/RD203 - FM Auctions and Beauty Contests.pdf> (p. 3).

² As described in the reflection document’s introduction, ETNO represents the voice of Europe’s largest telecom operators. Thus, ETNO has a vested interest in obtaining lower license fees for its member operators and insulating them from new entry. Note that the document also asserts: “The progress in technologies leads to significant evolutions of services and transformation of traditional markets. As a consequence, maintaining a distinction between incumbent operators and new entrants becomes more and more artificial.” (p. 2).

market, an auction simply matches willing buyers and willing sellers — it cannot protect them against their own mistakes.”³

While the spectrum auction experience offers some useful insights, there are major differences between spectrum licenses and gTLDs. Spectrum licenses are unique and are limited to a fixed supply — and specific spectrum licenses are needed to provide specific wireless services. Telecom firms in Europe in 2000 may have perceived that they needed to win specific licenses in order to remain in business. By contrast, gTLDs are unique only in their identifying string and the number of gTLDs can be expanded over time — and any of a large number of alternative gTLD strings can be used for a given purpose. If a bidder fails to win its first-choice gTLD, it can submit a new proposal and apply for an alternative string. In this respect, an auction for gTLDs is more likely to be comparable to an auction for houses⁴ than to an auction for spectrum. There are characteristics of a house that make it unique and more desirable than another home, but if an applicant is unsuccessful in a house auction, there is likely to be another suitable house available. Similarly, an applicant who finds .movie to be too expensive in a gTLD auction can instead apply for .film or .cinema. Participants in gTLD auctions will not generally find themselves in “must-win” situations; their second or third choices will be reasonable substitutes.

It is worth emphasizing that, similar to ICANN, most spectrum agencies have not placed revenue maximization at the top of their list of objectives. Rather, the efficient use of the spectrum, and the putting of spectrum into use in a timely fashion, has generally been uppermost. It has also been widely perceived that scarce spectrum is a valuable public resource that governments should not merely give away to self-interested individuals. Transferring TLD rights to third parties for little or no compensation would be equally as objectionable as spectrum giveaways.

At the same time, allocating these resources for free does not reduce the price to end-consumers.

It is a classic fallacy in economics (the “sunk cost fallacy”) that profit-maximizing firms will set their prices in relation to the level of past fixed costs. Rather, they will take account of the scarcity of the resources that they use, regardless of whether they pay for them or receive them for free. There may be a concern that auctions resolving contention among gTLD applications will result in passing on of costs to consumers. The available evidence after spectrum auctions has been that consumer prices do not depend on the price paid for the spectrum. A similar point has been seen recently in Europe, where utilities received grandfathered carbon emission allowances for free but nevertheless set higher consumer prices that reflected the opportunity cost of the allowances, not the (zero) price they paid.

Finally, various devices can be considered for favoring disadvantaged bidders in an auction. For example, a 25% bidding credit could be offered to community-based bidders whose community is located primarily in least-developed countries: a \$300,000 bid from such a bidder would be viewed as equivalent to a \$400,000 bid from a wealthy country. (Obviously, in such event, measures would need to be taken so that bidders in wealthy countries could not establish shell corporations for the primary purpose of “gaming” such bidding credits.) Such devices might make auctions more attractive to the Internet community.

³ Klemperer, P., “The Wrong Culprit for Telecom Trouble,” *Financial Times*, 26 Nov. 2002, p. 21.

⁴ Auctions for houses are commonplace and work well in various parts of the world, for example, in Sydney, Australia.

3. Alternative allocation mechanisms are deficient

Manheim and Solum (2003, p. 367) consider four possible allocation mechanisms:

- Rule of first occupancy⁵
- Lotteries
- Comparative evaluations
- Auctions

Meanwhile, the OECD paper does not even consider a rule of first occupancy and summarily dismisses lotteries: “These are little used by OECD governments where allocative choice is required” (p. 39). Both papers come down decisively in favor of auctions. While part of the reason to use auctions is the set of attractive properties outlined in the previous section, another reason to use auctions is that the alternatives are grossly deficient.

A rule of first occupancy does not seem worthy of any further attention, so we limit consideration to the two other alternatives: lotteries and comparative evaluations.

Lotteries

In the telecommunications area, the best known use of lotteries was in connection with the allocation of US mobile telephone licenses, beginning in 1981. The experience was summarized by Manheim and Solum (2003, pp. 396-397): “Applications came in by the hundreds of thousands. Winners would often ‘flip’ or resell their licenses to larger entities at substantial profit without ever delivering service to a single customer. Some licenses won at lottery were resold in short order for tens of millions of dollars. The windfalls continued, as per the Coase Theorem.⁶ But the transaction costs were high, including the cost of delay in getting licenses to firms that could actually use them. One estimation of social cost for the ten-year delay in licensing of cellular providers [by lottery] was 2 percent of Gross National Product (GNP). By 1985, the FCC indicated its desire to eliminate the lottery system.”

In addition, awarding rights to gTLDs by lottery or “coin flip” might be contrary to the laws in certain jurisdictions. We take no opinion on the legal argument, as conducting a lottery would otherwise appear antithetical to economic principles and to ICANN’s objectives.

Comparative evaluations

Before lotteries, radio spectrum licenses in the US were allocated by comparative evaluation. The process is summarized in Paul Milgrom’s book, “Putting Auction Theory to Work,” Cambridge University Press (2004, p. 3): “Spectrum rights (licenses) in the United States and many other countries had long been assigned in comparative hearings, in which regulators compared proposals to decide which applicant would put the spectrum to its best use. The process was hardly objective: it involved lawyers and lobbyists arguing that their plans and

⁵ A rule of “first occupancy” allocates an item to the first individual to gain possession of or make use of the item.

⁶ The Coase Theorem was introduced by University of Chicago Law & Economics Professor Ronald Coase, see <http://www.law.uchicago.edu/socrates/coase.html>. Coase won the 1991 Nobel Prize for his work. The theorem is summarized as “In a world where there are no transaction costs, an efficient outcome will occur regardless of the initial allocation of property rights.”

clients were most deserving of a valuable but free government license. With its formal procedures and appeals, a comparative hearing could take years to complete.” Milgrom adds in a footnote: “The process was once characterized by an FCC Commissioner as the ‘FCC’s equivalent of the Medieval trial by ordeal’ (as quoted by Kwerel and Felker (1985)).”

The International Olympic Committee uses a comparative evaluation process for determining the site of the Olympic Games. In one of the more notorious episodes, it was alleged that in connection with the selection of Salt Lake City for the 2002 Winter Games, IOC members accepted more than \$1 million in cash, gifts, trips and scholarships. As a result of this bribery scandal, 10 members of the IOC were expelled, another 10 members were sanctioned, and several criminal prosecutions ensued. While the IOC is unlikely to replace its comparative evaluation process with an explicit auction, the episode highlights that comparative evaluations without clear criteria for deciding an allocation are invitations to corruption. By contrast, since auctions are transparent and objective, it is much more difficult to influence the outcome in favor of a particular bidder.

The disadvantages of comparative evaluations can be summarized as follows:

- It is difficult to establish meaningful transparent and objective criteria that allow the evaluator to distinguish among and select one of multiple competing applications;
- As a consequence, the comparative evaluations take a long period of time and require the investment of exhaustive resources by both applicants and the evaluator;
- Also as a consequence, the comparative evaluation process is vulnerable to corruption;
- The awards, once made, are unlikely to withstand judicial review;
- If other than the highest-value applicant wins the comparative evaluation, the winner is likely to ‘flip’ the rights for speculative profits;
- Depending on how the comparative evaluation is structured, the process may favor well-connected applicants, and thus may not be any more protective of disadvantaged applicants than auctions; and
- In the language of the economics and political science literatures, the comparative evaluation process may thus be an ‘all-pay auction’ which dissipates revenues (through expenditures on consultants and lobbyists) instead of collecting revenues that can be channeled to the good of the internet community.

At the same time, as emphasized by the OECD paper and noted in Section 1 above, most of the advantages of comparative evaluations can be obtained through a pre-qualification process before the auction. The pre-qualification procedures could apply straightforward, transparent and objective standards that would deal with concerns that a stand-alone auction might otherwise engender among the Internet community. However, the pre-qualification process would often fail to eliminate multiple competing applications for new generic TLD strings, which would then be resolved by auction. Pre-qualification and evaluation will still be used as a primary allocation method, but auctions would serve as the tie-breaker for resolving contention among identical or similar string applications

EXHIBIT C-10

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

NU DOTCO, LLC. and VERISIGN, INC.

Amicus Curiae

ICDR CASE NO: 01-18-0004-2702

WITNESS STATEMENT OF PAUL LIVESAY IN SUPPORT OF

ICANN'S REJOINDER AND *AMICI'S* BRIEFS

Confidential – Attorneys' Eyes Only

Not to be Publicly Disclosed in IRP



I, Paul Livesay, declare as follows:

1. I am a former Vice-President and Associate General Counsel of VeriSign, Inc. (“Verisign” or the “Company”). I have personal knowledge of the matters set forth herein, except where I indicate otherwise, and am competent to testify as to those matters.

2. From 2014 through 2018, I served as a Vice-President and Associate General Counsel for Verisign. In that capacity, I was in charge of intellectual property matters, had responsibility for certain strategic business transactions for the Company, and provided general advice and counseling to the Company’s management on business and legal matters. My position at the company had both business and legal components. My statement is only a statement of facts and not legal reasoning or opinions. Previously, I had been with Verisign in 2009-2010 as Vice-President, Strategy and Management, for Verisign’s digital certificate business.

3. I have been an intellectual property and technology transactions attorney for over twenty-five years. Prior to joining Verisign in 2014, among other roles, I practiced law at the firm of Wilson, Sonsini, Goodrich & Rosati, was General Counsel of RSA Data Security, Inc., was General Counsel at the design firm IDEO LLC, and was Vice-President, Technology, for Symantec Corporation. I am a member of the Bar of the State of California.

The Secondary Market for new gTLDs and Discussions with .WEB Applicants

4. In 2014, I was put in charge of identifying potential business opportunities for Verisign in ICANN’s New gTLD Program. Up until that point, Verisign had participated in the New gTLD Program by filing applications for new TLDs that were variants of its company name (*i.e.*, “.Verisign”) or internationalized versions of Verisign’s existing TLDs, but Verisign had not sought to acquire the rights to a new gTLD not already associated with Verisign.

Redacted - Third Party Designated Confidential Information

. The period for filing new applications as part of the New gTLD Program had ended. Redacted - Third Party Designated Confidential Information



Redacted - Third Party Designated Confidential Information

5. Redacted - Third Party Designated Confidential Information

I studied very closely the New gTLD Applicant Guidebook (the “Guidebook”) published by ICANN, the Auction Rules, and other information regarding the New gTLD Program available on ICANN’s website, www.icann.org, to familiarize myself with the rules applicable to the Program. Redacted - Third Party Designated Confidential Information

6. The Guidebook and Auction Rules do not prohibit applicants from entering into business transactions with other entities with respect to an applied-for TLD. Based on the Guidebook, it is apparent that ICANN’s concern with respect to such transactions is whether a transaction would require re-evaluation of the applicant, which could result in a delay in the resolution of a contention set. For example, Section 4.1.3 of the Guidebook acknowledges that applicants may seek to resolve string contentions (*i.e.*, which of various competing applicants for a TLD would be awarded the TLD) by establishing joint ventures among themselves, which could change the ownership of the applicant or the identity of the applicant itself.¹ The Guidebook cautions that material changes such as these could require re-evaluation, and encourages applicants to combine in ways that do not require re-evaluation: “Applicants are encouraged to resolve contention by combining in a way that does not materially affect the

¹ Afilias C-3 (*gTLD Applicant Guidebook*, Module 4, § 4.1.3, available at <https://newgtlds.icann.org/en/applicants/agb>).



remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation.”²

7. Similarly, Clause 68 of the Auction Rules recognizes that applicants may enter into “settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction”; although once within an active auction timeline, these activities are prohibited during a “Blackout Period” extending from the deposit deadline for an auction through full payment of the winning auction bid, but permitted both for the period prior to and after the Blackout Period.³

8. Redacted - Third Party Designated Confidential Information

). Donuts was a major participant in the new gTLD Program, filing hundreds of applications for new gTLDs. Under the arrangement between Donuts and Demand Media, which was entered into while the new gTLD applications were pending, the gTLDs would be transferred to Demand Media after rights to the subject new gTLDs were awarded to Donuts in exchange for Demand Media’s assistance in funding Donuts’ acquisition of the gTLDs. Donuts also was one of the several applicants for the .WEB gTLD. Attached hereto as Exhibit A is a true and correct copy of a press release dated June 11, 2012 from Demand Media describing its arrangement with Donuts (<https://ir.leafgroup.com/investor-overview/investor->

² *Id.*

³ Afilias C-4 (*Auction Rules for New gTLDs, Indirect Contentions Edition, Version 2015-02-24*, Clause 68(a) & (b), available at <https://newgtlds.icann.org/en/applicants/auctions>).



press-releases/press-release-details/2012/Demand-Media-to-Participate-in-Historic-Expansion-of-Generic-Top-Level-Web-Domain-Name-Extensions/default.aspx).

9. Through my research, I also became aware that it was not uncommon for entities interested in acquiring a new gTLD to form a special purpose entity to be the applicant for a new gTLD. For example, I understand that Donuts formed a separate special purpose entity for each gTLD for which it applied. For .WEB, Donuts formed Ruby Glen, LLC and used that entity to apply for the gTLD. By contrast, Google used the same entity, Charleston Road Registry Inc., to apply for all of the new gTLDs it sought to acquire.

10. One effect of the use of special purpose entities was to facilitate secondary market transfers of new gTLDs through the transfer of the special purpose entity independent of other assets of a party supporting the applicant. Another effect of the use of such entities can be to maintain as confidential the party for whose benefit the application was being pursued. In this regard, the new gTLD application form required the disclosure of the name of the applicant and the identity of any person or entity that owned more than 15% of the applicant.⁴ In some instances, this resulted in the disclosure of the real party in interest. For example, Google is identified as the owner of Charleston Road Registry Inc. In other instances, the requirement for a disclosure of the real party in interest was avoided by forming another entity to be the parent of the applicant, so the real parties in interest were not disclosed as the parent entity in the application. Donuts formed “Covered TLD LLC,” for example, and made that entity the disclosed parent entity on many of its applications.

11. Redacted - Third Party Designated Confidential Information

ICANN’s website identified each new gTLD for which an application had been filed and listed the identity of applicants along with a copy of non-confidential parts of their respective applications. Redacted - Third Party Designated Confidential Information

⁴ Afilias C-3 (*gTLD Applicant Guidebook, Module 2, Attachment to Module 2, Evaluation Questions and Criteria, Question 11(c)*), available at <https://newgtlds.icann.org/en/applicants/agb>).

12. Redacted - Third Party Designated Confidential Information

13. Redacted - Third Party Designated Confidential Information

14. Redacted - Third Party Designated Confidential Information



The Domain Acquisition Agreement between Verisign and NDC

15. Redacted - Third Party Designated Confidential Information

16. Redacted - Third Party Designated Confidential Information

. Private

auctions are conducted on terms privately negotiated among the competing bidders for the TLD, and private auction agreements commonly include terms for the losing applicants to split the proceeds of the auction among themselves. In private auctions, which may have been the most common form of resolving contention sets, there are no Guidebook requirements, and commonly no other requirements, with respect to how a participant conducts its bid, disclosure of financing terms, disclosure of interested parties, or post award intentions of the participants. Indeed, some applicants seem to have made a lucrative business out of losing private auctions. In a public auction, by contrast, the terms are not privately negotiated among the participants/competitors, and the proceeds of the auction are placed in a fund to be set up by ICANN for investment benefitting the Internet community as a whole rather than benefitting the losing bidders in a private auction.

17. Redacted - Third Party Designated Confidential Information

18. On August 15, 2015, NDC and Verisign entered into the Domain Acquisition Agreement (“DAA”). A copy of the DAA is attached hereto as Exhibit D. The DAA is a conditional agreement pursuant to which Verisign agreed to provide the funds for NDC to participate in an auction for the .WEB gTLD. In the event NDC prevailed at the auction and



entered into a registry agreement for .WEB with ICANN -- upon application to ICANN and with ICANN's consent -- NDC would assign the .WEB registry agreement to Verisign.

19. Redacted - Third Party Designated Confidential Information

20. The DAA is compliant with all terms of the Guidebook and consistent with transactions by others with respect to the new gTLD Program. Verisign did not acquire any interest in or control over NDC. The application for .WEB was not transferred to Verisign. The DAA's registry agreement assignment provision was conditional and contingent, applied only to an executed registry agreement following an award of .WEB to NDC, and was subject to ICANN's prior consent. The structure of the agreement also was consistent with industry practices in the secondary market for new gTLD applications of which I became aware in my research of the New gTLD Program, as explained above and as further documented below.

21. Redacted - Third Party Designated Confidential Information

22. The express terms of the DAA establish that it does not transfer NDC's application for .WEB and that any transfer to Verisign would be in the future and contingent on



ICANN's normal processes for such transfers, including application to ICANN for consent to an assignment of the registry agreement and ICANN's consent. For example, the DAA provides:

Redacted - Third Party Designated Confidential Information

Thus, a transfer or assignment would only take place after a registry agreement was signed between ICANN and NDC, ICANN's subsequent consent to an assignment of the registry agreement to Verisign, and the subsequent execution and delivery of the Transfer Agreement.

23. The lack of any transfer of rights in NDC's Application or assignment of a registry agreement is further confirmed by the terms of the DAA that permitted a termination of Redacted - Third Party Designated Confidential Information



24. Redacted - Third Party Designated Confidential Information

25. The Guidebook does not require an applicant to reveal the existence of, sources or amounts of any funding for a public or private auction for a new gTLD or other resolution of a contention set. ICANN's new gTLD application requires applicants to provide certain financial information to ICANN regarding its ability to *operate* a new gTLD.⁵ There is no requirement that an applicant disclose any information regarding funding for participation in an auction. It is further my understanding that financial information submitted as part of a gTLD application also is designated confidential by ICANN and not disclosed to other applicants or the public. Accordingly, under the terms of the new gTLD Program, even if the sources or terms of their funding for participation in the auction were subject to disclosure to ICANN, which they were not, other members of the contention set would never have access to that information.

26. As another example of the confidential nature of financial arrangements, it was disclosed after the fact that Automattic Inc. ("Automattic") financed the successful bid in a private auction for the .BLOG gTLD by applicant Primer Nivel S.A. ("Primer Nivel"). The auction took place in February 2015. In May 2016, before the .WEB auction, it was reported that Primer Nivel's bid had been financed by Automattic, the owner of the blogging platform wordpress.com. According to press reports, Automattic paid Primer Nivel \$19 million in exchange for Primer Nivel's agreement to assign the .BLOG gTLD to Automattic if it was successful in the private auction. One of the press reports that I reviewed regarding this

⁵ Afilias C-3 (*gTLD Applicant Guidebook*, §§ 1.2.1.2, 1.2.2 & 2.2.2.2, available at <https://newgtlds.icann.org/en/applicants/agb>).



transaction is attached hereto as Exhibit E (Kevin Murphy, WordPress Reveals IT Bought .blog For \$19 Million, Domain Incite (May 13, 2016), <http://domainincite.com/20440-wordpress-reveals-it-bought-blog-for-19-million>). This funding transaction appears to have been kept confidential and not revealed to ICANN or other bidders, which included an Afilias entity (Afilias Domains No. 1 Limited), prior to the .BLOG auction. Specifically, a press report states that WordPress financed Primer Nivel’s winning auction bid but “wanted to stay stealth while in the bidding process and afterward in order not to draw too much attention.” See Ex. F (Alan Dunn, Knock Knock WordPress Acquires Blog for 19 million, NameCorp (May 15, 2016), <https://namecorp.com/knock-knock-wordpress-acquires-blog-for-19-million/>). On April 29, 2016, ICANN consented to the assignment of .BLOG from Primer Nivel to Knock Knock WHOIS There, LLC, a subsidiary of Automattic. See Ex. G (<https://www.icann.org/resources/agreement/blog-2015-05-14-en>). To the best of my knowledge, Afilias did not object to the .BLOG auction after Automattic’s role in financing Primer Nivel’s bid was revealed. This transaction further supported my understanding then that pre-auction financing agreements, such as the DAA, were consistent with the Guidebook.

The Assurances of Performance

27. Redacted - Third Party Designated Confidential Information



28. Redacted - Third Party Designated Confidential Information

[Redacted content]



Afilias Claims in the IRP

29. It is my understanding that Afilias argues in this IRP that the DAA constitutes an impermissible transfer by NDC of rights in its new gTLD application. Such an argument is inconsistent with the express terms of the DAA and Confirmation of Understandings described above. Further, such an interpretation of the Guidebook would be contrary to industry practices with respect to the New gTLD Program that I learned in researching the Guidebook and secondary market.

30. Redacted - Third Party Designated Confidential Information

31. Redacted - Third Party Designated Confidential Information

A public auction is specifically provided for in the Guidebook, is fair and conducted under ICANN's oversight, and I am not aware of any requirement under the Guidebook that an applicant agree to a private auction. To the contrary, the Guidebook provides a private auction may only be conducted if *all* members of the Contention Set agree to have a private auction.⁶

⁶ Afilias C-3 (*gTLD Applicant Guidebook*, §§ 4.13 & 4.3, available at <https://newgtlds.icann.org/en/applicants/agb>).



32. Redacted - Third Party Designated Confidential Information

33. Redacted - Third Party Designated Confidential Information

34. Redacted - Third Party Designated Confidential Information



35. I understand that Afilias has stated that its bidding in the .WEB auction was constrained by the terms of its financing arrangement, which limited its bidding to no more than \$135 million.⁷ The limits on Afilias' funding demonstrates that Afilias' own conduct as a bidder during the .WEB auction was limited by its own financing arrangements, appearing to confirm again the industry practice of financing arrangements with parties not part of the .WEB contention set.

The Auction

36. In accordance with the DAA, Verisign provided funds for NDC to use in bidding for the .WEB gTLD in the public auction. NDC submitted a final bid that ICANN deemed to be and announced as the winning bid. Shortly after the auction, NDC paid ICANN \$135 million as the winning bid for the .WEB gTLD. Those funds were provided to NDC by Verisign.

37. [Redacted - Third Party Designated Confidential Information]

38. Finally, I understand that Afilias makes a claim that there was some form of collusion between Verisign and ICANN during or following the auction proceedings. This is untrue. I was responsible for this transaction. I did not have any communications with ICANN before or following the auction process. [Redacted - Third Party Designated Confidential Information]

⁷ See Witness Statement of Ram Mohan, 1 November 2018, ¶ 35, fn. 38 (<https://www.icann.org/en/system/files/files/irp-afili-as-witness-statement-mohan-redacted-26nov18-en.pdf>).



. As a major participant in the DNS, Verisign has regular dealings with ICANN on a range of matters. Also, with respect to the questionnaire ICANN sent out to Verisign, NDC and contention set members who objected to ICANN regarding the public auction for .WEB, I am unaware of any advance notice by ICANN to NDC or Verisign of the questionnaire.

I swear under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 1st day of June 2020 at San Carlos, California.

By:

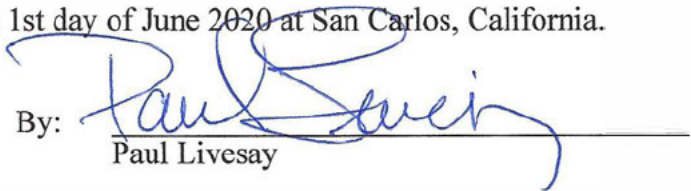

Paul Livesay

EXHIBIT C-11

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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)	
)	
Claimant,)	
)	
vs.)	ICDR Case No.
)	01-18-0004-
INTERNET CORPORATION FOR)	2702
ASSIGNED NAMES AND NUMBERS,)	
)	
Respondent.)	
)	

VOLUME VII
ARBITRATION HEARING HELD BEFORE
AUGUST 11, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
465538



(310) 207-8000 Los Angeles	(415) 433-5777 San Francisco	(949) 955-0400 Irvine	(858) 455-5444 San Diego
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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)
)
 Claimant,)
)
 vs.) ICDR Case No.
) 01-18-0004-
 INTERNET CORPORATION FOR) 2702
 ASSIGNED NAMES AND NUMBERS,)
)
 Respondent.)
)

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TUESDAY, AUGUST 11, 2020
ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME VII (Pages 1113-1308)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR

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A-P-P-E-A-R-A-N-C-E-S

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A-P-P-E-A-R-A-N-C-E-S
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CALIFORNIA, AUGUST 11, 2020

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ARBITRATOR BIENVENU: Mr. Livesay, good morning. Good morning, sir. I don't know where you're joining us from, but I made the presumption that "good morning" would work.

THE WITNESS: Yes, it's morning. I am here in California.

ARBITRATOR BIENVENU: Excellent. Sir, could I ask you to speak closer to your mic or to increase the volume of your mic?

THE WITNESS: Is that better? Can you hear me now better?

ARBITRATOR BIENVENU: It is better, but we could do with a bit more volume.

THE WITNESS: Let me put the mic here in front of my face. How about that?

ARBITRATOR BIENVENU: Mr. Livesay, my name is Pierre Bienvenu. I chair the Panel. My colleagues are Catherine Kessedjian, who is joining us from Paris, and Mr. Richard Chernick, who is joining from Los Angeles.

You have, sir, filed in connection with this Independent Review Process a witness statement dated 1st June 2020, correct?

1 THE WITNESS: Correct.

2 ARBITRATOR BIENVENU: And your statement
3 ends with your swearing that the statements in your
4 witness statement are true and correct?

5 THE WITNESS: Correct.

6 ARBITRATOR BIENVENU: I would ask you,
7 sir, in relation to the evidence that you will give
8 to the Panel today, likewise, solemnly to affirm
9 that it will be the truth, the whole truth and
10 nothing but the truth?

11 THE WITNESS: I do.

12 ARBITRATOR BIENVENU: Thank you.

13 Mr. Johnston.

14 MR. JOHNSTON: Good morning, Mr. Livesay.
15 Have you recently had an opportunity to review your
16 witness statement?

17 THE WITNESS: I have over the last few
18 days.

19 MR. JOHNSTON: And are there any
20 corrections you wish to make to it?

21 THE WITNESS: I think the only
22 clarification is there might be where I said not
23 four --

24 (Discussion off the record.)

25 ARBITRATOR BIENVENU: Maybe, Mr. Livesay,

1 maybe you could put your mic on something else so
2 it would be higher up. If you rest it on a book or
3 binder or whatever, it will be closer to you.

4 (Discussion off the record.)

5 ARBITRATOR BIENVENU: I believe
6 Mr. Johnston was asking if you had any corrections
7 that you wish to make to your witness statement,
8 and you were cut off in the course of your answer.

9 THE WITNESS: Right. I was simply stating
10 there's a point where I said I may have talked to
11 four or five of the potential set members, and I
12 can confirm I have only talked to four, not four or
13 five. It is a clarification. I don't think it is
14 inconsistent with the original statement.

15 MR. JOHNSTON: Mr. Chairman, we offer
16 Mr. Livesay for cross-examination.

17 ARBITRATOR BIENVENU: Thank you very much,
18 Mr. Johnston.

19 Mr. Litwin, you ready to proceed with your
20 cross-examination?

21 MR. LITWIN: I am, Mr. Chairman. Thank
22 you very much.

23 //

24 //

25 //

1 CROSS-EXAMINATION

2 BY MR. LITWIN

3 Q. Good morning, Mr. Livesay. My name is
4 Ethan Litwin. I am from the law firm of
5 Constantine Cannon. I understand that you have
6 likely received a package from us, as has
7 Mr. Johnston, and I would ask that you both open
8 them now.

9 A. All right.

10 Q. Mr. Livesay, as you will see, in fact, if
11 you just turn to your witness statement, which is
12 behind Tab 1, you'll see that we've marked each
13 page of the documents in that binder with a unique
14 page number. When I direct your attention to these
15 documents, I will refer to that unique page number,
16 okay?

17 A. The lower right-hand corner?

18 Q. Correct.

19 A. Okay.

20 Q. Now, there are a few documents that are
21 not in the binder. Those will be on the screen.
22 So I assume that you have been able to see on your
23 screen the documents that Chuck has been pulling up
24 this morning?

25 A. Yes.

1 Q. Okay. You're a little faint again, but I
2 think I can make it out.

3 A. I think it is just because when I look
4 away.

5 (Discussion off the record.)

6 Q. BY MR. LITWIN: All right. We are in
7 business.

8 Mr. Livesay, can you please tell me, in
9 addition to your witness statement, what other
10 documents you reviewed to prepare for your
11 testimony here today?

12 A. I reviewed some of the filings, I believe
13 Afiliast's filing from May, and then I also read
14 through some of the filings afterward, including
15 Afiliast's response and some of the other papers, but
16 largely just the filings over the last couple of
17 months.

18 Q. Did you look at any of the exhibits that
19 were referenced in those filings?

20 A. Exhibits -- I just read the filings mostly
21 directly.

22 Q. Okay. Mr. Livesay, you were employed at
23 VeriSign as a vice president and associate general
24 counsel between 2014 and 2018; is that correct?

25 A. Correct.

1 Q. And you had previously worked at VeriSign
2 in 2009-2010 as the vice president, strategy and
3 management for VeriSign's digital certificate
4 business; is that correct?

5 A. Correct.

6 Q. And in 2010, you left VeriSign to join
7 Symantec when it acquired VeriSign's certificate
8 business; is that right?

9 A. Correct. I was sold off in that
10 transaction, correct.

11 Q. Do you recall the month in 2014 when you
12 returned to VeriSign?

13 A. I think I started early June, like the
14 first week of June 2014.

15 Q. And what about the month in 2018 that you
16 left?

17 A. I believe my last day was early May of
18 2018.

19 Q. And what was the reason for your departure
20 in 2018?

21 A. I live in the Silicon Valley and VeriSign
22 is in Reston, Virginia. I was commuting every
23 other week for almost -- well, a long time. I got
24 separated from my wife in 2017 and ultimately just
25 had to return home.

1 And at that same time my mother was going
2 through a severe decline, had to take over as her
3 medical attorney-in-fact, and she went into
4 hospice. So I had that kind of stuff.

5 Q. Understood, Mr. Livesay.

6 A. I also wanted to take care of some stuff.

7 Q. Did you sign any sort of termination
8 agreement when you left VeriSign?

9 A. I'm sure I was exited as part of a
10 reduction in force. I am sure there was some forms
11 that I signed or whatnot.

12 Q. Did you sign anything related to providing
13 VeriSign with assistance in matters relating to
14 disputes concerning .WEB?

15 A. I don't recall anything like that as a
16 part of my departure, no.

17 Q. Since you left VeriSign, where have you
18 been employed?

19 A. Since leaving VeriSign, I am basically
20 working as an independent attorney contractor, as
21 you say, because I was dealing with a lot of other
22 family stuff at the time.

23 Q. Have you done any work for VeriSign since
24 leaving in 2018?

25 A. No, not until they contacted me in early

1 May regarding this matter.

2 Q. In early May of?

3 A. This year.

4 Q. Of this year?

5 A. Yeah.

6 Q. Are you providing your testimony in this
7 case pursuant to any contractual agreement with
8 VeriSign?

9 A. No.

10 Q. Have you been compensated in any way for
11 the assistance you have provided to VeriSign in
12 connection with these disputes concerning .WEB?

13 A. Nope.

14 Q. Do you have any financial interest in the
15 outcome of the .WEB dispute?

16 A. Nope.

17 Q. Okay. In 2014 you were asked to identify
18 potential business opportunities for VeriSign in
19 ICANN's new gTLD Program; is that right?

20 A. Yeah, towards the end of '14, yeah, I
21 began -- I started middle of '14 I was doing some
22 stuff having to do with strategy and the patent
23 group stuff. Later in the fall I kind of got into
24 this program, yeah.

25 Q. Who gave you this assignment?

1 A. My boss at the time, Tom Indelicarto, and
2 Jim Bidzos, the CEO.

3 Q. Mr. Bidzos personally instructed you to
4 identify opportunities in the new gTLD Program?

5 A. I worked for two people at the company, my
6 immediate boss and his boss. I do what they ask me
7 to do.

8 Q. Well, my question is: Do you recall
9 receiving this assignment from somebody?

10 A. You know, we had small discussions. I
11 don't recall a specific -- I am not really sure
12 what you're asking, because, like I said, I had
13 discussions with these two executives, and I was
14 asked to pursue and find opportunities in this
15 area.

16 Q. Okay. That's fair enough.

17 Just for the court reporter, could you
18 spell Indelicarto and Bidzos for her?

19 A. This is going to be good. Indelicarto,
20 I-n-d-e-l-i-c-a-r-t-o, Indelicarto, I think.

21 Q. I think that's right.

22 A. Bidzos, B-i-d-z-o-s.

23 Q. Thank you. Did you report back to
24 Mr. Indelicarto or Mr. Bidzos as you proceeded to
25 work on this assignment?

1 A. Sure, absolutely.

2 Q. How often?

3 A. Probably weekly or biweekly as we
4 progressed trying to investigate this area.
5 Obviously -- go ahead. Sorry.

6 Q. In what form did you report back, was it
7 in writing, email, memo, small meetings?

8 A. Most commonly small meetings talking about
9 the development and progress of matters.

10 Q. Did you collaborate on this project with
11 anyone else at VeriSign?

12 A. Not sure what you mean by "collaborate,"
13 depending on where in the project we were. Early
14 on it was a very small group. As we got into
15 later, working on the agreement became more
16 involved. There were other attorneys involved in
17 the drafting and that kind of stuff.

18 Q. So let's break this into the -- what I'll
19 call the investigative stage and the contracting
20 stage; is that fair, Mr. Livesay?

21 A. Within reason, yes, that's probably fair.

22 Q. Okay. So during the investigative stage,
23 how big was the group you were working with?

24 A. It was pretty small. A little project
25 group. I don't know entirely who else might have

1 been aware of the project outside of the few
2 executives I mentioned. I am not telling anyone
3 outside my -- those folks at that time.

4 Q. So outside of Mr. Bidzos and
5 Mr. Indelicarto, is there anyone else who was
6 working with you to identify opportunities in the
7 new gTLD Program?

8 A. Well, certainly there was some people on
9 the business side who were evaluating and making
10 the decisions whether it makes sense for us to get
11 into the gTLD market.

12 Q. Who were they -- I'm sorry.

13 A. I am not sure of everyone. I know I
14 worked with a gentleman by the name of John Cochran
15 at the time who was in the corporate strategy
16 group. I think he rolled up through finance.

17 To be fair, though, there's a distinction,
18 I think, between the business folks looking at
19 whether it makes sense for us to go into this
20 business and whether or not they were necessarily
21 involved in the project of pursuing opportunities.

22 What I mean by that is there was a
23 decision to potentially look at this opportunity,
24 but the folks developing that intel maybe weren't
25 necessarily aware of what I was doing in trying to

1 pursue an actual agreement with a contention
2 member.

3 Q. Okay. And what was Mr. Indelicarto's
4 title?

5 A. He's general counsel.

6 Q. And Mr. Bidzos?

7 A. He's the chairman, CEO and whatever stuff
8 you could put on there.

9 Q. Now, when you moved to the contracting
10 time of this project, you mentioned that other
11 lawyers were involved. Who were they?

12 A. Specifically a guy by the name of Kevin
13 Ristau, R-a-s-t-a-u, I think it is, and Rob Wilson.

14 Q. And the Panel is familiar with a document
15 called the Domain Acquisition Agreement, which is
16 the agreement you signed with NDC. Did Mr. Ristau
17 and Mr. Wilson draft that document?

18 A. They were definitely involved in the
19 drafting of that document for sure.

20 Q. Were you involved in the drafting of that
21 document?

22 A. Sure.

23 Q. I'm sorry, didn't hear that?

24 A. Yes.

25 Q. Did you work with Mr. David McAuley on

1 this project at all?

2 A. I don't recall that name, no, not on that
3 project.

4 Q. Do you know Mr. McAuley?

5 A. The name sounds familiar. Maybe he's a
6 VeriSign person, but it's been a while. I don't
7 recall.

8 Q. That's the same exact answer he gave about
9 you. He knew your name, but wasn't familiar.

10 Now, you got this project in 2014, and
11 that was after the new gTLD application window had
12 closed, correct?

13 A. I believe the application window closed in
14 '12, so yeah.

15 Q. Following the closure of the application
16 window, VeriSign had raised concerns with ICANN
17 about the risk of name collision; is that right?

18 A. I am not sure. I don't know. I think
19 that's handled within another group within
20 VeriSign.

21 Q. So are you aware that name collision
22 concerns the risk that delegation of new gTLDs
23 could interfere with the attempts to reach a
24 private domain and instead would result in
25 resolving to a public domain as well?

1 A. I thought you asked whether I was aware
2 somebody had communicated about it. I thought
3 that's what you asked. I am aware of the concept
4 of name collision.

5 Q. Okay. And just to be clear that we
6 understand what name "collision" is, so if there
7 were a registry for, let's say, .HOME or .CORP, for
8 example, a lot of people use those for their
9 private Internets, right?

10 A. I don't know. That's not my expertise.

11 Q. Would it be fair to say through its
12 lobbying efforts on name collision, VeriSign
13 managed to at least preliminarily take close to 10
14 million domain names off the market in 2013?

15 A. I have no idea what you mean by VeriSign's
16 lobbying, and I was not with the company in 2013.

17 Q. In January of 2014, ICANN announced that
18 it had received over 1,900 applications for new
19 gTLDs.

20 Do you recall that?

21 A. I wasn't with the company at that time.
22 You said January '14; is that right?

23 Q. Yes.

24 A. No. I joined in June of '14.

25 Q. Did you follow the progress of the new

1 gTLD Program during your time at Symantec?

2 A. No. Prior to joining VeriSign in 2014, I
3 had never been a part of the DNS world. Prior to
4 that, my history in security infrastructure had
5 been on the encryption side and then on the
6 certificate side. So me coming to VeriSign related
7 to the naming business was a new industry to me.

8 Q. Okay. When you joined VeriSign in June of
9 2014, were you aware that ICANN had announced that
10 it had received over 1,900 applications for new
11 gTLDs?

12 A. I am aware that they received a lot of
13 applications. That number sounds correct.

14 Q. And did you become aware in June of 2014,
15 when you began work on this assignment -- scratch
16 that.

17 When you returned to VeriSign, did you
18 become aware that ICANN had announced that it was
19 possible that the DNS would end up expanding by
20 over 1,300 gTLDs; is that right?

21 A. Certainly as I looked into the gTLD
22 program, I became aware of the large increase in
23 number of TLDs that would become available
24 potentially.

25 Q. And over the course of 2013 and 2014, are

1 you aware that quite a few articles had been
2 published from the financial press raising concerns
3 about the slowdown in the growth of the .COM
4 registry?

5 A. I wasn't with the company in 2013.

6 Q. Well, in your discussions with Mr. Bidzos,
7 the CEO, and Mr. Indelicarto, the general counsel,
8 did they disclose to you that there had been
9 concerns raised about the slowdown in the growth of
10 the .COM registry?

11 MR. JOHNSTON: Excuse me, Mr. Chairman,
12 I'd like to ask the witness to be conscious of the
13 fact that that question specifically refers to
14 conversations with Mr. Indelicarto, who is the
15 general counsel of the company, and ask the
16 witness, in the event of answering the question, it
17 might divulge any attorney-client communications
18 with Mr. Indelicarto, that he alert us so that
19 doesn't happen. Thank you.

20 MR. LITWIN: If I might respond briefly,
21 Mr. Chairman, I think we've established that the
22 meetings between Mr. Livesay, Mr. Indelicarto and
23 Mr. Bidzos concerned the business side of VeriSign.
24 I am asking a business question. I am not asking
25 for the witness to divulge any legal advice.

1 ARBITRATOR BIENVENU: I understand your
2 point, and Mr. Johnston did not object to the
3 question. He simply cautioned the witness not to
4 disclose what could be privileged communications in
5 the course of his answer.

6 Unless Mr. Johnston advises otherwise, I
7 did not hear him object to the question.

8 MR. JOHNSTON: That's correct.

9 MR. LITWIN: Okay. Thank you,
10 Mr. Chairman.

11 Q. Mr. Livesay, I will echo Mr. Johnston's
12 comment that at no time during my examination I
13 would ask you to reveal the substance of a
14 privileged communication. And please tell me if my
15 question, in your mind, elicits one.

16 My question is: Over the course of your
17 discussions with Mr. Indelicarto and Mr. Bidzos
18 concerning the -- finding opportunities for
19 VeriSign in the new gTLD Program, did they reveal
20 to you that during 2013 and 2014 there had been
21 articles published in the financial press raising
22 concerns about the slowdown in the growth of the
23 .COM registry?

24 A. I don't recall having any specific
25 discussions with Bidzos about that. I do know that

1 there has been obvious legal history and work
2 around that topic, but I am not a competition
3 attorney. I am not involved in the running of
4 .COM. That was a separate business unit, and I was
5 really invoked to try to find ways that the company
6 could simply have more opportunities at other
7 domains to sell more domain.

8 The history of .COM was a separate running
9 enterprise, not my forte.

10 Q. Now, in 2015, VeriSign sought to acquire
11 the rights to the .WEB registry by concluding the
12 DAA; is that correct?

13 A. I'm sorry, say that again?

14 Q. In 2015, VeriSign sought to acquire the
15 rights to the .WEB registry by concluding the DAA
16 with NDC; is that correct?

17 A. I don't know about the DAA, period. There
18 are several steps in that agreement. The goal was
19 hopefully finance or help NDC finance, win the
20 auction, and if they became the registry, that they
21 would seek to have it assigned to us.

22 So there were definitely some steps
23 involved. I don't know if I would say -- use your
24 description about finally signing.

25 Q. Well, let me rephrase it, Mr. Livesay.

1 Is it fair to say that the ultimate
2 objective that VeriSign sought to achieve by
3 entering into the DAA with NDC was the acquisition
4 of the rights to the .WEB registry?

5 A. The goal was for us to become the operator
6 of .WEB.

7 Q. And VeriSign has not signed any other
8 deals to acquire other gTLDs; is that right?

9 A. Not that I am aware of. Not in the time
10 that I was there.

11 Q. Were you aware, as you worked on this
12 project during the end of 2014 and 2015, that the
13 .COM Registry Agreement was due in the fall of
14 2016?

15 A. I don't recall being aware of that at the
16 time, no.

17 Q. Is it fair to say that the .COM Registry
18 Agreement is the single most important contract
19 that VeriSign has?

20 A. I don't think I'd be a good judge of that.

21 Q. Well, .COM is responsible for over a
22 billion dollars in revenue for VeriSign; isn't that
23 right?

24 A. That's true. But you asked if that's the
25 most important agreement. I don't know. I don't

1 run that business. I am not part of that business.

2 I don't know.

3 Q. Would it be fair to say -- strike that.

4 In connection with your assignment in 2014
5 to identify potential business opportunities in the
6 new gTLD Program, you state in your witness
7 statement that you studied very closely the new
8 gTLD application guidebook; is that correct?

9 A. I did, yep.

10 Q. And the auction rules?

11 A. When we got around to the auction, yep.

12 Q. And the other rules -- let me step back.

13 So when you say when you got around to the
14 auction, does that mean that you studied those
15 rules in the run-up to the auction in 2016?

16 A. At some point I would have been reading
17 the auction rules and become aware of them. I
18 don't recall exactly when, but yep.

19 Q. Well, was that before or after you
20 executed the DAA -- or VeriSign executed the DAA in
21 August of 2015?

22 A. I don't recall reviewing auction or
23 bidding agreements prior to signing the DAA, but I
24 don't know. I don't recall it.

25 Q. And did you study the other body of rules

1 that comprise the relevant rules that govern the
2 new gTLD Program?

3 A. Like what?

4 Q. Well, you mentioned -- let's look at your
5 witness statement. If you can turn to Tab 1 in
6 your binder, and I would direct your attention to
7 Paragraph 5, you write, "I studied very closely the
8 new gTLD Application Guidebook published by ICANN,
9 the Auction Rules, and other information regarding
10 the new gTLD Program on ICANN's website to
11 familiarize myself with the rules applicable to the
12 Program."

13 So I guess my question is, Mr. Livesay:
14 Other than the guidebook and the auction rules,
15 what other rules did you review?

16 A. You know, I think generally I am referring
17 to -- the ICANN website has a lot of information on
18 it. Anything I could read, I did. That's where I
19 found information about, say, applicants, what they
20 had done, where they are located. I think that end
21 there is saying I used the ICANN website as the
22 primary source of information for how the program
23 is run and the applicants and the contention sets.

24 Q. Redacted - Third-Party Designated Confidential Information
25

1 Redacted - Third-Party Designated Confidential Information

2
3
4 A. Redacted - Third-Party Designated Confidential Information

5 Q. I would now like to refer to you Tab 4 in
6 your binder.

7 A. You know, I am just looking at this side
8 of the paper. That's why I'm looking down.

9 Q. Okay. That's fair. I am going to be
10 largely doing the same thing over here.

11 Chuck will put things up on the screen in
12 case it is unclear.

13 So these are some significant excerpts
14 from the new gTLD guidebook, and I will just
15 represent to you that we've included the entire
16 module where we have accepted the module, but we do
17 have the entire version available electronically.

18 I would like to direct your attention to
19 Page 95. And on Page 95 you will see Rule 4.1.3,
20 which you discuss in your witness statement.

21 This section is entitled "Self-Resolution
22 of String Contention."

23 Do you see that, sir?

24 A. Yep.

25 Q. Now, it provides that, "Applicants that

1 are identified as being in contention are
2 encouraged to reach settlement or agreement among
3 themselves that resolves the contention."

4 It goes on to say, "Applicants may resolve
5 string contention in a manner whereby one or more
6 applicants withdraw their applications."

7 It goes on to say, "It is understood that
8 applicants may seek to establish joint ventures in
9 their efforts to resolve string contention," and
10 then concludes, it says, "Accordingly," and I would
11 interpret that as "however," given how we have gone
12 through this, that, "new joint ventures must take
13 place in a manner that does not materially change
14 the application, to avoid being subject to
15 reevaluation."

16 Do you see that, sir?

17 A. Yep.

18 Q. So it's fair to say that ICANN encourages
19 applicants to resolve contention sets among
20 themselves before an ICANN auction; is that fair?

21 A. That's fair.

22 Q. And one of the ways in which ICANN
23 envisioned that this may happen was by establishing
24 joint ventures among themselves; is that right?

25 A. It says it right there, correct.

1 Q. But ICANN cautions applicants that in
2 creating joint ventures, they shouldn't do so in a
3 manner that would require reevaluation under the
4 rules, right?

5 A. That's what it says.

6 Q. Okay. If you could please turn back to
7 Page 32 of Tab 4, you will see Rule 1.2.7 there.

8 Do you see that, sir?

9 A. What page number are we on?

10 Q. Page 32 of Tab 4.

11 A. All right. Yep.

12 Q. And what Section 1.2.7 provides, it says,
13 "Notice of Changes to Information. If at any time
14 during the evaluation process information
15 previously submitted by an applicant becomes untrue
16 or inaccurate, the applicant must promptly notify
17 ICANN via submission of the appropriate forms."

18 And then at the bottom, it says that,
19 "ICANN reserves the right" -- I guess it is in the
20 middle, rather -- "reserves the right to require a
21 re-evaluation of the application in the event of a
22 material change"; is that right?

23 A. That's what it says.

24 Q. Now, you can turn back to Page 95 if you
25 want, where Rule 4.1.3 is, but is it fair to say

1 that the lesson you drew from reviewing Rule 4.1.3
2 is that when applicants were seeking to resolve
3 contention among themselves, ICANN's primary
4 concern was that they did so in a way that would
5 not require reevaluation and thus not cause delay
6 in the resolution of the contention set; is that
7 fair?

8 A. It seems to be that they knew or were
9 expecting that people would resolve contention sets
10 through various agreements and simply wanted to
11 ensure that -- to try and do it in a way that did
12 not trigger reevaluation. I agree with that
13 statement.

14 That seemed to be what they were
15 encouraging and were also aware and wanted to be
16 clear, don't do anything that actually changes the
17 organizational function. I think they say -- I
18 don't recall where, but having an entity acquire an
19 applicant might require reevaluation. So they gave
20 some examples, I believe, about things you could or
21 shouldn't do. It seemed to be that's what they
22 were looking for in the guidebook.

23 Q. Now, of course, you were aware at the time
24 that VeriSign was not an applicant for .WEB; is
25 that right?

1 A. That's correct.

2 Q. Now, Section 1.2.7 requires applicants to
3 notify changes in their application via submission
4 of the appropriate forms, correct?

5 A. No. It says a material change to the
6 applicant or that becomes untrue or inaccurate. I
7 don't believe anything in the application of NU DOT
8 CO changed.

9 Q. Let's just keep it general for now,
10 Mr. Livesay. I will agree with you that where --
11 and I believe this is what you're saying, but if
12 you would confirm that Section 1.2.7 provides that
13 where a -- where information in the application
14 that had been previously submitted by the applicant
15 becomes untrue or inaccurate, that applicant must
16 promptly notify ICANN via submission of the
17 appropriate forms?

18 A. Correct. If something's untrue or
19 inaccurate, the applicant needs to do that.

20 Q. Now, those forms were analyzed pursuant to
21 ICANN's change request criteria, correct?

22 A. I don't know what form you're talking
23 about.

24 Q. You did not familiarize yourself with the
25 ICANN application portal?

1 A. We weren't making any changes to an
2 application requiring submission of a form. It
3 sounds like you jumped over something in this last
4 question, that's all.

5 Q. So Section 1.2.7 says if an application
6 previously submitted has information in it that
7 becomes untrue or inaccurate, the applicant must
8 promptly notify ICANN, correct?

9 A. Yeah. And you had asked me whether or not
10 I looked at the form, and I said no, because we
11 didn't do anything that changed the applicant that
12 made it untrue or inaccurate.

13 Q. Okay. Right now I am just trying to
14 inquire, Mr. Livesay, into your review of the ICANN
15 rules and procedures governing the new gTLD
16 Program. We'll come back to the particular
17 transaction in a minute.

18 Chuck, can you put up Exhibit C-56,
19 please.

20 ARBITRATOR BIENVENU: Is that in the
21 binder, Mr. Litwin?

22 MR. LITWIN: It is not. I apologize,
23 Mr. Chairman. There's a handful of documents that
24 are not in the binder.

25 Chuck, if you could just blow up -- yeah,

1 that part. That would be great.

2 Q. This is a document from ICANN's website
3 called the "New gTLD Application Change Request
4 Process and Criteria."

5 Have you seen this document before?

6 A. Doesn't look familiar to me, nope.

7 Q. So when you say that you carefully studied
8 the rules and procedures governing the new gTLD
9 Program, you did not review the change request
10 process?

11 A. I didn't say that. I am saying it doesn't
12 look familiar. Right now I can't see the document
13 on the screen because you have this thing blown up
14 in front of it.

15 MR. LITWIN: Chuck, can you please take
16 that off. Is there any way to blow up the whole
17 document, or at least the first page of it?

18 THE WITNESS: Your question was did I
19 review this when I reviewed the guidelines?

20 Q. BY MR. LITWIN: Correct.

21 A. When I went through the guidelines, I
22 looked for things that seemed relevant, and when I
23 got to something like this, which said "Change
24 Request Process," I look at what the requirement
25 is, doesn't apply, so I move on.

1 Q. Okay. So is it fair to say you did not
2 discuss the change request criteria with NDC?

3 A. Nope.

4 Q. Is it also fair to say in your work on the
5 DAA you did not consult with ICANN regarding the
6 applicability of the change request criteria?

7 A. Say that again?

8 Q. And is it fair to say that in connection
9 with your work on the DAA, you did not consult with
10 ICANN regarding the applicability of the change
11 request criteria?

12 A. Correct. I didn't contact ICANN in this
13 regard, no.

14 Q. And it is true, Mr. Livesay, that NDC, in
15 fact, never filed a change request with ICANN; is
16 that right?

17 A. As far as I am aware.

18 Q. Okay. Now, directing your attention to
19 the first page and to the section called change
20 request overview, you can see that the document
21 quotes that part of 1.2.7 that we just reviewed,
22 that when, "any time during the evaluation process
23 information previously submitted by the applicant
24 becomes untrue or inaccurate, the applicant must
25 promptly notify ICANN via submission of the

1 appropriate forms."

2 Do you see that, sir?

3 A. I see that, yep.

4 Q. And ICANN notes that the Application
5 Change Request process was, in fact, created "in
6 order to allow applicants to notify ICANN of
7 changes to application materials."

8 Do you see that at the bottom of that?

9 A. Yep.

10 Q. Now, if we can look at the next section,
11 it identifies seven criteria, and it is on the
12 bottom of this first page and the top of the next
13 page. I will just wait a second for Chuck to blow
14 that up for you.

15 And the seven criterion are, one,
16 explanation; two, evidence that the original
17 submission was in error; three, other parties
18 affected; four, precedents; five, fairness to
19 applicants; six, materiality; and seven, timing,
20 correct?

21 A. That's what it says.

22 Q. Now, ICANN states right below this -- and
23 Chuck, if you could blow that up -- that, "These
24 criteria were carefully developed to enable
25 applicants to make necessary changes to their

1 applications while ensuring a fair and equitable
2 process for all applications."

3 Do you see that, sir?

4 A. I see where that's written, yeah.

5 ARBITRATOR BIENVENU: "For all
6 applicants," not "for all applications."

7 MR. LITWIN: "For all applicants." Sorry.
8 I misspoke, Mr. Chairman.

9 Q. Let's move down to the next section, which
10 goes through these criterion in more detail.

11 So the first -- maybe just -- yeah, pull
12 up that whole box so we don't have to keep doing
13 it. That's great.

14 So the first criterion is explanation.
15 This is, as ICANN says here, simply an opportunity
16 to allow the applicant to provide an explanation
17 for the change.

18 A. If you weren't making a change, this
19 wouldn't apply, correct?

20 Q. Excuse me?

21 A. Since we didn't make a change, this
22 wouldn't apply, we didn't need to provide an
23 explanation if the change hadn't been made,
24 correct?

25 Q. What I am doing, sir, is just going

1 through the document so that we understand what
2 ICANN provided as their criterion. We'll come back
3 and look at the NDC application.

4 A. Right. When you read this, if you step
5 into these seven criteria on the presumption that a
6 change has been made and an application for a
7 change has been made, I agree these are all
8 written, but we didn't request a change because an
9 applicant -- and NDC's application wasn't altered.

10 Q. I understand that. I understand that that
11 is what you have testified to here today,
12 Mr. Livesay.

13 What I am trying just to establish is that
14 in the event that a change request had been
15 submitted, these are the criterion that ICANN would
16 have looked at, correct?

17 A. That seems to be the case. It is right
18 there in black and white.

19 ARBITRATOR BIENVENU: Mr. Litwin, this is
20 Pierre Bienvenu. Could I ask your colleague Chuck
21 to blow the introductory paragraph to the text that
22 we are looking at now. Thank you. This puts the
23 subparagraphs in context. Please continue with
24 your questions.

25 MR. LITWIN: Thank you, Mr. Chairman.

1 Q. So in the event -- and I'll phrase it like
2 that so it is clear, Mr. Livesay. In the event
3 that a change request was submitted to ICANN or --
4 I'll use the subjunctive -- were to be submitted to
5 ICANN, ICANN would first look at the explanation.

6 But is it fair to say that because this is
7 simply an opportunity to allow the applicant to
8 provide an explanation for the change, the
9 criterion is always satisfied and does not bear as
10 much weight as the others; is that fair,
11 Mr. Livesay?

12 A. I have no way of understanding of how
13 ICANN would weigh these in your hypothetical. You
14 are presenting a hypothetical to which you want a
15 hypothetical answer. I don't know.

16 Q. So what this says, and I will quote, it
17 says, "As such, this criterion is always met and
18 does not bear as much weight as the other
19 criteria."

20 Is that what it says, sir?

21 A. That's what it says.

22 Q. So turning next to evidence that the
23 original submission was an error. You know, I
24 think we can agree that even if NDC had submitted a
25 change request, which you testified they did not,

1 to your knowledge, this would not apply, in any
2 event, correct?

3 A. I don't know. I don't know. You are
4 creating a hypothetical which you want me to create
5 an answer to. I don't know. They did not submit a
6 change request because no change was made, and now
7 you're asking me to apply these rules that ICANN
8 would in your hypothetical.

9 Q. Well, fair enough, Mr. Livesay. In the
10 event that a change request is submitted --

11 A. This is a hypothetical question?

12 Q. Yes. In the event that a change request
13 were submitted to ICANN and it does not concern an
14 error in the original submission, but rather a
15 changed circumstance, this criterion would not
16 apply; is that correct?

17 A. I am not really familiar with how ICANN
18 applies these rules. You're reading the words the
19 same as I am right now.

20 Q. Let's skip down to "Precedents" and look
21 at that one. Here ICANN notes that if a change
22 request would create a new precedent, that change
23 request would be unlikely to be approved; is that
24 fair?

25 A. I am reading the same words you are.

1 Q. Well, is it fair, Mr. Livesay, based on
2 your reading of the same words that I am, that if a
3 change request were to create a new precedent, that
4 change would be unlikely to be approved?

5 A. That's what the words say. How ICANN
6 interprets it, I don't know.

7 Q. Now, going back to the "Other third
8 parties affected" criterion, this criterion
9 evaluates whether a change request materially
10 impacts other third parties, particularly other
11 applicants; is that correct?

12 A. That's what it says.

13 Q. And, in fact, it says that in cases where
14 a change to application material has the potential
15 to materially impact the status of another
16 applicant's application, this criterion is heavily
17 weighted; is that correct, sir?

18 A. You read the line.

19 Q. Now, closely related to the "Other third
20 parties affected" criterion is the "Fairness to
21 applicants" criterion. Here ICANN notes that it
22 will evaluate change requests to determine whether
23 granting the request, quote, "would put the
24 applicant in a position of advantage or
25 disadvantage compared to the other applicants,"

1 correct?

2 A. That is what it says.

3 Q. And ICANN further states that, quote, "if
4 a change request is found to materially impact
5 other third parties, it will likely be found to
6 cause issues of unfairness," right?

7 A. That's what it says.

8 Q. In other words, if granting the change
9 would be unfair to other applicants, this criterion
10 would weigh against granting the change, correct?

11 A. I don't know if your rewording is accurate
12 or the way ICANN would read it. I go with the
13 words that are on the page.

14 Q. The next criterion is "Materiality," which
15 notes that ICANN will consider whether a change
16 request will impact competing applications,
17 correct?

18 A. That's what it says.

19 Q. So if a change request would impact other
20 members of a contention set, that would satisfy the
21 materiality criterion, correct?

22 A. I mean, I am just reading the words here.
23 I am not really sure what you're trying to read
24 differently.

25 Q. I am not trying to read anything

1 differently, Mr. Livesay. I am just asking that
2 this "Materiality" criterion provides that if a
3 change request would impact other members of a
4 contention set -- and you can see the word
5 "contention set" in Line 2?

6 A. Yep.

7 Q. Do you see that?

8 A. Yeah.

9 Q. I'm sorry, are you saying "yes" or "yep"?

10 A. Yes, I see where you have highlighted.

11 Q. Then the "Materiality" criterion would be
12 satisfied; isn't that correct?

13 A. I don't see the word "satisfied" in there.

14 Q. Well, you understand that these criterion
15 are used by ICANN to determine whether or not to
16 approve a change request; is that right?

17 A. That's why I defer to how ICANN interprets
18 something. You are providing interpretations of
19 your reading, and I would have to defer to ICANN's
20 interpretation. You are providing hypotheticals
21 for a situation I don't believe we are in.

22 Q. I am just reading the rules.

23 A. You are reading them and then asking me to
24 affirm your ultimate reading where you change a few
25 words. You can read them, and I will affirm the

1 words on the page are what they are, but I have no
2 reason to take an interpretation because this isn't
3 a world -- a situation we were in. I will defer to
4 ICANN. How can I put my mind in what ICANN would
5 use in the seven criterion?

6 Q. Is it fair to say, Mr. Livesay, as you
7 conducted your review of the rules in the
8 guidebook, for example, you just looked at the
9 plain language of the rule and just applied that in
10 terms of your thinking about how to structure a
11 transaction?

12 A. Certainly not. I am not really sure where
13 you get that interpretation.

14 Q. Well, what I am asking --

15 MR. JOHNSTON: I would ask Mr. Litwin to
16 allow the witness to finish his answer before
17 interrupting with another question.

18 MR. LITWIN: I apologize. I thought he
19 was done.

20 Q. Please continue, Mr. Livesay.

21 A. I don't remember what the question was.
22 Where were we?

23 Q. Let me go back, because I think it was a
24 poorly-phrased question, and allow me to rephrase
25 it for you.

1 In reviewing these change request
2 criterion, you say -- well, you agree that that's
3 what it says, but, you know, if you're trying to
4 interpret it, it is really ICANN's job to interpret
5 it; is that right?

6 A. You presented on the screen right now the
7 seven criteria after a change request was submitted
8 and what ICANN would use to evaluate. This isn't
9 the standard for how you get into a change request.
10 This is once it is already there.

11 You asked previously did I look at the
12 rule and just decide there not to go through a
13 change request. No, there's a lot of factors.
14 There's a lot of rules.

15 I looked at other transactions going on in
16 the market. I saw disclosures of different
17 companies having funded other activities of other
18 applicants. I see elsewhere in the guidebook where
19 it encourages parties to resolve without changing
20 their application so as to not delay or have the
21 string -- I guess "delay" is the right word, or put
22 on hold. So there's a lot of factors that went
23 into this.

24 But at the end of the day, the path we
25 took is we are not looking to become the applicant.

1 We are looking to become the registry of this
2 domain and to try to help fund NDC to win the
3 auction. And if they ended up winning and we
4 successfully signed a Registry Agreement, they
5 would then apply to have it assigned to us, and we
6 would be evaluated at that time.

7 So I don't think there's anything -- we
8 were following -- we had a lot of different things,
9 both through what we see in the marketplace and
10 what the guidebook suggests, and we think we did it
11 correctly.

12 Q. So, Mr. Livesay, I am not trying to imply
13 here that NDC submitted a change request. I think
14 we have established that NDC did not submit a
15 change request.

16 What I am trying to do is to progress
17 through a set of ICANN rules that inform how ICANN
18 would consider a change request and asking you what
19 your view of the rule is outside of what may or may
20 not have happened regarding NDC.

21 A. And I have told you before, it is hard to
22 give you hypothetical answers to hypothetical
23 questions. So you just read one rule, and did it
24 go this way, no, it is not that.

25 Like I said, the way we approached this is

1 we are reading the rules. We are looking at
2 activities in the marketplace. We are looking at
3 what other strings and how other contention sets
4 get resolved. We look at other information in the
5 guidebook itself that suggests, recommends parties
6 reorganize themselves in a way that doesn't require
7 reevaluation, and we think we did that correctly.

8 Q. Mr. Livesay, is it fair to say that this
9 document that we are looking at now, Exhibit C-56,
10 concerns how ICANN evaluates change requests?

11 A. That is exactly what it says.

12 Q. And is it also fair that this document
13 informs whether or not a change request should be
14 filed?

15 A. That doesn't tell me that, no.

16 Q. So the description that ICANN provides
17 here about how it goes about evaluating and the
18 things it considers in evaluating a change request
19 has no bearing whatsoever to the decision on
20 whether or not to file a change request?

21 A. As I look at the document, there's a
22 criteria for filing the change request, which we
23 did not think applied, and these standards here, as
24 I read them, are once you're in that realm, this is
25 how those change requests would be addressed. It

1 would seem unusual to think that the change request
2 criteria are how you get into the change request
3 criteria, seems circular the way you have described
4 it.

5 Q. So the rule -- if we can turn back to the
6 first page of this document, C-56, ICANN quotes the
7 rule from the applicant guidebook?

8 A. That's right.

9 Q. That says if any information previously
10 submitted by an applicant becomes untrue or
11 inaccurate, that applicant is obligated to promptly
12 notify ICANN, correct?

13 A. That's what it says.

14 Q. And turning through this document, it does
15 suggest that, well, in determining whether or not
16 Rule 1.2.7 applies, whether those changes would be
17 unfair to applicants, whether those changes would
18 create new precedents, whether those --

19 A. You are jumping again. Those changes, if
20 there are no changes, you can't bootstrap yourself
21 into the criteria. There were no material changes
22 that made the application untrue and inaccurate.

23 Q. Okay. We'll come back to that. We'll
24 come --

25 MR. JOHNSTON: Stop interrupting.

1 THE WITNESS: I am confused at what you're
2 asking at this point, I guess.

3 MR. JOHNSTON: Your Honor, Mr. Chair, I
4 object to this line of questioning. We have been
5 spending a lot of time on this document, and
6 virtually every question posed lacked foundation
7 and most just asked the witness to read the
8 document.

9 If Mr. Litwin wants to make these
10 arguments in closing argument, that's appropriate.
11 But to spend all this time with the witness asking
12 questions that lack foundation is not appropriate.

13 ARBITRATOR BIENVENU: Your objection is
14 noted, Mr. Johnston.

15 As to the question of foundation,
16 Mr. Livesay, may I ask you just to clarify your
17 evidence as regards the knowledge that you had when
18 you familiarized yourself with the guidebook of the
19 requirement to notify ICANN of changes in an
20 application.

21 I am looking at Page 32 of the rough
22 transcript, and Mr. Litwin, having displayed the
23 document we have been talking about, said, "This is
24 a document from ICANN's website called the 'New
25 gTLD Application Change Request Process and

1 Criteria.' Have you seen this document before?"

2 Your answer was, "It doesn't look familiar
3 to me, nope.

4 "Question: So when you say that you
5 carefully studied the rules and procedures
6 governing the new gTLD Program, you did not review
7 the change request process?

8 "Answer: I didn't say that. I am saying
9 it doesn't look familiar. Right now I can't see
10 the document on the screen because you have got --
11 you have this thing blown up in front of it."

12 And then we went on.

13 Let me ask you this, Mr. Livesay: Was it
14 a concern to you, as you were considering on behalf
15 of VeriSign the potential of striking a deal with
16 NDC, that the agreement not trigger a notice of
17 change to information under Section 1.2.7 of the
18 guidebook?

19 I'm sorry, please --

20 (Discussion off the record.)

21 THE WITNESS: I said that's correct, we
22 were looking for --

23 (Discussion off the record.)

24 ARBITRATOR BIENVENU: Shall I repeat my
25 question?

1 (Discussion off the record.)

2 THE WITNESS: Please repeat the question.

3 (Discussion off the record.)

4 ARBITRATOR BIENVENU: Okay. So I am going
5 to read it, Mr. Livesay, so I don't interpret it.

6 "Was it a concern to you, as you were
7 considering on behalf of VeriSign the potential of
8 striking a deal with NDC, that the agreement not
9 trigger a notice of change to information under
10 Section 1.2.7 of the guidebook?"

11 THE WITNESS: That is correct. It was a
12 concern --

13 (Discussion off the record.)

14 THE WITNESS: So yes, it was a concern
15 that we not trigger or do anything to change the
16 application that would trigger a reevaluation
17 because we knew that that -- couple of things.
18 One, the guidebook suggests, one, to try and
19 resolve things without triggering reevaluation.

20 Two, if it did trigger reevaluation, that
21 might actually delay the string in getting
22 resolution. So yeah, it was a concern of ours to
23 not trigger that.

24 ARBITRATOR BIENVENU: Excellent.

25 Now, given that this was a concern, as you

1 sit here today, do you recall looking at the form
2 on which you were questioned in the past 15 minutes
3 entitled "New gTLD Application Change Request
4 Process and Criteria," do you recall looking at
5 that?

6 THE WITNESS: I recall only the portion --
7 the reference to 1.2.7. I don't recall
8 specifically the other, but this was a long time
9 ago, five or more years, and the guidebook is a
10 long document.

11 ARBITRATOR BIENVENU: Very well. Very
12 well. I am sorry for the interruption, Mr. Litwin.
13 Please proceed.

14 MR. LITWIN: Thank you, Mr. Chairman.

15 Q. I just have two more questions on this
16 document, Mr. Livesay. If you look at the next
17 page, Page 3 of this document, is it your
18 understanding that where change requests were
19 submitted to ICANN, they were posted on ICANN's
20 website?

21 A. Are you asking if I'm aware whether they
22 were?

23 Q. Yes.

24 A. I don't recall one way or the other. I
25 decline whether I knew that or not.

1 MR. LITWIN: Mr. Chairman, perhaps this is
2 a good time to take our first break today. I am at
3 a good breaking point in my outline.

4 ARBITRATOR BIENVENU: Very well.
5 Mr. Livesay, we are going to break for 15 minutes.
6 I am required by our sequestration order to ask
7 that you not discuss your evidence during the
8 break.

9 THE WITNESS: That's good.

10 ARBITRATOR BIENVENU: Thank you very much,
11 sir. So we will resume in 15 minutes, and you'll
12 be brought virtually to a separate room.

13 THE WITNESS: Okay. Thank you.

14 ARBITRATOR BIENVENU: Thank you.

15 (Whereupon a recess was taken.)

16 ARBITRATOR BIENVENU: Thank you very much.

17 Mr. Johnston, you are there?

18 MR. JOHNSTON: Yes, I am.

19 ARBITRATOR BIENVENU: Mr. Litwin, and is
20 Mr. Livesay back with us?

21 MR. ENGLISH: No, he's in the waiting
22 room.

23 ARBITRATOR BIENVENU: Okay. So you may
24 bring him back.

25 You ready to proceed, Mr. Litwin?

1 MR. LITWIN: I am, Mr. Chairman.

2 MR. ENGLISH: Okay. Mr. Livesay has
3 joined the meeting, and if he could unmute himself.

4 THE WITNESS: You can hear me all right
5 with the new microphone?

6 ARBITRATOR BIENVENU: We can hear you.

7 MR. LITWIN: Much better.

8 ARBITRATOR BIENVENU: Thank you very much.
9 So, Mr. Livesay, under the same solemn affirmation,
10 Mr. Litwin, please proceed.

11 Q. BY MR. LITWIN: Mr. Livesay, I just wanted
12 to ask you one last question about -- and just to
13 clarify your earlier testimony, about the change
14 request criterion document that we have been
15 reviewing, Exhibit C-56, I think what you said,
16 that it did not matter what you or VeriSign think
17 about the rules set forth in here, I think your
18 testimony was it's what ICANN thinks that matters;
19 is that a fair statement?

20 A. You read the provisions and then you
21 rephrased them and asked me if your rephrasing was
22 fair. I simply said I defer to ICANN how they
23 would interpret the plain language of these
24 provisions.

25 Q. Okay. Thank you.

1 So moving on, I would refer you back to
2 your witness statement and Paragraph 5. As you
3 recall from before the break, we left off with the
4 provision in the change request criterion document
5 that says that change requests would be posted to
6 ICANN's website.

7 And in response to the Chairman's
8 question, you said that you had studied the rules
9 to ensure that there were no changes that needed to
10 be reported to ICANN.

11 Redacted - Third-Party Designated Confidential Information
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18 A. Redacted - Third-Party Designated Confidential Information

19 Q. Okay. Now, let's turn back to Section
20 4.1.3 of the AGB. So that's Tab 4 at Page 95.

21 Are you there, sir?

22 A. Is that in what you sent me or is this
23 another document that's not in the binder you sent?

24 Q. No, it is there. It is Tab 4, Page 95.

25 A. Oh, 95, okay. Got it here.

1 Q. This rule is titled "Self-Resolution of
2 String Contention" and only concerns transactions
3 among contention set members themselves; is that
4 correct?

5 A. It appears to be the case, yeah.

6 Q. Okay. Please turn to Page 124 of this
7 document behind Tab 4, and I direct your attention
8 to what is the last line of Paragraph 10 of Module
9 6, the terms and conditions.

10 A. Yep.

11 Q. What it says here is that, "Applicant may
12 not resell, assign, or transfer any of applicant's
13 rights or obligations in connection with the
14 application."

15 Now, this provision is not limited to
16 transactions among contention set members, correct?

17 A. I am not sure -- say that again.

18 Q. So where this provision says, "Applicant
19 may not resell, assign, or transfer any of
20 applicant's rights or obligations in connection
21 with the application," my question to you, sir, is
22 that this provision is not limited to transactions
23 among contention set members?

24 A. As I read the sentence, it applies to
25 applicant. So I am not really sure what you're

1 saying about other contention sets. As I read
2 this, it is a restriction on an applicant.

3 Q. It is a restriction on an applicant that
4 provides that the, "Applicant may not resell,
5 assign, or transfer any of applicant's rights or
6 obligations in connection with the application" to
7 any third party, correct?

8 A. I guess. It doesn't say that limitation.
9 The limitation is on the applicant.

10 Q. I --

11 A. You're asking me to read something in
12 there that's not there. I mean, maybe you are -- I
13 am not really sure what you're asking me to read
14 into that. It says, "Applicant may not resell,
15 assign, or transfer any of the applicant's rights
16 or obligations." That seems very straightforward.

17 Q. Any -- sorry, Mr. Chairman.

18 ARBITRATOR BIENVENU: First of all, can
19 we, just in fairness to the witness, go to Page 120
20 of that document, just to situate that provision.
21 So this is part of the terms and conditions of
22 Module 6.

23 You are familiar with that document?

24 THE WITNESS: I recall reviewing it at
25 great length back in the day. I did not review it

1 again in advance of this testimony.

2 ARBITRATOR BIENVENU: Right. Now,
3 focusing back on the text on which Mr. Litwin drew
4 your attention --

5 THE WITNESS: Yep.

6 ARBITRATOR BIENVENU: -- do you understand
7 that provision as targeting transactions within a
8 contention set or as targeting transactions
9 generally, whether they involve contention set
10 members or not? I think that's the question that
11 is being asked of you.

12 THE WITNESS: I see. I don't read that
13 sentence that's highlighted as limited to just
14 within a contention set. It seems to apply to an
15 applicant both inside and outside a contention set.
16 The applicant cannot resell, assign or transfer in
17 and outside of a contention set. That's the way I
18 read it. Is that the clarification you were asking
19 for?

20 ARBITRATOR BIENVENU: I was just trying to
21 rephrase the question that was asked of you.

22 THE WITNESS: Got it.

23 ARBITRATOR BIENVENU: Back to you,
24 Mr. Litwin.

25 MR. LITWIN: Thank you, Mr. Chairman.

1 Q. In addition to your review of the
2 guidebook and other rules governing the new gTLD
3 Program, Redacted - Third-Party Designated Confidential Information
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5

6
7 A. Redacted - Third-Party Designated Confidential Information

8 Q. Redacted - Third-Party Designated Confidential Information
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13 A. In the sense -- how do you mean,
14 special-purpose vehicles -- go ahead. I am
15 listening.

16 Q. Perhaps I should just orient you to your
17 witness statement, sir. It is behind Tab 1. If
18 you look at Page 5, Paragraph 9.

19 A. Oh, correct, right, in terms of special.
20 Like in this example I found that sometimes an
21 entity would have a shell company for each
22 individual company, sometimes held by a parent, or
23 sometimes all the applications were held by one
24 entity, such as the way Google did it with
25 Charleston Road Registry. Redacted - Third-Party Designated
Confidential Information

1 Q. And we can look down at Paragraph 10,
2 where you continue your discussion about the
3 special purpose entities. You write, "For example,
4 Google is identified as the owner of Charleston
5 Road Registry, Inc.," correct?

6 A. Correct.

7 Q. And when you say "is identified," you mean
8 identified in the application, correct?

9 A. Correct. I have not looked at it, but if
10 I recall correctly, you can look at the
11 applications and it will show for each string who
12 the applicant is.

13 In this case it would show up as
14 Charleston Road Registry. If you then click on it,
15 it will show you the public portion of the
16 application, which would then show who the actual
17 party is, or the contact, I should say.

18 For instance, if I recall, if I looked up
19 this, it would have said -- on the applicant it
20 would have said Charleston Road Registry, but it
21 would have a contact name, and that contact name I
22 think was a Google address, for example, email,
23 that is.

24 Q. Yes. In fact, in Section 11 Google is
25 identified in each of Charleston Road Registry's

1 applications as the owner of Charleston Road
2 Registry.

3 Do you recall that?

4 A. I believe so, yeah. Let me see where
5 you're highlighting. Yep.

6 Q. Now, you also go on to write that, "In
7 other instances, the requirement for a disclosure
8 of the real party in interest was avoided by
9 forming another entity to be the parent of the
10 application, so the real parties in interest were
11 not disclosed as part of the parent entity in the
12 application." And you give an example. You say
13 "Donuts formed 'Covered TLD, LLC,' for example, and
14 made that entity the disclosed parent on many of
15 its applications."

16 A. Correct.

17 Q. You see that, sir?

18 A. Yep.

19 Q. And in Paragraph 9 you refer to Ruby Glen
20 LLC as a Donuts applicant entity, correct?

21 A. Correct.

22 Q. So what you're saying is that the
23 application would have been made on behalf of Ruby
24 Glen, and when you look at the ownership
25 information, it would say, "Covered TLD LLC,"

1 another shell, in your words, correct?

2 A. I believe that's correct.

3 Q. Now, are you aware that the primary
4 contact listed at Section 6 of Ruby Glen's
5 applications was identified as an executive vice
6 president of Donuts?

7 A. I believe I may recall it might have been
8 a Donuts address, perhaps, the email, perhaps, I
9 think you're talking about.

10 Q. Well, they give his title as the executive
11 vice president of Donuts, and as you say, there was
12 a Donuts email address associated with that contact
13 person. Does that sound familiar?

14 A. I don't recall seeing his title on the
15 application, but likely seeing the email.

16 Q. Do you also recall that at Section 11(b),
17 Ruby Glen identified Donuts' CEO and the chairman
18 of Donuts' Board of Directors as the two people who
19 had legal and executive responsibility for Ruby
20 Glen?

21 A. I'm sure at some point I looked at who the
22 individuals listed in the application were. I
23 don't recall specifically their names now.

24 Q. So it wasn't exactly a secret that Ruby
25 Glen was a Donuts special purpose entity, correct?

1 A. I don't think it was a secret, no.

2 Q. In the course of your research you learned
3 about an arrangement between Donuts and Demand
4 Media, correct?

5 A. Correct.

6 Q. If you could take a look at Page 18 of Tab
7 1. This is Exhibit A to your witness statement, a
8 press release by Demand Media. I am just going to
9 read what it says in the fourth paragraph.

10 It says, "As part of this initiative,
11 Demand Media has applied for 26 names on a
12 stand-alone basis. In addition, Demand Media has
13 entered into a strategic arrangement with Donuts,
14 an Internet domain registry founded by industry
15 veterans, through which it" -- meaning Demand
16 Media -- "may acquire rights in certain gTLDs after
17 they have been awarded to Donuts by ICANN. These
18 rights are shared equally with Donuts and are
19 associated with 107 gTLDs for which Donuts is the
20 applicant."

21 Do you see that?

22 A. I am reading along with you, yes.

23 Q. And this is one of the examples that
24 informed your research in advance of negotiating
25 the DAA, correct?

1 A. It was an example, yes.

2 Q. Now, if you look at the date of the press
3 release, you'll see it's from June 11th, 2012.

4 Do you see that?

5 A. Yep.

6 Q. So that was -- the press release was
7 issued shortly after the application window had
8 closed in April of 2012, as you testified earlier,
9 correct?

10 A. The dates look correct.

11 Q. And, therefore, this press release was
12 issued during the period for public comment and
13 evaluation by ICANN, correct?

14 A. That would be the case, yeah.

15 Q. Are you aware that Demand Media was
16 disclosed as Donuts's, quote, "partner in these 107
17 applications"?

18 A. I am not aware that they were listed as a
19 co-owner or partner, no.

20 Q. Are you aware that the public portions of
21 these applications are available on ICANN's
22 website?

23 A. The public portion of the applications
24 would naturally be available on ICANN's website.

25 Q. Did you review these 107 applications by

1 Donuts that you refer to at Paragraph 8 of your
2 witness statement?

3 A. I do not recall looking at all those
4 applications, no.

5 Q. So, for example, if I represented to you
6 that Demand Media is listed as Donuts's partner in
7 its applications for .CITY, .ASSOCIATES, .CAMERA,
8 .CHURCH, .CLOTHING, .COACH, .ECO, .ENERGY, .HELP,
9 .INVESTMENTS, .SALON, .SINGLES, .VENTURE and
10 .VOYAGE, among others, would you have any knowledge
11 as to whether or not Demand Media is, in fact,
12 listed as Donuts' partner in those applications?

13 MR. JOHNSTON: I'll object on grounds of
14 lack of foundation. Perhaps counsel could put just
15 one of those in front of the witness.

16 MR. LITWIN: Well, I am asking him for his
17 knowledge about this. I don't believe these are in
18 the record. I'd be happy to show him one if you
19 would consent to that.

20 MR. JOHNSTON: I would consent to showing
21 him the limited part you're representing to him is
22 in the application.

23 MR. LITWIN: Very good.

24 For my team that's on the phone, can you
25 send to Chuck the .CITY application, please.

1 Chuck, let me know when you get it.

2 I have just been told .CITY is on the
3 record, and they are pulling it up right now.

4 Chuck, when you get that, if you can just
5 put it up on the screen for everyone to see,
6 please.

7 MR. JOHNSTON: I'm sorry to have provoked
8 this delay. I had a specific reason, which I won't
9 explain with the witness on camera, but I had a
10 specific reason for wanting the witness to see the
11 application as opposed to rely on the
12 representation as made.

13 Again, I am sorry for the delay.

14 ARBITRATOR BIENVENU: That's fine. Let's
15 see if we can get the document up quickly,
16 otherwise we can put this in abeyance and come back
17 to it.

18 MR. LITWIN: There we go. Actually, while
19 we go through this, if you can just stop right
20 there, Chuck, don't move any further. If you can
21 blow up the full legal name at one, please?

22 MR. VAUGHAN: I don't have the ability to
23 blow anything up on this.

24 MR. LITWIN: Got it.

25 Q. Can you see that, Mr. Livesay?

1 A. I see it says, "Snow Sky, LLC."

2 MR. LITWIN: If we can go down to 6,
3 please, Chuck.

4 Q. You'll see the gentleman there is
5 identified as the executive vice president of
6 Donuts?

7 A. Yep, yep.

8 Q. And under 6(f), that's the Donuts email
9 address that you recall.

10 Do you see that, sir?

11 A. Yep, yep.

12 Q. Now, if you can go down to Paragraph 23.
13 Boy, this is incredibly small on my computer. What
14 it says in the second paragraph there is, "The
15 following response describes our registry services
16 as implemented by Donuts and our partners. Such
17 partners include Demand Media Europe Limited for
18 back-end registry services."

19 Do you see that, sir?

20 A. I see that.

21 Q. So Demand Media was disclosed in the .CITY
22 application submitted by Donuts to ICANN. So there
23 was no secret that Donuts and Demand Media had a
24 partnership, correct?

25 A. Well, I think the word "partnership" goes

1 to what you mean by partnership. In the press
2 release it doesn't describe the nature of that
3 partnership. In this it seems to limit Demand
4 Media, at least in the application, to being a BERS
5 provider, not necessarily a co-owner of the
6 application. Maybe you need to describe what
7 "partner" means in the relationship of the press
8 release.

9 When I read this, it looks like Demand
10 Media is simply, at the stage that this is made,
11 not represented as a co-owner, but a back-end
12 registry provider, which is a different matter, at
13 least as I read it.

14 Q. So let me see if I can break this down a
15 little bit.

16 In Paragraph 23 of the .CITY application,
17 Demand Media is identified as a partner for Donuts
18 to provide back-end registry services, correct?

19 A. Correct.

20 Q. So there was no secret that Demand Media
21 had at least some role here as a back-end registry
22 service provider associated with the .CITY
23 application, correct?

24 A. It appears in the .CITY application they
25 are the BERS, back-end provider. That doesn't

1 represent them as a co-owner or having an interest
2 in possibly obtaining the domain after its
3 delegation. It doesn't suggest they have any of
4 that kind of right in it.

5 Q. In the application --

6 A. In the public portion that you are having
7 me read, I am only saying that it lists them only
8 as a BERS provider, not a co-owner.

9 Q. Sir --

10 A. Which is what you mean to imply.

11 Q. Sir, I am not implying anything, and I
12 would appreciate it if you would let me finish my
13 question --

14 A. Go ahead.

15 Q. -- as well as I will let you finish your
16 answer.

17 My question is simply that Demand Media is
18 identified as a partner for Donuts at Paragraph 23
19 of the .CITY application for the purpose of
20 providing back-end registry services, correct?

21 A. They are identified as the back-end
22 registry service provider for this application.

23 Q. So there was no secret that Demand Media
24 was involved with Donuts in at least some capacity
25 in its application itself, correct?

1 A. As a back-end registry provider. I don't
2 see that as an owner.

3 Q. Now, we also looked at the press release
4 that was issued on June 11th, 2012, where Demand
5 Media publicly disclosed that its relationship with
6 Donuts was broader; is that correct?

7 A. I don't know what you mean by "broader."
8 If you mean -- as I read the article, it seems to
9 state that they had an arrangement whereby Donuts
10 would obtain certain TLDs and in some situations
11 postdelegation request assignment and transfer for
12 Demand Media, up to 107 of them. It looks like you
13 pointed me to one in which Demand Media is listed
14 as the BERS provider, okay.

15 Q. Okay. All I am saying, Mr. Livesay, is
16 that Demand Media was identified as having some
17 role in all of the 107 applications of which I am
18 showing you one?

19 A. And I am only able to confirm the one.
20 The one you're showing me shows them as a BERS
21 provider, nothing more.

22 Q. I will represent to you, sir, that the
23 same language is in each of those 107 different
24 applications.

25 A. Based on the --

1 MR. JOHNSTON: Excuse me, Mr. Livesay.

2 Objection; lack of foundation.

3 ARBITRATOR BIENVENU: Before I address the
4 objection, it is very important for us, in order to
5 have a clean record, that only one person speak at
6 a time. I understand it is difficult, especially
7 when we are proceeding by remote video, but let the
8 question be asked and then proceed with your
9 answer. And Mr. Litwin will not cut you off. He
10 will let you finish your answer.

11 Now, what is the nature of your objection,
12 Mr. Johnston? Lack of foundation as to what?

13 MR. JOHNSTON: Well, counsel was
14 representing what was present in 107 applications
15 the witness said he wasn't familiar with. The
16 question was only, "Take my representation; is that
17 true," as I heard the question. I think that's
18 pretty obviously a question that has no foundation
19 in the witness' knowledge.

20 ARBITRATOR BIENVENU: Mr. Litwin?

21 MR. LITWIN: I can rephrase.

22 Q. Is it fair to say, Mr. Livesay, that
23 Demand Media was disclosed as a partner of Donuts
24 for the purposes of back-end registry services in
25 its application submitted to ICANN?

1 A. The one you have shown me, it looks like
2 their limited nature as a partner is that of being
3 a BERS provider.

4 Q. Is it also fair that Demand Media issued a
5 public press release during the comment period and
6 the time at which ICANN was evaluating the
7 application to disclose its broader role regarding
8 those applications?

9 A. From the time and the dates of things,
10 that appears to be the case, yeah.

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1 agreement would have provided --

2 A. It is not an agreement, and so it is
3 hypothetical. Would have provided. This is a
4 first draft of something --

5 ARBITRATOR BIENVENU: Mr. Livesay.

6 THE WITNESS: Yes, sir.

7 ARBITRATOR BIENVENU: I'm sorry, I have
8 to -- I instruct you again to not cut off
9 Mr. Litwin in the middle of a question because we
10 are not going to get a clean record.

11 THE WITNESS: I am trying to -- sometimes
12 I think he's finished with a statement or a
13 question, and I am making a presumption -- I will
14 try to stop and hold back.

15 ARBITRATOR BIENVENU: Don't take this as a
16 reproach, Mr. Livesay, but just as a direction so
17 that in everybody's interest, we have a clean
18 record.

19 THE WITNESS: Understood.

20 ARBITRATOR BIENVENU: Very well.

21 So -- well, do you want to finish what you
22 were saying, Mr. Livesay, and then Mr. Litwin.

23 THE WITNESS: We can go back -- I am fine
24 with him asking or reasking questions. That's
25 fine.

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ARBITRATOR BIENVENU: Mr. Litwin.

MR. LITWIN: Thank you, Mr. Chairman.

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Q. Mr. Livesay, when we were talking about the change request criteria, you noted that you had received draft agreements and these were, in your view, precedents for the DAA.

Do you recall that testimony, sir?

A. Right. These were some examples of that, yeah.

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1 MR. LITWIN: Excuse me for one minute. I
2 just need to look at the transcript for a second.

3 Q. You testified a moment ago, and I am
4 referring to Page 81, line -- Lines 17, 18, 19, 20
5 and 21, you say, "To be honest, I don't recall
6 reviewing this document at depth really at the
7 time, because it presented a situation, in my view,
8 and the way they presented it, is we would buy the
9 entity."

10 So I'm a little confused because I think
11 you just said that you did review the document at
12 the time. So which is it?

13 A. First of all, like I said, I did review it
14 at the time. But at a basic level I saw that it
15 was trying to set up an acquisition of the entity.
16 I am sure my recollection back then is better now,
17 but I did not rereview or reexamine the documents
18 in preparation for this, is my point. I can assure
19 you I had a much better understanding of all this
20 five years ago than I do right now.

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2 ARBITRATOR BIENVENU: Mr. Livesay, I'm
3 sorry to interrupt.

4 THE WITNESS: He asked me a question, and
5 I am trying to answer it and then he jumps in and
6 tries to tell me to correct it. If he doesn't like
7 my answer, he can not like my answer. That's fine.

8 ARBITRATOR BIENVENU: Mr. Litwin, you are
9 not there to argue with the witness.

10 MR. LITWIN: Understood, your Honor.

11 ARBITRATOR BIENVENU: I would ask both of
12 you to sit back for a moment.

13 And, Mr. Livesay, let the questions come
14 and answer them in the best of your ability.

15 And please, I am addressing this to both
16 of you, don't cut each other off. It just creates
17 an unworkable record.

18 Mr. Litwin, please pose your question.

19 Q. BY MR. LITWIN: Mr. Livesay, I am going to
20 try and lay some foundation for what I'm asking you
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5 You see, this is my difficulty, Mr. Head of the
6 Tribunal, is he's quoting it and adding different
7 language as he's reading it, and I am left trying
8 to figure out is he asking for me to affirm his
9 interpretation of it or my reading of it when I
10 have not read these details.

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15 And if Mr. Litwin wants to read it and ask
16 if I can confirm what it says, I can do that. If
17 he's going to read it and add different words in,
18 how am I supposed to respond?

19 ARBITRATOR BIENVENU: So I may suggest,
20 Mr. Livesay, that you take a minute to look at the
21 language on which you are questioned and perhaps
22 refer back to terms that are defined in that
23 language. And once you have familiarized yourself
24 with that language, then Mr. Litwin can ask his
25 question. All he can ask for is your understanding

1 of that document as you sit here today and read the
2 language. Fair enough?

3 THE WITNESS: Well, I don't know. Is the
4 Tribunal willing to give me an hour to look at a
5 document that I haven't looked at in five years?

6 ARBITRATOR BIENVENU: You think you need
7 an hour?

8 THE WITNESS: I assure you that when we
9 went through this in 2015, it was a lot more than a
10 few hours to look at these documents and settle
11 this out. I am perfectly fine reviewing these
12 documents that never iterated, we didn't sign, but
13 if he's going to ask me to interpret documents that
14 have defined terms, I tend to read documents
15 thoroughly.

16 ARBITRATOR BIENVENU: Mr. Livesay, you
17 chose to append this document to your witness
18 statement.

19 THE WITNESS: I did. And I appended it as
20 an example of something I received. If he's going
21 to ask me to read it and interpret it as an
22 attorney, I should do that.

23 ARBITRATOR BIENVENU: You appended it in
24 order to make a point, and you are being questioned
25 about your evidence.

1 THE WITNESS: Fair enough.

2 ARBITRATOR BIENVENU: I think it is a fair
3 line of inquiry for Mr. Litwin in order to
4 understand your evidence.

5 THE WITNESS: Fair enough.

6 ARBITRATOR BIENVENU: Now, I fully
7 understand your concern that you don't want to be
8 trapped into giving a legal interpretation to a
9 document you have not recently reviewed. We
10 appreciate that, and we are sensitive to that.

11 Now you're being questioned on one
12 subparagraph of the agreement. I take your point
13 that they are defined terms, but please take the
14 time to read that one paragraph. If you want to
15 refer to the defined terms, do that, and then we'll
16 see the question and we'll step in if we find the
17 answer -- the question puts you in an unfair
18 position, but I don't think that it does. If you
19 take the time to review that paragraph, review the
20 defined terms, you should be able to answer his
21 question.

22 THE WITNESS: Fair enough.

23 I think it is back to you, Mr. Litwin, to
24 pick up wherever I interrupted.

25 MR. LITWIN: Thank you.

1 Q. Mr. Livesay, I just wanted to ask a couple
2 of questions. You executed your witness statement
3 on June 1st of this year, correct?

4 A. Correct.

5 Q. And did you review the attachments to your
6 witness statement when you signed it or before
7 you -- in the preparation of your witness
8 statement?

9 A. I reviewed that it was the document that I
10 received. I did not go through and reread the
11 document.

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1 Q. Are you aware that Dot Tech the entity
2 did, in fact, prevail at the ICANN auction for
3 .TECH the gTLD?

4 A. I believe I may have heard that, yeah.

5 Q. Are you also aware that Dot Tech the
6 entity submitted a revised application after the
7 auction identifying Radix as the new owner of the
8 applicant Dot Tech the entity?

9 A. I don't have any specific memory of that,
10 but sounds accurate, I guess.

11 Q. And are you aware that as a result of
12 submitting that revised application, ICANN
13 commenced a reevaluation of that application?

14 A. I was not aware of that, that I can
15 recall.

16 Q. Are you aware that Dot Tech the entity, in
17 fact, submitted a further revised application in
18 response to a change request that it had submitted
19 to ICANN?

20 A. Nope, not aware of that.

21 Q. You also refer in your witness statement
22 to a transaction between Automattic and Primer
23 Nivel regarding .BLOG; is that correct?

24 A. I think I refer to maybe a press release
25 or something about that, yeah.

1 Q. Now, you state that in May 2016 it was
2 reported that Primer Nivel's bid for .BLOG had
3 been, quote, "financed by Automattic," correct?

4 A. I think I'm citing a news source about
5 that, yeah.

6 Q. So the answer to my question is yes?

7 A. Correct.

8 Q. And those reports postdate your August
9 2015 Domain Acquisition Agreement with NDC,
10 correct?

11 A. I'd have to relook at the dates. Do we
12 have that as an attachment?

13 Q. Yes. It is an attachment to your witness
14 statement, sir.

15 A. Let me make sure I am remembering the
16 correct press releases here.

17 Q. They begin, sir, at Exhibit E, which is on
18 Page 95 of Tab 1, and continue on to Page 111.

19 A. Yeah. So your question is what?

20 Q. Let me ask my question again.

21 A. Yeah.

22 Q. These reports regarding .BLOG postdate the
23 August 2015 DAA, correct?

24 A. Yes. That appears to be the case,
25 correct.

1 Q. So it's fair to say that you did not
2 discover information concerning the
3 Automattic-Primer Nivel transaction as part of your
4 research prior to the execution of the DAA,
5 correct?

6 A. That would seem to be the case, yeah.

7 Q. Therefore, it's also fair to say that you
8 were not relying on the Automattic-Primer Nivel
9 transaction as a precedent for the DAA, correct?

10 A. Certainly not in advance of the DAA, but
11 it certainly seemed to give some credibility
12 heading up to the auction.

13 Q. Now, .BLOG was auctioned in February of
14 2015, correct?

15 A. I believe that sounds right.

16 Q. And in March of 2014, Primer Nivel had
17 submitted a change request to ICANN regarding
18 Paragraph 11 of its application, correct?

19 A. I am not aware that that's the case.

20 Q. I direct your attention to Page 96 of
21 Exhibit E, and at the bottom, last paragraph, it
22 says, "ICANN processed the change request to the
23 Question 11 answer in March of 2014."

24 Do you see that?

25 A. I do.

1 Q. And, in fact, Question 11 asks about
2 ownership information, correct?

3 A. I believe that's correct.

4 Q. And, in fact, in Section 11 is where Ruby
5 Glen disclosed that Donuts' CEO and chairman had
6 legal or executive authority over it, right?

7 A. I'm sorry, what's the reference to Donuts?
8 What?

9 Q. Sorry. I'll move on. I was trying to
10 refer to something earlier in the testimony, but it
11 is not important.

12 At the .BLOG auction, the winning bidder
13 was a company called Knock Knock Whois There LLC,
14 correct?

15 A. Sounds correct.

16 Q. And that entity was controlled by
17 Automattic, correct?

18 A. I believe that's the case.

19 Q. And you don't know any of the details
20 about how Automattic and the Primer Nivel deal was
21 structured, do you?

22 A. No, I don't have any window into that.

23 Q. Now, finally, sir, I'll represent to you
24 in his opening statement Mr. Johnston, counsel for
25 VeriSign, referred to several transactions that

1 were entered into by Afilias, these concerned
2 .MEET, .PROMO, .ARCHI, .SKI and .BIO. And for each
3 of these gTLDs, isn't it true that Afilias entered
4 into an agreement to acquire these Registry
5 Agreements after those Registry Agreements had been
6 fully executed?

7 A. I don't -- you had a list there. I don't
8 recall any of those specifically. Was that a list
9 of TLDs that had changed hands when?

10 Q. Correct. So this is .MEET, .PROMO,
11 .ARCHI, .SKI and .BIO.

12 Sitting here today, do you have any
13 information to suggest that any of those deals were
14 struck prior to the Registry Agreement being fully
15 executed between the registry operator and ICANN.

16 A. I don't have any special information on
17 that, no.

18 MR. LITWIN: Okay. Mr. Chairman, I think
19 it is a good opportunity to take a second break.

20 ARBITRATOR BIENVENU: Very well.

21 Can you give us -- without holding you to
22 it, but can you give us a sense of how much longer
23 you plan to go?

24 MR. LITWIN: It's a little difficult to
25 say, Mr. Chairman. I would have thought I would

1 have gone through the first part a bit faster than
2 I did. I estimate I have about an hour and a half
3 left, maybe a little bit more. Depends how quickly
4 we can move through these subjects.

5 ARBITRATOR BIENVENU: Very well. So let's
6 take a second break now.

7 So, Mr. Livesay, with the same
8 instructions, you'll be brought to another room.
9 Thank you for your cooperation, and we resume in 15
10 minutes.

11 THE WITNESS: All right. Thank you.

12 (Whereupon a recess was taken.)

13 ARBITRATOR BIENVENU: Thank you,
14 Mr. Livesay. So under the same solemn affirmation,
15 we continue with your cross-examination.

16 THE WITNESS: True, correct.

17 MR. LITWIN: Thank you, Mr. Chairman.

18 Q. Mr. Livesay, I would like to direct your
19 attention to Paragraph 18 of your witness statement
20 that appears on Pages 7 and 8, and there you write,
21 "The DAA is a conditional agreement pursuant to
22 which VeriSign agreed to provide the funds to NDC
23 to participate in the auction for the .WEB gTLD.

24 "In the event NDC prevailed at the auction
25 and entered into a Registry Agreement with .WEB

1 with ICANN -- upon application to ICANN and with
2 ICANN's consent -- NDC would assign the .WEB
3 Registry Agreement to VeriSign."

4 Sitting here today, do you still agree
5 with that statement?

6 A. Yes.

7 Q. And looking at Paragraph 20, further down
8 the page, you write, "The DAA is compliant with all
9 terms of the Guidebook and consistent with
10 transactions by others with respect to the new gTLD
11 Program."

12 You close that paragraph by saying, "The
13 structure of the agreement was also consistent with
14 industry practices in the secondary market for new
15 gTLD applications of which I became aware in my
16 research of the new gTLD Program, as explained
17 above and further documented below."

18 Sitting here today, do you agree with
19 those statements?

20 A. I do, yes.

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1 financing an opportunity.

2 Q. Did VeriSign provide financing to NDC?

3 A. We provided the funds so they could
4 participate in an auction. How you define
5 "finance," I am not sure. We did not finance their
6 entity. We financed their bid in the auction,
7 which I think are two different things.

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Q. You say that, "The DAA is a conditional agreement pursuant to which VeriSign agreed to provide the funds to NDC to participate in the auction for the .WEB gTLD," correct?

A. Correct.

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11 Q. Well, let's talk about -- let's step back
12 and talk generally, Mr. Livesay.

13 In a financing arrangement, generally the
14 entity that provides the financing defines the
15 principal amount of that financing.

16 A. So let me correct again. I did not say
17 this is a financing. I said elements analogous to
18 financing in the following sentence, we are
19 providing a lot of funds for a third party we are
20 arm's length with who I don't know very well. I
21 like Jose, seems like a trustworthy guy, but when I
22 say it is analogous to a financing, I mean from the
23 standpoint, whether it is a home financing or a
24 business financing or a small loan, an unsecured
25 financing, you might look for ways to secure your

1 interest in that money so it is not misused, used
2 for things it was not intended to, making sure it
3 is returned if something goes awry.

4 So when I say "analogous to a financing,"
5 I mean from the standpoint of putting protections
6 into the one providing the funds. I did not mean
7 to suggest it was a financing with a fixed
8 principal or interest rate or this or that.

9 That's why I am trying to make sure you
10 don't step over the word "analogous" and start
11 going into financing, because it is not that. It
12 is analogous to that from the sense of providing
13 protections for the funds we were providing.

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Q. So, Mr. Livesay, you testified earlier that VeriSign funded the \$135 million that was eventually paid as the winning bid at the .WEB auction, correct?

A. Correct.

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A. Correct.

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Q. And are you aware, sir, that in a financing agreement, when a financier secures a security interest, that is limited to the amount of investment that they have made, the amount of funding they have provided; isn't that true?

A. I wouldn't know because this isn't a financing agreement in the common sense. Even in the highlighted part, it says it serves like a security interest. I am not saying it is a security interest in the terms that you would have, like, mortgage interest, for instance. We don't have any -- we are trying to, like I said, analogize, when you put a lot of money on the table, how do you ensure that those moneys are used the way you and this other third party agreed.

Like I said, as much as I like Jose, they were a new party to us. They were working in the

1 secondary market of TLDs. They had been in private
2 auction along with all of these folks in this
3 cohort.

4 To me, as I am looking at this, it looks a
5 bit swampy, and I am thinking, how would we go
6 about preserving our interests so we don't get
7 hosed one way or another. And so we started
8 looking at ways to do that.

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In fact, you talked about a mortgage. So
maybe we could use that as a paradigm to compare

1 how this worked here.

2 In a mortgage, the borrower wants to buy
3 some real estate, and the bank loans, let's say,
4 \$500,000 to the borrower to enable them to do that.
5 And in exchange, they take a security interest in
6 the property; is that your understanding of how a
7 mortgage works?

8 A. Yeah, that's why I think comparing this to
9 a mortgage is totally inappropriate. Because the
10 thing about mortgages is, you're right, the lender
11 actually has an interest that's filed in states
12 with the Secretary of State or whoever, regarding
13 the particular property.

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22 Q. Right.

23 A. I don't think a mortgage is a fair
24 comparison because of that.

25 Q. I agree with you, Mr. Livesay. In fact,

1 when a bank has to foreclose, it recoups its
2 security interest up to the amount, in my example,
3 of the \$500,000 principal. Anything that the
4 auction of the property achieves above that goes to
5 the borrower, because the borrower is the owner.

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Q. I'm sorry, you're using the term
"nth-order possibility"?

A. Yeah.

Q. What does that mean?

A. Another word for saying seems like a very

1 remote possibility, right? You look at a tree of
2 potential outcomes. We simply ran through a lot of
3 them, some seemed a lot more remote than others, so
4 we tried to develop an outcome for it. Some of
5 them, we just said, "This seems like the way," and
6 we shook hands and signed the deal.

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Q. Now, the .WEB auction was comprised of several rounds over two days; is that right?

A. Yes.

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7 Q. Now, each round of this auction had a
8 start-of-round price and an end-of-round price; is
9 that correct?

10 A. That sounds correct, yeah.

11 Q. So as Mr. Rasco explained it on Friday, if
12 bidders did not want to continue bidding, they put
13 in a bid at the start-of-round price, correct, and
14 that would be treated as an exit-round bid?

15 A. I believe so.

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25 Q. So if a bidder wanted to continue to the

1 next round, they submitted the end-of-round price,
2 which was the top price in that range, to ensure
3 that they continued to the next round; is that
4 right?

5 A. That's my recollection, correct.

6 Q. And, of course, they could bid anything
7 between the start- and the end-of-round price,
8 right?

9 A. That's my understanding, or recollection,
10 yeah.

11 Q. So let's see how that worked in practice.

12 I will represent to you that during the
13 sixteenth round of the .WEB auction the
14 start-of-round price was \$57.5 million and the
15 end-of-round price was 71.9 million, okay?

16 A. Okay.

17 Q. Now, if that is correct --

18 Actually, Chuck, why don't you put up
19 Exhibit R-10, please. If you could just highlight
20 the sixteenth round.

21 A. This is not in the binder?

22 Q. It is not.

23 A. I will just look at the screen, then.

24 Q. If you just highlight the row information
25 and then the sixteenth row, please. So there you

1 see, sir, Round 16, the start-of-round price was
2 57.5 million and the end-of-round price was 71.9
3 million, right?

4 A. That's correct.

5 Q. Now, NDC entered a bid of -- I'm sorry,
6 did someone say something? I'm sorry.

7 NDC entered a bid of 71.9 million,
8 correct?

9 A. I would assume so if we went to the next
10 round.

11 Q. Well, you testified that the final bid you
12 submitted was 142 million?

13 A. I know. I know. I am just saying you're
14 providing me this. I am assuming this is the
15 accurate document, right? Naturally, to get to the
16 next round, I have to assume we bid at the
17 end-of-round price. I don't have any specific
18 recollection of the start-of-round price and the
19 end-of-round price. I am taking you at your word
20 that these are the actual amounts.

21 Q. From the ICANN website I represent to you
22 it is a fair and accurate information of the
23 information related to the .WEB auction.

24 A. From that standpoint, I would say we must
25 have entered the end-of-round price if we got to

1 the next round.

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4 A. Redacted - Third-Party Designated Confidential Information

5 Q. Now, I would like you to assume a
6 situation where Mr. Rasco believed that .WEB was
7 not worth more than \$65 million.

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12 A. I don't know. I have no way to assume
13 what Mr. Rasco is thinking or why he would think
14 like that. So you're creating a hypothetical, but
15 go ahead.

16 Q. I am asking you to assume that that
17 factual situation took place.

18 A. However improbable, but okay.

19 Q. Redacted - Third-Party Designated Confidential Information

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1 Q. And Mr. Rasco, I think you said it is
2 highly implausible, or words to that effect,
3 because, in fact, as we established earlier,

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Q. I will move on, Mr. Livesay.
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Q. Are you aware that Afilias has claimed in this IRP that NDC was obligated to disclose the existence and terms of the DAA to ICANN upon the execution of the DAA?

A. I am aware that Afilias has claimed that, yes.

1 Q. Now, the DAA provided that the existence
2 and terms of the agreement were confidential,
3 right?

4 A. Correct.

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1 Q. I am just wondering, is that a typo,
2 should it be October 20th, 2016?

3 A. No, I don't think it is a typo. I don't
4 recall -- there was a reason for that date. I
5 believe it was on -- I don't remember. I don't
6 remember, but there was a reason for that date. I
7 don't recall what it is now.

8 Q. Okay. If you turn to Page 78, you will
9 see that the DAA was executed on October -- excuse
10 me, on August 25th, 2015, but NDC did not disclose
11 the existence or terms of the DAA to ICANN in 2015,
12 did it?

13 A. 2015, I don't believe that they did, but I
14 believe -- pretty sure we provided a copy, but I
15 don't know about NU DOT CO.

16 Q. You provided -- sorry.

17 A. I said I don't recall whether NU DOT CO
18 provided them a copy in 2015.

19 Q. Did VeriSign provide ICANN with a copy of
20 the DAA in 2015?

21 A. I believe -- I am pretty sure that they
22 provided them a copy not too long after the
23 auction, but it's been a while. Whether it was '15
24 or '16, I thought it was '15, but that's my
25 recollection. That could be off.

1 Q. Maybe I can help you with the dates. The
2 ICANN auction for .WEB took place in July of 2016.
3 So did VeriSign disclose --

4 A. Okay. Fair enough. It would have been
5 after the auction. So that's correct.

6 Q. Okay.

7 A. My years are flipping in my head right
8 now. Sorry about that.

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Q. So your view was that -- strike that.

I am going to move on.

I'd like to direct your attention to your
witness statement where you write that,

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2 ARBITRATOR BIENVENU: Which paragraph?

3 Q. BY MR. LITWIN: Do you agree with that
4 statement?

5 ARBITRATOR BIENVENU: Which paragraph?

6 MR. LITWIN: If you just give me a second,
7 Mr. Chairman.

8 MR. VAUGHAN: It is on Page 8.

9 MR. LITWIN: Yes, Page 8 at Paragraph 21.

10 ARBITRATOR BIENVENU: Thank you.

11 THE WITNESS: I am reading that.

12 Q. BY MR. LITWIN: Now, this is a
13 representation that NDC made to VeriSign in the
14 context of a contract, correct?

15 A. Correct.

16 Q. It is fair to say that just because a
17 party represents something is true in an agreement,
18 that does not, in fact, prove that it is true,
19 right?

20 A. That's the nature of contracts, right.

21 Q. It is, indeed. That's why we have
22 misrepresentation suits, right.

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Q. In fact, that's what VeriSign requested
NDC to do in July of 2016, correct?

A. Correct.

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Q. Now, this confirmation was signed two days

1 prior to the .WEB auction; is that right?

2 A. I think the auction started on the 27th,
3 so maybe one day before.

4 Q. I'm sorry, one day before.

5 A. Two days before conclusion. So you win
6 that one. I'm with you on that one.

7 Q. There you go. Okay.

8 Now, following execution of this
9 confirmation of understanding, NDC did not disclose
10 the DAA to ICANN prior to the .WEB auction,
11 correct?

12 A. Correct.

13 Q. In fact, NDC never disclosed the DAA to
14 ICANN, right? It was only after Afilias had
15 complained to ICANN, after ICANN's external counsel
16 had called VeriSign's external counsel, did
17 VeriSign cause its external counsel to produce the
18 DAA, correct?

19 A. That's how I understand it was delivered
20 to them, yes.

21 Q. And when the DAA was finally disclosed,
22 VeriSign designated it as confidential, which
23 precluded ICANN from even informing Afilias or
24 anyone else that it received the agreement between
25 VeriSign and NDC, correct?

1 MR. JOHNSTON: Excuse me. I'd like to
2 just caution the witness not to disclose
3 communications with counsel or information he only
4 possesses because of a communication with counsel.

5 MR. LITWIN: I will accept a yes-or-no
6 answer to my question.

7 THE WITNESS: Could you restate it real
8 quick?

9 Q. BY MR. LITWIN: Sure. And when the DAA
10 was finally disclosed, VeriSign designated it as
11 confidential, which precluded ICANN from even
12 informing Afilias or anyone else that it had
13 received the agreement between VeriSign and NDC,
14 correct?

15 A. I can only confirm having been informed
16 that a copy was sent to them from our outside
17 counsel. Anything beyond that, I wasn't involved.

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25 Q. Okay. Let me step back. Is it fair to

1 say -- is it fair to say that in agreements, there
2 are certain things that are confidential and
3 certain things that are not?

4 A. I guess it would vary on the agreement.
5 Some make all the terms confidential, some make
6 some terms confidential. I think it would vary on
7 the agreement.

8 Q. So is your testimony here that VeriSign
9 considered the entirety of the DAA to be
10 confidential?

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20 Q. I'd like to direct your attention to Page
21 15 of your witness statement, and there to
22 Paragraph 38.

23 There you write, "I was responsible for
24 this transaction. I did not have communications
25 with ICANN before or following the auction process.

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Do you see that, sir?

A. Yes, yes.

Q. Okay. I'd like to place this with the context of some of the context that we heard previously. Are you aware that Mr. Rasco called Ms. Willett of ICANN on July 31st and told her that someone from VeriSign would be reaching out to call Mr. Atallah at ICANN?

A. I may have been told that at the time. I don't recall specifically.

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A. I'm sorry, I don't know.

MR. De GRAMONT: I think you said, "Someone did, in fact, call VeriSign."

MR. LITWIN: I'm sorry. Let me rephrase.

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Q. Well, I can refer you, sir, to Tab 10 of
your binder.

A. There it is.

1 Q. Does that help refresh your recollection
2 that the DAA was produced on August 23rd?

3 A. It is not refreshing my recollection
4 because I don't think I have ever actually seen
5 this document. I only know that it was sent. I
6 don't know the context. This is the first time I
7 recall seeing this particular letter.

8 Q. And the DAA was only produced after
9 Afilias had complained to ICANN; isn't that right,
10 as you've said earlier?

11 A. I mean, sadly, Afilias had already been
12 complaining since before the auction. So
13 everything happens after Afilias starts
14 complaining, right.

15 Q. Mr. Livesay, what evidence do you have
16 that Afilias made any complaints before the .WEB
17 auction?

18 A. I am not following your question about --
19 you asked about whether I knew when this -- when
20 the letter and the DAA went from our counsel to
21 ICANN's counsel, and then you said -- then you
22 asked, "Was this after or before Afilias" something
23 or other.

24 So I am trying to make sense of your
25 question.

1 Q. My question was --

2 A. Yep.

3 Q. -- that the DAA was finally produced to
4 ICANN only after Afilias had complained following
5 the conclusion of the .WEB auction?

6 A. That I can't be sure because I don't know
7 when Afilias first complained. I am not certain if
8 you mean when they made their first complaint to
9 ICANN or -- I don't know.

10 MR. LITWIN: Mr. Chairman, I'd like to
11 take a few minutes to confer with my colleagues,
12 please.

13 ARBITRATOR BIENVENU: Very well.

14 (Whereupon a recess was taken.)

15 MR. LITWIN: Thank you, Mr. Chairman.

16 ARBITRATOR KESSEDJIAN: Just a minute.
17 Mr. Chernick is not back.

18 MR. LITWIN: Oh, I see him now. May I
19 proceed, Mr. Chairman?

20 ARBITRATOR KESSEDJIAN: Indeed, he's back.

21 ARBITRATOR BIENVENU: Yes, go ahead.

22 Q. BY MR. LITWIN: Mr. Livesay, right before
23 we went to break -- and I am going to read the
24 question and answer back to you -- I asked, "And
25 the DAA was only produced after Afilias had

1 complained to ICANN; isn't that right?"

2 You responded, "I mean, sadly Afilias had
3 been complaining since before the auction."

4 Do you know how -- what the -- when
5 Afilias first complained to ICANN?

6 A. I don't. In fact, even when I say "before
7 the auction," I may be confusing it with some of
8 the activities of Donuts, who I believe filed some
9 case in trying to prevent the auction. I might
10 have been misspeaking about who was complaining.

11 The question about when did Afilias
12 complain, I don't know specifically when they made
13 any first formal complaint to ICANN. I don't know
14 what date that would be.

15 Q. Okay. But it's fair to say that you were
16 aware that complaints were made to ICANN regarding
17 the .WEB auction prior to the .WEB auction taking
18 place, correct?

19 A. There was definitely stuff circulating in
20 the swamp about that, yeah.

21 MR. LITWIN: Okay. Mr. Chairman, I have
22 no further questions. Thank you.

23 ARBITRATOR BIENVENU: Thank you very much,
24 Mr. Litwin.

25 Do my colleagues have questions for

1 Mr. Livesay?

2 ARBITRATOR KESSEDJIAN: I may have some.
3 Do you have any questions, Mr. Chairman?

4 ARBITRATOR BIENVENU: I have a few
5 questions, yes.

6 ARBITRATOR KESSEDJIAN: Perhaps you can go
7 ahead, and then I can ask if there are some
8 unanswered of my questions.

9 ARBITRATOR BIENVENU: Very well.
10 Mr. Chernick?

11 ARBITRATOR CHERNICK: I do not. Thank
12 you.

13 ARBITRATOR BIENVENU: Thank you.

14 Mr. Livesay, were you and the executives
15 you were working with on this initiative surprised
16 by the amount that NDC had to bid to win the
17 auction for .WEB?

18 THE WITNESS: I don't know if "surprised"
19 is the right word. I think we had been watching a
20 lot of TLDs go for higher prices right before then,
21 and I may get the numbers wrong, but I think .APP
22 went for 25, if I recall, something like that. We
23 were just watching this and looking and saying,
24 well, .WEB may have more potential than .APP.
25 Maybe .WEB's broader, maybe it goes for more than

1 that. 135, yeah, maybe higher than I thought, but,
2 yeah, not crazily surprised, I guess.

3 ARBITRATOR BIENVENU: When you say "higher
4 prices," you mean increasingly high prices?

5 Nothing was higher than what was bid for .WEB, as
6 we understand.

7 THE WITNESS: Yeah, I am not aware of
8 anything higher than .WEB. I am simply saying we
9 had seen some TLDs going for tens of million
10 dollars, at least in that area.

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15 THE WITNESS:

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ARBITRATOR BIENVENU: I think you mentioned at the beginning of your evidence, but I could be wrong, but I think you mentioned that among the documents that you reviewed for the preparation of your testimony today were the filings that the parties made in the IRP; is that correct?

THE WITNESS: Some of them. I don't believe all of them. I read Afilias' document

1 from -- I think it was May, in which I then -- that
2 was kind of some of the background of creating my
3 written testimony. And then I read the filings
4 that came in after that.

5 MR. BIENVENU: Oh, you did. So I was
6 going to ask you a question about --

7 THE WITNESS: Let me clarify. When I say
8 "read," I just breezed through to kind of
9 understand what was going on. I wasn't trying to
10 take up any of the legal arguments. I just want to
11 give you a heads-up on that.

12 ARBITRATOR BIENVENU: I would just invite
13 you to comment on a paragraph from the rejoinder
14 memorial of ICANN. This is not something you would
15 have reviewed before signing your witness statement
16 because it was filed on the same day as your
17 witness statement. It was filed on June 1st. But
18 perhaps you have read it since.

19 THE WITNESS: Do you have it there to
20 show?

21 ARBITRATOR BIENVENU: Yes. Perhaps
22 somebody could display on the screen the first
23 page. It is called "ICANN's Rejoinder Memorial."

24 Mr. Litwin, is Chuck available?

25 MR. LITWIN: Do you have a copy of the

1 rejoinder? My team is sending it to him right now.
2 I would send my copy, but it has quite a bit of
3 handwritten notes on it.

4 MR. VAUGHAN: All I need is an exhibit
5 number.

6 MR. LITWIN: It is not an exhibit. It is
7 a pleading. So someone is going to have to send it
8 to you.

9 MR. JOHNSTON: Or, Mr. Chairman, if it is
10 short enough and integrated itself, you might read
11 it to the witness. He might be able to answer the
12 question without actually seeing it. If he needs
13 to see it, he can ask.

14 ARBITRATOR BIENVENU: I'd like to invite
15 him to comment on three sentences in the middle of
16 a paragraph, and I think it would be more fair if a
17 witness could see the whole paragraph. So I would
18 prefer -- I don't want to read the whole paragraph.
19 Let's see if we can display it.

20 MR. LITWIN: It will be only one more
21 minute, Mr. Chairman.

22 (Discussion off the record.)

23 ARBITRATOR BIENVENU: The cover doesn't
24 look like my cover. Is this the one dated June
25 1st?

1 MR. LITWIN: I believe it is.

2 ARBITRATOR BIENVENU: Okay. Very well.

3 So this is the document, Mr. Livesay. Do
4 you remember seeing this document?

5 THE WITNESS: Not necessarily by the
6 pleading cover. I definitely read one of
7 ICANN's -- I don't know if it was this one because
8 I read one that must have been filed later than
9 this because it had my name in it. I don't know if
10 I read this ICANN paper.

11 ARBITRATOR BIENVENU: Anyway, the
12 paragraph on which I would like to invite you to
13 comment is Paragraph 82, if Chuck would display
14 that.

15 Mr. Livesay, you are welcome to read the
16 whole paragraph. My questions will concern the
17 third, fourth and fifth sentence in that paragraph.

18 THE WITNESS: All right. Paragraph 82,
19 just give me a second to read it.

20 Okay. I have read it. What's the
21 questions?

22 ARBITRATOR BIENVENU: So I'd like you to
23 comment on the statement, the fourth line,
24 "Determining that NDC violated the Guidebook is not
25 a simple analysis that is answered on the face of

1 the Guidebook. There is no Guidebook provision
2 that squarely addresses an arrangement like the
3 DAA."

4 So I stop there for a minute. Do you
5 agree with these statements?

6 THE WITNESS: As to the first highlighted
7 one, whether it is easy or difficult to determine
8 if it's been violated, I mean, that's ICANN's
9 perspective. I think they may be using some
10 information I'm not aware of.

11 Because, again, I don't believe that what
12 we did changed the ownership or would have required
13 any type of request for reevaluation. So I don't
14 know that I necessarily agree that it is not a
15 simple analysis.

16 And then the second statement, I think
17 that's probably true. There is no guidebook that
18 squarely addresses this anymore than there's one
19 that squarely addresses the way Google constructed
20 its document or the way that -- I forget -- the Dot
21 Tech, that's not expressly addressed either, I
22 don't think.

23 ARBITRATOR BIENVENU: And what about the
24 next sentence, "A true determination of whether
25 there was a breach of the Guidebook requires an

1 in-depth analysis and interpretation of the
2 Guidebook provisions at issue, their drafting
3 history to the extent it exists, how ICANN has
4 handled similar situations, and the terms of the
5 DAA."

6 THE WITNESS: I think it is certainly fair
7 to say that some analysis needs to be had between
8 the guidebook and the DAA. How in-depth that is, I
9 think, is a matter of opinion, I suppose.

10 ARBITRATOR BIENVENU: In your experience,
11 Mr. Livesay, and those you were working with at
12 VeriSign, but, you know, exclude conversations with
13 counsel, is there a mechanism for an applicant or
14 someone interesting in conceiving deals in what you
15 describe as the secondary market, to ask on a
16 confidential basis sort of advisory opinion from
17 ICANN as to the compliant nature of a possible
18 transaction with the applicable program rules?

19 THE WITNESS: I think maybe you are
20 getting at the question of -- maybe that was so
21 long that I didn't understand your question
22 exactly.

23 MR. BIENVENU: Let me rephrase it. It was
24 a long question.

25 Is there a mechanism for someone who, like

1 VeriSign when it was looking at the DAA, to ask
2 ICANN -- suppose you had a doubt as to whether the
3 DAA was permissible or not. Was there a mechanism
4 to ask on a confidential basis for an advisory
5 opinion on --

6 THE WITNESS: Okay. I was confused by
7 your use of the term "mechanism." It made it sound
8 like there was some fixed process within the
9 company that I am not aware of.

10 There was, however, a communication made
11 after the auction. Actually, I don't know
12 specifically a date, but I believe there was a
13 generic question asked by someone from our naming
14 group to someone at ICANN about what would happen
15 if -- you know, in a request for assignment and
16 what's looked at and what types of
17 disqualifications might affect that. I believe a
18 call like that was made, because the intent from
19 our standpoint was to -- at the request for
20 assignment, after NU DOT CO had executed the
21 Registry Agreement, we wanted to feel comfortable
22 that -- I don't want to use the word "perfunctory,"
23 but given our history in running TLDs, VeriSign,
24 that is, both financially and technically, we were
25 interested in making sure, is there any other

1 reason why an assignment would not be approved to
2 us as a potential assignee. Sorry.

3 ARBITRATOR BIENVENU: I think I know what
4 you're referring to in terms of asking what is the
5 practice of ICANN when it is to approve an
6 assignment.

7 But I meant to situate my question at
8 another point in time, an earlier point in time,
9 when you and your colleagues were engaged or
10 approaching the point where you would engage with
11 potential counterparties to strike a deal like the
12 one you made in the DAA.

13 Did you consider asking ICANN whether the
14 time of the transaction, the way you proposed to
15 structure it, complied with the guidebook?

16 THE WITNESS: I don't recall having a
17 discussion specifically. I think you're asking why
18 did we -- we could have just asked ICANN ahead of
19 the auction, or maybe that's what you're asking. I
20 am not really sure.

21 ARBITRATOR BIENVENU: I am asking whether
22 when you were contemplating entering into the
23 DAA --

24 THE WITNESS: Right.

25 ARBITRATOR BIENVENU: -- whether you

1 discussed seeking an advisory opinion from ICANN as
2 to the -- as to the compliant nature of the
3 agreement you were looking at with the program
4 rules?

5 THE WITNESS:

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21 ARBITRATOR BIENVENU: Very well. Thank
22 you, Mr. Livesay.

23 Mr. Johnston, any redirect, and do you
24 want to take --

25 ARBITRATOR KESSEDJIAN: Mr. Chairman --

1 ARBITRATOR BIENVENU: Oh, sorry. Excuse
2 me.

3 ARBITRATOR KESSEDJIAN: Everybody's tired,
4 but I think I can still survive. It is 9:38 p.m.
5 for me. So it is starting to be dinnertime in the
6 Spanish way.

7 Mr. Livesay, I still have a few questions
8 for you. This is Catherine Kessedjian. I am
9 speaking from Paris, and I'd like to come back to
10 one question that was asked by the Chair.

11 THE WITNESS: Yeah.

12 ARBITRATOR KESSEDJIAN: About the
13 relationship, the business and, I would say,
14 financial and whatever you want to call it,
15 relationship between the .WEB and the .COM and the
16 other gTLDs that we have there.

17 Am I correct to think that you were a vice
18 president of VeriSign for strategy and management
19 in 2009 and 2010?

20 THE WITNESS: Correct.

21 ARBITRATOR KESSEDJIAN: Thank you. So you
22 must have a sense of the business?

23 THE WITNESS: No, not the naming business.
24 At that time, the company was predominantly two
25 businesses. The certificate business, digital

1 certificates. In fact, at that time the digital
2 certificate business was about 50 percent larger
3 than the DNS business. I believe it was about
4 60/40, I want to say, out of a billion, roughly.

5 I come from the history of the certificate
6 business. When I was hired in, I worked directly
7 for the chairman, Jim Bidzos, at the time, to help
8 look at the splitting of the two businesses, but I
9 come from that half of the world.

10 ARBITRATOR KESSEDJIAN: Okay. Very good.
11 So it was only later in 2014 that you had to become
12 aware, if you will, of the business of the gTLDs?

13 THE WITNESS: A lot of rapid learning,
14 yes.

15 ARBITRATOR KESSEDJIAN: Yes. I am
16 absolutely confident that you are capable of that.

17 Now, we read in several reports and
18 particularly a report by J.P. Morgan that it was
19 the understanding of the business that, in fact,
20 .WEB was going to be a competitor for almost every
21 single gTLD because of the nature of the word
22 "WEB."

23 Now, what is your reaction to those
24 reports? Could you tell us a bit more about that?

25 THE WITNESS: I don't know that I am

1 familiar with the report you're referring to. I
2 read a lot of things back then. I definitely
3 recall hearing both, you know, that .WEB looked
4 like a great potential true generic. That
5 certainly played into reasons why VeriSign might be
6 interested in it, which is selling domains and
7 broadening the availability of domains is what
8 VeriSign does, and this looked like a good
9 opportunity for that.

10 ARBITRATOR KESSEDJIAN: Okay. Thank you
11 very much.

12 Now, I want to understand another point
13 that was not asked within the cross or by the
14 Chair. We heard since the beginning of the
15 hearing -- so last week we have been at this
16 hearing -- that, in fact, ICANN has always favored
17 what they call a private auction. In fact, ICANN
18 favors that the contention set people, entities
19 that are in the contention set, basically do it by
20 themselves. ICANN would much prefer not to have
21 the public auction.

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4 Could you explain to us why is it that
5 VeriSign was so adamant to actually have a public
6 auction and not making it private?

7 THE WITNESS: Sure, sure. One of the
8 things that, as I got more into looking at how the
9 contention sets were resolved, in any string that
10 has more than one, how do you resolve it? I
11 definitely read and familiarized myself, and it was
12 definitely made clear that ICANN prefers a private
13 resolution.

14 But as I talked to people in different
15 contention sets, both in .WEB and some others that
16 we looked at, what became curious to me was I
17 appreciated why ICANN would want the contention set
18 to resolve itself, because at that point in theory
19 all the potential antagonists have agreed, great
20 solution.

21 The thing that looked unusual to me is
22 that whether it is a private auction or other
23 private resolution, in the private auction case,
24 the winner is paying or -- another way to look at
25 it is buying off the losers. That has a weird

1 collusive look to it for someone like VeriSign.

2 So to have a situation where we are going
3 to somehow bid and pay off all the losers seemed
4 troubling, and that's one.

5 And then in the other private resolution,
6 in fact, where it is not necessarily auction, but
7 just contention set members are, I don't know,
8 resolving through agreement and having postauction
9 transfers, it just -- the lack of transparency in
10 the conduct between the contention set members
11 seemed unusual, and the fact that it was paying off
12 people to lose was troubling.

13 I think this even came back to prove
14 itself in reality.

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18 Some of those things seem to have come
19 back in play the following year leading up to the
20 auction. For example, I was surprised to see that
21 the other contention members were still trying to
22 contact NDC during the blackout period. That kind
23 of behavior is kind of the weird behavior we didn't
24 want to be a part of in a private resolution. I
25 realize the blackout period doesn't authorize that,

1 but it was happening anyway.

2 I also recall that Afilias made not one,
3 but two offers to somehow promise NU DOT CO an
4 amount. At one point I believe it was 16.8 and
5 then they came back and raised the number to 17.02
6 or something like that. I'm like, wow, this is
7 kind of weird stuff we were wondering about. How
8 is one contention set member able to simply offer
9 money to someone else? It just seemed weird to me.

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14 ARBITRATOR KESSEDJIAN: You are not
15 mentioning one point, which may be important, which
16 is the fact that VeriSign being secretly involved,
17 there was less of a possibility to control the
18 auction and the price.

19 THE WITNESS: I don't know if that's the
20 case. In a private auction, one could see --
21 that's the thing, the way privates are resolved was
22 kind of a bit of a black box.

23 ARBITRATOR KESSEDJIAN: Okay.

24 THE WITNESS: That was kind of -- the
25 unknowns just seemed -- let's go with something

1 that's straight and open.

2 ARBITRATOR KESSEDJIAN: Okay. Thank you.
3 Now, you said that at some stage in your testimony
4 tonight -- tonight for me -- that VeriSign didn't
5 want -- or VeriSign had the confidentiality clauses
6 in the DAA because without them, it would be
7 concerned that it would -- and I use your terms, at
8 least the ones that I have noted. I don't have the
9 real live feed. I didn't sign up for that --
10 upsetting the path. That's your words, at least
11 from what I have taken as notes.

12 Now, do you refer to that as a concern
13 that VeriSign, that if it were discovered by
14 anybody that VeriSign was behind one of the
15 contention set applicants, it would really be a
16 problem? Could you explore more what you meant by
17 upsetting the path?

18 THE WITNESS: I guess the only way I can
19 say it is all the alleged claims we are hearing now
20 from Afilias, however wrong I think they are, we
21 would have heard. But that wasn't really the main
22 drive. The main drive was we figured we'd be
23 reviewed and have to take that when it came out.

24 The point was there looked like a path,
25 that there's a specific point where it would be

1 evaluated, whether we were an appropriate assignee
2 or not of the RA. So I think we just looked at a
3 particular path that looked like it would work, and
4 it still required disclosure, eventually, and
5 that's the path we are on.

6 ARBITRATOR KESSEDJIAN: Thank you,
7 Mr. Livesay.

8 No more questions, Mr. Chairman.

9 ARBITRATOR BIENVENU: Thank you. And
10 apologies for forgetting to ask you for your
11 questions.

12 Mr. Chernick, any questions?

13 ARBITRATOR CHERNICK: No thank you.

14 ARBITRATOR BIENVENU: Mr. Johnston, do you
15 want to take a few minutes before you start your
16 redirect or do you want to start right away?

17 MR. JOHNSTON: I think two minutes would
18 be helpful, but I think it will only take two
19 minutes.

20 ARBITRATOR BIENVENU: Very well. Let us
21 know when you're ready.

22 MR. JOHNSTON: Can we have a room, JD?

23 MR. ENGLISH: Sure. Give me one second.

24 (Whereupon a recess was taken.)

25 ARBITRATOR BIENVENU: Mr. Johnston, are we

1 ready to go?

2 MR. JOHNSTON: Yes, and no. We have no
3 questions, and we just thank Mr. Livesay for his
4 testimony.

5 ARBITRATOR BIENVENU: Very well.
6 Mr. Livesay, I would like to say the very same
7 thing on behalf of the members of the Panel. Thank
8 you very much for your evidence and thank you for
9 your time today.

10 THE WITNESS: Thank you all for clocking
11 in from all different parts of the world. I have
12 it easy here in California time. My apologies to
13 France. It is past my dinnertime there. Okay.
14 Great.

15 ARBITRATOR BIENVENU: Thank you, sir.
16 JD, we'll remove the witness from the
17 room.

18 MR. ENGLISH: The witness is gone from the
19 room and the meeting.

20 ARBITRATOR BIENVENU: Very good. I think
21 this concludes the evidentiary portion of this
22 hearing. Perhaps I can begin by reverting to the
23 question foreshadowed in my opening remarks this
24 morning and ask whether the parties are satisfied
25 in the manner in which this hearing is being

1 conducted and whether there is any concern in this
2 regard that either party would wish to raise.

3 I'll begin with directing the question to
4 Mr. Ali on behalf of the claimant.

5 MR. ALI: Thank you, Mr. Chairman.

6 As I indicated last week and, I must say,
7 somewhat emotionally, for which I apologize to the
8 Panel, we on our side did not believe, do not feel
9 that the prehearing phase was handled very well by
10 the Panel, putting unnecessary, undue pressure on
11 counsel in a matter that is evidently extremely
12 complicated and one which we had a very significant
13 record to deal with and a number of witnesses.

14 With that having been said, I think I
15 speak on behalf of the client and our entire team
16 to say that the hearing has been handled extremely
17 well, of course with great help from our
18 technologists and the support, but so far as the
19 hearing itself is concerned, from Afiliias' side, we
20 have no concerns. Thank you for managing such a
21 good hearing and for very incisive and very
22 well-formed questions.

23 ARBITRATOR BIENVENU: Thank you, Mr. Ali.

24 Mr. LeVee, can I ask the same question to
25 the respondent?

1 MR. LeVEE: ICANN has no objections to how
2 any of these past several weeks have been handled.
3 Certainly the parties have had -- I said certainly
4 the parties have had vigorous exchanges and the
5 last several weeks have been extraordinarily busy
6 for everyone.

7 I think the Panel handled it extremely
8 well, given that we had set specific deadlines and
9 that we had last week scheduled in Chicago and the
10 Panel made it work and then added these days. And
11 ICANN is extraordinarily appreciative of the
12 Panel's efforts, its dedication, its questions and,
13 candidly, its patience. Because I think patience
14 was required over the course of the last seven days
15 of this hearing.

16 And may I say, it may well be that virtual
17 proceedings like this are here to stay for some
18 unknown and perhaps long periods of time.

19 I think these seven days showed that it
20 can work and that we can put together people in
21 multiple locations, including time zones that are
22 nine hours from mine. And I think, candidly, I did
23 not expect it would work as well as it did. And
24 yes, we had a little bit of technology issues come
25 across, but people will get better at that as time

1 goes by. Even in a thunderstorm, Paris didn't lose
2 its Wi-Fi connection tonight.

3 So we are very pleased, and we would like
4 to thank not only the members of the Panel, but
5 opposing counsel, obviously, our client, folks from
6 the VeriSign side.

7 We thank you. This has been seven very
8 challenging but ultimately days that made sense.
9 And we thank you, and we don't want to do it again
10 any time soon, but we think it worked.

11 So thank you, Mr. Chairman, for allowing
12 me to say that.

13 ARBITRATOR BIENVENU: Thank you,
14 Mr. LeVee.

15 May I then ask of the Amici, beginning
16 with Mr. Marenberg on behalf of NDC?

17 MR. MARENBERG: Thank you, Mr. Chairman.
18 Can you all hear me clearly?

19 ARBITRATOR BIENVENU: Very clearly.

20 MR. MARENBERG: Thank you.

21 First I would like to thank the Panel for
22 your hard work and your diligence, your patience
23 and, frankly, your graciousness in handling the
24 seven days of testimony that we've had.

25 And I also express agreement with

1 Mr. LeVee that I think that the virtual nature of
2 this proceeding has been relatively seamless.

3 And I think if I were a hotel or an
4 airline, I would worry because I think we are
5 demonstrating here that these trials -- or at least
6 trials that do not involve juries, can be
7 undertaken and undertaken well with the technology
8 available now.

9 On those grounds, I have nothing but
10 praise for the Panel and praise for TRIALanywhere
11 and the proceedings and the technology.

12 I do have some concerns that I want to
13 raise on behalf of Amici, and I want to preface it
14 by saying that I have no intention of relitigating
15 Procedural Order 1 here that limited the role of
16 Amici in this instance. That's not what I am
17 saying now.

18 I do want to express concerns, concerns
19 that are particularly acute to me in light of the
20 testimony of -- I think it was Mr. Disspain, where
21 he suggested that ICANN would give, I think -- I
22 don't know whether he used "deference" or whether
23 he would take into consideration and give serious
24 consideration to whatever recommendations this
25 Panel made.

1 Here's why I have concerns about that.
2 This has not been a true adversarial proceeding
3 from NDC's -- I'll let VeriSign speak for itself,
4 but certainly from NDC's point of view.

5 We do not have the ability to put on any
6 witnesses of our own. We have not had the ability
7 to demand that Afiliias stop playing games with this
8 Panel and not withdraw the witnesses that it
9 withdrew so that we couldn't cross-examine those
10 witnesses and explain to the Panel that what they
11 are accusing NDC of doing and VeriSign of doing is
12 functionally and substantively no different from
13 what they do every day.

14 If we had their witnesses here, we could
15 have -- well, I could still not have cross-examined
16 them, but perhaps someone could have. But the fact
17 that I couldn't cross-examine them and my client's
18 rights are at issue or potentially at issue is a
19 problem with the proceeding, not a problem with the
20 Panel, but it is a problem that suggests that the
21 Panel needs to be very careful, I'll just say it
22 that way, with the, quote, "recommendation that it
23 is making," because it is doing so on the basis of
24 a somewhat one-sided presentation.

25 By the way, and I think Mr. Ali will

1 object to this, but I believe that the Panel should
2 be taking and making adverse inferences from the
3 fact that Afiliias withdrew all its witnesses. That
4 is, as I understand it, a traditional prerogative
5 of the Panel when witnesses are under control of a
6 party and they are withdrawn for no reason at all.

7 Now, I am going to guess that Mr. Ali is
8 going to object to my suggesting that because,
9 after all, I am only an Amici and not a party, and
10 I have no right to make that suggestion.

11 But if that's true, that goes to, again,
12 the limitations of this proceeding as reflected
13 from the perspective of my client, NDC, whose
14 rights are at issue here.

15 There was another instance, and, again, I
16 take no umbrage of it, and I think that the Chair
17 was quite patient with me when I interrupted the
18 proceedings at a time where I thought a witness who
19 was commenting on the actions of my client was
20 interrupted by counsel and not able to give a full
21 explanation of the answer.

22 Now, I think the Panel quite rightly said,
23 "Under the rules, you're an Amici, you have no
24 right to do that under the rules we set up. And,
25 Mr. Marenberg, please be quiet." I think I was

1 after that.

2 But it goes again to the limitations of
3 the proceedings from the perspective of NDC.
4 Again, I suspect VeriSign feels similarly to this.

5 This is, in a sense, an unbalanced
6 proceeding. I think the evidence -- and I am not
7 going to say a lot about this. The evidence has
8 come out quite favorably to the positions that were
9 taken, but it has come out despite the fact that
10 this is an uneven proceeding and unbalanced
11 proceeding.

12 Therefore, those are the comments I want
13 to make. It is no criticism of the Panel at all.
14 It is the nature of the process that we are engaged
15 in.

16 ARBITRATOR BIENVENU: Thank you,
17 Mr. Marenberg.

18 We'll hear from the parties in a minute as
19 to what was -- what is going to be proposed in
20 terms of posthearing submissions, but you will have
21 an opportunity in the course of posthearing
22 submissions of making representations of the sort
23 that you have made now, about what should or should
24 not be our recommendations.

25 As you know, the question I'm posing has a

1 narrower objective. But anyway, your concerns and
2 comments are reflected in the record.

3 Mr. Johnston.

4 MR. JOHNSTON: Yes. I would agree with
5 what Mr. Marenberg says. I am going to make my
6 comments very pointed and brief.

7 I thought the Panel has been thoughtful,
8 prepared, courteous. I don't know most of the
9 Panel members. I haven't had experience with most
10 of you before, so I can tell you that I was
11 surprised and impressed.

12 I have been an arbitrator before, and I
13 don't think I have ever been more prepared or
14 courteous than the Panel has demonstrated during
15 this hearing.

16 My concern has nothing to do with the
17 Panel. My concern is the combination of the
18 system, IRP system, and the way, in my view -- and
19 I am not going to repeat my opening statement --
20 the way it's been misused here to try and bring
21 claims asking for resolution of issues and relief
22 directly against parties who cannot be parties by
23 virtue of the rules, an ambiguity that lasted
24 throughout this hearing as to what the jurisdiction
25 would be that the Panel would rule on.

1 So we have on the one hand a system that
2 did not allow Amici to appear as parties,
3 including, for the reasons Mr. Marenberg pointed
4 out, while at the same time we had a claimant
5 asking for relief directly against unrepresented
6 parties, and then from day one objecting to
7 participation by Amici, trying to keep us out of
8 the proceeding in virtually every way. Ultimately
9 there was some relenting on that, but as
10 Mr. Marenberg summarized, it has created a
11 one-sided proceeding.

12 So my concern is basically were the Panel
13 to go beyond what we believe the Panel's
14 jurisdiction is and either in their findings
15 regarding such matters as to whether the DAA is
16 consistent with the guidebook or awards relief,
17 such as undoing an auction and setting a price for
18 Afilias to walk off with .WEB, which is what
19 Afilias has asked the Panel to do.

20 I don't know that there's a way that the
21 Panel can remedy the system, but one step that
22 would remedy, I guess, our concerns is if the Panel
23 adopted our notion of its jurisdiction and stayed
24 within it.

25 Because once it goes beyond that

1 definition of jurisdiction, it directly impacts our
2 interests without an equal or fair representation.

3 But in terms of what the Panel's done as
4 opposed to the way the rules are attempted to be
5 used here, I only have compliments to offer.

6 ARBITRATOR BIENVENU: Thank you very much,
7 Mr. Johnston.

8 Can I ask, then, for the parties' thoughts
9 about posthearing submissions? I assume you have
10 had time over the past 24 hours to discuss that.

11 Mr. Ali, do you want to?

12 MR. ALI: Yes, we have, Mr. Chairman. I
13 think we agreed on a date for the filing -- the
14 first round filing of the posthearing submissions,
15 which is October 8th; is that correct, Jeff?

16 MR. LeVEE: Yes. I don't know that the
17 Amici have confirmed their agreement to that date,
18 but ICANN and Afilias have agreed that we will
19 submit our posthearing brief on 8 October of 2020.

20 If I might add, just so there's no
21 ambiguity, I would propose that we do so at 8:00
22 p.m. Pacific so that everyone knows exactly what
23 time they should be submitting their briefs.

24 MR. ALI: That's fine. Of course, this is
25 subject to your comments earlier, Mr. Chairman,

1 about the Panel having -- needing time to define
2 the questions and consider the evidence that you
3 have received over the course of the past seven
4 days.

5 ARBITRATOR BIENVENU: Did you discuss with
6 your colleagues, Mr. Ali, the question of the
7 length of the posthearing submissions?

8 MR. ALI: We did, and as you can imagine,
9 we had lengthy emails about the length, and we
10 couldn't reach agreement.

11 Our basic question is that --

12 ARBITRATOR BIENVENU: I am glad everyone's
13 sense of humor remains intact.

14 MR. ALI: Hopefully the posthearing briefs
15 will be shorter than the length of the emails.

16 In any event, our position is that we
17 should have the same number of pages as ICANN and
18 Amici put together, so that if each of the ICANN
19 and Amici have 50 pages each, we get 150 pages
20 simply because we need to respond to all of the
21 various arguments.

22 As we have seen, you have got a very
23 developed and large evidentiary record now based on
24 this hearing, and as we have seen previously,
25 particularly with the Amici, they cross-refer to

1 each other. So certainly it would be extremely
2 imbalanced if we were to be given the same number
3 of pages as each of ICANN and the Amici
4 individually.

5 So that's the starting -- that's the
6 discussion that we had, and ultimately I think we
7 would have to leave it with the Panel.

8 I would just make one other point, is that
9 the evidence that's been elicited here has been
10 through our cross-examination. So we would need to
11 have the opportunity to put all of that evidence in
12 context.

13 The other point is that insofar as
14 simultaneous submissions are concerned, it doesn't
15 really matter what the page limits are because at
16 this point, we don't have any further proceedings.
17 What we are trying to do is to put the evidence in
18 context and to help you, the panelists, by bringing
19 all of the various points, to crystallize them, to
20 put them in the context for you.

21 At the end of the day, it doesn't -- it is
22 not to our client's benefit to deluge you with
23 paper, but rather to present the case as clearly as
24 we can now that we have a full evidentiary record.

25 So that's where we are coming from, sir.

1 MR. LeVEE: May I?

2 ARBITRATOR BIENVENU: Yes. I thought he
3 was paving the way for the number, and you would
4 give us the number.

5 MR. LeVEE: Well, we did have a number of
6 discussions. Mr. Ali started, as he just
7 indicated, off the discussion by indicating that he
8 did not --

9 MR. ALI: Jeff, may I just interrupt you
10 for a second? Vice President Biden has just
11 nominated Kamala Harris for vice president.
12 Historic moment. Not to interrupt this historic
13 moment that we ourselves are engaged in here.

14 MR. LeVEE: So Mr. Ali did initially
15 suggest that the page limit -- that there not be a
16 page limit. ICANN strongly opposes that. I think
17 there should be limitations.

18 And then the issue was, well, should
19 Afilias have some additional pages because they are
20 responding to more briefs, but we only are going to
21 file one brief. So Afilias -- we have simultaneous
22 briefs, so Afilias isn't going to be responding to
23 briefs. They are going to be submitting their
24 briefs just as ICANN is submitting its brief, just
25 as the Amici are submitting theirs.

1 So under the equality of treatment
2 principle, ICANN very much would like to have the
3 same number of pages as Afilias. I understand, but
4 the Amici can confirm separately, that they have
5 agreed that whatever the page limit ICANN and
6 Afilias are given, that they would have that number
7 of pages combined. So by way of example, if ICANN
8 and Afilias each had 75 pages, then the Amici
9 combined would submit 75 pages.

10 I will tell you that ICANN proposed that
11 we submit a brief of 50 pages because we think 50
12 would be sufficient, and we're not looking to have
13 the Panel have another set of briefs that are
14 literally hundreds of pages long.

15 I think it is ultimately up to the Panel
16 to determine the length, but I do think that this
17 is a situation where ICANN and Afilias should have
18 the same number of pages. If we don't use the
19 number that we are given, that's our prerogative,
20 and if the Amici are willing to -- still willing to
21 have collectively the number of pages that ICANN
22 and Afilias have, I think that that would be
23 extraordinarily fair. It would be consistent with
24 the ICDR arbitration rules.

25 So that would be our proposal. I'll be

1 candid, Mr. Ali said he wanted 150 pages. We have
2 no interest in giving the Panel 450 pages or 350
3 pages, whatever that would work out with the Amici.
4 We think it is too much. There has been a lot of
5 ink provided to the Panel already, positions that
6 have been taken, and now the parties need to
7 comment on the what the evidence was.

8 And while it is true that Afilias did most
9 of the cross-examining, some of that was because
10 they withdrew witnesses. So the parties are where
11 we are, and I think ICANN's proposal is
12 extraordinarily reasonable and consistent with the
13 rules.

14 MR. ALI: Chairman, may I make a
15 suggestion here?

16 ARBITRATOR BIENVENU: Sure.

17 MR. ALI: Insofar as the responses to the
18 Amici is concerned, the Panel, of course, will be
19 aware of the page limits. There the parties have
20 agreed that the Amici shall each be permitted to
21 file separate briefs of 50 pages in length and that
22 the parties shall each be permitted to file briefs
23 100 pages in length.

24 As Mr. LeVee says, if we choose not to use
25 100 pages, that's, of course, our respective

1 prerogatives. That would be, I think, a good way
2 of resolving this matter, given the fact that
3 that's what we agreed, and that's what the Panel
4 accepted previously. So 50 pages for VeriSign, 50
5 pages for NDC, and 100 pages each for ICANN and
6 Afiliias would be my suggestion.

7 ARBITRATOR BIENVENU: Very well. You will
8 leave it with us.

9 MR. JOHNSTON: Can Amici be heard on this,
10 please?

11 ARBITRATOR BIENVENU: Yes, of course.

12 MR. JOHNSTON: At least I -- I am not sure
13 about Mr. Marenberg, but two months to prepare
14 postclosing briefs in a seven-day trial is
15 extraordinary in our view, and -- my view, it's a
16 lot of time.

17 As one of my colleagues said, memories
18 fade, and we just had this trial and hundreds of
19 pages of briefing immediately before the trial. It
20 seems to me that this could be pushed along more
21 quickly, which might be easier on everybody because
22 they will have this fresh in mind and not have to
23 reinvent the wheel in starting to think about their
24 posthearing briefs.

25 I am very cognizant that the Panel would

1 like time to pose some questions, and I think
2 that's a superb idea because it will hopefully
3 guide the briefs in the right direction as opposed
4 to, again, going over the whole history as though
5 this trial never took place.

6 So we started off proposing two weeks and
7 then went up to a month. But in terms of our
8 position, two months is a bit long.

9 So we would ask that it be a little bit
10 shorter and that the briefs not, again, be in the
11 hundreds of pages of length. There are -- you
12 know, it sometimes gets lost there that there are
13 people with other rights and interests in moving
14 this forward than just Afilias and ICANN.

15 These are people who went in and paid
16 their money at the auction and would like to see
17 this resolved and back to the Board to follow the
18 proper processes, at least as we see those
19 processes.

20 So we have some concern about the length
21 of time that's been set, and we have concerns about
22 the size of the briefs that Afilias wants because,
23 again, we have just had this trial. We are not
24 going to retry everything, hopefully, again based
25 on briefs, although I have no doubt that the

1 Afilias briefs will be excellent. We have seen
2 quite a few of them already.

3 ARBITRATOR CHERNICK: Mr. Chairman, is it
4 contemplated that upon the submission of the
5 posthearing briefs, the matter will be submitted
6 for decision to the Panel without necessity of
7 further argument?

8 ARBITRATOR BIENVENU: Well, that was the
9 next point I was going to raise. You recall that
10 in the charts -- the chart, singular, entitled
11 "Topics for Prehearing Conference" that was
12 delivered to the Panel after the prehearing
13 conference of 29 July, there was a box for closing
14 argument. There was disagreement -- sorry.

15 I think everybody agreed that it would be
16 at the discretion of the Panel, and the way we put
17 it was that we would decide after receiving
18 posthearing briefs, but that in the event that we
19 considered that closing argument would be helpful,
20 we would agree today or in the ensuing days on a
21 date for that purpose. It would be penciled into
22 everybody's agenda, and if ever we need to use it,
23 the date will be reserved.

24 So that was the last topic I was going to
25 cover.

1 I think normally we should not need
2 closing argument in addition to a prehearing --
3 sorry, posthearing briefs, but, you know, the
4 question having been raised by the parties, I am
5 happy to leave it aside as a possibility. But we
6 should fix the date right away so that everybody is
7 available if that is to happen.

8 I don't foresee it as needed at the
9 present time, but --

10 MR. ALI: Has the Panel discussed
11 potential dates so that we can consider?

12 ARBITRATOR BIENVENU: We have not. We
13 have not. That's a good suggestion, Mr. Ali.
14 Maybe we should send you a list of dates and the
15 parties can let us know what works for everybody.

16 MR. ALI: If I may just comment on what
17 Mr. Johnston said regarding the timing of the
18 posthearing briefs. Number one, state the obvious,
19 the parties agreed on a date.

20 Number two, harkening back to the comment
21 I made regarding the prehearing stage of this
22 arbitration, there is -- there are commercial
23 interests, of course, at play, but there are also
24 human frailties and human abilities. And my team
25 members are all taking a much-deserved break.

1 And then we have commitments as well that
2 in the way -- I had initially started out with
3 Mr. LeVee asking for October 15th or 16th, and we
4 compromised. I think I said October 9th, and ICANN
5 wanted October 8 because of other commitments that
6 ICANN has. So I think that that is fairly
7 reasonable, and I think a customary length of time
8 in international arbitration.

9 Certainly we are not intending to
10 regurgitate everything, but you do have an ample
11 evidentiary record from this hearing, and we do
12 feel that the Amici submission allowances of page
13 numbers is very reasonable and fits with what has
14 already been agreed by the parties.

15 MR. LeVEE: If I can just clarify one
16 thing? ICANN had originally proposed late
17 September. Mr. Ali had come back and said that
18 they had commitments, so we did go back and forth.
19 On that basis, we landed on October 8. So that is
20 what Afilias and ICANN agreed to following
21 negotiation. It is the case that Amici did express
22 concern.

23 ARBITRATOR BIENVENU: Very well. Leave it
24 with us.

25 I will mention, insofar as the list of

1 questions from the Panel is concerned, these will
2 be targeted questions on issues about which we
3 would like further assistance from the parties.

4 For the rest, we leave it to counsel to
5 structure their posthearing brief in the way that
6 they consider most useful to bring it all together,
7 knowing that we have the evidence of witnesses.

8 ARBITRATOR KESSEDJIAN: Please remember
9 our request for a common list of exhibits and a
10 common chronology, factual chronology.

11 (Discussion off the record.)

12 ARBITRATOR KESSEDJIAN: Please remember
13 our request of -- and then the two things.

14 (Discussion off the record.)

15 ARBITRATOR KESSEDJIAN: The first one is a
16 common list of exhibits chronologically ordered,
17 and then a factual common chronology so that we can
18 actually have common paths to what happened.
19 Factual, all the essential facts in this case.

20 By the way, if you do that, and we really
21 require that you do it, it will be easier for your
22 posthearing briefs because you would not have to
23 spend too much time on the facts.

24 MR. ALI: If I may, Professor Kessedjian,
25 we will do our best. My experience, it is not easy

1 to agree on certain facts.

2 ARBITRATOR KESSEDJIAN: I am not saying it
3 is easy.

4 MR. ALI: But I would -- I think we will
5 exercise our best efforts to provide the facts that
6 we can agree on.

7 I was just going to ask if the Panel has a
8 date in mind by which you would like that, or is
9 this to be submitted simultaneously with the
10 posthearing briefing?

11 ARBITRATOR KESSEDJIAN: We didn't discuss
12 that, but from my part, I would be happy to have it
13 with the posthearing brief.

14 ARBITRATOR BIENVENU: Yes, that would be
15 good.

16 All right. Anything else from the parties
17 or the Amici?

18 MR. ALI: If I may just take a quick --
19 just peek over my computer screen to my other
20 colleagues to see if they have anything.

21 Ethan, if there's anything, just text me.

22 Just one second, Mr. Chairman.

23 A very good question has been raised by
24 one of my colleagues, which is insofar as the
25 facts, the common list of facts are concerned, is

1 that also to be agreed with the Amici?

2 ARBITRATOR BIENVENU: Well, I think it
3 would be useful to submit it to the Amici for
4 comments once a first agreed chronology has been
5 generated between the parties, yes.

6 MR. ALI: Okay. We will try and work that
7 out, and hopefully we don't have to revert to the
8 Panel, but we'll do our best to achieve the
9 objective and fully understood what you're looking
10 for.

11 That having been said, from my side,
12 again, I would like to thank my colleagues on all
13 the other screens insofar as Amici and ICANN are
14 concerned. Of course, the Panel, for all of your
15 incredible work. I've certainly been extremely
16 impressed, as has already been expressed, with the
17 precision of your questions. It is not an easy
18 matter to grapple with.

19 I have to particularly let Mr. Chernick
20 know that since I was a little boy, I have always
21 loved Charlie Chaplin but have been petrified by
22 clowns. So spending seven days looking at the
23 clown has, I think, perhaps cured me of my phobia.

24 ARBITRATOR CHERNICK: So something has
25 been gained by this proceeding.

1 MR. ALI: Yes, absolutely.

2 And, of course, to TRIALanywhere. To
3 Balinda, to all of those who have not appeared on
4 the screens who have helped to make this production
5 happen, my deep gratitude.

6 I hope people do get some time to rest and
7 recover before we get into the -- into the rigors
8 of the fall. My thanks to all.

9 ARBITRATOR BIENVENU: Mr. LeVee, nothing
10 else on your part?

11 MR. LeVEE: I am not going to repeat what
12 I said before. I thank everyone. I hope in an
13 unusual summer that everyone has the opportunity to
14 have a nice vacation or holiday someplace. I wish
15 everyone well and thank you all.

16 ARBITRATOR BIENVENU: Thanks.

17 Mr. Johnston, Mr. Marenberg, no other
18 matter to --

19 MR. MARENBERG: In the area where I do a
20 lot of work, which is entertainment, they'd be
21 cuing the music at the Oscars by now.

22 ARBITRATOR BIENVENU: We have gone through
23 our agenda, so it remains to me to bring this
24 hearing to a close.

25 But before I do so, I would like to

1 express the Panel's gratitude to each and every
2 member of the teams of lawyers and support staff
3 that contributed to the representation of the
4 parties and the Amici in this IRP.

5 I would say, if I may say so, the parties
6 and Amici are extremely well-represented in this
7 case, and it truly is a pleasure for my colleagues
8 and I to work with professionals of such high
9 caliber.

10 We also appreciate the exemplary courtesy
11 and cooperation displayed among counsel throughout
12 the hearing. It makes it very easy for the Panel
13 when that happens.

14 We also wish to thank JD and his team for
15 their excellent services throughout the hearing.
16 Everything went very smoothly.

17 And last but not least, thank you to our
18 court reporter and those who support her for their
19 services in connection with this hearing.

20 So I know that on this note, my colleagues
21 join me in wishing everyone well. Stay safe, in
22 good health, and if I may end on a positive note,
23 we will get through this pandemic, and we will meet
24 in person again once we get to the end of this
25 tunnel.

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So thank you all and have a good end of
day.

MR. MARENBERG: Thank you.

ARBITRATOR KESSEDJIAN: Good-bye,
everyone.

MR. ENGLISH: Good-bye. Thanks everyone.

(Whereupon the proceedings were
concluded at 1:38 p.m.)

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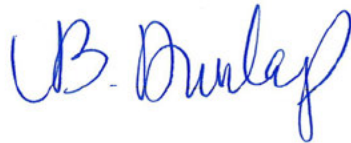
REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full, true, and correct record of said proceedings:

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 20th day of August, 2020.



BALINDA DUNLAP, CSR NO. 10710, RPR, CRR, RMR

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EXHIBIT C-12

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

VERISIGN, INC. and NU DOTCO, LLC.

Amicus Curiae.

ICDR CASE NO: 01-18-0004-2702

WITNESS STATEMENT OF JOSE IGNACIO RASCO III

1 June 2020

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Counsel to *Amicus Curiae*
Nu Dotco, LLC

I, Jose Ignacio Rasco III, declare as follows:

1. My full name is Jose Ignacio Rasco III, and I reside in Miami, Florida. I am currently the Chief Financial Officer and a Manager of Nu Dotco, LLC (“NDC”), a company founded to submit applications and acquire rights for new generic top level domains (“gTLD”) as part of the Internet Corporation for Assigned Names and Number’s (“ICANN”) New gTLD Program.

I. Biography

2. In 2001, I graduated from the University of Pennsylvania’s Wharton School with a Bachelor of Science Degree in Economics with concentrations in Accounting and Real Estate. In 2003, I earned a Master’s Degree in Taxation from Florida International University.

3. In 2005, I saw an opportunity to enter the domain name industry after I began working with Juan Diego Calle, an entrepreneur working within the internet space. In 2007, the Colombian government announced the release of the .CO geographic top level domain (“TLD”) for public auction. In 2009, I, Mr. Calle, Nicolai Bezsonoff, and a few others co-founded .CO Internet S.A.S. (“dotCO”) to acquire, develop, and operate the .CO TLD. I served as dotCO’s Chief Financial Officer, while Mr. Calle and Mr. Bezsonoff served as dotCO’s Chief Executive Officer and Chief Operating Officer, respectively. We operated dotCO as a joint venture with Neustar, Inc. (“Neustar”), an American technology company that served as our technical partner. In 2009, dotCO successfully bid for the .CO TLD, which we then operated with considerable success. Under our leadership, for example, we increased registrations and revenue to the point where .CO operated on par with top-echelon domains. Following that success, we sold dotCO to Neustar in 2014.

4. In 2012, while still at dotCO, Mr. Calle, Mr. Bezsonoff, and I began to strategize the future of our domain industry business. During this time, we closely followed ICANN’s

announcement of its New gTLD Program, under which ICANN promised to introduce numerous new gTLDs to the domain name system. As a complement to our existing dotCO business, we decided to participate in the New gTLD Program by applying to be operators of certain new gTLDs. We focused on those potential gTLDs that could occupy a corporate space similar to .CO and had the greatest potential for commercial success.

II. NDC's Management and Ownership

5. The business organization we used to pursue our interest in participating in ICANN's New gTLD Program was NDC, a name ("Nu Dotco") that is a takeoff on our then-existing business "dotCO." On March 19, 2012, Mr. Calle, Mr. Bezsonoff, and I founded NDC, a company organized under the laws of Delaware with its principal place of business in Florida. Maintaining the same positions and roles we served at dotCO, I served as NDC's Chief Financial Officer, Mr. Calle served as NDC's Chief Executive Officer, and Mr. Bezsonoff served as NDC's Chief Operating Officer.

6. At its formation, NDC was owned by two entities as follows: Domain Marketing Holdings, LLC ("DMH") owned 85% of NDC; Nuco LP, LLC ("Nuco") owned the other 15%. That ownership structure remained the same until December 2017, at which time Nuco distributed its 15% ownership interest in NDC to Nuco's members. As a result of that distribution, as of December 2017, DMH continued to hold 85% of NDC and the three other entities that had comprised Nuco collectively held the remaining 15% (with each necessarily owning less than 15%).

7. Accordingly, other than DMH and Nuco, no other entity or person has ever owned at least 15% of NDC. Similarly, there have been no changes or amendments to NDC's management since 2012. Mr. Calle, Mr. Bezsonoff, and I remain the sole officers of NDC and continue to perform the duties associated with those positions.

8. Formed for the specific purpose of submitting applications to ICANN to acquire gTLDs, NDC ultimately applied for thirteen (13) gTLDs through ICANN's New gTLD Program, including .WEB.¹

III. NDC's Application for .WEB

9. On June 13, 2012, NDC submitted an application to ICANN to acquire the right to operate the .WEB gTLD (the "Application"). Exhibit A attached hereto is a true and correct copy of the Application, together with the exhibits to that Application.² NDC timely paid the required \$185,000 application fee.

10. NDC's Application satisfied all of ICANN's requirements. For example:

- **Corporate Information**

11. Mr. Bezsonoff and I completed NDC's .WEB Application. In that regard, as specified by Sections 1 and 8 of the ICANN gTLD application form, we identified NDC as the applicant and as a Delaware limited liability company. Ex. A.1, §8(b). As specified by Sections 6 and 7 of the form, we listed me as NDC's "Primary Contact" and listed Mr. Bezsonoff as NDC's "Secondary Contact." *Id.* at §§6-7. And as specified by Sections 11(a) & (b), we listed three people as NDC's directors and officers: me as CFO, Mr. Calle as CEO, and Mr. Bezsonoff as COO. *Id.* at §§11(a), (b). This information was accurate at the time NDC's Application was prepared and submitted and this information remains accurate today.

12. To comply with the requirements of Section 11(c) of the gTLD application form, we identified "all shareholders holding at least 15% of shares" in NDC. As was accurate at the time, we listed Domain Marketing Holdings, LLC and Nuco LP, LLC as entities that held at least

¹ NDC applied for the following 13 gTLDs: .INC, .LLC, .GROUP, .LTD, .DESIGN, .MOVIE, .BOOK, .WEB, .CORP, .GMBH, .APP, .LAW, and .TECH.

² Exhibit A.1 contains publicly available portions of the Application. Exhibit A.2 contains non-public, confidential portions of the Application. Exhibits Aa-Ap contain exhibits submitted with the Application.

a 15% ownership interest in the LLC. *Id.* at §11(c). As stated above, these two entities are the only entities or persons that have ever held at least 15% of NDC.

- **Mission/Purpose of Proposed .gTLD**

13. Consistent with other gTLD applications NDC had submitted, in Section 18(a) of the Application we stated that the “mission/purpose” of .WEB was “to provide the internet community at-large with an alternative ‘home domain’ for their online presence. We envision that through strategic marketing campaigns designed to brand the domain, it will become a premium online namespace for a variety of businesses and websites. This general domain will provide new registrants with better, more relevant alternatives to the limited options remaining for current commercial TLD names.” *Id.* at §18(a).

14. Sections 18(b) and 18(c) of the ICANN gTLD application ask applicants, respectively, to describe how the “proposed gTLD will benefit registrants, Internet users, and others” and to describe “operating rules ... to eliminate or minimize social costs.” *Id.* at §§18(b), (c). In answering these questions, NDC provided its general vision of new gTLDs in the marketplace and its general strategy at the time as to how .WEB might be successfully and productively introduced and used to benefit consumers. *Id.* Although NDC used its experience with .CO as an *example* of how .WEB might accomplish these goals, we understood, and we stated in our answers, that specific plans would depend on market conditions and thus were not fully described in the Application. Nonetheless, we repeatedly stated NDC’s intent to follow ICANN’s policies, rules, and recommendations in connection with .WEB.

15. With slight modifications to reflect the specific gTLD at issue, NDC’s statements in Section 18 of its .WEB Application were largely identical to corresponding statements in all of NDC’s other ICANN gTLD applications. We understood Section 18 to request general

descriptions of marketing and other business intent, not binding commitments of future actions. In fact, as described in more detail below, I understand that ICANN does not use Section 18 to evaluate gTLD applications and does not take any interest in any distinctions that might arise between statements made in Section 18 of a gTLD application and how a domain is ultimately operated. To the best of my knowledge, other applicants—including Claimant Afilias Domains No. 3 Ltd. (“Afilias”)—similarly responded to Section 18 (and other sections) of the ICANN gTLD application form with near-identical statements in each of their applications, irrespective of how they operated domains they ultimately acquired or whether they subsequently transferred the domains to another entity. And, also to the best of my knowledge, ICANN has never policed any distinctions between Section 18 statements and such subsequent actions.

16. Nonetheless, I understand that Afilias has alleged that NDC’s answers to the application form’s “mission/purpose” inquiries in Section 18 were made false or misleading, thereby requiring an update to NDC’s Application, by NDC’s entry into the Domain Acquisition Agreement (“DAA”) with Verisign over three years later. *See* Part VI, *infra*. That is incorrect. First, NDC’s subjective views as to the “mission/purpose” of gTLDs, including .WEB, and how .WEB might benefit consumers and others have not changed, irrespective of who operates .WEB. Second, NDC’s Section 18 responses expressly stated that NDC’s marketing and other business plans were not final and were subject to market conditions. In all of my experience with ICANN applications, I have never updated, nor known any applicant to update, an application to reflect new and different marketing and business plans for a gTLD.

17. Third, given that NDC’s marketing and business plans were subject to change, as a baseline position NDC stated that it planned to follow ICANN’s policies, rules, and recommendations in connection with .WEB. Nothing in the DAA required an update to that

statement, including because I understood that Verisign, a longstanding registry owner and operator with whom ICANN was very familiar, would also follow those policies, rules, and recommendations. As a baseline, therefore, I did not believe anything about our Section 18 responses had materially changed on account of the DAA and I did not believe any amendment to NDC's Application was required or warranted. Among other things, in

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18. Moreover, as stated above, it has always been my understanding that the Section 18 "mission/purpose" inquiry is intended to provide ICANN with certain New gTLD Program statistics and is not part of the evaluation criteria. Rather, when evaluating whether an applicant is qualified to participate in a new gTLD contention set, ICANN has always been most concerned with whether that applicant has the financial ability and technical infrastructure to successfully operate the gTLD registry. For example, the ICANN Guidebook states that responses to Section 18 are "not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored."³

19. Instead, the Guidebook explains that Section 18 responses are used in connection with *ex-post* reviews of the gTLD program in general and not in connection with any specific application:

The information gathered in response to Question 18 is intended to inform the post-launch review of the New gTLD Program, from the perspective of assessing the relative costs and benefits achieved in the expanded gTLD space. For the application to be considered complete, answers to this section must be fulsome and

³ Afiliis C-3 (*gTLD Applicant Guidebook*, Attachment to Module 2, A-11, A-12, available at <https://newgtlds.icann.org/en/applicants/agb>).

sufficiently quantitative and detailed to inform future study on plans vs. results. The New gTLD Program will be reviewed, as specified in section 9.3 of the Affirmation of Commitments. This will include consideration of the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. *Id.*

20. As a result, while helpful for ICANN to assess the New gTLD Program in general, Section 18 responses are not a material part of evaluating a particular application and, moreover, are not subject to subsequent enforcement by ICANN in the event those responses differ from how or by whom a domain is ultimately operated. Accordingly, for this additional reason, I again did not believe that NDC was obligated to update any such response in its .WEB Application.

- **Technical Capabilities**

21. In Sections 23-44, NDC provided a robust description of its technical ability to operate the .WEB gTLD. For example, NDC explained that it had partnered with Neustar, an experienced domain registry company with proven and scalable infrastructure. Ex. A.2, §§23-27. NDC further provided detailed information regarding the specific services Neustar would provide, including the necessary security, abuse prevention, and rights protection services. *E.g., id.* at §§28-44.

- **Financial Information**

22. Redacted - Third Party Designated Confidential Information

This financial information is considered confidential by ICANN, and is not disclosed by ICANN in its public posting of new gTLD applications. Therefore, only ICANN would have had access to this information about NDC's financial ability to operate the .WEB gTLD. Other members of the Contention Set, including those who might bid at auction for .WEB, would not have had access to such financial information.

23. Notably, the ICANN application form did not call for, and therefore NDC did not provide, any information regarding NDC's financial capability to acquire the .WEB gTLD in an auction or sources of financing for that auction. In more than a dozen ICANN applications I have overseen for NDC, ICANN has never requested and NDC has never provided such information.

24. As NDC's primary contact for the Application, I received confirmation from ICANN that our .WEB Application had been accepted—meaning that the Application had satisfied all applicable ICANN criteria and evaluations—in June 2013.

25. Pursuant to the ICANN Guidebook, if more than one applicant applies for a gTLD, then the approved applicants are grouped together into a "Contention Set," with the competing applications resolved either through (i) a private auction or other negotiated settlement conducted by agreement of the applicants or, if all members of the Contention Set do not agree to a private auction, (ii) a public auction conducted under the auspices of ICANN.

26. In addition to NDC, there were six other approved applicants for the .WEB gTLD: Web.com Group, Inc., Charleston Road Registry Inc. (Google), Schlund Technologies GmbH, Dot Web Inc. (Radix), Ruby Glen LLC ("Donuts"), and Afilias. In February 2014, ICANN officially formed a Contention Set for .WEB comprising these seven applicants, including NDC.

27. It was not until April 2016, however, that ICANN sent notice to the Contention Set that ICANN would issue the .WEB gTLD and, therefore, that ICANN had scheduled a public

auction for .WEB to take place on July 27, 2016. Until ICANN sent that formal notice, there was no guarantee that ICANN would hold an auction for .WEB. Rather, as had occurred with other domain strings (such as .CORP), ICANN had the right to decline to issue the .WEB gTLD and thus not to hold an auction.

28. As a result, between June 2013, when ICANN approved NDC's application, and April 2016, when ICANN scheduled the public auction, there was no clarity as to how NDC's application for .WEB might ultimately be resolved.

IV. Changes to the gTLD Marketplace and the Emergence of New Participants

29. Following NDC's successful acquisition and operation of the .CO domain in 2010 and ICANN's introduction of the New gTLD Program in or around 2012, NDC decided to focus its gTLD acquisition strategy on similar company-type domains. For example, because "CO" is short for "Company," NDC applied for domain strings such as .INC, .LLC, .CORP, .LTD, and others in this corporate short identifier space. NDC also applied for domain strings related to high traffic Internet searches, including .MOVIE, .BOOK, and, of course, .WEB. In total, NDC submitted 13 ICANN applications for these and similar domains.

30. Between 2012 and 2015 several other companies emerged as repeat participants in the ICANN New gTLD Program. Prominent among these was Donuts. On information and belief, Donuts raised funds through private equity transactions to finance ICANN applications and auction bids. With that money, it is my understanding that Donuts applied for and bid on at least 300 gTLD domain strings, far more than NDC or, I believe, most other companies.

31. Donuts also emerged as a driving force behind the private auctions permitted by ICANN. As briefly described above, ICANN does not specify how applicants might privately resolve the Contention Set, and applicants may mutually agree to resolve the Contention Set through a private auction or other means. In fact, ICANN encourages applicants to resolve

Contention Sets on their own terms—viewing a public auction as a last resort—and historically has neither participated in nor policed those private resolutions.

32. To the contrary, once ICANN has determined that a gTLD application satisfies the requirements of the Guidebook and placed the various applicants into a Contention Set, to the best of my knowledge, ICANN has effectively fulfilled any gatekeeping function that it might undertake: ICANN has determined that the applicant is qualified and capable of operating the gTLD if that applicant emerges from the Contention Set and secures the rights to operate the domain. Beyond that, to the best of my knowledge, ICANN takes no position *on which* applicant in a Contention Set subsequently becomes eligible to sign a registry agreement with ICANN for the domain in question *or how* they do so. In fact, the Auction Rules expressly state that applicants within a Contention Set may discuss and negotiate, among other things, “settlement agreements or post-Auction ownership transfer arrangements” for the domain in question so long as the Contention Set is not within a designated Blackout Period shortly before a public auction.⁴

33. Accordingly, over the years, applicants have considered and employed numerous means to resolve Contention Sets. For example, when NDC first considered participating in the New gTLD Program, we researched the program rules and considered various means of resolving Contention Sets, including trading domains with other applicants who might have a greater interest in a particular domain string than NDC, cross-selling percentage interests in different domains, and buying various applicants out of their applications before any auction was held. Although NDC has never used these means in practice, I have never considered, and am not aware of anyone who does consider, such means of resolving Contention Sets to be prohibited by the ICANN rules.

⁴ Afiliac C-4 (*Auction Rules for New gTLDs: Indirect Contentions Edition*, 68(a)-(b), available at <https://newgtlds.icann.org/en/applicants/auctions>).

34. Following the disclosure by ICANN of the various entities that had submitted gTLD applications, NDC and those entities engaged in numerous discussions regarding how we might resolve Contention Sets without proceeding to a public ICANN auction. Most of the ideas discussed were variations on private auctions, and private auctions have since become the most prominent means to resolve Contention Sets. Although the terms of those auctions may vary depending on the agreement reached by members of the Contention Set, a common form of private auction—which Donuts was heavily involved in creating—is resolved in favor of the highest-bidding applicant. Unlike a public auction under the auspices of ICANN, however, the money offered by the *highest* bidder is often divided equally among the *losing* bidders, not paid to ICANN. As a result, each member of the Contention Set stands to benefit from a private auction as long as the “losers’ share” exceeds expenses, including the ICANN \$185,000 application fee.

35. As another example, in July 2016, Oliver Mauss, the CEO of 1&1 Internet, which owns the Schlund entity that had applied for .WEB and was in the .WEB Contention Set, emailed Mr. Calle with a proposal for an “alternative private auction.” Exhibit C attached hereto is a true and correct copy of that email, which Mr. Calle forwarded to me on July 5, 2016. In his email, Mr. Mauss described the “basic principles” of his proposal: “It divides the participants into groups of strong and weak;” “the weak players are meant to lose and are compensated for this with a pre-defined sum;” “the strong players bid for the asset;” and “the highest bid wins, but the winner pays a lower price than the 2nd highest bid.” *Id.* According to Mr. Mauss, this proposal had several advantages over a typical private auction (which he called an “Applicant Auction”) and an ICANN public auction. *Id.* For example, “the winning party pays less for the asset in comparison to both” an ICANN public auction or an “Applicant Auction;” “the losing strong players receive a higher return than in the Applicant Auction;” and “the losing weak players receive a lower return than in

the Applicant Auction.” *Id.* Essentially, Mr. Mauss concluded, the “benefit for the strong bidders comes from a lower share of proceeds for the weak bidders than in the Applicant Auction.” *Id.* We did not agree to participate in Mr. Mauss’s proposal, but it was yet another example of means through which participants in the New gTLD Program attempted to resolve Contention Sets without proceeding to a public ICANN auction.

36. Following ICANN’s publication of the Guidebook in 2012, Donuts made significant efforts to coordinate private auctions between gTLD applicants. For example, Donuts hired a mathematician to develop models for operating such auctions, developed tutorials, and hosted meetings and mock auctions so participants could experience and evaluate how private auctions might work. I participated in at least one such meeting, which was held during an ICANN conference (but was not on the official conference schedule) and which I understood had been arranged by Donuts. At that meeting, a mathematician and a private auction company provided information to gTLD applicants about how a private auction might work.

37. Other companies, including Afilias, similarly prioritized private auctions, ultimately treating gTLD applications as a form of arbitrage in which each application was an asset to be leveraged for profit without ever intending to actually operate any, or most, of the gTLDs. Based on my active participation in the domain industry for over 12 years and numerous conversations with other participants, it is my understanding that such practices were commonly known in the industry. I believe that ICANN was aware of these practices and, to my knowledge, did not object to them. I believed that these practices were acceptable to ICANN, which sought only to ensure that the ultimate operator was qualified and technically and financially capable of operating each respective gTLD.

38. By 2015, Donuts had become a well-financed, major force in the New gTLD Program. In addition, large companies such as Amazon and Google also began to participate in the Program, including by participating in private and public auctions.

39. As private auctions proliferated and the value of gTLD domain strings increased, including as a result of the influx of money from participants such as Donuts, Amazon, and Google, the market expectations for the .WEB domain and other new gTLDs increased.

40. Given these changes in the marketplace, ^{Redacted - Third Party Designated Confidential Information}

V. The Domain Acquisition Agreement and Confirmation of Understandings

A. The Domain Acquisition Agreement

41. In or around May 2015, I received a phone call from Verisign expressing interest in working with NDC to acquire the rights to .WEB. As noted above, by that date ICANN had formed the Contention Set for .WEB (meaning no new applicants could join) and

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In addition, as also noted above, by that date ICANN had yet to schedule a public auction for .WEB, and thus the domain was still on hold, so there was no clarity as to a resolution by either a public *or* a private auction. Consequently, because

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42. As stated above, based on my experience and discussions with others in the industry, it was common industry knowledge by 2015-2016 that gTLD applicants used various means to resolve Contention Sets and monetize their applications. In addition to private auctions, it was common knowledge that interested parties had monetized successful gTLD applications by assigning interests in domain strings after securing the rights from ICANN. And it was commonly understood that ICANN approved of these assignments. In fact, when NDC first developed its strategy in connection with the New gTLD Program, we considered the possibilities presented by these secondary market opportunities to acquire others' rights in domains, and we came to understand that other gTLD applicants had utilized such opportunities and entered into registry agreements with ICANN based on those opportunities.

43. For example, in or around 2013-2014 I knew that Donuts and Rightside Media had entered into an arrangement whereby certain gTLD applications were potentially financed by the other party in exchange for an interest in the domains in question if and when the domains were acquired. To the best of my knowledge, more than twenty (20) domains have been assigned under this arrangement without any update to ICANN applications disclosing the underlying arrangement. Later on, I knew that the .BLOG gTLD had been acquired by WordPress, or an affiliated entity, after another entity, Primer Nevel S.A, prevailed at auction and executed a registry agreement with ICANN.

44. In addition, I have reason to believe that Radix Registry ("Radix") acquired the rights to the .TECH gTLD through an agreement with Dot Tech, LLC. Dot Tech, LLC was in the .TECH Contention Set with NDC. At no time in the auction process for .TECH did NDC think or know that Radix was participating in any way in the auction and Dot Tech LLC did not update its ICANN application prior to the auction to reveal any agreement with Radix. Dot Tech, LLC won

the .TECH auction on or around September 17, 2014. Thereafter, on October 23, 2014, Dot Tech, LLC updated its application to, among other things, add Radix personnel (including Brijesh Joshi, a Radix Director) as officers and as the new Primary and Secondary Contacts and to reflect that a Radix entity was the only party holding 15% or more of the shares of Dot Tech, LLC. Attached hereto as Exhibits D and E, respectively, are Dot Tech, LLC's original June 2012 application and the revised application dated October 23, 2014. On November 7, 2014, less than two months after Dot Tech, LLC won the auction, **Radix** issued a press release stating that “**Radix** made the winning bid of \$6.7 million for rights to .TECH, competing with Google, Donuts, and other industry players.” (Emphasis added.) Indeed, based on the unsigned .TECH Registry Agreement available on ICANN's website, that agreement was set to be signed for Dot Tech LLC by Brijesh Joshi, the Radix Director whose name appeared on the Dot Tech LLC application for the first time after the auction was held, not anyone from Dot Tech LLC who had participated in the .TECH Contention Set. Attached hereto as Exhibits F and G, respectively, are true and correct copies of Radix's press release and the publicly available, unsigned, .TECH Registry Agreement.

45. It was in this context—our knowledge of these transactions, and our interest in maximizing NDC's return from our .WEB Application—that we began to consider any type of contact with Verisign about .WEB. In the spring and summer of 2015 NDC engaged in discussions with Verisign about the .WEB domain. Those discussions culminated in the August 25, 2015 “Domain Acquisition Agreement” between NDC and Verisign. Ex. B.

46. In the DAA, Redacted - Third Party Designated Confidential Information

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47. Redacted - Third Party Designated Confidential Information

48. Redacted - Third Party Designated Confidential Information

49. Redacted - Third Party Designated Confidential Information

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52. Redacted - Third Party Designated Confidential Information

53. **Redacted - Third Party Designated Confidential Information**

Not only in the past did any transfer depend on ICANN determining to delegate a .WEB TLD (as noted above), and not only must ICANN consent to an assignment of a .WEB registry agreement to Verisign, but the DAA further provides that **Redacted - Third Party Designated Confidential Information**

B. The Confirmation Of Understandings

54. In July 2016, Verisign requested that NDC confirm the parties' understanding regarding NDC's .WEB Application in light of allegations by Donuts that NDC had transferred control of NDC to a third party or assigned the .WEB Application to a third party. *See* Part VII.C,

infra. Because those allegations were unequivocally false, and because

Redacted - Third Party Designated Confidential Information, NDC readily agreed to Verisign's request, and the parties subsequently executed a letter agreement dated July 26, 2016 (the "Confirmation of Understandings"). Exhibit H attached hereto is a true and correct copy of the Confirmation of Understandings. Redacted - Third Party Designated Confidential Information

55. I understand that Afilius has alleged that the Confirmation of Understandings contained "false 'talking points'" provided to me by Verisign that I "duly signed" because I was "instructed" to do so by Verisign. Reply Memorial ¶79. That is false. I did not view the Confirmation of Understandings as "talking points," let alone as something to be used in coordinating any response to ICANN, but instead as an accurate statement of NDC's rights and obligations that protected NDC. As a result, I signed the Confirmation of Understandings of my own accord, for NDC and not for Verisign, because it was a true and accurate description of certain facts and understandings between NDC and Verisign, each of which is consistent with NDC's intent in executing the DAA. In addition, Redacted - Third Party Designated Confidential Information

56. For example, in the Confirmation of Understandings, Redacted - Third Party Designated Confidential Information

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57. Fully agreeing that the Confirmation of Understandings set forth NDC's rights as the applicant for .WEB and its rights and obligations under the DAA, each of which I understood to be consistent with and in compliance with ICANN rules and procedures, I signed the Confirmation of Understandings as of July 26, 2016. Importantly, the Confirmation of Understandings in no way contradicted what I told ICANN in June and July 2016—that NDC had not experienced any changes in its organizational management or control. *See* Part VII.C, *infra*.

As explained in detail below, my statements to ICANN were truthful, and I never deceived or misled ICANN or anyone else regarding NDC's .WEB Application.

VI. Neither the DAA Nor the Confirmation of Understandings Warranted an Update to NDC's .WEB Application

58. As discussed in Part III, *supra*, I did not believe that the DAA warranted or required any update to NDC's .WEB Application. The same is therefore true of the Confirmation of Understandings. For example, I address in Part III, *supra*, why I disagree with Afilias' assertions that the DAA rendered NDC's "mission/purpose" responses false or misleading. Simply put, nothing in the DAA changed NDC's view of the "mission/purpose" of .WEB or changed how NDC might operate .WEB or NDC's technical or financial capability to operate .WEB. Because nothing in those responses became false or misleading, I did not believe any update to the Application was necessary.

59. Indeed, Afilias assumes that, as of August 2015, there was no scenario in which NDC itself might operate .WEB. That is incorrect, including because Redacted - Third Party Designated Confidential Information and, as of August 2015, ICANN had yet to even conclude whether or how the .WEB Contention Set would be resolved. There was no guarantee, therefore, that the DAA would be in effect when the Contention Set was resolved.

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These facts informed my belief that NDC was under no obligation to update its .WEB application upon execution of the DAA.

60. I understand that Afilias has emphasized two provisions of the DAA in support of its argument that the DAA required an update to NDC's .WEB Application. First, Afilias repeatedly quotes the following: Redacted - Third Party Designated Confidential Information

61. Redacted - Third Party Designated Confidential Information

In fact, in the context of private auctions, there is no disclosure of interested parties or planned transfers of acquired domains, and I am not aware of any applicant, including Afiliias, questioning or challenging the results of a private auction on any basis, let alone on the basis that the winner of the auction subsequently transferred its rights in the domain to another, previously unknown party. Redacted - Third Party Designated Confidential Information

62. Second, Afilias also relies on language

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VII. Pre-Auction Communications with the .WEB Contention Set and ICANN

A. NDC Did Not Agree to a Private Auction for .WEB

63. As noted above, in April 2016, eight months after NDC and Verisign executed the DAA, ICANN informed the .WEB Contention Set that it had scheduled a public auction for July 27, 2016. Thereafter, members of that Contention Set began to discuss the private and public auction options for .WEB.

64. For example, between April and June 2016, I and Mr. Calle (the CEO of NDC) had various phone, email, and text conversations with other members of the Contention Set regarding both .WEB and other outstanding TLDs for which we had pending applications. In the course of those conversations, other members of the Contention Set, including Donuts and Afilias, attempted to persuade NDC to participate in a private auction for .WEB.

65. Because there is no obligation under the ICANN Guidebook or otherwise to participate in a private auction, NDC declined to do so in connection with .WEB. Not only did

Mr. Calle and I repeatedly decline requests from Donuts, Afiliias, and others, but we also never signed any agreement committing NDC to a private auction for .WEB. To be plain, NDC was not required to participate in a private auction for .WEB and never agreed to do so.

66. Nor would NDC Redacted - Third Party Designated Confidential Information

B. Other Contention Set Members Sought to Pressure NDC to Agree to a Private Auction

67. At the time, I understood that other members of the .WEB Contention Set were unhappy that NDC would not agree to a private auction. Recall that a private auction requires the consent of all members of the Contention Set. And recall that, in a private auction, the winner secures the rights to the gTLD at issue and the winning bid is shared among the losing parties. In contrast, in a public auction, the winning bid is retained by ICANN (for investment in the Internet infrastructure) and the losing bidders recover nothing.⁵ Accordingly, other members of the Contention Set stood to lose the opportunity to “earn” significant amounts of money as the losers in a private auction were .WEB to proceed to a public auction.

⁵ Applicants can recover portions of their application fee depending on if and when they exit the auction process, but recover nothing if they complete the auction but do not prevail.

68. One such party was Donuts. On June 6, 2016, I received an email from Jon Nevett, a co-founder of Donuts, regarding .WEB. Exhibit I attached hereto is a true and correct copy of an email string containing Mr. Nevett's June 6 email and our subsequent communications. In his June 6 email, Mr. Nevett said that he was unsure if I, Mr. Calle, and Mr. Bezsonoff were "still the Board members of your applicant" and asked us to agree to a two-month delay of the public auction for .WEB while the Contention Set tried "to work this out cooperatively." *Id.* Based on prior communications with Mr. Nevett, I understood him to be asking to discuss further NDC's participation in a private auction. On June 7, I replied to Mr. Nevett's email and informed him that NDC would not agree to a private auction (maintaining its intention to proceed to a public auction administered by ICANN) and would not agree to a postponement of the public auction. *Id.* In particular, I told Mr. Nevett that, based on his request, "I went back to check with all the powers that be and there was no change in the response and [NDC] will not be seeking an extension." *Id.*

69. In addition, in response to Mr. Nevett's inquiry about whom at NDC he should contact regarding .WEB, I stated that "Nicolai [Bezsonoff] is at [Neustar] full time and no longer involved with our TLD applications. I'm still running our program and Juan [Calle] sits on the board with me and several others." *Id.* Mr. Nevett responded with "Thanks Jose," and asked a follow-up question about unrelated domains. He did not ask for any other information or for any clarification about what I had written. *Id.*

70. I am aware that my reply to Mr. Nevett is being mischaracterized and used as the basis to withhold the award of .WEB to NDC following our successful auction bid in July 2016. My email to Mr. Nevett was an informal email between colleagues who, though also competitors, had a cordial, and even friendly relationship. In that context, I sought to politely respond to Mr.

Nevett's inquiry and deflect further questions. I never intended to suggest any of the changes to the ownership or control of NDC that have been alleged. Nor did I have any obligation or intention to provide detailed, formal information about our company or its management to Donuts.

71. To the contrary, as I have previously attested, I intended the following by the statements in my June 7 email:

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72. Again, I did not intend my June 7 email to a competitor to convey formal information about NDC's corporate organization, let alone to communicate some change to NDC's management that warranted an update to our .WEB Application, as there had been no such change since NDC submitted its .WEB Application. Rather, the language I used was intended to politely dissuade Mr. Nevett from continuing to pursue the issue of a private auction but, at the same time, not to create any ill will between us. I viewed the email as a polite "stiff-arm" response to a competitor to whom neither I nor NDC had any duty to provide either information or explanations for our decisions.

73. On the same day that Jon Nevett of Donuts emailed me, June 7, 2016, Steve Heflin of Afilius contacted Mr. Calle by text message to similarly ask if NDC would reconsider its decision to forego a private auction for .WEB. Exhibit J attached hereto is a true and correct copy of those text messages, which Mr. Calle forwarded to me on June 7, 2016. In those messages, Afilius offered to "guarantee [NDC] score[s] at least 16 mil if you go into the private auction and

lose.” Mr. Calle declined Afiliast’s offer. *Id.* Afiliast then offered to increase the guaranteed payment to “\$17.02” million. Mr. Calle again declined. *Id.*

74. John Kane of Afiliast also texted me to make the same request. I again declined. Exhibit K attached hereto is a true and correct copy of my text messages with Mr. Kane.

C. ICANN Investigated and Dismissed Complaints by the Other Contention Set Members

75. Unable to persuade NDC to participate in a private auction for .WEB, and, in my opinion, motivated entirely by a desire to delay the upcoming *public* auction so as to preserve the possibility that they might profit from the losers’ share in a *private* auction, on June 23, 2016, Donuts and Ruby Glen (which is owned and operated by Donuts) complained to ICANN that NDC had changed its ownership and/or management structure but had not reported the change to ICANN as allegedly required. Donuts and Ruby Glen requested that ICANN investigate those allegations and requested that the public auction for .WEB be delayed during that investigation. Exhibit L attached hereto is a true and correct copy of Donuts’ and Ruby Glen’s June 23, 2016 complaint to ICANN (the “Donuts Complaint”).

76. Signed by Jon Nevett of Donuts—with whom I had emailed between June 6-8, 2016—the Donuts Complaint was entirely premised on the misconception that my statements to Mr. Nevett on June 7 revealed a change in “ownership or control” of NDC that NDC had not communicated to ICANN through an update to NDC’s .WEB Application. *See id.*

77. On June 27, 2016, I received an email message from a member of ICANN’s New gTLD Operations department stating that ICANN “would like to confirm that there have not been changes to [NDC’s] application or the [NDC] organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors

[and/or] application contacts).” Exhibit M attached hereto is a true and correct copy of ICANN’s June 27, 2016 email and subsequent communications on that day between me and ICANN. ICANN’s email requested that, if “there have been any such changes,” NDC submit the changes to ICANN via ICANN’s customer portal. *Id.*

78. I responded to ICANN’s email on the same day, confirming that “there have been no changes to the [NDC] organization that would need to be reported to ICANN.” *Id.* ICANN responded that same day, informing me that no further action was required at the time. *Id.* I believed—and still believe—that my answer to ICANN’s inquiry was accurate and fully responsive. It most certainly was not an “outright lie” as Afilias accuses it to be. *Cf.* Reply Memorial, ¶73. To the contrary, as shown on Exhibit M, ICANN’s June 27 emails to me did not reference any complaint received by ICANN from any other party or any specific information that ICANN or any other party believed might be incorrect. Rather, given the type of potential changes highlighted in ICANN’s email—“changes that occur as part of regular business operations (*e.g., changes to officers and directors [and/or] application contacts*)” (my emphasis)—I understood ICANN to be making a routine inquiry of the Contention Set members given that many years had passed since the .WEB applications had been submitted and that the public auction date had been set and was rapidly approaching. That is, in the context of this very specific inquiry, I understood ICANN to be asking whether the identifying information set forth in NDC’s application, (*e.g., management, ownership, and contacts*) had changed, not whether *any aspect of NDC’s business had changed*. As such, it never occurred to me that ICANN’s routine inquiry might require disclosure of NDC’s financing arrangement with Verisign in general or the DAA in particular, especially given the well-known industry practice of transferring domains, with ICANN’s consent, after the auction process concluded.

79. The next I heard from anyone at ICANN about any potential concerns regarding NDC's .WEB Application was July 6-7, 2016, when I received emails from ICANN ombudsman Chris LaHatte informing me that "one or more" of the other applicants for .WEB had complained that NDC's .WEB Application had not been properly updated due to changes in NDC's board. Exhibit N attached hereto is a true and correct copy of Mr. LaHatte's emails to me and my response.

80. In particular, Mr. LaHatte referenced an email "which suggests that one of [NDC's] directors is no longer taking an active part in the application, and that there are other directors now involved." *Id.* And he informed me that the "complainant also suggested that NDC's shareholders have changed since the original application." *Id.* In the communications with ICANN that followed, I endeavored to be as thorough and responsive as possible, and I provided accurate and what I thought were clear answers to the questions I was asked. For example:

81. I responded to Mr. LaHatte on July 8, 2016, telling him that there had "been no changes to the [NDC] application. Neither the governance, management nor the ownership in [NDC] has changed." *Id.* I further explained that, in an LLC like NDC, "there are no directors, it is a manager managed company, as designated by the Members of the LLC within the Operating Agreement of the Limited Liability Company." *Id.* And in the case of NDC, I explained that there "has never been an amendment to that operating agreement. There are no new 'directors,' nor have any left the company." *Id.* Finally, I explained that, "while the managers are ultimately responsible for the LCC, as a manager, I take my duties very seriously and for major decisions, I confer with the Members (i.e. shareholders), which again for clarification, have never changed." *Id.*

82. My July 8 email was accurate at the time and remains accurate today. Mr. LaHatte asked if other NDC directors were involved with the .WEB application and if any shareholders had changed. I truthfully answered that neither was true. Moreover, in stating that I confer with other Members regarding “major decisions,” I only meant to clarify our general practice at NDC and not to represent anything specifically about .WEB. *Cf.* Reply Memorial, ¶81.

83. Also on July 8, 2016, I received an email from Christine Willet, whom I understand to be a Vice President, gTLD Operations, Global Domains Division, at ICANN. Ms. Willett asked me to call her regarding NDC’s .WEB Application and I did so the same day.

84. During that July 8, 2016 telephone conversation with Ms. Willett, I reiterated what I had explained to Mr. LaHatte, which was that neither the ownership nor the control of NDC had changed Redacted - Third Party Designated Confidential Information

85. During that same telephone conversation, I also explained that Redacted - Third Party Designated Confidential Information

86. Realizing that Donuts had misconstrued my June 7 response to Mr. Nevett and that my email was now the basis for the complaint to ICANN, I further explained to Ms. Willett that Redacted - Third Party Designated Confidential Information

87. I understand that Afilias now contends that my statements to the other applicants were intentionally misleading. However, I was under no obligation to be completely forthcoming about our internal operations or plans with parties who were competing for the same gTLD. Nor did I expect the same candor from the other applicants. My statements to Donuts were an attempt at politely deflecting a competitor. Nothing in ICANN's rules prohibits doing so. To be clear, nothing I said to Donuts or to ICANN was a "blatant falsehood" or any attempt to "affirmatively conceal" anything from anyone. *Cf.* Reply Memorial, ¶78. Afilias' assertions to the contrary are simply not true.

88. In fact, on July 11, 2016, I wrote to Ms. Willett to make sure the statements I made in our conversation on July 8 were clear. Exhibit O attached hereto is a true and correct copy of my July 11, 2016 email to Ms. Willett. In addition to reiterating what I had told her about the lack of any changes to the ownership or control of NDC, I also reiterated that I shared her understanding that other applicants had raised the complaint "in order to get more time to convince us to resolve the contention set via a private auction, even though we have made it very clear to them (and all other applicants) that we will not participate in a private auction and that we are committed to participating in ICANN's auction as scheduled." *Id.* In addition, I noted that under ICANN's rules every member of the Contention Set was required to join in a request for the postponement of a public auction, but as of July 11, 2016, the deadline to make such a unanimous request for .WEB had passed. *Id.*

89. On July 13, 2016, Ms. Willet informed the Contention Set that, among other things, ICANN had investigated the complaints of “potential changes of control” of NDC and, “to date we have found no basis to initiate the application change request process or postpone the auction.” Exhibit P attached hereto is a true and correct copy of Ms. Willett’s letter dated July 13, 2016.

90. Although my June 7, 2016 email to Mr. Nevett was taken entirely out of context, my responses to ICANN’s inquiries were unequivocal and accurate. In particular, as described above, I repeatedly told Ms. Willett and Mr. LaHatte in July 2016 that there had been no change to NDC’s management, control, or ownership since the filing of NDC’s .WEB Application, including because the LLC Operating Agreement had not been amended. *See, e.g.*, ¶¶ 81, 84, *supra*. Those statements were unequivocally true.

91. Moreover, the only changes to NDC’s ownership structure (pursuant to which Nuco distributed its shares in NDC to its shareholders) that have ever been made did not occur until December 2017, more than five years *after* NDC submitted its .WEB Application in 2012 and more than one year *after* both my communications with ICANN and the .WEB Auction in 2016. And in any event, that change to NDC’s ownership structure did not result in any new person or entity having more than a 15% interest in NDC, the threshold required to be disclosed in the ICANN application form. *See*, ¶12, *supra*. As such, even today, nearly eight years after NDC submitted its .WEB Application, the information therein remains accurate.

D. Afilias Attempted to Arrange a Private Auction for .WEB During the ICANN Blackout Period

92. As noted above, ICANN informed the parties in April 2016 that a public auction for .WEB had been scheduled for July 27, 2016.

93. Under the ICANN Auction Rules and Bidder Agreement, upon the commencement of a “Blackout Period,” “all applicants for Contention Strings within the Contention Set are

prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements with respect to any Contention Strings in the auction.”⁶ Violations of the Blackout Period can result in disqualification from the Contention Set.

94. The Blackout Period for .WEB commenced on July 20, 2016, when the deposit deadline for the .WEB auction expired. In particular, on July 20, 2016, I received an email from Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the .WEB auction) advising me—as every other member of the Contention Set was also advised—that “the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period.” Exhibit Q attached hereto is a true and correct copy of the July 20, 2016 email from Mr. Ausubel.

95. On July 22, 2016, two days after Mr. Ausubel notified the Contention Set that the Blackout Period had begun, I received a text message from John Kane of Afilias asking: “If ICANN delays the auction next week would you again consider a private auction? Y-N.” Exhibit R attached hereto is a true and correct copy of that July 22, 2016 text message.

96. I did not respond to Afilias' text message, as it was sent within the Blackout Period in violation of the Auction Rules and Bidder Agreement. Specifically, I understood that message to be an attempt to discuss resolution of the .WEB Contention Set by settlement during the Blackout Period and thus viewed it as a direct inquiry regarding NDC's strategy for the upcoming auction, in violation of the Blackout Period.

⁶ Afilias C-4 (*Auction Rules for New gTLDs: Indirect Contentions Edition*, 68(a), available at <https://newgtlds.icann.org/en/applicants/auctions>).

97. I also understood Afilius' text message to refer back to a proposal made by Afilius to Mr. Calle in June 2016 under which Afilius attempted to induce NDC to agree to a private auction for .WEB by guaranteeing NDC over \$17 million if NDC lost that auction. Because we were in the Blackout Period and the public auction was scheduled for five days later, July 27, I ignored Afilius' improper contact.

VIII. The .WEB Public Auction

98. The public auction for .WEB took place on July 27, 2016, continuing into the morning of July 28, 2016. I participated in that auction from Verisign's offices in Reston, Virginia.

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99. Redacted - Third Party Designated Confidential Information

100. Similarly, I believed that it was reasonable for

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Given the significant interest in the .WEB domain, there were numerous rounds of bidding across the two auction days. In an ICANN auction, a price is set in each round and applicants must enter a bid amount that is equal to or greater than the set price to continue to the next round. Although applicants know *how many* parties are participating in each round, they do not know *which* parties remain at any time or the limits of each party's financing or interest in the gTLD.

101. The .WEB auction concluded on July 28

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Apart from that statement, I have never possessed any information regarding the terms of Afiliás' financing, which I believe remains confidential.

102. Financing arrangements secured by the .WEB Contention Set were not disclosed by NDC or other bidders, as any such arrangements are commonly confidential. Nor is there any ICANN or other requirement that the Contention Set disclose available financing to ICANN or other members of the Contention Set. To the contrary, doing so would provide an unfair advantage to bidders that, upon such disclosure, would know the limits of their competitors' funds and thus know what amount of money would secure the winning bid. Such disclosure would thus be counterintuitive to a competitive auction, and I am not aware of any auction, ICANN or otherwise, that proceeds in such a manner. As a result, I did not know (and could not have known) that Afiliás

Redacted - Third Party Designated Confidential Information Nor would it have been appropriate for others to know the amount NDC could or might bid.

103. Having secured the winning bid, NDC

Redacted - Third Party Designated Confidential Information I understand that ICANN has retained the entire notwithstanding that it has not yet agreed to execute a Registry Agreement with NDC for the .WEB gTLD.

IX. Post-Auction Communications with ICANN Regarding .WEB

104. On September 16, 2016, I received an email from Ms. Willett at ICANN stating that Ruby Glen and Afiliast had continued to complain that NDC should not have participated in the .WEB public auction and that NDC's Application should be rejected. That letter was a surprise to me, as prior to receiving it I had not heard from or communicated with Ms. Willett or anyone else at ICANN about .WEB since confirming our payment for .WEB in August 2016.

105. In her letter, Ms. Willett requested that NDC provide responses to 20 questions posed by ICANN so that ICANN could evaluate those complaints. Ms. Willett's email also invited Ruby Glen, Afiliast, and Verisign to respond to the same questions, and I understand that each of those entities received the same request from ICANN. Exhibit S attached hereto is a true and correct copy of Ms. Willett's September 16, 2016 email.

106. NDC provided responses to ICANN's 20 questions on October 10, 2016. Exhibit T attached hereto is a true and correct copy of the October 10, 2016 email I sent to ICANN attaching those responses and the responses themselves.

107. Since submitting those responses in October 2016, NDC has periodically made inquiries to ICANN through the ICANN customer service portal regarding the status of .WEB. ICANN has never responded beyond a statement that the resolution of .WEB is on hold due to the pendency of accountability mechanisms or similar processes.

108. I understand Afilius has suggested that NDC somehow colluded with Verisign and ICANN regarding ICANN's investigation of Afilius' complaints. That is false. NDC does not have any ability to direct or control ICANN's investigation and has not remotely attempted to do so. NDC was not consulted by ICANN about its investigation and has no more insight into ICANN's investigation than any other party.

109. What is true, however, is that it is now June 2020, nearly four years after the public auction for .WEB. NDC has been seriously injured by the delays caused by the various—and in my opinion entirely unfounded—complaints and objections by Donuts and the pursuit of this proceeding by Afilius. Among other things, Redacted - Third Party Designated Confidential Information

110. Redacted - Third Party Designated Confidential Information by members of the .WEB Contention Set, including Afilius, following their unsuccessful attempts to either (i) coerce NDC to participate in a private auction for .WEB—thus ensuring a profit even if they lost that auction—or, (ii) when those efforts failed, to obtain the rights to .WEB themselves. Having accomplished neither, it is my belief that Afilius' continued complaints are no more than a transparent attempt to profit at NDC's and Verisign's expense. I respectfully submit that, as set forth in this statement, there is no factual basis for those complaints.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 30th day of May, 2020 at Miami, Florida.



Jose Ignacio Rasco III

EXHIBIT C-13

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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)	
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Claimant,)	
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vs.)	ICDR Case No.
)	01-18-0004-
INTERNET CORPORATION FOR)	2702
ASSIGNED NAMES AND NUMBERS,)	
)	
Respondent.)	
)	

VOLUME V
ARBITRATION
AUGUST 7, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
465536



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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)
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 Claimant,)
)
 vs.) ICDR Case No.
) 01-18-0004-
 INTERNET CORPORATION FOR) 2702
 ASSIGNED NAMES AND NUMBERS,)
)
 Respondent.)
)

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FRIDAY, AUGUST 7, 2020
ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME V
(Pages 788-1008)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR

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1 CALIFORNIA, CALIFORNIA, AUGUST 7, 2020

2 ---o0o---

3 ARBITRATOR BIENVENU: Good day, everyone.
4 It is an early morning on the West Coast. We have
5 a big day ahead of us.

6 I'll ask if there are preliminary matters
7 that the parties or Amici would like to raise.

8 MR. ALI: Just very briefly, Mr. Chairman.
9 Mr. LeVee had asked me earlier today to provide an
10 estimate regarding the cross-examination times for
11 Mr. Rasco and Mr. Disspain.

12 All I can say is that we worked pretty
13 much late into the night and all night to cut back
14 our examinations of both as much as we could to
15 allow the Panel time to ask questions and for
16 Mr. LeVee and Mr. Marenberg to conduct their
17 respective redirects of the witnesses.

18 I can't say much more than that because I
19 think we have done what we can. We hope that the
20 witnesses will be efficient in their responses and
21 that the redirects will be efficient as well to
22 allow you sufficient time to question the
23 witnesses.

24 I did make a commitment to Mr. LeVee, and
25 we will do everything that we can to abide by the

1 commitment that we made to do our part to get both
2 witnesses done today.

3 ARBITRATOR BIENVENU: Excellent. Thank
4 you, Mr. Ali, for that.

5 Mr. LeVee, will you be introducing -- no,
6 Mr. Marenberg will be introducing the witness this
7 morning, correct?

8 MR. MARENBERG: Correct.

9 MR. LeVEE: Yes.

10 ARBITRATOR BIENVENU: Good morning,
11 Mr. Marenberg.

12 MR. MARENBERG: Good morning.

13 ARBITRATOR BIENVENU: Do you have any
14 preliminary matters that you would like to raise,
15 or can we bring the witness in the hearing room?

16 MR. MARENBERG: Nope, I think we can bring
17 the witness in. The only thing I would say is --
18 and probably Mr. LeVee would echo this -- we have
19 gotten a commitment to finish both witnesses today.
20 That is obviously dependent on the length of the
21 cross-examination, and I think we should monitor it
22 as we are going forward carefully because we can
23 easily get off time.

24 ARBITRATOR BIENVENU: Yes, I think we are
25 all conscious of these constraints.

1 Mr. English, if you could bring the
2 witness in.

3 Morning, Mr. De Gramont.

4 MR. De GRAMONT: Morning.

5 MR. ENGLISH: The witness is now in the
6 meeting.

7 ARBITRATOR BIENVENU: Good morning,
8 Mr. Rasco. Can you hear me?

9 THE WITNESS: I can. Good morning.

10 ARBITRATOR BIENVENU: My name is Pierre
11 Bienvenu. I serve as Chair of the Panel. My
12 colleagues are Professor Catherine Kessedjian, who
13 is joining us from Paris, and Mr. Richard Chernick,
14 who is in Los Angeles.

15 Can you see all three of us on your
16 screen?

17 THE WITNESS: Yes. Good morning. I
18 believe I can, yes.

19 ARBITRATOR BIENVENU: Excellent. So,
20 Mr. Rasco, welcome and thank you for participating
21 in this hearing.

22 You have signed a witness statement in
23 relation to this case dated 30 May 2020?

24 THE WITNESS: That's correct.

25 ARBITRATOR BIENVENU: And at the end of

1 your witness statement, you swear that the content
2 of this statement is correct to the best of your
3 knowledge and belief, correct?

4 THE WITNESS: That's correct.

5 ARBITRATOR BIENVENU: May I ask you, sir,
6 in relation to the evidence that you will give to
7 the Panel today, likewise solemnly to affirm that
8 it will be the truth, the whole truth and nothing
9 but the truth?

10 THE WITNESS: I do.

11 ARBITRATOR BIENVENU: Thank you, sir.

12 Mr. Marenberg, any introductory questions?

13 MR. MARENBERG: Mr. Rasco, is there
14 anything that you would like to change or augment
15 to your witness declaration before
16 cross-examination starts?

17 THE WITNESS: Sure. Thanks, Steve.

18 Just in reviewing my witness statement, I
19 just wanted to point out a clarification. I
20 believe it is Paragraph 107 where I mentioned that
21 I communicated with ICANN primarily -- I
22 communicated with ICANN through the portal, and I
23 didn't mean that to be an exhaustive list. I also
24 did initiate communications with ICANN, I believe,
25 by email, and I think I attempted by phone call.

1 So I just wanted to clarify that. By no means was
2 I trying to exclude the fact that there was other
3 means of communications, but primarily ICANN
4 communications have been through the portal.

5 MR. MARENBERG: Mr. Rasco, what period of
6 time do the communications referenced by Paragraph
7 107 infer?

8 THE WITNESS: After the auction.

9 MR. MARENBERG: I have nothing further,
10 Mr. Chairman.

11 ARBITRATOR BIENVENU: Thank you,
12 Mr. Marenberg.

13 Mr. De Gramont, you will be conducting the
14 cross on behalf of the claimant?

15 MR. De GRAMONT: I will, Mr. Chairman.

16 ARBITRATOR BIENVENU: Morning to you.

17 MR. De GRAMONT: Morning to you. Thank
18 you, Mr. Chairman.

19 CROSS-EXAMINATION

20 BY MR. De GRAMONT

21 Q. Good morning, Mr. Rasco. My name is Alex
22 de Gramont. I represent Afiliias. Thank you very
23 much for being with us this morning.

24 You should have a package that has a
25 binder of documents, and I would ask you to open it

1 now.

2 A. Okay.

3 MR. MARENBERG: May I open mine as well?

4 MR. De GRAMONT: I don't know about that,
5 Mr. Marenberg. Yes, please go ahead.

6 Q. Mr. Rasco, you have a binder in front of
7 you. We have included your witness statement
8 behind Tab 1, and then behind that are various
9 documents that we're going to discuss with you.

10 The good news is we are going to skip a
11 lot of them in an effort to speed up the
12 examination, but we will be asking you about some
13 of them. You will see that we have put brackets at
14 the bottom of the page that has page numbers, and
15 that's because sometimes the PDF and the hardcopies
16 had different page numbers. Just so everyone can
17 follow, we will be looking at the bracketed page
18 numbers, okay?

19 A. Thank you.

20 Q. Okay. So, Mr. Rasco, you are still one of
21 the managers and the chief financial officer of NU
22 DOT CO, or NDC; is that correct?

23 A. That's correct.

24 Q. Are you currently employed in any other
25 capacity?

1 A. Yes, I am.

2 Q. And can you tell me in what other capacity
3 or capacities?

4 A. Sure, yeah, I have multiple -- multiple
5 jobs. I am the CEO and founder of the .HEALTH
6 top-level domain. I also operate a coworking space
7 here in Miami, so -- and also a real-estate-related
8 business.

9 Q. Okay. Thank you. You testify in your
10 witness statement that you and Juan Diego Calle and
11 Nicolai Bezsonoff founded NDC in 2012; is that
12 correct?

13 A. That's correct.

14 Q. And in Paragraph 6 of your witness
15 statement, you explain that at its founding, NDC
16 had two shareholders, the first was Domain
17 Marketing Holdings, LLC, or DMH, which owned 85
18 percent of NDC; is that correct?

19 A. That's right.

20 Q. And then Nuco LP, which owned the other 15
21 percent; is that right?

22 A. That's correct.

23 Q. And who owned DMH?

24 A. Redacted - Third-Party Designated Confidential Information

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Q. Can you tell us who owns STRAAT Investments?

A. Redacted - Third-Party Designated Confidential Information

Q. And then who owned Nuco?

A. Redacted - Third-Party Designated Confidential Information

Q. And do you know if that information was provided to ICANN?

A. I don't believe so. I believe the application only asked you who owned more than 15 percent.

Q. Now, you and Mr. Calle and Mr. Bezsonoff had previously launched the .CO ccTLD; is that correct?

A. That's correct, along with Lori Anne Wardi and Eduardo Santoyo.

Q. And the term "ccTLD" is an abbreviation for "country code TLD," correct?

1 A. That's correct.

2 Q. For ccTLDs each country decides how to
3 choose the registry for its own country TLD; is
4 that right?

5 A. That's right. They generally set up the
6 guidelines for running it.

7 Q. So Colombia had a public auction, and your
8 company .CO won the auction; is that correct?

9 A. It wasn't an auction; it was an RFP.

10 Q. And that took place under the procurement
11 laws of the Republic of Colombia, I assume?

12 A. That's correct.

13 Q. So it is a different process than the one
14 that ICANN used for issuing gTLDs in the new gTLD
15 Program, correct?

16 A. Yeah, that's right, that's right.

17 Q. Okay. So NDC was formed in 2012 for the
18 purpose of applying for new gTLD strings in the new
19 gTLD Program; is that right?

20 A. That's right.

21 Q. And NDC ultimately applied for 13 gTLD
22 strings, including .WEB, correct?

23 A. Thirteen, yes.

24 Q. And the one -- and the one gTLD that NDC
25 acquired was .HEALTH; is that right?

1 A. No, that's not correct. .HEALTH was
2 applied for by a different entity, so NDC has
3 nothing to do with .HEALTH.

4 Q. With respect to the 13 gTLD strings, I
5 assume that NDC paid the 185,000 application fee
6 for each application, right?

7 A. That's right.

8 Q. When you applied for .WEB and the other
9 strings in 2012, were you hoping to obtain the
10 Registry Agreement and operate the registries for
11 all of those gTLDs?

12 A. Redacted - Third-Party Designated Confidential Information
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16 Q. And did you envision in 2012 that there
17 would be private auctions and other settlement of
18 contention sets to, quote, "monetize," unquote, the
19 applications?

20 A. Well, we speculated, but there was no way
21 to be sure at that time.

22 Q. Okay. And you and Mr. Bezsonoff completed
23 NDC's .WEB application; is that correct?

24 A. Primarily. We might have had help from
25 other folks in several sections. It was a very

1 long application times 13 times. It was a pretty
2 long process.

3 Q. Did you hire consultants or proposal
4 writers to assist you?

5 A. No. We hired a young man by the name of
6 David McCombie who kind of helped us kind of
7 theorize about different outcomes and try to come
8 up with valuations for the different strings.

9 Q. And what kind of consultant was
10 Mr. McCombie?

11 A. David is a -- I guess like a management
12 consultant, McKinsey kind of background, or Bain,
13 one of those.

14 Q. Okay. Thank you.

15 You understood that the public portions of
16 the application would be publicly posted for public
17 comment, correct?

18 A. Yes. I can't recall which exact portions,
19 but yes, I remember that there was -- there were
20 definitely many aspects of the application that
21 were to remain public.

22 Q. Okay. And that was so the public could
23 see who was applying for each particular gTLD; is
24 that your understanding?

25 A. I believe so, yes.

1 Q. Okay. Skipping ahead to 2015, you state
2 in your witness statement that by 2015 market
3 conditions had changed and

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6 Do you recall that testimony?

7 A. I recall that section in my testimony,
8 yes.

9 Q. And you recall that given changing
10 market -- given what you described as changing
11 market conditions, you thought that

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14 A. My experience to that point is that in the
15 auctions that we participated in, just our
16 competitors were willing to bid a lot more than we
17 were.

18 Q. Okay. And you reached the same conclusion
19 with respect to .WEB; is that right?

20 A. That's correct.

21 Q. And you state that the, quote, "market
22 expectations for .WEB were high."

23 Do you recall that testimony?

24 A. Yes, I do.

25 Q. And that means that you believe that .WEB

1 was going to command a high price whether at an
2 ICANN auction or a private resolution of the
3 contention set; is that correct?

4 A. Yeah. Mostly in -- going back all the way
5 to 2011, when all of us potential applicants would
6 talk about the gTLD Program, .WEB was frequently
7 mentioned as one of the more attractive strings.

8 Q. Okay. And you knew who all the members of
9 the .WEB contention set were?

10 A. Not all of them personally, but yes, in
11 general I knew the organizations.

12 Q. And based on that knowledge, NDC was able
13 to consider how best to develop a strategy that
14 would allow for a return on your investment in
15 preparing the .WEB application; is that accurate?

16 A. Well, I don't necessarily think that
17 knowing who all the applicants were really affected
18 us. I think the market conditions are the things
19 that kind of drove our decision-making.

20 Q. Well, you mentioned in your witness
21 statement that there were some big players in the
22 .WEB contention set, Google, et cetera, so that
23 must have helped you assess the likely price at
24 which the contention set was going to be resolved,
25 whether privately or through an ICANN auction; is

1 that fair?

2 A. Well, it definitely influenced. However,
3 you know, Google had -- we had participated in
4 auctions with Google, and Google didn't value
5 everything very highly. They didn't bid up a lot
6 of things. So it really depended on the individual
7 string.

8 Q. On the individual string and on the
9 individual companies in the particular contention
10 set?

11 A. That's right.

12 Q. Okay. And you state in your witness
13 statement that in around May 2015 you, quote,
14 "received a phone call from VeriSign expressing
15 interest in working with NDC to acquire the rights
16 to .WEB," unquote. It is at Paragraph 41 of your
17 witness statement if you want to take a look.

18 A. I remember that.

19 Q. You remember that.

20 So who at VeriSign called you?

21 A. I believe the first contact that I had was
22 with Pat Kane. I don't know his exact title, but
23 he's generally the face of their registry program
24 and someone who I was friendly with and familiar
25 with.

1 Q. Okay. Do you recall what Mr. Kane said to
2 you?

3 A. He was trying -- he wanted me to have --
4 he didn't explain too much, but he wanted me to
5 have a conversation with a colleague of his at
6 VeriSign.

7 Q. And who was that colleague?

8 A. That was Paul Livesay.

9 Q. And we have been arguing about whether it
10 is pronounced Livesay or Livesay. Is it Livesay?

11 A. I think it is. I haven't spoken to Paul
12 in many years, but I think that's what it is.

13 Q. How long after your call with Mr. Kane did
14 you make -- did it take for you to make contact
15 with Mr. Livesay?

16 A. I can't recall exactly, sir, but I don't
17 believe it was the same day. It might have been
18 the next day or it could have been a few days. I
19 really don't recall.

20 Q. It was soon thereafter, soon after the
21 call with Mr. Kane?

22 A. That's probably accurate, yeah.

23 Q. And do you recall what Mr. Livesay said?

24 A. I think just speaking generally, you know,
25 I think the message was, Redacted - Third-Party Designated
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Q. Did he mention that VeriSign had failed to timely make applications for the gTLDs itself?

A. I am not sure that he told me that. I knew that they had applied and participated in the program to a certain extent, but obviously he was asking me about strings that they didn't apply for.

Q. So after that phone call, did you enter into negotiations with VeriSign that led to the Domain Acquisition Agreement, or the DAA?

A. Yeah, I can't recall the exact timeline, but yes, after that phone call we started talking. We started discussing what they would be interested in doing and went through various different thoughts as to how to work out some kind of a deal, which consummated in the DAA, I think in August of that year.

Q. Was he interested in any other gTLDs, or was the focus only on .WEB?

A. Well, when we first started talking, we were talking about our applications in general, our

1 gTLDs in general, and we were negotiating primarily
2 the three -- so at that moment we had four
3 applications remaining, I believe it was .WEB,
4 obviously, .INC, .LLC and .CORP, all four of those
5 applications -- yeah, all four of those
6 applications were on hold.

7 So mine and my partners' attitude was, all
8 right, if we are going to end up doing a deal,
9 let's try to do a deal for all our applications and
10 all these strings and then we're done with this
11 program. So we first started talking about all of
12 them.

13 Q. Did you reach an agreement on any of those
14 TLDs other than .WEB?

15 A. We didn't end up signing anything, no.

16 Q. And do you know why that is? How did it
17 come to be that only .WEB was the subject of your
18 agreement with VeriSign?

19 A. So we were actually negotiating on the
20 three primaries, which I would call .WEB, .INC and
21 .LLC. .CORP, there was some significant
22 questioning as to whether .CORP would ever see the
23 light of day, and that ended up being true.

24 So we actually were negotiating on those
25 three. The negotiations became difficult and

1 complicated, and at some point in those
2 negotiations, rather than breaking down completely,
3 I think we said, "Look, let's do this one at a
4 time."

5 Q. And did you have to enter into a
6 nondisclosure agreement in connection with the
7 negotiations, do you recall?

8 A. I don't recall. I wouldn't be surprised
9 if I did.

10 Q. Okay.

11 A. But I don't recall.

12 Q. And who conducted the negotiations for
13 NDC?

14 A. I was the primary point of contact with
15 VeriSign. And when it came down to actually
16 structuring the agreement, my attorney, Brian
17 Leventhal.

18 Q. And who conducted the negotiations for
19 VeriSign?

20 A. Mr. Livesay.

21 Q. Anyone else at VeriSign?

22 A. I met with several lawyers a few times,
23 again, I think more in the course of structuring
24 the agreement, but in terms of hard-nose
25 negotiations, it was myself and Mr. Livesay.

1 Q. Do you recall the names of the VeriSign
2 lawyers with whom you met?

3 A. I don't. I think one was Kevin, Kevin R.,
4 if I recall his initials.

5 Q. Did VeriSign send you the first draft of
6 the DAA?

7 A. I can't recall.

8 Q. Do you recall how many drafts were
9 exchanged over time?

10 A. No, not exactly, no.

11 Q. And were you, meaning you, Mr. Rasco,
12 focused on the substantive terms of the DAA or were
13 you focused primarily on the payment terms or both?

14 A. Well, you know, as in any negotiation, you
15 have stages. So first we tried to figure out what
16 we were all dealing with and then you try to come
17 to terms on the financial portion and then how you
18 execute it.

19 So I was involved in all of it, but
20 really, obviously, when it comes down to the legal
21 matters, I defer those, the legalities to Brian
22 Leventhal.

23 Q. Had Mr. Leventhal helped you on other
24 application issues?

25 A. Brian's been our corporate attorney for

1 many years, so he's well aware of all of our
2 businesses.

3 Q. Did you and Mr. Livesay meet in person to
4 negotiate or were the negotiations by phone?

5 A. Both.

6 Q. Do you recall how many times you met in
7 person?

8 A. We met one time in my office in Miami, and
9 we met one time definitely in VeriSign's office in
10 Virginia.

11 Q. And the DAA was executed on August 25th,
12 2016; is that correct?

13 A. That sounds correct.

14 Q. Was it executed in person?

15 A. I believe so, yes. I think Paul -- I
16 think Mr. Livesay was in my office.

17 Q. Let's take a look at the DAA, which is at
18 Tab 2 of your agreement. It is Exhibit C-69. And
19 you'll see that throughout NDC is referred to as
20 "the Company" and VeriSign is referred to as
21 "Verisign"; is that correct?

22 A. I see that, yes.

23 Q. Redacted - Third-Party Designated Confidential Information
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1 Do you see that?

2 A. Yes.

3 Q. And that's NDC, correct?

4 A. Yes.

5 Q. And if you turn to

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10 Do you see that?

11 A. I see that, yes.

12 Q. So you understood that after signing this
13 agreement, entering into this agreement,

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17 A. Well, I don't necessarily agree with that.
18 I think, Redacted - Third-Party Designated Confidential Information

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22 Q. In spite of what this says.

23 Okay. Let's look at some of the other
24 provisions. Let's take a look at

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A. I believe that's correct.

Q. In fact, it is more detailed than that.

Let me just read some of the language.

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So if I understand that correctly, you had

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5 A. Yes.

6 Q. And you had to

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12 Do you recall those requirements?

13 A. Yes, I do. I recall their

14 Redacted - Third-Party Designated Confidential Information so I felt that
15 these provisions were appropriate.

16 Q. I am not asking whether they are
17 appropriate. I am just asking if -- if my
18 understanding of them is consistent with yours,
19 which is that

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21
22 A. Correct.

23 Q. Redacted - Third-Party Designated Confidential Information

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25 A. You know, I believe I did. There may be

1 an occasion or two where I didn't think about some
2 of these. For the most part, I don't think I was
3 trying to conceal anything from VeriSign.

4 Q. And if you turn to
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12 A. That's correct.

13 Q. But it also provides that
14 Redacted - Third-Party Designated Confidential Information

15 A. That's correct.

16 Q. So Redacted - Third-Party Designated Confidential Information
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18 A. Redacted - Third-Party Designated Confidential Information

19 Q. Is that your understanding?

20 A. I believe that's about accurate, I think,
21 yes.

22 Q. Okay. Let's take a look at
23 Redacted - Third-Party Designated Confidential Information
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So here's the proviso.

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I am going to stop there. I know that's a lot, but what this provision is saying is that
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A. I think, as you've mentioned, there's some provisos, as you call them, but yes, in general, that's correct.

Q. Okay. And that's true even if
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A. I think, as you read, as long as we

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Q. Okay Redacted - Third-Party Designated Confidential Information

A. Correct. Redacted - Third-Party Designated Confidential
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Q. And you think that if the DAA had been disclosed, it would have affected the outcome of the auction?

A. I can't pretend to know what might have happened.

Q. So if Redacted - Third-Party Designated Confidential Information

A. I don't think that the DAA
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A. That's correct.

Q. Now, you have testified in your witness

1 statement that you thought this arrangement with
2 VeriSign was acceptable under the guidebook,
3 correct?

4 A. I did.

5 Q. Did you wonder why
6 Redacted - Third-Party Designated Confidential Information

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8 A. No, not really. As I just mentioned, I
9 think Redacted - Third-Party Designated Confidential Information

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14 Q. And you thought that it was prudent not to
15 let anyone know that NDC -- strike that.

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Do I understand that correctly?

A. That's correct. My experience working with public companies, they are pretty quirky about Redacted - Third-Party Designated Confidential Information

Q. Was it your understanding that under the guidebook a nonapplicant was permitted to indirectly participate in the resolution of the contention set or otherwise seeking to become the registry operator through an applicant's application?

A. I'm sorry, can you kind of rephrase that question? I don't understand.

Q. Yeah. What this provision states, if I understand it correctly, is that

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A. Well, I believe what this says is -- not
what this says, but they

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Q. Yeah. That's not what this says, though,
is it, sir?

A. It is contingent on a lot of things.

Q. Yeah. And so your view is that when they
say they were

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A. I think in terms of

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So yeah,
that's the way I viewed it.

Q. Redacted - Third-Party Designated Confidential Information So what was the
interest rate on the loan that VeriSign was
providing you with?

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Q. But NDC effectively

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A. I don't -- I don't see how you come to
that. Redacted - Third-Party Designated Confidential Information

Q. You basically

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A. No, I disagree.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

At that point, when we signed
the DAA, there was not even any clarity as to
whether or not the .WEB TLD would ever be
delegated. It was on hold and had been on hold for
years. So I don't...

Q. Redacted - Third-Party Designated Confidential Information

A. If that's the way you want to phrase it.

1 Q. The answer is yes, that's what you
2 thought?

3 A. Well, the DAA, Redacted - Third-Party Designated
4 Confidential Information

5 Q. Did you ever ask Mr. Livesay why
6 Redacted - Third-Party Designated Confidential Information

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9 A. I don't believe I did. As I mentioned, I
10 have been fortunate to do a few deals with public
11 companies, so I didn't think anything was strange
12 in terms of confidentiality. I don't even know how
13 many people within VeriSign knew about our
14 arrangement.

15 Q. And did you ever discuss with Mr. Calle or
16 Mr. Bezsonoff why

17 Redacted - Third-Party Designated Confidential Information

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19 A. Did I speak about that particularly with
20 Mr. Calle or Mr. Bezsonoff, I don't believe that I
21 did.

22 Q. Let's turn to Exhibit A

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A. I believe so. It looks like it is part of the original agreement.

Q. Redacted - Third-Party Designated Confidential Information

Do you see that?

A. I do, yes.

Q. And by the way,

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A. I mean, if you're saying it is. I don't recall, but sounds fair.

Q. Okay. I think that will become evident as we go through the provisions.

A. Okay.

Q. So you understood that

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1 that correct?

2 A. Yes, that was for -- in my mind,
3 Redacted - Third-Party Designated Confidential Information

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6 Q. And let's look at some of the terms and
7 conditions. Redacted - Third-Party Designated Confidential Information

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20 A. I think this section
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Q. Yeah, we'll come to that, sir.

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Do you see that?

A. I do.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

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Q. Redacted - Third-Party Designated Confidential Information

A. Well, I wouldn't phrase it that way.
VeriSign was not the bidder. NDC was the bidder.
NDC always retained control. As the one putting up
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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

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A. Yes, that's correct.

Q. Did you arrive two business days prior to the start of the auction?

A. I believe it was one business day. I don't think it ended up being two, but I can't be certain. I think it was just one business day.

Q. Redacted - Third-Party Designated Confidential Information

Do you see that?

A. I do, yes.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

1 Q. So how did this work, you and
2 Mr. Leventhal were sitting in a conference room at
3 VeriSign's offices; is that right?

4 A. That's correct.

5 Q. And who from VeriSign was there with you?

6 A. Mr. Livesay was there, and people would
7 come in and out. I am not sure who was there.
8 There might have been an IT support person that was
9 around. I am not sure exactly who else, but
10 obviously my relationship and my primary contact
11 was always Mr. Livesay.

12 Q. And do you recall how many bids you put in
13 during the bidding process?

14 A. No. The bid last -- the auction lasted
15 two days, so there were several rounds. I don't
16 recall exactly how many rounds. It is public, so
17 that information is available.

18 Q. And did Mr. Livesay tell you each bid to
19 make?

20 A. Well, the way the auction works is that I
21 believe you have a continue price. So the auction
22 provider generally provides a threshold for
23 continuing the auction. You have to bid something
24 above that amount in order to continue or that
25 amount to continue, and I believe that's how it

1 worked. Redacted - Third-Party Designated Confidential Information
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3 Q. Redacted - Third-Party Designated Confidential Information
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7 A. Redacted - Third-Party Designated Confidential Information
8 Q. Redacted - Third-Party Designated Confidential Information
9 A. Redacted - Third-Party Designated Confidential Information
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11 Q. Redacted - Third-Party Designated Confidential Information
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14 A. Well, as our funding source, we were kind
15 of limited as to what we were going to bid, just as
16 I'm sure my competitors who were financed by
17 outside sources were limited as to how much they
18 were going to bid.
19 Q. And you think that your competitors had
20 their financing sources sitting with them, telling
21 them whether they could bid on each specific round?
22 A. I can't pretend to know how they handled
23 it.
24 Q. Did VeriSign provide any
25 financial-modeling people for the bidding process?

1 A. I never participated in anything like
2 that.

3 Q. Okay. So you are not aware whether they
4 had financial-modeling people to figure out how
5 much to bid or not?

6 A. I don't know.

7 Q. Okay.

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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. How did you know that?

A. We had discussions.

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A. Redacted - Third-Party Designated Confidential Information

Q. And they did that during the negotiations?

A. I believe so, yes.

Q. Okay. We are going to come back to that point, but let me just ask you this: If that was VeriSign's position,

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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yes, I am there.

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Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. Yes.

Q. Redacted - Third-Party Designated Confidential Information

Do you recall that?

A. I do, yes.

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Q. Redacted - Third-Party Designated Confidential Information

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Q. **But if you disclosed -- strike that.**
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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

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2 A. You know, I don't know what I would have
3 done in that circumstance.

4 Q. Redacted - Third-Party Designated Confidential Information

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8 A. Redacted - Third-Party Designated Confidential Information

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10 MR. De GRAMONT: Mr. Chairman, I am going
11 to suggest that we take our break earlier today.
12 It might enable me to cut down on some of the
13 questions. Would that be acceptable to the Panel?

14 ARBITRATOR BIENVENU: It would certainly
15 be acceptable to us, and I don't expect
16 Mr. Marenberg would have any difficulty with that.

17 MR. MARENBERG: No objection,
18 Mr. Chairman.

19 ARBITRATOR BIENVENU: Excellent. So let's
20 break for 15 minutes.

21 And, Mr. Rasco, sorry, we have to -- you
22 still there, Mr. Rasco?

23 THE WITNESS: I am still here.

24 ARBITRATOR BIENVENU: Yes. I am going to
25 instruct you during our break, and that holds true

1 until the end of your evidence, not to discuss your
2 evidence with anyone during the break.

3 THE WITNESS: Understood.

4 ARBITRATOR BIENVENU: Thank you, sir.

5 THE WITNESS: Thank you.

6 (Whereupon a recess was taken.)

7 ARBITRATOR BIENVENU: Mr. Rasco, good
8 morning again.

9 THE WITNESS: Good morning.

10 ARBITRATOR BIENVENU: We will continue
11 with your cross-examination.

12 Mr. De Gramont, please proceed.

13 MR. De GRAMONT: Thank you, Mr. Chairman.

14 Q. Welcome back, Mr. Rasco.

15 A. Thank you.

16 Q. Now, there are various scenarios set forth
17 in the rest of Exhibit A as to what happens
18 depending on the outcome of the contention set. I
19 am going to focus primarily on the scenario which
20 actually happened, which was NDC winning the ICANN
21 auction.

22 So I'd like to direct you to
23 Redacted - Third-Party Designated Confidential Information

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A. That is correct.

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Do you see that, sir?

A. Yes.

Q. Redacted - Third-Party Designated Confidential Information

A. That seems accurate, yes.

Q. Redacted - Third-Party Designated Confidential Information

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A. That's what it says.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yeah. But, I mean, look, as a
businessperson, I don't know that anything is that
simple when you're talking about something of this
magnitude.

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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yes.

Q. Redacted - Third-Party Designated Confidential Information

A. What do you mean by that?

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

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Do you recall that?

A. I do recall.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. That seems likely, yes.

Q. Redacted - Third-Party Designated Confidential Information

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A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. Yes, it did.

Q. Redacted - Third-Party Designated Confidential Information

A. That is correct.

Q. Redacted - Third-Party Designated Confidential Information

A. We did receive that, yes.

Q. Redacted - Third-Party Designated Confidential Information

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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. **That's correct.**

Q. Redacted - Third-Party Designated Confidential Information

A. **We have.**

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

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A. Right, correct.

Q. Redacted - Third-Party Designated Confidential Information

A. Not technically, no.

Q. Do you have a rough estimate?

A. Redacted - Third-Party Designated Confidential Information

Q. Pretty good return on investment, right?

A. It was a fantastic deal.

Q. Okay. Congratulations for that.

A. It is not done yet, unfortunately.

Q. Okay. You write in your witness statement that in April 2016 ICANN sent notice to the contention set that ICANN had scheduled the ICANN auction for .WEB on 27 July 2016; is that correct?

A. That's correct.

Q. Do you recall this?

A. Yes, I do.

Q. And certain members of the contention set commenced discussions about a private resolution of

1 the contention set, right?

2 A. I believe so, yes. It was a general
3 practice, in my experience, in general, when a
4 string became available at the auction, then you'd
5 start talking.

6 Q. Do you recall when you advised the other
7 members of the contention set that NDC was not
8 willing to participate in a private auction?

9 A. I don't know -- I don't know if I actively
10 or affirmatively told them at some point other than
11 probably some of the correspondence that we are
12 going to speak of here today.

13 Q. Do you know if anyone else at NDC,
14 Mr. Calle or anyone else, advised the other members
15 of the contention set that it was not going to
16 participate in a public auction?

17 A. Other than some of the exhibits that were
18 kind of in front of us here today, I don't believe
19 so.

20 Q. Okay. Let's take a look at what's behind
21 Tab 6. It's Exhibit C-33. And if we look at the
22 last page, Page 4, we see that on October 12th,
23 2015, Mr. Jon Nevett of Donuts sent an email to you
24 and other members of the contention set advising
25 that the Vistaprint decision had been issued and

1 asking if everyone was available to discuss next
2 steps.

3 Do you see that?

4 A. I see that, yep.

5 Q. Okay. And do you remember receiving that
6 email?

7 A. I see that I am a recipient here. I don't
8 remember this email specifically, but it looks like
9 I most likely received it.

10 Q. And then if you look up a couple emails on
11 October 18, 2015, you replied all, quote, "All, I
12 won't be joining you in Dublin, but I'll support
13 however I can. Just let me know. Have a great
14 meeting. Jose."

15 Do you recall writing that email?

16 A. Yeah, this recalls my memory, yeah, sure.

17 Q. And this is a couple months after you've
18 entered the DAA, correct?

19 A. Correct. That would have been August, so
20 yes.

21 Q. And under the DAA Redacted - Third-Party Designated
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24 A. I guess we read that, yeah, sure.

25 Q. And do you recall if you forwarded this to

1 VeriSign?

2 A. I don't recall doing so.

3 Q. Yeah, okay. Let's turn to Page 2, and
4 this is skipping forward to May of 2016, and if you
5 look at the second email from the bottom, May 5th,
6 2016, at 11:44 p.m., Mr. Sandeep Ramchandani of
7 Radix wrote, "The GDD is just around the corner.
8 If most of us are going to be there, would be a
9 good opportunity to catch-up face to face,"
10 unquote.

11 What was GDD?

12 A. GDD is an industry meeting put on by
13 ICANN. GDD stands for the Global Domains Division.
14 Outside of the regular ICANN meetings there's
15 usually -- or there had been for a few years a GDD
16 meeting, which was really for the registry
17 operators primarily and the registrars.

18 So a lot less policy, you know, high-level
19 ICANN policy and more registry/registrar-related
20 policy and business.

21 Q. And if you go up a couple of emails to the
22 middle of the page, you'll see that on May 6, 2016,
23 Jon Nevett writes, quote, "I'm free for a call at
24 that time, but it shouldn't be that hard to
25 schedule the auction and decide what to do about

1 .WEBS."

2 And then right above that, on May 9th, you
3 write, Jose Ignacio Rasco writes, "Sandeep, I am
4 available for a call tomorrow if needed. Regards,
5 Jose," end quote.

6 Do you recall if that call took place?

7 A. I don't believe it did. I don't remember
8 being a part of a call like that.

9 Q. Do you recall if you forwarded this on to
10 VeriSign, Redacted - Third-Party Designated Confidential Information

11 A. I don't recall, no.

12 Q. If you turn to Page 1, at the bottom
13 you'll see a May 11, 2016, email from John Kane at
14 Afiliias, and he writes, quote, "Good news! I have
15 spoken directly with most members of the contention
16 set and/or saw confirmation in email that everyone
17 is willing to participate in a .WEB only auction.
18 If for any reason anyone's position has changed,
19 please let the group or the auction house know
20 ASAP. If we are going to keep it on track, I
21 suggest to do an auction the week of June 13th,"
22 unquote.

23 Do you recall receiving this email?

24 A. I don't particularly recall, but, yeah, it
25 is likely that I saw this as part of the contention

1 set.

2 Q. Do you recall if you or anyone else at NDC
3 had indicated that NDC would be willing to
4 participate in a private auction?

5 A. No. I remember speaking to the auction
6 providers and them giving the updates, but other
7 than that, I don't believe I ever committed
8 affirmatively or negatively.

9 Q. Okay. Redacted - Third-Party Designated Confidential Information

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13 A. No, no. My assumption all along was that
14 my default position was we are going to an ICANN
15 auction. If anything changed, I assumed we'd
16 discuss it.

17 Q. And then why were you talking to the
18 private auction providers if you knew that you were
19 going to an ICANN auction?

20 A. Just to stay informed.

21 Q. Just to stay informed?

22 A. Just to stay informed, yeah.

23 Q. And I assume you were passing that
24 information on to VeriSign?

25 A. I was probably updating VeriSign on what

1 was happening with the contention set, most likely,
2 yes.

3 Q. If you knew that you were not going to a
4 private auction, why didn't you just tell the other
5 members of the contention set of that fact?

6 A. Honestly, I didn't feel obligated to do
7 so. ICANN had set the public auction, and outside
8 of that, that's what was going to be next.

9 Q. Well, if all the members were talking
10 about privately resolving the contention set, you
11 felt no obligation to tell them that they shouldn't
12 be wasting their time because you were going to
13 insist on an ICANN auction?

14 A. No. I mean, at some point I do
15 communicate clearly that I am not changing my mind.

16 Q. Well, when you say changing your mind,
17 have you ever advised the members of the contention
18 set that NDC was likely going to seek an ICANN
19 auction as opposed to a private auction?

20 A. I don't recall, but honestly, the history
21 of NDC, we had participated in both. So one could
22 assume, you know, that we would participate in a
23 private auction.

24 Q. If you look up to the next email in
25 Exhibit C-33, you'll see there's a Jon Nevett email

1 dated July 7. He says, quote, "Hi guys. Just so
2 you are not surprised, we are seeking a
3 postponement of the .WEB ICANN auction. I don't
4 want to get into the details yet, but I don't want
5 you guys to be surprised if a postponement was
6 announced."

7 You are not copied on this email. I
8 assume by this point you had informed the other
9 members of the contention set that you were not
10 going to participate in the private auction?

11 A. No, I hadn't. I definitely had an
12 exchange with Jon Nevett in June where I told him
13 that we were not going to participate in the
14 private auction.

15 Q. Okay. Let's take a look at that. It is
16 behind Tab 8 of your email -- I'm sorry. It's
17 behind Tab 8 of your binder. It is Exhibit C-35.

18 A. Got it.

19 Q. And Mr. Nevett writes on June 6, "Hi guys.
20 Jose and I corresponded last week, but I wanted to
21 take another run at the three of you. Not sure if
22 you three are still the Board members of your
23 applicant, but I wanted to reach out to discuss a
24 couple of ideas," unquote.

25 And he asks for a two-month delay of the

1 ICANN auction and whether you would be agreeable to
2 that.

3 Do you recall receiving that email, that's
4 what you just referred to?

5 A. I do, yes.

6 Q. Okay. And do you recall whether you
7 forwarded it to anybody at VeriSign?

8 A. I don't believe I did, no.

9 Q. Okay. And then on June 7th you respond,
10 quote, "Thanks for the message. Sorry for the
11 delay. The three of us" -- and there you're
12 referring to yourself, Mr. Calle and Mr. Bezsonoff?

13 A. That's correct, yes.

14 Q. "The three of us are still technically the
15 managers of the LLC, but the decision goes beyond
16 just us. Nicolai is at NSR full time and no longer
17 involved with our TLD applications. I'm still
18 running our program and Juan sits on the Board with
19 me and several others. Based on your request, I
20 went back to check with all the powers that be and
21 there was no change in the response and will not be
22 seeking an extension."

23 So I have a few questions about this.

24 A. Sure.

25 Q. When you stated that "the decision goes

1 beyond just us," that was accurate, right? The
2 decision was really in the hands of VeriSign?

3 A. No, not at all. Really what I was
4 referring to there is that, you know, as an LLC, as
5 a company, you know, yes, while Juan, Nicolai and I
6 are the managers in general for major decisions, we
7 speak about it with the shareholders. So that's
8 what I was referring to.

9 Q. You were referring to the shareholders,
10 even though you had signed an agreement with
11 VeriSign Redacted - Third-Party Designated Confidential Information

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14 A. Well, no, as I previously stated,
15 Redacted - Third-Party Designated Confidential Information

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17 Subject to anything changing, that was
18 going to be our position.

19 Q. So your reasoning is -- sorry, I didn't
20 mean to cut you off, sir.

21 A. No, that's okay.

22 Q. So your thinking is that since you made
23 the decision to enter into an agreement which

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3 A. Well, I kind of disagree with your
4 premise. I don't believe there's any rights to
5 participate in a private auction. ICANN says you
6 can try to resolve these contention sets however
7 you want, and if you can't, you come to an ICANN
8 auction of last resort. So that's really what we
9 were doing.

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14 Q. Well, the question, sir, isn't whether
15 there's an obligation to participate in a private
16 auction, but all applicants have the choice as to
17 whether to participate in a private or ICANN
18 auction, Redacted - Third-Party Designated Confidential Information

19
20 A. Well, I believe you said that

21 Redacted - Third-Party Designated Confidential Information

22 There's no right to participate in a
23 private auction, so I don't think I was obliged to
24 explain to any of my competitors how I was going to
25 resolve our contention set.

1 Q. Well, there's no obligation to participate
2 in a private auction, but every applicant had a
3 right to do so, correct?

4 A. Well, no, ICANN says if there's a
5 contention set, figure it out. If you can't figure
6 it out, then you come to an auction. I didn't want
7 to figure it out. I already knew what I was doing.

8 Q. Right. Redacted - Third-Party Designated Confidential Information
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10 A. No, I disagree.

11 Q. All right. Then you say, "Nicolai is at
12 NSR full time and no longer involved with our TLD
13 applications."

14 What is "NSR"?

15 A. "NSR" is Neustar.

16 Q. And you say, "I'm still running our
17 program and Juan sits on the Board with me and
18 several others."

19 Who were the other Board members to whom
20 you were referring?

21 A. Well, I was referring there to our other
22 shareholders, the Board members. As you probably
23 are aware, LLCs don't have a Board of Directors.
24 They have managers and members. So there I was
25 just referring to our members.

1 Q. Sir, there were three members in the LLC,
2 correct?

3 A. No, there's three managers.

4 Q. Three managers. Oh, and when you say the
5 members, you're talking about the owners of the
6 other shares?

7 A. Shareholders.

8 Q. I see. Why didn't you simply say other
9 shareholders?

10 A. I mean, I was just writing an email. I
11 wasn't intending this to be some kind of official
12 document describing the inner workings of NU DOT
13 CO. I was really just trying to redirect and put
14 off Mr. Nevett, who I had a friendly relationship,
15 and, I mean, how many different ways could I tell
16 him we are not going to a private auction?

17 So I guess it was my fault for trying to
18 be a little polite in trying to just redirect him.

19 Q. But you certainly couldn't tell him the
20 truth, Redacted - Third-Party Designated Confidential Information

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23 A. Well, I wasn't going to tip my funding
24 sources for an ultimate auction. That would affect
25 the outcome of the auction.

1 Q. So you knew who all the other applicants
2 were, but they didn't know that VeriSign was behind
3 your application?

4 A. Well, VeriSign was not behind my
5 application. NU DOT CO is and always was in
6 control of our application. There was never --
7 VeriSign never controlled our application and never
8 controlled NU DOT CO.

9 Q. Well, I think the Panel will have to
10 determine that based on the terms of the DAA, sir.

11 Let me point you to the last sentence of
12 your June 7th email. It says, quote, "It pains me
13 personally to stroke a check to ICANN like this,
14 but that's what we're going to have to do just like
15 others did on .APP and .SHOP."

16 Now, it couldn't have been that painful to
17 stroke a check to ICANN since VeriSign was paying
18 for it, right?

19 A. Well, no matter what, yes, it was painful.

20 Q. How so?

21 A. Figuratively speaking it was just sending
22 ICANN \$135 million wasn't -- actually, at this time
23 I didn't know how much it was going to be, but I
24 was just speaking figuratively.

25 Q. But it was VeriSign's money, but it pained

1 you to take VeriSign's money and pay it to ICANN as
2 opposed to --

3 A. It was my application. Again, I was
4 trying to be polite and just get this guy off my
5 back, quite frankly.

6 Q. In any event, you're aware now that
7 Mr. Nevett contacted ICANN about a potential change
8 in control in NDC, right?

9 A. I later learned of that, yes.

10 Q. And you can see why based on your email he
11 thought there might have been a change in the
12 ownership or control; isn't that fair?

13 A. I mean, I can't pretend to understand what
14 he was thinking, but I see how he took my email out
15 of context and tried to create a barrier, a delay
16 to moving forward with the ICANN auction.

17 Q. When you say "out of context," you mean
18 that he thought you were being truthful?

19 A. I mean, yes, I probably told him a little
20 white lie in order to get him off my back, and yes.
21 Again, I was not trying to tell him how exactly
22 things operated internally at NU DOT CO. But most
23 clear to me is that NU DOT CO hadn't had any
24 changes to our organization, to our application or
25 anything else.

1 Q. Now, on June 27th you received an email
2 from Jared Erwin.

3 Do you recall that?

4 A. Yes.

5 Q. It is behind Tab 10 of your binder. It is
6 Exhibit M to your witness statement. And the
7 bottom email is from Mr. Erwin. He writes, quote,
8 "We would like to confirm that there have not been
9 changes to your application or the NU DOT CO LLC
10 organization that need to be reported to ICANN.
11 This may include any information that is no longer
12 true and accurate in the application, including
13 changes that occur as part of regular business
14 operations (e.g., changes to officers and
15 directors, application contacts)," unquote.

16 You appear to have responded very quickly
17 to that email, although I can't tell whether
18 there's a time change in this because you were in a
19 different time zone.

20 Do you recall responding very quickly?

21 A. I honestly don't. Just for your context,
22 this is not an email. This is a message system
23 within the customer service portal. So yeah, just
24 based on the time stamps, yeah, it looks like I got
25 to him pretty quickly, but I can't tell if I opened

1 that message at 12:45 or at 12:05.

2 Q. And you say, quote, "I can confirm that
3 there have been no changes to the NU DOT CO LLC
4 organization that would need to be reported to
5 ICANN."

6 Do you recall that?

7 A. Yes, I do.

8 Q. But you didn't answer the part of his
9 question asking you to confirm that there had not
10 been changes to the application.

11 Do you see that?

12 A. Yeah. As I testified, I honestly thought
13 this was a routine inquiry one month out from the
14 auction, considering the fact that it had been four
15 years since we submitted our application. I just
16 read it and fired off an answer.

17 I mean, I don't think anything was
18 inaccurate or misleading here. Nothing did change
19 in our application and nothing did change in NU DOT
20 CO.

21 Yeah, I see that I direct the answer, the
22 part of the organization, but I never intended to
23 withhold anything. There was no changes that I
24 felt I needed to report.

25 So I really just, again, as a routine

1 inquiry, I was like, okay, I guess they are getting
2 ready for the auction.

3 Q. And you state that other members of the
4 contention set were putting pressure on you to do a
5 private auction and you had your conversation with
6 Mr. Nevett re: the additional Board members, et
7 cetera, but it never entered into your mind that
8 this communication from ICANN had anything to do
9 with that?

10 A. No, at this point, no. I hadn't heard
11 back from Jon. I don't believe I heard back from
12 Jon after our exchange, and I don't recall having
13 heard from anyone, so no, it didn't spark anything
14 at that point.

15 Q. Notwithstanding the terms of the DAA that
16 we just reviewed, your view was that nothing about
17 your application had changed whatsoever; is that
18 your testimony, sir?

19 A. Nothing in the application changed that
20 would require any kind of disclosure to ICANN.

21 Q. Redacted - Third-Party Designated Confidential Information

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24 A. Redacted - Third-Party Designated Confidential Information

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3 Q. Redacted - Third-Party Designated Confidential Information

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8 Do you recall that?

9 A. Correct. Redacted - Third-Party Designated Confidential Information

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11 Q. Okay. You had several exchanges of emails
12 with the ombudsman on July 6, 7 and 8.

13 Do you recall that?

14 A. I do. I recall one email that I responded
15 to him, but yes.

16 Q. Okay. And then on July 8th, Ms. Willett
17 emailed you and asked you to call her.

18 Do you recall that?

19 A. I do, yes.

20 Q. And, in fact, you did call her, correct?

21 A. I did.

22 Q. Okay. And if you take a look behind Tab
23 13, we see the message that she sent to you on July
24 8th. It is Tab 13, "Rasco Witness Statement
25 Exhibit O." At the bottom of the page she asks you

1 to call her, and then there's an email on the top
2 that says -- well, in which you responded to her
3 after that conversation.

4 Do you recall when she sent you this email
5 or text or message?

6 A. Well, it says July 8th that she sent it to
7 me, and then the one you have in the box right now
8 is my follow-up response to her.

9 Q. I can't see a date here. You don't recall
10 when you sent that to her?

11 A. Just in reviewing for this, I don't know
12 if it was the next day or two days after. I am not
13 sure exactly.

14 Q. Okay. At the second-to-last paragraph you
15 write, quote, "I share your understanding that the
16 complaint was raised in order to get more time to
17 convince us to resolve the contention set via a
18 private auction, even though we have made it very
19 clear to them (and all other applicants) that we
20 will not participate in a private auction and that
21 we are committed to participating in ICANN's
22 auction as scheduled," unquote.

23 So did Ms. Willett tell you that she
24 thought the complaint was raised simply to get more
25 time to convince NDC in the private auction?

1 A. I don't recall if she raised that
2 possibility. I know we discussed it, and she
3 seemed to sympathize with that position.

4 Q. You mentioned that NDC had participated in
5 other ICANN auctions?

6 A. At least two that I can recall, yes.

7 Q. And do you recall in those auctions when
8 you received inquiries like that, you received from
9 Mr. Erwin about your management and control?

10 A. I don't recall, but they would have been
11 much earlier in the program.

12 Q. Okay.

13 A. There was a lot of preauction
14 correspondence getting ready for auctions, so I
15 honestly don't recall if a similar message to
16 Mr. Erwin ever came in.

17 Q. Would you take a look at what's behind Tab
18 14, which is Exhibit D to Ms. Willett's witness
19 statement. I don't know if you have seen this
20 before. Looking at Page 3, it is an email dated
21 Saturday, July 9, 2016, from Ms. Willett to Chris
22 LaHatte, who I understand was the ICANN ombudsman
23 at the time.

24 Have you ever seen this before?

25 A. I think I have.

1 Q. Let me rephrase it. Have you ever seen
2 this email outside the context of preparing for
3 your testimony?

4 A. No, I have not.

5 Q. I am going to refer you to Paragraph 5 and
6 it says, quote, "He" -- and she's referring to
7 Mr. Rasco. "He was contacted by a competitor who
8 took some of his words out of context and is using
9 them as evidence regarding the alleged change in
10 ownership. In communicating with that competitor,
11 he used language to give the impression that the
12 decision to not resolve contention privately was
13 not entirely his. However, this decision was, in
14 fact, his," end of quote.

15 Did you tell Ms. Willett that the decision
16 to skip the private auction and participate in the
17 ICANN auction was, in fact, your decision?

18 A. I told her that we as NDC had decided
19 already that we were going to the ICANN auction. I
20 don't know if I told her this was Jose Rasco's
21 decision, but collectively I told her, "Listen, we
22 had already decided that we weren't going to
23 consider a private auction."

24 Q. And, again, the decision was actually your
25 decision to enter the DAA; is that your testimony?

1 A. That's correct.

2 Q. Okay. Would you turn to Tab 15 of your
3 binder?

4 A. Yes.

5 Q. Actually, let me take a -- let's go back
6 to Willett Exhibit D for a moment. I want to ask
7 you a few follow-up questions about your saying
8 that the decision to enter the DAA was, in fact,
9 NDC's.

10 Again, you had entered the DAA a year
11 earlier in Redacted - Third-Party Designated Confidential Information

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14 MR. MARENBERG: Objection; misstates the
15 document and misstates his prior testimony.

16 Q. BY MR. De GRAMONT: Sir, do you disagree
17 that Redacted - Third-Party Designated Confidential Information

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19

20 A. Sorry, is that for me or for my attorney?

21 Q. It is for you, sir.

22 A. Sorry. Can you repeat it?

23 Q. Yes. We looked at the DAA,
24 Redacted - Third-Party Designated Confidential Information

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Do you recall that provision in the DAA?

A. I recall that there's a provision that
says Redacted - Third-Party Designated Confidential Information

Q. Let me just read to you again
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A. Redacted - Third-Party Designated Confidential Information

Q. In your witness statement you testified

1 that your communications with ICANN were as, quote,
2 "thorough and responsive as possible," unquote.

3 Do you recall that?

4 A. I mean, you'd have to point it out to me,
5 but if you're saying it is in my witness statement,
6 then I'll take that.

7 Q. It is at Paragraph 80.

8 In Paragraph 90 you testified that your
9 statements to ICANN were, quote, "unequivocally
10 true," unquote.

11 Do you recall that?

12 A. I don't, but if that's in my witness
13 statement, then I believe so.

14 Q. So when you --

15 MR. MARENBERG: Excuse me. Can you ask
16 Mr. De Gramont to put up these statements? Because
17 he's actually taking snippets of these statements
18 out of context, I believe.

19 ARBITRATOR BIENVENU: So the sentence is
20 now projected on the screen.

21 Q. MR. De GRAMONT: If you like, Mr. Rasco,
22 you can look at the hardcopy of the witness
23 statement, which is behind Tab 1 of your binder,
24 whichever you prefer.

25 Let me first read Paragraph 80.

1 MR. MARENBERG: If you could put up
2 Paragraph 80, that would be helpful, please.

3 Q. BY MR. De GRAMONT: Paragraph 80 says, In
4 particular, Mr. LaHatte referenced an email, quote,
5 "which suggests that one of [NDC's] directors is no
6 longer taking an active part in the application,
7 and that there are other directors now involved,"
8 unquote. And he informed me that the, quote,
9 "complainant also suggested that NDC's shareholders
10 have changed since the original application," close
11 quote. "In the communications with ICANN that
12 followed, I endeavored to be as thorough and
13 responsive as possible, and I provided what I
14 thought were clear answers to the questions I was
15 asked," unquote.

16 So did your testimony that you were
17 providing thorough and responsive answers extend to
18 your communication to Ms. Willett that the decision
19 as to whether to enter a private or ICANN auction
20 was NDC's decision?

21 A. I don't know. Can you rephrase that?
22 Because I am confused by what -- you're talking
23 about Ms. Willett and Mr. LaHatte in here, and I am
24 a little bit confused.

25 Q. It was a long question, and I apologize.

1 at ICANN?

2 A. I absolutely did not.

3 Q. Did you ever tell Ms. Willett or anyone
4 else at ICANN that VeriSign was funding your
5 application?

6 A. I did not.

7 Q. Prior to the auction?

8 A. Prior to the auction, I didn't mention
9 that anyone else was involved in the auction.

10 Q. Your testimony to the Panel is that when
11 you told Ms. Willett the decision to skip the
12 private auction was, in fact, NDC's, that that
13 testimony was, quote, "unequivocally true,"
14 unquote?

15 A. Yes, that's correct.

16 Q. Okay. So the auction went forward on 27
17 July 2016, correct?

18 A. That's right.

19 Q. Let's turn to what's behind Tab 15 of your
20 binder. It is Exhibit C-97. It is a letter dated
21 July 26, 2016, from Mr. Livesay to you.

22 Do you recall at this time, were you
23 already at VeriSign's headquarters in Virginia?
24 This was the day before the auction.

25 A. Was I -- was I there when?

1 Q. On July 26, when you received this letter?

2 A. Well, I'm not sure that -- I am not sure
3 when I exactly received the letter, but I know it
4 was signed on July 26.

5 Q. And do you recall if you signed it in
6 VeriSign's offices?

7 A. I believe I did, yes, in person.

8 Q. And the first paragraph says, quote,
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Did you understand Redacted - Third-Party Designated Confidential Information

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Mr. Livesay was referring to?

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A. I assume they were talking about the noise
that Donuts was making.

17

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Q. And how did -- how did Mr. Livesay become
aware of the noise that Donuts was making?

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A. Well, I can't recall precisely at this
point, but I believe Donuts tried to enjoin the
auction and get a postponement of the auction by
filing something, I don't know, in District Court
or something along those lines.

24

25

Q. Had you informed Mr. Livesay or anyone
else at VeriSign about the communications that you

1 had had with ICANN following Mr. Nevett's email
2 with you?

3 A. I can't recall precisely, but in most
4 likely circumstances, yes, I did.

5 Q. Okay. If you look at Page 2,
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17 Do you see that?

18 A. I do.

19 Q. And do you recall that there had been
20 discussions over the last several months prior to
21 this letter in which

22 Redacted - Third-Party Designated Confidential Information

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24 A. I honestly don't recall discussions. As I
25 mentioned before, I think the -- my assumption and

1 baseline position was that

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4 Q. Before we move on, just a few more
5 questions about your phone conversation with
6 Ms. Willett.

7 Did she ask about VeriSign during -- did
8 she mention VeriSign during that call?

9 A. I don't think so, no.

10 Q. Did anyone from ICANN ever mention
11 VeriSign in its preauction conversations with you?

12 A. Not that I can recall, no.

13 Q. Did she ask you any questions about the
14 email that you had sent to Mr. Nevett?

15 A. Did she ask me -- I think the basis for
16 the communication was that email and the ombudsman
17 inquiry. So I don't know -- I think that's what
18 the basis of the conversation was.

19 Q. Did she or anyone else from ICANN ask you
20 what you meant when you were referring to other
21 Board members, do you recall?

22 A. I think that was part of the communication
23 with Mr. LaHatte. I believe my phone conversation
24 with Christine, with Ms. Willett, was confirming
25 everything that I had told Mr. LaHatte.

1 Q. And so were you specifically asked about
2 what you meant when you were referring to all the
3 powers that be?

4 A. I don't know if Christine asked me about
5 that, honestly.

6 I took it as a we want to make absolutely
7 sure that there hasn't been any change in control
8 that you need to report or anything else that would
9 cause a change in your application. So that's the
10 context for which I was answering her completely.
11 As I mentioned before, the DAA was not something
12 that affected the application.

13 Q. Did either the ombudsman or Ms. Willett
14 walk you through your email to Mr. Nevett, do you
15 recall?

16 A. I don't think they did, no.

17 Q. Okay. So the auction proceeds on 27 July,
18 Redacted - Third-Party Designated Confidential Information
19 and were declared the winning bidder; is that
20 correct?

21 A. NU DOT CO won the auction, that's correct,
22 yes.

23 Q. And do you recall that on July 31st, 2016,
24 you wrote Ms. Willett

25 Redacted - Third-Party Designated Confidential Information

1 A. I do recall that, yes, I do.

2 Q. And how did you know that

3 Redacted - Third-Party Designated Confidential Information

4 A. I can't be certain, but I believe VeriSign
5 told me.

6 Q. Let's take a look at Exhibit C-100. It is
7 behind Tab 18. And at the bottom you wrote to
8 Ms. Willett on July 31st, 2016,

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14 You don't remember

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17 A. Like I said, my primary contact for most
18 issues was Mr. Livesay.

19 Q. Do you specifically remember Mr. Livesay
20 telling you that?

21 A. No, I don't.

22 Q. Do you recall someone from VeriSign
23 telling that you someone from VeriSign would or --
24 would soon be or already had contacted Akram
25 Atallah?

1 A. I can't remember, but if I had to assume
2 it was someone, it might have been Mr. Livesay.

3 Q. Did the person from VeriSign tell you who
4 from VeriSign would be calling Mr. Atallah?

5 A. Not that I know of, no.

6 Q. Okay. Do you know who called Mr. Atallah
7 from VeriSign?

8 A. I don't know that anyone actually did call
9 Mr. Atallah.

10 Q. So if we go up higher in this document,
11 there's an exchange of emails with Ms. Willett on
12 August 4th. You wrote

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15 Tell me how this worked.

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18 How did that work?

19 A. Logistically you want me to go through it?

20 Q. Very briefly.

21 A. So I believe

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1 Q. And then on Friday, August 5th,
2 Ms. Willett confirmed receipt of the proceeds and
3 said you should expect to receive an invitation to
4 contracting later that day.

5 Do you recall receiving the CIR later that
6 day?

7 A. I can't recall if we received it that day.
8 I know I did receive it at some point. I just
9 don't know when it was.

10 Q. Do you recall if it was in August 2016?

11 A. I can't, no.

12 Q. Okay. Do you recall if it was in 2016 at
13 all?

14 A. I don't recall honestly, no.

15 Q. Okay. Let's take a look at your witness
16 statement again. This is Paragraph 104. Tell me
17 when you're there. It is on Page 38, almost at the
18 end of your witness statement.

19 So you're there?

20 A. Yes, yes.

21 Q. Paragraph 104 says, quote, "On September
22 16, 2016, I received an email from Ms. Willett at
23 ICANN stating that Ruby Glen and Afiliias had
24 continued to complain that NDC should not have
25 participated in the .WEB public auction and that

1 NDC's application should be rejected. This letter
2 was a surprise to me, as prior to receiving it I
3 had not heard from or communicated with Ms. Willett
4 or anyone else at ICANN about .WEB since confirming
5 our payment for .WEB in August 2016," unquote.

6 Do you see that?

7 A. Yes, I do.

8 Q. Now, were you aware that on August 23rd,
9 2016, VeriSign's outside counsel had written a
10 letter to ICANN's outside counsel forwarding the
11 DAA and various other information?

12 A. I had to have been aware.

13 Q. Let's take a look at the letter. It is
14 Tab 20 of your binder, Exhibit C-102.

15 When you say you had to be aware, do you
16 specifically remember being aware or are you
17 assuming -- I'm sorry.

18 A. I recall the existence of the letter, but
19 as it was kind of a fairly legal matter, I wasn't
20 overly involved. Probably Brian Leventhal would
21 have been running point on something like this.

22 Q. You don't recall if you read it at the
23 time?

24 A. No, it is probable that I read it, but I
25 can't recall being overly involved in this.

1 Q. Do you have any understanding of what
2 prompted this letter to be sent from Arnold &
3 Porter to Jones Day?

4 MR. MARENBERG: Objection; calls for
5 privileged communication. If we can just limit it
6 to outside privileged communications, I would have
7 no problem with this question, Mr. Chairman.

8 MR. De GRAMONT: I'll rephrase.

9 ARBITRATOR BIENVENU: Would you like to
10 rephrase your question?

11 MR. De GRAMONT: I will, Mr. Chairman.

12 Q. Outside of communications with your
13 lawyer, do you have any understanding of what
14 prompted Arnold & Porter to send this letter to
15 Jones Day?

16 A. Outside of communications with Brian, I
17 can't recall.

18 Q. Do you recall wondering at the time why
19 Jones Day, the outside counsel, was reaching out to
20 VeriSign's outside counsel about this matter?

21 MR. MARENBERG: Objection.

22 THE WITNESS: I don't.

23 Q. BY MR. De GRAMONT: Let me restate it.

24 Did it seem strange to you that Jones Day
25 had reached out to VeriSign's outside counsel

1 rather than simply having ICANN contact NDC?

2 A. Did I think it was strange that ICANN's
3 outside counsel -- I didn't -- I didn't think about
4 this, honestly.

5 Q. If you take a look at -- do you recall
6 that NDC prepared responses to the questionnaire
7 from Ms. Willett?

8 A. What we referred to as the 20 questions?

9 Q. Yes. Those are the -- I actually didn't
10 count them, but that's how many questions
11 Ms. Willett sent to you?

12 A. I believe so. I was aware of that
13 document, yes.

14 Q. And you recall that NDC provided
15 responses, right?

16 A. We did, yes.

17 Q. And did you read them?

18 A. I definitely read them, at least some sort
19 of draft of them, yes.

20 Q. And did you read VeriSign's responses?

21 A. I can't recall. Again, this was a similar
22 situation where obviously it was increasingly legal
23 and legalese in nature, so I had Brian running this
24 process.

25 Q. And are you aware that many of the answers

1 are verbatim identical in the two responses?

2 A. Identical to what?

3 Q. To each other.

4 A. Sorry, can you rephrase?

5 Q. So for example --

6 A. I just don't know what you're comparing.

7 Q. So if you take a look at NDC's answers and
8 VeriSign's answers to the questionnaire --

9 A. Oh, I understand.

10 Q. -- many of those answers are verbatim
11 identical.

12 Do you remember that?

13 A. I don't recall, but obviously we were a
14 part of the same deal. So it doesn't sound strange
15 to me that, you know, our interpretation of our
16 deal is similar.

17 Q. And in some instances,
18 Redacted - Third-Party Designated Confidential Information

19 Do you recall that?

20 A. I don't particularly recall that.

21 Q. Okay. You're aware that the Antitrust
22 Division of the Department of Justice commenced an
23 investigation in late 2016 or early 2017 about the
24 transaction, right?

25 A. I'll never forget that.

1 Q. And the investigation lasted until January
2 2018?

3 A. That sounds about right.

4 Q. And was it your understanding that
5 everything regarding .WEB was on hold pending that
6 investigation?

7 A. I don't know that there was a firm policy
8 announcement by ICANN, but that was my general
9 understanding, that while the DOJ was looking at
10 this, nothing was going to happen on the ICANN
11 side.

12 Q. If you look at Paragraph 107 of your
13 witness statement, I think this is the paragraph
14 that Mr. Marenberg referred to you earlier on?

15 A. Yes. That's the one that I opened up the
16 proceedings with in adding to.

17 Q. I just wanted to make sure I understand
18 the clarification.

19 It says, quote, "Since submitting those
20 responses in October 2016, NDC has periodically
21 made inquiries to ICANN through the ICANN customer
22 service portal regarding the status of .WEB. ICANN
23 has never responded beyond a statement that the
24 resolution of .WEB is on hold due to the pendency
25 of the accountability mechanisms or similar

1 processes."

2 Could you just tell me the clarification
3 again so I make sure I understand that?

4 A. Yeah, here in the second line I said
5 "inquiries through the ICANN customer service
6 portal" -- it probably could have said "customer
7 services portal, email or phone call" -- regarding
8 the status of .WEB.

9 Q. So you do recall having communications
10 with ICANN after receiving the 2016 twenty
11 questions?

12 A. Yes, definitely.

13 Q. Do you recall that you reached out to
14 ICANN in December 2017?

15 A. I do.

16 Q. Let's take a look at that email. I think
17 we are both referring to the same thing. It is
18 behind Tab 31, Exhibit C-182, and down at the
19 bottom there's an email dated December 12th, 2017,
20 from Peg Rettino referring to a meeting that was
21 being scheduled in December of 2017.

22 Can you tell me what the meeting schedule
23 was?

24 A. If I recall correctly, I believe the
25 context of this message was around this time, just

1 prior to the holidays, I think we had received
2 maybe unofficial word from the DOJ that that
3 process was coming to an end sooner rather than
4 later.

5 So I believe I reached out to ICANN to
6 inquire as to what was next. What was going on
7 with -- at the time, besides the DOJ, there was an
8 ongoing accountability mechanism, which was the CEP
9 between Donuts and ICANN, CEP being Cooperative
10 Engagement Process.

11 So, you know, from my viewpoint, I was
12 trying to get ahead of the fact that, hey, if the
13 DOJ was going to end, I wanted to know what's going
14 on with the Donuts CEP, is that -- can that end?
15 Can we get to a signing?

16 I wanted my Registry Agreement to sign,
17 quite frankly. It had been already quite some time
18 since we had won the auction.

19 Q. And did you have a conversation with
20 people at ICANN in December 2017?

21 A. I believe we did, yes.

22 Q. Do you remember who you spoke to?

23 A. If I recall correctly, it probably would
24 have been John Jeffrey, general counsel, and Akram
25 Atallah, I believe at the time president of the

1 GDD.

2 Q. And was anyone else on the line from NDC?

3 A. I believe Mr. Marenberg was on the line
4 with me.

5 Q. And had Mr. Marenberg replaced your
6 earlier lawyer, whose name I am drawing a blank on?

7 A. Brian Leventhal. So we added
8 Mr. Marenberg to the team once we -- once we saw
9 that there was any potential litigation surrounding
10 this and for his experience handling the DOJ
11 inquiry.

12 Q. And was Mr. Marenberg recommended by
13 VeriSign?

14 A. Mr. Marenberg, I believe Brian and I had a
15 conversation about hiring an attorney and --

16 MR. MARENBERG: Objection.

17 Let me caution the witness. You should
18 not disclose your communications with
19 Mr. Leventhal.

20 I'll object to the question to the extent
21 that it calls for disclosure of those
22 communications on the grounds that it invades
23 privilege.

24 ARBITRATOR BIENVENU: Your response to the
25 objection, Mr. De Gramont?

1 MR. De GRAMONT: Let me rephrase the
2 question because I don't want to elicit any
3 client-counsel communications.

4 Q. This is just a yes-or-no question. Do you
5 know -- strike that.

6 Did VeriSign, to your knowledge, recommend
7 Mr. Marenberg for this assignment to NDC?

8 A. No. I recall VeriSign -- I recall
9 VeriSign proffering a few suggestions on law firms
10 to potentially hire, or speak to, at least.

11 Q. And do you recall if Mr. Marenberg was on
12 that list?

13 A. I can't recall. Honestly, these go to my
14 communications with Mr. Leventhal.

15 Q. I am sure Mr. Marenberg is on everyone's
16 list, but you don't recall if he was on the list
17 provided by VeriSign?

18 A. If he isn't, he should be.

19 Q. But you don't recall?

20 A. I can't recall, no.

21 Q. But you do recall that VeriSign provided
22 you with a list of possible lawyers for this
23 representation?

24 A. I believe they made some suggestions.

25 Q. Okay. So Mr. Marenberg was on the phone

1 with you. Anybody else from NDC?

2 A. No, I don't think on this call, no.

3 Q. Was anyone from VeriSign on the call?

4 A. No.

5 Q. Had VeriSign asked you to reach out to
6 ICANN?

7 A. No.

8 Q. And do you recall if anyone other than
9 John Jeffrey and Akram Atallah were on the line?

10 A. I don't believe that anyone else was on --
11 at least no one was disclosed to me if they were.

12 Q. And do you recall what you said to
13 Mr. Jeffrey and Mr. Atallah?

14 A. I think in summary, what I just previously
15 mentioned, which was, "Listen, I am sure you are
16 hearing just like we are that the DOJ investigation
17 is going to end without further action. You know,
18 I know that the Donuts CEP has been going on for a
19 very long time and can we expect that to come to an
20 end any time soon?"

21 Q. And what did they tell you?

22 A. There wasn't much of a concrete answer.
23 You know, all along I think for some time the
24 general message that we were getting was that that
25 Donuts CEP was going to end, but it never did.

1 Obviously it did eventually, but there was no real
2 concrete answer given other than when it ends and
3 if there are no accountability mechanisms, we'll
4 follow our process.

5 Q. Did they say that when it ends and when
6 there are no accountability mechanisms pending,
7 they would proceed to contract for .WEB with NDC?

8 A. I can't say that they said that verbatim,
9 but I think it was along the lines that they would
10 follow their process. As far as I knew it, the
11 process was that if there were no accountability
12 mechanisms, there was nothing standing in the way
13 from a Registry Agreement.

14 Q. A Registry Agreement with NDC?

15 A. With NDC, correct.

16 Q. Okay. Let me ask you this: Did you
17 follow up with anyone at VeriSign about the
18 conversation you had with Mr. Jeffrey and Mr. Akram
19 and Mr. Marenberg?

20 A. I probably gave them a summary of the
21 conversation, yes, although I can't be certain. In
22 most likely circumstances, I updated them on the
23 conversation.

24 Q. Are you aware that someone from VeriSign
25 reached out to ICANN staff in January 2018 to ask

1 about the process of having NDC assign the Registry
2 Agreement to VeriSign?

3 A. I recall in preparation for this, I recall
4 perhaps seeing that there was a contact about that.

5 Q. Let's just take a quick look at it. It is
6 Tab 32, Exhibit C-115.

7 I have two questions. First of all is
8 whether outside of preparing for the testimony, do
9 you recall seeing this exchange of emails at the
10 time?

11 A. I can't recall, no.

12 Q. Were you aware that these communications
13 were taking place at the time?

14 A. I honestly can't recall. I recognize
15 Jessica Hooper's name as someone who was assigned
16 by VeriSign at some point to help with the
17 assignment process. I think she was becoming
18 familiar with the assignment process.

19 Q. Do you recall speaking to her or anyone
20 else about that?

21 A. You know, I believe I did have a phone
22 call with someone. I think Jessica -- Ms. Hooper
23 was probably one of those people. It is just kind
24 of a preparatory call where we kind of talked about
25 what their understanding of the assignment process

1 was as the way they read it through ICANN's website
2 and the guidebook.

3 Q. Do you recall when that conversation took
4 place?

5 A. I really can't, no.

6 Q. Do you recall if they --

7 A. It was obviously premature.

8 Q. Do you recall if they told you that they
9 had already been in contact with ICANN?

10 A. No. I don't recall that.

11 Q. Okay. Let's take a look at what's behind
12 Tab 31 of your binder, which is Exhibit C-182, and
13 this is an email -- oh, we were looking at that.

14 So this is the email on top of that email
15 chain. It is an email from you to John Jeffrey and
16 Akram Atallah, dated February 15, 2018.

17 Do you recall whether between the phone
18 call in December 2017 and this February 15th, 2018,
19 email, there had been any other communications
20 between you and ICANN?

21 A. I can't be certain, but I don't believe
22 there were.

23 Q. Okay. And so you write to Mr. Jeffrey and
24 Mr. Atallah, quote, "I hope this message finds you
25 well. In line with our previous conversation, I am

1 contacting you regarding NuDotco signing the
2 Registry Agreement for .WEB. Now that the DOJ CID
3 has concluded and that there are no pending
4 accountability mechanisms associated with our
5 successful bid at the auction for this string in
6 2016, the next step in the process is for us to
7 execute the Registry Agreement. Please let me know
8 if you'll have sufficient time to get that to me
9 this week. Thanks so much for all your help
10 throughout this process, and I look forward to
11 wrapping this up."

12 Did you write this email yourself?

13 A. It definitely looks like my language, yes.

14 Q. Did anyone from ICANN respond to this
15 email?

16 A. I don't believe they did.

17 Q. So what was the next communication you had
18 with ICANN after this?

19 A. Again, I can't be certain, but I guess at
20 some point there was a notification that -- well, I
21 can't be certain if there was a notification that
22 there was no longer any accountability mechanisms
23 or whether or not that was for the entire
24 contention set, or in -- I believe it is in June we
25 received the Registry Agreement to sign.

1 Q. And when you received the Registry
2 Agreement, you signed it and returned it to ICANN?

3 A. As fast as I possibly could.

4 MR. De GRAMONT: Mr. Chairman, I think I
5 am getting close to the end of my examination.
6 Could I just have a two-minute break? I may have
7 about 15 minutes more or so, but I just want to
8 confer with my colleagues.

9 ARBITRATOR BIENVENU: Absolutely. I think
10 we will keep the witness in the hearing room, but
11 you are free to consult your colleagues.

12 MR. De GRAMONT: Thank you, Mr. Chairman.

13 (Whereupon a recess was taken.)

14 MR. De GRAMONT: Mr. Chairman, I'm sorry
15 that it took a little longer break than we thought,
16 but the time was well spent.

17 I have no further questions, Mr. Rasco.
18 Thank you very much for your time today.

19 THE WITNESS: Thank you very much.

20 ARBITRATOR BIENVENU: Mr. Marenberg has a
21 few questions for Mr. Rasco, and as we did for the
22 previous witness, I will begin. If my colleagues
23 have additional questions, they will go after me.

24 Mr. Rasco, could I ask you to take a look
25 at Paragraph 58 of your witness statement?

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THE WITNESS: Yes, Mr. Chairman.

ARBITRATOR BIENVENU: There you say in the first sentence that

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Do you see that?

THE WITNESS: I do, that's correct.

ARBITRATOR BIENVENU: The question of whether Redacted - Third-Party Designated Confidential Information

THE WITNESS: I don't recall it being a part of the negotiations, Mr. Chairman.

ARBITRATOR BIENVENU: You don't recall the determination being made on the part of NDC or as part of its negotiations with VeriSign as to whether or not -- let me finish, if I may.

THE WITNESS: Yeah, sorry.

ARBITRATOR BIENVENU: Do you recall a determination being made -- and, of course, please do not disclose any discussion you may have had with counsel. But do you recall the determination being made in the course of your negotiations with VeriSign Redacted - Third-Party Designated Confidential Information

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THE WITNESS: I am having a little trouble to try to figure out how to answer the question.

The way that I understood
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ARBITRATOR BIENVENU: Was the question of whether the guidebook -- or I'll say the program rules in order to include both the guidebook and the auction rules. Was the question of whether the program rules required disclosure of the DAA to ICANN discussed with ICANN?

THE WITNESS: Discussed with ICANN, no, I don't believe so. In what context? I am not sure.

1 ARBITRATOR BIENVENU: I am asking if you
2 had a discussion with ICANN about whether that kind
3 of an agreement needed to be disclosed to them?

4 THE WITNESS: No, sir. No, we did not.

5 MR. MARENBERG: Mr. Chairman, you meant to
6 be inquiring about discussions he had with ICANN
7 and not VeriSign?

8 ARBITRATOR BIENVENU: Yes, I meant to ask
9 ICANN. Prior I asked the clarifying, but now I was
10 talking about ICANN.

11 Mr. Rasco, as you sit here today, I
12 believe you are aware that in November 2016 the
13 ICANN Board turned its mind to the question of
14 whether NDC's bid was compliant with the program
15 rules and decided not to pronounce itself on that
16 question. Are you aware of that?

17 THE WITNESS: In the context of this
18 hearing, I became aware of that.

19 ARBITRATOR BIENVENU: Exactly.

20 Now, when did you -- withdrawn.

21 Were you informed of that decision in the
22 days, weeks or months following that decision?

23 THE WITNESS: I don't believe I ever was,
24 no.

25 ARBITRATOR BIENVENU: So it is in the

1 context of this IRP that you became aware of that?

2 THE WITNESS: I believe that's correct.

3 ARBITRATOR BIENVENU: So if we look at the
4 letter under Tab 33, which is a letter sent by
5 Mr. Marenberg to ICANN, you recognize this letter?
6 It is the very last tab of the witness binder.

7 THE WITNESS: Yes, I see that, yes.

8 ARBITRATOR BIENVENU: You recognize that
9 letter?

10 THE WITNESS: I do. I haven't seen it in
11 some time, but I vaguely recognize it, yes.

12 ARBITRATOR BIENVENU: If we look at the
13 last paragraph of that letter, so basically this is
14 a letter complaining to ICANN that a lot of time
15 has passed since the auction, and we have reached a
16 point when a Registry Agreement should be delivered
17 for execution to NDC. In substance, I believe
18 that's what the letter says.

19 In the last paragraph we read this, "ICANN
20 has gone to great lengths over a very long period
21 of time to protect what it thought might be any
22 interests of other parties, including," et cetera,
23 and then we have the sentence, "That process is
24 complete."

25 When that letter was sent out, and I

1 assume it was with your approval, you were not
2 aware that the ICANN Board had deferred
3 consideration of whether NDC's bid was compliant
4 with the program rules, were you?

5 THE WITNESS: I was not aware. In my
6 experience, most new TLD applications didn't go
7 before the ICANN Board to go to signing. But I was
8 not aware that the Board had made a decision not to
9 decide.

10 ARBITRATOR BIENVENU: Thank you,
11 Mr. Rasco.

12 Do my co-panelists have questions for
13 Mr. Rasco?

14 ARBITRATOR CHERNICK: I do not.

15 ARBITRATOR KESSEDJIAN: Sorry, took me
16 some time to unmute. No. I decided not to ask the
17 questions that I initially had because the topics
18 had been covered, even though I am still fairly
19 confused about some of the answers, but I think in
20 terms of time, I think I will refrain.

21 ARBITRATOR BIENVENU: Thank you very much.
22 Mr. Marenberg, any redirect for Mr. Rasco?

23 MR. MARENBERG: Yes. May I just have two
24 minutes to cut some questions and make it very
25 brief?

1 ARBITRATOR BIENVENU: Of course. Wave
2 your hand when you're ready.

3 MR. MARENBERG: I am just going to go off
4 and then come back.

5 (Whereupon a recess was taken.)

6 MR. MARENBERG: I am ready whenever you
7 are, Mr. Chairman.

8 ARBITRATOR BIENVENU: We are ready for
9 your questions, Mr. Marenberg. Please proceed with
10 your redirect.

11 REDIRECT EXAMINATION

12 BY MR. MARENBERG

13 Q. Can we put up Rasco Exhibit O, please?
14 Would you go to the text of the email?

15 ARBITRATOR BIENVENU: Do you know which
16 tab of the exhibit book?

17 MR. De GRAMONT: It is Tab 13.

18 ARBITRATOR BIENVENU: 13, thank you,
19 Mr. De Gramont.

20 Q. BY MR. MARENBERG: I believe, Mr. Rasco,
21 you were shown this exhibit by Mr. De Gramont, and
22 he asked you a couple questions about it.

23 I just want to confirm, Ms. Willett from
24 ICANN reached out to you and asked you to call her;
25 is that correct?

1 A. That's correct.

2 Q. And you did that same day?

3 A. I believe it was the same day, yes.

4 Q. Now, if we could put up paragraph --
5 excuse me, Exhibit C-75 and turn to Page 4, which
6 is Ms. Willett's summary of the conversation that
7 she had with Mr. Rasco. Go to Page 4, please.

8 Mr. De Gramont, what was -- that's it.
9 Right there.

10 And you were shown this exhibit earlier in
11 your testimony here today.

12 Do you recall that?

13 ARBITRATOR BIENVENU: This is Tab 14 of
14 the witness exhibit?

15 THE WITNESS: Yes, I recall.

16 Q. BY MR. MARENBERG: Now, Mr. De Gramont
17 highlighted various sections of this document with
18 you, and he has with other people.

19 I want to highlight another section.
20 Would you highlight Paragraph 1. It reads, "When
21 ICANN previously contacted him about potential
22 changes, he assumed that the confirmation was part
23 of the standard auction process, and his response
24 was relatively brief."

25 Mr. Rasco, is it your understanding that

1 what Ms. Willett is referring to there is your
2 initial email exchange or exchange on the portal
3 with --

4 A. Mr. Erwin.

5 Q. -- Mr. Erwin; is that correct?

6 A. That's correct.

7 Q. All right. And Ms. Willett is recounting
8 what you said to her about that exchange in 2016,
9 correct?

10 A. That sounds correct, yes.

11 Q. Now, a fair amount of ink has been spilled
12 insinuating that you have changed your view of what
13 you said to Mr. Erwin over time now that we are in
14 an IRP proceeding.

15 But at the time you had this conversation
16 with Ms. Willett in 2016, was there an IRP
17 proceeding involving Afiliast?

18 A. No, there was not.

19 Q. And so when you told Ms. Willett and gave
20 the explanation of your response to Mr. Erwin as
21 that it was simply part of the standard auction
22 process and that you quickly responded to
23 Mr. Erwin, that was not in the context of any
24 declaration or witness statement prepared in
25 connection with any IRP or litigation?

1 A. No, not at all.

2 Q. All right. Before there was ever any of
3 this contention, you had told Mr. Erwin essentially
4 what you said in your witness statement -- you had
5 told Ms. Willett essentially what you said in the
6 witness statement, which was, "I fired off a quick
7 response to Mr. Erwin as part of the standard
8 auction process"?

9 MR. De GRAMONT: Mr. Chairman, I am not
10 objecting to leading questions because I want this
11 to go fast, but at some point Mr. Marenberg cannot
12 testify for the witness. So I will object to that
13 last question as leading.

14 MR. MARENBERG: I'll withdraw it.

15 ARBITRATOR BIENVENU: I think, Mr. De
16 Gramont, we all understand what's happening here,
17 but your point is well-taken by your colleague, I'm
18 sure.

19 MR. De GRAMONT: Thank you.

20 Q. BY MR. MARENBERG: Now, if we could put up
21 Exhibit C-100, which is Tab 18 in the binder?

22 ARBITRATOR BIENVENU: Just so that it is
23 clear, when I said we all understand what's
24 happening now, I meant to say that counsel is
25 simply trying to go through points to be covered in

1 the most efficient way. That's what I meant.

2 MR. MARENBERG: Right. Thank you,
3 Mr. Chairman.

4 Q. So this is your exchange with Ms. Willett
5 on the 31st of July of 2016, and you write to her,
6 Redacted - Third-Party Designated Confidential Information

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9 To your knowledge, was this the first time
10 you said anything to ICANN about VeriSign's
11 involvement in the .WEB TLD?

12 A. I believe this was the first time I
13 mentioned VeriSign, that's correct.

14 Q. Now, did you discuss
15 Redacted - Third-Party Designated Confidential Information

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17 A. I don't recall exactly, Mr. Marenberg, but
18 I know that the plan all along was, subsequent to
19 the auction, to notify ICANN immediately of
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23 Q. Did you have an understanding yourself as
24 to whether Redacted - Third-Party Designated Confidential Information

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2 A. I knew that no matter what, they were
3 going to be aware of the agreement. I can't be
4 sure as to whether or not they were going to ask
5 for a copy of it, but I knew that we were going to
6 have to let them know about our agreement and about

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8 Q. Is it fair to say that

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11 A. Well, yeah, correct.

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16 Q. Is it accurate to say, in essence, from
17 the beginning of the negotiations with VeriSign
18 over this deal,

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21 MR. De GRAMONT: Mr. Chairman, I want this
22 to go quickly, but Mr. Marenberg is really
23 testifying for the witness. So object to that
24 question as leading.

25 ARBITRATOR BIENVENU: Mr. Marenberg, do

1 you want to reformulate your question?

2 MR. MARENBERG: I'll withdraw it, your
3 Honor.

4 Q. Now, let me just go back to the Exhibit
5 C-100.

6 At the time that you mentioned to
7 Ms. Willett on July 31st that ^{Redacted - Third-Party Designated Confidential Information}

8 what was the nature of the blogosphere as
9 it concerned the .WEB TLD?

10 A. So if I recall correctly, even prior to
11 the auction I believe the filings from Donuts or
12 Ruby Glen were made public in their attempts to try
13 to stop the auction. So at that point I guess the
14 scuttlebutt or the gossip going around was, wow,
15 there must be someone behind this. And there were
16 kind of -- I don't know if you would say
17 suppositions or there were assumptions that, wow,
18 it must -- what if one of the big players is here?
19 What if, could it possibly be VeriSign?

20 And then subsequent to the auction or
21 around the time of the auction when the actual
22 dollar amount came out, I have a feeling, if I
23 recall correctly, there was, you know, definitely
24 bloggers, whether it was Kevin Murphy of Domain
25 Incite or Kieren McCarthy, I forget where he was

1 writing at the time, but probably writing about the
2 potential participation of VeriSign.

3 Q. Can we put up Exhibit C-43, please?

4 MR. De GRAMONT: Mr. Chairman, I have a
5 feeling counsel is about to go beyond the scope of
6 cross-examination, and if so, I will object to
7 that.

8 MR. MARENBERG: I don't believe so.

9 ARBITRATOR BIENVENU: Would you like to
10 respond to that objection, Mr. Marenberg?

11 MR. MARENBERG: I think I am just putting
12 up the clarifications that Mr. De Gramont asked him
13 and putting it in that context.

14 MR. De GRAMONT: I didn't go through that
15 with this witness, but why don't we hear the
16 question and then I'll deal with the objection.

17 Q. BY MR. MARENBERG: Is this an example of
18 the types of communications that were circulating
19 in the blogosphere in the aftermath of the .WEB
20 auction?

21 A. That's correct, this is an example of
22 those assumptions that VeriSign was potentially
23 involved.

24 Q. Okay. Now, let's go back to Exhibit
25 C-100, please.

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ARBITRATOR BIENVENU: Tab 18?

MR. MARENBERG: Tab 18.

Q. Now I want to focus your attention on the next email after the one you sent on July 31st and after Ms. Willett's response.

That's your email of August 4th. For what purpose were you writing Ms. Willett on August 4th?

A. I was confirming that they received the payment and inquiring about the CIR, which is the invitation to contracting.

Q. Okay. At this point in time, did you have an understanding when you were communicating with Ms. Willett as to whether she understood that VeriSign was involved in some way in the .WEB TLD?

A. I don't know what she thought, but I had already -- Redacted - Third-Party Designated Confidential Information, so I am assuming she already knew about it.

Q. Okay. And let's go to the top email on the page, which is Ms. Willett's response. Same document, top email, please, C-100. Thank you.

And Ms. Willett responds to you,
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6 What did you understand she was telling
7 you there?

8 A. From my point of view,

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13 Q. This was after VeriSign's involvement had
14 been disclosed, correct?

15 A. That's correct. It didn't -- in other
16 words, it didn't look like there was much of a
17 surprise here.

18 MR. MARENBERG: I have no further
19 questions.

20 ARBITRATOR BIENVENU: Thank you very much,
21 Mr. Marenberg.

22 Mr. Rasco, I would like, on behalf of the
23 other members of the Panel and indeed on behalf of
24 all the participants in this process, to thank you
25 for your evidence and for your time.

1 THE WITNESS: Thank you very much,
2 Mr. Chairman. It was fun.

3 ARBITRATOR BIENVENU: Mr. Rasco, I must
4 instruct you not to discuss your evidence and your
5 testimony with any other persons who are scheduled
6 to appear before the Panel.

7 THE WITNESS: Yes, sir.

8 ARBITRATOR BIENVENU: Thank you very much,
9 indeed.

10 THE WITNESS: Thank you.

11 ARBITRATOR BIENVENU: We are on to our
12 next witness. Mr. LeVee, will you be leading or
13 introducing the witness?

14 ARBITRATOR KESSEDJIAN: Can we can have a
15 short break, probably five or eight minutes, no
16 more?

17 ARBITRATOR BIENVENU: An unscheduled
18 break?

19 ARBITRATOR KESSEDJIAN: An unscheduled
20 break, yes.

21 ARBITRATOR BIENVENU: I see agreement by
22 our friend Mr. Chernick, so let's have an
23 unscheduled break of five minutes.

24 In the meantime, Mr. LeVee, you can
25 perhaps ensure that the witness -- can you tell us

1 if the witness is ready?

2 MR. LeVEE: The witness should be in his
3 own holding room. I believe that's been confirmed.
4 I apologize. I had expected the Panel to take a
5 short break.

6 ARBITRATOR KESSEDJIAN: I am reading your
7 mind, Mr. LeVee.

8 MR. LeVEE: My apologies, but I am sitting
9 here getting my computer activated.

10 ARBITRATOR KESSEDJIAN: Let's meet in five
11 minutes.

12 MR. LeVEE: Five minutes is good with me.

13 (Whereupon a recess was taken.)

14 ARBITRATOR BIENVENU: Welcome, again,
15 Mr. Litwin.

16 MR. LITWIN: Thank you, Mr. Chairman.

17 ARBITRATOR BIENVENU: Mr. Disspain,
18 welcome. My name is Pierre Bienvenu. I chair the
19 Panel in this IRP. My colleagues are Professor
20 Catherine Kessedjian, whom I assume you see on your
21 screen, and Mr. Richard Chernick.

22 THE WITNESS: Yes, I can see them. Thank
23 you.

24 ARBITRATOR BIENVENU: Very well. So first
25 of all, on behalf of the Panel, welcome to you.

1 Sir, you have signed a witness statement
2 in relation to this case dated 1st June 2020.

3 THE WITNESS: Yes, I have.

4 ARBITRATOR BIENVENU: And at the end of
5 your statement, you swear that the content of your
6 statement is true and correct?

7 THE WITNESS: Yes, I do.

8 ARBITRATOR BIENVENU: May I ask you, sir,
9 likewise solemnly to affirm that the evidence that
10 you will give to the Panel today will be the truth,
11 the whole truth and nothing but the truth?

12 THE WITNESS: Yes, I do so affirm, sir.

13 ARBITRATOR BIENVENU: Thank you very much.
14 Mr. LeVee.

15 MR. LeVEE: Thank you, Mr. Chairman.

16 Good evening, Mr. Disspain. How are you?

17 THE WITNESS: I'm fine, Mr. LeVee. Thank
18 you. How are you?

19 MR. LeVEE: I am fine. Thank you.

20 I have just two questions. One, are you
21 in the United Kingdom? Is that where you are
22 testifying from?

23 THE WITNESS: Yes, I am.

24 MR. LeVEE: Okay. And second, the Chair
25 showed you your witness statement. Do you have any

1 corrections to your witness statement that you'd
2 like to correct?

3 THE WITNESS: No, I don't.

4 MR. LeVEE: Then, Mr. Chair, I have no
5 additional questions and submit Mr. Disspain to
6 cross-examination.

7 ARBITRATOR BIENVENU: Thank you,
8 Mr. LeVee.

9 The cross-examination will be conducted by
10 Mr. Litwin.

11 Mr. Litwin, your witness.

12 MR. LITWIN: Thank you, Mr. Chairman.

13 CROSS-EXAMINATION

14 BY MR. LITWIN

15 Q. Mr. Disspain, can you hear me okay?

16 A. Yes, I can. Thank you very much.

17 Q. Excellent. Good evening, sir. I
18 understand you have received a bundle containing
19 our exhibits?

20 A. I do have it, yeah.

21 Q. If you could open that on camera, and
22 Mr. LeVee may do the same.

23 A. I will do my best to open it on camera
24 without cutting myself.

25 Q. Don't cut yourself. We see it is

1 unopened.

2 A. I will put it down so I can open it
3 properly. Okay. There we go. Okay. There we
4 are.

5 Q. I regret to say we killed quite a number
6 of trees with it, and I am not sure we are actually
7 going to review much of it.

8 A. It would appear so, but I can use it for
9 scrap paper later.

10 Q. Very good. I am happy to hear to that.

11 But if I do refer to a document in that
12 binder, you will see that we have marked each page
13 at the bottom right-hand corner with a unique page
14 number that is new, and I will be referring to that
15 page number, not to the original document number.

16 A. You said the bottom right-hand corner?

17 Q. Yeah, should be the bottom right-hand
18 corner.

19 A. So that's ICANN-WEB_ something?

20 Q. Yes.

21 A. The binder wants to spring itself open, so
22 just give me a second so I don't lose any
23 documents. I will do my best. It is kind of
24 damaged.

25 Q. No worries. As I said, I don't expect to

1 look at much of anything in there.

2 A. Just so you know, it is actually broken.
3 Don't worry. My apologies.

4 Q. I apologize.

5 A. No, it is not your fault. I just didn't
6 want to be an inconvenience to you.

7 Q. Mr. Disspain, you are a member of ICANN's
8 Board of Directors, correct?

9 A. Yes, that's correct.

10 Q. When did you first join the Board?

11 A. October 2011.

12 Q. And you have been a member of the Board
13 since that time, correct?

14 A. That is correct.

15 Q. I would like to take you back to the
16 events of November 2016. You stated in your
17 witness statement that ICANN lawyers periodically
18 provided updates to the Board regarding the status
19 of .WEB; is that correct?

20 A. That's correct.

21 Q. And these updates address various legal
22 matters, such as the Ruby Glen litigation against
23 ICANN regarding .WEB, correct?

24 A. Yes, that's correct.

25 Q. And the associated CEP that Donuts, Ruby

1 Glen's parent entity, had initiated concerning
2 .WEB; is that correct?

3 A. Yes, that's correct as well.

4 Q. And the complaints that Afilias had made
5 to ICANN's ombudsman regarding .WEB?

6 A. Well, I think we knew that a complaint had
7 been made, but we didn't have any of the details.
8 That would not have been appropriate. Complaints
9 to the ombudsman, obviously they'd complained to
10 the ombudsman, so we didn't have any of the details
11 of that.

12 Q. What about the letters that Afilias had
13 written to Mr. Akram Atallah that had raised
14 concerns regarding how the .WEB contention set had
15 been resolved, were those discussed during those
16 updates?

17 A. I think we certainly knew about them
18 because they were -- as Akram said, they were
19 public. They would have been part of the briefing,
20 if you will, to discuss the issue.

21 Q. And at the time in 2016, Mr. Atallah was
22 the president of ICANN's Global Domains Division,
23 correct?

24 A. I believe so, yeah.

25 Q. Generally speaking, he was responsible for

1 overseeing the administration of the new gTLD
2 Program, right?

3 A. Reporting to the CEO, but yes.

4 Q. Now, you attended the public ICANN
5 meetings that were held in Hyderabad, India in
6 November 2016, correct?

7 A. I did, indeed.

8 Q. And during those meetings, did you attend
9 a Board workshop session on November 3rd, 2016,
10 where ICANN legal briefed the Board about .WEB?

11 A. The answer to that is yes, although I
12 couldn't be certain about the actual dates, but
13 yes, at Hyderabad in November we had a briefing
14 session on the issue.

15 Q. I will represent to you that in ICANN's
16 privilege log, there is an entry for a transcript
17 of a Board workshop session that took place on
18 November 3rd. If I am representing that correctly,
19 would that help you recall that that is the subject
20 of the discussion?

21 A. If that's what it says, then I accept
22 that's what it was, yes.

23 Q. I will also represent, as far as I can
24 tell from ICANN's website, the first meeting of the
25 ICANN Board was on November 5th. Is it your

1 recollection that this workshop was held before
2 that regular meeting?

3 A. So you say "meeting," you mean formal
4 meeting of the Board?

5 Q. Yes.

6 A. If you do, the answer is yes.

7 Q. Okay. Was there a discussion during that
8 November 3rd workshop that the conversation you
9 were having was privileged?

10 A. Yes.

11 Q. And that meeting took place in India,
12 correct?

13 A. It took place in Hyderabad, yes.

14 Q. And ICANN carries out its activities in
15 conformity with the principles of international
16 law, correct?

17 A. I can't -- I don't understand -- I can't
18 answer that question. I don't know what you mean.
19 ICANN carries out its activities pursuant to
20 California law, I think.

21 Q. So already I have misrepresented to you,
22 sir, we are going to take a look at your witness
23 binder.

24 A. Not a problem.

25 Q. But it is at the beginning?

1 A. Given the state of it --

2 Q. If you can turn to Tab 4, sir.

3 A. Yes, I have got Tab 4.

4 Q. And if you can, if you just give me a
5 minute here, if you turn to Page 5, these are
6 ICANN's bylaws.

7 A. Hang on, is this your page number?

8 Q. Yes. Exhibit C-1, Page 5.

9 A. I am on Page 5, yep, yep, yep.

10 Q. If you look at Section 1.2(a).

11 A. Yes, I have got that.

12 Q. It says, "In performing its Mission, ICANN
13 must operate in a manner consistent with these
14 Bylaws for the benefit of the Internet community as
15 a whole, carrying out its activities in conformity
16 with relevant principles of international law and
17 international conventions and applicable local
18 law."

19 Do you see that?

20 A. I am fine with that, and yes, that's
21 absolutely what the bylaws say.

22 Q. So when there was a -- when you write in
23 your witness statement, sir, that the Board's
24 communications with counsel during the November 3rd
25 workshop session were privileged, which set of laws

1 regarding the legal privilege are you referring to?

2 A. I'm referring to advice received by our
3 lawyers. I am not an international lawyer, and you
4 are asking me to provide you with a legal opinion,
5 which I can't do.

6 Q. So you don't -- sitting here today, you do
7 not have an understanding of which laws concerning
8 legal privilege were governing that meeting in
9 India?

10 A. I have an understanding.

11 MR. LeVEE: Mr. Chairman, could I
12 interrupt briefly? There has already been
13 litigation or activity regarding Afiliias's claims
14 relating to this meeting, and the Panel concluded
15 what it did. I am not going to say what the Panel
16 concluded in front of the witness.

17 But this clearly is an improper line of
18 questioning with respect to a legal issue. The
19 witness has already said he doesn't know the legal
20 issue, but he also did say he understood California
21 law applied.

22 ARBITRATOR BIENVENU: Let us see where
23 we're headed with Mr. Litwin's questions, and I
24 invite you to reformulate your objection as the
25 case may be.

1 MR. LeVEE: I will do that.

2 Q. BY MR. LITWIN: Mr. Disspain, do you need
3 me to restate?

4 A. Yes, I do. I have no idea what you were
5 asking me. So you have to start again, I'm afraid.

6 Q. So my only question was whether, sitting
7 here today, you have any understanding as to which
8 privilege rules applied to the meeting you were
9 having in Hyderabad, India?

10 A. My understanding is we were instructed
11 that that meeting was privileged, not specifically
12 by what law, but that it was privileged.

13 Q. Now, Mr. Disspain, I am going to ask you a
14 series of questions regarding the November 3rd
15 workshop session.

16 I will not ask you to reveal the substance
17 of any privileged communication made during that
18 workshop, and certainly by my questions I am not
19 intending to elicit any answers that would reveal
20 any such privileged communications.

21 I would therefore request that, just to be
22 safe, you keep your responses brief, but naturally
23 you should be guided by the instructions of your
24 counsel in this regard. But I just wanted to make
25 that clear up front.

1 A. I appreciated it, and I understand. Thank
2 you very much.

3 Q. To the best of your recollection, how many
4 directors attended the November 3rd workshop
5 session where issues related to .WEB were
6 discussed?

7 A. I wouldn't start to put a number on it.
8 My recollection is there were a significant number
9 of Board members present, but I couldn't tell you
10 how many.

11 Q. Could you give me an approximation of what
12 percentage of the Board was present?

13 A. It would be very much a guess, but in my
14 mind I would suggest it was certainly more than 50
15 percent. It could have been up to -- it could have
16 been everyone, but certainly more than 50 percent,
17 in my mind.

18 Q. Did anyone from ICANN staff attend the
19 November 3rd workshop?

20 A. Yes, lots of people from -- are you
21 talking about this specific session or just
22 general?

23 Q. Yes, yes.

24 A. This specific session?

25 Q. This specific session, where -- the

1 November 3rd workshop I am going to refer to when
2 the issue -- the legal issues regarding .WEB were
3 discussed.

4 A. Yes, certainly the lawyers did. John
5 Jeffrey was there. I think Amy Stathos was there,
6 the CEO was there. Again, I don't have a clear
7 recollection. I would be surprised to discover
8 that Akram Atallah wasn't there. I am not telling
9 you stuff from actual memory. I am telling you it
10 would surprise me if he hadn't been, but yes, there
11 was certainly staff present.

12 Q. So just to be clear, Mr. Disspain, I am
13 not asking you to speculate. I am asking you, to
14 the best of your recollection, was Mr. Atallah in
15 attendance?

16 A. I believe he was.

17 Q. What about Ms. Willett?

18 A. I don't remember.

19 Q. Other than Mr. Atallah, were there any
20 other members of ICANN staff present at the
21 November 3rd workshop session, also other than
22 legal staff, that you recall?

23 A. Not that I can recall.

24 Q. So just to clarify again, what we are
25 talking about in the November 3rd workshop session,

1 is it fair to say, and this is really a yes-or-no
2 question, that multiple topics were discussed
3 during the entirety of that November 3rd workshop
4 unrelated to .WEB?

5 A. Now you have confused me because you said
6 before, you said when you refer to the November 3rd
7 workshop, you are specifically referring to a
8 discussion about this.

9 Q. Correct. What I am trying to just get at,
10 sir, I just want to understand, this was one of the
11 topics that were discussed at the workshop? And
12 then we'll go on.

13 A. During the day, during our sessions, a
14 number of topics were discussed, yes, that is
15 correct.

16 Q. Okay. So from now on when I refer to the
17 November 3rd workshop session, I am just going to
18 refer to the discussion regarding .WEB.

19 To the best of your recollection, how long
20 was the discussion concerning .WEB?

21 A. I couldn't -- I genuinely couldn't say. I
22 don't know. I would be speculating.

23 Q. Okay.

24 A. I would be saying -- I'd be thinking it
25 through and saying, well, I know what was

1 discussed, how long would that take, et cetera, and
2 that's what you don't want me to do, so I don't
3 know.

4 Q. Would you say it was more than 15 minutes?

5 A. I'm going to resort to a reply I gave you
6 earlier in another context. I would be surprised
7 if it wasn't more than 15 minutes, but I remember
8 there being a full and open discussion about the
9 topic. How long it actually took, I couldn't say.

10 Q. Okay. Had there been another sort of full
11 and open discussion of legal issues regarding .WEB
12 in any of the other updates that had been provided
13 to the Board?

14 A. You mean at Hyderabad?

15 Q. No, at any other time that you recall.

16 A. I don't recall there being any
17 face-to-face discussion. I do recall that we were
18 kept up to speed with what was happening to some
19 extent, but I don't recall that -- so we received
20 updates in respect to what was going on with .WEB,
21 but I don't recall a Board discussion.

22 Q. Now, the discussion regarding .WEB that
23 took place on November 3rd, did that -- ICANN was
24 involved in active federal court litigation with
25 Ruby Glen at the time. So the briefing, I assume,

1 would have included a discussion of Ruby Glen's
2 case; is that right?

3 A. Well, it included an update on Ruby Glen's
4 case, yes.

5 Q. And Donuts' CEP that we mentioned earlier?

6 A. Again, it would have been -- we would have
7 been briefed that that had happened, that was
8 happening, yes.

9 Q. What about what ICANN was doing in
10 response to the letters that Mr. Atallah had
11 received from Afilias?

12 MR. LeVEE: That question I will object to
13 because it is so vague.

14 Ethan, can you make it a little bit more
15 clear? We are trying to make sure -- you are
16 trying to make sure he doesn't waive the privilege.
17 I am trying to make sure he doesn't waive the
18 privilege. That question --

19 THE WITNESS: I'll be guided by both of
20 you as to whether I am waiving the privilege or
21 not, so I am comfortable.

22 Q. BY MR. LITWIN: I think you should listen
23 to ICANN's lawyer.

24 A. I think you are probably right.

25 Q. That's not my role here today, but I do

1 want to make sure that I am sensitive to this.

2 So I will rephrase the question. So did
3 the Board also receive an update about ICANN's
4 response to Afiliast's letters to Mr. Atallah?

5 A. My recollection is that we knew that ICANN
6 had sent out a questionnaire, if that's what you're
7 asking me.

8 Q. Yes. That is what I'm asking you. Thank
9 you.

10 Did the Board discuss on November 3rd
11 Ms. Willett's pre-auction investigation of NDC? I
12 am asking just for a yes-or-no question, not about
13 the substance.

14 A. I don't know what you're referring to, so
15 I am afraid I can't -- I don't know what
16 Ms. Willett's pre-auction investigation is, so I
17 can't answer that.

18 Q. What about the ombudsman's
19 pre-investigation auction -- excuse me. Let me
20 rephrase.

21 What about the ombudsman pre-auction
22 investigation of NDC, was that discussed?

23 A. We wouldn't discuss what the ombudsman had
24 done, because that's a matter for the ombudsman and
25 that remains with him and no one else.

1 Q. I can represent that other contention set
2 members had complained about the .WEB auction at
3 one point or another. Did the Board discuss any
4 complaints that were brought by any contention set
5 member other than Afilias or Ruby Glen during the
6 November 3rd workshop?

7 A. Not that I can recall.

8 Q. You note in your witness statement that
9 Board members asked questions of ICANN's legal
10 counsel during the November 3rd discussion of .WEB.

11 To the best of your recollection, sir,
12 could you please identify everyone who asked a
13 question of ICANN's legal counsel during the
14 November 3rd discussion of .WEB?

15 A. Well, no, for a couple of reasons, but
16 mainly because I can remember the events and the
17 discussion, but you're asking me to identify
18 particular individuals who had asked particular
19 questions, and I can't do that.

20 I know there was a discussion. I know
21 that Board members were present. I know that -- I
22 believe, as I have already said, that 50 percent of
23 the Board was present, but I would not be able to
24 tell you who spoke, and I wouldn't be able to tell
25 you what questions they asked.

1 Q. Well, I am certainly not asking you to
2 reveal what questions were asked, sir.

3 Let me ask you this: Did you ask any
4 questions during that November 3rd discussion of
5 .WEB?

6 A. I believe that I probably did.

7 Q. Sitting here today, do you have a
8 recollection one way or another?

9 A. Well, you see, here's the challenge. I
10 know me, so I know that it's highly likely I would
11 have asked questions.

12 But if you're asking me can I actually
13 remember, I know you are not going to ask me what
14 they were, but logically for me to remember, I
15 would need to remember the questions, the answer is
16 no. To revert to a previous answer, I would be
17 surprised if I did not.

18 Q. Understood. We sound very much alike,
19 Mr. Disspain.

20 You note in your witness statement that
21 you received briefing materials in advance of the
22 November 3rd meeting, correct?

23 A. Correct.

24 Q. And did those briefing materials include a
25 copy of the August 25th, 2015, VeriSign-NDC Domain

1 Acquisition Agreement?

2 A. Not to my recollection.

3 Q. Did the briefing materials contain a copy
4 of the August 23rd, 2016, letter from Mr. Ronald
5 Johnston of Arnold & Porter on behalf of VeriSign
6 to Mr. Eric Enson of Jones Day on behalf of ICANN?

7 A. Again, not to my recollection.

8 Q. You mentioned a few minutes earlier that
9 ICANN had sent questionnaires out in response to
10 Afilias's complaints. Were the responses to those
11 questionnaires that were received from Afilias
12 included in your briefing materials?

13 A. Not to my recollection.

14 Q. What about the answers that were received
15 to the questionnaire from VeriSign or NDC, do you
16 recall?

17 A. I don't recall any responses or the
18 questionnaire.

19 Q. Did you ever discuss any issues regarding
20 .WEB with Mr. Atallah?

21 A. Are you asking me personally or are you
22 asking me --

23 Q. Yes, personally.

24 A. Not that I can recall, no.

25 Q. Since the Board was also discussing the

1 Ruby Glen .WEB litigation, did the briefing
2 materials also contain -- or did the briefing
3 materials contain a copy of Ruby Glen's pleadings
4 from that case?

5 A. Again, not that I can recall. I don't
6 remember seeing those.

7 Q. Did the briefing materials contain a copy
8 of any of the legal briefs at that had been filed
9 as of November 3rd, 2016, in that case?

10 A. Again --

11 MR. LeVEE: Let me just interrupt. I am
12 letting this go on, but I am confident that
13 whatever materials were provided to the Board would
14 themselves be -- the fact of a lawyer giving a
15 document to the Board would itself be privileged.

16 I don't think it is appropriate -- and I
17 don't want to waive the privilege, but I don't
18 think it is appropriate for questions to be asked
19 about what specific materials were provided to the
20 Board. They were selected by counsel. That's
21 already been established.

22 MR. LITWIN: Mr. Chairman, may I respond
23 to that, please?

24 ARBITRATOR BIENVENU: I was going to
25 invite you to do so.

1 MR. LITWIN: Thank you, Mr. Chairman.

2 Without belaboring the point, it is
3 well-established that the identity of a document
4 that is provided by a lawyer to a client is not
5 privileged, but the contents of that document and
6 any discussion about that document to the extent
7 the document is privileged.

8 So I believe I am entitled to know what
9 documents were provided to the Board. To the
10 extent that they are nonprivileged documents, I
11 would ask questions about them. To the extent it
12 is a privileged document, I obviously would not ask
13 questions about them.

14 MR. LeVEE: May I respond?

15 ARBITRATOR BIENVENU: Just a minute,
16 Mr. LeVee. I have a question.

17 What you say is well-established,
18 Mr. Litwin, is this a matter of New York law,
19 California law, U.S. federal law or all?

20 MR. LITWIN: I believe it is all of the
21 above, and I will represent that I checked with my
22 ethics counsel before embarking on these questions
23 here today. I would be happy to provide a written
24 opinion to the Panel if it so desires.

25 ARBITRATOR BIENVENU: Mr. LeVee, you want

1 to respond?

2 MR. LeVEE: Thank you, Mr. Chairman.

3 The Panel has already ruled that
4 California law applies, so I am going to stick with
5 California law.

6 Under California law, the fact that a
7 document exists, that's not privileged. The fact
8 that a lawyer gives the document to the client,
9 that is privileged because the lawyer is making a
10 determination of what materials to provide to the
11 client, and that is privileged.

12 So I agree with Mr. Litwin to the extent
13 that a document itself, the very existence of the
14 fact that a letter was sent, that's not a
15 privileged fact. I haven't argued that it was, but
16 the transmission by the lawyer to the client is
17 privileged. There are many cases in California
18 that agree with that concept.

19 MR. LITWIN: Mr. Chairman, if I might, I
20 am really at the end of these questions, so I think
21 we are having a debate over an academic point. But
22 if the Panel would like to hear further on this, I
23 would be happy to submit something in writing so we
24 do not take up any more of Mr. Disspain's time.

25 ARBITRATOR BIENVENU: So would you like,

1 then, to withdraw your question and move on to the
2 next topic?

3 MR. LITWIN: Yes, Mr. Chairman.

4 ARBITRATOR BIENVENU: Thank you.

5 Q. BY MR. LITWIN: Mr. Disspain, you stated
6 in your witness statement that on November 3rd the
7 Board, quote, "Chose not to take any action at that
8 time," close quote, concerning .WEB.

9 Did the Board take a vote on November 3rd?

10 A. No.

11 Q. Was a straw poll taken?

12 A. Not that I can recall.

13 Q. Was there a show of hands?

14 A. Not that I can recall.

15 Q. Was there a call of ayes and nays?

16 A. No, again, not that I can recall. It was
17 a decision to -- a choice, if you will, to do what
18 we would usually do, normally do with a
19 longstanding practice of not interfering when there
20 was an outstanding accountability mechanism.

21 Q. I will represent to you, Mr. Disspain,
22 that ICANN has stated at oral argument in this IRP
23 that the Board, quote, "decided to defer" --

24 A. But it wasn't a vote or a straw poll.

25 ARBITRATOR BIENVENU: Mr. Litwin, I think

1 you hadn't completed your question.

2 MR. LITWIN: To clear up the record, why
3 don't I ask my question again.

4 Q. So as I was saying, Mr. Disspain, at oral
5 argument ICANN's counsel represented that during
6 the November 3rd meeting, the Board, and I quote,
7 "decided to defer," end quote, "consideration of
8 Afiliast's complaints regarding the resolution of
9 the .WEB contention set."

10 Would you agree with that statement that
11 the Board took a, quote, "decision to defer"?

12 A. We decided that it was -- there were
13 outstanding accountability mechanisms.

14 ARBITRATOR BIENVENU: I'm sorry to
15 interrupt you. There was a break in the
16 communication, so we did not hear the beginning of
17 your question. Could I ask you to start again at
18 the very beginning of your answer?

19 THE WITNESS: The beginning of my answer.
20 I will do my best.

21 The Board discussed the briefing and it
22 decided that -- we had agreed that we would
23 continue the longstanding practice of not doing
24 anything where there is an outstanding
25 accountability mechanism.

1 I don't recall if there was a specific
2 agreement to not to deal with Afiliias' issues. It
3 was more -- my recollection, it was more it is not
4 appropriate for us to be doing anything in respect
5 to this because there are accountability --

6 (Discussion off the record.)

7 THE WITNESS: -- and our variable
8 practices.

9 MR. LeVEE: Mr. Disspain -- go ahead,
10 Mr. Chairman.

11 THE WITNESS: Would it be helpful if I
12 disconnect and reconnect? Would that be helpful?

13 ARBITRATOR KESSEDJIAN: Yes.

14 THE WITNESS: Shall I just do that?

15 ARBITRATOR KESSEDJIAN: Mr. Disspain,
16 Catherine Kessedjian, make sure you are close to
17 your Wi-Fi connection.

18 THE WITNESS: Close to my Wi-Fi
19 connection. Thank you. I will disconnect and
20 reconnect now.

21 ARBITRATOR BIENVENU: Yeah, okay.

22 (Whereupon a recess was taken.)

23 ARBITRATOR BIENVENU: You are back with
24 us. So let's -- do you have a live feed of the
25 transcript? Mr. Litwin, do you know where we left

1 off?

2 THE WITNESS: I do. I think --

3 ARBITRATOR BIENVENU: I think you should
4 repeat your question.

5 And, Mr. Disspain, you are going to have
6 to repeat your answer, I'm afraid.

7 THE WITNESS: Not a problem.

8 Q. BY MR. LITWIN: Just to summarize,
9 Mr. Disspain, because I think you generally do
10 recall what my question was, was -- would you agree
11 with ICANN's counsel's statement that the Board
12 took a, quote, "decision to defer," end quote,
13 during the November 3rd workshop session?

14 A. So what I said to you in response to that
15 question is I think the Board made a choice to
16 follow its longstanding practice of not doing
17 anything when there is an outstanding
18 accountability mechanism.

19 I cannot say that the Board proactively
20 decided, proactively agreed, proactively chose to
21 as to put to do -- as to do it as you put it, which
22 is to not pursue Afilias' complaints.

23 We just decided that it was our standard
24 practice not to do anything because there were
25 outstanding accountability mechanisms.

1 Q. So when you say that the Board did not
2 proactively decide, is it fair to say you received
3 a brief from legal counsel, questions were asked of
4 legal counsel, responses to those questions were
5 given, and then you moved on to the next item on
6 the agenda?

7 A. Yeah, it wasn't before us for a
8 decision -- for a formal decision unless we had
9 chosen to move to a formal decision.

10 What we chose to do was to follow our
11 longstanding practice.

12 MR. LITWIN: Excuse me for one second,
13 please.

14 (Whereupon a recess was taken.)

15 Q. BY MR. LITWIN: So, Mr. Disspain, I think
16 you testified earlier that certain members of staff
17 were present during the November 3rd workshop where
18 the .WEB issues were discussed, correct?

19 A. Correct, yes, that's correct.

20 Q. And that included Mr. Atallah?

21 A. That's my recollection.

22 Q. So Mr. Atallah, at the least, would have
23 heard the conversation and heard the questions that
24 were asked of legal counsel and the responses that
25 were given, correct?

1 A. Yes. If my recollection is correct and he
2 was in the room, then yes, he would have heard.

3 Q. The ICANN bylaws require that ICANN must
4 make, quote, "any action taken by the Board
5 publicly available within seven business days of
6 the conclusion of each meeting."

7 Are you aware of that, sir?

8 A. Yes, I am aware of what you just said,
9 yes.

10 Q. And that if the Board determines not to
11 disclose any action, that the Board must disclose
12 the reasons for that disclosure; is that also
13 correct?

14 A. That sounds right.

15 Q. Are you aware that Afilias sent a DIDP --
16 again, that's D-I-D-P for the court reporter -- a
17 DIDP request to ICANN in early 2018 demanding that
18 ICANN disclose the status of its .WEB investigation
19 and the .WEB contention set; are you aware of that?

20 A. I am aware there was a DIDP question from
21 Afilias, and I think that's the one you're
22 referring to, yes.

23 Q. Are you aware, in response to ICANN's
24 response to that DIDP request, Afilias filed a
25 reconsideration request?

1 A. Yep.

2 Q. Are you aware that ICANN, in its response
3 to the DIDP request, did not disclose anything
4 about the November 3rd workshop?

5 A. Yes, I think I would have been aware of
6 that at the time. At the time the reconsideration
7 request came in, I would have been aware of that,
8 yes.

9 Q. Are you aware that the Board denied
10 Afiliias' --

11 A. Yes.

12 Q. -- reconsideration request?

13 A. Yes.

14 Q. You state in your -- yes?

15 ARBITRATOR BIENVENU: Excuse me. The
16 Chair here. I am sorry to break your flow.

17 Could you, for my benefit, recall what
18 precisely was being sought by the DIDP and what was
19 the decision and then what precisely was being
20 sought by the reconsideration request?

21 MR. LITWIN: Mr. Chairman, I do not have
22 those documents in front of me, but I believe we
23 will have time that my team can compile those so we
24 can put those on the screen when I complete my
25 questions. Would that be acceptable, Mr. Chairman?

1 ARBITRATOR BIENVENU: Yeah, I don't need
2 to see the documents. I just need to have an
3 understanding exactly of what was being sought at
4 each step and what decision was at each step.

5 But if it takes too long to summarize it,
6 let's defer it.

7 MR. LITWIN: I just don't want to
8 misrepresent anything, Mr. Chairman. I would
9 prefer to take that later on in the examination, if
10 I might.

11 ARBITRATOR BIENVENU: That's fine. Please
12 proceed.

13 Q. BY MR. LITWIN: Mr. Disspain, you state in
14 your witness statement that it did not seem prudent
15 for the Board to interfere or preempt issues that
16 were the subject of accountability mechanisms
17 concerning .WEB; is that right?

18 A. Yes, that's correct.

19 Q. Now, as of November 3rd, 2016, Donuts had
20 filed a CEP concerning .WEB; is that correct?

21 A. Yes.

22 Q. And the claims at issue in the CEP had
23 also been brought in court as part of Ruby Glen's
24 litigation against ICANN; is that correct?

25 A. If you say so. I can't confirm that

1 personally.

2 Q. Is it your understanding that the claims
3 that were at issue, at least in the CEP, concerned
4 the conduct of ICANN's preauction investigation of
5 NDC?

6 A. I haven't looked at that for some time.
7 That sounds right, but I can't remember exactly. I
8 just know that there was an outstanding CEP and
9 that, therefore, waiting for that or any others
10 would be a prudent way to deal with the matter.

11 Q. Now, other than the Donuts CEP, as of
12 November 3rd, 2016, there were no other
13 accountability mechanisms pending concerning .WEB,
14 correct?

15 A. Not that I can recall, no, I don't believe
16 so.

17 Q. You state in your witness statement that
18 the Board also considered that there might be
19 future accountability mechanisms brought concerning
20 .WEB, correct?

21 A. That's correct.

22 Q. So there could be more CEPs, right?

23 A. There could be more CEPs. There could be
24 reconsideration requests. There could be DIDP
25 requests. There could be other considerations,

1 yes.

2 Q. Is a DIDP request an accountability
3 mechanism?

4 A. Probably not. Fair enough. It would be a
5 reconsideration request or a CEP.

6 Q. Or an IRP?

7 A. Or an IRP as an accountability mechanism,
8 that's correct.

9 Q. Now, if an IRP was brought, the bylaws
10 strongly encouraged and were designed to strongly
11 encourage complainants to bring a CEP before an
12 IRP, right?

13 A. Correct.

14 Q. Now, the purpose of a CEP is to narrow
15 claims in advance of filing an IRP; is that right?

16 A. Yeah, but I think it is also -- yes, but
17 in the main, it is also about getting the parties
18 together to discuss things and see if we can avoid
19 an IRP, if possible. But yes, you're right. The
20 purpose is to do exactly what you just said.

21 Q. I guess if everybody agrees you have
22 narrowed the claims completely and everybody can go
23 home happy, right?

24 A. Correct.

25 Q. So if ICANN determines if it agreed with

1 the claimant on any issue, that would help narrow
2 the claims in dispute in advance of filing an IRP,
3 right?

4 A. If they agreed. If the claimant and ICANN
5 agreed on something, absolutely it would.

6 Q. And if the ICANN --

7 A. By the way, if the claimant agreed with
8 ICANN or ICANN agreed with the claimant,
9 absolutely.

10 Q. Point taken. And if the ICANN Board
11 determined that it agreed with the claimant on any
12 issue, that would also help to narrow the claims in
13 dispute in advance of filing an IRP, right?

14 A. It would except for the fact that the
15 Board hasn't involved itself and didn't involve
16 itself in CEPs. The Board -- CEP is an
17 accountability mechanism. The accountability
18 mechanism takes place -- that particular
19 accountability mechanism takes place between ICANN
20 and the claimant, and so the Board wouldn't get
21 involved at all in that respect.

22 Q. Wouldn't it be consistent with the CEP for
23 the ICANN Board, if it had the opportunity to do
24 so, to consider the merits of a claim presented to
25 ICANN during CEP?

1 A. It never has. As far as I am aware, it
2 never has.

3 Q. You state in your witness statement that
4 you recall that once there were no pending
5 accountability mechanisms in June of 2018, that
6 ICANN staff changed the status of the .WEB
7 contention set from "on hold" to "resolved" and
8 NDC's status from "on hold" to "in contracting"; is
9 that right?

10 A. Yes.

11 Q. And Afilias' status had changed at the
12 same time from "on hold" to "will not proceed"; is
13 that also correct?

14 A. If you say so. I think that's a natural
15 corollary from the move that you previously laid
16 out, so yes.

17 Q. So just -- it would be ICANN's general
18 practice that if one member of a contention set's
19 status had changed to "in contracting," the other
20 members of the contention set would move to "will
21 not proceed," correct?

22 A. That sounds right.

23 Q. Are you aware that those changes were made
24 the very day after Afilias' reconsideration request
25 was denied?

1 A. No. I mean, I am aware they were made. I
2 wasn't -- I was aware -- not -- in contrast of the
3 fact it was the very day after.

4 Q. The ICANN Board did not meet to consider
5 the merits of Afilias' complaints during the
6 resolution -- regarding the resolution of the .WEB
7 contention set in June of 2018 after those
8 accountability mechanisms had expired, did it?

9 A. I don't think so. Again, you need to run
10 that past me one more time. Are you asking me that
11 we didn't meet to discuss what, Afilias'
12 complaints?

13 Q. Yes. So on November 3rd you stated that
14 the Board had --

15 A. Yes.

16 Q. -- chosen not to discuss any of the issues
17 regarding .WEB until all accountability mechanisms
18 had expired?

19 You write in your witness statement that
20 they had expired in June of 2018 --

21 A. Correct.

22 Q. -- and now my question is: Did the Board
23 meet in June of 2018, after those accountability
24 mechanisms had expired, to discuss those issues
25 regarding the .WEB?

1 A. That's a slightly different question. Yes
2 is the answer, the Boards did meet. Certainly the
3 Board Accountability Mechanisms Committee met. It
4 may have been that there were -- my recollection
5 would be that there were other Board members
6 present.

7 But originally you asked me specifically
8 to discuss Afilias' complaints, I think, and
9 that's -- I wouldn't say that. What I would say is
10 that we met -- we were briefed that after the
11 contract came off hold that that is what had
12 occurred, and, in fact, the Board Accountability
13 Mechanisms Committee was briefed prior to it coming
14 off hold, that the next step -- the next step in
15 the process would be that it would come off hold.

16 And it was also briefed that Afilias had
17 written letters, maybe a letter, I can't remember,
18 one or more than one, to say that if that happened,
19 if it came off hold, Afilias was going to launch an
20 accountability mechanism. I can't remember if it
21 says an IRP or not, but launch an accountability
22 mechanism. The BAMC was aware of that.

23 Q. Did the BAMC discuss the substance of
24 Afilias' complaints about how the resolution of the
25 .WEB set had occurred?

1 A. No.

2 Q. Did the Board during June of 2018 discuss
3 the merits of Afiliias' complaints regarding the
4 resolution of the .WEB contention set?

5 A. No.

6 Q. So, Mr. Disspain, as it turns out, this
7 was not the only period where there was no
8 accountability mechanism pending concerning .WEB.
9 I will represent to you that the Donuts CEP that we
10 discussed earlier terminated on January 30th of
11 2018 and that Donuts was given until February 14 of
12 2018 to file an IRP.

13 Are you aware of that?

14 A. That sounds right.

15 Q. And are you also aware that Donuts did
16 not, in fact, file an IRP by February 14?

17 A. Yes, I am aware of that.

18 Q. And Afiliias filed its first
19 reconsideration request on April 23rd, 2018.

20 Are you aware of that?

21 A. I am, indeed.

22 Q. So during the period when there was no
23 accountability mechanisms pending, the ICANN Board
24 held workshop sessions on March 9th and 11th.

25 Did the Board take up the merits of

1 Afilias' .WEB complaints during those workshops?

2 A. No.

3 Q. And on March 15th the Board held a regular
4 meeting, and by "regular meeting," I mean the
5 formal meeting that's called the regular meeting
6 that's set forth in ICANN's bylaws.

7 Did the Board consider the merits of
8 Afilias' .WEB complaints during the March 15
9 meeting?

10 A. No. The Board has, to my recollection,
11 not considered the merits of Afilias' complaint.

12 MR. LITWIN: Mr. Chairman, at this time I
13 would request that we would take our recess. I
14 realize it is a bit early, but I am coming towards
15 the end, and I would like to confer with my team
16 and also respond to your question about the
17 reconsideration requests.

18 ARBITRATOR BIENVENU: Surely. We will
19 take our 15-minute recess.

20 Mr. Disspain, you are not to discuss your
21 evidence with anyone during the break.

22 THE WITNESS: I shall not do so,
23 Mr. Chairman. Thank you very much. I will,
24 however, be leaving the camera. I believe the
25 expression is to take a comfort break.

1 ARBITRATOR BIENVENU: That's fine. Thank
2 you, Mr. Disspain.

3 MR. LITWIN: Thank you, Mr. Disspain.

4 THE WITNESS: Thank you.

5 (Whereupon a recess was taken.)

6 ARBITRATOR BIENVENU: Mr. Litwin, do you
7 wish to continue your cross-examination?

8 MR. LITWIN: I do, Mr. Chairman. Thank
9 you.

10 Chuck, if you could bring up Exhibit C-78,
11 please.

12 MR. VAUGHAN: Is this in the binder?

13 MR. LITWIN: This is not in the binder.

14 This is in response to the question the Chairman
15 asked of me earlier. I just wanted to have this up
16 to walk Mr. Disspain through it.

17 Q. Mr. Disspain, I will represent to you that
18 this is a letter that my colleague, Arif Ali, sent
19 to the Board of ICANN regarding a request for
20 update on ICANN's investigation of the .WEB
21 contention set and containing also a request for
22 documents pursuant to the DIDP.

23 So, Chuck, could we look at the top of
24 Page 2, please.

25 MR. LeVEE: Can I ask, Ethan, that you

1 just thumb through the whole thing so we can see
2 how long it is?

3 MR. LITWIN: Of course. It is a five-page
4 letter.

5 Chuck, if you could just scroll briefly
6 through all five pages, please.

7 Now, if you could go back to Page 2. If
8 you could just blow up the first -- the bullet and
9 the heading, rather, in the first two paragraphs --
10 three paragraphs. I'm sorry. That will be
11 easiest, yes.

12 Q. You will see, Mr. Disspain, this is
13 entitled "Request for Update on ICANN's
14 Investigation of .WEB Contention Set."

15 Do you see that, sir?

16 A. I do.

17 Q. Mr. Ali writes, "Therefore, pursuant to
18 ICANN's transparency obligations, we respectfully
19 request that ICANN provide an update on the status
20 of ICANN's investigation of the .WEB contention
21 set, including: (1) the steps (if any) taken by
22 ICANN to disqualify NDC's bid on the basis that NDC
23 violated the rules applicable to its application;
24 and (2) the steps (if any) taken by ICANN to assess
25 competition issues arising out of delegation of

1 .WEB to VeriSign."

2 Do you see that, sir?

3 A. I do.

4 Q. And turn to the next page. And if you
5 could just highlight the Point Heading II, Chuck.

6 This says, "Request for Documents Pursuant
7 to the DIDP," and you understand, Mr. Disspain,
8 that refers to the document information -- now I
9 can't remember. What is DIDP? Document
10 Information Disclosure Policy?

11 A. Yes.

12 Q. Yes. If we could turn to the next page,
13 Page 4 of the February 23rd, 2018, letter, Mr. Ali
14 requests the disclosure of, No. 6, "All documents
15 concerning any investigation or discussion related
16 to the .WEB contention set."

17 Do you see that, sir?

18 A. I do.

19 Q. So this DIDP request was sent on February
20 23rd of 2018.

21 Are you aware that ICANN responded to it
22 on March 24th?

23 A. I am aware that ICANN responded to it. I
24 have no idea what the date was.

25 Q. Are you aware that ICANN did not disclose

1 documents pursuant to this request?

2 A. Yes, I am.

3 Q. Are you aware that ICANN did not provide a
4 status update as requested pursuant to Point
5 Heading I?

6 A. Not specifically. I am aware that there
7 was a reconsideration request in respect to the
8 DIDP request, so matters that were part of that
9 reconsideration request, I would have been aware of
10 it at the time we were considering the
11 reconsideration request.

12 Q. I am just going to take you through the
13 timeline, Mr. Disspain.

14 On April 23rd, are you aware that Afiliias
15 filed a reconsideration request regarding the
16 denial of the DIDP request that had been sent in
17 February of 2018?

18 A. Again, I am aware they filed a
19 reconsideration request. I take your word for it
20 that it was on that date.

21 Q. And are you aware that also on April 23rd
22 Afiliias filed a second DIDP request requesting, in
23 sum and substance, the same information as in
24 February 23rd?

25 A. I do recall there was a -- I do recall

1 that there was a second DIDP request, yes.

2 Q. Now, on May 23rd, are you aware that ICANN
3 responded to this second DIDP request?

4 A. If you're asking me about the date, no.
5 If you're asking am I aware they responded, yes.

6 Q. And are you aware that they received the
7 same answer, which is essentially nothing?

8 A. Yes, I believe that that's correct.

9 Q. And then on June 5th, are you aware that
10 Afiliias' reconsideration request that had been
11 filed on April 23rd was considered within the BAMC?

12 A. So I am. Again, if you say it was on June
13 the 5th, I will accept that. I am aware of that.
14 I have a memory of that discussion, yes.

15 Q. And I believe it was your testimony from
16 earlier today that the BAMC recommended that
17 Afiliias' reconsideration request be denied; is that
18 a fair statement?

19 A. It is a little difficult to remember with
20 it, because there were two, but yes, I believe that
21 that's correct, we did, indeed.

22 Q. And are you aware that the -- that
23 Afiliias' reconsideration request was never
24 presented to the full Board?

25 A. I believe that under the bylaws at that

1 time, that's correct, yes.

2 MR. LITWIN: Mr. Chairman, does that
3 clarify your questions about the timeline and what
4 was requested under Afilias' DIDP request and
5 reconsideration requests?

6 ARBITRATOR BIENVENU: Yes, it does. Thank
7 you very much. All of these correspondence are in
8 the file, are in the record?

9 MR. LITWIN: They are, Mr. Chairman.

10 ARBITRATOR BIENVENU: Thank you very much.

11 Q. BY MR. LITWIN: Mr. Disspain, you
12 testified earlier today that ICANN and the ICANN
13 Board has a policy of not considering the merits of
14 complaints that are subject to outstanding
15 accountability mechanisms; is that correct?

16 A. No. I said that we had a longstanding
17 practice. And I'm sorry to be picky, but the term
18 "policy" in the context of ICANN has a different
19 meaning.

20 Q. And what is the difference between
21 practice and policy, in your mind, as a Board
22 member?

23 A. Well, policy is -- a policy in the ICANN
24 context is the policy that is set by the supporting
25 organizations for dealing with -- in the case of a

1 gTLD, the GNSO in the case of country codes and
2 ccNSO.

3 I didn't say "policy." I said "practice."
4 I don't use the word "policy" because that has a
5 different meaning to me.

6 Q. So the Board has certain practices that it
7 observes in its functioning; is that fair to say?

8 A. Yes. If you're implying that there's a
9 list of them somewhere, no. But there are things
10 that we have generally done over time, and our
11 practice has -- was in respect to new gTLDs, very
12 specifically, to avoid stepping in where there are
13 outstanding accountability mechanisms running.

14 Q. Is that practice documented anywhere?

15 A. Not -- I couldn't say, don't know.

16 Q. Is it in the bylaws, for example?

17 A. Not as far as I'm aware.

18 Q. Is there a document on ICANN's website
19 that reveals that practice?

20 A. Not as far as I'm aware, but it may be
21 that there are documents on the website that reveal
22 discussions that will reveal rationale. There may
23 be mentions in rationales and resolutions that say,
24 "In accordance with ICANN's longstanding practice."
25 They may appear in "whereas" clauses to

1 resolutions, you know, "whereas there was an
2 accountability mechanism outstanding." I don't
3 know. I can't say.

4 Q. So is it fair to say if I were to -- let
5 me just ask you, sir, just to bottom this out --

6 A. Sure.

7 Q. -- can you direct me to any resolution or
8 rationale that discloses this practice?

9 A. No. But I can direct you to numerous
10 occasions where -- there have been a number of
11 occasions where the Board has not done anything
12 because there have been accountability mechanisms
13 running. It's just our practice.

14 Q. Were those examples -- well, strike that.
15 Can you give me another example of when
16 the Board has not intervened because of an
17 outstanding accountability mechanism.

18 A. Not off the top of my head, and I wouldn't
19 do that without going away and doing some research,
20 but I can assure you they exist.

21 Q. So it's fair to say, sitting here today,
22 you could not direct me to any minutes or
23 transcripts of a Board meeting where that practice
24 was disclosed?

25 A. It would be fair to say that I cannot

1 direct you there today, but I can confirm that it
2 is a longstanding practice.

3 Q. Now, the practice, as you say, was
4 exercised during the November 3rd workshop session.
5 There was no transcript posted from that workshop,
6 correct?

7 A. No, there wasn't, and the discussion was
8 privileged, in any event.

9 Q. So is it fair to say that where this
10 practice had arisen previously was likely to be in
11 the context of a privileged discussion with
12 counsel?

13 A. It's possible. It's equally possible that
14 it could have been disclosed, as I said, as part of
15 a formal resolution as a parse action in a
16 "whereas" clause. I don't know.

17 So I don't think you can draw that
18 conclusion. I think you can say that it's --
19 either way is possible. I can only comment on this
20 particular occasion and tell you that it was
21 privileged.

22 Q. Okay. ICANN has collected hundreds of
23 millions of dollars in fees and auction proceeds as
24 a consequence of its administration of the new gTLD
25 Program; is that correct?

1 A. Yes, that's correct.

2 Q. In fact, just looking at auction proceeds,
3 ICANN has collected net revenues of approximately
4 \$240 million; is that correct?

5 A. That's about right.

6 Q. So if my math is correct, the .WEB auction
7 brought in somewhere north of 50 percent of that
8 \$240 million; is that fair to say?

9 A. If your math is correct, then yes, that is
10 correct.

11 Q. Now, ICANN represented to the community
12 that it would hold the auction proceeds in a fully
13 segregated bank and investment account earmarked
14 for use in a community-developed plan, correct?

15 A. You are going to have to tell me where we
16 represented that, because I don't recall that term.
17 I am not saying that -- I am not saying that -- I'm
18 saying that I don't remember us saying we would put
19 it in an entirely separate bank account, et cetera,
20 et cetera, et cetera. I don't remember any of
21 that.

22 Q. Okay. Are you aware that there is a CCWG,
23 a Cross Community Working Group, that was formed to
24 discuss the final plan for use of the funds; is
25 that correct?

1 A. I am aware of that, yes.

2 Q. Are you aware that they have yet to
3 develop a final plan for the use of those funds?

4 A. They have developed a number of proposals,
5 but the plan is as of yet still forming. We
6 anticipate we will be sending a report through to
7 the Board relatively soon.

8 Q. Since VeriSign paid the \$135 million
9 winning bid to ICANN, that money has earned
10 interest; is that fair to say?

11 A. Yes, I believe so. I wouldn't have any of
12 the details.

13 Q. Is it fair to say that ICANN has, in fact,
14 earned over \$10 million in interest on the auction
15 funds that it is holding in its bank in investment
16 accounts?

17 A. I have no idea. I could find out, but I
18 don't know.

19 Q. In the event that ICANN is required to
20 refund part or all of the \$135 million to VeriSign,
21 would it need to pay interest on that?

22 A. I don't know.

23 Q. If it is required to pay interest, would
24 it be a fair estimate to say that it is a
25 proportion relative to the overall value of the

1 \$135 million, as opposed to the full corpus that's
2 in that account?

3 A. I don't understand the question.

4 MR. LeVEE: Okay.

5 MR. LITWIN: I will rephrase. That was a
6 terrible question.

7 Q. Mr. Disspain, assuming my math is correct
8 and the \$135 million winning bid that was paid on
9 .WEB represents more than 50 percent of the corpus
10 of that investment account where the auction
11 proceeds are held --

12 A. Yes.

13 Q. -- is it fair to say that if ICANN is
14 required to refund that winning bid payment to
15 VeriSign and it had to pay interest on that, that a
16 reasonable estimate would be somewhere over 50
17 percent of the interest earned to date on that
18 account?

19 A. Well, there are so many ifs in that
20 question it is not helping me to answer it. I
21 don't know.

22 If you're saying -- I mean, if you're
23 asking me if you took the full amount of the money
24 and you got paid 1 percent interest on it and if
25 ICANN was refunding that money to VeriSign and it

1 was required to refund the portion of the interest,
2 then obviously it seems to me logical to say that
3 the 1 percent on that money would be paid. But I
4 don't know for sure, and I have no idea what the
5 actual arrangements are off the top of my head.

6 Q. Is it true that ICANN has already moved
7 \$36 million out of this account that holds the
8 auction proceeds and moved it into ICANN's reserve
9 fund?

10 A. It is correct that ICANN has repaid the
11 reserve fund with the amount of money calculated to
12 have been the cost of the gTLD Program, but that
13 is -- if you say that's 36 million, again, I'll
14 take your word for it. Off the top of my head, I
15 can't remember the exact amount. But yes, that is
16 correct, the amount, the costs of the new gTLD
17 Program have been refunded.

18 Q. And a reserve fund is used to pay
19 operating expenses when a company runs a deficit;
20 is that right?

21 A. Well, we could get into an extraordinarily
22 long discussion about what reserve funds are for
23 and whether it is a reserve fund and/or a
24 contingency fund, whether it should be the amount
25 of money to pay to wind down an organization in the

1 event that it's being wound up, et cetera, et
2 cetera. So I would prefer not to provide a
3 cast-iron definition of what a reserve fund is for.
4 It is entirely dependent on the organization
5 itself.

6 And ICANN has dipped into the reserve fund
7 on occasions and has a policy -- the Board has an
8 agreement, rather, to try to increase the amount of
9 the reserve fund to a reasonable amount. I can't
10 remember the exact number off the top of my head.

11 Q. When you say that ICANN has dipped into
12 the reserve fund, that is from time to time to pay
13 operating expenses, correct?

14 A. It pays some of the New gTLD expenses out
15 of its reserve funds, so yes. If you want to
16 characterize that as operating expenses, yes,
17 that's correct.

18 MR. LITWIN: Chuck, can you pull up Module
19 4 of the AGB, please, the applicant guidebook, and
20 I would refer your direction to Page 4-19.

21 ARBITRATOR BIENVENU: Is that in the
22 witness binder, Mr. Litwin?

23 MR. LITWIN: I am going to check, but I
24 don't believe it is.

25 ARBITRATOR BIENVENU: Okay. That's fine.

1 We will look at it on the screen.

2 MR. LITWIN: Oh, it is. It is Tab 6.

3 THE WITNESS: My strong advice is to tell
4 me to look at it on the screen instead of the
5 binder.

6 MR. LITWIN: Yeah, I think we have --
7 Chuck, I need Module 4, not Module 6. I think it
8 is Exhibit 314, if that helps. Okay. This is not
9 what I asked for.

10 Mr. Chairman, I am just going to go off
11 the record, but I think I am done with the witness.
12 May I have two minutes?

13 MR. ALI: Wait a second. You are not done
14 with the witness, Ethan. Why don't you and I just
15 have a chat first.

16 MR. LITWIN: Yeah, that's fine. That's
17 what I was going to say.

18 ARBITRATOR BIENVENU: Okay. So let's
19 pause for a few minutes to give counsel for the
20 claimant an opportunity to consult.

21 THE WITNESS: Mr. Chairman, are you okay
22 if I disappear briefly?

23 ARBITRATOR BIENVENU: I think you will be
24 made to disappear, but you may disappear.

25 THE WITNESS: Thank you so much. I

1 appreciate it.

2 (Whereupon a recess was taken.)

3 ARBITRATOR BIENVENU: All right. We are
4 ready to resume.

5 Mr. Disspain, I believe Mr. Litwin has
6 more questions for you.

7 Q. BY MR. LITWIN: Mr. Disspain, thank you
8 very much. I have just a couple of questions for
9 you.

10 Earlier, a few minutes ago, I represented
11 to you that ICANN had represented to the community
12 that it would hold the auction proceeds in a fully
13 segregated bank account, investment account
14 earmarked for community use.

15 I'd like to direct your attention to
16 Module 4 of the guidebook. This is Exhibit C-3.

17 Do you see that, sir, on your screen?

18 Mr. Disspain, I'll ask you again, do you
19 see Module 4 of the guidebook up on your screen
20 there?

21 A. Yes, I do.

22 Q. If we could turn to Page 4-19 of the
23 guidebook, which I understand is on Page 203 of the
24 PDF, and on that page, if you can bring up that
25 footnote on the bottom, please, you will see in

1 that second paragraph that the guidebook says that,
2 "Any proceeds from auctions will be reserved and
3 earmarked until the uses of funds are determined."

4 And then it says -- I am trying to find
5 where it says this -- that, "Possible uses of
6 auction funds include formation of a foundation
7 with a clear mission and transparent way to
8 allocate funds to projects that are of interest to
9 the greater Internet community."

10 Do you see that?

11 A. I do. That's what the working group is
12 currently working on, yes.

13 Q. And if you can -- if I could now call up
14 Exhibit 314, which are the Board resolutions.

15 MR. LeVEE: Is that in the binder?

16 MR. LITWIN: It is not.

17 Q. So these are -- if we could turn to Page
18 45, please.

19 MR. LeVEE: Ethan, if you would give me a
20 second with the exhibits. You are faster than I am
21 at putting them up, and I have to get copies.

22 MR. LITWIN: I understand that. Please
23 let me know when you're ready, Jeff.

24 MR. LeVEE: Thank you. Is it C-314?

25 MR. LITWIN: It is -- I believe it is. My

1 team has told me it is 314.

2 MR. LeVEE: Okay. I have got it. Thank
3 you. For the record, it is C-314, I believe.

4 Q. BY MR. LITWIN: Can we blow up Page 45,
5 please?

6 A. What is it I am actually looking at?

7 Q. These are the Board resolutions from
8 October 25th, 2018.

9 Chuck, can you just blow up that page?
10 I'm sorry, I apologize.

11 Arif, if you have anything on this, let me
12 know, but I'm sorry, I don't see the quote.

13 MR. ALI: Just one second, please.

14 ARBITRATOR KESSEDJIAN: I don't see the
15 Chair of the Tribunal anymore.

16 ARBITRATOR BIENVENU: I have lost my
17 connection, but I can still see the proceedings
18 using our administrative secretary's screen. I am
19 in the process of reconnecting.

20 ARBITRATOR KESSEDJIAN: Okay. You'll have
21 the time to find out what you want to show us.

22 (Discussion off the record.)

23 MR. LITWIN: Mr. Chairman, I would just
24 ask that, given that I cannot find what my team is
25 trying to refer to me, that perhaps Mr. Ali could

1 ask whatever question he is asking me to ask the
2 witness, just to be more efficient, given the time
3 limits.

4 ARBITRATOR BIENVENU: Mr. LeVee, any
5 objection to that?

6 MR. LeVEE: If it is one or two questions,
7 I have no objection to that.

8 ARBITRATOR BIENVENU: Mr. Ali, good
9 afternoon to you, and please proceed.

10 MR. De GRAMONT: Mr. Chairman, this is
11 Mr. De Gramont. Mr. Ali is just trying to find the
12 relevant page. This is one of the challenges of
13 having everybody spread out in different places,
14 and the associate who knows the documents best is
15 at home in Pennsylvania.

16 So if you'll just bear with us for another
17 minute, we'll be right back. Thank you.

18 ARBITRATOR BIENVENU: Thank you.

19 (Whereupon a recess was taken.)

20 MR. LeVEE: I wonder if the Panel has
21 questions. They could begin, conscious of the
22 time.

23 ARBITRATOR BIENVENU: Does that foreshadow
24 the length of your redirect, Mr. LeVee?

25 MR. LeVEE: It is only because I do not

1 know how long the members of the Panel will ask
2 questions.

3 ARBITRATOR BIENVENU: I was joking.

4 I think I prefer to wait until the
5 cross-examination is completed.

6 (Whereupon a recess was taken.)

7 ARBITRATOR BIENVENU: Please proceed,
8 Mr. Ali.

9 MR. ALI: Thank you, Mr. Chairman.

10 CROSS-EXAMINATION

11 BY MR. ALI

12 Q. Mr. Disspain, good afternoon. This is
13 Arif Ali here. It's been a long time since we have
14 seen each other.

15 A. It has, indeed.

16 Q. At the bottom of Page 66, you see that
17 language that says "Resolved"?

18 A. Yeah.

19 Q. "The Board directs the president and CEO,
20 or his designee(s)"?

21 A. Yep.

22 Q. Then we go to the top of the next page,
23 "to take all actions necessary to increase the
24 Reserve Fund through annual excesses from the
25 operating fund of ICANN organization by a total

1 amount of 32 million over a period of seven to
2 eight years starting with fiscal year 2019."

3 So my question is: If that money -- those
4 are moneys that are coming from the auction fund;
5 is that correct?

6 A. No. That's a resolution to direct the
7 president and CEO to take all actions necessary to
8 increase the reserve fund through annual excesses
9 from the operating fund by 32 million over a period
10 of seven to eight years. If they were to take
11 funds from the auction proceeds fund, then it would
12 be able to come out in one go and it would say
13 "auction proceeds funds" rather than "operating
14 fund."

15 Q. All right. Then let's continue down
16 below.

17 A. Yep. That's the resolution that deals
18 with the repayment of the costs of the -- of the
19 new gTLD Program, I believe.

20 Q. So what you're telling us is that no money
21 has been taken from the proceeds of the auctions to
22 fund the reserve fund?

23 A. That is correct. I am telling you that
24 one payment has been made -- well, a payment, I
25 don't know if it was one, but the new gTLD Program

1 was costed to be a cost of 36 million, and the
2 Board resolved that the auction proceeds should --
3 the 36 million should be taken from the auction
4 proceeds.

5 And I believe from memory that that means
6 that the Cross Community Working Group is working
7 on the principle that the funds for .WEB being cast
8 aside to a different category, that there is
9 roughly speaking, ignoring those, roughly speaking,
10 some 80-something to \$3 million left of the
11 proceeds, apart from the .WEB proceeds, and that is
12 the number they are working on, because no one has
13 any idea what will happen to the .WEB proceeds at
14 this stage.

15 And there is a separate resolution above
16 that which has to do with ongoing replenishment of
17 the reserve fund over a period of seven to eight
18 years, which is the Board's decision based on the
19 fact that the Board believes that that should be
20 set at a particular level, and I cannot remember
21 off the top of my head what that level is.

22 Q. None of those moneys from the reserve fund
23 would come from the auction proceeds; that's your
24 testimony?

25 A. Didn't say that. I said that the \$36

1 million from the auction proceeds that you referred
2 to here is repayment to the -- for the new GTLD
3 process -- sorry, new gTLD Program costs.

4 The previous resolution refers very
5 specifically to \$32 million being funded into the
6 reserve fund from annual excesses from the
7 operating fund of ICANN over seven to eight years,
8 which is not the same as the auction proceeds.

9 MR. ALI: Thank you, Mr. Disspain. I have
10 no further questions.

11 ARBITRATOR BIENVENU: Thank you, Mr. Ali.

12 Mr. Litwin, does that complete the
13 cross-examination of Mr. Disspain by the claimant?

14 MR. LITWIN: It does, Mr. Chairman.

15 Mr. Disspain, thank you very much, and I
16 do apologize about the kerfuffle at the end here.

17 THE WITNESS: There is nothing to
18 apologize for except possibly your binder.

19 ARBITRATOR BIENVENU: So do my colleagues
20 have questions for Mr. Disspain, or shall I begin
21 and you have supplementary questions and you go
22 after? What's your preference?

23 ARBITRATOR CHERNICK: Go ahead, Pierre.

24 ARBITRATOR KESSEDJIAN: Yeah, I think
25 that's good if you go ahead.

1 ARBITRATOR BIENVENU: Mr. Disspain, just a
2 couple of questions.

3 Turning your mind back to the November
4 2016 workshop session concerning .WEB, and
5 repeating the caution not to disclose any
6 privileged communication or any privileged advice,
7 do you know whether, as part of the briefing that
8 was provided to the Board at that session, the
9 staff of ICANN or, you know, what I think you
10 referred to as ICANN org had taken a position and
11 that position was conveyed to the Board as to
12 whether the NDC bid complied with the program? Was
13 there an ICANN staff position on this question?

14 THE WITNESS: I think I understand your
15 question, Mr. Chairman.

16 MR. LeVEE: Mr. Chairman, I am really
17 uncomfortable making this objection, but I do think
18 you are asking about the contents of a privileged
19 communication.

20 ARBITRATOR BIENVENU: Because you -- well,
21 I do not want to do so.

22 Basically it is a question I asked
23 Ms. Willett, I believe, what I tried to explore
24 with Ms. Willett, but if you're saying that
25 whatever position ICANN staff would have taken

1 would reflect the advice of counsel, I am prepared
2 to move forward.

3 MR. LeVEE: I am saying that.

4 ARBITRATOR BIENVENU: Okay. Very well.

5 Mr. Disspain -- and forgive me, Mr. LeVee,
6 I really didn't want to elicit privileged
7 communications or advice.

8 MR. LeVEE: Fair enough.

9 ARBITRATOR BIENVENU: Mr. Disspain, did
10 the Board discuss at the November 2016 working
11 session that its decision not to take any action
12 regarding the claims arising from the .WEB auction
13 should not be made public, including should not be
14 communicated to those who were within the
15 contention set? Was that part of the discussion?

16 THE WITNESS: No, I don't believe it was.

17 ARBITRATOR BIENVENU: And you as a Board
18 member, do you know that the decision taken by the
19 Board at that workshop session was only
20 communicated to the claimant as is alleged by the
21 claimant in the course of these proceedings?

22 THE WITNESS: Forgive me, Mr. Chairman. I
23 am not sure I actually understand your question.

24 ARBITRATOR BIENVENU: Let me reformulate
25 it.

1 Are you aware, as you sit here today, that
2 the decision taken by the Board during that
3 workshop was only communicated to Afiliias in the
4 course of the proceedings in this IRP, so just very
5 recently?

6 THE WITNESS: No. I am now aware of that.
7 I wasn't aware of that at the time. I am aware of
8 it because it's been mentioned.

9 ARBITRATOR BIENVENU: At the November 2016
10 session, Mr. Disspain, you were made aware that
11 Afiliias -- and you might have been aware of that
12 from prior correspondence -- was taking the
13 position that NDC's bid, supported as it was by
14 VeriSign through an agreement with NDC, that
15 Afiliias was taking the position that that bid did
16 not comply with the guidebook and the auction
17 rules, correct?

18 THE WITNESS: Yes, I am aware that Afiliias
19 had said that in correspondence.

20 ARBITRATOR BIENVENU: So after the
21 November 2016 working session, you knew as a Board
22 member that the question of whether the bid was
23 compliant or not was a pending question, one on
24 which the Board had not pronounced and had decided
25 not to address in November 2016; is that correct?

1 THE WITNESS: Yes. I was -- I knew that
2 we had not -- that it had not been addressed.
3 Well, no -- yes, you're right. I knew that.

4 ARBITRATOR BIENVENU: Right. And by early
5 2018, the situation as I have just described it,
6 remained unchanged; is that correct?

7 THE WITNESS: Yes.

8 ARBITRATOR BIENVENU: Can you look now at
9 Paragraphs 12 and 13 of your witness statement?

10 THE WITNESS: Yes.

11 ARBITRATOR BIENVENU: And there you refer
12 to the events of the first half of the year 2018?

13 THE WITNESS: Correct.

14 ARBITRATOR BIENVENU: So first you
15 referred to the DOJ announcement in January 2018
16 that it had closed its investigation?

17 THE WITNESS: Correct.

18 ARBITRATOR BIENVENU: Then to the
19 withdrawal by Donuts of its CEP?

20 THE WITNESS: Correct.

21 ARBITRATOR BIENVENU: And then the denial
22 by the Board of Afiliias' reconsideration request
23 regarding its document requests, correct?

24 THE WITNESS: Correct.

25 ARBITRATOR BIENVENU: And then you come to

1 ICANN's decision in June 2018 to change the status
2 of the .WEB contention set and send a draft
3 Registry Agreement for .WEB to NDC?

4 THE WITNESS: Correct.

5 ARBITRATOR BIENVENU: And in Paragraph 13,
6 you mention that this was a decision of ICANN
7 staff.

8 Do you see that?

9 THE WITNESS: I do.

10 ARBITRATOR BIENVENU: Does that mean that
11 the Board was not consulted about this decision?

12 THE WITNESS: Well, it depends on what you
13 mean by the word "consulted." But let me tell you
14 what actually happened. Perhaps that would be
15 helpful.

16 Again, I can't give you dates, but I can
17 tell you that prior to the -- I think I have
18 already said this to Mr. Litwin. Prior to the
19 lifting of the hold on the contention set, the
20 matter was discussed in the Board Accountability
21 Mechanisms Committee, I believe as part of its
22 general litigation update, but I am not certain.

23 In that discussion we were told that the
24 next step in the process was for -- should all of
25 the accountability mechanisms be dealt with, was

1 for it to come off hold, but that Afiliias had made
2 it abundantly clear that in the event that it did
3 come off hold, that they would file an IRP.

4 And we were also clear as a Board
5 committee that Afiliias would be aware that it had
6 come off hold because all of the contention set
7 members would be informed that it had come off
8 hold. So that occurred.

9 And then secondly, a couple days -- again,
10 I don't know exactly, I can't remember exactly
11 when -- after it had actually come off hold, there
12 was another discussion at which we were told that
13 it had come off hold and that an IRP claim from
14 Afiliias was expected -- I am going to paraphrase
15 here -- at any minute, so to speak, because that is
16 what they said they would do.

17 I hope that's helpful and clear.

18 ARBITRATOR BIENVENU: Yes, it is. In
19 fact, it kind of anticipates what was my next
20 question. When you say in the penultimate sentence
21 of Paragraph 13, "Given the letters we had received
22 from Afiliias threatening to take legal action in
23 such circumstances, I fully expected, as did
24 others, that Afiliias would immediately initiate
25 another Accountability Mechanism" --

1 THE WITNESS: Yes.

2 ARBITRATOR BIENVENU: -- so that suggests
3 that you as a Board member actually turned your
4 mind to this issue. And in light of that
5 expectation -- well, I shouldn't say that, but you
6 turned your mind to this, and you anticipated that
7 an IRP would be coming?

8 THE WITNESS: We as a group meeting --
9 again, I'm sorry. I cannot remember. I am fairly
10 sure it was the Board Accountability Mechanisms
11 Committee meeting, but I imagine there would have
12 been other Board members present as well. We were
13 very clear that our understanding was that Afilias
14 had said categorically that they would launch an
15 IRP in the event that the contention set was taken
16 off hold.

17 ARBITRATOR BIENVENU: By ICANN sending a
18 draft Registry Agreement to NDC for execution,
19 would you consider, Mr. Disspain, that ICANN was,
20 in effect, expressing disagreement with those who
21 claimed that NDC's bid was noncompliant and that
22 the auction rules had been breached by NDC because
23 of its agreement with VeriSign?

24 THE WITNESS: No, I don't think so. I
25 think that ICANN was taking the next step in its

1 process. You know, there are two -- without
2 wishing to place any weight on either side in this
3 matter, there are two sides. There are the Afilias
4 side, who are bringing this IRP; and then there are
5 others on the other side who believe that they are
6 entitled to the TLD. So both sides need to be
7 treated fairly by ICANN. The best way for ICANN to
8 do that is to follow its process.

9 To be clear, having been told in no
10 uncertain terms by Afilias that they were intending
11 to lodge an IRP, that is what we expected to
12 happen, and that is exactly what did happen. I
13 don't think you can read into the step, the process
14 step, a motive, if you will, that says we,
15 therefore, believe that this is the right thing to
16 do.

17 ARBITRATOR BIENVENU: Let us assume,
18 Mr. Disspain, that contrary to your and your
19 colleagues's expectations, Afilias had not
20 commenced an IRP, what would have happened then?
21 Would ICANN have executed the Registry Agreement
22 that NDC had promptly signed and returned to ICANN?

23 THE WITNESS: Well, Mr. Chairman, I can't
24 say what would have happened. I can say that the
25 Board would have known that Afilias had not filed

1 an IRP. I can say that the Board -- when I say
2 "the Board," I am mainly talking about the
3 Accountability Mechanisms Committee, but for the
4 purposes of this discussion, it amounts to the same
5 thing, and that the Board would have known that the
6 contract -- or the BAMC had known that the contract
7 had been returned, and I can't say what the Board
8 would have done in those circumstances. But I can
9 say that the Board would have been aware.

10 ARBITRATOR BIENVENU: Are you aware,
11 Mr. Disspain, that in November 2018, after Afilias
12 filed its IRP, ICANN took the position in the
13 context of the IRP that it would only keep the dot
14 contention set on hold until 27 November 2018, so
15 as to give an opportunity to Afilias to file a
16 request for emergency relief, barring which --
17 barring which ICANN would take the contention set
18 off of its on-hold status?

19 THE WITNESS: Yes, I am.

20 ARBITRATOR BIENVENU: You were aware of
21 that?

22 THE WITNESS: And I am aware that this is
23 the practice in respect to IRPs, that the process
24 itself -- it differs slightly from the way that
25 reconsideration requests are dealt with, in that

1 there is a mechanism by which the claimant can
2 bring a -- I think you used the expression
3 "emergency relief claim" to stay the moving
4 forwards. So yes, I am aware of that and that that
5 is the practice.

6 But I am not ICANN's lawyer, and what
7 lawyers instructed, advised us to do, I can't
8 comment.

9 ARBITRATOR BIENVENU: And what I'm
10 interested in asking you, Mr. Disspain, is whether
11 in so doing, ICANN was again taking a position that
12 might have resulted in .WEB being awarded to NDC,
13 delegated to NDC without the Board having the
14 opportunity to determine the question that it chose
15 not to pronounce upon in November 2016, namely
16 whether the bid was compliant?

17 THE WITNESS: So the answer to that
18 question is, again, I need to say I don't know what
19 the Board would have done, but to take the leap to
20 say does ICANN's position in the legal proceedings
21 imply that the delegation would have taken place is
22 a leap -- is not a leap I would take because I
23 don't know what the Board would have done.

24 And it is not -- it is impossible to
25 suggest that the Board would have stepped in, but I

1 don't know. I can't say whether they would or
2 wouldn't. That is purely a hypothetical.

3 ARBITRATOR BIENVENU: Now, I assume that
4 you are aware that in this IRP, as we speak today,
5 ICANN takes no position as to whether NDC's bid
6 violated the guidebook or not, you're aware of
7 that?

8 THE WITNESS: Yes.

9 ARBITRATOR BIENVENU: So the matter, then,
10 comes before -- the matter comes before the IRP
11 Panel, and the Panel doesn't have the benefit of
12 ICANN's view on the -- on whether the bid is
13 compliant or not even though the guidebook emanates
14 from ICANN.

15 You don't think it would have been useful
16 to the Panel to have the view of ICANN as to the
17 reach or the interpretation of the guidebook in
18 relation to an agreement like the DAA?

19 THE WITNESS: Well, I think two things,
20 Mr. Chairman. I think that the Board -- the Board
21 has rigorously stuck to its practice and its
22 processes.

23 And secondly, that the scope of the Panel,
24 as I understand it, doesn't stretch to a
25 discussion -- or, rather, a decision in respect to

1 the actual DAA itself.

2 Now, I am not holding myself out as an
3 expert in this respect. I am merely reading the
4 bylaws. That's my understanding. So I can only
5 say what I understand.

6 ARBITRATOR BIENVENU: I think you have
7 very accurately described the position of ICANN
8 before the Panel, but the claimant is taking a
9 different position.

10 THE WITNESS: I understand that.

11 ARBITRATOR KESSEDJIAN: Mr. Chairman, can
12 I ask a follow-up question on this one without
13 interrupting you, or do you want to finish your
14 questions?

15 ARBITRATOR BIENVENU: No, if it is a
16 follow-up question.

17 ARBITRATOR KESSEDJIAN: Mr. Disspain, this
18 is Catherine Kessedjian. I am speaking from Paris,
19 so we are actually closer.

20 THE WITNESS: Is it as hot there as it is
21 here?

22 ARBITRATOR KESSEDJIAN: It's very warm.

23 I have a follow-up question on this very
24 question of how you understand the scope of the
25 jurisdiction of the IRP. It is one of the issues

1 we have.

2 You just said that you don't think -- you
3 were careful, and if I rephrase in a way that is
4 not correct, please interrupt me.

5 But you said that you don't think that the
6 IRP jurisdiction will stretch to whether or not the
7 DAA was validly entered into considering the
8 guidebook rules; is that correct?

9 THE WITNESS: Yes. That is, in essence,
10 what I said, yes.

11 ARBITRATOR KESSEDJIAN: Okay. So if you
12 consider this is not our jurisdiction, whose
13 jurisdiction is that? Where does an applicant go
14 to have this question resolved?

15 THE WITNESS: Well, Professor, that is an
16 extraordinarily good question, and I believe that
17 at the end of the day, the answer may well be that
18 it is a matter for the Board. But that's just my
19 opinion, and I am not here to debate the legal
20 issues.

21 The IRP itself is -- the bylaws are very
22 clear about what an IRP does and what an IRP does
23 not do.

24 Let me suggest something to you as a sort
25 of answer to your question.

1 The Board -- I was asked earlier on what
2 would have happened if the Board had not -- if the
3 IRP had not happened, and I said I don't know
4 because I don't know what the Board would have
5 done.

6 What I do know is what the Board will do
7 with respect to this IRP. If the IRP finds in
8 favor of ICANN, the Board is going to consider the
9 decision of that IRP, and what the Board will do is
10 to take very seriously -- it will operate within
11 its fiduciary responsibility and its responsibility
12 to the community, within its responsibility to
13 ICANN's mission and bylaws and public interest, and
14 it will take very seriously anything that the Panel
15 says by way of recommendation outside of its
16 decision on the finer points of what the Panel's
17 scope extends to in respect to the bylaws.

18 Now, I can't say what the Board will do,
19 and I can't say that the Board will necessarily do
20 anything. But what I can say is that this Panel
21 operates under the terms of the bylaws, and I think
22 my understanding of an interpretation of bylaws is
23 the correct one.

24 I don't know if that's helpful.

25 ARBITRATOR KESSEDJIAN: I am just

1 surprised by the beginning of your answer, or
2 beginning of your explanation, for which I am very
3 grateful.

4 Sorry, I don't have the feed of the court
5 reporter.

6 THE WITNESS: Not a problem.

7 ARBITRATOR KESSEDJIAN: Did you say that
8 the Board would take seriously only if the IRP was
9 in favor of ICANN?

10 THE WITNESS: No, no, no. I was not
11 suggesting that at all, no. What the Panel decides
12 is what the Panel decides. I was simply suggesting
13 that if the Panel -- I was simply saying that the
14 Panel -- it is open to the Panel to make its
15 decision.

16 And if the Panel, on making its decisions,
17 makes a series of recommendations, those
18 recommendations are something that we treat very
19 seriously by the Board.

20 ARBITRATOR KESSEDJIAN: Thank you very
21 much.

22 THE WITNESS: That's all I was trying to
23 say. I hope that's clearer.

24 ARBITRATOR KESSEDJIAN: Yes, indeed.

25 THE WITNESS: I apologize if we missed

1 each other.

2 ARBITRATOR KESSEDJIAN: No, no, that's
3 great. Thank you.

4 ARBITRATOR BIENVENU: My last question,
5 Mr. Disspain, is the following: I am speaking
6 under the control of Mr. LeVee, but I understand --
7 not because we are treading near privilege, but
8 because I am about to summarize the position of
9 ICANN.

10 THE WITNESS: Okay. Thank you.

11 ARBITRATOR BIENVENU: I think I am correct
12 in describing ICANN's position in this IRP as being
13 that the proper scope of the IRP requires the Panel
14 to limit itself in deciding whether in making the
15 decision that it did in November 2016, the Board
16 acted reasonably.

17 My question to you is: Let us imagine
18 that we accept that position and that we refuse the
19 claimant's invitation to pronounce on the question
20 of whether the NDC's bid was compliant with the
21 program rules, then what will happen then and when
22 will the Board have an opportunity to resolve that
23 question and to pronounce upon it?

24 THE WITNESS: Thank you. I am going to,
25 in some respects, repeat what I just said to

1 Professor Kessedjian, but in the context of your
2 question. So when will the Board have an
3 opportunity?

4 My recollection is that the Board, there
5 is a set time frame in which the Board must address
6 any decision made by the Panel. I can't remember
7 what it is off the top of my head, but there is a
8 set time frame. So that is the answer, whatever
9 the set time frame is, that's the answer to that
10 question.

11 In respect to what the Board will do, I
12 don't know what the Board will do. Let me say it
13 again. I believe that the Board would take very
14 seriously any recommendations made by this Panel
15 outside of its decision within scope. This Panel
16 would have heard everything, and this Panel will
17 be -- what it says in respect to its decision is
18 its decision.

19 If it wants to make a series of
20 recommendations outside of its decision, I am
21 saying, when the Board looks at the decision of
22 this Panel, I would expect the Board to take those
23 recommendations very seriously.

24 ARBITRATOR BIENVENU: My question was
25 slightly different --

1 THE WITNESS: I apologize.

2 ARBITRATOR BIENVENU: -- than Professor
3 Kessedjian's question.

4 My question was: If we accept ICANN's
5 submission that in making the decision that it did,
6 the Board acted reasonably, and accept the further
7 submission by the respondent that we should go no
8 further, then the question that was not addressed
9 in November 2016 and that remains as yet
10 unaddressed, when will that question be resolved?

11 THE WITNESS: I don't know. All I can
12 tell you is that pursuant to the decision of this
13 Panel, the Board will meet and the Board will
14 consider what this Panel has to say. But I can't
15 give you -- I apologize. I can't give you a
16 clearer answer than that.

17 ARBITRATOR BIENVENU: No, that's fair
18 enough. Thank you. Thank you, Mr. Disspain.

19 Any questions from my colleagues?

20 ARBITRATOR CHERNICK: No, thank you.

21 ARBITRATOR KESSEDJIAN: No other
22 questions.

23 ARBITRATOR BIENVENU: Mr. LeVee, any
24 redirect?

25 MR. LeVEE: I do have some redirect. I am

1 mindful that it is seven minutes before we are
2 supposed to conclude, and if it's possible to go
3 over just a couple, I'll do my best to be
4 efficient.

5 ARBITRATOR BIENVENU: Thank you,
6 Mr. LeVee.

7 REDIRECT EXAMINATION

8 BY MR. LeVEE

9 Q. Mr. Disspain, thank you for staying with
10 us.

11 Let me return you briefly to the November
12 2016 meeting.

13 Do you recall anyone at the meeting
14 voicing opposition to the decision that was taken?

15 A. Do you mean voicing opposition to deciding
16 that we would not do anything pending the
17 accountability mechanisms running their course?

18 Q. Yes.

19 A. No, I do not.

20 Q. You were asked about whether the bylaws
21 required the publication of a decision from a
22 workshop like this.

23 A. Yes.

24 Q. I am not going -- I don't have the time to
25 take you through all the bylaws.

1 Do you have an understanding of whether
2 the bylaws require publication of actions taken at
3 Board workshops?

4 A. I don't believe that the bylaws do.

5 Q. Okay. Now, you were shown an application
6 under the DIDP policy, but you were not shown the
7 response. So I am going to ask Ms. Ozurovich to
8 bring up the response, and I think the exhibit
9 number is VeriSign-24.

10 Do you see that on your screen?

11 A. Yes, I do.

12 Q. And this is dated 24 March 2018.

13 Do you see that?

14 A. I do. Very large font now.

15 Q. The very first paragraph, can you read it
16 without Ms. Ozurovich blowing it up?

17 A. Yeah, I can read that perfectly well.
18 Thank you.

19 Q. Okay. In the first paragraph it
20 references a letter dated 23 February 2018, which
21 was Exhibit C-78 that you were shown earlier?

22 A. Yep, I remember that.

23 Q. And it included a request for an update
24 and then also a request under the DIDP policy.

25 Do you see that?

1 A. Yes, I do.

2 Q. And there was a statement by counsel that
3 ICANN provided no documents in response.

4 I wanted just briefly to show you that --
5 have you seen this before?

6 A. No, not that I can recall.

7 Q. Okay. Do you know --

8 A. Who is it from?

9 Q. Well, it is from ICANN.

10 A. Okay. Fine.

11 Q. Do you know whether as part of the DIDP
12 response ICANN refers people who submit DIDP
13 applications to documents that are in -- that are
14 publicly available?

15 A. I do know that ICANN does that, if the
16 document is published, then they will say go here.

17 Q. Okay. So ICANN doesn't actually send
18 copies of the documents; ICANN identifies where in
19 the public domain those documents exist?

20 A. Absolutely.

21 Q. So just by way of example, if you look --
22 I am going to go to Page 6. We are going to look
23 at the -- that's 4. If you look at the bottom, do
24 you see where it says, "Item 4, all applications
25 and all documents," et cetera, et cetera?

1 A. Yep.

2 Q. You see that ICANN provided links to a
3 number of materials?

4 A. Yep.

5 Q. I am going to ask you to turn to Page 16,
6 Ms. Ozurovich, just so you can see that initially
7 the response is 16 pages. I am not going to take
8 the time to go through all the responses.

9 Do you see that?

10 A. Yep.

11 Q. And then if you turn, Ms. Ozurovich, just
12 sort of scan through the next page, next several
13 pages, through Page 28, are additional links that
14 ICANN provided to Afilias and its counsel where
15 materials can be found?

16 A. Correct.

17 Q. And is that what you understand to be
18 ICANN's policy in terms of responding to the DIDP
19 request?

20 A. When you say is that what I understand,
21 you mean where the documents are public to provide
22 links? Yes.

23 Q. Yes.

24 A. Yes.

25 Q. Do you understand whether ICANN discloses

1 information that is privileged in response to a
2 DIDP request?

3 A. No, it doesn't.

4 Q. Okay. You were asked about the extent to
5 which ICANN's practice of keeping contention sets
6 on hold as a result of accountability mechanisms --
7 and I am not going to -- I am trying to avoid
8 saying what you said, but you reference the
9 possibility that ICANN has published material on
10 this topic.

11 Do you remember your testimony on that?

12 A. Yes, I did. I said it is possible. I
13 have no idea whether it's happened or not, but it
14 is possible.

15 Q. Let me ask everyone to take a look at
16 Exhibit R-33. Do you recall that ICANN published
17 updates on application status and contention sets
18 from time to time?

19 A. I certainly do, yeah.

20 Q. This particular one is dated August 1,
21 2016. Do you know if ICANN published them
22 regularly?

23 A. Yes. But how regularly, I don't know.

24 Q. Okay. And you can see -- I am not going
25 to read it all. I am going to go to the second

1 page in a second, but you can see that in the
2 middle there's a bold that says "Application Status
3 and Contention Set Status."

4 Do you see that?

5 A. Yes, yes.

6 Q. Toward the bottom it says "Explanation of
7 Application Status."

8 Do you see that?

9 A. Yes, I do.

10 Q. Now, I am going to just read at the
11 bottom. It says, "Alternatively" -- the very last
12 line, "Alternatively, the page may reflect one of
13 the following statuses for an application."

14 Do you see that?

15 A. Yep, yes.

16 Q. Okay. Now we'll turn the page. I am
17 going to have Ms. Ozurovich blow up just that top
18 section, just like that.

19 A. Brilliant.

20 Q. So one of the statuses is that the
21 application has been withdrawn, correct?

22 A. Yes, yep.

23 Q. Another is that it is not approved?

24 A. Yep.

25 Q. Another is that it will not proceed?

1 A. Yep.

2 Q. And then it says, "On-Hold"?

3 A. Yes.

4 Q. "May be applied if there are pending
5 activities (e.g., ICANN accountability mechanisms,
6 ICANN public comment periods)," so forth and so on?

7 A. Yep.

8 Q. Is that some recognition of the practice
9 that ICANN posted on its website that
10 accountability mechanisms result in an on-hold
11 status?

12 A. Yes.

13 Q. Okay.

14 ARBITRATOR BIENVENU: What's the exhibit
15 number of this document that you just introduced?
16 Because the transcript says 433.

17 MR. LeVEE: "R," as in "Robert," 33.

18 ARBITRATOR BIENVENU: R-33, thank you.

19 MR. LeVEE: Of course.

20 Q. Do you know whether in June 2018 -- I
21 think I misspoke.

22 You may be on mute, Mr. Disspain.

23 A. Sorry. I had to close the window due to
24 bats flying around.

25 Q. Sounds like a good excuse.

1 A. Trust me, you don't want one in the house.

2 Q. I am positive.

3 Do you know whether prior to June of 2018,
4 when Afiliias initiated what was actually a CEP at
5 that time, do you know whether Afiliias had
6 initiated an accountability mechanism relating to
7 the .WEB auction?

8 A. Not as far as I can recall.

9 Q. Okay. So the status at that time was that
10 Afiliias had sent letters?

11 A. Yeah, they sent heaps of letters saying
12 this was wrong, this should happen, that should
13 happen, et cetera. The questionnaire had gone out
14 and so on.

15 But they had not of themselves actually
16 filed any form of -- ignoring the DIDP, which is
17 separate, they had not filed any accountability
18 mechanism in this .WEB matter, no.

19 Q. Okay. In your witness statement, which is
20 the first tab of the binder, if you'd like to look
21 at it.

22 A. Yeah.

23 Q. You say -- I am not going to read it, but
24 you comment -- you address how ICANN deals with
25 letters, right?

1 A. Yeah, yep.

2 Q. And the practice of ICANN was that absent
3 the accountability mechanisms, such as a
4 reconsideration request, CEP and so forth, that was
5 the way to know that a contention set would be
6 placed on hold; is that correct?

7 A. Well, kind of. In essence, the way I
8 would put it is you can write whatever letters you
9 like. The way that you move forward with an issue
10 of this nature is through using ICANN's
11 accountability mechanisms. That's what they are
12 there for.

13 MR. LeVEE: Mr. Chairman, may I take one
14 minute to consult with my colleagues, including
15 Mr. Smith, who, of course, is in San Francisco?

16 ARBITRATOR BIENVENU: Of course.

17 MR. LITWIN: Before we break, I would beg
18 the Panel's indulgence to allow me one brief
19 recross on a document that was inspired by your
20 question, Mr. Chairman, that I think would clarify
21 one of Mr. Disspain's responses. It would be no
22 more than two minutes.

23 ARBITRATOR BIENVENU: That's fine. We
24 will hear the question, but first I will allow
25 Mr. LeVee to consult his colleagues.

1 MR. LeVEE: Just for the record,
2 Mr. Chairman, I do object to redirect -- sorry,
3 recross. It is not part of the rules. It is not
4 something we have done, and I just want the
5 objection noted for the record.

6 (Whereupon a recess was taken.)

7 ARBITRATOR BIENVENU: Mr. LeVee.

8 MR. LeVEE: I have no additional
9 questions. I do repeat that I am concerned about
10 recross, and if there is recross, I would ask that
11 I be given at least the opportunity to respond to
12 it.

13 ARBITRATOR BIENVENU: Yes, yes, well, I
14 agree with you that there is no recross, but I
15 didn't understand Mr. Litwin to ask for recross,
16 and if he did, I would disallow it.

17 However, we are an international
18 arbitration, and it is customary to allow counsel
19 to ask, you know, supplementary questions if they
20 arise out of redirect.

21 So I am sure that Mr. Litwin will be
22 disciplined, as he should be at this stage in the
23 process, and ask a question that only is
24 supplemental to your redirect, and he will do so
25 under our watchful eye.

1 MR. LeVEE: Thank you, Mr. Chairman.

2 MR. LITWIN: Mr. Chairman, just as a point
3 of clarification, my question arises not out of
4 Mr. LeVee's redirect, but in response to an answer
5 Mr. Disspain gave to one of your questions.

6 ARBITRATOR BIENVENU: That's fine. Please
7 proceed, but understand this is a supplementary
8 question, not a continuation of your cross.

9 MR. LITWIN: I understand, Mr. Chairman.

10 SUPPLEMENTARY EXAMINATION

11 BY MR. LITWIN

12 Q. Mr. Disspain, do you recall the Chairman
13 asking you about whether or not the Registry
14 Agreement would have been signed by ICANN in June
15 of 2018?

16 A. Can I interrupt you for one second? I
17 lost you at the beginning of your question. I just
18 heard you for the last ten seconds.

19 Can you go back and start again for me,
20 please?

21 Q. Mr. Disspain, do you recall that the
22 Chairman asked you whether or not ICANN would have
23 executed the Registry Agreement in June of 2018,
24 and you said that one way or another, you could not
25 speculate as to what would have happened?

1 Do you recall that?

2 A. Yes.

3 MR. LITWIN: I would ask Chuck to bring up
4 Exhibit 170, please.

5 MR. LeVEE: Mr. Chairman, I can tell
6 already, this is recross.

7 ARBITRATOR BIENVENU: I'll allow the
8 question, Mr. LeVee.

9 Q. BY MR. LITWIN: Mr. Disspain, I am showing
10 you an email that was sent from Mr. Grant Nakata
11 from ICANN internally, and he writes, "I want to
12 provide an update on the WEB Registry Agreement."

13 This email was sent on June 20th, 2018,
14 two days after Afilias filed its CEP.

15 He says, "Prior to the execution of the
16 WEB Registry Agreement, we received notice that a
17 Cooperative Engagement Process (CEP) was initiated
18 on .WEB. The .WEB/WEBS contention set has been
19 placed On Hold. We will void the current Registry
20 Agreement (via DocuSign). If or when we are able
21 to proceed, we will reinitiate this approval
22 process."

23 If you look down in this document at the
24 bottom of Page 1 and onto Page 2, you will see that
25 the Registry Agreement had been approved by

1 Ms. Christine Willett and the other members of her
2 team.

3 Do you see that, sir?

4 A. It would appear so, yes.

5 Q. So does that refresh your recollection
6 that had Afilias not filed its CEP, that ICANN was
7 ready to sign the Registry Agreement?

8 A. No, it doesn't, because this doesn't
9 refresh my recollection. I don't have a
10 recollection. I simply said what I said. I am not
11 aware of these emails. They are internal emails,
12 so I can't comment on them.

13 Q. That's because the Board does not have to
14 approve a Registry Agreement. It simply required
15 the signature of Mr. Atallah; is that correct?

16 A. The Board does not have to approve an
17 agreement, that is correct. However, as I already
18 said, the BAMC in its discussion with ICANN org
19 prior to -- sorry, post the lifting of hold would
20 have been aware if Afilias had not filed a --
21 what's the word I'm looking for? Accountability
22 mechanism, that's the word. Thank you.
23 Accountability mechanism.

24 But I am talking about what the Board was
25 doing. I can't tell you what ICANN org was doing.

1 That's a matter for ICANN org.

2 MR. LITWIN: Okay. Thank you,
3 Mr. Chairman.

4 ARBITRATOR BIENVENU: Thank you,
5 Mr. Litwin.

6 Mr. LeVee?

7 MR. LeVEE: I do not have follow-up.
8 Thank you.

9 ARBITRATOR BIENVENU: Mr. Disspain, it
10 remains for me and the members of the Panel and,
11 indeed, all the participants in this process, to
12 thank you very much for your time and for your
13 evidence. We appreciate it very much.

14 THE WITNESS: Thank you very much, indeed.

15 MR. LITWIN: Thank you, Mr. Disspain.

16 THE WITNESS: Thank you, Mr. Chairman.
17 Thank you all.

18 ARBITRATOR BIENVENU: Mr. Disspain, one
19 last point. Per the sequestration order, it
20 requires that I instruct you not to discuss the
21 case with other persons who may appear as witnesses
22 before us.

23 THE WITNESS: Not a problem. Thank you.

24 ARBITRATOR BIENVENU: Thank you. Thank
25 you for your time.

1 THE WITNESS: Thank you very much.

2 Good-bye.

3 ARBITRATOR BIENVENU: Well, it's been a
4 long day. Is there anything that absolutely needs
5 to be raised now, as opposed to when we resume next
6 Monday? Looking at the claimant.

7 MR. ALI: I apologize. Nothing from
8 claimant's side, Mr. Chairman, other than thank you
9 for a good week.

10 ARBITRATOR BIENVENU: On the respondent's
11 side, Mr. LeVee?

12 MR. LeVEE: Nothing beyond wishing
13 everyone a very nice weekend. We will see you on
14 Monday.

15 ARBITRATOR BIENVENU: Those are wishes I
16 send back from everyone on the Panel.

17 I wish to thank everyone for what I know
18 was an extremely demanding week. We are certainly
19 impressed, but mostly very grateful for the
20 extraordinary work of counsel throughout the week,
21 and in particular for going through our demanding
22 agenda today.

23 So thank you all. Have a good weekend.
24 We resume on Monday at the normal hour. And the
25 next witness is?

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MR. ALI: Mr. McAuley.

ARBITRATOR CHERNICK: Is the normal hour
8:00 a.m. Pacific?

ARBITRATOR BIENVENU: That's correct.

ARBITRATOR CHERNICK: Okay. That's fine.

ARBITRATOR BIENVENU: Thank you all. And
I wish you all a restful weekend.

ARBITRATOR KESSEDJIAN: Have a good
weekend.

MR. LITWIN: Thank you.

MR. LeVEE: Have a good weekend.

(Whereupon the proceedings were
concluded at 1:18 p.m.)

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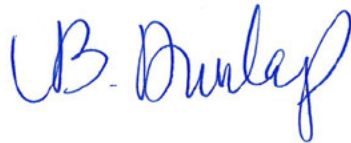
REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full, true, and correct record of said proceedings:

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 18th day of August, 2020.



BALINDA DUNLAP, CSR NO. 10710, RPR, CRR, RMR

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EXHIBIT C-14

BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation

As amended 2 June 2022

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ARTICLE 1 MISSION, COMMITMENTS AND CORE VALUES

Section 1.1. MISSION

(a) The mission of the Internet Corporation for Assigned Names and Numbers ("**ICANN (Internet Corporation for Assigned Names and Numbers)**") is to ensure the stable and secure operation of the Internet's unique identifier systems as described in this Section 1.1(a) (the "**Mission**"). Specifically, ICANN (Internet Corporation for Assigned Names and Numbers):

(i) Coordinates the allocation and assignment of names in the root zone of the Domain Name (Domain Name) System ("**DNS (Domain Name System)**") and coordinates the development and implementation of policies concerning the registration of second-level

domain names in generic top-level domains ("**gTLDs**"). In this role, ICANN (Internet Corporation for Assigned Names and Numbers)'s scope is to coordinate the development and implementation of policies:

- For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS (Domain Name System) including, with respect to gTLD (generic Top Level Domain) registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and
- That are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to gTLD (generic Top Level Domain) registrars and registries shall be deemed to be within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

(ii) Facilitates the coordination of the operation and evolution of the DNS (Domain Name System) root name server system.

(iii) Coordinates the allocation and assignment at the top-most level of Internet Protocol (Protocol) numbers and Autonomous System numbers. In service of its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) (A) provides registration services and open access for global number registries as requested by the Internet Engineering Task Force ("IETF (Internet Engineering Task Force)") and the

Regional Internet Registries ("**RIRs**") and (B) facilitates the development of global number registry policies by the affected community and other related tasks as agreed with the RIRs.

(iv) Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN (Internet Corporation for Assigned Names and Numbers)'s scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall not act outside its Mission.

(c) ICANN (Internet Corporation for Assigned Names and Numbers) shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN (Internet Corporation for Assigned Names and Numbers) does not hold any governmentally authorized regulatory authority.

(d) For the avoidance of doubt and notwithstanding the foregoing:

(i) the foregoing prohibitions are not intended to limit ICANN (Internet Corporation for Assigned Names and Numbers)'s authority or ability to adopt or implement policies or procedures that take into account the use of domain names as natural-language identifiers;

(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents

listed in subsections (A) through (C) below, and ICANN (Internet Corporation for Assigned Names and Numbers)'s performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (Internet Corporation for Assigned Names and Numbers) (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission or otherwise exceed the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s authority or powers pursuant to these Bylaws ("**Bylaws**") or ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation ("**Articles of Incorporation**"):

(A)

(1) all registry agreements and registrar accreditation agreements between ICANN (Internet Corporation for Assigned Names and Numbers) and registry operators or registrars in force on 1 October 2016 ^[1], including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;

(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;

(B) any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and

(C) ICANN (Internet Corporation for Assigned Names and Numbers)'s Five-Year Strategic Plan and Five-Year Operating Plan (Five-Year Operating Plan) existing on 10 March 2016.

(iii) Section 1.1(d)(ii) does not limit the ability of a party to any agreement described therein to challenge any provision of such agreement on any other basis, including the other party's interpretation of the provision, in any proceeding or process involving ICANN (Internet Corporation for Assigned Names and Numbers).

(iv) ICANN (Internet Corporation for Assigned Names and Numbers) shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.

Section 1.2. COMMITMENTS AND CORE VALUES

In performing its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) will act in a manner that complies with and reflects ICANN (Internet Corporation for Assigned Names and Numbers)'s Commitments and respects ICANN (Internet Corporation for Assigned Names and Numbers)'s Core Values, each as described below.

(a) COMMITMENTS

In performing its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity

with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN (Internet Corporation for Assigned Names and Numbers) commits to do the following (each, a "**Commitment**," and collectively, the "**Commitments**"):

- (i) Preserve and enhance the administration of the DNS (Domain Name System) and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS (Domain Name System) and the Internet;
- (ii) Maintain the capacity and ability to coordinate the DNS (Domain Name System) at the overall level and work for the maintenance of a single, interoperable Internet;
- (iii) Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN (Internet Corporation for Assigned Names and Numbers)'s activities to matters that are within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and require or significantly benefit from global coordination;
- (iv) Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN (Internet Corporation for Assigned Names and Numbers) in all events shall act, (B) promote well-informed decisions based on expert advice, and (C)

ensure that those entities most affected can assist in the policy development process;

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

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

(b) **CORE VALUES**

In performing its Mission, the following "**Core Values**" should also guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):

(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN (Internet Corporation for Assigned Names and Numbers) and relevant external expert bodies;

(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;

(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a

competitive environment in the DNS (Domain Name System) market;

(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;

(vi) While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities;

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

(viii) Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN (Internet Corporation for Assigned Names and Numbers) outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN (Internet Corporation for Assigned Names and Numbers) to enforce its human

rights obligations, or the human rights obligations of other parties, against other parties.

(c) The Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN (Internet Corporation for Assigned Names and Numbers)'s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

ARTICLE 2 POWERS

Section 2.1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) 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). With respect to any matters that would fall within the provisions of Section 3.6(a)-(c), the Board may act only by a majority vote of all Directors. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of the Directors present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean

the vote of only those Directors present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "of all Directors."

Section 2.2. RESTRICTIONS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not act as a Domain Name (Domain Name) System Registry or Registrar or Internet Protocol (Protocol) Address Registry in competition with entities affected by the policies of ICANN (Internet Corporation for Assigned Names and Numbers). Nothing in this Section 2.2 is intended to prevent ICANN (Internet Corporation for Assigned Names and Numbers) from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

Section 2.3. NON-DISCRIMINATORY TREATMENT

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

ARTICLE 3 TRANSPARENCY

Section 3.1. OPEN AND TRANSPARENT

ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy

development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN (Internet Corporation for Assigned Names and Numbers) shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN (Internet Corporation for Assigned Names and Numbers)'s constituent bodies (including the detailed explanations discussed above).

Section 3.2. WEBSITE

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain a publicly-accessible Internet World Wide Web site (the "**Website**"), which may include, among other things, (a) a calendar of scheduled meetings of the Board, the EC (Empowered Community) (as defined in Section 6.1(a)), Supporting Organizations (Supporting Organizations) (as defined in Section 11.1), and Advisory Committees (Advisory Committees) (as defined in Section 12.1); (b) a docket of all pending policy development matters, including their schedule and current status; (c) specific meeting notices and agendas as described below; (d) information on the ICANN (Internet Corporation for Assigned Names and Numbers) Budget (as defined in Section 22.4(a)(i)), the IANA (Internet Assigned Numbers Authority) Budget (as defined in Section 22.4(b)(i)), annual audit, financial contributors and the amount of their contributions, and related matters; (e) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (f) announcements about ICANN (Internet Corporation for Assigned Names and Numbers) activities of interest to significant segments of the

ICANN (Internet Corporation for Assigned Names and Numbers) community; (g) comments received from the community on policies being developed and other matters; (h) information about ICANN (Internet Corporation for Assigned Names and Numbers)'s physical meetings and public forums; and (i) other information of interest to the ICANN (Internet Corporation for Assigned Names and Numbers) community.

Section 3.3. MANAGER OF PUBLIC PARTICIPATION

There shall be a staff position designated as Manager of Public Participation, or such other title as shall be determined by the President, that shall be responsible, under the direction of the President, for coordinating the various aspects of public participation in ICANN (Internet Corporation for Assigned Names and Numbers), including the Website and various other means of communicating with and receiving input from the general community of Internet users.

Section 3.4. MEETING NOTICES AND AGENDAS

At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

Section 3.5. MINUTES AND PRELIMINARY REPORTS

- a. All minutes of meetings of the Board, the Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations) (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN (Internet Corporation for Assigned Names and Numbers)

Secretary ("**Secretary**") for posting on the Website. All proceedings of the EC (Empowered Community) Administration (as defined in Section 6.3) and the EC (Empowered Community) shall be provided to the Secretary for posting on the Website.

- b. No later than 11:59 p.m. on the second business day after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any resolutions passed by the Board at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the resolutions made publicly available. The Secretary shall send notice to the Board and the Chairs of the Supporting Organizations (Supporting Organizations) (as set forth in Article 9 through Article 11) and Advisory Committees (Advisory Committees) (as set forth in Article 12) informing them that the resolutions have been posted.
- c. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 3.5(b).

above. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.

- d. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office, then the next immediately following business day), the minutes of the Board shall be made publicly available on the Website; provided, however, that any minutes of the Board relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

Section 3.6. NOTICE AND COMMENT ON POLICY ACTIONS

(a) With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN (Internet Corporation for Assigned Names and Numbers) shall:

(i) provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;

(ii) provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments (such comment period to be aligned with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment practices), prior to any action by the Board; and

(iii) in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee (Advisory Committee) ("**GAC (Governmental Advisory Committee)**" or "**Governmental Advisory Committee (Advisory Committee)**") and take duly into account any advice timely presented by the Governmental Advisory Committee (Advisory Committee) on its own initiative or at the Board's request.

(b) Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 3.6(a)(ii), prior to any final Board action.

(c) After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS (Domain Name System), financial impacts or other issues that were considered by the Board in approving such

resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.

(d) Where a Board resolution is consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice (as defined in Section 12.2(a)(x)), the Board shall make a determination whether the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution, in which case the Board shall so indicate in such resolution approving the decision (a "**GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution**") and shall cite the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. To the extent practical, the Board shall ensure that GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolutions only relate to the matters that were the subject of the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and not matters unrelated to the applicable GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. For the avoidance of doubt: (i) a GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution shall not have the effect of making any other Board resolutions in the same set or series so designated, unless other resolutions are specifically identified as such by the Board; and (ii) a Board resolution approving an action consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice received during a standard engagement process in which input from all Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) has been requested shall not be considered a GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution based solely on that input, unless the GAC (Governmental Advisory Committee)

Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution.

(e) GAC (Governmental Advisory Committee) Carve-out

(i) Where a Board resolution is consistent with GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and the Board has determined that the GAC (Governmental Advisory Committee) Consensus (Consensus) Advice was a material factor in the Board's adoption of such resolution as described in the relevant GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution, the Governmental Advisory Committee (Advisory Committee) shall not participate as a decision-maker in the EC (Empowered Community)'s exercise of its right to challenge the Board's implementation of such GAC (Governmental Advisory Committee) Consensus (Consensus) Advice. In such cases, the Governmental Advisory Committee (Advisory Committee) may participate in the EC (Empowered Community) in an advisory capacity only with respect to the applicable processes described in Annex D, but its views will not count as support or an objection for purposes of the thresholds needed to convene a community forum or exercise any right of the EC (Empowered Community) ("**GAC (Governmental Advisory Committee) Carve-out**"). In the case of a Board Recall Process (as defined in Section 3.3 of Annex D), the GAC (Governmental Advisory Committee) Carve-out shall only apply if an IRP Panel has found that, in implementing GAC (Governmental Advisory Committee) Consensus (Consensus) Advice, the Board acted inconsistently with the Articles of Incorporation or these Bylaws.

(ii) When the GAC (Governmental Advisory Committee) Carve-out applies (A) any petition notice

provided in accordance with Annex D or Approval Action Board Notice (as defined in Section 1.2 of Annex D) shall include a statement that cites the specific GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution and the line item or provision that implements such specific GAC (Governmental Advisory Committee) Consensus (Consensus) Board Resolution ("GAC (Governmental Advisory Committee) Consensus (Consensus) Statement"), (B) the Governmental Advisory Committee (Advisory Committee) shall not be eligible to support or object to any petition pursuant to Annex D or Approval Action (as defined in Section 1.1 of Annex D), and (C) any EC (Empowered Community) Decision (as defined in Section 4.1(a) of Annex D) that requires the support of four or more Decisional Participants (as defined in Section 6.1(a)) pursuant to Annex D shall instead require the support of three or more Decisional Participants with no more than one Decisional Participant objecting.

(iii) For the avoidance of doubt, the GAC (Governmental Advisory Committee) Carve-out shall not apply to the exercise of the EC (Empowered Community)'s rights where a material factor in the Board's decision was advice of the Governmental Advisory Committee (Advisory Committee) that was not GAC (Governmental Advisory Committee) Consensus (Consensus) Advice.

Section 3.7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN (Internet Corporation for Assigned Names and Numbers) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE 4 ACCOUNTABILITY AND REVIEW

Section 4.1. PURPOSE

In carrying out its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) shall be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws, including the Mission set forth in Article 1 of these Bylaws. This Article 4 creates reconsideration and independent review processes for certain actions as set forth in these Bylaws and procedures for periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s structure and operations, which are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article 3 and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 4.2. RECONSIDERATION

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or Staff may request ("**Requestor**") the review or reconsideration of that action or inaction by the Board. For purposes of these Bylaws, "**Staff**" includes employees and individual long-term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors directly.

(b) The EC (Empowered Community) may file a Reconsideration Request (as defined in Section 4.2(c)) if approved pursuant to Section 4.3 of Annex D ("**Community Reconsideration Request**") and if the matter relates to the exercise of the powers and rights of the EC (Empowered

Community) of these Bylaws. The EC (Empowered Community) Administration shall act as the Requestor for such a Community Reconsideration Request and shall act on behalf of the EC (Empowered Community) for such Community Reconsideration Request as directed by the Decisional Participants, as further described in Section 4.3 of Annex D.

(c) A Requestor may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) 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 (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments, Core Values and/or established ICANN (Internet Corporation for Assigned Names and Numbers) 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.

(d) Notwithstanding any other provision in this Section 4.2, the scope of reconsideration shall exclude the following:

(i) Disputes relating to country code top-level domain ("**ccTLD (Country Code Top Level Domain)**") delegations and re-delegations;

(ii) Disputes relating to Internet numbering resources;
and

(iii) Disputes relating to protocol parameters.

(e) The Board has designated the Board Accountability Mechanisms Committee to review and consider Reconsideration Requests. The Board Accountability Mechanisms Committee shall have the authority to:

(i) Evaluate Reconsideration Requests;

(ii) Summarily dismiss insufficient or frivolous Reconsideration Requests;

(iii) Evaluate Reconsideration Requests for urgent consideration;

(iv) Conduct whatever factual investigation is deemed appropriate;

(v) Request additional written submissions from the affected party, or from other parties; and

(vi) Make a recommendation to the Board on the merits of the Reconsideration Request, if it has not been summarily dismissed.

(f) ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the normal administrative costs of the Reconsideration Request process. Except with respect to a Community Reconsideration Request, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration

Request shall be communicated to the Requestor, who shall then have the option of withdrawing the request or agreeing to bear such costs.

(g) All Reconsideration Requests must be submitted by the Requestor to an email address designated by the Board Accountability Mechanisms Committee:

(i) For Reconsideration Requests that are not Community Reconsideration Requests, such Reconsideration Requests must be submitted:

(A) for requests challenging Board actions, within 30 days after the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale;

(B) for requests challenging Staff actions, within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action; or

(C) for requests challenging either Board or Staff inaction, within 30 days after the date on which the Requestor reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

(ii) For Community Reconsideration Requests, such Community Reconsideration Requests must be submitted in accordance with the timeframe set forth in Section 4.3 of Annex D.

(h) To properly initiate a Reconsideration Request, all Requestors must review, complete and follow the

Reconsideration Request form posted on the Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>. Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

(i) Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request, not including exhibits. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

(j) 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.

(k) The Board Accountability Mechanisms Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Accountability Mechanisms Committee 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 Board Accountability Mechanisms Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the

Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

(m) The Board Accountability Mechanisms Committee may ask ICANN (Internet Corporation for Assigned Names and Numbers) Staff for its views on a Reconsideration Request, which comments shall be made publicly available on the Website.

(n) The Board Accountability Mechanisms Committee may request additional information or clarifications from the Requestor, and may elect to conduct a meeting with the Requestor by telephone, email or, if acceptable to the Requestor, in person. A Requestor may also ask for an

opportunity to be heard. The Board Accountability Mechanisms Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation.

(o) The Board Accountability Mechanisms Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation. Any information collected by ICANN (Internet Corporation for Assigned Names and Numbers) from third parties shall be provided to the Requestor.

(p) The Board Accountability Mechanisms Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the Requestor, by the ICANN (Internet Corporation for Assigned Names and Numbers) Staff, and by any third party.

(q) The Board Accountability Mechanisms Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within 30 days following its receipt of the Ombudsman's evaluation (or 30 days 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), unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. In any event, the Board Accountability Mechanisms Committee shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request. The final recommendation of the Board Accountability Mechanisms Committee shall be documented and promptly

(i.e., as soon as practicable) posted on the Website 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 Board Accountability Mechanisms Committee's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the 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 Board Accountability Mechanisms Committee'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.

(r) The Board shall not be bound to follow the recommendations of the Board Accountability Mechanisms Committee. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Accountability Mechanisms Committee within 45 days of receipt of the Board Accountability Mechanisms Committee's recommendation or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on the Website. In any event, the Board's final decision shall be made within 135 days of initial receipt of the Reconsideration Request by the Board Accountability Mechanisms Committee. The Board's decision on the recommendation shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3 of these Bylaws. If the Requestor so requests, the Board shall post both a recording and a transcript of the substantive Board discussion from the meeting at which the Board considered the Board Accountability Mechanisms Committee's

recommendation. All briefing materials supplied to the Board shall be provided to the Requestor. The Board may redact such briefing materials and the recording and transcript on the basis that such information (i) relates to confidential personnel matters, (ii) is covered by attorney-client privilege, work product doctrine or other recognized legal privilege, (iii) is subject to a legal obligation that ICANN (Internet Corporation for Assigned Names and Numbers) maintain its confidentiality, (iv) would disclose trade secrets, or (v) would present a material risk of negative impact to the security, stability or resiliency of the Internet. In the case of any redaction, ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Requestor a written rationale for such redaction. If a Requestor believes that a redaction was improper, the Requestor may use an appropriate accountability mechanism to challenge the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s redaction.

(s) If the Requestor believes that the Board action or inaction for which a Reconsideration Request is submitted is so urgent that the timing requirements of the process set forth in this Section 4.2 are too long, the Requestor may apply to the Board Accountability Mechanisms Committee for urgent consideration. Any request for urgent consideration must be made within two business days (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.

(t) The Board Accountability Mechanisms Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Accountability Mechanisms Committee agrees to consider the matter with urgency, it will cause notice to be provided to

the Requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Accountability Mechanisms Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Reconsideration Request, or as soon thereafter as feasible. If the Board Accountability Mechanisms Committee does not agree to consider the matter with urgency, the Requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.

(u) The Board Accountability Mechanisms Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:

(i) the number and general nature of Reconsideration Requests received, including an identification if the Reconsideration Requests were acted upon, summarily dismissed, or remain pending;

(ii) for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any Reconsideration Request pending for more than ninety (90) days;

(iii) an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and

(iv) whether or not, in the Board Accountability Mechanisms Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN

(Internet Corporation for Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

(a) In addition to the reconsideration process described in Section 4.2, ICANN (Internet Corporation for Assigned Names and Numbers) shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant (as defined in Section 4.3(b)(i)) to be within the scope of the Independent Review Process ("**IRP**"). The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):

(i) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.

(ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).

(iii) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the global Internet community and Claimants.

(iv) Address claims that ICANN (Internet Corporation for Assigned Names and Numbers) has failed to enforce its rights under the IANA (Internet Assigned Numbers Authority) Naming Function Contract (as defined in Section 16.3(a)).

(v) Provide a mechanism by which direct customers of the IANA (Internet Assigned Numbers Authority) naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.

(vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.

(b) The scope of the IRP is defined with reference to the following terms:

(i) A "**Claimant**" is any legal or natural person, group, or entity including, but not limited to the EC (Empowered Community), a Supporting Organization (Supporting Organization), or an Advisory Committee (Advisory Committee) that has been materially affected by a Dispute. To be materially affected by a Dispute,

the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

(A)The EC (Empowered Community) is deemed to be materially affected by all Covered Actions. ICANN (Internet Corporation for Assigned Names and Numbers) shall not assert any defenses of standing or capacity against the EC (Empowered Community) in any forum.

(B)ICANN (Internet Corporation for Assigned Names and Numbers) shall not object to the standing of the EC (Empowered Community), a Supporting Organization (Supporting Organization), or an Advisory Committee (Advisory Committee) to participate in an IRP, to compel an IRP, or to enforce an IRP decision on the basis that it is not a legal person with capacity to sue. No special pleading of a Claimant's capacity or of the legal existence of a person that is a Claimant shall be required in the IRP proceedings. No Claimant shall be allowed to proceed if the IRP Panel (as defined in Section 4.3(g)) concludes based on evidence submitted to it that the Claimant does not fairly or adequately represent the interests of those on whose behalf the Claimant purports to act.

(ii) "**Covered Actions**" are defined as any actions or failures to act by or within ICANN (Internet Corporation for Assigned Names and Numbers) committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.

(iii) "**Disputes**" are defined as:

(A)Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

- (1) exceeded the scope of the Mission;
- (2) resulted from action taken in response to advice or input from any Advisory Committee (Advisory Committee) or Supporting Organization (Supporting Organization) that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- (3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- (4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- (5) arose from claims involving rights of the EC (Empowered Community) as set forth in the Articles of Incorporation or Bylaws.

(B) Claims that ICANN (Internet Corporation for Assigned Names and Numbers), the Board, individual Directors, Officers or Staff members have not enforced ICANN (Internet Corporation for Assigned Names and Numbers)'s contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, and

(C) Claims regarding PTI service complaints by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions that are not resolved through mediation.

(c) Notwithstanding any other provision in this Section 4.3, the IRP's scope shall exclude all of the following:

- (i) EC (Empowered Community) challenges to the result(s) of a PDP (Policy Development Process), unless the Supporting Organization (Supporting Organization)(s) that approved the PDP (Policy

Development Process) supports the EC (Empowered Community) bringing such a challenge;

(ii) Claims relating to ccTLD (Country Code Top Level Domain) delegations and re-delegations;

(iii) Claims relating to Internet numbering resources, and

(iv) Claims relating to protocol parameters.

(d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "**Claim**") with the IRP Provider (described in Section 4.3(m) below). For the EC (Empowered Community) to commence an IRP ("**Community IRP**"), the EC (Empowered Community) shall first comply with the procedures set forth in Section 4.2 of Annex D.

(e) Cooperative Engagement Process

(i) Except for Claims brought by the EC (Empowered Community) in accordance with this Section 4.3 and Section 4.2 of Annex D, prior to the filing of a Claim, the parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process ("**CEP**") for the purpose of attempting to resolve and/or narrow the Dispute. CEPs shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time.

(ii) The CEP is voluntary. However, except for Claims brought by the EC (Empowered Community) in accordance with this Section 4.3 and Section 4.2 of Annex D, if the Claimant does not participate in good faith in the CEP and ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party

in the IRP, the IRP Panel shall award to ICANN (Internet Corporation for Assigned Names and Numbers) all reasonable fees and costs incurred by ICANN (Internet Corporation for Assigned Names and Numbers) in the IRP, including legal fees.

(iii) Either party may terminate the CEP efforts if that party: (A) concludes in good faith that further efforts are unlikely to produce agreement; or (B) requests the inclusion of an independent dispute resolution facilitator ("**IRP Mediator**") after at least one CEP meeting.

(iv) Unless all parties agree on the selection of a particular IRP Mediator, any IRP Mediator appointed shall be selected from the members of the Standing Panel (described in Section 4.3(j) below) by its Chair, but such IRP Mediator shall not thereafter be eligible to serve as a panelist presiding over an IRP on the matter.

(f) ICANN (Internet Corporation for Assigned Names and Numbers) hereby waives any defenses that may be afforded under Section 5141 of the California Corporations Code ("**CCC**") against any Claimant, and shall not object to the standing of any such Claimant to participate in or to compel an IRP, or to enforce an IRP decision on the basis that such Claimant may not otherwise be able to assert that a Covered Action is ultra vires.

(g) Upon the filing of a Claim, an Independent Review Process Panel ("**IRP Panel**", described in Section 4.3(k) below) shall be selected in accordance with the Rules of Procedure (as defined in Section 4.3(n)(i)). Following the selection of an IRP Panel, that IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN (Internet Corporation for Assigned Names and Numbers)'s written response ("**Response**") in compliance

with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law. If no Response is timely filed by ICANN (Internet Corporation for Assigned Names and Numbers), the IRP Panel may accept the Claim as unopposed and proceed to evaluate and decide the Claim pursuant to the procedures set forth in these Bylaws.

(h) After a Claim is referred to an IRP Panel, the parties are urged to participate in conciliation discussions for the purpose of attempting to narrow the issues that are to be addressed by the IRP Panel.

(i) Each IRP Panel shall conduct an objective, de novo examination of the Dispute.

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

(ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

(iii) For Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

(iv) With respect to claims that ICANN (Internet Corporation for Assigned Names and Numbers) has not enforced its contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming

Function Contract, the standard of review shall be whether there was a material breach of ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.

(v) For avoidance of doubt, IRPs initiated through the mechanism contemplated at Section 4.3(a)(iv) above, shall be subject to a separate standard of review as defined in the IANA (Internet Assigned Numbers Authority) Naming Function Contract.

(j) Standing Panel

(i) There shall be an omnibus standing panel of at least seven members (the "**Standing Panel**") each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS (Domain Name System) and ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, work, policies, practices, and procedures. Members of the Standing Panel shall receive at a minimum, training provided by ICANN (Internet Corporation for Assigned Names and Numbers) on the workings and management of the Internet's unique identifiers and other appropriate training as recommended by the IRP Implementation Oversight Team (described in Section 4.3(n)(i)).

(ii) ICANN (Internet Corporation for Assigned Names and Numbers) shall, in consultation with the Supporting Organizations (Supporting Organizations)

and Advisory Committees (Advisory Committees), initiate a four-step process to establish the Standing Panel to ensure the availability of a number of IRP panelists that is sufficient to allow for the timely resolution of Disputes consistent with the Purposes of the IRP.

(A) ICANN (Internet Corporation for Assigned Names and Numbers), in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), shall initiate a tender process for an organization to provide administrative support for the IRP Provider (as defined in Section 4.3(m)), beginning by consulting the "**IRP Implementation Oversight Team**" (described in Section 4.3(n)(i)) on a draft tender document.

(B) ICANN (Internet Corporation for Assigned Names and Numbers) shall issue a call for expressions of interest from potential panelists, and work with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) and the Board to identify and solicit applications from well-qualified candidates, and to conduct an initial review and vetting of applications.

(C) The Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) shall nominate a slate of proposed panel members from the well-qualified candidates identified per the process set forth in Section 4.3(j)(ii)(B).

(D) Final selection shall be subject to Board confirmation, which shall not be unreasonably withheld.

(iii) Appointments to the Standing Panel shall be made for a fixed term of five years with no removal except for specified cause in the nature of corruption, misuse of

position, fraud or criminal activity. The recall process shall be developed by the IRP Implementation Oversight Team.

(iv) Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region (as defined in Section 7.5).

(k) IRP Panel

(i) A three-member IRP Panel shall be selected from the Standing Panel to hear a specific Dispute.

(ii) The Claimant and ICANN (Internet Corporation for Assigned Names and Numbers) shall each select one panelist from the Standing Panel, and the two panelists selected by the parties will select the third panelist from the Standing Panel. In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and ICANN (Internet Corporation for Assigned Names and Numbers) shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist. In the event that no Standing Panel is in place when an IRP Panel must be convened and the two party-selected panelists cannot agree on the third panelist, the IRP Provider's rules shall apply to selection of the third panelist.

(iii) Assignment from the Standing Panel to IRP Panels shall take into consideration the Standing Panel members' individual experience and expertise in issues related to highly technical, civil society,

business, diplomatic, and regulatory skills as needed by each specific proceeding, and such requests from the parties for any particular expertise.

(iv) Upon request of an IRP Panel, the IRP Panel shall have access to independent skilled technical experts at the expense of ICANN (Internet Corporation for Assigned Names and Numbers), although all substantive interactions between the IRP Panel and such experts shall be conducted on the record, except when public disclosure could materially and unduly harm participants, such as by exposing trade secrets or violating rights of personal privacy.

(v) IRP Panel decisions shall be made by a simple majority of the IRP Panel.

(l) All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for Claimants if needed.

(m) IRP Provider

(i) All IRP proceedings shall be administered by a well-respected international dispute resolution provider ("**IRP Provider**"). The IRP Provider shall receive and distribute IRP Claims, Responses, and all other submissions arising from an IRP at the direction of the IRP Panel, and shall function independently from ICANN (Internet Corporation for Assigned Names and Numbers).

(n) Rules of Procedure

(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) and comprised of members of the global Internet

community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("**Rules of Procedure**") that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

(ii) The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), and take effect upon approval by the Board, such approval not to be unreasonably withheld.

(iii) The Standing Panel may recommend amendments to such Rules of Procedure as it deems appropriate to fulfill the Purposes of the IRP, however no such amendment shall be effective without approval by the Board after publication and a period of public comment that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements:

(A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute;

(B) Issues relating to joinder, intervention, and consolidation of Claims;

(C) Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN (Internet Corporation for Assigned Names and Numbers)'s Response;

(D) Availability and limitations on discovery methods;

(E) Whether hearings shall be permitted, and if so what form and structure such hearings would take;

(F) Procedures if ICANN (Internet Corporation for Assigned Names and Numbers) elects not to respond to an IRP; and

(G) The standards and rules governing appeals from IRP Panel decisions, including which IRP Panel decisions may be appealed.

(o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;

(ii) Request additional written submissions from the Claimant or from other parties;

(iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN (Internet Corporation for Assigned Names and Numbers) failed to enforce ICANN (Internet Corporation for Assigned Names and Numbers)'s contractual rights with respect to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or resolve PTI service complaints by direct customers of the IANA (Internet Assigned Numbers Authority) naming functions, as applicable;

(iv) Recommend that ICANN (Internet Corporation for Assigned Names and Numbers) stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;

(v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

(vi) Determine the timing for each IRP proceeding; and

(vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

(p) A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN (Internet Corporation for Assigned Names and Numbers) action or decision until such time as the opinion of the IRP Panel is considered as described in Section 4.3(o)(iv), in order to maintain the *status quo*. A single member of the Standing Panel ("**Emergency Panelist**") shall be selected to adjudicate requests for interim relief. In the event that no Standing Panel is in place when an Emergency Panelist must be selected, the IRP Provider's rules shall apply to the selection of the Emergency Panelist.

Interim relief may only be provided if the Emergency Panelist determines that the Claimant has established all of the following factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief;

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.

(q) Conflicts of Interest

(i) Standing Panel members must be independent of ICANN (Internet Corporation for Assigned Names and Numbers) and its Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), and so must adhere to the following criteria:

(A) Upon consideration for the Standing Panel and on an ongoing basis, Panelists shall have an affirmative obligation to disclose any material relationship with ICANN (Internet Corporation for Assigned Names and Numbers), a Supporting Organization (Supporting Organization), an Advisory Committee (Advisory Committee), or any other participant in an IRP proceeding.

(B) Additional independence requirements to be developed by the IRP Implementation Oversight Team, including term limits and restrictions on post-term appointment to other ICANN (Internet Corporation for Assigned Names and Numbers) positions.

(ii) The IRP Provider shall disclose any material relationship with ICANN (Internet Corporation for Assigned Names and Numbers), a Supporting Organization (Supporting Organization), an Advisory Committee (Advisory Committee), or any other participant in an IRP proceeding.

(r) ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

(s) An IRP Panel should complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure. The preceding sentence does not provide the basis for a Covered Action.

(t) Each IRP Panel shall make its decision based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its decision shall specifically designate the prevailing party as to each part of a Claim.

(u) All IRP Panel proceedings shall be conducted on the record, and documents filed in connection with IRP Panel proceedings shall be posted on the Website, except for settlement negotiation or other proceedings that could

materially and unduly harm participants if conducted publicly. The Rules of Procedure, and all Claims, petitions, and decisions shall promptly be posted on the Website when they become available. Each IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets, but only if such confidentiality does not materially interfere with the transparency of the IRP proceeding.

(v) Subject to this Section 4.3, all IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.

(w) Subject to any limitations established through the Rules of Procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc within sixty (60) days of issuance of such decision.

(x) The IRP is intended as a final, binding arbitration process.

(i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.

(ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN (Internet Corporation for Assigned Names and Numbers) without a *de novo* review of the decision of the IRP Panel or en banc Standing Panel, as

applicable, with respect to factual findings or conclusions of law.

(iii) ICANN (Internet Corporation for Assigned Names and Numbers) intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.

(A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.

(B) If an IRP Panel decision in a Community IRP is in favor of the EC (Empowered Community), the Board shall comply within 30 days of such IRP Panel decision.

(C) If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC (Empowered Community) may seek enforcement in a court of competent jurisdiction. In the case of the EC (Empowered Community), the EC (Empowered Community) Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN (Internet Corporation for Assigned Names and Numbers) agrees; provided that

such a non-binding IRP decision is not intended to be and shall not be enforceable.

(y) ICANN (Internet Corporation for Assigned Names and Numbers) shall seek to establish means by which community, non-profit Claimants and other Claimants that would otherwise be excluded from utilizing the IRP process may meaningfully participate in and have access to the IRP process.

Section 4.4. PERIODIC REVIEW OF ICANN (Internet Corporation for Assigned Names and Numbers) STRUCTURE AND OPERATIONS

(a) The Board shall cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each Advisory Committee (Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee (as defined in Section 8.1) by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization, council or committee has a continuing purpose in the ICANN (Internet Corporation for Assigned Names and Numbers) structure, (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness and (iii) whether that organization, council or committee is accountable to its constituencies, stakeholder groups, organizations and other stakeholders.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN (Internet Corporation for Assigned Names and Numbers) being reviewed by a two-thirds vote of all Directors, subject to any rights of the EC (Empowered Community) under the Articles of Incorporation and these Bylaws.

(b) The Governmental Advisory Committee (Advisory Committee) shall provide its own review mechanisms.

Section 4.5. ANNUAL REVIEW

ICANN (Internet Corporation for Assigned Names and Numbers) will produce an annual report on the state of the accountability and transparency reviews, which will discuss the status of the implementation of all review processes required by Section 4.6 and the status of ICANN (Internet Corporation for Assigned Names and Numbers)'s implementation of the recommendations set forth in the final reports issued by the review teams to the Board following the conclusion of such review ("**Annual Review Implementation Report**"). The Annual Review Implementation Report will be posted on the Website for public review and comment. Each Annual Review Implementation Report will be considered by the Board and serve as an input to the continuing process of implementing the recommendations from the review teams set forth in the final reports of such review teams required in Section 4.6.

Section 4.6. SPECIFIC REVIEWS

(a) Review Teams and Reports

(i) Review teams will be established for each applicable review, which will include both a limited number of members and an open number of observers. The chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) participating in the applicable review shall select a group of up to 21 review team members from among the prospective members nominated by the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), balanced for diversity and skill. In addition, the Board may designate one Director or Liaison to serve as a member of the review team. Specific guidance on the selection process is provided within the operating standards developed for the conduct of reviews under this Section 4.6 (the "Operating Standards"). The Operating Standards shall be developed through community consultation, including public comment opportunities as necessary that comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers). The Operating Standards must be aligned with the following guidelines:

(A) Each Supporting Organization (Supporting Organization) and Advisory Committee (Advisory Committee) participating in the applicable review may nominate up to seven prospective members for the review team;

(B) Any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) nominating at least one, two or three prospective review team members shall be entitled to have those one, two or three nominees selected as members to the review team, so long as the nominees

meet any applicable criteria for service on the team;
and

(C) If any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) has not nominated at least three prospective review team members, the Chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) shall be responsible for the determination of whether all 21 SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) member seats shall be filled and, if so, how the seats should be allocated from among those nominated.

(ii) Members and liaisons of review teams shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and their applicable review team any conflicts of interest with a specific matter or issue under review in accordance with the most recent Board-approved practices and Operating Standards. The applicable review team may exclude from the discussion of a specific complaint or issue any member deemed by the majority of review team members to have a conflict of interest. Further details on the conflict of interest practices are included in the Operating Standards.

(iii) Review team decision-making practices shall be specified in the Operating Standards, with the expectation that review teams shall try to operate on a consensus basis. In the event a consensus cannot be found among the members of a review team, a majority vote of the members may be taken.

(iv) Review teams may also solicit and select independent experts to render advice as requested by the review team. ICANN (Internet Corporation for

Assigned Names and Numbers) shall pay the reasonable fees and expenses of such experts for each review contemplated by this Section 4.6 to the extent such fees and costs are consistent with the budget assigned for such review. Guidelines on how review teams are to work with and consider independent expert advice are specified in the Operating Standards.

(v) Each review team may recommend that the applicable type of review should no longer be conducted or should be amended.

(vi) Confidential Disclosure to Review Teams

(A) To facilitate transparency and openness regarding ICANN (Internet Corporation for Assigned Names and Numbers)'s deliberations and operations, the review teams, or a subset thereof, shall have access to ICANN (Internet Corporation for Assigned Names and Numbers) internal information and documents pursuant to the Confidential Disclosure Framework set forth in the Operating Standards (the "**Confidential Disclosure Framework**"). The Confidential Disclosure Framework must be aligned with the following guidelines:

(1) ICANN (Internet Corporation for Assigned Names and Numbers) must provide a justification for any refusal to reveal requested information. ICANN (Internet Corporation for Assigned Names and Numbers)'s refusal can be appealed to the Ombudsman and/or the ICANN (Internet Corporation for Assigned Names and Numbers) Board for a ruling on the disclosure request.

(2) ICANN (Internet Corporation for Assigned Names and Numbers) may designate certain documents and information as "for review team members only" or for a

subset of the review team members based on conflict of interest. ICANN (Internet Corporation for Assigned Names and Numbers)'s designation of documents may also be appealed to the Ombudsman and/or the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

(3) ICANN (Internet Corporation for Assigned Names and Numbers) may require review team members to sign a non-disclosure agreement before accessing documents.

(vii) Reports

(A) Each report of the review team shall describe the degree of consensus or agreement reached by the review team on each recommendation contained in such report. Any member of a review team not in favor of a recommendation of its review team (whether as a result of voting against a matter or objecting to the consensus position) may record a minority dissent to such recommendation, which shall be included in the report of the review team. The review team shall attempt to prioritize each of its recommendations and provide a rationale for such prioritization.

(B) At least one draft report of the review team shall be posted on the Website for public review and comment. The review team must consider the public comments received in response to any posted draft report and shall amend the report as the review team deems appropriate and in the public interest before submitting its final report to the Board. The final report should include an explanation of how public comments were considered as well as a summary of changes made in response to public comments.

(C) Each final report of a review team shall be published for public comment in advance of the

Board's consideration. Within six months of receipt of a final report, the Board shall consider such final report and the public comments on the final report, and determine whether to approve the recommendations in the final report. If the Board does not approve any or all of the recommendations, the written rationale supporting the Board's decision shall include an explanation for the decision on each recommendation that was not approved. The Board shall promptly direct implementation of the recommendations that were approved.

(b) Accountability and Transparency Review

(i) The Board shall cause a periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making reflect the public interest and are accountable to the Internet community ("**Accountability and Transparency Review**").

(ii) The issues that the review team for the Accountability and Transparency Review (the "**Accountability and Transparency Review Team**") may assess include, but are not limited to, the following:

(A) assessing and improving Board governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which the Board's composition and allocation structure meets ICANN (Internet Corporation for Assigned Names and Numbers)'s present and future needs, and the appeal mechanisms for Board decisions contained in these Bylaws;

(B) assessing the role and effectiveness of the GAC (Governmental Advisory Committee)'s interaction with the Board and with the broader ICANN (Internet Corporation for Assigned Names and Numbers) community, and making recommendations for improvement to ensure effective consideration by ICANN (Internet Corporation for Assigned Names and Numbers) of GAC (Governmental Advisory Committee) input on the public policy aspects of the technical coordination of the DNS (Domain Name System);

(C) assessing and improving the processes by which ICANN (Internet Corporation for Assigned Names and Numbers) receives public input (including adequate explanation of decisions taken and the rationale thereof);

(D) assessing the extent to which ICANN (Internet Corporation for Assigned Names and Numbers)'s decisions are supported and accepted by the Internet community;

(E) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development; and

(F) assessing and improving the Independent Review Process.

(iii) The Accountability and Transparency Review Team shall also assess the extent to which prior Accountability and Transparency Review recommendations have been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

(iv) The Accountability and Transparency Review Team may recommend to the Board the termination or amendment of other periodic reviews required by this

Section 4.6, and may recommend to the Board the creation of additional periodic reviews.

(v) The Accountability and Transparency Review Team should issue its final report within one year of convening its first meeting.

(vi) The Accountability and Transparency Review shall be conducted no less frequently than every five years measured from the date the previous Accountability and Transparency Review Team was convened.

(c) Security (Security – Security, Stability and Resiliency (SSR)), Stability (Security, Stability and Resiliency), and Resiliency (Security Stability & Resiliency (SSR)) Review

(i) The Board shall cause a periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the systems and processes, both internal and external, that directly affect and/or are affected by the Internet's system of unique identifiers that ICANN (Internet Corporation for Assigned Names and Numbers) coordinates ("**SSR Review**").

(ii) The issues that the review team for the SSR Review ("**SSR Review Team**") may assess are the following:

(A) security, operational stability and resiliency matters, both physical and network, relating to the coordination of the Internet's system of unique identifiers;

(B) conformance with appropriate security contingency planning framework for the Internet's system of unique

identifiers; and

(C) maintaining clear and globally interoperable security processes for those portions of the Internet's system of unique identifiers that ICANN (Internet Corporation for Assigned Names and Numbers) coordinates.

(iii) The SSR Review Team shall also assess the extent to which ICANN (Internet Corporation for Assigned Names and Numbers) has successfully implemented its security efforts, the effectiveness of the security efforts to deal with actual and potential challenges and threats to the security and stability of the DNS (Domain Name System), and the extent to which the security efforts are sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the DNS (Domain Name System), consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

(iv) The SSR Review Team shall also assess the extent to which prior SSR Review recommendations have been implemented and the extent to which implementation of such recommendations has resulted in the intended effect.

(v) The SSR Review shall be conducted no less frequently than every five years, measured from the date the previous SSR Review Team was convened.

(d) Competition, Consumer Trust and Consumer Choice Review

(i) ICANN (Internet Corporation for Assigned Names and Numbers) will ensure that it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse

issues, sovereignty concerns, and rights protection prior to, or concurrent with, authorizing an increase in the number of new top-level domains in the root zone of the DNS (Domain Name System) pursuant to an application process initiated on or after the date of these Bylaws ("**New gTLD (generic Top Level Domain) Round**").

(ii) After a New gTLD (generic Top Level Domain) Round has been in operation for one year, the Board shall cause a competition, consumer trust and consumer choice review as specified in this Section 4.6(d). ("**CCT (Competition, Consumer Choice & Consumer Trust) Review**").

(iii) The review team for the CCT (Competition, Consumer Choice & Consumer Trust) Review ("**CCT (Competition, Consumer Choice & Consumer Trust) Review Team**") will examine (A) the extent to which the expansion of gTLDs has promoted competition, consumer trust and consumer choice and (B) the effectiveness of the New gTLD (generic Top Level Domain) Round's application and evaluation process and safeguards put in place to mitigate issues arising from the New gTLD (generic Top Level Domain) Round.

(iv) For each of its recommendations, the CCT (Competition, Consumer Choice & Consumer Trust) Review Team should indicate whether the recommendation, if accepted by the Board, must be implemented before opening subsequent rounds of new generic top-level domain applications periods.

(v) The CCT (Competition, Consumer Choice & Consumer Trust) Review Team shall also assess the extent to which prior CCT (Competition, Consumer Choice & Consumer Trust) Review recommendations have been implemented and the extent to which

implementation of such recommendations has resulted in the intended effect.

(e) Registration Directory Service Review

(i) Subject to applicable laws, ICANN (Internet Corporation for Assigned Names and Numbers) shall use commercially reasonable efforts to enforce its policies relating to registration directory services and shall work with Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) to explore structural changes to improve accuracy and access to generic top-level domain registration data, as well as consider safeguards for protecting such data.

(ii) The Board shall cause a periodic review to assess the effectiveness of the then current gTLD (generic Top Level Domain) registry directory service and whether its implementation meets the legitimate needs of law enforcement, promoting consumer trust and safeguarding registrant data ("**Directory Service Review**").

(iii) The review team for the Directory Service Review ("**Directory Service Review Team**") will consider the Organisation for Economic Co-operation and Development ("**OECD (Organization for Economic Co-operation and Development)**") Guidelines on the Protection of Privacy and Transborder Flows of Personal Data as defined by the OECD (Organization for Economic Co-operation and Development) in 1980 and amended in 2013 and as may be amended from time to time.

(iv) The Directory Service Review Team shall assess the extent to which prior Directory Service Review recommendations have been implemented and the

extent to which implementation of such recommendations has resulted in the intended effect.

(v) The Directory Service Review shall be conducted no less frequently than every five years, measured from the date the previous Directory Service Review Team was convened, except that the first Directory Service Review to be conducted after 1 October 2016 shall be deemed to be timely if the applicable Directory Service Review Team is convened on or before 31 October 2016.

Section 4.7. COMMUNITY MEDIATION

(a) If the Board refuses or fails to comply with a duly authorized and valid EC (Empowered Community) Decision under these Bylaws, the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate a mediation process pursuant to this Section 4.7. The Board shall be deemed to have refused or failed to comply with a duly authorized and valid EC (Empowered Community) Decision if the Board has not complied with the EC (Empowered Community) Decision within 30 days of being notified of the relevant EC (Empowered Community) Decision.

(b) If a Mediation Initiation Notice (as defined in Section 4.1(a) of Annex D) is delivered to the Secretary pursuant to and in compliance with Section 4.1(a) of Annex D, as soon as reasonably practicable thereafter, the EC (Empowered Community) Administration shall designate individuals to represent the EC (Empowered Community) in the mediation ("**Mediation Administration**") and the Board shall designate representatives for the mediation ("**Board Mediation**")

Representatives"). Members of the EC (Empowered Community) Administration and the Board can designate themselves as representatives. ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the Mediation Initiation Notice on the Website.

(c) There shall be a single mediator who shall be selected by the agreement of the Mediation Administration and Board Mediation Representatives. The Mediation Administration shall propose a slate of at least five potential mediators, and the Board Mediation Representatives shall select a mediator from the slate or request a new slate until a mutually-agreed mediator is selected. The Board Mediation Representatives may recommend potential mediators for inclusion on the slates selected by the Mediation Administration. The Mediation Administration shall not unreasonably decline to include mediators recommended by the Board Mediation Representatives on proposed slates and the Board Mediation Representatives shall not unreasonably withhold consent to the selection of a mediator on slates proposed by the Mediation Administration.

(d) The mediator shall be a licensed attorney with general knowledge of contract law and general knowledge of the DNS (Domain Name System) and ICANN (Internet Corporation for Assigned Names and Numbers). The mediator may not have any ongoing business relationship with ICANN (Internet Corporation for Assigned Names and Numbers), any Supporting Organization (Supporting Organization) (or constituent thereof), any Advisory Committee (Advisory Committee) (or constituent thereof), the EC (Empowered Community) Administration or the EC (Empowered Community). The mediator must confirm in writing that he or she is not, directly or indirectly, and will not become during the term of the mediation, an employee, partner, executive officer, director, consultant or advisor of ICANN (Internet Corporation for Assigned Names and Numbers), any Supporting Organization (Supporting

Organization) (or constituent thereof), any Advisory Committee (Advisory Committee) (or constituent thereof), the EC (Empowered Community) Administration or the EC (Empowered Community).

(e) The mediator shall conduct the mediation in accordance with these Bylaws, the laws of California and the rules and procedures of a well-respected international dispute resolution provider, which may be the IRP Provider. The arbitration will be conducted in the English language consistent with the provisions relevant for mediation under the IRP Rules of Procedure and will occur in Los Angeles County, California, unless another location is mutually-agreed between the Mediation Administration and Board Mediation Representatives.

(f) The Mediation Administration and the Board Mediation Representatives shall discuss the dispute in good faith and attempt, with the mediator's assistance, to reach an amicable resolution of the dispute.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall bear all costs of the mediator.

(h) If the Mediation Administration and the Board Mediation Representatives have engaged in good faith participation in the mediation but have not resolved the dispute for any reason, the Mediation Administration or the Board Mediation Representatives may terminate the mediation at any time by declaring an impasse.

(i) If a resolution to the dispute is reached by the Mediation Administration and the Board Mediation Representatives, the Mediation Administration and the Board Mediation Representatives shall document such resolution including recommendations ("**Mediation Resolution**" and the date of such resolution, the "**Mediation Resolution Date**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the Mediation Resolution on the Website

(in no event later than 14 days after mediation efforts are completed) and the EC (Empowered Community) Administration shall promptly notify the Decisional Participants of the Mediation Resolution.

(j) The EC (Empowered Community) shall be deemed to have accepted the Mediation Resolution if it has not delivered an EC (Empowered Community) Community IRP Initiation Notice (as defined in Section 4.2(e) of Annex D) pursuant to and in compliance with Section 4.2 of Annex D within eighty (80) days following the Mediation Resolution Date.

ARTICLE 5 OMBUDSMAN

Section 5.1. OFFICE OF OMBUDSMAN

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain an Office of Ombudsman ("**Office of Ombudsman**"), to be managed by an ombudsman ("**Ombudsman**") and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

(b) The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.

(c) The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.

(d) The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN (Internet Corporation for Assigned Names and Numbers) Budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the

general ICANN (Internet Corporation for Assigned Names and Numbers) Budget recommended by the ICANN (Internet Corporation for Assigned Names and Numbers) President to the Board. Nothing in this Section 5.1 shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 5.2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who believe that the ICANN (Internet Corporation for Assigned Names and Numbers) staff, Board or an ICANN (Internet Corporation for Assigned Names and Numbers) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN (Internet Corporation for Assigned Names and Numbers) staff, the Board, or ICANN (Internet Corporation for Assigned Names and Numbers) constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results. With respect to the Reconsideration Request Process set forth in Section 4.2, the Ombudsman shall serve the function expressly provided for in Section 4.2.

Section 5.3. OPERATIONS

The Office of Ombudsman shall:

- (a) facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN (Internet Corporation for Assigned Names and Numbers) community (excluding employees and vendors/suppliers of ICANN (Internet Corporation for Assigned Names and Numbers)) may have with specific actions or failures to act by the Board or ICANN (Internet Corporation for Assigned Names and Numbers) staff which have not otherwise become the subject of either a Reconsideration Request or Independent Review Process;
- (b) perform the functions set forth in Section 4.2 relating to review and consideration of Reconsideration Requests;
- (c) exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;
- (d) have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN (Internet Corporation for Assigned Names and Numbers) staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN (Internet Corporation for Assigned Names and Numbers));

(e) heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN (Internet Corporation for Assigned Names and Numbers) community and online availability;

(f) maintain neutrality and independence, and have no bias or personal stake in an outcome; and

(g) comply with all ICANN (Internet Corporation for Assigned Names and Numbers) conflicts of interest and confidentiality policies.

Section 5.4. INTERACTION WITH ICANN (Internet Corporation for Assigned Names and Numbers) AND OUTSIDE ENTITIES

(a) No ICANN (Internet Corporation for Assigned Names and Numbers) employee, Board member, or other participant in Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) shall prevent or impede the Ombudsman's contact with the ICANN (Internet Corporation for Assigned Names and Numbers) community (including employees of ICANN (Internet Corporation for Assigned Names and Numbers)). ICANN (Internet Corporation for Assigned Names and Numbers) employees and Board members shall direct members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who voice problems, concerns, or complaints about ICANN (Internet Corporation for Assigned Names and Numbers) to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) staff and other ICANN (Internet Corporation for Assigned Names and Numbers) participants shall observe and respect determinations made by the Office of

Ombudsman concerning confidentiality of any complaints received by that Office.

(c) Contact with the Ombudsman shall not constitute notice to ICANN (Internet Corporation for Assigned Names and Numbers) of any particular action or cause of action.

(d) The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

(e) The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.

Section 5.5. ANNUAL REPORT

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

ARTICLE 6 EMPOWERED COMMUNITY

Section 6.1. COMPOSITION AND ORGANIZATION OF THE EMPOWERED

COMMUNITY

(a) The Empowered Community ("**EC (Empowered Community)**") shall be a nonprofit association formed under the laws of the State of California consisting of the ASO (Address Supporting Organization), the ccNSO (Country Code Names Supporting Organization) (as defined in Section 10.1), the GNSO (Generic Names Supporting Organization) (as defined in Section 11.1), the ALAC (At-Large Advisory Committee) (as defined in Section 12.2(d)(i)) and the GAC (Governmental Advisory Committee) (each a "**Decisional Participant**" or "associate," and collectively, the "**Decisional Participants**").

(b) This Article 6 shall constitute the articles of association of the EC (Empowered Community) and shall be considered the formational "governing document" (as defined in Section 18008 of the CCC) of the EC (Empowered Community), and the terms contained herein and in these Bylaws relating to the EC (Empowered Community) shall be the EC (Empowered Community)'s "governing principles" (as defined in Section 18010 of the CCC), which may only be amended as set forth in Section 25.2 . Where necessary for purposes of interpretation of these Bylaws, an "associate" shall be deemed to be a "member" of the EC (Empowered Community) as defined in Section 18015 of the CCC. Any change in the number and/or identity of Decisional Participants for any reason (including the resignation of any Decisional Participant or the addition of new Decisional Participants as a result of the creation of additional Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees)), and any corresponding changes in the voting thresholds for exercise of the EC (Empowered Community)'s rights described in Annex D of these Bylaws, will only be effective following the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D. The EC (Empowered Community) may not be dissolved except upon the

completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D.

(c) The sole purpose of the EC (Empowered Community) is to exercise its rights and perform its obligations under ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and these Bylaws, and the EC (Empowered Community) shall have no other powers or rights except as expressly provided therein. The EC (Empowered Community) may only act as provided in these Bylaws. Any act of the EC (Empowered Community) that is not in accordance with these Bylaws shall not be effective.

(d) The EC (Empowered Community) shall not acquire, hold, manage, encumber or transfer any interest in real or personal property, nor have any directors, officers or employees. The EC (Empowered Community) shall not merge with or into another entity nor shall it dissolve, except with the approval of the Board and as part of a Fundamental Bylaw Amendment (as defined in Section 25.2(b)).

(e) Decisional Participants shall not transfer their right to be an associate of the EC (Empowered Community). Any attempted transfer by any Decisional Participant of its right to be an associate of the EC (Empowered Community) shall be void ab initio.

(f) The location and street address of the EC (Empowered Community) shall be the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

(g) Each Decisional Participant shall, except as otherwise provided in Annex D, adopt procedures for exercising the rights of such Decisional Participant pursuant to the procedures set forth in Annex D, including (i) who can submit a petition to such Decisional Participant, (ii) the process for an individual to submit a petition to such Decisional Participant, including whether a petition must be accompanied by a rationale, (iii) how the Decisional

Participant determines whether to accept or reject a petition, (iv) how the Decisional Participant determines whether an issue subject to a petition has been resolved, (v) how the Decisional Participant determines whether to support or object to actions supported by another Decisional Participant, and (vi) the process for the Decisional Participant to notify its constituents of relevant matters.

Section 6.2. POWERS AND ACKNOWLEDGMENTS

(a) Pursuant to and in compliance with the terms and conditions of these Bylaws, the EC (Empowered Community) shall have the powers and rights, as set forth more fully elsewhere in these Bylaws, to:

(i) Appoint and remove individual Directors (other than the President);

(ii) Recall the entire Board;

(iii) Reject ICANN (Internet Corporation for Assigned Names and Numbers) Budgets, IANA (Internet Assigned Numbers Authority) Budgets, Operating Plans (as defined in [Section 22.5\(a\)\(i\)](#)) and Strategic Plans (as defined in [Section 22.5\(b\)\(i\)](#));

(iv) Reject Standard Bylaw Amendments (as defined in [Section 25.1\(a\)](#));

(v) Approve Fundamental Bylaw Amendments, Articles Amendments (as defined in [Section 25.2\(b\)](#)), and Asset Sales (as defined in [Article 26\(a\)](#));

(vi) Reject PTI Governance Actions (as defined in [Section 16.2\(d\)](#));,

(vii) Require the ICANN (Internet Corporation for Assigned Names and Numbers) Board to re-review its rejection of IFR Recommendation Decisions (as defined in Section 18.6(d)), Special IFR Recommendation Decisions (as defined in Section 18.12(e)), SCWG Creation Decisions (as defined in Section 19.1(d)) and SCWG Recommendation Decisions (as defined in Section 19.4(d));

(viii) Initiate a Community Reconsideration Request, mediation or a Community IRP; and

(ix) Take necessary and appropriate action to enforce its powers and rights, including through the community mechanism contained in Annex D or an action filed in a court of competent jurisdiction.

(b) The EC (Empowered Community) may pursue an action in any court with jurisdiction over ICANN (Internet Corporation for Assigned Names and Numbers) to enforce the EC (Empowered Community)'s rights under these Bylaws. ICANN (Internet Corporation for Assigned Names and Numbers) acknowledges the EC (Empowered Community)'s legal personhood and shall not raise the EC (Empowered Community)'s legal personhood as a defense in any proceeding between ICANN (Internet Corporation for Assigned Names and Numbers) and the EC (Empowered Community). ICANN (Internet Corporation for Assigned Names and Numbers) shall not assert as a defense that prior filing or completion of a Reconsideration Request or an IRP Claim was a prerequisite to an action in court regarding the EC (Empowered Community)'s power to appoint or remove an individual Director or recall the Board (except to the extent an IRP Panel award is applicable pursuant to Section 3.6(e)).

(c) By nominating a Director for designation by the EC (Empowered Community) or exercising the community mechanism contained in Annex D with respect to any rights

granted to the EC (Empowered Community) pursuant to these Bylaws, the EC (Empowered Community) and each of its Decisional Participants agrees and consents to the terms of these Bylaws and intends to be legally bound hereby.

Section 6.3. EC (Empowered Community) ADMINISTRATION

(a) The Decisional Participants shall act through their respective chairs or such other persons as may be designated by the Decisional Participants (collectively, such persons are the "**EC (Empowered Community) Administration**"). Each Decisional Participant shall deliver annually a written certification from its chair or co-chairs to the Secretary designating the individual who shall represent the Decisional Participant on the EC (Empowered Community) Administration.

(b) In representing a Decisional Participant on the EC (Empowered Community) Administration, the representative individual shall act solely as directed by the represented Decisional Participant and in accordance with processes developed by such Decisional Participant in accordance with Section 6.1(g).

(c) In representing the EC (Empowered Community) Administration, the individuals serving thereon shall act as required for the EC (Empowered Community) to follow the applicable procedures in Annex D, and to implement EC (Empowered Community) decisions made in accordance with such procedures.

(d) All communications and notices required or permitted to be given under these Bylaws by a Decisional Participant shall be provided by the Decisional Participant's representative on the EC (Empowered Community) Administration. All communications and notices required or permitted to be given under these Bylaws by the EC

(Empowered Community) shall be provided by any member of the EC (Empowered Community) Administration. Where a particular Bylaws notice provision does not require notice to the Secretary, the EC (Empowered Community) and the Decisional Participants shall provide a copy of the notice to the Secretary in accordance with Section 21.5, and ICANN (Internet Corporation for Assigned Names and Numbers) shall post it on the Website.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall be entitled to rely on notices from a Decisional Participant's representative or an individual serving on the EC (Empowered Community) Administration delivered in accordance with Section 21.5 as evidence that the actions set forth therein have been approved by or are the actions of the Decisional Participant, the EC (Empowered Community) or the EC (Empowered Community) Administration, as applicable, pursuant to and in compliance with the requirements of these Bylaws (including Annex D) .

(f) No person participating in the EC (Empowered Community), the EC (Empowered Community) Administration or a Decisional Participant shall be liable for any debt, obligation or liability of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community), other than in the case of a fraudulent act committed by such person.

Section 6.4. CONSENT TO BOARD-INITIATED REMOVAL OF DIRECTOR WITHOUT CAUSE

In the event the EC (Empowered Community) Administration receives from the Secretary a valid notice as described in Section 7.11(a)(i)(B), indicating that the Board has voted to remove a Director without cause pursuant to Section 7.11(a)(i)(B), the EC (Empowered Community) shall without deliberation consent to such removal, and the EC

(Empowered Community) Administration shall provide notice to the Secretary of such consent.

ARTICLE 7 BOARD OF DIRECTORS

Section 7.1. COMPOSITION OF THE BOARD

The ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors ("**Board**") shall consist of sixteen voting directors ("**Directors**"). In addition, four non-voting liaisons ("**Liaisons**") shall be appointed for the purposes set forth in Section 7.9. Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the Board.

Section 7.2. DIRECTORS AND THEIR SELECTION; ELECTION OF CHAIR AND VICE-CHAIR

(a) As of the effective date of the amendment and restatement of these Bylaws on 1 October 2016, the EC (Empowered Community) shall be the sole designator of ICANN (Internet Corporation for Assigned Names and Numbers) and shall designate, within the meaning of Section 5220 of the CCC, all Directors except for the President ex officio. The EC (Empowered Community) shall notify promptly the Secretary in writing of the following designations:

(i) Eight Directors nominated by the Nominating Committee to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seats 1 through 8.

(ii) Two Directors nominated by the ASO (Address Supporting Organization) to be designated as Directors by the EC (Empowered Community). These

seats on the Board are referred to in these Bylaws as Seat 9 and Seat 10.

(iii) Two Directors nominated by the ccNSO (Country Code Names Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 11 and Seat 12.

(iv) Two Directors nominated by the GNSO (Generic Names Supporting Organization) to be designated as Directors by the EC (Empowered Community). These seats on the Board are referred to in these Bylaws as Seat 13 and Seat 14.

(v) One Director nominated by the At-Large Community to be designated as Directors by the EC (Empowered Community). This seat on the Board is referred to in these Bylaws as Seat 15.

In addition to the Directors designated by the EC (Empowered Community), the President shall serve ex officio as a Director. The seat held by the President on the Board is referred to in these Bylaws as Seat 16.

(b) In carrying out its responsibilities to nominate the Directors for Seats 1 through 8 for designation by the EC (Empowered Community), the Nominating Committee shall ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4 and Section 7.5. At no time when it makes its nomination shall the Nominating Committee nominate a Director to fill any vacancy or expired term whose designation would cause the total number of Directors (not including the President) from countries in any one Geographic Region to exceed five; and the Nominating Committee shall ensure when it makes its nominations that

the Board includes at least one Director who is from a country in each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region ("Diversity Calculation"). For purposes of this Section 7.2(b), if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship ("**Domicile**"), that candidate may be deemed to be from either country and must select in his or her Statement of Interest the country of citizenship or Domicile that he or she wants the Nominating Committee to use for Diversity Calculation purposes. For purposes of this Section 7.2(b), a person can only have one Domicile, which shall be determined by where the candidate has a permanent residence and place of habitation.

(c) In carrying out their responsibilities to nominate Directors for Seats 9 through 15 for designation by the EC (Empowered Community), the Supporting Organizations (Supporting Organizations) and the At-Large Community shall seek to ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4 and Section 7.5. The Supporting Organizations (Supporting Organizations) shall ensure that, at any given time, no two Directors nominated by a Supporting Organization (Supporting Organization) are citizens from the same country or of countries located in the same Geographic Region. For purposes of this Section 7.2(c), if any candidate for Director maintains citizenship or Domicile of more than one country, that candidate may be deemed to be from either country and must select in his or her Statement of Interest the country of citizenship or Domicile that he or she wants the Supporting Organization (Supporting Organization) or the At-Large Community, as applicable, to use for nomination purposes. For purposes of this Section 7.2(c), a person can only have one Domicile,

which shall be determined by where the candidate has a permanent residence and place of habitation.

(d) The Board shall annually elect a Chair and a Vice-Chair from among the Directors, not to include the President.

(e) The EC (Empowered Community) shall designate each person nominated as a Director by the Nominating Committee, the ASO (Address Supporting Organization), the ccNSO (Country Code Names Supporting Organization), the GNSO (Generic Names Supporting Organization) and the At-Large Community in accordance with this Section 7.2.

(f) As a condition to sitting on the Board, each Director other than the President ex officio shall sign a pre-service letter pursuant to which such Director:

(i) acknowledges and agrees to the EC (Empowered Community)'s right to remove the Director at any time and for any reason following the processes set forth in these Bylaws;

(ii) acknowledges and agrees that serving as a Director shall not establish any employment or other relationship (whether to ICANN (Internet Corporation for Assigned Names and Numbers), the EC (Empowered Community), any body entitled to nominate a Director, or any of their agents) that provides any due process rights related to termination of service as a Director; and

(iii) conditionally and irrevocably resigns as a Director automatically effective upon communication to the Director or, in the case of Board recall, communication to the Board of a final determination of removal following the processes set forth in these Bylaws.

Section 7.3. CRITERIA FOR NOMINATION OF DIRECTORS

Directors shall be:

- (a) Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;
- (b) Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers) decisions on the global Internet community, and committed to the success of ICANN (Internet Corporation for Assigned Names and Numbers);
- (c) Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in this Section 7.3;
- (d) Persons who, in the aggregate, have personal familiarity with the operation of gTLD (generic Top Level Domain) registries and registrars; with ccTLD (Country Code Top Level Domain) registries; with IP (Internet Protocol or Intellectual Property) address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet; and
- (e) Persons who are able to work and communicate in written and spoken English.

Section 7.4. ADDITIONAL QUALIFICATIONS

- (a) Notwithstanding anything herein to the contrary, no official of a national government or a multinational entity established by treaty or other agreement between national governments

may serve as a Director. As used herein, the term "official" means a person (i) who holds an elective governmental office or (ii) who is employed by such government or multinational entity and whose primary function with such government or entity is to develop or influence governmental or public policies.

(b) No person who serves in any capacity (including as a liaison) on any Supporting Organization (Supporting Organization) Council shall simultaneously serve as a Director or Liaison to the Board. If such a person is identified by, or presents themselves to, the Supporting Organization (Supporting Organization) Council or the At-Large Community for consideration for nomination to serve as a Director, the person shall not thereafter participate in any discussion of, or vote by, the Supporting Organization (Supporting Organization) Council or the committee designated by the At-Large Community relating to the nomination of Directors by the Council or At-Large Community, until the Council or committee(s) specified by the At-Large Community has nominated the full complement of Directors it is responsible for nominating. In the event that a person serving in any capacity on a Supporting Organization (Supporting Organization) Council is considered for nomination to serve as a Director, the constituency group or other group or entity that selected the person may select a replacement for purposes of the Council's nomination process. In the event that a person serving in any capacity on the At-Large Advisory Committee (Advisory Committee) is identified as or accepts a nomination to be considered for nomination by the At-Large Community as a Director, the Regional At-Large Organization or other group or entity that selected the person may select a replacement for purposes of the At-Large Community's nomination process.

(c) Persons serving in any capacity on the Nominating Committee shall be ineligible for nomination or designation to positions on the Board as provided by Section 8.8.

(d) No person who serves on the EC (Empowered Community) Administration while serving in that capacity shall be considered for nomination or designated to the Board, nor serve simultaneously on the EC (Empowered Community) Administration and as a Director or Liaison to the Board.

Section 7.5. INTERNATIONAL REPRESENTATION

In order to ensure broad international representation on the Board, the nomination of Directors by the Nominating Committee, each Supporting Organization (Supporting Organization) and the At-Large Community shall comply with all applicable diversity provisions of these Bylaws or of any memorandum of understanding referred to in these Bylaws concerning the Supporting Organization (Supporting Organization). One intent of these diversity provisions is to ensure that at all times each Geographic Region shall have at least one Director, and at all times no Geographic Region shall have more than five Directors on the Board (not including the President). As used in these Bylaws, each of the following is considered to be a "**Geographic Region**": (a) Europe; (b) Asia/Australia/Pacific; (c) Latin America/Caribbean islands; (d) Africa; and (e) North America. The specific countries included in each Geographic Region shall be determined by the Board, and this Section 7.5 shall be reviewed by the Board from time to time (and in any event at least once every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet.

Section 7.6. DIRECTORS' CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall require a statement from each Director not less frequently than once a year setting forth all business and other

affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers). Each Director shall be responsible for disclosing to ICANN (Internet Corporation for Assigned Names and Numbers) any matter that could reasonably be considered to make such Director an "interested director" within the meaning of Section 5233 of the CCC. In addition, each Director shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) any relationship or other factor that could reasonably be considered to cause the Director to be considered to be an "interested person" within the meaning of Section 5227 of the CCC. The Board shall adopt policies specifically addressing Director, Officer, EC (Empowered Community) and Supporting Organization (Supporting Organization) conflicts of interest. No Director shall vote on any matter in which he or she has a material and direct financial interest that would be affected by the outcome of the vote.

Section 7.7. DUTIES OF DIRECTORS

Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN (Internet Corporation for Assigned Names and Numbers) and not as representatives of the EC (Empowered Community), the Nominating Committee, Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) that nominated them, as applicable, their employers, or any other organizations or constituencies.

Section 7.8. TERMS OF DIRECTORS

(a) The regular term of office of Director Seats 1 through 15 shall begin as follows:

- (i) The regular terms of Seats 1 through 3 shall begin at the conclusion of each ICANN (Internet Corporation

for Assigned Names and Numbers) annual meeting every third year after 2003;

(ii) The regular terms of Seats 4 through 6 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2004;

(iii) The regular terms of Seats 7 and 8 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2005;

(iv) The terms of Seats 9 and 12 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2015;

(v) The terms of Seats 10 and 13 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2013; and

(vi) The terms of Seats 11, 14 and 15 shall begin at the conclusion of each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2014.

(b) Each Director holding any of Seats 1 through 15, including a Director nominated and designated to fill a vacancy, shall hold office for a term that lasts until the next term for that Seat commences and until a successor has been designated and qualified or until that Director resigns or is removed in accordance with these Bylaws. For the avoidance of doubt, the new governance provisions effective as of the amendment and restatement of these Bylaws on 1 October 2016 shall not have the effect of shortening or

terminating the terms of any Directors serving at the time of the amendment and restatement.

(c) At least two months before the commencement of each annual meeting, the Nominating Committee shall give the EC (Empowered Community) Administration (with a copy to the Decisional Participants and Secretary) written notice of its nomination of Directors for seats with terms beginning at the conclusion of the annual meeting, and the EC (Empowered Community) Administration shall promptly provide the Secretary (with a copy to the Decisional Participants) with written notice of the designation of those Directors. All such notices shall be posted promptly to the Website.

(d) At least six months before the date specified for the commencement of the term as specified in Section 7.8(a)(iv) through Section 7.8(a)(vi) above, any Supporting Organization (Supporting Organization) or the At-Large Community entitled to nominate a Director for a Seat with a term beginning that year shall give the EC (Empowered Community) Administration (with a copy to the Secretary and the Decisional Participants) written notice of its nomination of Directors for seats with terms beginning at the conclusion of the annual meeting, and the EC (Empowered Community) Administration shall promptly provide the Secretary (with a copy to the Decisional Participants) with written notice of the designation of those Directors. All such notices shall be posted promptly to the Website.

(e) No Director may serve more than three consecutive terms. For these purposes, a person designated to fill a vacancy in a term shall not be deemed to have served that term.

(f) The term as Director of the person holding the office of President shall be for as long as, and only for as long as, such person holds the office of President.

Section 7.9. NON-VOTING LIAISONS

(a) The non-voting Liaisons shall include:

- (i) One appointed by the Governmental Advisory Committee (Advisory Committee);
- (ii) One appointed by the Root Server System Advisory Committee (Advisory Committee) established by Section 12.2(c);
- (iii) One appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Section 12.2(b); and
- (iv) One appointed by the Internet Engineering Task Force.

(b) The Liaisons shall serve terms that begin at the conclusion of each annual meeting. At least one month before the commencement of each annual meeting, each body entitled to appoint a Liaison shall give the Secretary written notice of its appointment.

(c) Each Liaison may be reappointed, and shall remain in that position until a successor has been appointed or until the Liaison resigns or is removed in accordance with these Bylaws.

(d) The Liaisons shall be entitled to attend Board meetings, participate in Board discussions and deliberations, and have access (under conditions established by the Board) to materials provided to Directors for use in Board discussions, deliberations and meetings, but shall otherwise not have any of the rights and privileges of Directors. Liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section

7.9(d) for the purpose of consulting with their respective committee or organization.

Section 7.10. RESIGNATION OF A DIRECTOR OR NON-VOTING LIAISON

Subject to Section 5226 of the CCC, any Director or Liaison may resign at any time by giving written notice thereof to the Chair of the Board, the President, the Secretary, or the Board. Such resignation shall take effect at the time specified, and, unless otherwise specified, the acceptance of such resignation shall not be necessary to make it effective.

Section 7.11. REMOVAL OF A DIRECTOR OR NON-VOTING LIAISON

(a) Directors

(i) Any Director designated by the EC (Empowered Community) may be removed without cause:

(A) by the EC (Empowered Community) pursuant to and in compliance with procedures in Section 3.1 or Section 3.2 of Annex D, as applicable, or

(B) following notice to that Director, by a three-fourths (3/4) majority vote of all Directors; provided, however, that (x) each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director; and (y) such removal shall not be effective until the Secretary has provided notice to the EC (Empowered Community) Administration of the Board's removal vote and the requirements of Section 6.4 have been met.

(ii) The Board may remove any Director who has been declared of unsound mind by a final order of court, or convicted of a felony, or been found by a final order or

judgment of any court to have breached any duty under Sections 5230 through 5239 of the CCC, and in the case of such removal, the Secretary shall promptly notify the EC (Empowered Community) Administration in writing, with a copy to the body that nominated such Director, and shall promptly post such notification to the Website. The vacancies created by such removal shall be filled in accordance with Section 7.12(a).

(iii) All Directors (other than the President) may be removed at the same time by the EC (Empowered Community) by the EC (Empowered Community) Administration delivering an EC (Empowered Community) Board Recall Notice to the Secretary pursuant to and in compliance with Section 3.3 of Annex D. The vacancies created by such removal shall be filled by the EC (Empowered Community) in accordance with Section 7.12(b).

(b) With the exception of the Liaison appointed by the Governmental Advisory Committee (Advisory Committee), any Liaison may be removed following notice to that Liaison and to the organization which selected that Liaison, by a three-fourths (3/4) majority vote of all Directors if the selecting organization fails to promptly remove that Liaison following such notice. The vacancies created by such removal shall be filled in accordance with Section 7.12. The Board may request the Governmental Advisory Committee (Advisory Committee) to consider the replacement of the Governmental Advisory Committee (Advisory Committee) Liaison if the Board, by a three-fourths (3/4) majority vote of all Directors, determines that such an action is appropriate.

Section 7.12. VACANCIES

(a) This Section 7.12(a) shall apply to Board vacancies other than those occurring by recall of all Directors (other than the President). A vacancy or vacancies in the Board shall be

deemed to exist in the case of the death, resignation, or removal of any Director or Interim Director (as defined in Section 7.12(b)), or if the authorized number of Directors is increased. Vacancies occurring in Seats 1 through 15 shall be filled by the EC (Empowered Community) after nomination as provided in Section 7.2 and Articles 8 through 12. A vacancy in Seat 16 shall be filled as provided in Article 15. A Director designated by the EC (Empowered Community) to fill a vacancy on the Board shall serve for the unexpired term of his or her predecessor in office and until a successor has been designated and qualified. No reduction of the authorized number of Directors shall have the effect of removing a Director prior to the expiration of the Director's term of office.

(b) This Section 7.12(b) shall apply to Board vacancies occurring when all Directors (other than the President) are recalled as provided by Section 7.11(a)(iii). Concurrently with delivery of any EC (Empowered Community) Board Recall Notice (as defined in Section 3.3(f) of Annex D), the EC (Empowered Community) Administration shall provide written notice of the EC (Empowered Community)'s designation of individuals to fill such vacancies (each such individual, an "**Interim Director**") to the Decisional Participants and to the Secretary, who shall cause such notice to be promptly posted to the Website. An Interim Director must meet the criteria specified in Section 7.3, Section 7.4 and Section 7.5, as applicable. An Interim Director shall hold office until the EC (Empowered Community) designates the Interim Director's successor in accordance with Section 7.12(a), and the successor's designation shall occur within 120 days of the Interim Director's designation. For avoidance of doubt, persons designated as Interim Directors may be eligible for designation as Directors as well.

(c) The organizations selecting the Liaisons identified in Section 7.9 are responsible for determining the existence of, and filling, any vacancies in those positions. Such

organizations shall give the Secretary written notice of their appointments to fill any such vacancies, subject to the requirements set forth in [Section 7.4](#), as applicable.

Section 7.13. ANNUAL MEETINGS

Annual meetings of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shall be held for the purpose of electing Officers and for the transaction of such other business as may come before the meeting. Each annual meeting of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shall be held at the principal office of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#), or any other appropriate place of the Board's time and choosing, provided such annual meeting is held within 14 months of the immediately preceding annual meeting. If the Board determines that it is practical, the annual meeting should be distributed in real-time and archived video and audio formats on the Internet.

Section 7.14. REGULAR MEETINGS

Regular meetings of the Board shall be held on dates to be determined by the Board. In the absence of other designation, regular meetings shall be held at the principal office of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#).

Section 7.15. SPECIAL MEETINGS

Special meetings of the Board may be called by or at the request of one-quarter (1/4) of the Directors, by the Chair of the Board or the President. A call for a special meeting shall be made by the Secretary. Special meetings shall be held at the principal office of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) unless otherwise specified in the notice of the meeting.

Section 7.16. NOTICE OF MEETINGS

Notice of time and place of all meetings shall be delivered personally or by telephone or by electronic mail to each Director and Liaison, or sent by first-class mail (air mail for addresses outside the United States) or facsimile, charges prepaid, addressed to each Director and Liaison at the Director's or Liaison's address as it is shown on the records of ICANN (Internet Corporation for Assigned Names and Numbers). In case the notice is mailed, it shall be deposited in the United States mail at least fourteen (14) days before the time of the holding of the meeting. In case the notice is delivered personally or by telephone or facsimile or electronic mail it shall be delivered personally or by telephone or facsimile or electronic mail at least forty-eight (48) hours before the time of the holding of the meeting.

Notwithstanding anything in this Section 7.16 to the contrary, notice of a meeting need not be given to any Director or Liaison who signed a waiver of notice or a Director who signed a written consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such Director. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

Section 7.17. QUORUM

At all annual, regular, and special meetings of the Board, a majority of the total number of Directors then in office shall constitute a quorum for the transaction of business, and the act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board, unless otherwise provided herein or by law. If a quorum shall not be present at any meeting of the Board, the Directors present thereat may adjourn the meeting from time to time to another place, time or date. If the meeting is adjourned for more than

twenty-four (24) hours, notice shall be given to those Directors not at the meeting at the time of the adjournment.

Section 7.18. ACTIONS BY TELEPHONE MEETING OR BY OTHER COMMUNICATIONS EQUIPMENT

Directors and Liaisons may participate in a meeting of the Board or Board Committee (as defined in [Section 14.1](#)) through use of (a) conference telephone or similar communications equipment, provided that all Directors participating in such a meeting can speak to and hear one another or (b) electronic video screen communication or other communication equipment; provided that (i) all Directors participating in such a meeting can speak to and hear one another, (ii) all Directors are provided the means of fully participating in all matters before the Board or Board Committee, and (iii) [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) adopts and implements means of verifying that (A) a person participating in such a meeting is a Director or other person entitled to participate in the meeting and (B) all actions of, or votes by, the Board or Board Committee are taken or cast only by Directors and not persons who are not Directors. Participation in a meeting pursuant to this [Section 7.18](#) constitutes presence in person at such meeting. [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shall make available at the place of any meeting of the Board the telecommunications equipment necessary to permit Directors and Liaisons to participate by telephone.

Section 7.19. ACTION WITHOUT MEETING

Any action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action. Such written consent shall have the same force and effect as the

unanimous vote of such Directors. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.

Section 7.20. ELECTRONIC MAIL

If permitted by applicable law, communication by electronic mail shall be considered equivalent to any communication otherwise required to be in writing. ICANN (Internet Corporation for Assigned Names and Numbers) shall take such steps as it deems appropriate under the circumstances to assure itself that communications by electronic mail are authentic.

Section 7.21. BOARD RIGHTS OF INSPECTION

(a) Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of ICANN (Internet Corporation for Assigned Names and Numbers).

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

Section 7.22. COMPENSATION

(a) Except for the President of ICANN (Internet Corporation for Assigned Names and Numbers), who serves ex officio as a Director, each of the Directors shall be entitled to receive compensation for his or her services as a Director. The President shall receive only his or her compensation for service as President and shall not receive additional compensation for service as a Director.

(b) If the Board determines to offer a compensation arrangement to one or more Directors (other than the President) for services to ICANN (Internet Corporation for Assigned Names and Numbers) as Directors, the Board shall follow the process that is calculated to pay an amount for service as a Director that is not an excess benefit under the standards set forth in Section 4958 of the Internal Revenue Code of 1986, as amended (the "**Code**").

(c) As part of the process, the Board shall retain an Independent Valuation Expert (as defined in Section 7.22(g)) (i) to consult with and to advise the Board regarding Director compensation arrangements and to issue to the Board a Reasoned Written Opinion (as defined in Section 7.22(g)(ii)) from such expert regarding the ranges of Reasonable Compensation (as defined in Section 7.22(g)(iii)) for any such services by a Director. The expert's opinion shall address all relevant factors affecting the level of compensation to be paid a Director, including offices held on the Board, attendance at Board and Board Committee meetings, the nature of service on the Board and on Board Committees, and appropriate data as to comparability regarding director compensation arrangements for U.S.-based, nonprofit, tax-exempt organizations possessing a global employee base.

(d) After having reviewed the Independent Valuation Expert's Reasoned Written Opinion, the Board shall meet with the expert to discuss the expert's opinion and to ask questions of the expert regarding the expert's opinion, the comparability data obtained and relied upon, and the conclusions reached by the expert.

(e) The Board shall adequately document the basis for any determination the Board makes regarding a Director compensation arrangement concurrently with making that determination.

(f) In addition to authorizing payment of compensation for services as Directors as set forth in this Section 7.22, the Board may also authorize the reimbursement of actual and necessary reasonable expenses incurred by any Director and by Liaisons performing their duties as Directors or Liaisons.

(g) As used in this Section 7.22, the following terms shall have the following meanings:

(i) An "**Independent Valuation Expert**" means a person retained by ICANN (Internet Corporation for Assigned Names and Numbers) to value compensation arrangements that: (A) holds itself out to the public as a compensation consultant; (B) performs valuations regarding compensation arrangements on a regular basis, with a majority of its compensation consulting services performed for persons other than ICANN (Internet Corporation for Assigned Names and Numbers); (C) is qualified to make valuations of the type of services involved in any engagement by and for ICANN (Internet Corporation for Assigned Names and Numbers); (D) issues to ICANN (Internet Corporation for Assigned Names and Numbers) a Reasoned Written Opinion regarding a particular compensation arrangement; and (E) includes in its Reasoned Written Opinion a certification that it meets the requirements set forth in (A) through (D) of this definition.

(ii) A "**Reasoned Written Opinion**" means a written opinion of a valuation expert who meets the requirements of Section 7.22(g)(i)(A) through (D). To be reasoned, the opinion must be based upon a full disclosure by ICANN (Internet Corporation for Assigned Names and Numbers) to the valuation expert of the factual situation regarding the compensation arrangement that is the subject of the opinion, the

opinion must articulate the applicable valuation standards relevant in valuing such compensation arrangement, the opinion must apply those standards to such compensation arrangement, and the opinion must arrive at a conclusion regarding whether the compensation arrangement is within the range of Reasonable Compensation for the services covered by the arrangement. A written opinion is reasoned even though it reaches a conclusion that is subsequently determined to be incorrect so long as the opinion addresses itself to the facts and the applicable standards. However, a written opinion is not reasoned if it does nothing more than recite the facts and express a conclusion.

(iii) "**Reasonable Compensation**" shall have the meaning set forth in §53.4958-4(b)(1)(ii) of the Regulations issued under §4958 of the Code.

(h) Each of the Liaisons, with the exception of the Governmental Advisory Committee (Advisory Committee) Liaison, shall be entitled to receive compensation for his or her services as a Liaison. If the Board determines to offer a compensation arrangement to one or more Liaisons, the Board shall approve that arrangement by a required three-fourths (3/4) vote.

Section 7.23. PRESUMPTION OF ASSENT

A Director present at a Board meeting at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention is entered in the minutes of the meeting, or unless such Director files a written dissent or abstention to such action with the person acting as the secretary of the meeting before the adjournment thereof, or forwards such dissent or abstention by registered mail to the Secretary immediately after the adjournment of the meeting. Such right to dissent or

abstain shall not apply to a Director who voted in favor of such action.

Section 7.24 INTERIM BOARD

Except in circumstances in which urgent decisions are needed to protect the security, stability or resilience of the DNS (Domain Name System) or to the extent necessary to comply with its fiduciary obligations under applicable law, a Board that consists of a majority or more of Interim Directors (an "**Interim Board**") shall (a) consult with the chairs of the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) before making major decisions and (b) consult through a community forum (in a manner consistent with the process for a Rejection Action Community Forum pursuant to Section 2.3 of Annex D) prior to taking any action that would, if implemented, materially change ICANN (Internet Corporation for Assigned Names and Numbers)'s strategy, policies or management, including replacement of the then-serving President. Interim Directors shall be entitled to compensation as provided in this Article 7.

Section 7.25 COMMUNICATION OF DESIGNATION

Upon its receipt of nominations as provided in Articles 7 through 12, the EC (Empowered Community) Administration, on behalf of the EC (Empowered Community), shall promptly notify the Secretary of the EC (Empowered Community)'s designation of individuals to fill seats on the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall post all such designations promptly to the Website.

ARTICLE 8 NOMINATING COMMITTEE

Section 8.1. DESCRIPTION

There shall be a Nominating Committee of ICANN (Internet Corporation for Assigned Names and Numbers) ("**Nominating Committee**"), responsible for nominating all Directors except the President and those Directors nominated by Decisional Participants; for nominating two directors of PTI (in accordance with the articles of incorporation and bylaws of PTI); and for such other selections as are set forth in these Bylaws. Notification of the Nominating Committee's Director nominations shall be given by the Nominating Committee Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25. Notification of the Nominating Committee's PTI director nomination shall be given to the Secretary.

Section 8.2. COMPOSITION

The Nominating Committee shall be composed of the following persons:

- (a) A non-voting Chair, appointed by the Board;
- (b) A non-voting Chair-Elect, appointed by the Board as a non-voting advisor;
- (c) A non-voting liaison appointed by the Root Server System Advisory Committee (Advisory Committee) established by Section 12.2(c);
- (d) A non-voting liaison appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Section 12.2(b);
- (e) A non-voting liaison appointed by the Governmental Advisory Committee (Advisory Committee);

(f) Five voting delegates selected by the At-Large Advisory Committee (Advisory Committee) established by Section 12.2(d);

(g) Voting delegates to the Nominating Committee shall be selected from the Generic Names Supporting Organization (Supporting Organization) established by Article 11, as follows:

- (i) One delegate from the Registries Stakeholder Group;
- (ii) One delegate from the Registrars Stakeholder Group;
- (iii) Two delegates from the Business Constituency, one representing small business users and one representing large business users;
- (iv) One delegate from the Internet Service Providers and Connectivity Providers Constituency (as defined in Section 11.5(a)(iii));
- (v) One delegate from the Intellectual Property Constituency; and
- (vi) One delegate from consumer and civil society groups, selected by the Non-Commercial Users Constituency.

(h) One voting delegate each selected by the following entities:

- (i) The Council of the Country Code Names Supporting Organization (Supporting Organization) established by Section 10.3;

(ii) The Council of the Address Supporting Organization (Supporting Organization) established by Section 9.2; and

(iii) The Internet Engineering Task Force.

(i) A non-voting Associate Chair, who may be appointed by the Chair, at his or her sole discretion, to serve during all or part of the term of the Chair. The Associate Chair may not be a person who is otherwise a member of the same Nominating Committee. The Associate Chair shall assist the Chair in carrying out the duties of the Chair, but shall not serve, temporarily or otherwise, in the place of the Chair.

Section 8.3. TERMS

(a) Each voting delegate shall serve a one-year term. A delegate may serve at most two successive one-year terms, after which at least two years must elapse before the individual is eligible to serve another term.

(b) The regular term of each voting delegate shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the immediately following ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.

(c) Non-voting liaisons shall serve during the term designated by the entity that appoints them. The Chair, the Chair-Elect, and any Associate Chair shall serve as such until the conclusion of the next ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.

(d) It is anticipated that upon the conclusion of the term of the Chair-Elect, the Chair-Elect will be appointed by the Board to the position of Chair. However, the Board retains the discretion to appoint any other person to the position of

Chair. At the time of appointing a Chair-Elect, if the Board determines that the person identified to serve as Chair shall be appointed as Chair for a successive term, the Chair-Elect position shall remain vacant for the term designated by the Board.

(e) Vacancies in the positions of delegate, non-voting liaison, Chair or Chair-Elect shall be filled by the entity entitled to select the delegate, non-voting liaison, Chair or Chair-Elect involved. For any term that the Chair-Elect position is vacant pursuant to Section 8.3(d), or until any other vacancy in the position of Chair-Elect can be filled, a non-voting advisor to the Chair may be appointed by the Board from among persons with prior service on the Board or a Nominating Committee, including the immediately previous Chair of the Nominating Committee. A vacancy in the position of Associate Chair may be filled by the Chair in accordance with the criteria established by Section 8.2(i).

(f) The existence of any vacancies shall not affect the obligation of the Nominating Committee to carry out the responsibilities assigned to it in these Bylaws.

Section 8.4. CRITERIA FOR SELECTION OF NOMINATING COMMITTEE DELEGATES

Delegates to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee shall be:

(a) Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and with experience and competence with collegial large group decision-making;

(b) Persons with wide contacts, broad experience in the Internet community, and a commitment to the success of ICANN (Internet Corporation for Assigned Names and Numbers);

(c) Persons whom the selecting body is confident will consult widely and accept input in carrying out their responsibilities;

(d) Persons who are neutral and objective, without any fixed personal commitments to particular individuals, organizations, or commercial objectives in carrying out their Nominating Committee responsibilities;

(e) Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers)'s activities on the broader Internet community who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and

(f) Persons who are able to work and communicate in written and spoken English.

Section 8.5. DIVERSITY

In carrying out its responsibilities to nominate Directors to fill Seats 1 through 8 (and selections to any other ICANN (Internet Corporation for Assigned Names and Numbers) bodies as the Nominating Committee is responsible for under these Bylaws), the Nominating Committee shall take into account the continuing membership of the Board (and such other bodies), and seek to ensure that the persons it nominates to serve as Director and selects shall, to the extent feasible and consistent with the other criteria required to be applied by Section 8.4, be guided by Section 1.2(b)(ii).

Section 8.6. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational

support necessary for the Nominating Committee to carry out its responsibilities.

Section 8.7. PROCEDURES

The Nominating Committee shall adopt such operating procedures as it deems necessary, which shall be published on the Website.

Section 8.8. INELIGIBILITY FOR SELECTION BY NOMINATING COMMITTEE

No person who serves on the Nominating Committee in any capacity shall be eligible for nomination by any means to any position on the Board or any other ICANN (Internet Corporation for Assigned Names and Numbers) body having one or more membership positions that the Nominating Committee is responsible for filling, until the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting that coincides with, or is after, the conclusion of that person's service on the Nominating Committee.

Section 8.9. INELIGIBILITY FOR SERVICE ON NOMINATING COMMITTEE

No person who is an employee of or paid consultant to ICANN (Internet Corporation for Assigned Names and Numbers) (including the Ombudsman) shall simultaneously serve in any of the Nominating Committee positions described in Section 8.2.

ARTICLE 9 ADDRESS SUPPORTING ORGANIZATION

Section 9.1. DESCRIPTION

(a) The Address Supporting Organization (Supporting Organization) ("**Address Supporting Organization (Supporting Organization)**") or "**ASO (Address Supporting Organization)**") shall advise the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses.

(b) The ASO (Address Supporting Organization) shall be the entity established by the Memorandum of Understanding entered on 21 October 2004 between ICANN (Internet Corporation for Assigned Names and Numbers) and the Number Resource Organization ("NRO (Number Resource Organization)"), an organization of the existing RIRs.

Section 9.2. ADDRESS COUNCIL

(a) The ASO (Address Supporting Organization) shall have an Address Council, consisting of the members of the NRO (Number Resource Organization) Number Council.

(b) The Address Council shall nominate individuals to fill Seats 9 and 10 on the Board. Notification of the Address Council's nominations shall be given by the Address Council in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

ARTICLE 10 COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

Section 10.1. DESCRIPTION

There shall be a policy-development body known as the Country-Code Names Supporting Organization (Supporting Organization) ("**ccNSO (Country Code Names Supporting Organization)**"), which shall be responsible for:

- (a) developing and recommending to the Board global policies relating to country-code top-level domains;
- (b) Nurturing consensus across the ccNSO (Country Code Names Supporting Organization)'s community, including the name-related activities of ccTLDs;
- (c) Coordinating with other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), committees, and constituencies under ICANN (Internet Corporation for Assigned Names and Numbers);
- (d) Nominating individuals to fill Seats 11 and 12 on the Board; and
- (e) Other responsibilities of the ccNSO (Country Code Names Supporting Organization) as set forth in these Bylaws.

Policies that apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership are only those policies developed according to Section 10.4(j) and Section 10.4(k). However, the ccNSO (Country Code Names Supporting Organization) may also engage in other activities authorized by its members. Adherence to the results of these activities will be voluntary and such activities may include: seeking to develop voluntary best practices for ccTLD (Country Code Top Level Domain) managers, assisting in skills building within the global community of ccTLD (Country Code Top Level Domain) managers, and enhancing operational and technical cooperation among ccTLD (Country Code Top Level Domain) managers.

Section 10.2. ORGANIZATION

The ccNSO (Country Code Names Supporting Organization) shall consist of (a) ccTLD (Country Code Top Level Domain)

managers that have agreed in writing to be members of the ccNSO (Country Code Names Supporting Organization) (see [Section 10.4\(b\)](#)) and (b) a ccNSO (Country Code Names Supporting Organization) Council responsible for managing the policy-development process of the ccNSO (Country Code Names Supporting Organization).

Section 10.3. ccNSO (Country Code Names Supporting Organization) COUNCIL

(a) The ccNSO (Country Code Names Supporting Organization) Council shall consist of three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each of ICANN (Internet Corporation for Assigned Names and Numbers)'s Geographic Regions in the manner described in [Section 10.4\(g\)](#) through [Section 10.4\(i\)](#); (ii) three ccNSO (Country Code Names Supporting Organization) Council members selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee; (iii) liaisons as described in [Section 10.3\(b\)](#); and (iv) observers as described in [Section 10.3\(c\)](#).

(b) There shall also be one liaison to the ccNSO (Country Code Names Supporting Organization) Council from each of the following organizations, to the extent they choose to appoint such a liaison: (i) the Governmental Advisory Committee (Advisory Committee); (ii) the At-Large Advisory Committee (Advisory Committee); and (iii) each of the Regional Organizations described in [Section 10.5](#). These liaisons shall not be members of or entitled to vote on the ccNSO (Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. Appointments of liaisons shall be made by providing written notice to the ICANN (Internet Corporation for Assigned Names and

Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair, and shall be for the term designated by the appointing organization as stated in the written notice. The appointing organization may recall from office or replace its liaison at any time by providing written notice of the recall or replacement to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(c) The ccNSO (Country Code Names Supporting Organization) Council may agree with the Council of any other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) to exchange observers. Such observers shall not be members of or entitled to vote on the ccNSO (Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. The appointing Council may designate its observer (or revoke or change the designation of its observer) on the ccNSO (Country Code Names Supporting Organization) Council at any time by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(d) (i) the regular term of each ccNSO (Country Code Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the third ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter;

(ii) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting

Organization) members within each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region shall be staggered so that one member's term begins in a year divisible by three, a second member's term begins in the first year following a year divisible by three, and the third member's term begins in the second year following a year divisible by three; and (iii) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the Nominating Committee shall be staggered in the same manner. Each ccNSO (Country Code Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

(e) A ccNSO (Country Code Names Supporting Organization) Council member may resign at any time by giving written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

(f) ccNSO (Country Code Names Supporting Organization) Council members may be removed for not attending three consecutive meetings of the ccNSO (Country Code Names Supporting Organization) Council without sufficient cause or for grossly inappropriate behavior, both as determined by at least a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council.

(g) A vacancy on the ccNSO (Country Code Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any ccNSO (Country Code Names Supporting Organization) Council member. Vacancies in the positions of the three members selected by the Nominating Committee shall be filled for the unexpired term involved by the Nominating Committee giving

the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of its selection, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair. Vacancies in the positions of the ccNSO (Country Code Names Supporting Organization) Council members selected by ccNSO (Country Code Names Supporting Organization) members shall be filled for the unexpired term by the procedure described in Section 10.4(g) through (i).

(h) The role of the ccNSO (Country Code Names Supporting Organization) Council is to administer and coordinate the affairs of the ccNSO (Country Code Names Supporting Organization) (including coordinating meetings, including an annual meeting, of ccNSO (Country Code Names Supporting Organization) members as described in Section 10.4(f)) and to manage the development of policy recommendations in accordance with Section 10.6(a). The ccNSO (Country Code Names Supporting Organization) Council shall also undertake such other roles as the members of the ccNSO (Country Code Names Supporting Organization) shall decide from time to time.

(i) The ccNSO (Country Code Names Supporting Organization) Council shall nominate individuals to fill Seats 11 and 12 on the Board by written ballot or by action at a meeting; any such nomination must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office. Notification of the ccNSO (Country Code Names Supporting Organization) Council's nominations shall be given by the ccNSO (Country Code Names Supporting Organization) Council Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(j) The ccNSO (Country Code Names Supporting Organization) Council shall select from among its members the ccNSO (Country Code Names Supporting Organization) Council Chair and such Vice Chair(s) as it deems appropriate. Selections of the ccNSO (Country Code Names Supporting Organization) Council Chair and Vice Chair(s) shall be by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office. The term of office of the ccNSO (Country Code Names Supporting Organization) Council Chair and any Vice Chair(s) shall be as specified by the ccNSO (Country Code Names Supporting Organization) Council at or before the time the selection is made. The ccNSO (Country Code Names Supporting Organization) Council Chair or any Vice Chair(s) may be recalled from office by the same procedure as used for selection.

(k) The ccNSO (Country Code Names Supporting Organization) Council, subject to direction by the ccNSO (Country Code Names Supporting Organization) members, shall adopt such rules and procedures for the ccNSO (Country Code Names Supporting Organization) as it deems necessary, provided they are consistent with these Bylaws. Rules for ccNSO (Country Code Names Supporting Organization) membership and operating procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council shall be published on the Website.

(l) Except as provided by [Section 10.3\(i\)](#) and [Section 10.3\(j\)](#), the ccNSO (Country Code Names Supporting Organization) Council shall act at meetings. The ccNSO (Country Code Names Supporting Organization) Council shall meet regularly on a schedule it determines, but not fewer than four times each calendar year. At the discretion of the ccNSO (Country Code Names Supporting Organization) Council, meetings may be held in person or by other means, provided that all ccNSO (Country Code Names Supporting Organization)

Council members are permitted to participate by at least one means described in Section 10.3(n). Except where determined by a majority vote of the members of the ccNSO (Country Code Names Supporting Organization) Council present that a closed session is appropriate, physical meetings shall be open to attendance by all interested persons. To the extent practicable, ccNSO (Country Code Names Supporting Organization) Council meetings should be held in conjunction with meetings of the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

(m) Notice of time and place (and information about means of participation other than personal attendance) of all meetings of the ccNSO (Country Code Names Supporting Organization) Council shall be provided to each ccNSO (Country Code Names Supporting Organization) Council member, liaison, and observer by e-mail, telephone, facsimile, or a paper notice delivered personally or by postal mail. In case the notice is sent by postal mail, it shall be sent at least 21 days before the day of the meeting. In case the notice is delivered personally or by telephone, facsimile, or e-mail it shall be provided at least seven days before the day of the meeting. At least seven days in advance of each ccNSO (Country Code Names Supporting Organization) Council meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

(n) Members of the ccNSO (Country Code Names Supporting Organization) Council may participate in a meeting of the ccNSO (Country Code Names Supporting Organization) Council through personal attendance or use of electronic communication (such as telephone or video conference), provided that (i) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting can speak to and hear one

another, (ii) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting are provided the means of fully participating in all matters before the ccNSO (Country Code Names Supporting Organization) Council, and (iii) there is a reasonable means of verifying the identity of ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting and their votes. A majority of the ccNSO (Country Code Names Supporting Organization) Council members (i.e. those entitled to vote) then in office shall constitute a quorum for the transaction of business, and actions by a majority vote of the ccNSO (Country Code Names Supporting Organization) Council members present at any meeting at which there is a quorum shall be actions of the ccNSO (Country Code Names Supporting Organization) Council, unless otherwise provided in these Bylaws. The ccNSO (Country Code Names Supporting Organization) Council shall transmit minutes of its meetings to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following the meeting, and no later than 21 days following the meeting.

Section 10.4. MEMBERSHIP

(a) The ccNSO (Country Code Names Supporting Organization) shall have a membership consisting of ccTLD (Country Code Top Level Domain) managers. Any ccTLD (Country Code Top Level Domain) manager that meets the membership qualifications stated in Section 10.4(b) shall be entitled to be members of the ccNSO (Country Code Names Supporting Organization). For purposes of this Article 10, a ccTLD (Country Code Top Level Domain) manager is the organization or entity responsible for managing a ccTLD (Country Code Top Level Domain) according to and under the current heading "Delegation Record" in the Root Zone (Root Zone) Database, or under any later modification, for that country-code top-level domain.

For purposes of this Article, and Annexes B and C of these Bylaws, "Territory" is defined to be the country, dependency or other area of particular geopolitical interest listed on the 'International Standard ISO (International Organization for Standardization) 3166-1, Codes for the representation of names of countries and their subdivisions – Part 1: Country Codes', or, in some exceptional cases listed on the reserved ISO (International Organization for Standardization) 3166-1 code elements.

(b) Any ccTLD (Country Code Top Level Domain) manager may become a ccNSO (Country Code Names Supporting Organization) member by submitting an application to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive applications. The application shall be in writing in a form designated by the ccNSO (Country Code Names Supporting Organization) Council. The application shall include the ccTLD (Country Code Top Level Domain) manager's recognition of the role of the ccNSO (Country Code Names Supporting Organization) within the ICANN (Internet Corporation for Assigned Names and Numbers) structure as well as the ccTLD (Country Code Top Level Domain) manager's agreement, for the duration of its membership in the ccNSO (Country Code Names Supporting Organization), (i) to adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (ii) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by Section 10.4(j) and Section 10.4(k), and (ii) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under Section 10.7(c). A ccNSO (Country Code Names Supporting Organization) member may resign from membership at any time by giving written notice to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive notices of resignation. Upon

resignation the ccTLD (Country Code Top Level Domain) manager ceases to agree to (A) adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (B) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by [Section 10.4\(j\)](#) and [Section 10.4\(k\)](#), and (C) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under [Section 10.7\(c\)](#). In the absence of designation by the ccNSO (Country Code Names Supporting Organization) Council of a person to receive applications and notices of resignation, they shall be sent to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall notify the ccNSO (Country Code Names Supporting Organization) Council of receipt of any such applications and notices.

(c) Neither membership in the ccNSO (Country Code Names Supporting Organization) nor membership in any Regional Organization described in [Section 10.5](#) shall be a condition for access to or registration in the IANA (Internet Assigned Numbers Authority) database. Any individual relationship a ccTLD (Country Code Top Level Domain) manager has with ICANN (Internet Corporation for Assigned Names and Numbers) or the ccTLD (Country Code Top Level Domain) manager's receipt of IANA (Internet Assigned Numbers Authority) services is not in any way contingent upon membership in the ccNSO (Country Code Names Supporting Organization).

(d) The Geographic Regions of ccTLDs shall be as described in [Section 7.5](#). For purposes of this [Article 10](#), managers of ccTLDs within a Geographic Region that are members of the ccNSO (Country Code Names Supporting Organization) are referred to as ccNSO (Country Code Names Supporting Organization) members "within" the Geographic Region,

regardless of the physical location of the ccTLD (Country Code Top Level Domain) manager. In cases where the Geographic Region of a ccNSO (Country Code Names Supporting Organization) member is unclear, the ccTLD (Country Code Top Level Domain) member should self-select according to procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council.

(e) Designation of Representative

(i) Each ccTLD (Country Code Top Level Domain) manager may designate in writing a person, organization, or entity to represent the ccTLD (Country Code Top Level Domain) manager in matters relating to the ccNSO (Country Code Names Supporting Organization) ("Representative"). In the absence of such a designation, the person, organization, or entity listed as the administrative contact in the IANA (Internet Assigned Numbers Authority) database shall be deemed to be the designate of the ccTLD (Country Code Top Level Domain) manager by whom the ccNSO (Country Code Names Supporting Organization) member shall be represented.

(ii) For any Territory for which there is a single ccTLD (Country Code Top Level Domain) manager that is a ccNSO (Country Code Names Supporting Organization) member, the Representative selected by that manager in accordance with Section 10.4(e) shall be the Territory's emissary ("Emissary") for the purpose of voting in the specific cases enumerated in this Article, Annex B, or Annex C of these Bylaws. In the event two or more ccTLD (Country Code Top Level Domain) managers from the same Territory are ccNSO (Country Code Names Supporting Organization) members, those ccTLD (Country Code Top Level Domain) managers are to appoint one of the Representatives from among those ccNSO (Country

Code Names Supporting Organization) members to serve as the Emissary to vote on behalf of the ccNSO (Country Code Names Supporting Organization) members from that Territory.

(iii) During any period in which an Emissary is not appointed, the ccTLD (Country Code Top Level Domain) manager that has been the member of the ccNSO (Country Code Names Supporting Organization) for the longest period is deemed to be the Emissary for that Territory.

(iv) Each Emissary, regardless of the number of ccTLD (Country Code Top Level Domain) managers within the relevant Territory, is entitled to cast a single vote in any round of any voting process defined within this Article, Annex B or Annex C that is reserved for Emissary voting. The ccTLD (Country Code Top Level Domain) managers within each Territory may define the process to determine how their respective Emissary's vote is determined.

(f) There shall be an annual meeting of ccNSO (Country Code Names Supporting Organization) members, which shall be coordinated by the ccNSO (Country Code Names Supporting Organization) Council. Annual meetings should be open for all to attend, and a reasonable opportunity shall be provided for ccTLD (Country Code Top Level Domain) managers that are not members of the ccNSO (Country Code Names Supporting Organization) as well as other non-members of the ccNSO (Country Code Names Supporting Organization) to address the meeting. To the extent practicable, annual meetings of the ccNSO (Country Code Names Supporting Organization) members shall be held in person and should be held in conjunction with meetings of the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

(g) The ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members from each Geographic Region (see Section 10.3(a)(i)) shall be selected through nomination, and if necessary election, by the ccNSO (Country Code Names Supporting Organization) members within that Geographic Region. At least 90 days before the end of the regular term of any ccNSO (Country Code Names Supporting Organization)-member-selected member of the ccNSO (Country Code Names Supporting Organization) Council, or upon the occurrence of a vacancy in the seat of such a ccNSO (Country Code Names Supporting Organization) Council member, the ccNSO (Country Code Names Supporting Organization) Council shall establish a nomination and election schedule, which shall be sent to all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region and posted on the Website.

(h) Any ccNSO (Country Code Names Supporting Organization) member may nominate an individual to serve as a ccNSO (Country Code Names Supporting Organization) Council member representing the ccNSO (Country Code Names Supporting Organization) member's Geographic Region. Nominations must be seconded by another ccNSO (Country Code Names Supporting Organization) member from a different Territory, from the same Geographic Region. By accepting their nomination, individuals nominated to the ccNSO (Country Code Names Supporting Organization) Council agree to support the policies committed to by ccNSO (Country Code Names Supporting Organization) members.

(i) If at the close of nominations there are no more candidates nominated (with seconds and acceptances) in a particular Geographic Region than there are seats on the ccNSO (Country Code Names Supporting Organization) Council available for that Geographic Region, then the nominated candidates shall be selected to serve on the

ccNSO (Country Code Names Supporting Organization) Council. Otherwise, an election by written ballot (which may be by electronic means) shall be held to select the ccNSO (Country Code Names Supporting Organization) Council members from among those nominated (with seconds and acceptances), with ccNSO (Country Code Names Supporting Organization) members from the Geographic Region being entitled to vote in the election through their Emissaries. In such an election, a majority of the Emissaries entitled to vote in the Geographic Region shall constitute a quorum, and the selected candidate must receive a plurality of the votes cast by the Emissaries within the Geographic Region. The ccNSO (Country Code Names Supporting Organization) Council Chair shall provide the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary prompt written notice of the selection of ccNSO (Country Code Names Supporting Organization) Council members under this paragraph.

(j) Subject to Section 10.4(k), ICANN (Internet Corporation for Assigned Names and Numbers) policies shall apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership to the extent, and only to the extent, that the policies (i) only address issues that are within scope of the ccNSO (Country Code Names Supporting Organization) according to Section 10.6(a) and Annex C; (ii) have been developed through the ccPDP as described in Section 10.6, and (iii) have been recommended as such by the ccNSO (Country Code Names Supporting Organization) to the Board, and (iv) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD (Country Code Top Level Domain) manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN (Internet Corporation for Assigned Names and Numbers) in its activities concerning ccTLDs.

(k) A ccNSO (Country Code Names Supporting Organization) member shall not be bound if it provides a declaration to the ccNSO (Country Code Names Supporting Organization) Council stating that (i) implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in [Section 10.4\(j\)](#)), and (ii) failure to implement the policy would not impair DNS (Domain Name System) operations or interoperability, giving detailed reasons supporting its statements. After investigation, the ccNSO (Country Code Names Supporting Organization) Council will provide a response to the ccNSO (Country Code Names Supporting Organization) member's declaration. If there is a ccNSO (Country Code Names Supporting Organization) Council consensus disagreeing with the declaration, which may be demonstrated by a vote of 14 or more members of the ccNSO (Country Code Names Supporting Organization) Council, the response shall state the ccNSO (Country Code Names Supporting Organization) Council's disagreement with the declaration and the reasons for disagreement. Otherwise, the response shall state the ccNSO (Country Code Names Supporting Organization) Council's agreement with the declaration. If the ccNSO (Country Code Names Supporting Organization) Council disagrees, the ccNSO (Country Code Names Supporting Organization) Council shall review the situation after a six-month period. At the end of that period, the ccNSO (Country Code Names Supporting Organization) Council shall make findings as to (A) whether the ccNSO (Country Code Names Supporting Organization) members' implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in [Section 10.4\(j\)](#)) and (B) whether failure to implement the policy would impair DNS (Domain Name System) operations or interoperability. In making any findings disagreeing with the declaration, the ccNSO (Country Code Names Supporting Organization) Council shall proceed by consensus, which may be demonstrated by a vote of 14 or more members of the

ccNSO (Country Code Names Supporting Organization) Council.

Section 10.5. REGIONAL ORGANIZATIONS

The ccNSO (Country Code Names Supporting Organization) Council may designate a Regional Organization for each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, provided that the Regional Organization is open to full membership by all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region. Decisions to designate or de-designate a Regional Organization shall require a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council and shall be subject to review according to procedures established by the Board.

Section 10.6. ccNSO (Country Code Names Supporting Organization) POLICY-DEVELOPMENT PROCESS AND SCOPE

(a) The scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role shall be as stated in Annex C to these Bylaws; any modifications to the scope shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

(b) In developing global policies within the scope of the ccNSO (Country Code Names Supporting Organization) and recommending them to the Board, the ccNSO (Country Code Names Supporting Organization) shall follow the ccNSO (Country Code Names Supporting Organization) Policy-Development Process ("ccPDP"). The ccPDP shall be as stated in Annex B to these Bylaws; modifications shall be recommended to the Board by the ccNSO (Country Code

Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Section 10.7. STAFF SUPPORT AND FUNDING

(a) Upon request of the ccNSO (Country Code Names Supporting Organization) Council, a member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff may be assigned to support the ccNSO (Country Code Names Supporting Organization) and shall be designated as the ccNSO (Country Code Names Supporting Organization) Staff Manager. Alternatively, the ccNSO (Country Code Names Supporting Organization) Council may designate, at ccNSO (Country Code Names Supporting Organization) expense, another person to serve as ccNSO (Country Code Names Supporting Organization) Staff Manager. The work of the ccNSO (Country Code Names Supporting Organization) Staff Manager on substantive matters shall be assigned by the Chair of the ccNSO (Country Code Names Supporting Organization) Council, and may include the duties of ccPDP Issue Manager.

(b) Upon request of the ccNSO (Country Code Names Supporting Organization) Council, ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the ccNSO (Country Code Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by ccNSO (Country Code Names Supporting Organization) participants for travel to any meeting of the ccNSO (Country Code Names Supporting Organization) or for any other purpose. The ccNSO (Country Code Names Supporting Organization) Council may make provision, at ccNSO (Country Code Names Supporting Organization) expense, for administrative and operational support in addition or as an

alternative to support provided by ICANN (Internet Corporation for Assigned Names and Numbers).

(c) The ccNSO (Country Code Names Supporting Organization) Council shall establish fees to be paid by ccNSO (Country Code Names Supporting Organization) members to defray ccNSO (Country Code Names Supporting Organization) expenses as described in Section 10.7(a) and Section 10.7(b), as approved by the ccNSO (Country Code Names Supporting Organization) members.

(d) Written notices given to the Secretary under this Article 10 shall be permanently retained, and shall be made available for review by the ccNSO (Country Code Names Supporting Organization) Council on request. The Secretary shall also maintain the roll of members of the ccNSO (Country Code Names Supporting Organization), which shall include the name of each ccTLD (Country Code Top Level Domain) manager's designated representative, and which shall be posted on the Website.

ARTICLE 11 GENERIC NAMES SUPPORTING ORGANIZATION

Section 11.1. DESCRIPTION

There shall be a policy-development body known as the Generic Names Supporting Organization (Supporting Organization) (the "**Generic Names Supporting Organization (Supporting Organization)**" or "**GNSO (Generic Names Supporting Organization)**"), and collectively with the ASO (Address Supporting Organization) and ccNSO (Country Code Names Supporting Organization), the "**Supporting Organizations (Supporting Organizations)**"), which shall be responsible for developing and recommending to the Board substantive policies relating to generic top-level domains and other responsibilities of the

GNSO (Generic Names Supporting Organization) as set forth in these Bylaws.

Section 11.2. ORGANIZATION

The GNSO (Generic Names Supporting Organization) shall consist of:

(a) A number of Constituencies, where applicable, organized within the Stakeholder Groups as described in Section 11.5;

(b) Four Stakeholder Groups organized within Houses as described in Section 11.5;

(c) Two Houses within the GNSO (Generic Names Supporting Organization) Council as described in Section 11.3(h);

(d) A GNSO (Generic Names Supporting Organization) Council responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization), as described in Section 11.3; and

(e) Except as otherwise defined in these Bylaws, the four Stakeholder Groups and the Constituencies will be responsible for defining their own charters with the approval of their members and of the Board.

Section 11.3. GNSO (Generic Names Supporting Organization) COUNCIL

(a) Subject to Section 11.5, the GNSO (Generic Names Supporting Organization) Council shall consist of:

(i) three representatives selected from the Registries Stakeholder Group;

(ii) three representatives selected from the Registrars Stakeholder Group;

(iii) six representatives selected from the Commercial Stakeholder Group;

(iv) six representatives selected from the Non-Commercial Stakeholder Group; and

(v) three representatives selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSO (Generic Names Supporting Organization) Council including, e.g. the making and seconding of motions and of serving as Chair if elected. One Nominating Committee appointee voting representative shall be assigned to each House (as described in Section 11.3(h)) by the Nominating Committee.

No individual representative may hold more than one seat on the GNSO (Generic Names Supporting Organization) Council at the same time.

Stakeholder Groups should, in their charters, ensure their representation on the GNSO (Generic Names Supporting Organization) Council is as diverse as possible and practicable, including considerations of geography, GNSO (Generic Names Supporting Organization) Constituency, sector, ability and gender.

There may also be liaisons to the GNSO (Generic Names Supporting Organization) Council from other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and/or Advisory Committees (Advisory Committees), from time to time. The appointing organization shall designate, revoke, or change its

liaison on the GNSO (Generic Names Supporting Organization) Council by providing written notice to the Chair of the GNSO (Generic Names Supporting Organization) Council and to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary. Liaisons shall not be members of or entitled to vote, to make or second motions, or to serve as an officer on the GNSO (Generic Names Supporting Organization) Council, but otherwise liaisons shall be entitled to participate on equal footing with members of the GNSO (Generic Names Supporting Organization) Council.

(b) The regular term of each GNSO (Generic Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter. The regular term of two representatives selected from Stakeholder Groups with three Council seats shall begin in even-numbered years and the regular term of the other representative selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of three representatives selected from Stakeholder Groups with six Council seats shall begin in even-numbered years and the regular term of the other three representatives selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of one of the three members selected by the Nominating Committee shall begin in even-numbered years and the regular term of the other two of the three members selected by the Nominating Committee shall begin in odd-numbered years. Each GNSO (Generic Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

Except in a "special circumstance," such as, but not limited to, meeting geographic or other diversity requirements defined in the Stakeholder Group charters, where no alternative representative is available to serve, no Council member may be selected to serve more than two consecutive terms, in such a special circumstance a Council member may serve one additional term. For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term. A former Council member who has served two consecutive terms must remain out of office for one full term prior to serving any subsequent term as Council member. A "special circumstance" is defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

(c) A vacancy on the GNSO (Generic Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any member. Vacancies shall be filled for the unexpired term by the appropriate Nominating Committee or Stakeholder Group that selected the member holding the position before the vacancy occurred by giving the GNSO (Generic Names Supporting Organization) Secretariat written notice of its selection. Procedures for handling Stakeholder Group-appointed GNSO (Generic Names Supporting Organization) Council member vacancies, resignations, and removals are prescribed in the applicable Stakeholder Group Charter.

A GNSO (Generic Names Supporting Organization) Council member selected by the Nominating Committee may be removed for cause: (i) stated by a three-fourths (3/4) vote of all members of the applicable House to which the Nominating Committee appointee is assigned; or (ii) stated by a three-fourths (3/4) vote of all members of each House in the case of the non-voting Nominating Committee appointee (see Section 11.3(h)). Such removal shall be subject to reversal by the ICANN (Internet Corporation for Assigned Names and

Numbers) Board on appeal by the affected GNSO (Generic Names Supporting Organization) Council member.

(d) The GNSO (Generic Names Supporting Organization) Council is responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization). It shall adopt such procedures (the "**GNSO (Generic Names Supporting Organization) Operating Procedures**") as it sees fit to carry out that responsibility, provided that such procedures are approved by a majority vote of each House. The GNSO (Generic Names Supporting Organization) Operating Procedures shall be effective upon the expiration of a twenty-one (21) day public comment period, and shall be subject to Board oversight and review. Until any modifications are recommended by the GNSO (Generic Names Supporting Organization) Council, the applicable procedures shall be as set forth in Section 11.6.

(e) No more than one officer, director or employee of any particular corporation or other organization (including its subsidiaries and affiliates) shall serve on the GNSO (Generic Names Supporting Organization) Council at any given time.

(f) The GNSO (Generic Names Supporting Organization) shall nominate by written ballot or by action at a meeting individuals to fill Seats 13 and 14 on the Board. Each of the two voting Houses of the GNSO (Generic Names Supporting Organization), as described in Section 11.3(h), shall make a nomination to fill one of two Board seats, as outlined below; any such nomination must have affirmative votes comprising sixty percent (60%) of all the respective voting House members:

(i) the Contracted Parties House (as described in Section 11.3(h)(i)) shall select a representative to fill Seat 13; and

(ii) the Non-Contracted Parties House (as described in Section 11.3(h)(ii)) shall select a representative to fill Seat 14.

Election procedures are defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

Notification of the Board seat nominations shall be given by the GNSO (Generic Names Supporting Organization) Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(g) The GNSO (Generic Names Supporting Organization) Council shall select the GNSO (Generic Names Supporting Organization) Chair for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. Each House (as described in Section 11.3(h)) shall select a Vice-Chair, who will be a Vice-Chair of the whole of the GNSO (Generic Names Supporting Organization) Council, for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. The procedures for selecting the Chair and any other officers are contained in the GNSO (Generic Names Supporting Organization) Operating Procedures. In the event that the GNSO (Generic Names Supporting Organization) Council has not elected a GNSO (Generic Names Supporting Organization) Chair by the end of the previous Chair's term, the Vice-Chairs will serve as Interim GNSO (Generic Names Supporting Organization) Co-Chairs until a successful election can be held.

(h) Except as otherwise required in these Bylaws, for voting purposes, the GNSO (Generic Names Supporting Organization) Council (see Section 11.3(a)) shall be organized into a bicameral House structure as described below:

(i) the Contracted Parties House includes the Registries Stakeholder Group (three members), the Registrars Stakeholder Group (three members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee for a total of seven voting members; and

(ii) the Non Contracted Parties House includes the Commercial Stakeholder Group (six members), the Non-Commercial Stakeholder Group (six members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee to that House for a total of thirteen voting members.

Except as otherwise specified in these Bylaws, each member of a voting House is entitled to cast one vote in each separate matter before the GNSO (Generic Names Supporting Organization) Council.

(i) Except as otherwise specified in these Bylaws, Annex A, Annex A-1 or Annex A-2 hereto, or the GNSO (Generic Names Supporting Organization) Operating Procedures, the default threshold to pass a GNSO (Generic Names Supporting Organization) Council motion or other voting action requires a simple majority vote of each House. The voting thresholds described below shall apply to the following GNSO (Generic Names Supporting Organization) actions:

(i) Create an Issues Report: requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House.

(ii) Initiate a Policy Development Process ("**PDP (Policy Development Process)**") Within Scope (as described in Annex A): requires an affirmative vote of

more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(iii) Initiate a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of GNSO (Generic Names Supporting Organization) Supermajority (as defined in Section 11.3(i)(xix)).

(iv) Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Within Scope: requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(v) Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(vi) Changes to an Approved PDP (Policy Development Process) Team Charter: For any PDP (Policy Development Process) Team Charter approved under (iv) or (v) above, the GNSO (Generic Names Supporting Organization) Council may approve an amendment to the Charter through a simple majority vote of each House.

(vii) Terminate a PDP (Policy Development Process): Once initiated, and prior to the publication of a Final Report, the GNSO (Generic Names Supporting Organization) Council may terminate a PDP (Policy Development Process) only for significant cause, upon a motion that passes with a GNSO (Generic Names Supporting Organization) Supermajority Vote in favor of termination.

(viii) Approve a PDP (Policy Development Process) Recommendation Without a GNSO (Generic Names

Supporting Organization) Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO (Generic Names Supporting Organization) Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation.

(ix) Approve a PDP (Policy Development Process) Recommendation With a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority,

(x) Approve a PDP (Policy Development Process) Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

(xi) Modification of Approved PDP (Policy Development Process) Recommendation: Prior to Final Approval by the Board, an Approved PDP (Policy Development Process) Recommendation may be modified or amended by the GNSO (Generic Names Supporting Organization) Council with a GNSO (Generic Names Supporting Organization) Supermajority vote.

(xii) Initiation of an Expedited Policy Development Process ("**EPDP**"): requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xiii) Approve an EPDP Team Charter: requires an affirmative vote of a GNSO (Generic Names

Supporting Organization) Supermajority.

(xiv) Approval of EPDP Recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xv) Approve an EPDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

(xvi) Initiation of a GNSO (Generic Names Supporting Organization) Guidance Process ("GGP"): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

(xvii) Rejection of Initiation of a GGP Requested by the Board: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xviii) Approval of GGP Recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(xix) A "**GNSO (Generic Names Supporting Organization) Supermajority**" shall mean: (A) two-thirds (2/3) of the Council members of each House, or (B) three-fourths (3/4) of the Council members of one House and a majority of the Council members of the other House.

(j) The voting thresholds described below shall apply to the following GNSO (Generic Names Supporting Organization)

actions as a Decisional Participant in the Empowered Community. For any action not listed, the default threshold for the GNSO (Generic Names Supporting Organization) to act as a Decisional Participant in the Empowered community requires a simple majority vote of each House:

(i) Amendment of PTI Articles of Incorporation as contemplated in Section 16.2: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(ii) GNSO (Generic Names Supporting Organization) Council Inspection Request as contemplated in Section 22.7: requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House.

(iii) GNSO (Generic Names Supporting Organization) Council Inspection Remedy, as contemplated in Section 22.7 - e, and Stakeholder Group / Constituency Inspection Remedy, as contemplated in Section 22.7 – e(ii) and e(iii), for an inspection requested by the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community: requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House.

(iv) Amendments to Fundamental Bylaws and Article Amendments as contemplated by Section 25.2 of the Bylaws, Asset Sales, as contemplated by Article 26 of the Bylaws, amendments to ICANN (Internet Corporation for Assigned Names and Numbers) Articles of Incorporation: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(v) Approval of a Nominating Committee Director Removal Petition as contemplated in Annex D, Article 3, Section 3.1(b) and support for a petition submitted by a Petitioning Decisional Participant as contemplated in Section 3.2(d): requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(vi) Approval of a Nominating Committee Director Removal Supported Petition as contemplated in Annex D, Article 3, Section 3.1(f): requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(vii) Approval of a petition to remove a director holding seat 13 or 14 as contemplated in Annex D, Article 3, Section 3.2(a): requires an affirmative vote of at least three-fourths (3/4) of the House that appointed that Director.

(viii) Approval of a petition notice to remove a director holding seat 13 or 14 as contemplated in Annex D, Article 3, Section 3.2(f): requires an affirmative vote of at least three-fourths (3/4) of the GNSO (Generic Names Supporting Organization) Council and at least three-fourths (3/4) of the House that appointed that Director.

(ix) Approval of a Board Recall Petition as contemplated in Annex D, Article 3, Section 3.3(b) and support for another Petitioning Decisional Participant: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

(x) Approval of a Board Recall Supported Petition as contemplated in Annex D, Article 3, Section 3.3(e): requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.

Section 11.4. STAFF SUPPORT AND FUNDING

(a) A member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff shall be assigned to support the GNSO (Generic Names Supporting Organization), whose work on substantive matters shall be assigned by the Chair of the GNSO (Generic Names Supporting Organization) Council, and shall be designated as the GNSO (Generic Names Supporting Organization) Staff Manager ("Staff Manager").

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the GNSO (Generic Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by GNSO (Generic Names Supporting Organization) participants for travel to any meeting of the GNSO (Generic Names Supporting Organization) or for any other purpose. ICANN (Internet Corporation for Assigned Names and Numbers) may, at its discretion, fund travel expenses for GNSO (Generic Names Supporting Organization) participants under any travel support procedures or guidelines that it may adopt from time to time.

Section 11.5. STAKEHOLDER GROUPS

(a) The following "**Stakeholder Groups**" are hereby recognized as representative of a specific group of one or more "**Constituencies**" or interest groups:

(i) Registries Stakeholder Group representing all gTLD (generic Top Level Domain) registries under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

(ii) Registrars Stakeholder Group representing all registrars accredited by and under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

(iii) Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet ("**Commercial Stakeholder Group**"), which includes the Business Constituency ("**Business Constituency**"), Intellectual Property Constituency ("**Intellectual Property Constituency**") and the Internet Service Providers and Connectivity Providers Constituency ("**Internet Service Providers and Connectivity Providers Constituency**"); and

(iv) Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.

(b) Each Stakeholder Group is assigned a specific number of GNSO (Generic Names Supporting Organization) Council seats in accordance with Section 11.3(a).

(c) Each Stakeholder Group identified in Section 11.3(a) and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Recognition is granted by the Board based upon the extent to which, in fact, the entity represents the global interests of the stakeholder communities it purports to represent and operates to the maximum extent feasible in an open and transparent manner consistent with procedures designed to ensure fairness. Stakeholder Group and Constituency Charters may be reviewed periodically as prescribed by the Board.

(d) Any group of individuals or entities may petition the Board for recognition as a new or separate Constituency in the

Non-Contracted Parties House. Any such petition shall contain:

- (i) A detailed explanation of why the addition of such a Constituency will improve the ability of the GNSO (Generic Names Supporting Organization) to carry out its policy-development responsibilities;
- (ii) A detailed explanation of why the proposed new Constituency adequately represents, on a global basis, the stakeholders it seeks to represent;
- (iii) A recommendation for organizational placement within a particular Stakeholder Group; and
- (iv) A proposed charter that adheres to the principles and procedures contained in these Bylaws.

Any petition for the recognition of a new Constituency and the associated charter shall be posted for public comment.

(e) The Board may create new Constituencies as described in Section 11.5(c) in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of ICANN (Internet Corporation for Assigned Names and Numbers). In the event the Board is considering acting on its own motion it shall post a detailed explanation of why such action is necessary or desirable, set a reasonable time for public comment, and not make a final decision on whether to create such new Constituency until after reviewing all comments received. Whenever the Board posts a petition or recommendation for a new Constituency for public comment, the Board shall notify the GNSO (Generic Names Supporting Organization) Council and the appropriate Stakeholder Group affected and shall consider any response to that notification prior to taking action.

Section 11.6. POLICY DEVELOPMENT PROCESS

The policy-development procedures to be followed by the GNSO (Generic Names Supporting Organization) shall be as stated in Annex A to these Bylaws. These procedures may be supplemented or revised in the manner stated in Section 11.3(d).

ARTICLE 12 ADVISORY COMMITTEES

Section 12.1. GENERAL

The Board may create one or more "**Advisory Committees (Advisory Committees)**" in addition to those set forth in this Article 12. Advisory Committee (Advisory Committee) membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees (Advisory Committees) shall have no legal authority to act for ICANN (Internet Corporation for Assigned Names and Numbers), but shall report their findings and recommendations to the Board.

Section 12.2. SPECIFIC ADVISORY COMMITTEES

There shall be at least the following Advisory Committees (Advisory Committees):

(a) Governmental Advisory Committee (Advisory Committee)

(i) The Governmental Advisory Committee (Advisory Committee) should consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation

for Assigned Names and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues.

(ii) Membership in the Governmental Advisory Committee (Advisory Committee) shall be open to all national governments. Membership shall also be open to Distinct Economies as recognized in international fora, and multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee (Advisory Committee) through its Chair.

(iii) The Governmental Advisory Committee (Advisory Committee) may adopt its own charter and internal operating principles or procedures to guide its operations, to be published on the Website.

(iv) The chair of the Governmental Advisory Committee (Advisory Committee) shall be elected by the members of the Governmental Advisory Committee (Advisory Committee) pursuant to procedures adopted by such members.

(v) Each member of the Governmental Advisory Committee (Advisory Committee) shall appoint one accredited representative to the Governmental Advisory Committee (Advisory Committee). The accredited representative of a member must hold a formal official position with the member's public administration. The term "official" includes a holder of an elected governmental office, or a person who is employed by such government, public authority, or multinational governmental or treaty organization and whose primary function with such government, public authority, or organization is to develop or influence governmental or public policies.

(vi) The Governmental Advisory Committee (Advisory Committee) shall annually appoint one Liaison to the Board, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee.

(vii) The Governmental Advisory Committee (Advisory Committee) may designate a non-voting liaison to each of the Supporting Organization (Supporting Organization) Councils and Advisory Committees (Advisory Committees), to the extent the Governmental Advisory Committee (Advisory Committee) deems it appropriate and useful to do so.

(viii) The Board shall notify the Chair of the Governmental Advisory Committee (Advisory Committee) in a timely manner of any proposal raising public policy issues on which it or any of the Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

(ix) The Governmental Advisory Committee (Advisory Committee) may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.

(x) The advice of the Governmental Advisory Committee (Advisory Committee) on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the Board determines to take an action that is not consistent with Governmental Advisory Committee (Advisory Committee) advice, it shall so inform the Governmental Advisory Committee (Advisory

Committee) and state the reasons why it decided not to follow that advice. Any Governmental Advisory Committee (Advisory Committee) advice approved by a full Governmental Advisory Committee (Advisory Committee) consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection ("**GAC (Governmental Advisory Committee) Consensus (Consensus) Advice**"), may only be rejected by a vote of no less than 60% of the Board, and the Governmental Advisory Committee (Advisory Committee) and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. The Governmental Advisory Committee (Advisory Committee) will state whether any advice it gives to the Board is GAC (Governmental Advisory Committee) Consensus (Consensus) Advice.

(xi) If GAC (Governmental Advisory Committee) Consensus (Consensus) Advice is rejected by the Board pursuant to Section 12.2(a)(x) and if no such mutually acceptable solution can be found, the Board will state in its final decision the reasons why the Governmental Advisory Committee (Advisory Committee) advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee (Advisory Committee) members with regard to public policy issues falling within their responsibilities.

(b) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)

(i) The role of the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) ("**Security (Security – Security, Stability**

and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)" or "SSAC (Security and Stability Advisory Committee)" is to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. It shall have the following responsibilities:

(A) To communicate on security matters with the Internet technical community and the operators and managers of critical DNS (Domain Name System) infrastructure services, to include the root name server operator community, the top-level domain registries and registrars, the operators of the reverse delegation trees such as in-addr.arpa and ip6.arpa, and others as events and developments dictate. The SSAC (Security and Stability Advisory Committee) shall gather and articulate requirements to offer to those engaged in technical revision of the protocols related to DNS (Domain Name System) and address allocation and those engaged in operations planning.

(B) To engage in ongoing threat assessment and risk analysis of the Internet naming and address allocation services to assess where the principal threats to stability and security lie, and to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community accordingly. The SSAC (Security and Stability Advisory Committee) shall recommend any necessary audit activity to assess the current status of DNS (Domain Name System) and address allocation security in relation to identified risks and threats.

(C) To communicate with those who have direct responsibility for Internet naming and address

allocation security matters (IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (as defined in Section 12.2(c)(i)), RIRs, name registries, etc.), to ensure that its advice on security risks, issues, and priorities is properly synchronized with existing standardization, deployment, operational, and coordination activities. The SSAC (Security and Stability Advisory Committee) shall monitor these activities and inform the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on their progress, as appropriate.

(D) To report periodically to the Board on its activities.

(E) To make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.

(ii) The SSAC (Security and Stability Advisory Committee)'s chair and members shall be appointed by the Board. SSAC (Security and Stability Advisory Committee) membership appointment shall be for a three-year term, commencing on 1 January and ending the second year thereafter on 31 December. Members may be re-appointed, and there are no limits to the number of terms members may serve. The SSAC (Security and Stability Advisory Committee) chair may provide recommendations to the Board regarding appointments to the SSAC (Security and Stability Advisory Committee). The SSAC (Security and Stability Advisory Committee) chair shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the SSAC (Security and Stability Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have the power to remove SSAC (Security and Stability Advisory Committee)

appointees as recommended by or in consultation with the SSAC (Security and Stability Advisory Committee).

(iii) The SSAC (Security and Stability Advisory Committee) shall annually appoint a Liaison to the Board according to Section 7.9.

(c) Root Server System Advisory Committee (Advisory Committee)

(i) The role of the Root Server System Advisory Committee (Advisory Committee) ("**Root Server System Advisory Committee (Advisory Committee)**" or "**RSSAC (Root Server System Advisory Committee)**") is to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System. It shall have the following responsibilities:

(A) Communicate on matters relating to the operation of the Root Servers (Root Servers) and their multiple instances with the Internet technical community and the ICANN (Internet Corporation for Assigned Names and Numbers) community. The RSSAC (Root Server System Advisory Committee) shall gather and articulate requirements to offer to those engaged in technical revision of the protocols and best common practices related to the operation of DNS (Domain Name System) servers.

(B) Communicate on matters relating to the administration of the Root Zone (Root Zone) with those who have direct responsibility for that administration. These matters include the processes and procedures for the production of the Root Zone (Root Zone) File.

(C) Engage in ongoing threat assessment and risk analysis of the Root Server System and recommend any necessary audit activity to assess the current status of root servers and the root zone.

(D) Respond to requests for information or opinions from the Board.

(E) Report periodically to the Board on its activities.

(F) Make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.

(ii) The RSSAC (Root Server System Advisory Committee) shall be led by a chair. The RSSAC (Root Server System Advisory Committee) chair and members shall be appointed by the Board.

(A) RSSAC (Root Server System Advisory Committee) membership appointment shall be for a three-year term, commencing on 1 January and ending the second year thereafter on 31 December. Members may be re-appointed, and there are no limits to the number of terms the members may serve. The RSSAC (Root Server System Advisory Committee) chair shall provide recommendations to the Board regarding appointments to the RSSAC (Root Server System Advisory Committee). If the Board declines to appoint a person nominated by the RSSAC (Root Server System Advisory Committee), then it will provide the rationale for its decision. The RSSAC (Root Server System Advisory Committee) chair shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the RSSAC (Root Server System Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have the power to remove RSSAC (Root Server System Advisory Committee) appointees as

recommended by or in consultation with the RSSAC (Root Server System Advisory Committee).

(B) The RSSAC (Root Server System Advisory Committee) shall recommend the appointment of the chair to the Board following a nomination process that it devises and documents.

(iii) The RSSAC (Root Server System Advisory Committee) shall annually appoint a Liaison to the Board according to Section 7.9jm.

(d) At-Large Advisory Committee (Advisory Committee)

(i) The At-Large Advisory Committee (Advisory Committee) ("**At-Large Advisory Committee (Advisory Committee)**" or "**ALAC (At-Large Advisory Committee)**") is the primary organizational home within ICANN (Internet Corporation for Assigned Names and Numbers) for individual Internet users. The role of the ALAC (At-Large Advisory Committee) shall be to consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers), insofar as they relate to the interests of individual Internet users. This includes policies created through ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations), as well as the many other issues for which community input and advice is appropriate. The ALAC (At-Large Advisory Committee), which plays an important role in ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, also coordinates some of ICANN (Internet Corporation for Assigned Names and Numbers)'s outreach to individual Internet users.

(ii) The ALAC (At-Large Advisory Committee) shall consist of (A) two members selected by each of the Regional At-Large Organizations ("**RALOs**") established according to Section 12.2(d)(vii), and (B) five members selected by the Nominating Committee. The five members selected by the Nominating Committee shall include one citizen of a country within each of the five Geographic Regions established according to Section 7.5.

(iii) The regular terms of members of the ALAC (At-Large Advisory Committee) shall be as follows:

(A) The term of one member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an even-numbered year.

(B) The term of the other member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an odd-numbered year.

(C) The terms of three of the members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an odd-numbered year and the terms of the other two members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an even-numbered year.

(D) The regular term of each member shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the term began.

(iv) The Chair of the ALAC (At-Large Advisory Committee) shall be elected by the members of the ALAC (At-Large Advisory Committee) pursuant to

procedures adopted by the ALAC (At-Large Advisory Committee).

(v) The ALAC (At-Large Advisory Committee) shall, after consultation with each RALO, annually appoint five voting delegates (no two of whom shall be citizens of countries in the same Geographic Region) to the Nominating Committee.

(vi) The At-Large Advisory Committee (Advisory Committee) may designate non-voting liaisons to each of the ccNSO (Country Code Names Supporting Organization) Council and the GNSO (Generic Names Supporting Organization) Council.

(vii) There shall be one RALO for each Geographic Region established according to Section 7.5. Each RALO shall serve as the main forum and coordination point for public input to ICANN (Internet Corporation for Assigned Names and Numbers) in its Geographic Region and shall be a non-profit organization certified by ICANN (Internet Corporation for Assigned Names and Numbers) according to criteria and standards established by the Board based on recommendations of the At-Large Advisory Committee (Advisory Committee). An organization shall become the recognized RALO for its Geographic Region upon entering a Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) addressing the respective roles and responsibilities of ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO regarding the process for selecting ALAC (At-Large Advisory Committee) members and requirements of openness, participatory opportunities, transparency, accountability, and diversity in the RALO's structure and procedures, as well as criteria and standards for

the RALO's constituent At-Large Structures ("**At-Large Structures**").

(viii) Each RALO shall be comprised of self-supporting At-Large Structures within its Geographic Region that have been certified to meet the requirements of the RALO's Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) according to Section 12.2(d)(ix). If so provided by its Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers), a RALO may also include individual Internet users who are citizens or residents of countries within the RALO's Geographic Region.

(ix) Membership in the At-Large Community

(A) The criteria and standards for the certification of At-Large Structures within each Geographic Region shall be established by the Board based on recommendations from the ALAC (At-Large Advisory Committee) and shall be stated in the Memorandum of Understanding between ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO for each Geographic Region.

(B) The criteria and standards for the certification of At-Large Structures shall be established in such a way that participation by individual Internet users who are citizens or residents of countries within the Geographic Region of the RALO will predominate in the operation of each At-Large Structure within the RALO, while not necessarily excluding additional participation, compatible with the interests of the individual Internet users within the region, by others.

(C) Each RALO's Memorandum of Understanding shall also include provisions designed to allow, to the greatest extent possible, every individual Internet user

who is a citizen of a country within the RALO's Geographic Region to participate in at least one of the RALO's At-Large Structures.

(D) To the extent compatible with these objectives, the criteria and standards should also afford to each RALO the type of structure that best fits the customs and character of its Geographic Region.

(E) Once the criteria and standards have been established as provided in this Section 12.2(d)(ix), the ALAC (At-Large Advisory Committee), with the advice and participation of the RALO where the applicant is based, shall be responsible for certifying organizations as meeting the criteria and standards for At-Large Structure accreditation.

(F) Decisions to certify or decertify an At-Large Structure shall be made as decided by the ALAC (At-Large Advisory Committee) in its rules of procedure, save always that any changes made to the rules of procedure in respect of an At-Large Structure applications shall be subject to review by the RALOs and by the Board.

(G) Decisions as to whether to accredit, not to accredit, or disaccredit an At-Large Structure shall be subject to review according to procedures established by the Board.

(H) On an ongoing basis, the ALAC (At-Large Advisory Committee) may also give advice as to whether a prospective At-Large Structure meets the applicable criteria and standards.

(x) The ALAC (At-Large Advisory Committee) is also responsible, working in conjunction with the RALOs, for coordinating the following activities:

(A) Nominating individuals to fill Seat 15 on the Board. Notification of the At-Large Community's nomination shall be given by the ALAC (At-Large Advisory Committee) Chair in writing to the EC (Empowered Community) Administration, with a copy to the Secretary, and the EC (Empowered Community) shall promptly act on it as provided in Section 7.25.

(B) Keeping the community of individual Internet users informed about the significant news from ICANN (Internet Corporation for Assigned Names and Numbers);

(C) Distributing (through posting or otherwise) an updated agenda, news about ICANN (Internet Corporation for Assigned Names and Numbers), and information about items in the ICANN (Internet Corporation for Assigned Names and Numbers) policy-development process;

(D) Promoting outreach activities in the community of individual Internet users;

(E) Developing and maintaining on-going information and education programs, regarding ICANN (Internet Corporation for Assigned Names and Numbers) and its work;

(F) Establishing an outreach strategy about ICANN (Internet Corporation for Assigned Names and Numbers) issues in each RALO's Geographic Region;

(G) Participating in the ICANN (Internet Corporation for Assigned Names and Numbers) policy development processes and providing input and advice that accurately reflects the views of individual Internet users;

(H) Making public, and analyzing, ICANN (Internet Corporation for Assigned Names and Numbers)'s proposed policies and its decisions and their (potential) regional impact and (potential) effect on individuals in the region;

(I) Offering Internet-based mechanisms that enable discussions among members of At-Large Structures; and

(xi) Establishing mechanisms and processes that enable two-way communication between members of At-Large Structures and those involved in ICANN (Internet Corporation for Assigned Names and Numbers) decision-making, so interested individuals can share their views on pending ICANN (Internet Corporation for Assigned Names and Numbers) issues.

Section 12.3. PROCEDURES

Each Advisory Committee (Advisory Committee) shall determine its own rules of procedure and quorum requirements; provided that each Advisory Committee (Advisory Committee) shall ensure that the advice provided to the Board by such Advisory Committee (Advisory Committee) is communicated in a clear and unambiguous written statement, including the rationale for such advice. The Board will respond in a timely manner to formal advice from all Advisory Committees (Advisory Committees) explaining what action it took and the rationale for doing so.

Section 12.4. TERM OF OFFICE

The chair and each member of an Advisory Committee (Advisory Committee) shall serve until his or her successor is appointed, or until such Advisory Committee (Advisory Committee) is sooner terminated, or until he or she is

removed, resigns, or otherwise ceases to qualify as a member of the Advisory Committee (Advisory Committee).

Section 12.5. VACANCIES

Vacancies on any Advisory Committee (Advisory Committee) shall be filled in the same manner as provided in the case of original appointments.

Section 12.6. COMPENSATION

Advisory Committee (Advisory Committee) members shall receive no compensation for their services as a member of such Advisory Committee (Advisory Committee). The Board may, however, authorize the reimbursement of actual and necessary expenses incurred by Advisory Committee (Advisory Committee) members, including Directors, performing their duties as Advisory Committee (Advisory Committee) members.

ARTICLE 13 OTHER ADVISORY MECHANISMS

Section 13.1. EXTERNAL EXPERT ADVICE

(a) Purpose. The purpose of seeking external expert advice is to allow the policy-development process within ICANN (Internet Corporation for Assigned Names and Numbers) to take advantage of existing expertise that resides in the public or private sector but outside of ICANN (Internet Corporation for Assigned Names and Numbers). In those cases where there are relevant public bodies with expertise, or where access to private expertise could be helpful, the Board and constituent bodies should be encouraged to seek advice from such expert bodies or individuals.

(b) Types of Expert Advisory Panels

(i) On its own initiative or at the suggestion of any ICANN (Internet Corporation for Assigned Names and Numbers) body, the Board may appoint, or authorize the President to appoint, Expert Advisory Panels consisting of public or private sector individuals or entities. If the advice sought from such Panels concerns issues of public policy, the provisions of Section 13.1(c) shall apply.

(ii) In addition, in accordance with Section 13.1(c), the Board may refer issues of public policy pertinent to matters within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission to a multinational governmental or treaty organization.

(c) Process for Seeking Advice: Public Policy Matters

(i) The Governmental Advisory Committee (Advisory Committee) may at any time recommend that the Board seek advice concerning one or more issues of public policy from an external source, as set out above.

(ii) In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, the Board shall, as appropriate, consult with the Governmental Advisory Committee (Advisory Committee) regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.

(iii) The Board shall, as appropriate, transmit any request for advice from a multinational governmental or treaty organization, including specific terms of reference, to the Governmental Advisory Committee (Advisory Committee), with the suggestion that the

request be transmitted by the Governmental Advisory Committee (Advisory Committee) to the multinational governmental or treaty organization.

(d) Process for Seeking and Advice: Other Matters. Any reference of issues not concerning public policy to an Expert Advisory Panel by the Board or President in accordance with Section 13.1(b)(i), shall be made pursuant to terms of reference describing the issues on which input and advice is sought and the procedures and schedule to be followed.

(e) Receipt of Expert Advice and its Effect. External advice pursuant to this Section 13.1 shall be provided in written form. Such advice is advisory and not binding, and is intended to augment the information available to the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body in carrying out its responsibilities.

(f) Opportunity to Comment. The Governmental Advisory Committee (Advisory Committee), in addition to the Supporting Organizations (Supporting Organizations) and other Advisory Committees (Advisory Committees), shall have an opportunity to comment upon any external advice received prior to any decision by the Board.

Section 13.2. TECHNICAL LIAISON GROUP

(a) Purpose. The quality of ICANN (Internet Corporation for Assigned Names and Numbers)'s work depends on access to complete and authoritative information concerning the technical standards that underlie ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship to the organizations that produce these standards is therefore particularly important. The Technical Liaison Group ("**TLG**") shall connect the Board with appropriate sources of technical advice on specific matters

pertinent to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities.

(b) TLG Organizations. The TLG shall consist of four organizations: the European Telecommunications Standards Institute (ETSI (European Telecommunications Standards Institute)), the International Telecommunications Union's Telecommunication Standardization Sector (ITU (International Telecommunication Union)-T), the World Wide Web Consortium (W3C (World Wide Web Consortium)), and the Internet Architecture Board ("**IAB (Internet Architecture Board)**").

(c) Role. The role of the TLG organizations shall be to channel technical information and guidance to the Board and to other ICANN (Internet Corporation for Assigned Names and Numbers) entities. This role has both a responsive component and an active "watchdog" component, which involve the following responsibilities:

(i) In response to a request for information, to connect the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body with appropriate sources of technical expertise. This component of the TLG role covers circumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) seeks an authoritative answer to a specific technical question. Where information is requested regarding a particular technical standard for which a TLG organization is responsible, that request shall be directed to that TLG organization.

(ii) As an ongoing "watchdog" activity, to advise the Board of the relevance and progress of technical developments in the areas covered by each organization's scope that could affect Board decisions or other ICANN (Internet Corporation for Assigned Names and Numbers) actions, and to draw attention to

global technical standards issues that affect policy development within the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission. This component of the TLG role covers circumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) is unaware of a new development, and would therefore otherwise not realize that a question should be asked.

(d) TLG Procedures. The TLG shall not have officers or hold meetings, nor shall it provide policy advice to the Board as a committee (although TLG organizations may individually be asked by the Board to do so as the need arises in areas relevant to their individual charters). Neither shall the TLG debate or otherwise coordinate technical issues across the TLG organizations; establish or attempt to establish unified positions; or create or attempt to create additional layers or structures within the TLG for the development of technical standards or for any other purpose.

(e) Technical Work with the IETF (Internet Engineering Task Force). The TLG shall have no involvement with ICANN (Internet Corporation for Assigned Names and Numbers)'s work for the Internet Engineering Task Force (IETF (Internet Engineering Task Force)), Internet Research Task Force, or the Internet Architecture Board (IAB (Internet Architecture Board)), as described in the IETF (Internet Engineering Task Force)-ICANN (Internet Corporation for Assigned Names and Numbers) Memorandum of Understanding Concerning the Technical Work of the Internet Assigned Numbers Authority ratified by the Board on 10 March 2000 and any supplemental agreements thereto.

(f) Individual Technical Experts. Each TLG organization shall designate two individual technical experts who are familiar with the technical standards issues that are relevant to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. These 8 experts shall be available as

necessary to determine, through an exchange of e-mail messages, where to direct a technical question from ICANN (Internet Corporation for Assigned Names and Numbers) when ICANN (Internet Corporation for Assigned Names and Numbers) does not ask a specific TLG organization directly.

ARTICLE 14 BOARD AND TEMPORARY COMMITTEES

Section 14.1. BOARD COMMITTEES

The Board may establish one or more committees of the Board (each, a "**Board Committee**"), which shall continue to exist until otherwise determined by the Board. Only Directors may be appointed to a Committee of the Board; provided, that a Liaison may be appointed as a liaison to a Committee of the Board consistent with their non-voting capacity. If a person appointed to a Committee of the Board ceases to be a Director, such person shall also cease to be a member of any Committee of the Board. Each Committee of the Board shall consist of two or more Directors. The Board may designate one or more Directors as alternate members of any such committee, who may replace any absent member at any meeting of the committee. Committee members may be removed from a committee at any time by a two-thirds (2/3) majority vote of all Directors; provided, however, that in no event shall a Director be removed from a committee unless such removal is approved by not less than a majority of all Directors.

Section 14.2. POWERS OF BOARD COMMITTEES

(a) The Board may delegate to Committees of the Board all legal authority of the Board except with respect to:

- (i) The filling of vacancies on the Board or on any committee;

- (ii) The amendment or repeal of Bylaws or the Articles of Incorporation or the adoption of new Bylaws or Articles of Incorporation;
- (iii) The amendment or repeal of any resolution of the Board which by its express terms is not so amendable or repealable;
- (iv) The appointment of committees of the Board or the members thereof;
- (v) The approval of any self-dealing transaction, as such transactions are defined in Section 5233(a) of the CCC;
- (vi) The approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget required by Section 22.4 or the Operating Plan or Strategic Plan required by Section 22.5; or
- (vii) The compensation of any Officer described in Article 15.

(b) The Board shall have the power to prescribe the manner in which proceedings of any Committee of the Board shall be conducted. In the absence of any such prescription, such committee shall have the power to prescribe the manner in which its proceedings shall be conducted. Unless these Bylaws, the Board or such committee shall otherwise provide, the regular and special meetings of committees shall be governed by the provisions of Article 7 applicable to meetings and actions of the Board. Each committee shall keep regular minutes of its proceedings and shall report the same to the Board from time to time, as the Board may require.

Section 14.3. TEMPORARY COMMITTEES

The Board may establish such temporary committees as it sees fit, with membership, duties, and responsibilities as set forth in the resolutions or charters adopted by the Board in establishing such committees.

ARTICLE 15 OFFICERS

Section 15.1. OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) (each, an "**Officer**") shall be a President (who shall serve as Chief Executive Officer), a Secretary, and a Chief Financial Officer. ICANN (Internet Corporation for Assigned Names and Numbers) may also have, at the discretion of the Board, any additional officers that it deems appropriate. Any person, other than the President, may hold more than one office, except that no member of the Board (other than the President) shall simultaneously serve as an officer of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 15.2. ELECTION OF OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be elected annually by the Board, pursuant to the recommendation of the President or, in the case of the President, of the Chair of the Board. Each such officer shall hold his or her office until he or she resigns, is removed, is otherwise disqualified to serve, or his or her successor is elected.

Section 15.3. REMOVAL OF OFFICERS

Any Officer may be removed, either with or without cause, by a two-thirds (2/3) majority vote of all Directors. Should any vacancy occur in any office as a result of death, resignation,

removal, disqualification, or any other cause, the Board may delegate the powers and duties of such office to any Officer or to any Director until such time as a successor for the office has been elected.

Section 15.4. PRESIDENT

The President shall be the Chief Executive Officer (CEO) of ICANN (Internet Corporation for Assigned Names and Numbers) 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.

Section 15.5. SECRETARY

The Secretary shall keep or cause to be kept the minutes of the Board in one or more books provided for that purpose, shall see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law, and in general shall perform all duties as from time to time may be prescribed by the President or the Board.

Section 15.6. CHIEF FINANCIAL OFFICER

The Chief Financial Officer ("**CFO**") shall be the chief financial officer of ICANN (Internet Corporation for Assigned Names and Numbers). If required by the Board, the CFO shall give a bond for the faithful discharge of his or her duties in such form and with such surety or sureties as the Board shall determine. The CFO shall have charge and custody of all the funds of ICANN (Internet Corporation for Assigned Names and Numbers) and shall keep or cause to be kept, in

books belonging to ICANN (Internet Corporation for Assigned Names and Numbers), full and accurate amounts of all receipts and disbursements, and shall deposit all money and other valuable effects in the name of ICANN (Internet Corporation for Assigned Names and Numbers) in such depositories as may be designated for that purpose by the Board. The CFO shall disburse the funds of ICANN (Internet Corporation for Assigned Names and Numbers) as may be ordered by the Board or the President and, whenever requested by them, shall deliver to the Board and the President an account of all his or her transactions as CFO and of the financial condition of ICANN (Internet Corporation for Assigned Names and Numbers). The CFO shall be responsible for ICANN (Internet Corporation for Assigned Names and Numbers)'s financial planning and forecasting and shall assist the President in the preparation of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget, the IANA (Internet Assigned Numbers Authority) Budget and Operating Plan. The CFO shall coordinate and oversee ICANN (Internet Corporation for Assigned Names and Numbers)'s funding, including any audits or other reviews of ICANN (Internet Corporation for Assigned Names and Numbers) or its Supporting Organizations (Supporting Organizations). The CFO shall be responsible for all other matters relating to the financial operation of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 15.7. ADDITIONAL OFFICERS

In addition to the officers described above, any additional or assistant officers who are elected or appointed by the Board shall perform such duties as may be assigned to them by the President or the Board.

Section 15.8. COMPENSATION AND EXPENSES

The compensation of any Officer of ICANN (Internet Corporation for Assigned Names and Numbers) shall be approved by the Board. Expenses incurred in connection with performance of their officer duties may be reimbursed to Officers upon approval of the President (in the case of Officers other than the President), by another Officer designated by the Board (in the case of the President), or the Board.

Section 15.9. CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall establish a policy requiring a statement from each Officer not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers).

ARTICLE 16 POST-TRANSITION IANA (Internet Assigned Numbers Authority) ENTITY

Section 16.1. DESCRIPTION

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain as a separate legal entity a California nonprofit public benefit corporation (**"PTI"**) for the purpose of providing IANA (Internet Assigned Numbers Authority) services, including providing IANA (Internet Assigned Numbers Authority) naming function services pursuant to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, as well as other services as determined by ICANN (Internet Corporation for Assigned Names and Numbers) in coordination with the direct and indirect customers of the IANA (Internet Assigned Numbers Authority) functions. ICANN (Internet Corporation for Assigned Names and Numbers) shall at all times be the sole member of PTI as that term is defined in Section 5056 of the CCC (**"Member"**). For the purposes of these Bylaws, the

"IANA (Internet Assigned Numbers Authority) naming function" does not include the Internet Protocol (Protocol) numbers and Autonomous System numbers services (as contemplated by Section 1.1(a)(iii)), the protocol ports and parameters services and the root zone maintainer function.

Section 16.2. PTI Governance

(a) ICANN (Internet Corporation for Assigned Names and Numbers), in its capacity as the sole Member of PTI, shall elect the directors of PTI in accordance with the articles of incorporation and bylaws of PTI and have all other powers of a sole Member under the CCC except as otherwise provided in these Bylaws.

(b) No amendment or modification of the articles of incorporation of PTI shall be effective unless approved by the EC (Empowered Community) (pursuant to the procedures applicable to Articles Amendments described in Section 25.2, as if such Article Amendment referenced therein refers to an amendment of PTI's articles of incorporation).

(c) ICANN (Internet Corporation for Assigned Names and Numbers) shall not amend or modify the bylaws of PTI in a manner that would effect any of the matters set forth in clauses (i) through (xiv) below (a "**PTI Bylaw Amendment**") if such PTI Bylaw Amendment has been rejected by the EC (Empowered Community) pursuant to the procedures described in Section 16.2(e):

(i) any change to the corporate form of PTI to an entity that is not a California nonprofit public benefit corporation organized under the CCC or any successor statute;

(ii) any change in the corporate mission of PTI that is materially inconsistent with ICANN (Internet

Corporation for Assigned Names and Numbers)'s
Mission as set forth in these Bylaws;

(iii) any change to the status of PTI as a corporation
with members;

(iv) any change in the rights of ICANN (Internet
Corporation for Assigned Names and Numbers) as the
sole Member of PTI, including voting, classes of
membership, rights, privileges, preferences,
restrictions and conditions;

(v) any change that would grant rights to any person or
entity (other than ICANN (Internet Corporation for
Assigned Names and Numbers)) with respect to PTI
as designators or otherwise to: (A) elect or designate
directors of PTI; or (B) approve any amendments to
the articles of incorporation or bylaws of PTI;

(vi) any change in the number of directors of the board
of directors of PTI (the "**PTI Board**");

(vii) any changes in the allocation of directors on the
PTI Board between independent directors and
employees of ICANN (Internet Corporation for
Assigned Names and Numbers) or employees of PTI
or to the definition of "independent" (as used in PTI's
bylaws) for purposes of determining whether a director
of PTI is independent;

(viii) the creation of any committee of the PTI Board
with the power to exercise the authority of the PTI
Board;

(ix) any change in the procedures for nominating
independent PTI directors;

(x) the creation of classes of PTI directors or PTI
directors with different terms or voting rights;

(xi) any change in PTI Board quorum requirements or voting requirements;

(xii) any change to the powers and responsibilities of the PTI Board or the PTI officers;

(xiii) any change to the rights to exculpation and indemnification that is adverse to the exculpated or indemnified party, including with respect to advancement of expenses and insurance, provided to directors, officers, employees or other agents of PTI;
or

(xiv) any change to the requirements to amend the articles of incorporation or bylaws of PTI.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall not take any of the following actions (together with the PTI Bylaw Amendments, "**PTI Governance Actions**") if such PTI Governance Action has been rejected by the EC (Empowered Community) pursuant to the procedures described in Section 16.2(e).

(i) Any resignation by ICANN (Internet Corporation for Assigned Names and Numbers) as sole Member of PTI or any transfer, disposition, cession, expulsion, suspension or termination by ICANN (Internet Corporation for Assigned Names and Numbers) of its membership in PTI or any transfer, disposition, cession, expulsion, suspension or termination by ICANN (Internet Corporation for Assigned Names and Numbers) of any right arising from its membership in PTI.

(ii) Any sale, transfer or other disposition of PTI's assets, other than (A) in the ordinary course of PTI's business, (B) in connection with an IANA (Internet Assigned Numbers Authority) Naming Function

Separation Process (as defined in Section 19.1(a)) that has been approved in accordance with Article 19 or (C) the disposition of obsolete, damaged, redundant or unused assets.

(iii) Any merger, consolidation, sale or reorganization of PTI.

(iv) Any dissolution, liquidation or winding-up of the business and affairs of PTI or the commencement of any other voluntary bankruptcy proceeding of PTI.

(e) Promptly after the Board approves a PTI Governance Action (a "**PTI Governance Action Approval**"), the Secretary shall provide a notice of the Board's decision to the EC (Empowered Community) Administration and the Decisional Participants ("Board Notice"), which Board Notice shall enclose a copy of the PTI Governance Action that is the subject of the PTI Governance Action Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) A PTI Governance Action shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice (as defined in Section 2.2(c)(i) of Annex D) is not timely delivered by the Rejection Action Petitioning Decisional Participant (as defined in Section 2.2(c)(i) of Annex D) to the Secretary pursuant to and in compliance with Section

2.2(c) of Annex D or (2) a Rejection Process Termination Notice (as defined in Section 2.2(c)(ii) of Annex D) is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Period (as defined in Section 2.2(b) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition (as defined in Section 2.2(d)(i) of Annex D) is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period (as defined in Section 2.2(d)(i) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice (as defined in Section 2.4(b) of Annex D) is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the PTI Governance Action that is the subject of the PTI Governance Action Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period (as defined in Section 2.4(a) of Annex D) relating to such PTI Governance Action Approval and the effectiveness of such PTI Governance Action shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(ii) A PTI Governance Action that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(iii) Following receipt of an EC (Empowered Community) Rejection Notice relating to a PTI Governance Action, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the PTI Governance Action in determining whether or not to develop a new PTI Governance Action and the substance of such new PTI Governance Action, which shall be subject to the procedures of this Section 16.2.

Section 16.3. IANA (Internet Assigned Numbers Authority) NAMING FUNCTION CONTRACT

(a) On or prior to 1 October 2016, ICANN (Internet Corporation for Assigned Names and Numbers) shall enter into a contract with PTI for the performance of the IANA (Internet Assigned Numbers Authority) naming function (as it may be amended or modified, the "**IANA (Internet Assigned Numbers Authority) Naming Function Contract**") and a related statement of work (the "**IANA (Internet Assigned Numbers Authority) Naming Function SOW**"). Except as to implement any modification, waiver or amendment to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW related to an IFR Recommendation or Special IFR Recommendation approved pursuant to [Section 18.6](#) or an SCWG Recommendation approved pursuant to [Section 19.4](#) (which, for the avoidance of doubt, shall not be subject to this [Section 16.3\(a\)](#)), ICANN (Internet Corporation for Assigned Names and Numbers) shall not agree to modify, amend or waive any Material Terms (as defined below) of the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW if a majority of each of the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils reject the proposed modification, amendment or waiver. The following are the "**Material Terms**" of the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW:

- (i) The parties to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(ii) The initial term and renewal provisions of the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(iii) The manner in which the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW may be terminated;

(iv) The mechanisms that are available to enforce the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(v) The role and responsibilities of the CSC (as defined in Section 17.1), escalation mechanisms and/or the IFR (as defined in Section 18.1);

(vi) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's provisions requiring that fees charged by PTI be based on direct costs and resources incurred by PTI;

(vii) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's prohibition against subcontracting;

(viii) The availability of the IRP as a point of escalation for claims of PTI's failure to meet defined service level expectations;

(ix) The IANA (Internet Assigned Numbers Authority) Naming Function Contract's audit requirements; and

(x) The requirements related to ICANN (Internet Corporation for Assigned Names and Numbers) funding of PTI.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall enforce its rights under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and the IANA (Internet Assigned Numbers Authority) Naming Function SOW.

ARTICLE 17 CUSTOMER STANDING COMMITTEE

Section 17.1. DESCRIPTION

ICANN (Internet Corporation for Assigned Names and Numbers) shall establish a Customer Standing Committee ("**CSC**") to monitor PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW.

The mission of the CSC is to ensure continued satisfactory performance of the IANA (Internet Assigned Numbers Authority) naming function for the direct customers of the naming services. The direct customers of the naming services are top-level domain registry operators as well as root server operators and other non-root zone functions.

The CSC will achieve this mission through regular monitoring of the performance of the IANA (Internet Assigned Numbers Authority) naming function against the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW and through mechanisms to engage with PTI to remedy identified areas of concern.

The CSC is not authorized to initiate a change in PTI through a Special IFR (as defined in [Section 18.1](#)), but may escalate a failure to correct an identified deficiency to the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), which might then

decide to take further action using consultation and escalation processes, which may include a Special IFR. The ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) may address matters escalated by the CSC, pursuant to their operating rules and procedures.

Section 17.2. COMPOSITION, APPOINTMENT, TERM AND REMOVAL

(a) The CSC shall consist of:

(i) Two individuals representing gTLD (generic Top Level Domain) registry operators appointed by the Registries Stakeholder Group;

(ii) Two individuals representing ccTLD (Country Code Top Level Domain) registry operators appointed by the ccNSO (Country Code Names Supporting Organization); and

(iii) One individual liaison appointed by PTI,

each appointed in accordance with the rules and procedures of the appointing organization; provided that such individuals should have direct experience and knowledge of the IANA (Internet Assigned Numbers Authority) naming function.

(b) If so determined by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), the CSC may, but is not required to, include one additional member: an individual representing top-level domain registry operators that are not considered a ccTLD (Country Code Top Level Domain) or gTLD (generic Top Level Domain), who shall be appointed by the ccNSO (Country Code Names Supporting Organization) and the GNSO (Generic Names Supporting Organization). Such

representative shall be required to submit a letter of support from the registry operator it represents.

(c) Each of the following organizations may also appoint one liaison to the CSC in accordance with the rules and procedures of the appointing organization: (i) GNSO (Generic Names Supporting Organization) (from the Registrars Stakeholder Group or the Non-Contracted Parties House), (ii) ALAC (At-Large Advisory Committee), (iii) either the NRO (Number Resource Organization) or ASO (Address Supporting Organization) (as determined by the ASO (Address Supporting Organization)), (iv) GAC (Governmental Advisory Committee), (v) RSSAC (Root Server System Advisory Committee), (vi) SSAC (Security and Stability Advisory Committee) and (vii) any other Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) established under these Bylaws.

(d) The GNSO (Generic Names Supporting Organization) and ccNSO (Country Code Names Supporting Organization) shall approve the initial proposed members and liaisons of the CSC, and thereafter, the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) shall approve each annual slate of members and liaisons being recommended for a new term.

(e) The CSC members and liaisons shall select from among the CSC members who will serve as the CSC's liaison to the IFRT (as defined in Section 18.1) and any Separation Cross-Community Working Group ("**SCWG**").

(f) Any CSC member or liaison may be removed and replaced at any time and for any reason or no reason by the organization that appointed such member or liaison.

(g) In addition, the Chair of the CSC may recommend that a CSC member or liaison be removed by the organization that appointed such member or liaison, upon any of the following:

(i) (A) for not attending without sufficient cause a minimum of nine CSC meetings in a one-year period (or at least 75% of all CSC meetings in a one-year period if less than nine meetings were held in such one-year period) or (B) if such member or liaison has been absent for more than two consecutive meetings without sufficient cause; or (ii) for grossly inappropriate behavior.

(h) A vacancy on the CSC shall be deemed to exist in the event of the death, resignation or removal of any CSC member or liaison. Vacancies shall be filled by the organization(s) that appointed such CSC member or liaison. The appointing organization(s) shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the Chair of the CSC. The organization(s) responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 17.3.CSC CHARTER; PERIODIC REVIEW

(a) The CSC shall act in accordance with its charter (the "**CSC Charter**").

(b) The effectiveness of the CSC shall be reviewed two years after the first meeting of the CSC; and then every three years thereafter. The method of review will be determined by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) and the findings of the review will be published on the Website.

(c) The CSC Charter shall be reviewed by a committee of representatives from the ccNSO (Country Code Names Supporting Organization) and the Registries Stakeholder Group selected by such organizations. This review shall commence one year after the first meeting of the CSC. Thereafter, the CSC Charter shall be reviewed by such

committee of representatives from the ccNSO (Country Code Names Supporting Organization) and the Registries Stakeholder Group selected by such organizations at the request of the CSC, ccNSO (Country Code Names Supporting Organization), GNSO (Generic Names Supporting Organization), the Board and/or the PTI Board and/or by an IFRT in connection with an IFR.

(d) Amendments to the CSC Charter shall not be effective unless ratified by the vote of a simple majority of each of the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to each such organizations' procedures. Prior to any action by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization), any recommended changes to the CSC Charter shall be subject to a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers). Notwithstanding the foregoing, to the extent any provision of an amendment to the CSC Charter conflicts with the terms of the Bylaws, the terms of the Bylaws shall control.

Section 17.4. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the CSC to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the CSC.

ARTICLE 18 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION REVIEWS

Section 18.1. IANA (Internet Assigned Numbers Authority) NAMING FUNCTION REVIEW

The Board, or an appropriate committee thereof, shall cause periodic and/or special reviews (each such review, an "IFR") of PTI's performance of the IANA (Internet Assigned Numbers Authority) naming function against the contractual requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract and the IANA (Internet Assigned Numbers Authority) Naming Function SOW to be carried out by an IANA (Internet Assigned Numbers Authority) Function Review Team ("IFRT") established in accordance with Article 18, as follows:

- (a) Regularly scheduled periodic IFRs, to be conducted pursuant to Section 18.2 below ("**Periodic IFRs**"); and
- (b) IFRs that are not Periodic IFRs, to be conducted pursuant to Section 18.12 below ("**Special IFRs**").

Section 18.2. FREQUENCY OF PERIODIC IFRS

- (a) The first Periodic IFR shall be convened no later than [1 October 2018].
- (b) Periodic IFRs after the first Periodic IFR shall be convened no less frequently than every five years, measured from the date the previous IFRT for a Periodic IFR was convened.
- (c) In the event a Special IFR is ongoing at the time a Periodic IFR is required to be convened under this Section 18.2, the Board shall cause the convening of the Periodic IFR to be delayed if such delay is approved by the vote of (i) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s

procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members and (ii) a GNSO (Generic Names Supporting Organization) Supermajority. Any decision by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) to delay a Periodic IFR must identify the period of delay, which should generally not exceed 12 months after the completion of the Special IFR.

Section 18.3. IFR RESPONSIBILITIES

For each Periodic IFR, the IFRT shall:

- (a) Review and evaluate the performance of PTI against the requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract in relation to the needs of its direct customers and the expectations of the broader ICANN (Internet Corporation for Assigned Names and Numbers) community, and determine whether to make any recommendations with respect to PTI's performance;
- (b) Review and evaluate the performance of PTI against the requirements set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;
- (c) Review the IANA (Internet Assigned Numbers Authority) Naming Function SOW and determine whether to recommend any amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW to account for the needs of the direct customers of the naming services and/or the community at large;
- (d) Review and evaluate the openness and transparency procedures of PTI and any oversight structures for PTI's

performance, including reporting requirements and budget transparency;

(e) Review and evaluate the performance and effectiveness of the EC (Empowered Community) with respect to actions taken by the EC (Empowered Community), if any, pursuant to Section 16.2, Section 18.6, Section 18.12, Section 19.1, Section 19.4, Section 22.4(b) and Annex D;

(f) Review and evaluate the performance of the IANA (Internet Assigned Numbers Authority) naming function according to established service level expectations during the IFR period being reviewed and compared to the immediately preceding Periodic IFR period;

(g) Review and evaluate whether there are any systemic issues that are impacting PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(h) Initiate public comment periods and other processes for community input on PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW (such public comment periods shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers));

(i) Consider input from the CSC and the community on PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW;

(j) Identify process or other areas for improvement in the performance of the IANA (Internet Assigned Numbers Authority) naming function under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA

(Internet Assigned Numbers Authority) Naming Function SOW and the performance of the CSC and the EC (Empowered Community) as it relates to oversight of PTI; and

(k) Consider and assess any changes implemented since the immediately preceding IFR and their implications for the performance of PTI under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW.

Section 18.4. IFR REQUIRED INPUTS

In conducting an IFR, the IFRT shall review and analyze the following information:

(a) Reports provided by PTI pursuant to the IANA (Internet Assigned Numbers Authority) Naming Function Contract and/or IANA (Internet Assigned Numbers Authority) Naming Function SOW during the IFR period being reviewed, any portion of which may be redacted pursuant to the Confidential Disclosure Framework set forth in the Operating Standards in accordance with Section 4.6(a)(vi);

(b) Reports provided by the CSC in accordance with the CSC Charter during the IFR period being reviewed;

(c) Community inputs through public consultation procedures as reasonably determined by the IFRT, including, among other things, public comment periods, input provided at in-person sessions during ICANN (Internet Corporation for Assigned Names and Numbers) meetings, responses to public surveys related to PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW, and public inputs during meetings of the IFRT;

(d) Recommendations for technical, process and/or other improvements relating to the mandate of the IFR provided by the CSC or the community; and

(e) Results of any site visit conducted by the IFRT, which shall be conducted in consultation with ICANN (Internet Corporation for Assigned Names and Numbers) (i) upon reasonable notice, (ii) in a manner so as to not affect PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW and (iii) pursuant to procedures and requirements reasonably developed by ICANN (Internet Corporation for Assigned Names and Numbers) and reasonably acceptable to the IFRT. Any such site visit shall be limited to matters reasonably related to the IFRT's responsibilities pursuant to Section 18.3.

Section 18.5. IFR RESULTS AND RECOMMENDATIONS

(a) The results of the IFR are not limited and could include a variety of recommendations or no recommendation; provided, however, that any recommendations must directly relate to the matters discussed in Section 18.3 and comply with this Section 18.5.

(b) Any IFRT recommendations should identify improvements that are supported by data and associated analysis about existing deficiencies and how they could be addressed. Each recommendation of the IFRT shall include proposed remedial procedures and describe how those procedures are expected to address such issues. The IFRT's report shall also propose timelines for implementing the IFRT's recommendations. The IFRT shall attempt to prioritize each of its recommendations and provide a rationale for such prioritization.

(c) In any case where a recommendation of an IFRT focuses on a service specific to gTLD (generic Top Level Domain) registry operators, no such recommendation shall be made by the IFRT in any report to the community (including any report to the Board) if opposition to such recommendation is expressed by any IFRT member appointed by the Registries Stakeholder Group. In any case where a recommendation of an IFRT focuses on a service specific to ccTLD (Country Code Top Level Domain) registry operators, no such recommendation shall be made by the IFRT in any report to the community (including any report to the Board) if opposition to such recommendation is expressed by any IFRT member appointed by the ccNSO (Country Code Names Supporting Organization).

(d) Notwithstanding anything herein to the contrary, the IFRT shall not have the authority to review or make recommendations relating to policy or contracting issues that are not included in the IANA (Internet Assigned Numbers Authority) Naming Function Contract or the IANA (Internet Assigned Numbers Authority) Naming Function SOW, including, without limitation, policy development, adoption processes or contract enforcement measures between contracted registries and ICANN (Internet Corporation for Assigned Names and Numbers).

Section 18.6. RECOMMENDATIONS TO AMEND THE IANA (Internet Assigned Numbers Authority) NAMING FUNCTION CONTRACT, IANA (Internet Assigned Numbers Authority) NAMING FUNCTION SOW OR CSC

(a) The IFRT may recommend, among other things to the extent reasonably related to the IFR responsibilities set forth in Section 18.3, amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract, IANA (Internet Assigned Numbers Authority) Naming Function SOW and/or the CSC Charter. The IFRT shall, at a minimum,

take the following steps before an amendment to either the IANA (Internet Assigned Numbers Authority) Naming Function Contract, IANA (Internet Assigned Numbers Authority) Naming Function SOW or CSC Charter is proposed:

- (i) Consult with the Board (such consultation to be conducted in parallel with other processes set forth in this Section 18.6(a)) and PTI;
- (ii) Consult with the CSC;
- (iii) Conduct a public input session for ccTLD (Country Code Top Level Domain) and gTLD (generic Top Level Domain) registry operators; and
- (iv) Seek public comment on the amendments that are under consideration by the IFRT through a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

(b) A recommendation of an IFRT for a Periodic IFR that would amend the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW shall only become effective if, with respect to each such recommendation (each, an "**IFR Recommendation**"), each of the following occurs:

- (i) The IFR Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds

(2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the IFR Recommendation; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the IFR Recommendation pursuant to and in compliance with Section 18.6(d).

(c) If the Board (x) rejects an IFR Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 18.6(b) (i) or (y) does not resolve to either accept or reject an IFR Recommendation within 45 days of the later of (1) the date that the condition in Section 18.6(b)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 18.6(b)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable IFR Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a

Rejection Action Community Forum (as defined in Section 2.3(a) of Annex D), which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants (as defined in Section 2.2(d)(i) of Annex D) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the IFR Recommendation or approve the IFR Recommendation (either, a "**Post-Forum IFR Recommendation Decision**").

(A) If the Board resolves to approve the IFR Recommendation, such IFR Recommendation will be subject to Section 18.6(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the IFR Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum IFR Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an IFR Recommendation (an "**IFR Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the IFR Recommendation that is the subject of the IFR Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An IFR Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such IFR Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by

the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such IFR Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such IFR Recommendation Decision.

(ii) An IFR Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(e) For the avoidance of doubt, Section 18.6(d) shall not apply when the Board acts in a manner that is consistent with an IFR Recommendation unless such IFR Recommendation relates to an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process as described in Article 19.

(f) Timelines for implementing any amendments to the IANA (Internet Assigned Numbers Authority) Naming Function Contract or IANA (Internet Assigned Numbers Authority) Naming Function SOW shall be reasonably agreed between

the IFRT, ICANN (Internet Corporation for Assigned Names and Numbers) and PTI.

(g) A recommendation of an IFRT that would amend the CSC Charter shall only become effective if approved pursuant to Section 17.3(d).

Section 18.7. COMPOSITION OF IFR TEAMS

Each IFRT shall consist of the following members and liaisons to be appointed in accordance with the rules and procedures of the appointing organization:

(a) Three representatives who are associated with ccTLD (Country Code Top Level Domain) managers, appointed by the ccNSO (Country Code Names Supporting Organization) Council. Representatives need not be associated with a ccNSO (Country Code Names Supporting Organization) member. The ccNSO (Country Code Names Supporting Organization) Council should use an inclusive process, which is open to all ccTLD (Country Code Top Level Domain) managers, independent of their membership to the ccNSO (Country Code Names Supporting Organization). It is strongly recommended that the ccNSO (Country Code Names Supporting Organization) Council reaches out to all ccTLD (Country Code Top Level Domain) managers directly and or through regional ccTLD (Country Code Top Level Domain) organizations (i.e., AfTLD, APTLD (Council of the Asia Pacific country code Top Level Domains), LACTLD (Latin American and Caribbean ccTLDs), and CENTR (Council of European National Top level domain Registries)) in seeking volunteers;

(b) Two representatives appointed by the Registries Stakeholder Group;

(c) One representative appointed by the Registrars Stakeholder Group;

- (d) One representative appointed by the Commercial Stakeholder Group;
- (e) One representative appointed by the Non-Commercial Stakeholder Group;
- (f) One representative appointed by the GAC (Governmental Advisory Committee);
- (g) One representative appointed by the SSAC (Security and Stability Advisory Committee);
- (h) One representative appointed by the RSSAC (Root Server System Advisory Committee);
- (i) One representative appointed by the ALAC (At-Large Advisory Committee);
- (j) One liaison appointed by the CSC;
- (k) One liaison who may be appointed by the ASO (Address Supporting Organization); and
- (l) One liaison who may be appointed by the IAB (Internet Architecture Board).
- (m) The IFRT shall also include an unlimited number of non-member, non-liaison participants.
- (n) The IFRT shall not be a standing body. A new IFRT shall be constituted for each IFR and the IFRT shall automatically dissolve following the end of the process for approving such IFRT's IFR Recommendations pursuant to Section 18.6.

Section 18.8. MEMBERSHIP; ELECTION OF CO-CHAIRS, AND LIAISONS

- (a) All candidates for appointment to the IFRT as a member or liaison shall submit an expression of interest to the organization that would appoint such candidate as a member

or liaison to the IFRT, which shall state: (i) why the candidate is interested in becoming involved in the IFRT, (ii) what particular skills the candidate would bring to the IFRT, (iii) the candidate's knowledge of the IANA (Internet Assigned Numbers Authority) functions, (iv) the candidate's understanding of the purpose of the IFRT, and (v) that the candidate understands the time necessary to participate in the IFR process and can commit to the role.

(b) Members, liaisons and participants of the IFRT shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and the IFRT any conflicts of interest with a specific complaint or issue under review. The IFRT may exclude from the discussion of a specific complaint or issue any member deemed by the majority of IFRT members to have a conflict of interest. The co-chairs of the IFRT shall record any such conflict of interest in the minutes of the IFRT.

(c) To the extent reasonably possible, the appointing organizations for the IFRT members and liaisons shall work together to achieve an IFRT that is balanced for diversity (including functional, geographic and cultural) and skill, and should seek to broaden the number of individuals participating across the various reviews; provided, that the IFRT should include members from each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, and the ccNSO (Country Code Names Supporting Organization) and Registries Stakeholder Group shall not appoint multiple members who are citizens of countries from the same ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region.

(d) The IFRT shall be led by two co-chairs: one appointed by the GNSO (Generic Names Supporting Organization) from one of the members appointed pursuant to clauses (c)-(f) of Section 18.7 and one appointed by the ccNSO (Country Code Names Supporting Organization) from one of the

members appointed pursuant to clauses (a)-(b) of Section 18.7.

(e) The PTI Board shall select a PTI staff member to serve as a point of contact to facilitate formal lines of communication between the IFRT and PTI. The Board shall select an ICANN (Internet Corporation for Assigned Names and Numbers) staff member to serve as a point of contact to facilitate formal lines of communication between the IFRT and ICANN (Internet Corporation for Assigned Names and Numbers).

(f) Liaisons to the IFRT are not members of or entitled to vote on any matters before the IFRT, but otherwise are entitled to participate on equal footing with members of the IFRT.

(g) Other participants are entitled to participate in the IFRT, but are not entitled to vote.

(h) Removal and Replacement of IFRT Members and Liaisons

(i) The IFRT members and liaisons may be removed from the IFRT by their respective appointing organization at any time upon such organization providing written notice to the Secretary and the co-chairs of the IFRT.

(ii) A vacancy on the IFRT shall be deemed to exist in the event of the death, resignation or removal of any IFRT member or liaison. Vacancies shall be filled by the organization that appointed such IFRT member or liaison. The appointing organization shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the IFRT co-chairs. The organization responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 18.9. MEETINGS

(a) All actions of the IFRT shall be taken by consensus of the IFRT, which is where a small minority may disagree, but most agree. If consensus cannot be reached with respect to a particular issue, actions by the majority of all of the members of the IFRT shall be the action of the IFRT.

(b) Any members of the IFRT not in favor of an action (whether as a result of voting against a matter or objecting to the consensus position) may record a minority dissent to such action, which shall be included in the IFRT minutes and/or report, as applicable.

(c) IFRT meetings, deliberations and other working procedures shall be open to the public and conducted in a transparent manner to the fullest extent possible.

(d) The IFRT shall transmit minutes of its meetings to the Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following each IFRT meeting. Recordings and transcripts of meetings, as well as mailing lists, shall also be posted to the Website.

Section 18.10. COMMUNITY REVIEWS AND REPORTS

(a) The IFRT shall seek community input as to the issues relevant to the IFR through one or more public comment periods that shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers) and through discussions during ICANN (Internet Corporation for Assigned Names and Numbers)'s public meetings in developing and finalizing its recommendations and any report.

(b) The IFRT shall provide a draft report of its findings and recommendations to the community for public comment. The

public comment period is required to comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

(c) After completion of the IFR, the IFRT shall submit its final report containing its findings and recommendations to the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall thereafter promptly post the IFRT's final report on the Website.

Section 18.11. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for each IFRT to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the IFRT.

Section 18.12. SPECIAL IFRS

(a) A Special IFR may be initiated outside of the cycle for the Periodic IFRs to address any deficiency, problem or other issue that has adversely affected PTI's performance under the IANA (Internet Assigned Numbers Authority) Naming Function Contract and IANA (Internet Assigned Numbers Authority) Naming Function SOW (a "**PTI Performance Issue**"), following the satisfaction of each of the following conditions:

(i) The Remedial Action Procedures of the CSC set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract shall have been followed and failed to correct the PTI Performance Issue and the outcome of such procedures shall have been reviewed by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names

Supporting Organization) according to each organization's respective operating procedures;

(ii) The IANA (Internet Assigned Numbers Authority) Problem Resolution Process set forth in the IANA (Internet Assigned Numbers Authority) Naming Function Contract shall have been followed and failed to correct the PTI Performance Issue and the outcome of such process shall have been reviewed by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) according to each organization's respective operating procedures;

(iii) The ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) shall have considered the outcomes of the processes set forth in the preceding clauses (i) and (ii) and shall have conducted meaningful consultation with the other Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) with respect to the PTI Performance Issue and whether or not to initiate a Special IFR; and

(iv) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), if a public comment period is requested by the ccNSO (Country Code Names Supporting Organization) and the GNSO (Generic Names Supporting Organization), a Special IFR shall have been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or if such procedures do not define a supermajority, two-thirds (2/3) of the Council members)

and (B) a GNSO (Generic Names Supporting Organization) Supermajority.

(b) Each Special IFR shall be conducted by an IFRT and shall follow the same procedures and requirements applicable to Periodic IFRs as set forth in this Section 18, except that:

(i) The scope of the Special IFR and the related inputs that are required to be reviewed by the IFRT shall be focused primarily on the PTI Performance Issue, its implications for overall IANA (Internet Assigned Numbers Authority) naming function performance by PTI and how to resolve the PTI Performance Issue;

(ii) The IFRT shall review and analyze the information that is relevant to the scope of the Special IFR; and

(iii) Each recommendation of the IFRT relating to the Special IFR, including but not limited to any recommendation to initiate an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process, must be related to remediating the PTI Performance Issue or other issue with PTI's performance that is related to the IFRT responsibilities set forth in Section 18.3, shall include proposed remedial procedures and describe how those procedures are expected to address the PTI Performance Issue or other relevant issue with PTI's performance.

(c) A recommendation of an IFRT for a Special IFR shall only become effective if, with respect to each such recommendation (each, a "**Special IFR Recommendation**"), each of the following occurs:

(i) The Special IFR Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the Special IFR Recommendation; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the Special IFR Recommendation pursuant to and in compliance with Section 18.12(e).

(d) If the Board (x) rejects a Special IFR Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 18.12(c)(i) or (y) does not resolve to either accept or reject a Special IFR Recommendation within 45 days of the later of (1) the date that the condition in Section 18.12(c)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 18.12(c)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable Special IFR Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants,

on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the Special IFR Recommendation or approve the Special IFR Recommendation (either, a "**Post-Forum Special IFR Recommendation Decision**").

(A) If the Board resolves to approve the Special IFR Recommendation, such Special IFR Recommendation will be subject to Section 18.6(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the Special IFR Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum Special IFR Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(e) Promptly after the Board approves a Special IFR Recommendation (a "**Special IFR Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Special IFR Recommendation that is the subject of the Special IFR Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) A Special IFR Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection

Action Petition Period relating to such Special IFR Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Special IFR Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Special IFR Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Special IFR Recommendation Decision.

(ii) A Special IFR Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(f) For the avoidance of doubt, Section 18.12(e) shall not apply when the Board acts in a manner that is consistent with a Special IFR Recommendation unless such Special IFR

Recommendation relates to an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process as described in Article 19.

Section 18.13. PROPOSED SEPARATION PROCESS

The IFRT conducting either a Special IFR or Periodic IFR may, upon conclusion of a Special IFR or Periodic IFR, as applicable, determine that an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process is necessary and, if so, it shall recommend the creation of an SCWG pursuant to Article 19.

ARTICLE 19 IANA (Internet Assigned Numbers Authority) NAMING FUNCTION SEPARATION PROCESS

Section 19.1. ESTABLISHING AN SCWG

(a) An "**IANA (Internet Assigned Numbers Authority) Naming Function Separation Process**" is the process initiated in accordance with this Article 19 pursuant to which PTI may cease to perform the IANA (Internet Assigned Numbers Authority) naming function including, without limitation, the initiation of a request for proposal to select an operator to perform the IANA (Internet Assigned Numbers Authority) naming function instead of PTI ("**IANA (Internet Assigned Numbers Authority) Naming Function RFP**"), the selection of an IANA (Internet Assigned Numbers Authority) naming function operator other than PTI, termination or non-renewal of the IANA (Internet Assigned Numbers Authority) Naming Function Contract, and/or divestiture, or other reorganization of PTI by ICANN (Internet Corporation for Assigned Names and Numbers).

(b) The Board shall establish an SCWG if each of the following occurs:

(i) The IFRT conducting either a Special IFR or Periodic IFR, upon conclusion of a Special IFR or Periodic IFR, as applicable, has recommended that an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process is necessary and has recommended the creation of an SCWG (an "**SCWG Creation Recommendation**");

(ii) The SCWG Creation Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(iii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the SCWG Creation Recommendation. A determination by the Board to not approve an SCWG Creation Recommendation, where such creation has been approved by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to Section 19.1(b)(ii), shall require a vote of at least two-thirds (2/3) of the Board and the Board shall follow the same consultation procedures set forth in Section 9 of Annex A of these Bylaws that relate to Board rejection of a PDP (Policy Development Process) recommendation that is supported by a GNSO (Generic Names Supporting Organization) Supermajority; and

(iv) The EC (Empowered Community) has not rejected the Board's approval of the SCWG Creation Recommendation pursuant to and in compliance with Section 19.1(d).

(c) If the Board (x) rejects an SCWG Creation Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 19.1(b)(ii) or (y) does not resolve to either accept or reject an SCWG Creation Recommendation within 45 days of the later of (1) the date that the condition in Section 19.1(b)(ii) is satisfied or (2) the expiration of the public comment period contemplated by Section 19.1(b)(iii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable SCWG Creation Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional

Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the SCWG Creation Recommendation or approve the SCWG Creation Recommendation (either, a "**Post-Forum SCWG Creation Recommendation Decision**").

(A) If the Board resolves to approve the SCWG Creation Recommendation, such SCWG Creation Recommendation will be subject to Section 19.1(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the SCWG Creation Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum SCWG Creation Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an SCWG Creation Recommendation (an "**SCWG Creation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the SCWG Creation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery

of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An SCWG Creation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such SCWG Creation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such SCWG Creation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2)

a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the SCWG Creation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such SCWG Creation Decision.

(ii) An SCWG Creation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

Section 19.2. SCWG RESPONSIBILITIES

The responsibilities of the SCWG shall be as follows:

(a) The SCWG shall determine how to resolve the PTI Performance Issue(s) which the IFRT that conducted the Special IFR or Periodic IFR, as applicable, identified as triggering formation of this SCWG.

(b) If the SCWG recommends the issuance of an IANA (Internet Assigned Numbers Authority) Naming Function RFP, the SCWG shall:

(i) Develop IANA (Internet Assigned Numbers Authority) Naming Function RFP guidelines and requirements for the performance of the IANA (Internet Assigned Numbers Authority) naming function, in a manner consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s publicly available procurement guidelines (as in effect immediately prior to the formation of the SCWG); and

(ii) Solicit input from ICANN (Internet Corporation for Assigned Names and Numbers) as well as the global

Internet community (through community consultation, including public comment opportunities as necessary that comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers)) on requirements to plan and participate in the IANA (Internet Assigned Numbers Authority) Naming Function RFP process.

(c) If an SCWG Recommendation (as defined in Section 19.4(b)) to issue the IANA (Internet Assigned Numbers Authority) Naming Function RFP is approved pursuant to Section 19.4(b) and the EC (Empowered Community) does not reject the relevant SCWG Recommendation Decision pursuant to Section 19.4(d), the SCWG, in consultation with ICANN (Internet Corporation for Assigned Names and Numbers), shall:

(i) Issue the IANA (Internet Assigned Numbers Authority) Naming Function RFP;

(ii) Review responses from interested candidates to the IANA (Internet Assigned Numbers Authority) Naming Function RFP, which may be received from PTI and/or any other entity or person; and

(iii) Recommend the entity that ICANN (Internet Corporation for Assigned Names and Numbers) should contract with to perform the IANA (Internet Assigned Numbers Authority) naming function.

(d) If the SCWG recommends an IANA (Internet Assigned Numbers Authority) Naming Function Separation Process other than the issuance of an IANA (Internet Assigned Numbers Authority) Naming Function RFP, the SCWG shall develop recommendations to be followed with respect to that process and its implementation consistent with the terms of this Article 19. The SCWG shall monitor and manage the

implementation of such IANA (Internet Assigned Numbers Authority) Naming Function Separation Process.

Section 19.3. COMMUNITY REVIEWS AND REPORTS

(a) The SCWG shall seek community input through one or more public comment periods (such public comment period shall comply with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers)) and may recommend discussions during ICANN (Internet Corporation for Assigned Names and Numbers)'s public meetings in developing and finalizing its recommendations and any report.

(b) The SCWG shall provide a draft report of its findings and recommendations to the community after convening of the SCWG, which such draft report will be posted for public comment on the Website. The SCWG may post additional drafts of its report for public comment until it has reached its final report.

(c) After completion of its review, the SCWG shall submit its final report containing its findings and recommendations to the Board. ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the SCWG's final report on the Website.

Section 19.4. SCWG RECOMMENDATIONS

(a) The recommendations of the SCWG are not limited and could include a variety of recommendations or a recommendation that no action is required; provided, however, that any recommendations must directly relate to the matters discussed in Section 19.2 and comply with this Section 19.4.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) shall not implement an SCWG recommendation (including an SCWG recommendation to issue an IANA (Internet Assigned Numbers Authority) Naming Function RFP) unless, with respect to each such recommendation (each, an "**SCWG Recommendation**"), each of the following occurs:

(i) The SCWG Recommendation has been approved by the vote of (A) a supermajority of the ccNSO (Country Code Names Supporting Organization) Council (pursuant to the ccNSO (Country Code Names Supporting Organization)'s procedures or, if such procedures do not define a supermajority, two-thirds (2/3) of the ccNSO (Country Code Names Supporting Organization) Council's members) and (B) a GNSO (Generic Names Supporting Organization) Supermajority;

(ii) After a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), the Board has approved the SCWG Recommendation. A determination by the Board to not approve an SCWG Recommendation, where such SCWG Recommendation has been approved by the ccNSO (Country Code Names Supporting Organization) and GNSO (Generic Names Supporting Organization) Councils pursuant to Section 19.4(b)(i), shall require a vote of at least two-thirds (2/3) of the Board and the Board shall follow the same consultation procedures set forth in Section 9 of Annex A of these Bylaws that relate to Board rejection of a PDP (Policy Development Process) recommendation that is supported by a GNSO (Generic Names Supporting Organization) Supermajority; and

(iii) The EC (Empowered Community) has not rejected the Board's approval of the SCWG Recommendation pursuant to and in compliance with Section 19.4(d).

(c) If the Board (x) rejects an SCWG Recommendation that was approved by the ccNSO (Country Code Names Supporting Organization) Council and GNSO (Generic Names Supporting Organization) Council pursuant to Section 19.4(b)(i) or (y) does not resolve to either accept or reject an SCWG Recommendation within 45 days of the later of (1) the date that the condition in Section 19.4(b)(i) is satisfied or (2) the expiration of the public comment period contemplated by Section 19.4(b)(ii), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the applicable SCWG Recommendation. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(i) ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a Rejection Action Community Forum, which Rejection Action Community Forum shall be conducted in accordance with Section 2.3 of Annex D, to discuss the Board Notice; provided, that, for purposes of Section 2.3 of Annex D, (A) the Board Notice shall be treated as the Rejection Action Supported Petition, (B) the EC (Empowered Community) Administration shall be treated as the Rejection Action Petitioning Decisional Participant (and there shall be no Rejection Action Supporting Decisional Participants) and (C) the

Rejection Action Community Forum Period shall expire on the 21st day after the date the Secretary provides the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

(ii) No later than 45 days after the conclusion of such Rejection Action Community Forum Period, the Board shall resolve to either uphold its rejection of the SCWG Recommendation or approve the SCWG Recommendation (either, a "**Post-Forum SCWG Recommendation Decision**").

(A) If the Board resolves to approve the SCWG Recommendation, such SCWG Recommendation will be subject to Section 19.4(d).

(B) For the avoidance of doubt, the Board shall not be obligated to change its decision on the SCWG Recommendation as a result of the Rejection Action Community Forum.

(C) The Board's Post-Forum SCWG Recommendation Decision shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3.

(d) Promptly after the Board approves an SCWG Recommendation (an "**SCWG Recommendation Decision**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the SCWG Recommendation that is the subject of the SCWG Recommendation Decision. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants.

The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(i) An SCWG Recommendation Decision shall become final upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Period relating to such SCWG Recommendation Decision;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such SCWG Recommendation Decision; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by

the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the SCWG Recommendation Decision shall be final as of the date immediately following the expiration of the Rejection Action Decision Period relating to such SCWG Recommendation Decision.

(ii) An SCWG Recommendation Decision that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the costs relating to recommendations made by the SCWG, including, without limitation, costs related to the process of selecting or potentially selecting a new operator for the IANA (Internet Assigned Numbers Authority) naming function and the operating costs of the successor operator that are necessary for the successor operator's performance of the IANA (Internet Assigned Numbers Authority) naming function as ICANN (Internet Corporation for Assigned Names and Numbers)'s independent contractor. ICANN (Internet Corporation for Assigned Names and Numbers) shall not be authorized to raise fees from any TLD (Top Level Domain) registry operators to cover the costs associated with implementation of any SCWG Recommendations that specifically relate to the transition to a successor operator. For avoidance of doubt, this restriction shall not apply to collecting appropriate fees necessary to maintain the ongoing performance of the IANA (Internet Assigned Numbers Authority) naming function, including those relating to the operating costs of the successor operator.

(f) In the event that (i) an SCWG Recommendation that selects an entity (other than PTI) as a new operator of the IANA (Internet Assigned Numbers Authority) naming function is approved pursuant to Section 19.4(b) and (ii) the EC (Empowered Community) does not reject the relevant SCWG Recommendation Decision pursuant to Section 19.4(d), ICANN (Internet Corporation for Assigned Names and Numbers) shall enter into a contract with the new operator on substantially the same terms recommended by the SCWG and approved as part of such SCWG Recommendation.

(g) As promptly as practical following an SCWG Recommendation Decision becoming final in accordance with this Section 19.4, ICANN (Internet Corporation for Assigned Names and Numbers) shall take all steps reasonably necessary to effect such SCWG Recommendation Decision as soon as practicable.

Section 19.5. SCWG COMPOSITION

(a) Each SCWG shall consist of the following members and liaisons to be appointed in accordance with the rules and procedures of the appointing organization:

(i) Two representatives appointed by the ccNSO (Country Code Names Supporting Organization) from its ccTLD (Country Code Top Level Domain) registry operator representatives;

(ii) One non-ccNSO (Country Code Names Supporting Organization) ccTLD (Country Code Top Level Domain) representative who is associated with a ccTLD (Country Code Top Level Domain) registry operator that is not a representative of the ccNSO (Country Code Names Supporting Organization),

appointed by the ccNSO (Country Code Names Supporting Organization); it is strongly recommended that the ccNSO (Country Code Names Supporting Organization) consult with the regional ccTLD (Country Code Top Level Domain) organizations (i.e., AfTLD, APTLD (Council of the Asia Pacific country code Top Level Domains), LACTLD (Latin American and Caribbean ccTLDs) and CENTR (Council of European National Top level domain Registries)) in making its appointment;

(iii) Three representatives appointed by the Registries Stakeholder Group;

(iv) One representative appointed by the Registrars Stakeholder Group;

(v) One representative appointed by the Commercial Stakeholder Group;

(vi) One representative appointed by the Non-Commercial Stakeholder Group;

(vii) One representative appointed by the GAC (Governmental Advisory Committee);

(viii) One representative appointed by the SSAC (Security and Stability Advisory Committee);

(ix) One representative appointed by the RSSAC (Root Server System Advisory Committee);

(x) One representative appointed by the ALAC (At-Large Advisory Committee);

(xi) One liaison appointed by the CSC;

(xii) One liaison appointed by the IFRT that conducted the Special IFR or Periodic IFR, as applicable, that

recommended the creation of the SCWG, who shall be named in the IFRT's recommendation to convene the Special IFR;

(xiii) One liaison who may be appointed by the ASO (Address Supporting Organization);

(xiv) One liaison who may be appointed by the IAB (Internet Architecture Board); and

(xv) One liaison who may be appointed by the Board.

(xvi) The SCWG may also include an unlimited number of non-member, non-liaison participants.

(b) All candidates for appointment to the SCWG as a member or liaison shall submit an expression of interest to the organization that would appoint such candidate as a member or liaison, which shall state (i) why the candidate is interested in becoming involved in the SCWG, (ii) what particular skills the candidate would bring to the SCWG, (iii) the candidate's knowledge of the IANA (Internet Assigned Numbers Authority) naming function, (iv) the candidate's understanding of the purpose of the SCWG, and (v) that the candidate understands the time necessary to participate in the SCWG process and can commit to the role.

(c) Members and liaisons of the SCWG shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) and the SCWG any conflicts of interest with a specific complaint or issue under review. The SCWG may exclude from the discussion of a specific complaint or issue any member, liaison or participant deemed by the majority of SCWG members to have a conflict of interest. The co-chairs of the SCWG shall record any such conflict of interest in the minutes of the SCWG.

(d) To the extent reasonably possible, the appointing organizations for SCWG members and liaisons shall work together to:

(i) achieve an SCWG that is balanced for diversity (including functional, geographic and cultural) and skill, and should seek to broaden the number of individuals participating across the various reviews; provided, that the SCWG should include members from each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, and the ccNSO (Country Code Names Supporting Organization) and Registries Stakeholder Group shall not appoint multiple members who are citizens of countries from the same ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region;

(ii) ensure that the SCWG is comprised of individuals who are different from those individuals who comprised the IFRT that conducted the Special IFR or Periodic IFR, as applicable, that recommended the creation of the SCWG, other than the liaison to the IFRT appointed by the CSC; and

(iii) seek to appoint as representatives of the SCWG as many individuals as practicable with experience managing or participating in RFP processes.

(e) ICANN (Internet Corporation for Assigned Names and Numbers) shall select an ICANN (Internet Corporation for Assigned Names and Numbers) staff member and a PTI staff member to serve as points of contact to facilitate formal lines of communication between the SCWG and ICANN (Internet Corporation for Assigned Names and Numbers) and the SCWG and PTI. Communications between the SCWG and the ICANN (Internet Corporation for Assigned Names and Numbers) and PTI points of contact shall be communicated by the SCWG co-chairs.

(f) The SCWG shall not be a standing body. Each SCWG shall be constituted when and as required under these Bylaws and shall dissolve following the end of the process for approving such SCWG's SCWG Recommendations pursuant to Section 19.4(d).

Section 19.6. ELECTION OF CO-CHAIRS AND LIAISONS

(a) The SCWG shall be led by two co-chairs: one appointed by the GNSO (Generic Names Supporting Organization) from one of the members appointed pursuant to clauses (iii)-(vi) of Section 19.5(a) and one appointed by the ccNSO (Country Code Names Supporting Organization) from one of the members appointed pursuant to clauses (i)-(ii) of Section 19.5(a).

(b) Liaisons to the SCWG shall not be members of or entitled to vote on any matters before the SCWG, but otherwise shall be entitled to participate on equal footing with SCWG members.

(c) Removal and Replacement of SCWG Members and Liaisons

(i) The SCWG members and liaisons may be removed from the SCWG by their respective appointing organization at any time upon such organization providing written notice to the Secretary and the co-chairs of the SCWG.

(ii) A vacancy on the SCWG shall be deemed to exist in the event of the death, resignation or removal of any SCWG member or liaison. Vacancies shall be filled by the organization that appointed such SCWG member or liaison. The appointing organization shall provide written notice to the Secretary of its appointment to fill a vacancy, with a notification copy to the SCWG co-

chairs. The organization responsible for filling such vacancy shall use its reasonable efforts to fill such vacancy within one month after the occurrence of such vacancy.

Section 19.7. MEETINGS

- (a) The SCWG shall act by consensus, which is where a small minority may disagree, but most agree.
- (b) Any members of the SCWG not in favor of an action may record a minority dissent to such action, which shall be included in the SCWG minutes and/or report, as applicable.
- (c) SCWG meetings and other working procedures shall be open to the public and conducted in a transparent manner to the fullest extent possible.
- (d) The SCWG shall transmit minutes of its meetings to the Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following each SCWG meeting, and no later than five business days following the meeting.
- (e) Except as otherwise provided in these Bylaws, the SCWG shall follow the guidelines and procedures applicable to ICANN (Internet Corporation for Assigned Names and Numbers) Cross Community Working Groups that will be publicly available and may be amended from time to time.

Section 19.8. ADMINISTRATIVE SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the SCWG to carry out its responsibilities, including providing and facilitating remote participation in all meetings of the SCWG.

Section 19.9. CONFLICTING PROVISIONS

In the event any SCWG Recommendation that is approved in accordance with this [Article 19](#) requires [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) to take any action that is inconsistent with a provision of the Bylaws (including any action taken in implementing such SCWG Recommendation), the requirements of such provision of these Bylaws shall not apply to the extent of that inconsistency.

ARTICLE 20 INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS

Section 20.1. INDEMNIFICATION GENERALLY

[ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shall, to the maximum extent permitted by the CCC, indemnify each of its agents against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with any proceeding arising by reason of the fact that any such person is or was an agent of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#), provided that the indemnified person's acts were done in good faith and in a manner that the indemnified person reasonably believed to be in [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s best interests and not criminal. For purposes of this [Article 20](#), an "agent" of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) includes any person who is or was a Director, Officer, employee, or any other agent of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) (including a member of the [EC \(Empowered Community\)](#), the [EC \(Empowered Community\) Administration](#), any [Supporting Organization \(Supporting Organization\)](#), any [Advisory Committee \(Advisory Committee\)](#), the [Nominating Committee](#), any other [ICANN \(Internet Corporation for](#)

Assigned Names and Numbers) committee, or the Technical Liaison Group) acting within the scope of his or her responsibility; or is or was serving at the request of ICANN (Internet Corporation for Assigned Names and Numbers) as a Director, Officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise. The Board may adopt a resolution authorizing the purchase and maintenance of insurance on behalf of any agent of ICANN (Internet Corporation for Assigned Names and Numbers) against any liability asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not ICANN (Internet Corporation for Assigned Names and Numbers) would have the power to indemnify the agent against that liability under the provisions of this Article 20.

Section 20.2. INDEMNIFICATION WITH RESPECT TO DIRECTOR REMOVAL

If a Director initiates any proceeding in connection with his or her removal or recall pursuant to the Bylaws, to which a person who is a member of the leadership council (or equivalent body) of a Decisional Participant or representative of a Decisional Participant in the EC (Empowered Community) Administration is a party or is threatened to be made a party (as a party or witness) (a "**Director Removal Proceeding**"), ICANN (Internet Corporation for Assigned Names and Numbers) shall, to the maximum extent permitted by the CCC, indemnify any such person, against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred by such person in connection with such Director Removal Proceeding, for actions taken by such person in his or her representative capacity within his or her Decisional Participant pursuant to the processes and procedures set forth in these Bylaws, provided that all such actions were taken by such person in good faith and in a manner that such person reasonably believed to be in ICANN (Internet Corporation for Assigned

Names and Numbers)'s best interests and not criminal. The actual and reasonable legal fees of a single firm of counsel and other expenses actually and reasonably incurred by such person in defending against a Director Removal Proceeding shall be paid by ICANN (Internet Corporation for Assigned Names and Numbers) in advance of the final disposition of such Director Removal Proceeding, provided, however, that such expenses shall be advanced only upon delivery to the Secretary of an undertaking (which shall be in writing and in a form provided by the Secretary) by such person to repay the amount of such expenses if it shall ultimately be determined that such person is not entitled to be indemnified by ICANN (Internet Corporation for Assigned Names and Numbers). ICANN (Internet Corporation for Assigned Names and Numbers) shall not be obligated to indemnify such person against any settlement of a Director Removal Proceeding, unless such settlement is approved in advance by the Board in its reasonable discretion. Notwithstanding Section 20.1, the indemnification provided in this Section 20.2 shall be ICANN (Internet Corporation for Assigned Names and Numbers)'s sole indemnification obligation with respect to the subject matter set forth in this Section 20.2.

ARTICLE 21 GENERAL PROVISIONS

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 (Internet Corporation for Assigned Names and Numbers), and such authority may be general or confined to specific instances. In the absence of a contrary Board authorization, contracts and instruments may only be executed by the following Officers: President, any Vice President, or the CFO. Unless authorized or ratified by the Board, no other Officer, agent, or employee shall have any power or authority to bind ICANN

(Internet Corporation for Assigned Names and Numbers) or to render it liable for any debts or obligations.

Section 21.2. DEPOSITS

All funds of ICANN (Internet Corporation for Assigned Names and Numbers) not otherwise employed shall be deposited from time to time to the credit of ICANN (Internet Corporation for Assigned Names and Numbers) in such banks, trust companies, or other depositories as the Board, or the President under its delegation, may select.

Section 21.3. CHECKS

All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of ICANN (Internet Corporation for Assigned Names and Numbers) shall be signed by such Officer or Officers, agent or agents, of ICANN (Internet Corporation for Assigned Names and Numbers) and in such a manner as shall from time to time be determined by resolution of the Board.

Section 21.4. LOANS

No loans shall be made by or to ICANN (Internet Corporation for Assigned Names and Numbers) and no evidences of indebtedness shall be issued in its name unless authorized by a resolution of the Board. Such authority may be general or confined to specific instances; provided, however, that no loans shall be made by ICANN (Internet Corporation for Assigned Names and Numbers) to its Directors or Officers.

Section 21.5. NOTICES

All notices to be given to the EC (Empowered Community) Administration, the Decisional Participants, or the Secretary pursuant to any provision of these Bylaws shall be given either (a) in writing at the address of the appropriate party as

set forth below or (b) via electronic mail as provided below, unless that party has given a notice of change of postal or email address, as provided in this Section 21.5. Any change in the contact information for notice below will be given by the party within 30 days of such change. Any notice required by these Bylaws will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via electronic mail, upon confirmation of receipt by the recipient's email server, provided that such notice via electronic mail shall be followed by a copy sent by regular postal mail service within three days. In the event other means of notice become practically achievable, such as notice via a secure website, the EC (Empowered Community) Administration, the Decisional Participants, and ICANN (Internet Corporation for Assigned Names and Numbers) will work together to implement such notice means.

If to ICANN (Internet Corporation for Assigned Names and Numbers), addressed to:

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

USA

Email:

Attention: Secretary

If to a Decisional Participant or the EC (Empowered Community) Administration, addressed to the contact information available at [insert Website reference].

ARTICLE 22 FISCAL AND STRATEGIC MATTERS, INSPECTION AND INDEPENDENT INVESTIGATION

Section 22.1. ACCOUNTING

The fiscal year end of ICANN (Internet Corporation for Assigned Names and Numbers) shall be determined by the Board.

Section 22.2. AUDIT

At the end of the fiscal year, the books of ICANN (Internet Corporation for Assigned Names and Numbers) shall be closed and audited by certified public accountants. The appointment of the fiscal auditors shall be the responsibility of the Board.

Section 22.3. ANNUAL REPORT AND ANNUAL STATEMENT

The Board shall publish, at least annually, a report describing its activities, including an audited financial statement, a description of any payments made by ICANN (Internet Corporation for Assigned Names and Numbers) to Directors (including reimbursements of expenses) and a description of ICANN (Internet Corporation for Assigned Names and Numbers)'s progress towards the obligations imposed under the Bylaws as revised on 1 October 2016 and the Operating Plan and Strategic Plan. ICANN (Internet Corporation for Assigned Names and Numbers) shall cause the annual report and the annual statement of certain transactions as required by the CCC to be prepared and sent to each member of the Board and to such other persons as the Board may designate, no later than one hundred twenty (120) days after the close of ICANN (Internet Corporation for Assigned Names and Numbers)'s fiscal year.

Section 22.4. BUDGETS

(a) ICANN (Internet Corporation for Assigned Names and Numbers) Budget

(i) In furtherance of its Commitment to transparent and accountable budgeting processes, at least forty-five (45) days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed annual operating plan and budget of ICANN (Internet Corporation for Assigned Names and Numbers) for the next fiscal year (the "**ICANN (Internet Corporation for Assigned Names and Numbers) Budget**"), which shall be posted on the Website. The ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall identify anticipated revenue sources and levels and shall, to the extent practical, identify anticipated material expense items by line item.

(ii) Prior to approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the ICANN (Internet Corporation for Assigned Names and Numbers) Budget development process, and comply with the requirements of this Section 22.4(a).

(iii) Prior to approval of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the Board, a draft of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget and may direct ICANN (Internet Corporation for Assigned Names and Numbers) Staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an ICANN (Internet Corporation for Assigned Names and Numbers) Budget (an "**ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) An ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall become effective

upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date (as defined in Section 2.2(a) of Annex D) relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the

Rejection Action Petition Support Period relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that is the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such ICANN (Internet Corporation for Assigned Names and Numbers) Budget Approval and the effectiveness of such ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An ICANN (Internet Corporation for Assigned Names and Numbers) Budget that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the ICANN (Internet Corporation for Assigned Names and Numbers) Budget in determining the substance of such new ICANN (Internet Corporation for Assigned Names and Numbers) Budget, which shall be subject to the procedures of this Section 22.4(a).

(ix) If an ICANN (Internet Corporation for Assigned Names and Numbers) Budget has not come into full force and effect pursuant to this Section 22.4(a) on or prior to the first date of any fiscal year of ICANN (Internet Corporation for Assigned Names and Numbers), the Board shall adopt a temporary budget in accordance with Annex E hereto ("**Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget**"), which Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall be effective until such time as an ICANN (Internet Corporation for Assigned Names and Numbers) Budget has been effectively approved by the Board and not rejected by the EC (Empowered Community) pursuant to this Section 22.4(a).

(b) IANA (Internet Assigned Numbers Authority) Budget

(i) At least 45 days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) shall prepare and submit to the Board a proposed annual operating plan and budget of PTI and the IANA (Internet Assigned Numbers Authority) department, which budget shall include

itemization of the direct costs for ICANN (Internet Corporation for Assigned Names and Numbers)'s IANA (Internet Assigned Numbers Authority) department, all costs for PTI, direct costs for shared resources between ICANN (Internet Corporation for Assigned Names and Numbers) and PTI and support functions provided by ICANN (Internet Corporation for Assigned Names and Numbers) to PTI and ICANN (Internet Corporation for Assigned Names and Numbers)'s IANA (Internet Assigned Numbers Authority) department for the next fiscal year (the "**IANA (Internet Assigned Numbers Authority) Budget**"), which shall be posted on the Website. Separately and in addition to the general ICANN (Internet Corporation for Assigned Names and Numbers) planning process, ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to prepare and submit to the PTI Board a proposed annual operating plan and budget for PTI's performance of the IANA (Internet Assigned Numbers Authority) functions for the next fiscal year ("**PTI Budget**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), as well as the Registries Stakeholder Group, the IAB (Internet Architecture Board) and RIRs, during the PTI Budget development process, and shall seek public comment on the draft PTI Budget prior to approval of the PTI Budget by PTI. ICANN (Internet Corporation for Assigned Names and Numbers) shall require PTI to submit the PTI Budget to ICANN (Internet Corporation for Assigned Names and Numbers) as an input prior to and for the purpose of being included in the proposed Operating Plan (as defined in [Section 22.5\(a\)](#)) and ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

(ii) Prior to approval of the IANA (Internet Assigned Numbers Authority) Budget by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), as well as the Registries Stakeholder Group, IAB (Internet Architecture Board) and RIRs, during the IANA (Internet Assigned Numbers Authority) Budget development process, and comply with the requirements of this Section 22.4(b).

(iii) Prior to approval of the IANA (Internet Assigned Numbers Authority) Budget by the Board, a draft of the IANA (Internet Assigned Numbers Authority) Budget shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the IANA (Internet Assigned Numbers Authority) Budget and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an IANA (Internet Assigned Numbers Authority) Budget (an **"IANA (Internet Assigned Numbers Authority) Budget Approval"**), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the IANA (Internet Assigned Numbers Authority) Budget that is

the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) An IANA (Internet Assigned Numbers Authority) Budget shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the IANA (Internet Assigned Numbers Authority) Budget that is the subject of the IANA (Internet Assigned Numbers Authority) Budget Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such IANA (Internet Assigned Numbers Authority) Budget Approval and the effectiveness of such IANA (Internet Assigned Numbers Authority) Budget shall not be subject to further challenge by the

EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An IANA (Internet Assigned Numbers Authority) Budget that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an IANA (Internet Assigned Numbers Authority) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the IANA (Internet Assigned Numbers Authority) Budget in determining the substance of such new IANA (Internet Assigned Numbers Authority) Budget, which shall be subject to the procedures of this Section 22.4(b).

(ix) If an IANA (Internet Assigned Numbers Authority) Budget has not come into full force and effect pursuant to this Section 22.4(b) on or prior to the first date of any fiscal year of ICANN (Internet Corporation for Assigned Names and Numbers), the Board shall adopt a temporary budget in accordance with Annex F hereto ("**Caretaker IANA (Internet Assigned Numbers Authority) Budget**"), which Caretaker IANA (Internet Assigned Numbers Authority) Budget shall be effective until such time as an IANA (Internet Assigned Numbers Authority) Budget has been effectively approved by the Board and not rejected by the EC (Empowered Community) pursuant to this Section 22.4(b).

(c) If an IANA (Internet Assigned Numbers Authority) Budget does not receive an EC (Empowered Community) Rejection Notice but an ICANN (Internet Corporation for Assigned Names and Numbers) Budget receives an EC (Empowered Community) Rejection Notice, any subsequent revised ICANN (Internet Corporation for Assigned Names and Numbers) Budget shall not alter the expenditures allocated for the IANA (Internet Assigned Numbers Authority) Budget.

(d) If an ICANN (Internet Corporation for Assigned Names and Numbers) Budget does not receive an EC (Empowered Community) Rejection Notice but an IANA (Internet Assigned Numbers Authority) Budget receives an EC (Empowered Community) Rejection Notice, any subsequent revised IANA (Internet Assigned Numbers Authority) Budget shall, once approved, be deemed to automatically modify the ICANN (Internet Corporation for Assigned Names and Numbers) Budget in a manner determined by the Board without any further right of the EC (Empowered Community) to reject the ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

(e) Under all circumstances, the Board will have the ability to make out-of-budget funding decisions for unforeseen expenses necessary to maintaining ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission or to fulfilling ICANN (Internet Corporation for Assigned Names and Numbers)'s pre-existing legal obligations and protecting ICANN (Internet Corporation for Assigned Names and Numbers) from harm or waste.

(f) To maintain ongoing operational excellence and financial stability of the IANA (Internet Assigned Numbers Authority) functions (so long as they are performed by ICANN (Internet Corporation for Assigned Names and Numbers) or pursuant to contract with ICANN (Internet Corporation for Assigned Names and Numbers)) and PTI, ICANN (Internet Corporation for Assigned Names and Numbers) shall be required to plan

for and allocate funds to ICANN (Internet Corporation for Assigned Names and Numbers)'s performance of the IANA (Internet Assigned Numbers Authority) functions and to PTI, as applicable, that are sufficient to cover future expenses and contingencies to ensure that the performance of those IANA (Internet Assigned Numbers Authority) functions and PTI in the future are not interrupted due to lack of funding.

(g) The ICANN (Internet Corporation for Assigned Names and Numbers) Budget and the IANA (Internet Assigned Numbers Authority) Budget shall be published on the Website.

Section 22.5. PLANS

(a) Operating Plan

(i) At least 45 days prior to the commencement of each fiscal year, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed operating plan of ICANN (Internet Corporation for Assigned Names and Numbers) for the next five fiscal years (the "**Operating Plan**"), which shall be posted on the Website.

(ii) Prior to approval of the Operating Plan by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the Operating Plan development process, and comply with the requirements of this Section 22.5(a).

(iii) Prior to approval of the Operating Plan by the Board, a draft of the Operating Plan shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the Operating Plan and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves an Operating Plan (an "**Operating Plan Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Operating Plan that is the subject of the Operating Plan Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) An Operating Plan shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the

Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Operating Plan that is the subject of the Operating Plan Approval shall

be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Operating Plan Approval and the effectiveness of such Operating Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) An Operating Plan that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to an Operating Plan, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Operating Plan in determining the substance of such new Operating Plan, which shall be subject to the procedures of this Section 22.5(a).

(b) Strategic Plan

(i) At least 45 days prior to the commencement of each five fiscal year period, with the first such period covering fiscal years 2021 through 2025, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall prepare and submit to the Board a proposed strategic plan of ICANN (Internet Corporation for Assigned Names and Numbers) for the next five fiscal years (the "**Strategic Plan**"), which shall be posted on the Website.

(ii) Prior to approval of the Strategic Plan by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) staff shall consult with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) during the Strategic Plan development process, and comply with the requirements of this Section 22.5(b).

(iii) Prior to approval of the Strategic Plan by the Board, a draft of the Strategic Plan shall be posted on the Website and shall be subject to public comment.

(iv) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Strategic Plan and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods of lengths determined by the Board, in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(v) Promptly after the Board approves a Strategic Plan (a "**Strategic Plan Approval**"), the Secretary shall provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall enclose a copy of the Strategic Plan that is the subject of the Strategic Plan Approval. ICANN (Internet Corporation for Assigned Names and Numbers) shall post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website promptly following the delivery of the Board Notice to the EC (Empowered Community) Administration and the Decisional Participants. The EC (Empowered

Community) Administration shall promptly commence and comply with the procedures and requirements specified in Article 2 of Annex D.

(vi) A Strategic Plan shall become effective upon the earliest to occur of the following:

(A)(1) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the 28th day following the Rejection Action Board Notification Date relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(B)(1) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further challenge by the EC

(Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D; and

(C)(1) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (2) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Strategic Plan that is the subject of the Strategic Plan Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Strategic Plan Approval and the effectiveness of such Strategic Plan shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(vii) A Strategic Plan that has been rejected by the EC (Empowered Community) pursuant to and in compliance with Article 2 of Annex D shall have no force and effect, and shall be void ab initio.

(viii) Following receipt of an EC (Empowered Community) Rejection Notice relating to a Strategic Plan, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Strategic Plan in determining the substance of such new Strategic Plan, which shall be subject to the procedures of this Section 22.5(b).

Section 22.6. FEES AND CHARGES

The Board may set fees and charges for the services and benefits provided by ICANN (Internet Corporation for Assigned Names and Numbers), with the goal of fully recovering the reasonable costs of the operation of ICANN (Internet Corporation for Assigned Names and Numbers) and establishing reasonable reserves for future expenses and contingencies reasonably related to the legitimate activities of ICANN (Internet Corporation for Assigned Names and Numbers). Such fees and charges shall be fair and equitable, shall be published for public comment prior to adoption, and once adopted shall be published on the Website in a sufficiently detailed manner so as to be readily accessible.

Section 22.7. INSPECTION

(a) A Decisional Participant (the "**Inspecting Decisional Participant**") may request to inspect the accounting books and records of ICANN (Internet Corporation for Assigned Names and Numbers), as interpreted pursuant to the provisions of Section 6333 of the CCC, and the minutes of the Board or any Board Committee for a purpose reasonably related to such Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community). The Inspecting Decisional Participant shall make such a request by providing written notice from the chair of the Inspecting Decisional Participant to the Secretary stating the nature of the documents the Inspecting Decisional Participant seeks to inspect ("**Inspection Request**"). Any Inspection Request must be limited to the accounting books and records of ICANN (Internet Corporation for Assigned Names and Numbers) relevant to the operation of ICANN (Internet Corporation for Assigned Names and Numbers) as a whole, and shall not extend to the underlying sources of such accounting books or records or to documents only relevant to a small or isolated aspect of ICANN (Internet Corporation for Assigned Names and Numbers)'s operations

or that relate to the minutiae of ICANN (Internet Corporation for Assigned Names and Numbers)'s financial records or details of its management and administration (the "**Permitted Scope**"). Unless ICANN (Internet Corporation for Assigned Names and Numbers) declines such request (as provided below), ICANN (Internet Corporation for Assigned Names and Numbers) shall make the records requested under an Inspection Request available for inspection by such Inspecting Decisional Participant within 30 days of the date the Inspection Request is received by the Secretary or as soon as reasonably practicable thereafter. All materials and information made available by ICANN (Internet Corporation for Assigned Names and Numbers) for inspection pursuant to an Inspection Request may only be used by the Inspecting Decisional Participant for purposes reasonably related to such Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community). ICANN (Internet Corporation for Assigned Names and Numbers) shall post all Inspection Requests to the Website.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) may decline an Inspection Request on the basis that such Inspection Request (i) is motivated by a Decisional Participant's financial, commercial or political interests, or those of one or more of its constituents, (ii) relates to documents that are not reasonably related to the purpose specified in the Inspection Request or the Inspecting Decisional Participant's interest as a Decisional Participant in the EC (Empowered Community), (iii) requests identical records provided in a prior request of such Decisional Participant, (iv) is not within the Permitted Scope, (v) relates to personnel records, (vi) relates to documents or communications covered by attorney-client privilege, work product doctrine or other legal privilege or (vii) relates to documents or communications that ICANN (Internet Corporation for Assigned Names and Numbers) may not make available under applicable law because such documents or communications contain confidential

information that ICANN (Internet Corporation for Assigned Names and Numbers) is required to protect. If an Inspection Request is overly broad, ICANN (Internet Corporation for Assigned Names and Numbers) may request a revised Inspection Request from the Inspecting Decisional Participant.

(c) Any such inspections shall be conducted at the times and locations reasonably determined by ICANN (Internet Corporation for Assigned Names and Numbers) and shall not be conducted in a manner that unreasonably interferes with ICANN (Internet Corporation for Assigned Names and Numbers)'s operations. All such inspections shall be subject to reasonable procedures established by ICANN (Internet Corporation for Assigned Names and Numbers), including, without limitation, the number of individuals authorized to conduct any such inspection on behalf of the Inspecting Decisional Participant. ICANN (Internet Corporation for Assigned Names and Numbers) may require the inspectors to sign a non-disclosure agreement. The Inspecting Decisional Participant may, at its own cost, copy or otherwise reproduce or make a record of materials inspected. ICANN (Internet Corporation for Assigned Names and Numbers) may redact or determine not to provide requested materials on the same basis that such information is of a category or type described in Section 22.7(b), in which case ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Inspecting Decisional Participant a written rationale for such redactions or determination.

(d) The inspection rights provided to the Decisional Participants pursuant to this Section 22.7 are granted to the Decisional Participants and are not granted or available to any other person or entity. Notwithstanding the foregoing, nothing in this Section 22.7 shall be construed as limiting the accessibility of ICANN (Internet Corporation for Assigned Names and Numbers)'s document information disclosure policy ("**DIDP**").

(e) If the Inspecting Decisional Participant believes that ICANN (Internet Corporation for Assigned Names and Numbers) has violated the provisions of this Section 22.7, the Inspecting Decisional Participant may seek one or more of the following remedies: (i) appeal such matter to the Ombudsman and/or the Board for a ruling on the matter, (ii) initiate the Reconsideration Request process in accordance with Section 4.2, (iii) initiate the Independent Review Process in accordance with Section 4.3, or (iv) petition the EC (Empowered Community) to initiate (A) a Community IRP pursuant to Section 4.2 of Annex D or (B) a Board Recall Process pursuant to Section 3.3 of Annex D. Any determination by the Ombudsman is not binding on ICANN (Internet Corporation for Assigned Names and Numbers) staff, but may be submitted by the Inspecting Decisional Participant when appealing to the Board for a determination, if necessary.

Section 22.8. INDEPENDENT INVESTIGATION

If three or more Decisional Participants deliver to the Secretary a joint written certification from the respective chairs of each such Decisional Participant that the constituents of such Decisional Participants have, pursuant to the internal procedures of such Decisional Participants, determined that there is a credible allegation that ICANN (Internet Corporation for Assigned Names and Numbers) has committed fraud or that there has been a gross mismanagement of ICANN (Internet Corporation for Assigned Names and Numbers)'s resources, ICANN (Internet Corporation for Assigned Names and Numbers) shall retain a third-party, independent firm to investigate such alleged fraudulent activity or gross mismanagement. ICANN (Internet Corporation for Assigned Names and Numbers) shall post all such certifications to the Website. The independent firm shall issue a report to the Board. The Board shall consider the recommendations and findings set forth in such report. Such report shall be posted on the Website,

which may be in a redacted form as determined by the Board, in order to preserve attorney-client privilege, work product doctrine or other legal privilege or where such information is confidential, in which case ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Decisional Participants that submitted the certification a written rationale for such redactions.

ARTICLE 23 MEMBERS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not have members, as contemplated by Section 5310 of the CCC, notwithstanding the use of the term "member" in these Bylaws, in any ICANN (Internet Corporation for Assigned Names and Numbers) document, or in any action of the Board or staff. For the avoidance of doubt, the EC (Empowered Community) is not a member of ICANN (Internet Corporation for Assigned Names and Numbers).

ARTICLE 24 OFFICES AND SEAL

Section 24.1. OFFICES

The principal office for the transaction of the business of ICANN (Internet Corporation for Assigned Names and Numbers) shall be in the County of Los Angeles, State of California, United States of America. ICANN (Internet Corporation for Assigned Names and Numbers) may also have an additional office or offices within or outside the United States of America as it may from time to time establish.

Section 24.2. SEAL

The Board may adopt a corporate seal and use the same by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise.

ARTICLE 25 AMENDMENTS

Section 25.1. AMENDMENTS TO THE STANDARD BYLAWS

(a) Except as otherwise provided in the Articles of Incorporation or these Bylaws, these Bylaws may be altered, amended, or repealed and new Bylaws adopted only upon approval by a two-thirds vote of all Directors and in compliance with the terms of this Section 25.1 (a "**Standard Bylaw Amendment**").

(b) Prior to approval of a Standard Bylaw Amendment by the Board, a draft of the Standard Bylaw Amendment shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(c) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to post a revised draft of the Standard Bylaw Amendment and may conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) Within seven days after the Board's approval of a Standard Bylaw Amendment ("**Standard Bylaw Amendment Approval**"), the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the approved amendment and the Board's rationale for adopting such amendment, and (ii) post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website. The steps contemplated in Article 2 of Annex D shall then be followed.

(e) A Standard Bylaw Amendment shall become effective upon the earliest to occur of the following:

(i) (A) A Rejection Action Petition Notice is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(c) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the 30th day following the Rejection Action Board Notification Date relating to such Standard Bylaw Amendment Approval and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D;

(ii) (A) A Rejection Action Supported Petition is not timely delivered by the Rejection Action Petitioning Decisional Participant to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.2(d) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Petition Support Period relating to such Standard Bylaw Amendment and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC

(Empowered Community)'s rejection right as described in Article 2 of Annex D; or

(iii) (A) An EC (Empowered Community) Rejection Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4 of Annex D or (B) a Rejection Process Termination Notice is delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and in compliance with Section 2.4(c) of Annex D, in which case the Standard Bylaw Amendment that is the subject of the Standard Bylaw Amendment Approval shall be in full force and effect as of the date immediately following the expiration of the Rejection Action Decision Period relating to such Standard Bylaw Amendment and the effectiveness of such Standard Bylaw Amendment shall not be subject to further challenge by the EC (Empowered Community) pursuant to the EC (Empowered Community)'s rejection right as described in Article 2 of Annex D.

(f) If an EC (Empowered Community) Rejection Notice is timely delivered by the EC (Empowered Community) Administration to the Secretary pursuant to and compliance with Section 2.4 of Annex D, the Standard Bylaw Amendment contained in the Board Notice shall be deemed to have been rejected by the EC (Empowered Community). A Standard Bylaw Amendment that has been rejected by the EC (Empowered Community) shall be null and void and shall not become part of these Bylaws, notwithstanding its approval by the Board.

(g) The Secretary shall promptly inform the Board of the receipt and substance of any Rejection Action Petition, Rejection Action Supported Petition or EC (Empowered Community) Rejection Notice delivered by the Rejection Action Petitioning Decisional Participant or the EC

(Empowered Community) Administration, as applicable, to the Secretary hereunder.

(h) Following receipt of an EC (Empowered Community) Rejection Notice pertaining to a Standard Bylaw Amendment, ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the Standard Bylaw Amendment in determining whether or not to develop a new Standard Bylaw Amendment and the substance of such new Standard Bylaw Amendment, which shall be subject to the procedures of this Section 25.1.

Section 25.2. AMENDMENTS TO THE FUNDAMENTAL BYLAWS AND ARTICLES OF INCORPORATION

(a) Article 1; Sections 4.2, 4.3 and 4.7; Article 6; Sections 7.1 through 7.5, inclusive, and Sections 7.8, 7.11, 7.12, 7.17, 7.24 and 7.25; those portions of Sections 8.1, 9.2(b), 10.3(i), 11.3(f) and 12.2(d)(x)(A) relating to the provision to the EC (Empowered Community) of nominations of Directors by the nominating body, Articles 16, 17, 18 and 19, Sections 22.4, 22.5, 22.7 and 22.8, Article 26, Section 27.1; Annexes D, E and F; and this Article 25 are each a "**Fundamental Bylaw**" and, collectively, are the "**Fundamental Bylaws**".

(b) Notwithstanding any other provision of these Bylaws, a Fundamental Bylaw or the Articles of Incorporation may be altered, amended, or repealed (a "**Fundamental Bylaw Amendment**" or an "**Articles Amendment**"), only upon approval by a three-fourths vote of all Directors and the approval of the EC (Empowered Community) as set forth in this Section 25.2.

(c) Prior to approval of a Fundamental Bylaw Amendment, or an Articles Amendment by the Board, a draft of the

Fundamental Bylaw Amendment or Articles Amendment, as applicable, shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to submit a revised draft of the Fundamental Bylaw Amendment or Articles Amendment, as applicable, and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(e) Within seven days after the Board's approval of a Fundamental Bylaw Amendment or Articles Amendment, as applicable, the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the approved amendment and (ii) post the Board Notice, along with a copy of the notification(s) sent to the EC (Empowered Community) Administration and the Decisional Participants, on the Website. The steps contemplated in Article 1 of Annex D shall then be followed.

(f) If the EC (Empowered Community) Administration timely delivers an EC (Empowered Community) Approval Notice (as defined in Section 1.4(b) of Annex D), the Fundamental Bylaw Amendment or Articles Amendment, as applicable, set forth in the Board Notice shall be deemed approved by the EC (Empowered Community), and, as applicable, (i) such Fundamental Bylaw Amendment shall be in full force and effect as part of these Bylaws as of the date immediately following the Secretary's receipt of the EC (Empowered Community) Approval Notice; or (ii) the Secretary shall cause

such Articles Amendment promptly to be certified by the appropriate officers of ICANN (Internet Corporation for Assigned Names and Numbers) and filed with the California Secretary of State. In the event of such approval, neither the Fundamental Bylaw Amendment nor the Articles Amendment shall be subject to any further review or approval of the EC (Empowered Community). The Secretary shall promptly inform the Board of the receipt of an EC (Empowered Community) Approval Notice.

(g) If an EC (Empowered Community) Approval Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary, the Fundamental Bylaw Amendment or Articles Amendment, as applicable, set forth in the Board Notice shall be deemed not approved by the EC (Empowered Community), shall be null and void, and, notwithstanding its approval by the Board, the Fundamental Bylaw Amendment shall not be part of these Bylaws and the Articles Amendment shall not be filed with the Secretary of State.

(h) If a Fundamental Bylaw Amendment or Articles Amendment, as applicable, is not approved by the EC (Empowered Community), ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the concerns raised by the EC (Empowered Community) in determining whether or not to develop a new Fundamental Bylaws Amendment or Articles Amendment, as applicable, and the substance thereof, which shall be subject to the procedures of this Section 25.2.

Section 25.3. AMENDMENTS RESULTING FROM A POLICY DEVELOPMENT PROCESS

The Board shall not combine an amendment of these Bylaws that was the result of a policy development process of a Supporting Organization (Supporting Organization) (a "**PDP (Policy Development Process) Amendment**") with any

other amendment. The Board shall indicate in the applicable Board Notice whether such amendment is a PDP (Policy Development Process) Amendment.

Section 25.4. OTHER AMENDMENTS

For the avoidance of doubt, these Bylaws can only be amended as set forth in this Article 25. Neither the EC (Empowered Community), the Decisional Participants, the Supporting Organizations (Supporting Organizations), the Advisory Committees (Advisory Committees) nor any other entity or person shall have the power to directly propose amendments to these Bylaws.

ARTICLE 26 SALE OR OTHER DISPOSITION OF ALL OR SUBSTANTIALLY ALL OF ICANN (Internet Corporation for Assigned Names and Numbers)'S ASSETS

(a) ICANN (Internet Corporation for Assigned Names and Numbers) may consummate a transaction or series of transactions that would result in the sale or disposition of all or substantially all of ICANN (Internet Corporation for Assigned Names and Numbers)'s assets (an "Asset Sale") only upon approval by a three-fourths vote of all Directors and the approval of the EC (Empowered Community) as set forth in this Article 26.

(b) Prior to approval of an Asset Sale by the Board, a draft of the definitive Asset Sale agreement (an "**Asset Sale Agreement**"), shall be posted on the Website and shall be subject to public comment in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(c) After reviewing the comments submitted during the public comment period, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to

submit a revised draft of the Asset Sale Agreement, as applicable, and may direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to conduct one or more additional public comment periods in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment processes.

(d) Within seven days after the Board's approval of an Asset Sale the Secretary shall (i) provide a Board Notice to the EC (Empowered Community) Administration and the Decisional Participants, which Board Notice shall contain the form of the Asset Sale Agreement and (ii) post the Board Notice on the Website. The steps contemplated in Article 1 of Annex D shall then be followed.

(e) If the EC (Empowered Community) Administration timely delivers an EC (Empowered Community) Approval Notice for the Asset Sale pursuant to and in compliance with the procedures and requirements of Section 1.4(b) of Annex D, the Asset Sale set forth in the Board Notice shall be deemed approved by the EC (Empowered Community), and the Asset Sale may be consummated by ICANN (Internet Corporation for Assigned Names and Numbers), but only under the terms set forth in the Asset Sale Agreement. In the event of such approval, the Asset Sale shall not be subject to any further review or approval of the EC (Empowered Community). The Secretary shall promptly inform the Board of the receipt of an EC (Empowered Community) Approval Notice.

(f) If an EC (Empowered Community) Approval Notice is not timely delivered by the EC (Empowered Community) Administration to the Secretary, the Asset Sale set forth in the Board Notice shall be deemed not approved by the EC (Empowered Community), shall be null and void, and, notwithstanding its approval by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) shall not consummate the Asset Sale.

(g) If an Asset Sale is not approved by the EC (Empowered Community), ICANN (Internet Corporation for Assigned Names and Numbers) staff and the Board shall consider the concerns raised by the EC (Empowered Community) in determining whether or not to consider a new Asset Sale, and the substance thereof, which shall be subject to the procedures of this Article 26.

ARTICLE 27 TRANSITION ARTICLE

Section 27.1. WORK STREAM 2

(a) The Cross-Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability ("CCWG-Accountability") was established pursuant to a charter dated 3 November 2014 ("**CCWG-Accountability Charter**"). The CCWG-Accountability Charter was subsequently adopted by the GNSO (Generic Names Supporting Organization), ALAC (At-Large Advisory Committee), ccNSO (Country Code Names Supporting Organization), GAC (Governmental Advisory Committee), ASO (Address Supporting Organization) and SSAC (Security and Stability Advisory Committee) ("**CCWG Chartering Organizations**"). The CCWG-Accountability Charter as in effect on 3 November 2014 shall remain in effect throughout Work Stream 2 (as defined therein).

(b) The CCWG-Accountability recommended in its Supplemental Final Proposal on Work Stream 1 Recommendations to the Board, dated 23 February 2016 ("**CCWG-Accountability Final Report**") that the below matters be reviewed and developed following the adoption date of these Bylaws ("**Work Stream 2 Matters**"), in each case, to the extent set forth in the CCWG-Accountability Final Report:

(i) Improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s standards for

diversity at all levels;

(ii) ICANN (Internet Corporation for Assigned Names and Numbers) staff accountability;

(iii) Supporting Organization (Supporting Organization) and Advisory Committee (Advisory Committee) accountability, including but not limited to improved processes for accountability, transparency, and participation that are helpful to prevent capture;

(iv) Improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency, focusing on enhancements to ICANN (Internet Corporation for Assigned Names and Numbers)'s existing DIDP, transparency of ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with governments, improvements to ICANN (Internet Corporation for Assigned Names and Numbers)'s whistleblower policy and transparency of Board deliberations;

(v) Developing and clarifying the FOI-HR (as defined in Section 27.2);

(vi) Addressing jurisdiction-related questions, including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability;

(vii) Considering enhancements to the Ombudsman's role and function;

(viii) Guidelines for standards of conduct presumed to be in good faith associated with exercising removal of individual Directors; and

(ix) Reviewing the CEP (as set forth in Section 4.3).

(c) As provided in the CCWG-Accountability Charter and the Board's 2014.10.16.16 resolution, the Board shall consider consensus-based recommendations from the CCWG-Accountability on Work Stream 2 Matters ("**Work Stream 2 Recommendations**") with the same process and criteria it committed to using to consider the CCWG-Accountability recommendations in the CCWG-Accountability Final Report ("**Work Stream 1 Recommendations**"). For the avoidance of doubt, that process and criteria includes:

(i) All Work Stream 2 Recommendations must further the following principles:

(A) Support and enhance the multistakeholder model;

(B) Maintain the security, stability and resiliency of the DNS (Domain Name System);

(C) Meet the needs and expectations of the global customers and partners of the IANA (Internet Assigned Numbers Authority) services;

(D) Maintain the openness of the Internet; and

(E) Not result in ICANN (Internet Corporation for Assigned Names and Numbers) becoming a government-led or an inter-governmental organization.

(ii) If the Board determines, by a vote of a two-thirds majority of the Board, that it is not in the global public interest to implement a Work Stream 2 Recommendation, it must initiate a dialogue with the CCWG-Accountability.

(iii) The Board shall provide detailed rationale to accompany the initiation of dialogue. The Board and the CCWG-Accountability shall mutually agree upon the method (e.g., by teleconference, email or

otherwise) by which the dialogue will occur. Discussions shall be held in good faith and in a timely and efficient manner in an effort to find a mutually acceptable solution.

(iv) The CCWG-Accountability shall have an opportunity to address the Board's concerns and report back to the Board on further deliberations regarding the Board's concerns. The CCWG-Accountability shall discuss the Board's concerns within 30 days of the Board's initiation of the dialogue.

If a Work Stream 2 Recommendation is modified by the CCWG-Accountability, the CCWG-Accountability shall submit the modified Work Stream 2 Recommendation to the Board for further consideration along with detailed rationale on how the modification addresses the concerns raised by the Board.

(v) If, after the CCWG-Accountability modifies a Work Stream 2 Recommendation, the Board still believes it is not in the global public interest to implement the Work Stream 2 Recommendation, the Board may, by a vote of a two-thirds majority of the Board, send the matter back to the CCWG-Accountability for further consideration. The Board shall provide detailed rationale to accompany its action. If the Board determines not to accept a modified version of a Work Stream 2 Recommendation, unless required by its fiduciary obligations, the Board shall not establish an alternative solution on the issue addressed by the Work Stream 2 Recommendation until such time as the CCWG-Accountability and the Board reach agreement.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall provide adequate support for work on Work

Stream 2 Matters, within budgeting processes and limitations reasonably acceptable to the CCWG-Accountability.

(e) The Work Stream 2 Matters specifically referenced in Section 27.1(b) shall be the only matters subject to this Section 27.1 and any other accountability enhancements should be developed through ICANN (Internet Corporation for Assigned Names and Numbers)'s other procedures.

(f) The outcomes of each Work Stream 2 Matter are not limited and could include a variety of recommendations or no recommendation; provided, however, that any resulting recommendations must directly relate to the matters discussed in Section 27.1(b).

Section 27.2. HUMAN RIGHTS

(a) The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights ("**FOI-HR**") is (i) approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2, with the CCWG Chartering Organizations having the role described in the CCWG-Accountability Charter, and (ii) approved by the Board, in each case, using the same process and criteria as for Work Stream 1 Recommendations.>

(b) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2, or the independent review process provided in Section 4.3, based solely on the inclusion of the Core Value set forth in Section 1.2(b)(viii). (i) until after the FOI-HR contemplated by Section 27.2(a) is in place or (ii) for actions of ICANN (Internet Corporation for Assigned Names and Numbers) or the Board that occurred prior to the effectiveness of the FOI-HR.

Section 27.3. EXISTING GROUPS AND TASK

FORCES

Notwithstanding the adoption or effectiveness of these Bylaws, task forces and other groups in existence prior to the date of these Bylaws shall continue unchanged in membership, scope, and operation unless and until changes are made by ICANN (Internet Corporation for Assigned Names and Numbers) in compliance with the Bylaws.

Section 27.4. CONTRACTS WITH ICANN (Internet Corporation for Assigned Names and Numbers)

Notwithstanding the adoption or effectiveness of these Bylaws, all agreements, including employment and consulting agreements, entered into by ICANN (Internet Corporation for Assigned Names and Numbers) shall continue in effect according to their terms.

Annex A: GNSO (Generic Names Supporting Organization) Policy Development Process

The following process shall govern the GNSO (Generic Names Supporting Organization) policy development process ("**PDP (Policy Development Process)**") until such time as modifications are recommended to and approved by the Board. The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are not intended to result in a Consensus (Consensus) Policy, the Council may act through other processes.

Section 1. Required Elements of a Policy Development Process

The following elements are required at a minimum to form Consensus (Consensus) Policies as defined within ICANN (Internet Corporation for Assigned Names and Numbers)

contracts, and any other policies for which the GNSO (Generic Names Supporting Organization) Council requests application of this Annex A:

- a. Final Issue Report requested by the Board, the GNSO (Generic Names Supporting Organization) Council ("Council") or Advisory Committee (Advisory Committee), which should include at a minimum a) the proposed issue raised for consideration, b) the identity of the party submitting the issue, and c) how that party is affected by the issue;
- b. Formal initiation of the Policy Development Process by the Council;
- c. Formation of a Working Group or other designated work method;
- d. Initial Report produced by a Working Group or other designated work method;
- e. Final Report produced by a Working Group, or other designated work method, and forwarded to the Council for deliberation;
- f. Council approval of PDP (Policy Development Process) Recommendations contained in the Final Report, by the required thresholds;
- g. PDP (Policy Development Process) Recommendations and Final Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and
- h. Board approval of PDP (Policy Development Process) Recommendations.

Section 2. **Policy Development Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a Policy Development Process Manual ("PDP

(Policy Development Process) Manual") within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The PDP (Policy Development Process) Manual shall contain specific additional guidance on completion of all elements of a PDP (Policy Development Process), including those elements that are not otherwise defined in these Bylaws. The PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d).

Section 3. Requesting an Issue Report

Board Request. The Board may request an Issue Report by instructing the GNSO (Generic Names Supporting Organization) Council ("Council") to begin the process outlined the PDP (Policy Development Process) Manual. In the event the Board makes a request for an Issue Report, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for an Issue Report.

Council Request. The GNSO (Generic Names Supporting Organization) Council may request an Issue Report by a vote of at least one-fourth (1/4) of the members of the Council of each House or a majority of one House.

Advisory Committee (Advisory Committee) Request. An Advisory Committee (Advisory Committee) may raise an issue for policy development by action of such committee to request an Issue Report, and transmission of that request to the Staff Manager and GNSO (Generic Names Supporting Organization) Council.

Section 4. Creation of an Issue Report

Within forty-five (45) calendar days after receipt of either (i) an instruction from the Board; (ii) a properly supported motion from the GNSO (Generic Names Supporting Organization) Council; or (iii) a properly supported motion from an Advisory Committee (Advisory Committee), the Staff Manager will create a report (a "**Preliminary Issue Report**"). In the event the Staff Manager determines that more time is necessary to create the Preliminary Issue Report, the Staff Manager may request an extension of time for completion of the Preliminary Issue Report.

The following elements should be considered in the Issue Report:

- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the request for the Issue Report;
- c. How that party is affected by the issue, if known;
- d. Support for the issue to initiate the PDP (Policy Development Process), if known;
- e. The opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue proposed for consideration within the Policy Development Process is properly within the scope of the Mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization) as set forth in the Bylaws.
- f. The opinion of ICANN (Internet Corporation for Assigned Names and Numbers) Staff as to whether the Council should initiate the PDP (Policy Development Process) on the issue.

Upon completion of the Preliminary Issue Report, the Preliminary Issue Report shall be posted on the Website for

a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

The Staff Manager is responsible for drafting a summary and analysis of the public comments received on the Preliminary Issue Report and producing a Final Issue Report based upon the comments received. The Staff Manager should forward the Final Issue Report, along with any summary and analysis of the public comments received, to the Chair of the GNSO (Generic Names Supporting Organization) Council for consideration for initiation of a PDP (Policy Development Process).

Section 5. Initiation of the PDP (Policy Development Process)

The Council may initiate the PDP (Policy Development Process) as follows:

Board Request: If the Board requested an Issue Report, the Council, within the timeframe set forth in the PDP (Policy Development Process) Manual, shall initiate a PDP (Policy Development Process). No vote is required for such action.

GNSO (Generic Names Supporting Organization) Council or Advisory Committee (Advisory Committee) Requests: The Council may only initiate the PDP (Policy Development Process) by a vote of the Council. Initiation of a PDP (Policy Development Process) requires a vote as set forth in Section 11.3(i)(ii) and Section 11.3(i)(iii) in favor of initiating the PDP (Policy Development Process).

Section 6. Reports

An Initial Report should be delivered to the GNSO (Generic Names Supporting Organization) Council and posted for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet

Corporation for Assigned Names and Numbers), which time may be extended in accordance with the PDP (Policy Development Process) Manual. Following the review of the comments received and, if required, additional deliberations, a Final Report shall be produced for transmission to the Council.

Section 7. Council Deliberation

Upon receipt of a Final Report, whether as the result of a working group or otherwise, the Council chair will (i) distribute the Final Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

The Council approval process is set forth in Section 11.3(i)(iv) through Section 11.3(vii), as supplemented by the PDP (Policy Development Process) Manual.

Section 8. Preparation of the Board Report

If the PDP (Policy Development Process) recommendations contained in the Final Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 9. Board Approval Processes

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Council recommendation as soon as feasible, but preferably not later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the PDP (Policy Development Process) Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any PDP (Policy Development Process) Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the policy recommended by a GNSO (Generic Names Supporting Organization) Supermajority Vote or less than a GNSO (Generic Names Supporting Organization) Supermajority vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "**Board Statement**"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "**Supplemental Recommendation**") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such policy is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the policy in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 10. Implementation of Approved Policies

Upon a final decision of the Board adopting the policy, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create an implementation plan based upon the implementation recommendations identified in the Final Report, and to implement the policy. The GNSO (Generic Names Supporting Organization) Council may, but is not required to, direct the creation of an implementation review team to assist in implementation of the policy.

Section 11. Maintenance of Records

Throughout the PDP (Policy Development Process), from policy suggestion to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each PDP (Policy Development Process) issue. Such status page will outline the completed and upcoming steps in the PDP (Policy Development Process) process, and contain links to key resources (e.g. Reports, Comments Fora, WG (Working Group) Discussions, etc.).

Section 12. Additional Definitions

"Comment Site", "Comment Forum", "Comments For a" and "Website" refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the PDP (Policy Development Process) will be posted.

"Supermajority Vote" means a vote of more than sixty-six (66) percent of the members present at a meeting of the applicable body, with the exception of the GNSO (Generic Names Supporting Organization) Council.

"Staff Manager" means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the PDP (Policy Development Process).

"GNSO (Generic Names Supporting Organization) Supermajority Vote" shall have the meaning set forth in the Bylaws.

Section 13. Applicability

The procedures of this Annex A shall be applicable to all requests for Issue Reports and PDPs initiated after 8 December 2011. For all ongoing PDPs initiated prior to 8 December 2011, the Council shall determine the feasibility of

transitioning to the procedures set forth in this Annex A for all remaining steps within the PDP (Policy Development Process). If the Council determines that any ongoing PDP (Policy Development Process) cannot be feasibly transitioned to these updated procedures, the PDP (Policy Development Process) shall be concluded according to the procedures set forth in Annex A in force on 7 December 2011.

Annex A-1: GNSO (Generic Names Supporting Organization) Expedited Policy Development Process

The following process shall govern the specific instances where the GNSO (Generic Names Supporting Organization) Council invokes the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process ("EPDP"). The GNSO (Generic Names Supporting Organization) Council may invoke the EPDP in the following limited circumstances: (1) to address a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the Board or the implementation of such an adopted recommendation; or (2) to create new or additional recommendations for a specific policy issue that had been substantially scoped previously such that extensive, pertinent background information already exists, e.g. (a) in an Issue Report for a possible PDP (Policy Development Process) that was not initiated; (b) as part of a previous PDP (Policy Development Process) that was not completed; or (c) through other projects such as a GGP. The following process shall be in place until such time as modifications are recommended to and approved by the Board. Where a conflict arises in relation to an EPDP between the PDP (Policy Development Process) Manual (see Annex 2 of the GNSO (Generic Names Supporting Organization) Operating Procedures) and the procedures

described in this Annex A-1, the provisions of this Annex A-1 shall prevail.

The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. Provided the Council believes and documents via Council vote that the above-listed criteria are met, an EPDP may be initiated to recommend an amendment to an existing Consensus (Consensus) Policy; however, in all cases where the GNSO (Generic Names Supporting Organization) is conducting policy-making activities that do not meet the above criteria as documented in a Council vote, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process

The following elements are required at a minimum to develop expedited GNSO (Generic Names Supporting Organization) policy recommendations, including recommendations that could result in amendments to an existing Consensus (Consensus) Policy, as part of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process:

- a. Formal initiation of the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process by the GNSO (Generic Names Supporting Organization) Council, including an EPDP scoping document;
- b. Formation of an EPDP Team or other designated work method;
- c. Initial Report produced by an EPDP Team or other designated work method;

- d. Final EPDP Policy Recommendation(s) Report produced by an EPDP Team, or other designated work method, and forwarded to the Council for deliberation;
- e. GNSO (Generic Names Supporting Organization) Council approval of EPDP Policy Recommendations contained in the Final EPDP Policy Recommendation(s) Report, by the required thresholds;
- f. EPDP Recommendations and Final EPDP Recommendation(s) Report forwarded to the Board through a Recommendations Report approved by the Council; and
- g. Board approval of EPDP Recommendation(s).

Section 2. **Expedited Policy Development Process Manual**

The GNSO (Generic Names Supporting Organization) shall include a specific section(s) on the EPDP process as part of its maintenance of the GNSO (Generic Names Supporting Organization) Policy Development Process Manual (PDP (Policy Development Process) Manual), described in Annex 5 of the GNSO (Generic Names Supporting Organization) Operating Procedures. The EPDP Manual shall contain specific additional guidance on completion of all elements of an EPDP, including those elements that are not otherwise defined in these Bylaws. The E PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Section 11.3(d).

Section 3. **Initiation of the EPDP**

The Council may initiate an EPDP as follows:

The Council may only initiate the EPDP by a vote of the Council. Initiation of an EPDP requires an affirmative Supermajority vote of the Council (as defined in Section 11.3(i)(xii) of these Bylaws) in favor of initiating the EPDP.

The request to initiate an EPDP must be accompanied by an EPDP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG (Stakeholder Group) / C;
2. Origin of issue (e.g. previously completed PDP (Policy Development Process));
3. Scope of the effort (detailed description of the issue or question that the EPDP is expected to address);
4. Description of how this issue meets the criteria for an EPDP, i.e. how the EPDP will address either: (1) a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the Board or the implementation of such an adopted recommendation, or (2) new or additional policy recommendations on a specific GNSO (Generic Names Supporting Organization) policy issue that had been scoped previously as part of a PDP (Policy Development Process) that was not completed or other similar effort, including relevant supporting information in either case;
5. If not provided as part of item 4, the opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel as to whether the issue proposed for consideration is properly within the scope of the Mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization);

6. Proposed EPDP mechanism (e.g. WG (Working Group), DT (Drafting Team), individual volunteers);
7. Method of operation, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;
8. Decision-making methodology for EPDP mechanism, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;
9. Target completion date.

Section 4. **Council Deliberation**

Upon receipt of an EPDP Final Recommendation(s) Report, whether as the result of an EPDP Team or otherwise, the Council chair will (i) distribute the Final EPDP Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

Approval of EPDP Recommendation(s) requires an affirmative vote of the Council meeting the thresholds set forth in Section 11.3(i)(xiv) and (xv), as supplemented by the PDP (Policy Development Process) Manual.

Section 5. **Preparation of the Board Report**

If the EPDP Recommendation(s) contained in the Final EPDP Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendation(s) Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 6. **Board Approval Processes**

The Board will meet to discuss the EPDP recommendation(s) as soon as feasible, but preferably not later than the second

meeting after receipt of the Recommendations Report from the Staff Manager. Board deliberation on the EPDP Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any EPDP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed EPDP Recommendations are not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by

teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the guidance in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. **Implementation of Approved Policies**

Upon a final decision of the Board adopting the EPDP recommendations, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the EPDP Recommendations. If deemed necessary, the Board shall direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, based upon the guidance recommendations identified in the Final EPDP Recommendation(s) Report.

Section 8. **Maintenance of Records**

Throughout the EPDP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each EPDP issue. Such status page will outline the completed and upcoming steps in the EPDP process, and contain links to key resources (e.g. Reports, Comments Fora, EPDP Discussions, etc.).

Section 9. **Applicability**

The procedures of this Annex A-1 shall be applicable from 28 September 2015 onwards.

Annex A-2: GNSO (Generic Names Supporting Organization) Guidance Process

The following process shall govern the GNSO (Generic Names Supporting Organization) guidance process ("**GGP**") until such time as modifications are recommended to and approved by the Board . The role of the GNSO (Generic Names Supporting Organization) is outlined in Article 11 of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are intended to result in a Consensus (Consensus) Policy, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Guidance Process

The following elements are required at a minimum to develop GNSO (Generic Names Supporting Organization) guidance:

1. Formal initiation of the GNSO (Generic Names Supporting Organization) Guidance Process by the Council, including a GGP scoping document;

2. Identification of the types of expertise needed on the GGP Team;
3. Recruiting and formation of a GGP Team or other designated work method;
4. Proposed GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team or other designated work method;
5. Final GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team, or other designated work method, and forwarded to the Council for deliberation;
6. Council approval of GGP Recommendations contained in the Final Recommendation(s) Report, by the required thresholds;
7. GGP Recommendations and Final Recommendation(s) Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and
8. Board approval of GGP Recommendation(s).

Section 2. **GNSO (Generic Names Supporting Organization) Guidance Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a GNSO (Generic Names Supporting Organization) Guidance Process (GGP Manual) within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The GGP Manual shall contain specific additional guidance on completion of all elements of a GGP, including those elements that are not otherwise defined in these Bylaws. The GGP Manual and any amendments thereto are subject to a twenty-one (21)

day public comment period at minimum, as well as Board oversight and review, as specified at [Section 11.3\(d\)](#).

Section 3. Initiation of the GGP

The Council may initiate a GGP as follows:

The Council may only initiate the GGP by a vote of the Council or at the formal request of the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#). Initiation of a GGP requires a vote as set forth in [Section 11.3\(i\)\(xvi\)](#) in favor of initiating the GGP. In the case of a GGP requested by the Board, a GGP will automatically be initiated unless the [GNSO \(Generic Names Supporting Organization\) Council](#) votes against the initiation of a GGP as set forth in [Section 11.3\(i\)\(xvii\)](#).

The request to initiate a GGP must be accompanied by a GGP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / [SG \(Stakeholder Group\)](#) / C
2. Origin of issue (e.g., board request)
3. Scope of the effort (detailed description of the issue or question that the GGP is expected to address)
4. Proposed GGP mechanism (e.g. [WG \(Working Group\)](#), [DT \(Drafting Team\)](#), individual volunteers)
5. Method of operation, if different from [GNSO \(Generic Names Supporting Organization\) Working Group Guidelines](#)
6. Decision-making methodology for GGP mechanism, if different from [GNSO \(Generic Names Supporting Organization\) Working Group Guidelines](#)
7. Desired completion date and rationale

In the event the Board makes a request for a GGP, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for a GGP.

Section 4. **Council Deliberation**

Upon receipt of a Final Recommendation(s) Report, whether as the result of a GGP Team or otherwise, the Council chair will (i) distribute the Final Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the GGP Manual.

The Council approval process is set forth in Section 11.3(xviii) as supplemented by the GGP Manual.

Section 5. **Preparation of the Board Report**

If the GGP recommendations contained in the Final Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the Board.

Section 6. **Board Approval Processes**

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Guidance recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the GGP Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any GGP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board

unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such guidance is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed GNSO (Generic Names Supporting Organization) Guidance recommendation(s) adopted by a GNSO (Generic Names Supporting Organization) Supermajority Vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.
- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such

guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. Implementation of Approved GNSO (Generic Names Supporting Organization) Guidance

Upon a final decision of the Board adopting the guidance, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the GNSO (Generic Names Supporting Organization) Guidance. If deemed necessary, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) Staff to work with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, if deemed necessary, based upon the guidance recommendations identified in the Final Recommendation(s) Report.

Section 8. Maintenance of Records

Throughout the GGP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each GGP issue. Such status page will outline the completed and upcoming steps in the GGP process, and contain links to key resources (e.g. Reports, Comments Fora, GGP Discussions, etc.).

Section 9. Additional Definitions

"Comment Site", **"Comment Forum"**, **"Comments Fora"** and **"Website"** refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the GGP will be posted.

"**GGP Staff Manager**" means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the GGP.

Annex B: ccNSO (Country Code Names Supporting Organization) Policy-Development Process (ccPDP)

The following process shall govern the ccNSO (Country Code Names Supporting Organization) policy-development process ("**PDP (Policy Development Process)**").

1. Request for an Issue Report

An Issue Report may be requested by any of the following:

- a. *Council*. The ccNSO (Country Code Names Supporting Organization) Council (in this Annex B, the "**Council**") may call for the creation of an Issue Report by documentation of support from at least seven of the members of the Council present at any meeting or voting by electronic means.
- b. *Board*. The Board may call for the creation of an Issue Report by requesting the Council to begin the policy-development process.
- c. *Regional Organization*. One or more of the Regional Organizations representing ccTLDs in the ICANN (Internet Corporation for Assigned Names and Numbers) recognized Regions may call for creation of an Issue Report by requesting the Council to begin the policy-development process.
- d. *ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee)*. An ICANN (Internet Corporation for Assigned Names and Numbers) Supporting

Organization (Supporting Organization) or an ICANN (Internet Corporation for Assigned Names and Numbers) Advisory Committee (Advisory Committee) may call for creation of an Issue Report by requesting the Council to begin the policy-development process.

- e. *Members of the ccNSO (Country Code Names Supporting Organization)*. At least ten members of the ccNSO (Country Code Names Supporting Organization) from at least ten different Territories may call for the creation of an Issue Report at any meeting or by electronic means.

Any request for an Issue Report must be in writing and must set out the issue upon which an Issue Report is requested in sufficient detail to enable the Issue Report to be prepared. It shall be open to the Council to request further information or undertake further research or investigation.

2. Creation of the Issue Report and Initiation Threshold

Within fourteen (14) days after the receipt of a request as outlined in Item 1 above the Council shall appoint an Issue Manager. The Issue Manager may be a staff member of ICANN (Internet Corporation for Assigned Names and Numbers) (in which case the costs of the Issue Manager shall be borne by ICANN (Internet Corporation for Assigned Names and Numbers)) or such other person or persons selected by the Council (in which case the ccNSO (Country Code Names Supporting Organization) shall be responsible for the costs of the Issue Manager).

Within fifteen (15) calendar days after appointment (or such other time as the Council shall, in consultation with the Issue Manager, deem to be appropriate), the Issue Manager shall create an Issue Report. Each Issue Report shall contain at least the following:

- a. The proposed issue raised for consideration;

- b. The identity of the party submitting the issue;
- c. How that party is affected by the issue;
- d. Support for the issue to initiate the PDP (Policy Development Process);
- e. A recommendation from the Issue Manager as to whether the Council should move to initiate the PDP (Policy Development Process) for this issue (the "**Manager Recommendation**"). Each Manager Recommendation shall include, and be supported by, an opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers) policy process and within the scope of the ccNSO (Country Code Names Supporting Organization). In coming to his or her opinion, the General Counsel shall examine whether:
 - 1) The issue is within the scope of the Mission;
 - 2) Analysis of the relevant factors according to Section 10.6(b) and Annex C affirmatively demonstrates that the issue is within the scope of the ccNSO (Country Code Names Supporting Organization);In the event that the General Counsel reaches an opinion in the affirmative with respect to points 1 and 2 above then the General Counsel shall also consider whether the issue:
 - 3) Implicates or affects an existing ICANN (Internet Corporation for Assigned Names and Numbers) policy;
 - 4) Is likely to have lasting value or applicability, albeit with the need for occasional updates, and to establish a guide or framework for future decision-making.

In all events, consideration of revisions to the ccPDP (this Annex B) or to the scope of the ccNSO (Country Code Names Supporting Organization) (Annex C) shall be within the scope of ICANN (Internet Corporation for Assigned Names and Numbers) and the ccNSO (Country Code Names Supporting Organization).

In the event that General Counsel is of the opinion the issue is not properly within the scope of the ccNSO (Country Code Names Supporting Organization) Scope, the Issue Manager shall inform the Council of this opinion. If after an analysis of the relevant factors according to Section 10.6 and Annex C a majority of 10 or more Council members is of the opinion the issue is within scope the Chair of the ccNSO (Country Code Names Supporting Organization) shall inform the Issue Manager accordingly. General Counsel and the ccNSO (Country Code Names Supporting Organization) Council shall engage in a dialogue according to agreed rules and procedures to resolve the matter. In the event no agreement is reached between General Counsel and the Council as to whether the issue is within or outside Scope of the ccNSO (Country Code Names Supporting Organization) then by a vote of 15 or more members the Council may decide the issue is within scope. The Chair of the ccNSO (Country Code Names Supporting Organization) shall inform General Counsel and the Issue Manager accordingly. The Issue Manager shall then proceed with a recommendation whether or not the Council should move to initiate the PDP (Policy Development Process) including both the opinion and analysis of General Counsel and Council in the Issues Report.

- f. In the event that the Manager Recommendation is in favor of initiating the PDP (Policy Development Process), a proposed time line for conducting each of

the stages of PDP (Policy Development Process) outlined herein ("**PDP (Policy Development Process) Time Line**").

- g. g. If possible, the issue report shall indicate whether the resulting output is likely to result in a policy to be approved by the Board. In some circumstances, it will not be possible to do this until substantive discussions on the issue have taken place. In these cases, the issue report should indicate this uncertainty. Upon completion of the Issue Report, the Issue Manager shall distribute it to the full Council for a vote on whether to initiate the PDP (Policy Development Process).

3. Initiation of PDP (Policy Development Process)

The Council shall decide whether to initiate the PDP (Policy Development Process) as follows:

- a. Within 21 days after receipt of an Issue Report from the Issue Manager, the Council shall vote on whether to initiate the PDP (Policy Development Process). Such vote should be taken at a meeting held in any manner deemed appropriate by the Council, including in person or by conference call, but if a meeting is not feasible the vote may occur electronic means.
- b. A vote of ten or more Council members in favor of initiating the PDP (Policy Development Process) shall be required to initiate the PDP (Policy Development Process) provided that the Issue Report states that the issue is properly within the scope of the Mission and the ccNSO (Country Code Names Supporting Organization) Scope.

4. Decision Whether to Appoint Task Force; Establishment of Time Line

At the meeting of the Council where the PDP (Policy Development Process) has been initiated (or, where the Council employs a vote by electronic means, in that vote) pursuant to Item 3 above, the Council shall decide, by a majority vote of members present at the meeting (or voting by electronic means), whether or not to appoint a task force to address the issue. If the Council votes:

- a. In favor of convening a task force, it shall do so in accordance with Item 7 below.
- b. Against convening a task force, then it shall collect information on the policy issue in accordance with Item 8 below.

The Council shall also, by a majority vote of members present at the meeting or voting by electronic means, approve or amend and approve the PDP (Policy Development Process) Time Line set out in the Issue Report.

5. Composition and Selection of Task Forces

- a. Upon voting to appoint a task force, the Council shall invite each of the Regional Organizations (see Section 10.5) to appoint two individuals to participate in the task force (the "**Representatives**"). Additionally, the Council may appoint up to three advisors (the "**Advisors**") from outside the ccNSO (Country Code Names Supporting Organization) and, following formal request for GAC (Governmental Advisory Committee) participation in the Task Force, accept up to two Representatives from the Governmental Advisory Committee (Advisory Committee) to sit on the task force. The Council may increase the number of Representatives that may sit on a task force in its discretion in circumstances that it deems necessary or appropriate.

- b. Any Regional Organization wishing to appoint Representatives to the task force must provide the names of the Representatives to the Issue Manager within ten (10) calendar days after such request so that they are included on the task force. Such Representatives need not be members of the Council, but each must be an individual who has an interest, and ideally knowledge and expertise, in the subject matter, coupled with the ability to devote a substantial amount of time to the task force's activities.
- c. The Council may also pursue other actions that it deems appropriate to assist in the PDP (Policy Development Process), including appointing a particular individual or organization to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager in accordance with the PDP (Policy Development Process) Time Line.

6. Public Notification of Initiation of the PDP (Policy Development Process) and Comment Period

After initiation of the PDP (Policy Development Process), ICANN (Internet Corporation for Assigned Names and Numbers) shall post a notification of such action to the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be commenced for the issue. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. The Issue Manager, or some other designated Council representative shall review the comments and incorporate them into a report (the "**Comment Report**") to be included in

either the Preliminary Task Force Report or the Initial Report, as applicable.

7. Task Forces

a. *Role of Task Force.* If a task force is created, its role shall be responsible for (i) gathering information documenting the positions of the ccNSO (Country Code Names Supporting Organization) members within the Geographic Regions and other parties and groups; and (ii) otherwise obtaining relevant information that shall enable the Task Force Report to be as complete and informative as possible to facilitate the Council's meaningful and informed deliberation.

The task force shall not have any formal decision-making authority. Rather, the role of the task force shall be to gather information that shall document the positions of various parties or groups as specifically and comprehensively as possible, thereby enabling the Council to have a meaningful and informed deliberation on the issue.

b. *Task Force Charter or Terms of Reference.* The Council, with the assistance of the Issue Manager, shall develop a charter or terms of reference for the task force (the "**Charter**") within the time designated in the PDP (Policy Development Process) Time Line. Such Charter shall include:

1. The issue to be addressed by the task force, as such issue was articulated for the vote before the Council that initiated the PDP (Policy Development Process);
2. The specific time line that the task force must adhere to, as set forth below, unless the Council determines that there is a compelling reason to extend the timeline; and
3. Any specific instructions from the Council for the task force, including whether or not the task force should

solicit the advice of outside advisors on the issue.

The task force shall prepare its report and otherwise conduct its activities in accordance with the Charter. Any request to deviate from the Charter must be formally presented to the Council and may only be undertaken by the task force upon a vote of a majority of the Council members present at a meeting or voting by electronic means. The quorum requirements of Section 10.3(n) shall apply to Council actions under this Item 7(b).

c. Appointment of Task Force Chair. The Issue Manager shall convene the first meeting of the task force within the time designated in the PDP (Policy Development Process) Time Line. At the initial meeting, the task force members shall, among other things, vote to appoint a task force chair. The chair shall be responsible for organizing the activities of the task force, including compiling the Task Force Report. The chair of a task force need not be a member of the Council.

d. Collection of Information.

1. Regional Organization Statements. The Representatives shall each be responsible for soliciting the position of the Regional Organization for their Geographic Region, at a minimum, and may solicit other comments, as each Representative deems appropriate, including the comments of the ccNSO (Country Code Names Supporting Organization) members in that region that are not members of the Regional Organization, regarding the issue under consideration. The position of the Regional Organization and any other comments gathered by the Representatives should be submitted in a formal statement to the task force chair (each, a "**Regional Statement**") within the time designated in the PDP (Policy Development Process) Time Line. Every Regional Statement shall include at least the following:

(i) If a Supermajority Vote (as defined by the Regional Organization) was reached, a clear statement of the

Regional Organization's position on the issue;

(ii) If a Supermajority Vote was not reached, a clear statement of all positions espoused by the members of the Regional Organization;

(iii) A clear statement of how the Regional Organization arrived at its position(s). Specifically, the statement should detail specific meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

(iv) A statement of the position on the issue of any ccNSO (Country Code Names Supporting Organization) members that are not members of the Regional Organization;

(v) An analysis of how the issue would affect the Region, including any financial impact on the Region; and

(vi) An analysis of the period of time that would likely be necessary to implement the policy.

2. *Outside Advisors.* The task force may, in its discretion, solicit the opinions of outside advisors, experts, or other members of the public. Such opinions should be set forth in a report prepared by such outside advisors, and (i) clearly labeled as coming from outside advisors; (ii) accompanied by a detailed statement of the advisors' (a) qualifications and relevant experience and (b) potential conflicts of interest. These reports should be submitted in a formal statement to the task force chair within the time designated in the PDP (Policy Development Process) Time Line.

e. *Task Force Report.* The chair of the task force, working with the Issue Manager, shall compile the Regional Statements, the Comment Report, and other information or reports, as applicable, into a single document ("**Preliminary Task Force Report**") and distribute the Preliminary Task Force Report to the full task force within the time designated

in the PDP (Policy Development Process) Time Line. The task force shall have a final task force meeting to consider the issues and try and reach a Supermajority Vote. After the final task force meeting, the chair of the task force and the Issue Manager shall create the final task force report (the "**Task Force Report**") and post it on the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). Each Task Force Report must include:

1. A clear statement of any Supermajority Vote (being 66% of the task force) position of the task force on the issue;
2. If a Supermajority Vote was not reached, a clear statement of all positions espoused by task force members submitted within the time line for submission of constituency reports. Each statement should clearly indicate (i) the reasons underlying the position and (ii) the Regional Organizations that held the position;
3. An analysis of how the issue would affect each Region, including any financial impact on the Region;
4. An analysis of the period of time that would likely be necessary to implement the policy; and
5. The advice of any outside advisors appointed to the task force by the Council, accompanied by a detailed statement of the advisors' (i) qualifications and relevant experience and (ii) potential conflicts of interest.

8. Procedure if No Task Force is Formed

- a. If the Council decides not to convene a task force, each Regional Organization shall, within the time designated in the PDP (Policy Development Process) Time Line, appoint a representative to solicit the

Region's views on the issue. Each such representative shall be asked to submit a Regional Statement to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.

- b. The Council may, in its discretion, take other steps to assist in the PDP (Policy Development Process), including, for example, appointing a particular individual or organization, to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.
- c. The Council shall formally request the Chair of the GAC (Governmental Advisory Committee) to offer opinion or advice.
- d. The Issue Manager shall take all Regional Statements, the Comment Report, and other information and compile (and post on the Website) an Initial Report within the time designated in the PDP (Policy Development Process) Time Line. Thereafter, the Issue Manager shall, in accordance with Item 9 below, create a Final Report.

9. Comments to the Task Force Report or Initial Report

- a. A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be opened for comments on the Task Force Report or Initial Report. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. All comments shall include the author's name, relevant experience, and interest in the issue.

- b. At the end of the comment period, the Issue Manager shall review the comments received and may, in the Issue Manager's reasonable discretion, add appropriate comments to the Task Force Report or Initial Report, to prepare the "**Final Report**". The Issue Manager shall not be obligated to include all comments made during the comment period, nor shall the Issue Manager be obligated to include all comments submitted by any one individual or organization.
- c. The Issue Manager shall prepare the Final Report and submit it to the Council chair within the time designated in the PDP (Policy Development Process) Time Line.

10. Council Deliberation

- a. Upon receipt of a Final Report, whether as the result of a task force or otherwise, the Council chair shall (i) distribute the Final Report to all Council members; (ii) call for a Council meeting within the time designated in the PDP (Policy Development Process) Time Line wherein the Council shall work towards achieving a recommendation to present to the Board; and (iii) formally send to the GAC (Governmental Advisory Committee) Chair an invitation to the GAC (Governmental Advisory Committee) to offer opinion or advice. Such meeting may be held in any manner deemed appropriate by the Council, including in person or by conference call. The Issue Manager shall be present at the meeting.
- b. The Council may commence its deliberation on the issue prior to the formal meeting, including via in-person meetings, conference calls, e-mail discussions, or any other means the Council may choose.

- c. The Council may, if it so chooses, solicit the opinions of outside advisors at its final meeting. The opinions of these advisors, if relied upon by the Council, shall be (i) embodied in the Council's report to the Board, (ii) specifically identified as coming from an outside advisor; and (iii) accompanied by a detailed statement of the advisor's (a) qualifications and relevant experience and (b) potential conflicts of interest.

11. Recommendation of the Council

In considering whether to make a recommendation on the issue (a "**Council Recommendation**"), the Council shall seek to act by consensus. If a minority opposes a consensus position, that minority shall prepare and circulate to the Council a statement explaining its reasons for opposition. If the Council's discussion of the statement does not result in consensus, then a recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council, and shall be conveyed to the Members as the Council's Recommendation. Notwithstanding the foregoing, as outlined below, all viewpoints expressed by Council members during the PDP (Policy Development Process) must be included in the Members Report.

12. Council Report to the Members

In the event that a Council Recommendation is adopted pursuant to Item 11 then the Issue Manager shall, within seven days after the Council meeting, incorporate the Council's Recommendation together with any other viewpoints of the Council members into a Members Report to be approved by the Council and then to be submitted to the Members (the "**Members Report**"). The Members Report must contain at least the following:

- a. A clear statement of the Council's recommendation;
- b. The Final Report submitted to the Council; and

- c. A copy of the minutes of the Council's deliberation on the policy issue (see Item 10), including all the opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

13. Members Vote

Following the submission of the Members Report and within the time designated by the PDP (Policy Development Process) Time Line, the ccNSO (Country Code Names Supporting Organization) members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and lodged through their designated Emissaries. The members' votes shall be lodged over such a period of time as designated in the PDP (Policy Development Process) Time Line (at least 21 days long).

In the event that at least 50% of the Emissaries lodge votes within the voting period, the resulting vote will be employed without further process. In the event that fewer than 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes in the first round of voting, the first round will not be employed and the results of a final, second round of voting, conducted after at least thirty days notice to the ccNSO (Country Code Names Supporting Organization) members, will be employed irrespective of whether at least 50% of the Emissaries lodge votes. In the event that more than 66% of the votes received at the end of the voting period shall be in favor of the Council Recommendation, then the recommendation shall be conveyed to the Board in accordance with Item 14 below as the ccNSO (Country Code Names Supporting Organization) Recommendation.

14. Board Report

The Issue Manager shall within seven days after a ccNSO (Country Code Names Supporting Organization) Recommendation being made in accordance with Item 13

incorporate the ccNSO (Country Code Names Supporting Organization) Recommendation into a report to be approved by the Council and then to be submitted to the Board (the "**Board Report**"). The Board Report must contain at least the following:

- a. A clear statement of the ccNSO (Country Code Names Supporting Organization) recommendation;
- b. The Final Report submitted to the Council; and
- c. the Members' Report.

15. Board Vote

- a. The Board shall meet to discuss the ccNSO (Country Code Names Supporting Organization) Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.
- b. The Board shall adopt the ccNSO (Country Code Names Supporting Organization) Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or of ICANN (Internet Corporation for Assigned Names and Numbers).
 1. In the event that the Board determines not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation in a report to the Council (the "**Board Statement**"); and (ii) submit the Board Statement to the Council.
 2. The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement

is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

3. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council (the Council's "**Supplemental Recommendation**"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13 . In the event that more than 66% of the votes cast by ccNSO (Country Code Names Supporting Organization) Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that acceptance of such policy would constitute a breach of the fiduciary duties of the Board to the Company.
4. In the event that the Board does not accept the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, it shall state its reasons for doing so in its final decision ("**Supplemental Board Statement**").

5. In the event the Board determines not to accept a ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, then the Board shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved until such time as the ccNSO (Country Code Names Supporting Organization) shall, under the ccPDP, make a recommendation on the issue that is deemed acceptable by the Board.

16. Implementation of the Policy

Upon adoption by the Board of a ccNSO (Country Code Names Supporting Organization) Recommendation or ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, the Board shall, as appropriate, direct or authorize ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the policy.

17. Maintenance of Records

With respect to each ccPDP for which an Issue Report is requested (see Item 1), ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain on the Website a status web page detailing the progress of each ccPDP, which shall provide a list of relevant dates for the ccPDP and shall also link to the following documents, to the extent they have been prepared pursuant to the ccPDP:

- a. Issue Report;
- b. PDP (Policy Development Process) Time Line;
- c. Comment Report;
- d. Regional Statement(s);
- e. Preliminary Task Force Report;

- f. Task Force Report;
- g. Initial Report;
- h. Final Report;
- i. Members' Report;
- j. Board Report;
- k. Board Statement;
- l. Supplemental Members' Report; and
- m. Supplemental Board Statement.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) shall post on the Website comments received in electronic written form specifically suggesting that a ccPDP be initiated.

Annex C: The Scope of the ccNSO (Country Code Names Supporting Organization)

This annex describes the scope and the principles and method of analysis to be used in any further development of the scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role. As provided in Section 10.6(b) of the Bylaws, that scope shall be defined according to the procedures of the ccPDP.

The scope of the ccNSO (Country Code Names Supporting Organization)'s authority and responsibilities must recognize the complex relation between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers/registries with regard to policy issues. This annex shall assist the ccNSO (Country Code Names Supporting Organization), the ccNSO (Country Code Names Supporting Organization) Council, and the Board and staff in delineating relevant global policy issues.

Policy areas

The ccNSO (Country Code Names Supporting Organization)'s policy role should be based on an analysis of the following functional model of the DNS (Domain Name System):

1. Data is registered/maintained to generate a zone file,
2. A zone file is in turn used in TLD (Top Level Domain) name servers.

Within a **TLD (Top Level Domain)** two functions have to be performed (these are addressed in greater detail below):

1. Entering data into a database ("**Data Entry Function**") and
2. Maintaining and ensuring upkeep of name-servers for the TLD (Top Level Domain) ("**Name Server Function**").

These two core functions must be performed at the ccTLD (Country Code Top Level Domain) registry level as well as at a higher level (IANA (Internet Assigned Numbers Authority) function and root servers) and at lower levels of the DNS (Domain Name System) hierarchy. This mechanism, as RFC (Request for Comments) 1591 points out, is recursive:

There are no requirements on sub domains of top-level domains beyond the requirements on higher-level domains themselves. That is, the requirements in this memo are applied recursively. In particular, all sub domains shall be allowed to operate their own domain name servers, providing in them whatever information the sub domain manager sees fit (as long as it is true and correct).

The Core Functions

1. Data Entry Function (DEF):

Looking at a more detailed level, the first function (entering and maintaining data in a database) should be fully defined by a naming policy. This naming policy must specify the rules and conditions:

- a. under which data will be collected and entered into a database or data changed (at the TLD (Top Level Domain) level among others, data to reflect a transfer from registrant to registrant or changing registrar) in the database.
- b. for making certain data generally and publicly available (be it, for example, through Whois or nameservers).

2. The Name-Server Function (NSF (National Science Foundation (USA)))

The name-server function involves essential interoperability and stability issues at the heart of the domain name system. The importance of this function extends to nameservers at the ccTLD (Country Code Top Level Domain) level, but also to the root servers (and root-server system) and nameservers at lower levels.

On its own merit and because of interoperability and stability considerations, properly functioning nameservers are of utmost importance to the individual, as well as to the local and the global Internet communities.

With regard to the nameserver function, therefore, policies need to be defined and established. Most parties involved, including the majority of ccTLD (Country Code Top Level Domain) registries, have accepted the need for common policies in this area by adhering to the relevant RFCs, among others RFC (Request for Comments) 1591.

Respective Roles with Regard to Policy, Responsibilities, and Accountabilities

It is in the interest of ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers to ensure the stable and proper functioning of the domain name system. ICANN (Internet Corporation for Assigned Names and Numbers) and the ccTLD (Country Code Top Level Domain) registries each have a distinctive role to play in this regard that can be defined by the relevant policies. The scope of the ccNSO (Country Code Names Supporting Organization) cannot be established without reaching a common understanding of the allocation of authority between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) registries.

Three roles can be distinguished as to which responsibility must be assigned on any given issue:

- Policy role: i.e. the ability and power to define a policy;
- Executive role: i.e. the ability and power to act upon and implement the policy; and
- Accountability role: i.e. the ability and power to hold the responsible entity accountable for exercising its power.

Firstly, responsibility presupposes a policy and this delineates the policy role. Depending on the issue that needs to be addressed those who are involved in defining and setting the policy need to be determined and defined. Secondly, this presupposes an executive role defining the power to implement and act within the boundaries of a policy. Finally, as a counter-balance to the executive role, the accountability role needs to be defined and determined.

The information below offers an aid to:

1. delineate and identify specific policy areas;
2. define and determine roles with regard to these specific policy areas.

This annex defines the scope of the ccNSO (Country Code Names Supporting Organization) with regard to developing policies. The scope is limited to the policy role of the ccNSO (Country Code Names Supporting Organization) policy-development process for functions and levels explicitly stated below. It is anticipated that the accuracy of the assignments of policy, executive, and accountability roles shown below will be considered during a scope-definition ccPDP process.

Name Server Function (as to ccTLDs)

Level 1: Root Name Servers

Policy role: IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: Root Server System Operators

Accountability role: RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))

Level 2: ccTLD (Country Code Top Level Domain) Registry Name Servers in respect to interoperability

Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers)), for best practices a ccNSO (Country Code Names Supporting Organization) process can be organized

Executive role: ccTLD (Country Code Top Level Domain) Manager

Accountability role: part ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority)), part Local Internet Community, including local government

Level 3: User's Name Servers

Policy role: ccTLD (Country Code Top Level Domain) Manager, IETF (Internet Engineering Task Force) (RFC (Request for Comments))

Executive role: Registrant (Registrant)

Accountability role: ccTLD (Country Code Top Level Domain) Manager

Data Entry Function (as to ccTLDs)

Level 1: Root Level Registry

Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority))

Accountability role: ICANN (Internet Corporation for Assigned Names and Numbers) community, ccTLD (Country Code Top Level Domain) Managers, (national authorities in some cases)

Level 2: ccTLD (Country Code Top Level Domain) Registry

Policy role: Local Internet Community, including local government, and/or ccTLD (Country Code Top Level Domain) Manager according to local structure

Executive role: ccTLD (Country Code Top Level Domain) Manager

Accountability role: Local Internet Community, including national authorities in some cases

Level 3: Second and Lower Levels

Policy role: Registrant (Registrant)

Executive role: Registrant (Registrant)

Accountability role: Registrant (Registrant), users of lower-level domain names

ANNEX D: EC (Empowered Community) MECHANISM

ARTICLE 1 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO

APPROVE APPROVAL ACTIONS

Section 1.1. APPROVAL ACTIONS

The processes set forth in this Article 1 shall govern the escalation procedures for the EC (Empowered Community)'s exercise of its right to approve the following (each, an "**Approval Action**") under the Bylaws:

- a. Fundamental Bylaw Amendments, as contemplated by Section 25.2 of the Bylaws;
- b. Articles Amendments, as contemplated by Section 25.2 of the Bylaws; and
- c. Asset Sales, as contemplated by Article 26 of the Bylaws.

Section 1.2. APPROVAL PROCESS

Following the delivery of a Board Notice for an Approval Action ("**Approval Action Board Notice**") by the Secretary to the EC (Empowered Community) Administration and the Decisional Participants (which delivery date shall be referred to herein as the "**Approval Action Board Notification Date**"), the Decisional Participants shall thereafter promptly inform their constituents of the delivery of the Approval Action Board Notice. Any Approval Action Board Notice relating to a Fundamental Bylaw Amendment or Articles Amendment shall include a statement, if applicable, that the Fundamental Bylaw Amendment or Articles Amendment, as applicable, is based solely on the outcome of a PDP (Policy Development Process), citing the specific PDP (Policy Development Process) and the provision in the Fundamental Bylaw Amendment or Articles Amendment subject to the Approval Action Board Notice that implements such PDP (Policy Development Process) (as applicable, a "**PDP (Policy Development Process) Fundamental Bylaw Statement**" or "**PDP (Policy Development Process) Articles Statement**") and the name of the Supporting Organization (Supporting

Organization) that is a Decisional Participant that undertook the PDP (Policy Development Process) relating to the Fundamental Bylaw Amendment or Articles Amendment, as applicable (as applicable, the "**Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant**" or "**Articles Amendment PDP (Policy Development Process) Decisional Participant**"). The process set forth in this Section 1.2 of this Annex D as it relates to a particular Approval Action is referred to herein as the "**Approval Process**."

Section 1.3. APPROVAL ACTION COMMUNITY FORUM

- a. ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Approval Action (an "**Approval Action Community Forum**").
- b. If the EC (Empowered Community) Administration requests a publicly-available conference call by providing a notice to the Secretary, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Approval Action Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- c. The Approval Action Community Forum shall be convened and concluded during the period beginning upon the Approval Action Board Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the Approval Action Board

Notification Date ("**Approval Action Community Forum Period**"). If the EC (Empowered Community) Administration requests that the Approval Action Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the Approval Action Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the EC (Empowered Community) Administration. If the Approval Action Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the Approval Action Board Notification Date, the Approval Action Community Forum Period for the Approval Action shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

- d. The Approval Action Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Approval Action Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Approval Action Community Forum will not be held during an ICANN (Internet

Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Approval Action Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

- e. The EC (Empowered Community) Administration shall manage and moderate the Approval Action Community Forum in a fair and neutral manner.
- f. ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Approval Action prior to the convening of and during the Approval Action Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).
- g. ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Approval Action Community Forum in order to address any questions or concerns regarding the Approval Action.
- h. For the avoidance of doubt, the Approval Action Community Forum is not a decisional body.
- i. During the Approval Action Community Forum Period, an additional one or two Community Forums may be held at the discretion of the Board or the EC

(Empowered Community) Administration. If the Board decides to hold an additional one or two Approval Action Community Forums, it shall provide a rationale for such decision, which rationale ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

- j. ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Approval Action Community Forum and shall promptly post on the Website a public record of the Approval Action Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Approval Action Community Forum.

Section 1.4. DECISION WHETHER TO APPROVE AN APPROVAL ACTION

(a) Following the expiration of the Approval Action Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Approval Action Community Forum Period (such period, the "**Approval Action Decision Period**"), with respect to each Approval Action, each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Approval Action, (ii) objects to such Approval Action or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Approval Action), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered

Community) Administration of any of the foregoing prior to the expiration of the Approval Action Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Approval Action Decision Period).

(b) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver a written notice ("**EC (Empowered Community) Approval Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Article 1 of this Annex D, the EC (Empowered Community) has approved the Approval Action if:

- (i) The Approval Action does not relate to a Fundamental Bylaw Amendment or Articles Amendment and is (A) supported by three or more Decisional Participants and (B) not objected to by more than one Decisional Participant;
- (ii) The Approval Action relates to a Fundamental Bylaw Amendment and is (A) supported by three or more Decisional Participants (including the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant if the Board Notice included a PDP (Policy Development Process) Fundamental Bylaw Statement) and (B) not objected to by more than one Decisional Participant; or
- (iii) The Approval Action relates to an Articles Amendment and is (A) supported by three or more Decisional Participants (including the Articles Amendment PDP (Policy Development Process) Decisional Participant if the Board Notice included a PDP (Policy Development Process) Articles

Statement) and (B) not objected to by more than one Decisional Participant.

(c) If the Approval Action does not obtain the support required by Section 1.4(b)(i), (ii) or (iii) of this Annex D, as applicable, the Approval Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Approval Action Decision Period, deliver to the Secretary a notice certifying that the Approval Process has been terminated with respect to the Approval Action ("**Approval Process Termination Notice**").

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Approval Action Board Notice, (ii) EC (Empowered Community) Approval Notice, (iii) Approval Process Termination Notice, (iv) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (v) other notices the Secretary receives under this Article 1.

ARTICLE 2 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO REJECT SPECIFIED ACTIONS

Section 2.1. Rejection Actions

The processes set forth in this Article 2 shall govern the escalation procedures for the EC (Empowered Community)'s exercise of its right to reject the following (each, a "**Rejection Action**") under the Bylaws:

- a. PTI Governance Actions, as contemplated by Section 16.2(d) of the Bylaws;
- b. IFR Recommendation Decisions, as contemplated by Section 18.6(d) of the Bylaws;

- c. Special IFR Recommendation Decisions, as contemplated by Section 18.12(e) of the Bylaws;
- d. SCWG Creation Decisions, as contemplated by Section 19.1(d) of the Bylaws;
- e. SCWG Recommendation Decisions, as contemplated by Section 19.4(d) of the Bylaws;
- f. ICANN (Internet Corporation for Assigned Names and Numbers) Budgets, as contemplated by Section 22.4(a)(v) of the Bylaws;
- g. IANA (Internet Assigned Numbers Authority) Budgets, as contemplated by Section 22.4(b)(v) of the Bylaws;
- h. Operating Plans, as contemplated by Section 22.5(a)(v) of the Bylaws;
- i. Strategic Plans, as contemplated by Section 22.5(b)(v) of the Bylaws; and
- j. Standard Bylaw Amendments, as contemplated by Section 25.1(e) of the Bylaws.

Section 2.2. PETITION PROCESS FOR SPECIFIED ACTIONS

(a) Following the delivery of a Board Notice for a Rejection Action ("**Rejection Action Board Notice**") by the Secretary to the EC (Empowered Community) Administration and Decisional Participants (which delivery date shall be referred to herein as the "**Rejection Action Board Notification Date**"), the Decisional Participants shall thereafter promptly inform their constituents of the delivery of the Rejection Action Board Notice. The process set forth in this Section 2.2 of this Annex D as it relates to a particular Rejection Action is referred to herein as the "**Rejection Process**."

(b) During the period beginning on the Rejection Action Board Notification Date and ending at 11:59 p.m. (as

calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the Rejection Action Board Notification Date (as it relates to a particular Rejection Action, the "**Rejection Action Petition Period**"), subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant, seeking to reject the Rejection Action and initiate the Rejection Process (a "**Rejection Action Petition**").

(c) A Decisional Participant that has received a Rejection Action Petition shall either accept or reject such Rejection Action Petition; provided that a Decisional Participant may only accept such Rejection Action Petition if it was received by such Decisional Participant during the Rejection Action Petition Period.

(i) If, in accordance with the requirements of Section 2.2(c) of this Annex D, a Decisional Participant accepts a Rejection Action Petition during the Rejection Action Petition Period, the Decisional Participant shall promptly provide to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary written notice ("**Rejection Action Petition Notice**") of such acceptance (such Decisional Participant, the "**Rejection Action Petitioning Decisional Participant**"), and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Action Petition Notice on the Website. The Rejection Action Petition Notice shall also include:

(A) the rationale upon which rejection of the Rejection Action is sought. Where the Rejection Action Petition Notice relates to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, an IANA (Internet Assigned Numbers Authority) Budget, an

Operating Plan or a Strategic Plan, the Rejection Action Petition Notice shall not be valid and shall not be accepted by the EC (Empowered Community) Administration unless the rationale set forth in the Rejection Action Petition Notice is based on one or more significant issues that were specifically raised in the applicable public comment period(s) relating to perceived inconsistencies with the Mission, purpose and role set forth in ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws, the global public interest, the needs of ICANN (Internet Corporation for Assigned Names and Numbers)'s stakeholders, financial stability, or other matter of concern to the community; and

(B) where the Rejection Action Petition Notice relates to a Standard Bylaw Amendment, a statement, if applicable, that the Standard Bylaw Amendment is based solely on the outcome of a PDP (Policy Development Process), citing the specific PDP (Policy Development Process) and the provision in the Standard Bylaw Amendment subject to the Board Notice that implements such PDP (Policy Development Process) ("**PDP (Policy Development Process) Standard Bylaw Statement**") and the name of the Supporting Organization (Supporting Organization) that is a Decisional Participant that undertook the PDP (Policy Development Process) relating to the Standard Bylaw Amendment ("**Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant**").

The Rejection Process shall thereafter continue pursuant to Section 2.2(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Rejection Action Petition Notice

pursuant to Section 2.2(c)(i) of this Annex D during the Rejection Action Petition Period, the Rejection Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Rejection Action Petition Period, deliver to the Secretary a notice certifying that the Rejection Process has been terminated with respect to the Rejection Action contained in the Approval Notice ("**Rejection Process Termination Notice**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Process Termination Notice on the Website.

(d) Following the delivery of a Rejection Action Petition Notice to the EC (Empowered Community) Administration pursuant to Section 2.2(c)(i) of this Annex D, the Rejection Action Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Rejection Action Petition. The Rejection Action Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Rejection Action Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Rejection Action Supporting Decisional Participant**") during the period beginning upon the expiration of the Rejection Action Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Rejection Action Petition Period (the "**Rejection Action Petition Support Period**"), the

Rejection Action Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Rejection Action Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Rejection Action Supporting Decisional Participant, and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post such Rejection Action Supported Petition on the Website. Each Rejection Action Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Rejection Action Petition, and ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post each such notice on the Website. Such Rejection Action Supported Petition shall include:

- (A) a supporting rationale in reasonable detail;
- (B) contact information for at least one representative who has been designated by the Rejection Action Petitioning Decisional Participant who shall act as a liaison with respect to the Rejection Action Supported Petition;
- (C) a statement as to whether or not the Rejection Action Petitioning Decisional Participant and/or the Rejection Action Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Rejection Action Community Forum (as defined in Section 2.3 of this Annex D) for the community to discuss the Rejection Action Supported Petition;
- (D) a statement as to whether the Rejection Action Petitioning Decisional Participant and the Rejection

Action Supporting Decisional Participant have determined to hold the Rejection Action Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, taking into account the limitation on holding such a Rejection Action Community Forum when the Rejection Action Supported Petition relates to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget as described in Section 2.3(c) of this Annex D; and

(E) a PDP (Policy Development Process) Standard Bylaw Statement, if applicable.

The Rejection Process shall thereafter continue for such Rejection Action Supported Petition pursuant to Section 2.3 of this Annex D. The foregoing process may result in more than one Rejection Action Supported Petition relating to the same Rejection Action.

(ii) The Rejection Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Rejection Action Petition Support Period, deliver to the Secretary a Rejection Process Termination Notice, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website, if:

(A) no Rejection Action Petitioning Decisional Participant is able to obtain the support of at least one other Decisional Participant for its Rejection Action Petition during the Rejection Action Petition Support Period; or

(B) where the Rejection Action Supported Petition includes a PDP (Policy Development Process)

Standard Bylaw Statement, the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Rejection Action Petitioning Decisional Participant or (y) one of the Rejection Action Supporting Decisional Participants.

Section 2.3. REJECTION ACTION COMMUNITY FORUM

- a. If the EC (Empowered Community) Administration receives a Rejection Action Supported Petition under Section 2.2(d) of this Annex D during the Rejection Action Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Rejection Action Supported Petition ("**Rejection Action Community Forum**"). If the EC (Empowered Community) Administration receives more than one Rejection Action Supported Petition relating to the same Rejection Action, all such Rejection Action Supported Petitions shall be discussed at the same Rejection Action Community Forum.
- b. If a publicly-available conference call has been requested in a Rejection Action Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Rejection Action Community Forum relating to that Rejection Action Supported Petition, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. If a conference call has been requested in relation to more than one Rejection

Action Supported Petition relating to the same Rejection Action, all such Rejection Action Supported Petitions shall be discussed during the same conference call.

- c. The Rejection Action Community Forum shall be convened and concluded during the period beginning upon the expiration of the Rejection Action Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Petition Support Period ("**Rejection Action Community Forum Period**") unless all Rejection Action Supported Petitions relating to the same Rejection Action requested that the Rejection Action Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Rejection Action Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting (except as otherwise provided below with respect to a Rejection Action Supported Petition relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget) on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Rejection Action Petitioning Decisional Participant(s) and the Rejection Action Supporting Decisional Participant(s). If the Rejection Action Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of

ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Petition Support Period, the Rejection Action Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting. Notwithstanding the foregoing and notwithstanding any statement in the Rejection Action Supported Petition, a Rejection Action Community Forum to discuss a Rejection Action Supported Petition relating to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget or IANA (Internet Assigned Numbers Authority) Budget may only be held at a scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting if such Rejection Action Community Forum occurs during the Rejection Action Community Forum Period, without any extension of such Rejection Action Community Forum Period.

- d. The Rejection Action Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Rejection Action Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Rejection Action Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such

- Rejection Action Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.
- e. The EC (Empowered Community) Administration shall manage and moderate the Rejection Action Community Forum in a fair and neutral manner.
- f. ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Rejection Action Supported Petition prior to the convening of and during the Rejection Action Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).
- g. ICANN (Internet Corporation for Assigned Names and Numbers) staff (including the CFO when the Rejection Action Supported Petition relates to an ICANN (Internet Corporation for Assigned Names and Numbers) Budget, IANA (Internet Assigned Numbers Authority) Budget or Operating Plan) and Directors representing the Board are expected to attend the Rejection Action Community Forum in order to address the concerns raised in the Rejection Action Supported Petition.
- h. If the Rejection Action Petitioning Decisional Participant and each of the Rejection Action Supporting Decisional Participants for an applicable Rejection Action Supported Petition agree before, during or after the Rejection Action Community Forum

that the issue raised in such Rejection Action Supported Petition has been resolved, such Rejection Action Supported Petition shall be deemed withdrawn and the Rejection Process with respect to such Rejection Action Supported Petition will be terminated. If all Rejection Action Supported Petitions relating to a Rejection Action are withdrawn, the Rejection Process will automatically be terminated. If a Rejection Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Rejection Action Supported Petition, deliver to the Secretary a Rejection Process Termination Notice. For the avoidance of doubt, the Rejection Action Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Rejection Action Petitioning Decisional Participant and the Rejection Action Supporting Decisional Participant(s).

- i. During the Rejection Action Community Forum Period, an additional one or two Rejection Action Community Forums may be held at the discretion of a Rejection Action Petitioning Decisional Participant and a related Rejection Action Supporting Decisional Participant, or the EC (Empowered Community) Administration.
- j. ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Rejection Action Community Forum and shall promptly post on the Website a public record of the Rejection Action Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Rejection Action Community Forum.

Section 2.4. DECISION WHETHER TO REJECT A REJECTION ACTION

(a) Following the expiration of the Rejection Action Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Rejection Action Community Forum Period (such period, the "**Rejection Action Decision Period**"), with respect to each Rejection Action Supported Petition, each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Rejection Action Supported Petition and has determined to reject the Rejection Action, (ii) objects to such Rejection Action Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Rejection Action Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to expiration of the Rejection Action Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Rejection Action Decision Period).

(b) The EC (Empowered Community) Administration, within twenty-four (24) hours of the expiration of the Rejection Action Decision Period, shall promptly deliver a written notice ("**EC (Empowered Community) Rejection Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Article 2 of Annex D, the EC (Empowered Community) has resolved to reject the Rejection Action if (after accounting for any adjustments to

the below as required by the GAC (Governmental Advisory Committee) Carve-out pursuant to Section 3.6(e) of the Bylaws if the Rejection Action Supported Petition included a GAC (Governmental Advisory Committee) Consensus (Consensus) Statement):

(i) A Rejection Action Supported Petition relating to a Rejection Action other than a Standard Bylaw Amendment is (A) supported by four or more Decisional Participants and (B) not objected to by more than one Decisional Participant; or

(ii) A Rejection Action Supported Petition relating to a Standard Bylaw Amendment that is (A) supported by three or more Decisional Participants (including the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant if the Rejection Action Supported Petition included a PDP (Policy Development Process) Standard Bylaw Statement) and (B) not objected to by more than one Decisional Participant.

(c) If no Rejection Action Supported Petition obtains the support required by Section 2.4(b)(i) or (ii) of this Annex D, as applicable, the Rejection Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Rejection Action Decision Period, deliver to the Secretary a Rejection Process Termination Notice.

(d) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Rejection Action Board Notice, (ii) Rejection Action Petition, (iii) Rejection Action Petition Notice, (iv) Rejection Action Supported Petition, (v) EC (Empowered Community) Rejection Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to reject the

Rejection Action, (vi) Rejection Process Termination Notice, and (vii) other notices the Secretary receives under this [Article 2](#).

ARTICLE 3 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO REMOVE DIRECTORS AND RECALL THE BOARD

Section 3.1. NOMINATING COMMITTEE DIRECTOR REMOVAL PROCESS

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove a Director holding Seats 1 through 8 and initiate the Nominating Committee Director Removal Process ("**Nominating Committee Director Removal Petition**"). Each Nominating Committee Director Removal Petition shall set forth the rationale upon which such individual seeks to remove such Director. The process set forth in this [Section 3.1](#) of [Annex D](#) is referred to herein as the "**Nominating Committee Director Removal Process**."

(b) During the period beginning on the date that the Decisional Participant received the Nominating Committee Director Removal Petition (such date of receipt, the "**Nominating Committee Director Removal Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s principal office) on the date that is the 21st day after the Nominating Committee Director Removal Petition Date (as it relates to a particular Director, the "**Nominating Committee Director Removal Petition Period**"), the Decisional Participant that has received a Nominating Committee Director Removal Petition ("**Nominating Committee Director Removal Petitioned Decisional Participant**") shall either accept or reject such

Nominating Committee Director Removal Petition; provided that a Nominating Committee Director Removal Petitioned Decisional Participant shall not accept a Nominating Committee Director Removal Petition if, during the same term, the Director who is the subject of such Nominating Committee Director Removal Petition had previously been subject to a Nominating Committee Director Removal Petition that led to a Nominating Committee Director Removal Community Forum (as discussed in [Section 3.1\(e\)](#) of this [Annex D](#)).

(c) During the Nominating Committee Director Removal Petition Period, the Nominating Committee Director Removal Petitioned Decisional Participant shall invite the Director subject to the Nominating Committee Director Removal Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) to a dialogue with the individual(s) bringing the Nominating Committee Director Removal Petition and the Nominating Committee Director Removal Petitioned Decisional Participant's representative on the [EC \(Empowered Community\) Administration](#). The Nominating Committee Director Removal Petition may not be accepted unless this invitation has been extended upon reasonable notice and accommodation to the affected Director's availability. If the invitation is accepted by either the Director who is the subject of the Nominating Committee Director Removal Petition or the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director), the Nominating Committee Director Removal Petitioned Decisional Participant shall not accept the Nominating Committee Director Removal Petition until the dialogue has occurred or there have been reasonable efforts to have the dialogue.

(i) If, in accordance with [Section 3.1\(b\)](#) of this [Annex D](#), a Nominating Committee Director Removal Petitioned Decisional Participant accepts a Nominating Committee Director Removal Petition during the

Nominating Committee Director Removal Petition Period (such Decisional Participant, the "**Nominating Committee Director Removal Petitioning Decisional Participant**"), the Nominating Committee Director Removal Petitioning Decisional Participant shall, within twenty-four (24) hours of its acceptance of the Nominating Committee Director Removal Petition, provide written notice ("**Nominating Committee Director Removal Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary. The Nominating Committee Director Removal Petition Notice shall include the rationale upon which removal of the affected Director is sought. The Nominating Committee Director Removal Process shall thereafter continue pursuant to Section 3.1(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Nominating Committee Director Removal Petition Notice pursuant to Section 3.1(c)(i) of this Annex D during the Nominating Committee Director Removal Petition Period, the Nominating Committee Director Removal Process shall automatically be terminated with respect to the applicable Nominating Committee Director Removal Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Petition Period, deliver to the Secretary a notice certifying that the Nominating Committee Director Removal Process has been terminated with respect to the applicable Nominating Committee Director Removal Petition ("**Nominating Committee Director Removal Process Termination Notice**").

(d) Following the delivery of a Nominating Committee Director Removal Petition Notice to the EC (Empowered

Community) Administration by a Nominating Committee Director Removal Petitioning Decisional Participant pursuant to Section 3.1(c)(i) of this Annex D, the Nominating Committee Director Removal Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Nominating Committee Director Removal Petition. The Nominating Committee Director Removal Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Nominating Committee Director Removal Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a **"Nominating Committee Director Removal Supporting Decisional Participant"**) during the period beginning upon the expiration of the Nominating Committee Director Removal Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Nominating Committee Director Removal Petition Period (the **"Nominating Committee Director Removal Petition Support Period"**), the Nominating Committee Director Removal Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary (**"Nominating Committee Director Removal Supported Petition"**) within twenty-four (24) hours of receiving the support of at least one Nominating Committee Director Removal Supporting Decisional Participant. Each Nominating Committee Director Removal Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional

Participants and the Secretary within twenty-four (24) hours of providing support to the Nominating Committee Director Removal Petition. Such Nominating Committee Director Removal Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Nominating Committee Director Removal Petitioning Decisional Participant who shall act as a liaison with respect to the Nominating Committee Director Removal Supported Petition;

(C) a statement as to whether or not the Nominating Committee Director Removal Petitioning Decisional Participant and/or the Nominating Committee Director Removal Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Nominating Committee Director Removal Community Forum (as defined in Section 3.1(e) of this Annex D) for the community to discuss the Nominating Committee Director Removal Supported Petition; and

(D) a statement as to whether the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant have determined to hold the Nominating Committee Director Removal Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Nominating Committee Director Removal Process shall thereafter continue for such Nominating

Committee Director Removal Petition pursuant to Section 3.1(e) of this Annex D.

(ii) The Nominating Committee Director Removal Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Petition Support Period, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice if the Nominating Committee Director Removal Petitioning Decisional Participant is unable to obtain the support of at least one other Decisional Participant for its Nominating Committee Director Removal Petition during the Nominating Committee Director Removal Petition Support Period.

(e) If the EC (Empowered Community) Administration receives a Nominating Committee Director Removal Supported Petition under Section 3.1(d) of this Annex D during the Nominating Committee Director Removal Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Nominating Committee Director Removal Supported Petition ("**Nominating Committee Director Removal Community Forum**").

(i) If a publicly-available conference call has been requested in a Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Nominating Committee Director Removal Community Forum, and inform the Decisional Participants of the date, time and participation methods of such

conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Director who is the subject of the Nominating Committee Director Removal Supported Petition regarding his or her availability.

(ii) The Nominating Committee Director Removal Community Forum shall be convened and concluded during the period beginning upon the expiration of the Nominating Committee Director Removal Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Petition Support Period ("**Nominating Committee Director Removal Community Forum Period**") unless the Nominating Committee Director Removal Supported Petition requested that the Nominating Committee Director Removal Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Nominating Committee Director Removal Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant(s); provided, that, the date and time of any Nominating Committee Director Removal Community Forum shall be determined after consultation with the Director who

is the subject of the Nominating Committee Director Removal Supported Petition regarding his or her availability. If the Nominating Committee Director Removal Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Petition Support Period, the Nominating Committee Director Removal Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Nominating Committee Director Removal Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the Nominating Committee Director Removal Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Nominating Committee Director Removal Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of the Nominating Committee Director Removal Community Forum, which ICANN

(Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Nominating Committee Director Removal Community Forum in a fair and neutral manner; provided that no individual from the Nominating Committee Director Removal Petitioning Decisional Participant or the Nominating Committee Director Removal Supporting Decisional Participant, nor the individual who initiated the Nominating Committee Director Removal Petition, shall be permitted to participate in the management or moderation of the Nominating Committee Director Removal Community Forum.

(v) The Director subject to the Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Nominating Committee Director Removal Supported Petition prior to the convening of and during the Nominating Committee Director Removal Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) The Director who is the subject of the Nominating Committee Director Removal Supported Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) are expected to

attend the Nominating Committee Director Removal Community Forum in order to address the issues raised in the Nominating Committee Director Removal Supported Petition.

(vii) If the Nominating Committee Director Removal Petitioning Decisional Participant and each of the Nominating Committee Director Removal Supporting Decisional Participants for an applicable Nominating Committee Director Removal Supported Petition agree before, during or after the Nominating Committee Director Removal Community Forum that the issue raised in such Nominating Committee Director Removal Supported Petition has been resolved, such Nominating Committee Director Removal Supported Petition shall be deemed withdrawn and the Nominating Committee Director Removal Process with respect to such Nominating Committee Director Removal Supported Petition will be terminated. If a Nominating Committee Director Removal Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Nominating Committee Director Removal Supported Petition, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice. For the avoidance of doubt, the Nominating Committee Director Removal Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Nominating Committee Director Removal Petitioning Decisional Participant and the Nominating Committee Director Removal Supporting Decisional Participant(s).

(viii) During the Nominating Committee Director Removal Community Forum Period, an additional one or two Nominating Committee Director Removal

Community Forums may be held at the discretion of a Nominating Committee Director Removal Petitioning Decisional Participant and a related Nominating Committee Director Removal Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Nominating Committee Director Removal Community Forum and shall promptly post on the Website a public record of the Nominating Committee Director Removal Community Forum as well as all written submissions of the Director who is the subject of the Nominating Committee Director Removal Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Nominating Committee Director Removal Community Forum.

(f) Following the expiration of the Nominating Committee Director Removal Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Community Forum Period (such period, the "**Nominating Committee Director Removal Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Nominating Committee Director Removal Supported Petition, (ii) objects to such Nominating Committee Director Removal Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Nominating Committee Director Removal Supported

Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Nominating Committee Director Removal Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Nominating Committee Director Removal Decision Period).

(g) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Decision Period, deliver a written notice ("**Nominating Committee Director Removal Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of Section 3.1 of this Annex D, the EC (Empowered Community) has approved of the removal of the Director who is subject to the Nominating Committee Director Removal Process if the Nominating Committee Director Removal Supported Petition is (i) supported by three or more Decisional Participants and (ii) not objected to by more than one Decisional Participant.

(h) Upon the Secretary's receipt of a Nominating Committee Director Removal Notice, the Director subject to such Nominating Committee Director Removal Notice shall be effectively removed from office and shall no longer be a Director and such Director's vacancy shall be filled in accordance with Section 7.12 of the Bylaws.

(i) If the Nominating Committee Director Removal Supported Petition does not obtain the support required by Section 3.1(g) of this Annex D, the Nominating Committee Director Removal Process will automatically be terminated and the

EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Nominating Committee Director Removal Decision Period, deliver to the Secretary a Nominating Committee Director Removal Process Termination Notice. The Director who was subject to the Nominating Committee Director Removal Process shall remain on the Board and not be subject to the Nominating Committee Director Removal Process for the remainder of the Director's current term.

(j) If neither a Nominating Committee Director Removal Notice nor a Nominating Committee Director Removal Process Termination Notice are received by the Secretary prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Nominating Committee Director Removal Community Forum Period, the Nominating Committee Director Removal Process shall automatically terminate and the Director who was subject to the Nominating Committee Director Removal Process shall remain on the Board and shall not be subject to the Nominating Committee Director Removal Process for the remainder of the Director's current term.

(k) Notwithstanding anything in this Section 3.1 to the contrary, if, for any reason, including due to resignation, death or disability, a Director who is the subject of a Nominating Committee Director Removal Process ceases to be a Director, the Nominating Committee Director Removal Process for such Director shall automatically terminate without any further action of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community) Administration.

(l) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Nominating Committee Director Removal Petition, (ii)

Nominating Committee Director Removal Petition Notice, (iii) Nominating Committee Director Removal Supported Petition, (iv) Nominating Committee Director Removal Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to remove the relevant Director, (v) Nominating Committee Director Removal Process Termination Notice, and (vi) other notices the Secretary receives under this Section 3.1.

Section 3.2. SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) DIRECTOR REMOVAL PROCESS

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to the ASO (Address Supporting Organization), ccNSO (Country Code Names Supporting Organization), GNSO (Generic Names Supporting Organization) or At-Large Community (as applicable, the "**Applicable Decisional Participant**") seeking to remove a Director who was nominated by that Supporting Organization (Supporting Organization) or the At-Large Community in accordance with Section 7.2(a) of the Bylaws, and initiate the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition**"). The process set forth in this Section 3.2 of this Annex D is referred to herein as the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process.**"

(b) During the period beginning on the date that the Applicable Decisional Participant received the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director

Removal Petition (such date of receipt, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Date** (as it relates to a particular Director, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period**"), the Applicable Decisional Participant shall either accept or reject such **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition** pursuant to the internal procedures of the Applicable Decisional Participant for the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition**; provided that the Applicable Decisional Participant shall not accept an **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition** if, during the same term, the Director who is the subject of such **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition** had previously been subject to an **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition** that led to an **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum** (as defined in [Section 3.2\(d\)](#) of this [Annex D](#)).

(c) During the **SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period**, the

Applicable Decisional Participant shall invite the Director subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) to a dialogue with the individual(s) bringing the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition and the Applicable Decisional Participant's representative on the EC (Empowered Community) Administration. The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition may not be accepted unless this invitation has been extended upon reasonable notice and accommodation to the affected Director's availability. If the invitation is accepted by either the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition or the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director), the Applicable Decisional Participant shall not accept the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition until the dialogue has occurred or there have been reasonable efforts to have the dialogue.

(i) If, in accordance with Section 3.2(b), the Applicable Decisional Participant accepts an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the Applicable Decisional Participant shall, within twenty-four (24) hours of the Applicable Decisional Participant's acceptance of the SO (Supporting Organization)/AC

(Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition, provide written notice ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary. Such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice shall include:

- (A) a supporting rationale in reasonable detail;
- (B) contact information for at least one representative who has been designated by the Applicable Decisional Participant who shall act as a liaison with respect to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice;
- (C) a statement as to whether or not the Applicable Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum (as defined in Section 3.2(d) of this Annex D) for the community to discuss the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition; and
- (D) a statement as to whether the Applicable Decisional Participant has determined to hold the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration))

Director Removal Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall thereafter continue for such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition pursuant to Section 3.2(d) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice pursuant to Section 3.2(c)(i) during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall automatically be terminated with respect to the applicable SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, deliver to the Secretary a notice certifying that the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process has been terminated with respect to the applicable SO (Supporting

Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice**").

(d) If the EC (Empowered Community) Administration receives an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice under Section 3.2(c) of this Annex D during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum**").

(i) If a publicly-available conference call has been requested in an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which

ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice regarding his or her availability.

(ii) The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be convened and concluded during the period beginning upon the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period (**"SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period"**) unless the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice requested that the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be held

during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Applicable Decisional Participant; provided, that the date and time of any SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum shall be determined after consultation with the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice regarding his or her availability. If the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain

registration)) Director Removal Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects, and/or, only if the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum in a fair and neutral manner; provided that no individual from the Applicable Decisional Participant, nor the individual who initiated the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition, shall be permitted to participate in the management or moderation of the SO (Supporting Organization)/AC

(Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum.

(v) The Director subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice prior to the convening of and during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) The Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice and the Chair of the Board (or the Vice Chair of the Board if the Chair is the affected Director) are expected to attend the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum in order to address the issues raised in the SO (Supporting Organization)/AC (Advisory Committee; or

Administrative Contact (of a domain registration))
Director Removal Petition Notice.

(vii) If the Applicable Decisional Participant agrees before, during or after the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum that the issue raised in such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice has been resolved, such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice shall be deemed withdrawn and the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process with respect to such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice will be terminated. If an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, deliver to the Secretary an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice. For the avoidance of doubt, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum is not a

decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Applicable Decisional Participant.

(viii) During the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum Period, an additional one or two SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forums may be held at the discretion of the Applicable Decisional Participant or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum and shall promptly post on the Website a public record of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum as well as all written submissions of the Director who is the subject of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Community Forum.

(e) Following the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative

Contact (of a domain registration)) Director Removal Community Forum Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the request of the EC (Empowered Community) Administration, issue a request for comments and recommendations from the community, which shall be delivered to the Secretary for prompt posting on the Website along with a means for comments and recommendations to be submitted to ICANN (Internet Corporation for Assigned Names and Numbers) on behalf of the EC (Empowered Community) Administration. This comment period shall remain open until 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the request for comments and recommendations was posted on the Website (the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website all comments and recommendations received by ICANN (Internet Corporation for Assigned Names and Numbers) during the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period.

(f) Following the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Comment Period (such period, the "**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration))**")

Director Removal Decision Period"), the Applicable Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether the Applicable Decisional Participant has support for the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice within the Applicable Decisional Participant of a three-quarters majority as determined pursuant to the internal procedures of the Applicable Decisional Participant ("**SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice**"). The Applicable Decisional Participant shall, within twenty-four (24) hours of obtaining such support, deliver the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice to the EC (Empowered Community) Administration, the other Decisional Participants and Secretary, and ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the Applicable Decisional Participant, concurrently post on the Website an explanation provided by the Applicable Decisional Participant as to why the Applicable Decisional Participant has chosen to remove the affected Director. Upon the Secretary's receipt of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice from the EC (Empowered Community) Administration, the Director subject to such SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice shall be effectively removed from office and shall no longer be a Director and such Director's vacancy shall be filled in accordance with Section 7.12 of the Bylaws.

(g) If the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice does not obtain the support required by Section 3.2(f) of this Annex D,

the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the failure to obtain such support, deliver to the Secretary an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice. The Director who was subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall remain on the Board and shall not be subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for the remainder of the Director's current term.

(h) If neither an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice nor an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice are received by the Secretary prior to the expiration of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Decision Period, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall automatically terminate and the Director who was subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process shall remain on the Board and shall not be subject to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for the remainder of the Director's current term.

(i) Notwithstanding anything in this Section 3.2 to the contrary, if, for any reason, including due to resignation, death or disability, a Director who is the subject of an SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process ceases to be a Director, the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process for such Director shall automatically terminate without any further action of ICANN (Internet Corporation for Assigned Names and Numbers) or the EC (Empowered Community) Administration.

(j) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition, (ii) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Petition Notice, (iii) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to remove the relevant Director, (iv) SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Process Termination Notice, and (v) other notices the Secretary receives under this Section 3.2.

Section 3.3. BOARD RECALL PROCESS

(a) Subject to the procedures and requirements developed by the applicable Decisional Participant, an individual may submit a petition to a Decisional Participant seeking to remove all Directors (other than the President) at the same time and initiate the Board Recall Process ("**Board Recall**

Petition"), provided that a Board Recall Petition cannot be submitted solely on the basis of a matter decided by a Community IRP if (i) such Community IRP was initiated in connection with the Board's implementation of GAC (Governmental Advisory Committee) Consensus (Consensus) Advice and (ii) the EC (Empowered Community) did not prevail in such Community IRP. Each Board Recall Petition shall include a rationale setting forth the reasons why such individual seeks to recall the Board. The process set forth in this Section 3.3 of this Annex D is referred to herein as the "**Board Recall Process.**"

(b) A Decisional Participant that has received a Board Recall Petition shall either accept or reject such Board Recall Petition during the period beginning on the date the Decisional Participant received the Board Recall Petition ("**Board Recall Petition Date**") and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the date that is the 21st day after the Board Recall Petition Date (the "**Board Recall Petition Period**").

(i) If, in accordance with Section 3.3(b) of this Annex D, a Decisional Participant accepts a Board Recall Petition during the Board Recall Petition Period (such Decisional Participant, the "**Board Recall Petitioning Decisional Participant**"), the Board Recall Petitioning Decisional Participant shall, within twenty-four (24) hours of the expiration of its acceptance of the Board Recall Petition, provide written notice ("**Board Recall Petition Notice**") of such acceptance to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary. The Board Recall Petition Notice shall include the rationale upon which removal of the Board is sought. The Board Recall Process shall thereafter continue pursuant to Section 3.3(c) of this Annex D.

(ii) If the EC (Empowered Community) Administration has not received a Board Recall Petition Notice pursuant to Section 3.3(b)(i) of this Annex D during the Board Recall Petition Period, the Board Recall Process shall automatically be terminated with respect to the Board Recall Petition and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Petition Period, deliver to the Secretary a notice certifying that the Board Recall Process has been terminated with respect to the Board Recall Petition ("**Board Recall Process Termination Notice**").

(c) Following the delivery of a Board Recall Petition Notice to the EC (Empowered Community) Administration by a Board Recall Petitioning Decisional Participant pursuant to Section 3.3(b)(i) of this Annex D, the Board Recall Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Board Recall Petition. The Board Recall Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Board Recall Petitioning Decisional Participant obtains the support of at least two other Decisional Participants (each, a "**Board Recall Supporting Decisional Participant**") during the period beginning upon the expiration of the Board Recall Petition Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 7th day after the expiration of the Board Recall Petition Period (the "**Board Recall Petition Support Period**"), the Board Recall Petitioning Decisional

Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Board Recall Supported Petition**") within twenty-four hours of receiving the support of at least two Board Recall Supporting Decisional Participants. Each Board Recall Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Board Recall Petition. Such Board Recall Supported Petition shall include:

- (A) a supporting rationale in reasonable detail;
- (B) contact information for at least one representative who has been designated by the Board Recall Petitioning Decisional Participant who shall act as a liaison with respect to the Board Recall Supported Petition;
- (C) a statement as to whether or not the Board Recall Petitioning Decisional Participant and/or the Board Recall Supporting Decisional Participants requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Board Recall Community Forum (as defined in Section 3.3(d) of this Annex D) for the community to discuss the Board Recall Supported Petition; and
- (D) a statement as to whether the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants have determined to hold the Board Recall Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Board Recall Process shall thereafter continue for such Board Recall Supported Petition pursuant to Section 3.3(d) of this Annex D.

(ii) The Board Recall Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Petition Support Period, deliver to the Secretary a Board Recall Process Termination Notice if the Board Recall Petitioning Decisional Participant is unable to obtain the support of at least two other Decisional Participants for its Board Recall Petition during the Board Recall Petition Support Period.

(d) If the EC (Empowered Community) Administration receives a Board Recall Supported Petition under Section 3.3(c) of this Annex D during the Board Recall Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested parties may discuss the Board Recall Supported Petition ("**Board Recall Community Forum**").

(i) If a publicly-available conference call has been requested in a Board Recall Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Board Recall Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website. The date and time of any such conference call shall be determined after consultation with the Board regarding the availability of the Directors.

(ii) The Board Recall Community Forum shall be convened and concluded during the period beginning upon the expiration of the Board Recall Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Petition Support Period (**"Board Recall Community Forum Period"**) unless the Board Recall Supported Petition requested that the Board Recall Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Board Recall Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants; provided, that, the date and time of any Board Recall Community Forum shall be determined after consultation with the Board regarding the availability of the Directors. If the Board Recall Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Petition Support Period, the Board Recall Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Board Recall Community Forum shall have at least one face-to-face meeting and may also be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects. If the Board Recall Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of the Board Recall Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Board Recall Community Forum in a fair and neutral manner; provided that no individual from the Board Recall Petitioning Decisional Participant or a Board Recall Supporting Decisional Participant, nor the individual who initiated the Board Recall Petition, shall be permitted to participate in the management or moderation of the Board Recall Community Forum.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Board Recall Supported Petition prior to the convening of and during the Board Recall Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by

ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and the full Board are expected to attend the Board Recall Community Forum in order to address the issues raised in the Board Recall Supported Petition.

(vii) If the Board Recall Petitioning Decisional Participant and each of the Board Recall Supporting Decisional Participants for the Board Recall Supported Petition agree before, during or after the Board Recall Community Forum that the issue raised in such Board Recall Supported Petition has been resolved, such Board Recall Supported Petition shall be deemed withdrawn and the Board Recall Process with respect to such Board Recall Supported Petition will be terminated. If a Board Recall Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Board Recall Supported Petition, deliver to the Secretary a Board Recall Process Termination Notice. For the avoidance of doubt, the Board Recall Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants.

(viii) During the Board Recall Community Forum Period, an additional one or two Board Recall Community Forums may be held at the discretion of the Board Recall Petitioning Decisional Participant and the Board Recall Supporting Decisional Participants, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the

Board Recall Community Forum and shall promptly post on the Website a public record of the Board Recall Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Board Recall Community Forum.

(e) Following the expiration of the Board Recall Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Board Recall Community Forum Period (such period, the "**Board Recall Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Board Recall Supported Petition, (ii) objects to such Board Recall Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to such Board Recall Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to expiration of the Board Recall Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Board Recall Decision Period).

(f) The EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Decision Period, deliver a written notice ("**EC**

(Empowered Community) Board Recall Notice") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 3.3 of this Annex D, the EC (Empowered Community) has resolved to remove all Directors (other than the President) if (after accounting for any adjustments to the below as required by the GAC (Governmental Advisory Committee) Carve-out pursuant to Section 3.6(e) of the Bylaws if an IRP Panel found that, in implementing GAC (Governmental Advisory Committee) Consensus (Consensus) Advice, the Board acted inconsistently with the Articles or Bylaws) a Board Recall Supported Petition (i) is supported by four or more Decisional Participants, and (ii) is not objected to by more than one Decisional Participant.

(g) Upon the Secretary's receipt of an EC (Empowered Community) Board Recall Notice, all Directors (other than the President) shall be effectively removed from office and shall no longer be Directors and such vacancies shall be filled in accordance with Section 7.12 of the Bylaws.

(h) If the Board Recall Supported Petition does not obtain the support required by Section 3.3(f) of this Annex D, the Board Recall Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Board Recall Decision Period, deliver to the Secretary a Board Recall Process Termination Notice. All Directors shall remain on the Board.

(i) If neither an EC (Empowered Community) Board Recall Notice nor a Board Recall Process Termination Notice are received by the Secretary prior to the expiration of the Board Recall Decision Period, the Board Recall Process shall automatically terminate and all Directors shall remain on the Board.

(j) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Board Recall Petition, (ii) Board Recall Petition Notice, (iii) Board

Recall Supported Petition, (iv) EC (Empowered Community) Board Recall Notice and the written explanation provided by the EC (Empowered Community) Administration as to why the EC (Empowered Community) has chosen to recall the Board, (v) Board Recall Process Termination Notice, and (vi) other notices the Secretary receives under this Section 3.3.

Article 4 PROCEDURE FOR EXERCISE OF EC (Empowered Community)'S RIGHTS TO INITIATE MEDIATION, A COMMUNITY IRP OR RECONSIDERATION REQUEST

Section 4.1. MEDIATION INITIATION

(a) If the Board refuses or fails to comply with a decision by the EC (Empowered Community) delivered to the Secretary pursuant to an EC (Empowered Community) Approval Notice, EC (Empowered Community) Rejection Notice, Nominating Committee Director Removal Notice, SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Director Removal Notice or EC (Empowered Community) Board Recall Notice pursuant to and in compliance with Article 1, Article 2 or Article 3 of this Annex D, or rejects or otherwise does not take action that is consistent with a final IFR Recommendation, Special IFR Recommendation, SCWG Creation Recommendation or SCWG Recommendation, as applicable (each, an "**EC (Empowered Community) Decision**"), the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate mediation with the Board in relation to that EC (Empowered Community) Decision as contemplated by Section 4.7 of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration, the Decisional Participants and the Secretary

requesting the initiation of a mediation ("**Mediation Initiation Notice**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any Mediation Initiation Notice.

(b) As soon as practicable after receiving a Mediation Initiation Notice, the EC (Empowered Community) Administration and the Secretary shall initiate mediation, which shall proceed in accordance with Section 4.7 of the Bylaws.

Section 4.2. COMMUNITY IRP

(a) After completion of a mediation under Section 4.7 of the Bylaws, the EC (Empowered Community) Administration representative of any Decisional Participant who supported the exercise by the EC (Empowered Community) of its rights in the applicable EC (Empowered Community) Decision during the applicable decision period may request that the EC (Empowered Community) initiate a Community IRP (a "**Community IRP Petitioning Decisional Participant**"), as contemplated by Section 4.3 of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration and the Decisional Participants requesting the initiation of a Community IRP ("**Community IRP Petition**"). The Community IRP Petitioning Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. The process set forth in this Section 4.2 of this Annex D as it relates to a particular Community IRP Petition is referred to herein as the "**Community IRP Initiation Process**."

(b) Following the delivery of a Community IRP Petition to the EC (Empowered Community) Administration by a Community IRP Petitioning Decisional Participant pursuant to Section 4.2(a) of this Annex D (which delivery date shall be referred to herein as the "**Community IRP Notification Date**"), the Community IRP Petitioning Decisional Participant shall

contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any other Decisional Participants support the Community IRP Petition. The Community IRP Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Community IRP Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Community IRP Supporting Decisional Participant**") during the period beginning on the Community IRP Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the Community IRP Notification Date (the "**Community IRP Petition Support Period**"), the Community IRP Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Community IRP Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Community IRP Supporting Decisional Participant. Each Community IRP Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Community IRP Petition. Such Community IRP Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Community IRP Petitioning Decisional Participant who shall act as a

liaison with respect to the Community IRP Supported Petition;

(C) a statement as to whether or not the Community IRP Petitioning Decisional Participant and/or the Community IRP Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Community IRP Community Forum (as defined in Section 4.2(c) of this Annex D) for the community to discuss the Community IRP Supported Petition;

(D) a statement as to whether the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant have determined to hold the Community IRP Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting;

(E) where the Community IRP Supported Petition relates to a Fundamental Bylaw Amendment, a PDP (Policy Development Process) Fundamental Bylaw Statement if applicable and, if so, the name of the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant;

(F) where the Community IRP Supported Petition relates to an Articles Amendment, a PDP (Policy Development Process) Articles Statement if applicable and, if so, the name of the Articles Amendment PDP (Policy Development Process) Decisional Participant;

(G) where the Community IRP Supported Petition relates to a Standard Bylaw Amendment, a PDP (Policy Development Process) Standard Bylaw Statement if applicable and, if so, the name of the

Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant; and

(H) where the Community IRP Supported Petition relates to a policy recommendation of a cross community working group chartered by more than one Supporting Organization (Supporting Organization) ("**CCWG Policy Recommendation**"), a statement citing the specific CCWG Policy Recommendation and related provision in the Community IRP Supported Petition ("**CCWG Policy Recommendation Statement**"), and, if so, the name of any Supporting Organization (Supporting Organization) that is a Decisional Participant that approved the CCWG Policy Recommendation ("**CCWG Policy Recommendation Decisional Participant**").

The Community IRP Initiation Process shall thereafter continue for such Community IRP Supported Petition pursuant to Section 4.2(c) of this Annex D.

(ii) The Community IRP Initiation Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community IRP Petition Support Period, deliver to the Secretary a notice certifying that the Community IRP Initiation Process has been terminated with respect to the Community IRP included in the Community IRP Petition ("**Community IRP Termination Notice**") if:

(A) no Community IRP Petitioning Decisional Participant is able to obtain the support of at least one other Decisional Participant for its Community IRP Petition during the Community IRP Petition Support Period;

(B) where the Community IRP Supported Petition includes a PDP (Policy Development Process)

Fundamental Bylaw Statement, the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants;

(C)where the Community IRP Supported Petition includes a PDP (Policy Development Process) Articles Statement, the Articles Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants;

(D)where the Community IRP Supported Petition includes a PDP (Policy Development Process) Standard Bylaw Statement, the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants; or

(E) where the Community IRP Supported Petition includes a CCWG Policy Recommendation Statement, the CCWG Policy Recommendation Decisional Participant is not (x) the Community IRP Petitioning Decisional Participant or (y) one of the Community IRP Supporting Decisional Participants.

(c) If the EC (Empowered Community) Administration receives a Community IRP Supported Petition under Section 4.2(b) of this Annex D during the Community IRP Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested third parties may discuss the Community IRP Supported Petition ("**Community IRP Community Forum**").

(i) If a publicly-available conference call has been requested in a Community IRP Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Community IRP Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(ii) The Community IRP Community Forum shall be convened and concluded during the period beginning on the expiration of the Community IRP Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community IRP Petition Support Period ("**Community IRP Community Forum Period**") unless the Community IRP Supported Petition requested that the Community IRP Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Community IRP Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant(s). If the Community IRP Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local

time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community IRP Petition Support Period, the Community IRP Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Community IRP Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects and/or, only if the Community IRP Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, face-to-face meetings. If the Community IRP Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Community IRP Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Community IRP Community Forum in a fair and neutral manner.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional

Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Community IRP Supported Petition prior to the convening of and during the Community IRP Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Community IRP Community Forum in order to discuss the Community IRP Supported Petition.

(vii) If the Community IRP Petitioning Decisional Participant and each of the Community IRP Supporting Decisional Participants for the Community IRP Supported Petition agree before, during or after a Community IRP Community Forum that the issue raised in such Community IRP Supported Petition has been resolved, such Community IRP Supported Petition shall be deemed withdrawn and the Community IRP Initiation Process with respect to such Community IRP Supported Petition will be terminated. If a Community IRP Initiation Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Community IRP Supported Petition, deliver to the Secretary a Community IRP Termination Notice. For the avoidance of doubt, the Community IRP Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Community IRP Petitioning Decisional Participant and the Community IRP Supporting Decisional Participant(s).

(viii) During the Community IRP Community Forum Period, an additional one or two Community IRP Community Forums may be held at the discretion of a Community IRP Petitioning Decisional Participant and a related Community IRP Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Community IRP Community Forum and shall promptly post on the Website a public record of the Community IRP Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Community IRP Community Forum.

(d) Following the expiration of the Community IRP Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Community IRP Community Forum Period (such period, the "**Community IRP Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Community IRP Supported Petition, (ii) objects to such Community IRP Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Community IRP Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community)

Administration of any of the foregoing prior to the expiration of the Community IRP Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Community IRP Decision Period).

(e) The EC (Empowered Community) Administration, within twenty-four (24) hours of the expiration of the Community IRP Decision Period, shall promptly deliver a written notice ("**EC (Empowered Community) Community IRP Initiation Notice**") to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 4.2 of this Annex D, the EC (Empowered Community) has resolved to accept the Community IRP Supported Petition if:

(i) A Community IRP Supported Petition that does not include a PDP (Policy Development Process) Fundamental Bylaw Statement, a PDP (Policy Development Process) Articles Statement, a PDP (Policy Development Process) Standard Bylaw Statement or a CCWG Policy Recommendation Statement (A) is supported by three or more Decisional Participants, and (B) is not objected to by more than one Decisional Participant;

(ii) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Fundamental Bylaw Statement, (B) is supported by three or more Decisional Participants (including the Fundamental Bylaw Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant;

(iii) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Articles Statement, (B) is supported by three or more Decisional Participants (including the Articles Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant;

(iv) A Community IRP Supported Petition that (A) includes a PDP (Policy Development Process) Standard Bylaw Statement, (B) is supported by three or more Decisional Participants (including the Standard Bylaw Amendment PDP (Policy Development Process) Decisional Participant), and (C) is not objected to by more than one Decisional Participant; or

(v) A Community IRP Supported Petition that (A) includes a CCWG Policy Recommendation Statement, (B) is supported by three or more Decisional Participants (including the CCWG Policy Recommendation Decisional Participant), and (C) is not objected to by more than one Decisional Participant.

(f) If the Community IRP Supported Petition does not obtain the support required by Section 4.2(e) of this Annex D, the Community IRP Initiation Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community IRP Decision Period, deliver to the Secretary a Community IRP Termination Notice.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Community IRP Petition, (ii) Community IRP Supported Petition, (iii) EC (Empowered Community) Community IRP Initiation Notice, (iv) Community IRP Termination Notice, (v)

written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (vi) other notices the Secretary receives under this Section 4.2.

Section 4.3. COMMUNITY RECONSIDERATION REQUEST

(a) Any Decisional Participant may request that the EC (Empowered Community) initiate a Reconsideration Request (a "**Community Reconsideration Petitioning Decisional Participant**"), as contemplated by Section 4.2(b) of the Bylaws, by delivering a notice to the EC (Empowered Community) Administration and the other Decisional Participants, with a copy to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website, requesting the review or reconsideration of an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or staff ("**Community Reconsideration Petition**"). A Community Reconsideration Petition must be delivered within 30 days after the occurrence of any of the conditions set forth in Section 4.2(g)(i)(A), (B) or (C) of the Bylaws. In that instance, the Community Reconsideration Petition must be delivered within 30 days from the initial posting of the rationale. The process set forth in this Section 4.3 of this Annex D as it relates to a particular Community Reconsideration Petition is referred to herein as the "**Community Reconsideration Initiation Process**."

(b) Following the delivery of a Community Reconsideration Petition to the EC (Empowered Community) Administration by a Community Reconsideration Petitioning Decisional Participant pursuant to Section 4.3(a) of this Annex D (which delivery date shall be referred to herein as the "**Community Reconsideration Notification Date**"), the Community Reconsideration Petitioning Decisional Participant shall contact the EC (Empowered Community) Administration and the other Decisional Participants to determine whether any

other Decisional Participants support the Community Reconsideration Petition. The Community Reconsideration Petitioning Decisional Participant shall forward such communication to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website.

(i) If the Community Reconsideration Petitioning Decisional Participant obtains the support of at least one other Decisional Participant (a "**Community Reconsideration Supporting Decisional Participant**") during the period beginning on the Community Reconsideration Notification Date and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the Community Reconsideration Notification Date (the "**Community Reconsideration Petition Support Period**"), the Community Reconsideration Petitioning Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary ("**Community Reconsideration Supported Petition**") within twenty-four (24) hours of receiving the support of at least one Community Reconsideration Supporting Decisional Participant. Each Community Reconsideration Supporting Decisional Participant shall provide a written notice to the EC (Empowered Community) Administration, the other Decisional Participants and the Secretary within twenty-four (24) hours of providing support to the Community Reconsideration Petition. Such Community Reconsideration Supported Petition shall include:

(A) a supporting rationale in reasonable detail;

(B) contact information for at least one representative who has been designated by the Community

Reconsideration Petitioning Decisional Participant who shall act as a liaison with respect to the Community Reconsideration Supported Petition;

(C) a statement as to whether or not the Community Reconsideration Petitioning Decisional Participant and/or the Community Reconsideration Supporting Decisional Participant requests that ICANN (Internet Corporation for Assigned Names and Numbers) organize a publicly-available conference call prior to the Community Reconsideration Community Forum (as defined in Section 4.3(c) of this Annex D) for the community to discuss the Community Reconsideration Supported Petition; and

(D) a statement as to whether the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant have determined to hold the Community Reconsideration Community Forum during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

The Community Reconsideration Initiation Process shall thereafter continue for such Community Reconsideration Supported Petition pursuant to Section 4.3(c) of this Annex D.

(ii) The Community Reconsideration Initiation Process shall automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Petition Support Period, deliver to the Secretary a notice certifying that the Community Reconsideration Initiation Process has been terminated with respect to the Reconsideration Request included in the Community Reconsideration Petition ("**Community Reconsideration Termination Notice**") if the Community Reconsideration Petitioning

Decisional Participant is unable to obtain the support of at least one other Decisional Participant for its Community Reconsideration Petition during the Community Reconsideration Petition Support Period.

(c) If the EC (Empowered Community) Administration receives a Community Reconsideration Supported Petition under Section 4.3(b) of this Annex D during the Community Reconsideration Petition Support Period, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, convene a forum at which the Decisional Participants and interested third parties may discuss the Community Reconsideration Supported Petition ("**Community Reconsideration Community Forum**").

(i) If a publicly-available conference call has been requested in a Community Reconsideration Supported Petition, ICANN (Internet Corporation for Assigned Names and Numbers) shall, at the direction of the EC (Empowered Community) Administration, schedule such call prior to any Community Reconsideration Community Forum, and inform the Decisional Participants of the date, time and participation methods of such conference call, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(ii) The Community Reconsideration Community Forum shall be convened and concluded during the period beginning on the expiration of the Community Reconsideration Petition Support Period and ending at 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community Reconsideration Petition Support Period ("**Community Reconsideration Forum Period**") unless the

Community Reconsideration Supported Petition requested that the Community Reconsideration Community Forum be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, in which case the Community Reconsideration Community Forum shall be held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the date and at the time determined by ICANN (Internet Corporation for Assigned Names and Numbers), taking into account any date and/or time requested by the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant(s). If the Community Reconsideration Community Forum is held during the next scheduled ICANN (Internet Corporation for Assigned Names and Numbers) public meeting and that public meeting is held after 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 30th day after the expiration of the Community Reconsideration Petition Support Period, the Community Reconsideration Community Forum Period shall expire at 11:59 p.m., local time of the city hosting such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting on the official last day of such ICANN (Internet Corporation for Assigned Names and Numbers) public meeting.

(iii) The Community Reconsideration Community Forum shall be conducted via remote participation methods such as teleconference, web-based meeting room and/or such other form of remote participation as the EC (Empowered Community) Administration selects and/or, only if the Community Reconsideration Community Forum is held during an ICANN (Internet Corporation for Assigned Names and Numbers) public

meeting, face-to-face meetings. If the Community Reconsideration Community Forum will not be held during an ICANN (Internet Corporation for Assigned Names and Numbers) public meeting, the EC (Empowered Community) Administration shall promptly inform ICANN (Internet Corporation for Assigned Names and Numbers) of the date, time and participation methods of such Community Reconsideration Community Forum, which ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post on the Website.

(iv) The EC (Empowered Community) Administration shall manage and moderate the Community Reconsideration Community Forum in a fair and neutral manner.

(v) ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) may deliver to the EC (Empowered Community) Administration in writing its views and questions on the Community Reconsideration Supported Petition prior to the convening of and during the Community Reconsideration Community Forum. Any written materials delivered to the EC (Empowered Community) Administration shall also be delivered to the Secretary for prompt posting on the Website in a manner deemed appropriate by ICANN (Internet Corporation for Assigned Names and Numbers).

(vi) ICANN (Internet Corporation for Assigned Names and Numbers) staff and Directors representing the Board are expected to attend the Community Reconsideration Community Forum in order to discuss the Community Reconsideration Supported Petition.

(vii) If the Community Reconsideration Petitioning Decisional Participant and each of the Community Reconsideration Supporting Decisional Participants for a Community Reconsideration Supported Petition agree before, during or after the Community Reconsideration Community Forum that the issue raised in such Community Reconsideration Supported Petition has been resolved, such Community Reconsideration Supported Petition shall be deemed withdrawn and the Community Reconsideration Initiation Process with respect to such Community Reconsideration Supported Petition will be terminated. If a Community Reconsideration Initiation Process is terminated, the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the resolution of the issue raised in the Community Reconsideration Supported Petition, deliver to the Secretary a Community Reconsideration Termination Notice. For the avoidance of doubt, the Community Reconsideration Community Forum is not a decisional body and the foregoing resolution process shall be handled pursuant to the internal procedures of the Community Reconsideration Petitioning Decisional Participant and the Community Reconsideration Supporting Decisional Participant(s).

(viii) During the Community Reconsideration Community Forum Period, an additional one or two Community Reconsideration Community Forums may be held at the discretion of a Community Reconsideration Petitioning Decisional Participant and a related Community Reconsideration Supporting Decisional Participant, or the EC (Empowered Community) Administration.

(ix) ICANN (Internet Corporation for Assigned Names and Numbers) will provide support services for the Community Reconsideration Community Forum and

shall promptly post on the Website a public record of the Community Reconsideration Community Forum as well as all written submissions of ICANN (Internet Corporation for Assigned Names and Numbers) and any Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee) (including Decisional Participants) related to the Community Reconsideration Community Forum.

(d) Following the expiration of the Community Reconsideration Community Forum Period, at any time or date prior to 11:59 p.m. (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) on the 21st day after the expiration of the Community Reconsideration Community Forum Period (such period, the "**Community Reconsideration Decision Period**"), each Decisional Participant shall inform the EC (Empowered Community) Administration in writing as to whether such Decisional Participant (i) supports such Community Reconsideration Supported Petition, (ii) objects to such Community Reconsideration Supported Petition or (iii) has determined to abstain from the matter (which shall not count as supporting or objecting to the Community Reconsideration Supported Petition), and each Decisional Participant shall forward such notice to the Secretary for ICANN (Internet Corporation for Assigned Names and Numbers) to promptly post on the Website. If a Decisional Participant does not inform the EC (Empowered Community) Administration of any of the foregoing prior to the expiration of the Community Reconsideration Decision Period, the Decisional Participant shall be deemed to have abstained from the matter (even if such Decisional Participant informs the EC (Empowered Community) Administration of its support or objection following the expiration of the Community Reconsideration Decision Period).

(e) If (i) three or more Decisional Participants support the Community Reconsideration Supported Petition and (ii) no more than one Decisional Participant objects to the Community Reconsideration Supported Petition, then the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Decision Period, deliver a notice to the Secretary certifying that, pursuant to and in compliance with the procedures and requirements of this Section 4.3 of this Annex D, the EC (Empowered Community) has resolved to accept the Community Reconsideration Supported Petition ("**EC (Empowered Community) Reconsideration Initiation Notice**"). The Reconsideration Request shall then proceed in accordance with Section 4.2 of the Bylaws.

(f) If the Community Reconsideration Supported Petition does not obtain the support required by Section 4.3(e) of this Annex D, the Community Reconsideration Initiation Process will automatically be terminated and the EC (Empowered Community) Administration shall, within twenty-four (24) hours of the expiration of the Community Reconsideration Decision Period, deliver to the Secretary a Community Reconsideration Termination Notice.

(g) ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post to the Website any (i) Community Reconsideration Petition, (ii) Community Reconsideration Supported Petition, (iii) EC (Empowered Community) Reconsideration Initiation Notice, (iv) Community Reconsideration Termination Notice, (v) written explanation provided by the EC (Empowered Community) Administration related to any of the foregoing, and (vi) other notices the Secretary receives under this Section 4.3.

Annex E: Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles

1. Principles

The caretaker ICANN (Internet Corporation for Assigned Names and Numbers) budget (the "**Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget**") is defined as an annual operating plan and budget that is established by the CFO in accordance with the following principles (the "**Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles**"):

- a. It is based on then-current ICANN (Internet Corporation for Assigned Names and Numbers) operations;
- b. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to "take good care" and not expose itself to additional enterprise risk(s) as a result of the rejection of an ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the EC (Empowered Community) pursuant to the Bylaws;
- c. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to react to emergency situations in a fashion that preserves the continuation of its operations;
- d. It allows ICANN (Internet Corporation for Assigned Names and Numbers) to abide by its existing obligations (including Articles of Incorporation, Bylaws, and contracts, as well as those imposed under law);
- e. It enables ICANN (Internet Corporation for Assigned Names and Numbers) to avoid waste of its resources during the rejection period (i.e., the period between when an ICANN (Internet Corporation for Assigned Names and Numbers) Budget is rejected by the EC (Empowered

Community) pursuant to the Bylaws and when an ICANN (Internet Corporation for Assigned Names and Numbers) Budget becomes effective in accordance with the Bylaws) or immediately thereafter, by being able to continue activities during the rejection period that would otherwise need to be restarted at a materially incremental cost; and

- f. Notwithstanding any other principle listed above, it prevents ICANN (Internet Corporation for Assigned Names and Numbers) from initiating activities that remains subject to community consideration (or for which that community consideration has not concluded) with respect to the applicable ICANN (Internet Corporation for Assigned Names and Numbers) Budget, including without limitation, preventing implementation of any expenditure or undertaking any action that was the subject of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget that was rejected by the EC (Empowered Community) that triggered the need for the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

1. Examples

Below is a non-exhaustive list of examples, to assist with the interpretation of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles, of what a Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget would logically include:

- i. the functioning of the EC (Empowered Community), the Decisional Participants, and any Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) that are not Decisional Participants;

- ii. the functioning of all redress mechanisms, including without limitation the office of the Ombudsman, the IRP, and mediation;
- iii. employment of staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) across all locations, including all related compensation, benefits, social security, pension, and other employment costs;
- iv. hiring staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) in the normal course of business;
- v. necessary or time-sensitive travel costs for staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) or vendors as needed in the normal course of business;
- vi. operating all existing ICANN (Internet Corporation for Assigned Names and Numbers) offices, and continuing to assume obligations relative to rent, utilities, maintenance, and similar matters;
- vii. contracting with vendors as needed in the normal course of business;
- viii. conducting ICANN (Internet Corporation for Assigned Names and Numbers) meetings and ICANN (Internet Corporation for Assigned Names and Numbers) intercessional meetings previously contemplated; and

ix. participating in engagement activities in furtherance of the approved Strategic Plan.

b. Below is a non-limitative list of examples, to assist with the interpretation of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles, of what a Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget would logically exclude:

i. hiring staff (i.e., employees and individual long term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors) or entering into new agreements in relation to activities that are the subject of the rejection of the ICANN (Internet Corporation for Assigned Names and Numbers) Budget by the EC (Empowered Community) pursuant to the Bylaws, unless excluding these actions would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

ii. in the normal course of business, travel not deemed indispensable during the rejection period, unless the lack of travel would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

iii. entering into new agreements in relation to opening or operating new ICANN (Internet Corporation for Assigned Names and Numbers) locations/offices, unless the lack of commitment would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles;

iv. entering into new agreements with governments (or their affiliates), unless the lack of commitment would violate any of the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget Principles; and

v. the proposed expenditure that was the basis for the rejection by the EC (Empowered Community) that triggered the need for the Caretaker ICANN (Internet Corporation for Assigned Names and Numbers) Budget.

Annex F: Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles

1. Principles

The caretaker IANA (Internet Assigned Numbers Authority) Budget (the "**Caretaker IANA (Internet Assigned Numbers Authority) Budget**") is defined as an annual operating plan and budget that is established by the CFO in accordance with the following principles (the "**Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles**"):

- a. It is based on then-current operations of the IANA (Internet Assigned Numbers Authority) functions;
- b. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to "take good care" and not expose itself to additional enterprise risk(s) as a result of the rejection of an IANA (Internet Assigned Numbers Authority) Budget by the EC (Empowered Community) pursuant to the Bylaws;
- c. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to react to emergency situations in a fashion that preserves the continuation of its operations;
- d. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA

(Internet Assigned Numbers Authority) functions, to abide by its existing obligations (including Articles of Incorporation, Bylaws, and contracts, as well as those imposed under law);

- e. It allows ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, to avoid waste of its resources during the rejection period (i.e., the period between when an IANA (Internet Assigned Numbers Authority) Budget is rejected by the EC (Empowered Community) pursuant to the Bylaws and when an IANA (Internet Assigned Numbers Authority) Budget becomes effective in accordance with the Bylaws) or immediately thereafter, by being able to continue activities during the rejection period that would have otherwise need to be restarted at an incremental cost; and
- f. Notwithstanding any other principle listed above, it prevents ICANN (Internet Corporation for Assigned Names and Numbers), in its responsibility to fund the operations of the IANA (Internet Assigned Numbers Authority) functions, from initiating activities that remain subject to community consideration (or for which that community consultation has not concluded) with respect to the applicable IANA (Internet Assigned Numbers Authority) Budget, including without limitation, preventing implementation of any expenditure or undertaking any action that was the subject of the IANA (Internet Assigned Numbers Authority) Budget that was rejected by the EC (Empowered Community) that triggered the need for the Caretaker IANA (Internet Assigned Numbers Authority) Budget.

1. Examples

a. Below is a non-exhaustive list of examples, to assist with the interpretation of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles, of what a Caretaker IANA (Internet Assigned Numbers Authority) Budget would logically include:

i. employment of staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) across all locations, including all related compensation, benefits, social security, pension, and other employment costs;

ii. hiring staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) in the normal course of business;

iii. necessary or time-sensitive travel costs for staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) or vendors as needed in the normal course of business;

iv. operating all existing offices used in the performance of the IANA (Internet Assigned Numbers Authority) functions, and continuing to assume obligations relative to rent, utilities, maintenance, and similar matters;

v. contracting with vendors as needed in the normal course of business;

vi. participating in meetings and conferences previously contemplated;

vii. participating in engagement activities with ICANN (Internet Corporation for Assigned Names and Numbers)'s Customer Standing Committee or the customers of the IANA (Internet Assigned Numbers Authority) functions;

viii. fulfilling obligations (including financial obligations under agreements and memoranda of understanding to which ICANN (Internet Corporation for Assigned Names and Numbers) or its affiliates is a party that relate to the IANA (Internet Assigned Numbers Authority) functions; and

ix. participating in engagement activities in furtherance of the approved Strategic Plan.

b. Below is a non-limitative list of examples, to assist with the interpretation of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles, of what a Caretaker IANA (Internet Assigned Numbers Authority) Budget would logically exclude:

i. hiring staff (i.e., employees and individual long term paid contractors serving in locations where the entity or entities performing the IANA (Internet Assigned Numbers Authority) functions does not have the mechanisms to employ such contractors) or entering into new agreements in relation to activities that are the subject of the rejection of the IANA (Internet Assigned Numbers Authority) Budget by the EC (Empowered Community) pursuant to the Bylaws, unless excluding these actions would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

ii. in the normal course of business, travel not deemed indispensable during the rejection period, unless the lack of

travel would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

iii. entering into new agreements in relation to opening or operating new locations/offices where the IANA (Internet Assigned Numbers Authority) functions shall be performed, unless the lack of commitment would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles;

iv. entering into new agreements with governments (or their affiliates), unless the lack of commitment would violate any of the Caretaker IANA (Internet Assigned Numbers Authority) Budget Principles; and

v. the proposed expenditure that was the basis for the rejection by the EC (Empowered Community) that triggered the need for the Caretaker IANA (Internet Assigned Numbers Authority) Budget.

ANNEX G-1

The topics, issues, policies, procedures and principles referenced in Section 1.1(a)(i) with respect to gTLD (generic Top Level Domain) registrars are:

- issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet, registrar services, registry services, or the DNS (Domain Name System);
- functional and performance specifications for the provision of registrar services;
- registrar policies reasonably necessary to implement Consensus (Consensus) Policies relating to a gTLD (generic Top Level Domain) registry;

- resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names, but including where such policies take into account use of the domain names); or
- restrictions on cross-ownership of registry operators and registrars or resellers and regulations and restrictions with respect to registrar and registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or reseller are affiliated.

Examples of the above include, without limitation:

- principles for allocation of registered names in a TLD (Top Level Domain) (e.g., first-come/first-served, timely renewal, holding period after expiration);
- prohibitions on warehousing of or speculation in domain names by registries or registrars;
- reservation of registered names in a TLD (Top Level Domain) that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS (Domain Name System) or the Internet (e.g., establishment of reservations of names from registration);
- maintenance of and access to accurate and up-to-date information concerning registered names and name servers;
- procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility among continuing registrars of the registered names

sponsored in a TLD (Top Level Domain) by a registrar losing accreditation; and

- the transfer of registration data upon a change in registrar sponsoring one or more registered names.

ANNEX G-2

The topics, issues, policies, procedures and principles referenced in Section 1.1(a)(i) with respect to gTLD (generic Top Level Domain) registries are:

- issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or DNS (Domain Name System);
- functional and performance specifications for the provision of registry services;
- security and stability of the registry database for a TLD (Top Level Domain);
- registry policies reasonably necessary to implement Consensus (Consensus) Policies relating to registry operations or registrars;
- resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or
- restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.

Examples of the above include, without limitation:

- principles for allocation of registered names in a TLD (Top Level Domain) (e.g., first-come/first-served, timely renewal, holding period after expiration);
- prohibitions on warehousing of or speculation in domain names by registries or registrars;
- reservation of registered names in the TLD (Top Level Domain) that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS (Domain Name System) or the Internet (e.g., establishment of reservations of names from registration);
- maintenance of and access to accurate and up-to-date information concerning domain name registrations; and
- procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD (Top Level Domain) affected by such a suspension or termination.

[1] When "1 October 2016" is used, that signals that the date that will be used is the effective date of the Bylaws.

EXHIBIT C-15



CONTENTION SET STATUS

[Download Initial String Contention Re](#)
[Download Current Contention Set Im](#)

Search **Reset**

You can enter date, eg. 2014-05-21, 21 May 2014 or 05/21/2014

FILTER RESULTS

Apply Filters

Reset All

This page reflects the current string contention sets as of the most recent update (**04 May 2021**) to this page. String contention sets will be updated from time to time to reflect any changes. Please note that the current status of string contention sets could change due to changes to application status as a result of withdrawals, evaluation results, dispute resolution proceedings, contention resolution processes, or the potential impact of ICANN accountability mechanisms. Except for the application statuses "Withdrawn" and "Delegated", application statuses are not final.

A change in application status or update to a contention set is intended to inform the applicants and the community of an application's current status. A change or update is not a definite indication that an application may proceed to another phase of the program. For more information including definitions of application statuses see the [applicant advisory \(http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en\)](http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en).

	Set	Set Number
	Name (/applicationstatus/stringcontentionstatus.contentiongrid.columns:sort/name)	(/applicationstatus/stringcontentionstatus.contentiongrid.columns:sc
▶	View Image (/applicationstatus/stringcontentionstatus.viewcontentionsetimage) 网站 (xn--5tzm5g) ge)	9
▶	View Image (/applicationstatus/stringcontentionstatus.viewcontentionsetimage) CAM ge)	24
▶	View Image (/applicationstatus/stringcontentionstatus.viewcontentionsetimage) GMBH ge)	30
▶	View Image (/applicationstatus/stringcontentionstatus.viewcontentionsetimage) APP ge)	39
▶	View Image (/applicationstatus/stringcontentionstatus.viewcontentionsetimage) MOVIE ge)	131
▶	View Image (/applicationstatus/stringcontentionstatus.viewcontentionsetimage) WEBSITE ge)	133

▶	Set Name (/applicationstatus/stringcontentionstatus.contentiongrid.columns:sort/name),	Set Number /applicationstatus/stringcontentionstatus.contentiongrid.columns:sc
▼	View Image /applicationstatus/stringcontentionstatus:viewcontentionsetimage	233
WEB / WEBS		
539	WEBS 1-1033-22687 (Withdrawn) , (https://gtdresult.icann.org/applicationstatus/applicationdetails/1561)	Vistaprint Limited
632	WEB 1-1296-36138 (In Contracting) , (https://gtdresult.icann.org/applicationstatus/applicationdetails/1053)	NU DOT CO LLC
868	WEB 1-1681-58699 (Will Not Proceed) , (https://gtdresult.icann.org/applicationstatus/applicationdetails/520)	Charleston Road Registry I
946	WEB 1-1009-97005 (Withdrawn) , (https://gtdresult.icann.org/applicationstatus/applicationdetails/1596)	Web.com Group, Inc.
986	WEB 1-956-26846 (Will Not Proceed) , (https://gtdresult.icann.org/applicationstatus/applicationdetails/1663)	DotWeb Inc.
1218	WEB 1-1527-54849 (Will Not Proceed) , (https://gtdresult.icann.org/applicationstatus/applicationdetails/692)	Ruby Glen, LLC
1360	WEB 1-1013-6638 (Will Not Proceed) , (https://gtdresult.icann.org/applicationstatus/applicationdetails/292)	Afilias Domains No. 3 Limite
1717	WEBS 1-1033-73917 (In Contracting) , (https://gtdresult.icann.org/applicationstatus/applicationdetails/1560)	Vistaprint Limited
1750	WEB 1-1013-77165 (Will Not Proceed) , (https://gtdresult.icann.org/applicationstatus/applicationdetails/542)	Schlund Technologies Gmt

Displaying 1 - 7 of 7

Notes:

1. **On Hold:** One or more applications in the contention set may have a status of On Hold. Applications in the set cannot proceed to New gTLD Program Auctions until the set is no longer on hold.
2. Winning applicant results are preliminary until the winning price is received in full.
3. Per the 4 February 2018 Board [resolution \(https://www.icann.org/resources/board-material/resolutions-2018-02-04-en#2.c\)](https://www.icann.org/resources/board-material/resolutions-2018-02-04-en#2.c), the Board directed the President and CEO that the applications for .CORP, .HOME, and .MAIL should not proceed in the New gTLD Program. As the applications for the strings .CORP, .HOME, and .MAIL were not approved to proceed in the New gTLD Program, contention no longer exists, and the contention set status has been updated to "Resolved".

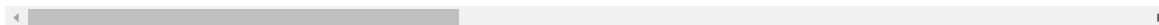


EXHIBIT C-16



New gTLD Application Submitted to ICANN by: NU DOT CO LLC

String: WEB

Originally Posted: 13 June 2012

Application ID: 1-1296-36138

Applicant Information

1. Full legal name

NU DOT CO LLC

2. Address of the principal place of business

Contact Information
Redacted

3. Phone number

Contact Information Redacted

4. Fax number

Contact Information Redacted

5. If applicable, website or URL

Primary Contact

6(a). Name

Jose Ignacio Rasco

6(b). Title

Manager

6(c). Address

6(d). Phone Number

Contact Information Redacted

6(e). Fax Number

6(f). Email Address

Contact Information Redacted

Secondary Contact

7(a). Name

Mr. Nicolai Bezsonoff

7(b). Title

Manager

7(c). Address

7(d). Phone Number

Contact Information Redacted

7(e). Fax Number

7(f). Email Address

Contact Information Redacted

Proof of Legal Establishment

8(a). Legal form of the Applicant

Limited liability company

8(b). State the specific national or other jurisdiction that defines the type of entity identified in 8(a).

NU DOTCO LLC is a UNITED STATES entity, registered in the STATE of DELAWARE as a limited liability company.

8(c). Attach evidence of the applicant's establishment.

Attachments are not displayed on this form.

9(a). If applying company is publicly traded, provide the exchange and symbol.

9(b). If the applying entity is a subsidiary, provide the parent company.

9(c). If the applying entity is a joint venture, list all joint venture partners.

Applicant Background

11(a). Name(s) and position(s) of all directors

Jose Ignacio Rasco III	Manager
Juan Diego Calle	Manager
Nicolai Bezsonoff	Manager

11(b). Name(s) and position(s) of all officers and partners

Jose Ignacio Rasco III	CFO
Juan Diego Calle	CEO
Nicolai Bezsonoff	COO

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Domain Marketing Holdings, LLC	Not Applicable
NUCO LP, LLC	Not Applicable

11(d). For an applying entity that does not have directors, officers, partners, or shareholders: Name(s) and position(s) of all individuals having legal or executive responsibility

Applied-for gTLD string

13. Provide the applied-for gTLD string. If an IDN, provide the U-label.

WEB

14(a). If an IDN, provide the A-label (beginning with "xn--").

14(b). If an IDN, provide the meaning or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.

14(c). If an IDN, provide the language of the label (in English).

14(c). If an IDN, provide the language of the label (as referenced by ISO-639-1).

14(d). If an IDN, provide the script of the label (in English).

14(d). If an IDN, provide the script of the label (as referenced by ISO 15924).

14(e). If an IDN, list all code points contained in the U-label according to Unicode form.

15(a). If an IDN, Attach IDN Tables for the proposed registry.

Attachments are not displayed on this form.

15(b). Describe the process used for development of the IDN tables submitted, including consultations and sources used.

15(c). List any variant strings to the applied-for gTLD string according to the relevant IDN tables.

16. Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.

NU DOTCO, LLC (“NU.CO”) foresees no known rendering issues in connection with the proposed .LAW TLD which it is seeking to apply for as a gTLD. This answer is based upon consultation with NU.CO’s backend provider, Neustar, which has successfully launched a number of new gTLDs over the last decade. In reaching this determination, the following data points were analyzed:

- ICANN’s Security Stability Advisory Committee (SSAC) entitled Alternative TLD Name Systems and Roots: Conflict, Control and Consequences (SAC009);
- IAB - RFC3696 “Application Techniques for Checking and Transformation of Names”
- Known software issues which Neustar has encountered during the last decade launching new gTLDs;
- Character type and length;
- ICANN supplemental notes to Question 16; and
- ICANN’s presentation during its Costa Rica regional meeting on TLD Universal Acceptance;

17. (OPTIONAL) Provide a representation of the label according to the International Phonetic Alphabet (<http://www.langsci.ucl.ac.uk/ipa/>).

Mission/Purpose

18(a). Describe the mission/purpose of your proposed gTLD.

18.1 Mission/purpose of .WEB

The mission of .WEB is to provide the internet community at-large with an alternative “home domain” for their online presence. We envision that through strategic marketing campaigns designed to brand the domain, it will become a premium online namespace for a variety of businesses and websites. This general domain will provide new registrants with better, more relevant alternatives to the limited options remaining for current commercial TLD names.

18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

18.2 How will .WEB benefit registrants, Internet users, and others?

.WEB seeks to offer registrants and the broader internet community, with a reliable, trusted, and secure top level domain (TLD). Congestion in the current availability of commercial TLD names fundamentally advantages older incumbent players. Providing access to additional high-value second level domain names (i.e. shorter and more memorable) will provide an opportunity for new entrants to compete effectively for internet users’ finite attention. The domain’s coherent and consistent branding will assist registrants in developing meaningful emotional connection with users, allowing them to further differentiate themselves as premium destinations. These marketing efforts along with the initial adoption of key industry players, should reinforce the implicit attribution of “cutting-edge” and “innovativeness” upon its registrants. Prospective users benefit from the long-term commitment of a proven executive team that has a track-record of building and successfully marketing affinity TLD’s (e.g., .CO targeting innovative businesses and entrepreneurs).

The demand for having an online presence continues to grow worldwide, especially as more people and

businesses become active internet users, enjoying the increases in productivity and promotional effectiveness that the internet offers. A clear example of this is the number of worldwide internet users, which has grown at an average 18% annual rate over the past decade, and domain registrations which have experienced similar adoption rates having grown from approximately 25mm in 2000 to over 225mm today.

In particular for small businesses and entrepreneurs, the Internet offers an incredibly useful way to promote themselves to a wider audience, both locally and globally. Moreover, it allows them to cost-effective offer their products and services directly to consumers, leveling the playing field with larger and more established competitors. A number of new and innovative business models have been established that were not possible prior to the Internet, creating substantial value for society.

However, until a few years ago it was difficult and costly for individuals and small businesses to establish an internet presence. This has changed as prices decreased dramatically and offerings became more accessible and intuitive. This is the result of having many retailers (i.e. registrars or resellers) that compete amongst each other on price, along with product and service differentiation. Differentiation has mainly centered around higher value-add services ancillary to the domain registration itself, such as hosting, web-site builders, SSL, e-mail, etc. The basic product (a domain) has not changed much, and until now, there have been few feasible alternatives to the commercial TLDs. The proposed new TLDs will provide users with more relevant and customized options. Just as ICANN opened up the market for the distribution and registration of domains and created the Registrar industry, which ultimately benefitted hundreds of millions of people and businesses worldwide, we expect that the introduction of new TLDs will yield similar benefits.

The experienced team behind this application initially launched and currently operates the .CO ccTLD. The intention is for .WEB to be added to .CO's product portfolio, where it can benefit from economies of scale along with the firm's experience and expertise in marketing and branding TLD properties. Their successful track record proves that properly branded affinity domains can help sites form deeper emotional connections with their users, providing significant value-add. The .CO re-launch is a great illustration of how a new option in TLDs can address the unmet needs an affinity group (e.g., small businesses and start ups), and we continue to firmly believe that the new .WEB domain will provide better, more relevant solutions for registrants .

Since its launch, .CO's marketing has primarily focused on developing a worldwide ecosystem of innovative small businesses and entrepreneurs. To date, the .CO registry, .CO Internet S.A.S, has reached close to 1.3 million domains under management, with more than one million individual new Registrations in the first year alone and a renewal rate for domains purchased during launch of nearly 70% and a current average renewal rate of 65%. The renewal rate is one of the highest amongst the industry and especially high considering it has not yet reached the multiple year expiration dates, where it's expected to climb even higher. In addition, .CO has become the standard secondary option to .COM for the leading global registrars, having the most conversions when presented with a non-.COM option. Further, .CO has secured a strong position with the tech startup community by securing such high profile users as Twitter (t.co), Google (g.co), tech influencers like Angel list (angel.co) and 500 Startups (500.co), and entrepreneurship organizations like Startup America (s.co).

.CO has differentiated itself from other existing TLDs by combining innovative branding with the highest standards in trademark protection, unprecedented marketing campaigns, and pro active security monitoring. We plan to implement a very similar strategy for .WEB in its launch, operation, promotion and growth.

We plan to target a similar community of entrepreneurs, startups, and progressive corporate entities that are looking for an online presence with a suitable domain name. We anticipate the addressable community will continue to grow as traditional businesses choose to launch an online presence for their pre-existing operations and as entrepreneurs launch new start-ups. The domain's marketing strategy will utilize a 3 pillar framework, similar to that used with .CO:

- Awareness: We plan to launch marketing campaigns to both the small businesses and entrepreneurs promoting .WEB via a combination of:
 - o Media placements online and offline
 - o Social media campaigns
 - o Events
 - o Sponsorships
 - o Endorsements
 - o PR efforts
 - o Direct marketing

o Channel marketing

Usage: We plan to foster the community of users of .WEB via a combination community engagement and outreach, use-case development and direct marketing to base.

- Distribution: The distribution will be done through the existing ICANN accredited registrar channel and will include marketing at the point of sale, packages and bundles, campaigns, etc.

The marketing plans will evolve depending on market conditions, but using .CO as an example, we implemented an awareness and branding strategy that included the creation of a brand identity and logo; mass media placements including 2 super bowl commercials with one of our partners plus many TV placements; billboards and other outdoors campaigns; several online media campaigns including networks, re-targeting and videos; ongoing Twitter, Facebook engagements; sponsorship and presence in a variety of events for TMs (INTA), Tech startups (SxSW, Web 2.0, Internetweek, etc.), Startups (Task Rabbit TR.co), Community (ICANN, LACTLD, etc.), etc. We also implemented for .CO a strong usage promotion of the domain by creating and fostering a community of .CO users and case studies. We achieved this through a combination of events, sponsorships, and partnerships with different entities like Angel.co, 500.co, Startup America (s.co), founders institute (fi.co), etc. We also cultivated many case studies of successful .CO users, remaining in close contact with them. Finally, we implemented a rigorous channel marketing and sales plan that included marketing placements at the point of purchase plus co-marketing and community outreach.

While we do plan to follow a similar strategy to achieve widespread awareness, usage and distribution, the budget and actual placements for promoting .WEB will be scaled down accordingly, as neither its volume of registrations or revenues is expected to be in line with that of .CO.

By launching the .WEB domain we expect to provide more descriptive/ relevant options for end users, including access to desirable second level domain names which are unavailable or occupied by current general TLD's. As illustrated with .CO, the rapid growth to 1.3 million domains is evidence of pent up demand in the marketplace for good, descriptive domain names. We expect that our marketing strategies will result in a new branded and available option that will emotionally connect with potential users and allow them to differentiate themselves through the use of a branded premium domain.

We will also follow the same ICANN rules and distribution methods of major gTLDs thereby ensuring Registrars and Resellers do not have to change their systems to distribute the .WEB domain. As our systems are already integrated with largest registrars in the world and we have implemented industry best practices, the transition to delegation and launch should be seamless to the registrar channel as well as consumers.

We will also implement a thick whois and adopt any ICANN recommendations or requirements in the future. In order to protect the privacy of our users, we will allow the use of Privacy or Proxy registrations by reputable registrars that comply with applicable policies specified by ICANN. We find this service is highly valuable for registrants that want to ensure their information is not available online and would like to maintain a higher level privacy.

18(c). What operating rules will you adopt to eliminate or minimize social costs?

18.3 .WEB operating rules to benefit consumers

We plan to follow all ICANN policies, including the best practices and recommendations for gTLDs. This will allow us to ensure end users, have an easy way to register/purchase, administer, and use their domains. Adopting these policies will also prevent malicious behavior by third parties and ensure a smooth operation of the domain. The plans for the launch will be similar to the launch process used in .CO, which included:

- Gradual Offering Plan: The .CO launch included a very comprehensive gradual opening plan that both protected trademarks and provided transparency to end users. The launch was lauded by ICANN for its comprehensiveness and management. For the launch of .WEB we will follow ICANN's policies especially as it relates to the Trademark Clearinghouse which was similar to the process we used for .CO:

-
o Sunrise: Provide a period of a few weeks to allow the TM and IP community to register their .WEB domains prior to the opening to the public. Trademark validations will be done by the Trademark Clearinghouse or as specified by ICANN in their policies. If there are multiple validated

applications, these would go to auction and allocated based on these results.

o Landrush: Provide a period of a few weeks to allow domain investors and others that are interested in premium domains to apply for these domains. Once the period of the Landrush phase is over, a process to check the applications will determine if these were unique or if there were multiple applicants. If single applicants, then the domain is awarded at that time. If multiple applicants then the domain would go to an auction in which all applicants would be able to participate. For .CO this process included close to 30,000 applications and the resulting auctions were managed by Pool.com. The process was very successful managing to allocate very efficiently domains according to their perceived value by applicants and bidders at the resulting auctions.

- General Availability: For .CO we had 100k registrations in the first 10 minutes and we didn't have a single issue nor service degradation through the launch or afterwards. We achieved this through a combination of strong planning between our partners, especially Neustar our back-end provider; communication with our Registrars prior and during the launch in a very structured way; strong infrastructure planning and provisioning; and effective load, contingency, and disaster recovery planning. We plan to use similar methods for the launch of .WEB.

o First come first serve during GA and afterwards, which we believe is the best mechanism to ensure a fair allocation of domains once the domain has been launched.

o Use of UDRP and any other best-practices in rights protection mechanisms

o Highly managed General Availability launch

- Premium Domains: We will keep some domains for premium sales and these will be restricted prior to the Gradual Offering Plan begins, but can be applied for during the Sunrise phase. These premium domains will be brokered or sold via auction directly or through an accredited 3rd party. With .CO we used this mechanism as a way to allocate high value domains and also to promote the usage of the domain by high profile companies including Twitter with t.co, Google with g.co, Startup America with s.co, as well as a myriad of smaller startups and other endorsements.

Community-based Designation

19. Is the application for a community-based TLD?

No

20(a). Provide the name and full description of the community that the applicant is committing to serve.

20(b). Explain the applicant's relationship to the community identified in 20(a).

20(c). Provide a description of the community-based purpose of the applied-for gTLD.

20(d). Explain the relationship between the applied-for gTLD string and the community identified in 20(a).

20(e). Provide a description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD.

20(f). Attach any written endorsements from institutions/groups representative of the community identified in 20(a).

Attachments are not displayed on this form.

Geographic Names

21(a). Is the application for a geographic name?

No

Protection of Geographic Names

22. Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD.

In preparation for answering this question, NU DOTCO, LLC (NU.CO) reviewed the following relevant background material regarding the protection of geographic names in the DNS, including:

- ICANN Board Resolution 01-92 regarding the methodology developed for the reservation and release of country names in the .INFO top-level domain (see <http://www.icann.org/en/minutes/minutes-10sep01.htm>);
- ICANN's Proposed Action Plan on .INFO Country Names (see <http://www.icann.org/en/meetings/montevideo/action-plan-country-names-09oct01.htm>);
- "Report of the Second WIPO Internet Domain Name Process: The Recognition and Rights and the Use of Names in the Internet Domain Name System," Section 6, Geographical Identifiers (see <http://www.wipo.int/amc/en/processes/process2/report/html/report.html>);
- ICANN's Governmental Advisory Committee (GAC) Principles Regarding New gTLDs, (see https://gacweb.icann.org/download/attachments/1540128/gTLD_principles_0.pdf?version=1&modificationDate=1312358178000); and
- ICANN's Generic Names Supporting Organization (GNSO) Reserved Names Working Group – Final Report (see <http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm>).

Initial Reservation of Country and Territory Names

NU.CO is committed to initially reserving the country and territory names contained in the internationally recognized lists described in Article 5 of Specification 5 attached to the New gTLD Applicant Guidebook at the second level and at all other levels within the .WEB gTLD at which domain name registrations will be provided. Specifically, NU.CO will reserve:

- The short form (in English) of all country and territory names contained on the ISO 3166- 1 list, as updated from time to time, including the European Union, which is exceptionally reserved on the ISO 3166-1 list, and its scope extended in August 1999 to any application needing to represent the name European Union (see http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm#EU);
- The United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and
- The list of United Nations member states in six official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names.

Potential Future Release of Two Character Names

While NU.CO foresees no immediate need for plans to make use of these initially reserved country names at the second level within the .WEB namespace, NU.CO recognizes that there has been several successful and non-misleading use of country names by new gTLD operators as evidenced below:

AUSTRALIA.COOP – Is operated by Co-operatives Australia the national body for State Co-operative Federations and provides a valuable resource about cooperatives within Australia.

UK.COOP – Is operated by Co-operatives UK the national trade body that campaigns for co-operation and works to promote, develop and unite co-operative enterprises within the United Kingdom.

NZ.COOP – Is operated by the New Zealand Cooperatives Association which brings together the country’s cooperative mutual business in a not-for-profit incorporated society.

USA.JOBS - Is operated by DirectEmployers Association (DE). While Employ Media the registry operator of the .JOBS gTLD is currently in a dispute with ICANN regarding the allocation of this and other domain names. Direct Employers has a series of partnerships and programs with the United States Department of Labor, the National Association of State Workforce Agencies and Facebook to help unemployed workers find jobs.

MALDIVIAN.AERO - Is the dominant domestic air carrier in Maldives, and provides a range of commercial and leisure air transport services.

The more likely request by NU.CO will come in connection with the un-reservation and allocation of two-letter .WEB domain names, e.g. US.WEB, UK.WEB, etc. If NU.CO should decide in the future to attempt and allocate these domain names, it would submit the proper Registry Service Evaluation Processes (RSEP) with ICANN. In evaluating similar RSEP requests that have been submitted to ICANN by other gTLD registry operators, NU.CO believes that its request would be favorably granted.

Creation and Updating the Policies

NU.CO is committed to continually reviewing and updating when necessary its policies in this area. Consistent with this commitment, NU.CO intends to remain an active participant in any ongoing ICANN policy discussion regarding the protection of geographic names within the DNS.

Registry Services

23. Provide name and full description of all the Registry Services to be provided.

23.1 Introduction

NU DOTCO LLC has elected to partner with NeuStar, Inc (“Neustar”) to provide back-end services for the .WEB registry. In making this decision, NU DOTCO LLC recognized that Neustar already possesses a production-proven registry system that can be quickly deployed and smoothly operated over its robust,

flexible, and scalable world-class infrastructure. The existing registry services will be leveraged for the .WEB registry. The following section describes the registry services to be provided.

23.2 Standard Technical and Business Components

Neustar will provide the highest level of service while delivering a secure, stable and comprehensive registry platform. NU DOTCO LLC will use Neustar's Registry Services platform to deploy the .WEB registry, by providing the following Registry Services (none of these services are offered in a manner that is unique to .WEB):

- Registry-Registrar Shared Registration Service (SRS)
- Extensible Provisioning Protocol (EPP)
- Domain Name System (DNS)
- WHOIS
- DNSSEC
- Data Escrow
- Dissemination of Zone Files using Dynamic Updates
- Access to Bulk Zone Files
- Dynamic WHOIS Updates
- IPv6 Support
- Rights Protection Mechanisms
- Internationalized Domain Names (IDN)

The following is a description of each of the services.

23.2.1 SRS

Neustar's secure and stable SRS is a production-proven, standards-based, highly reliable, and high-performance domain name registration and management system. The SRS includes an EPP interface for receiving data from registrars for the purpose of provisioning and managing domain names and name servers. The response to Question 24 provides specific SRS information.

23.2.2 EPP

The .WEB registry will use the Extensible Provisioning Protocol (EPP) for the provisioning of domain names. The EPP implementation will be fully compliant with all RFCs. Registrars are provided with access via an EPP API and an EPP based Web GUI. With more than 10 gTLD, ccTLD, and private TLDs implementations, Neustar has extensive experience building EPP-based registries. Additional discussion on the EPP approach is presented in the response to Question 25.

23.2.3 DNS

NU DOTCO LLC will leverage Neustar's world-class DNS network of geographically distributed nameserver sites to provide the highest level of DNS service. The service utilizes "Anycast" routing technology, and supports both IPv4 and IPv6. The DNS network is highly proven, and currently provides service to over 20 TLDs and thousands of enterprise companies. Additional information on the DNS solution is presented in the response to Questions 35.

23.2.4 WHOIS

Neustar's existing standard WHOIS solution will be used for the .WEB. The service provides supports for near real-time dynamic updates. The design and construction is agnostic with regard to data display policy is flexible enough to accommodate any data model. In addition, a searchable WHOIS service that complies with all ICANN requirements will be provided. The following WHOIS options will be provided:

- Standard WHOIS (Port 43)
- Standard WHOIS (Web)
- Searchable WHOIS (Web)

23.2.5 DNSSEC

An RFC compliant DNSSEC implementation will be provided using existing DNSSEC capabilities. Neustar is an experienced provider of DNSSEC services, and currently manages signed zones for three large top level domains: .biz, .us, and .co. Registrars are provided with the ability to submit and manage DS

records using EPP, or through a web GUI. Additional information on DNSSEC, including the management of security extensions is found in the response to Question 43.

23.2.6 Data Escrow

Data escrow will be performed in compliance with all ICANN requirements in conjunction with an approved data escrow provider. The data escrow service will:

- Protect against data loss
- Follow industry best practices
- Ensure easy, accurate, and timely retrieval and restore capability in the event of a hardware failure
- Minimizes the impact of software or business failure.

Additional information on the Data Escrow service is provided in the response to Question 38.

23.2.7 Dissemination of Zone Files using Dynamic Updates

Dissemination of zone files will be provided through a dynamic, near real-time process. Updates will be performed within the specified performance levels. The proven technology ensures that updates pushed to all nodes within a few minutes of the changes being received by the SRS. Additional information on the DNS updates may be found in the response to Question 35.

23.2.8 Access to Bulk Zone Files

NU DOTCO LLC will provide third party access to the bulk zone file in accordance with specification 4, Section 2 of the Registry Agreement. Credentialing and dissemination of the zone files will be facilitated through the Central Zone Data Access Provider.

23.2.9 Dynamic WHOIS Updates

Updates to records in the WHOIS database will be provided via dynamic, near real-time updates. Guaranteed delivery message oriented middleware is used to ensure each individual WHOIS server is refreshed with dynamic updates. This component ensures that all WHOIS servers are kept current as changes occur in the SRS, while also decoupling WHOIS from the SRS. Additional information on WHOIS updates is presented in response to Question 26.

23.2.10 IPv6 Support

The .WEB registry will provide IPv6 support in the following registry services: SRS, WHOIS, and DNS/DNSSEC. In addition, the registry supports the provisioning of IPv6 AAAA records. A detailed description on IPv6 is presented in the response to Question 36.

23.2.11 Required Rights Protection Mechanisms

NU DOTCO LLC, will provide all ICANN required Rights Mechanisms, including:

- Trademark Claims Service
- Trademark Post-Delegation Dispute Resolution Procedure (PDDRP)
- Registration Restriction Dispute Resolution Procedure (RRDRP)
- UDRP
- URS
- Sunrise service.

More information is presented in the response to Question 29.

23.2.12 Internationalized Domain Names (IDN)

IDN registrations are provided in full compliance with the IDNA protocol. Neustar possesses extensive experience offering IDN registrations in numerous TLDs, and its IDN implementation uses advanced technology to accommodate the unique bundling needs of certain languages. Character mappings are easily constructed to block out characters that may be deemed as confusing to users. A detailed description of the IDN implementation is presented in response to Question 44.

23.3 Unique Services

NU DOTCO LLC will not be offering services that are unique to .WEB.

23.4 Security or Stability Concerns

All services offered are standard registry services that have no known security or stability concerns. Neustar has demonstrated a strong track record of security and stability within the industry.

Demonstration of Technical & Operational Capability

24. Shared Registration System (SRS) Performance

24.1 Introduction

NU DOTCO LLC has partnered with NeuStar, Inc ("Neustar"), an experienced TLD registry operator, for the operation of the .WEB Registry. The applicant is confident that the plan in place for the operation of a robust and reliable Shared Registration System (SRS) as currently provided by Neustar will satisfy the criterion established by ICANN.

Neustar built its SRS from the ground up as an EPP based platform and has been operating it reliably and at scale since 2001. The software currently provides registry services to five TLDs (.BIZ, .US, TEL, .CO and .TRAVEL) and is used to provide gateway services to the .CN and .TW registries. Neustar's state of the art registry has a proven track record of being secure, stable, and robust. It manages more than 6 million domains, and has over 300 registrars connected today. The following describes a detailed plan for a robust and reliable SRS that meets all ICANN requirements including compliance with Specifications 6 and 10.

24.2 The Plan for Operation of a Robust and Reliable SRS

24.2.1 High-level SRS System Description

The SRS to be used for .WEB will leverage a production-proven, standards-based, highly reliable and high-performance domain name registration and management system that fully meets or exceeds the requirements as identified in the new gTLD Application Guidebook.

The SRS is the central component of any registry implementation and its quality, reliability and capabilities are essential to the overall stability of the TLD. Neustar has a documented history of deploying SRS implementations with proven and verifiable performance, reliability and availability. The SRS adheres to all industry standards and protocols. By leveraging an existing SRS platform, NU DOTCO LLC is mitigating the significant risks and costs associated with the development of a new system. Highlights of the SRS include:

- State-of-the-art, production proven multi-layer design
- Ability to rapidly and easily scale from low to high volume as a TLD grows
- Fully redundant architecture at two sites
- Support for IDN registrations in compliance with all standards
- Use by over 300 Registrars
- EPP connectivity over IPv6
- Performance being measured using 100% of all production transactions (not sampling).

24.2.2 SRS Systems, Software, Hardware, and Interoperability

The systems and software that the registry operates on are a critical element to providing a high quality of service. If the systems are of poor quality, if they are difficult to maintain and operate, or if the registry personnel are unfamiliar with them, the registry will be prone to outages. Neustar has a decade of experience operating registry infrastructure to extremely high service level requirements. The infrastructure is designed using best of breed systems and software. Much of the application software that performs registry-specific operations was developed by the current engineering team and a result the team is intimately familiar with its operations.

The architecture is highly scalable and provides the same high level of availability and performance as volumes increase. It combines load balancing technology with scalable server technology to provide a cost effective and efficient method for scaling.

The Registry is able to limit the ability of any one registrar from adversely impacting other registrars by consuming too many resources due to excessive EPP transactions. The system uses network layer 2 level packet shaping to limit the number of simultaneous connections registrars can open to the protocol layer.

All interaction with the Registry is recorded in log files. Log files are generated at each layer of the system. These log files record at a minimum:

- The IP address of the client
- Timestamp
- Transaction Details
- Processing Time.

In addition to logging of each and every transaction with the SRS Neustar maintains audit records, in the database, of all transformational transactions. These audit records allow the Registry, in support of the applicant, to produce a complete history of changes for any domain name.

24.2.3 SRS Design

The SRS incorporates a multi-layer architecture that is designed to mitigate risks and easily scale as volumes increase. The three layers of the SRS are:

- Protocol Layer
- Business Policy Layer
- Database.

Each of the layers is described below.

24.2.4 Protocol Layer

The first layer is the protocol layer, which includes the EPP interface to registrars. It consists of a high availability farm of load-balanced EPP servers. The servers are designed to be fast processors of transactions. The servers perform basic validations and then feed information to the business policy engines as described below. The protocol layer is horizontally scalable as dictated by volume.

The EPP servers authenticate against a series of security controls before granting service, as follows:

- The registrar's host exchanges keys to initiates a TLS handshake session with the EPP server.
- The registrar's host must provide credentials to determine proper access levels.
- The registrar's IP address must be preregistered in the network firewalls and traffic-shapers.

24.2.5 Business Policy Layer

The Business Policy Layer is the "brain" of the registry system. Within this layer, the policy engine servers perform rules-based processing as defined through configurable attributes. This process takes individual transactions, applies various validation and policy rules, persists data and dispatches notification through the central database in order to publish to various external systems. External systems fed by the Business Policy Layer include backend processes such as dynamic update of DNS, WHOIS and Billing.

Similar to the EPP protocol farm, the SRS consists of a farm of application servers within this layer. This design ensures that there is sufficient capacity to process every transaction in a manner that meets or exceeds all service level requirements. Some registries couple the business logic layer directly in the protocol layer or within the database. This architecture limits the ability to scale the registry. Using a decoupled architecture enables the load to be distributed among farms of inexpensive servers that can be scaled up or down as demand changes.

The SRS today processes over 30 million EPP transactions daily.

24.2.6 Database

The database is the third core components of the SRS. The primary function of the SRS database is to provide highly reliable, persistent storage for all registry information required for domain registration services. The database is highly secure, with access limited to transactions from authenticated registrars, trusted application-server processes, and highly restricted access by the registry database administrators. A full description of the database can be found in response to Question 33.

Figure 24-1 attached depicts the overall SRS architecture including network components.

24.2.7 Number of Servers

As depicted in the SRS architecture diagram above Neustar operates a high availability architecture where at each level of the stack there are no single points of failures. Each of the network level devices run with dual pairs as do the databases. For the .WEB registry, the SRS will operate with 8 protocol servers and 6 policy engine servers. These expand horizontally as volume increases due to additional TLDs, increased load, and through organic growth. In addition to the SRS servers described above, there are multiple backend servers for services such as DNS and WHOIS. These are discussed in detail within those respective response sections.

24.2.8 Description of Interconnectivity with Other Registry Systems

The core SRS service interfaces with other external systems via Neustar's external systems layer. The services that the SRS interfaces with include:

- WHOIS
- DNS
- Billing
- Data Warehouse (Reporting and Data Escrow).

Other external interfaces may be deployed to meet the unique needs of a TLD. At this time there are no additional interfaces planned for .WEB.

The SRS includes an "external notifier" concept in its business policy engine as a message dispatcher. This design allows time-consuming backend processing to be decoupled from critical online registrar transactions. Using an external notifier solution, the registry can utilize "control levers" that allow it to tune or to disable processes to ensure optimal performance at all times. For example, during the early minutes of a TLD launch, when unusually high volumes of transactions are expected, the registry can elect to suspend processing of one or more back end systems in order to ensure that greater processing power is available to handle the increased load requirements. This proven architecture has been used with numerous TLD launches, some of which have involved the processing of over tens of millions of transactions in the opening hours. The following are the standard three external notifiers used the SRS:

24.2.9 WHOIS External Notifier

The WHOIS external notifier dispatches a work item for any EPP transaction that may potentially have an impact on WHOIS. It is important to note that, while the WHOIS external notifier feeds the WHOIS system, it intentionally does not have visibility into the actual contents of the WHOIS system. The WHOIS external notifier serves just as a tool to send a signal to the WHOIS system that a change is ready to occur. The WHOIS system possesses the intelligence and data visibility to know exactly what needs to change in WHOIS. See response to Question 26 for greater detail.

24.2.10 DNS External Notifier

The DNS external notifier dispatches a work item for any EPP transaction that may potentially have an impact on DNS. Like the WHOIS external notifier, the DNS external notifier does not have visibility into the actual contents of the DNS zones. The work items that are generated by the notifier indicate to the dynamic DNS update sub-system that a change occurred that may impact DNS. That DNS system has the ability to decide what actual changes must be propagated out to the DNS constellation. See response to Question 35 for greater detail.

24.2.11 Billing External Notifier

The billing external notifier is responsible for sending all billable transactions to the downstream financial systems for billing and collection. This external notifier contains the necessary logic to determine what types of transactions are billable. The financial systems use this information to apply appropriate debits and credits based on registrar.

24.2.12 Data Warehouse

The data warehouse is responsible for managing reporting services, including registrar reports, business intelligence dashboards, and the processing of data escrow files. The Reporting Database is used to create both internal and external reports, primarily to support registrar billing and contractual reporting requirement. The data warehouse databases are updated on a daily basis with full copies of the production SRS data.

24.2.13 Frequency of Synchronization between Servers

The external notifiers discussed above perform updates in near real-time, well within the prescribed service level requirements. As transactions from registrars update the core SRS, update notifications are pushed to the external systems such as DNS and WHOIS. These updates are typically live in the external system within 2-3 minutes.

24.2.14 Synchronization Scheme (e.g., hot standby, cold standby)

Neustar operates two hot databases within the data center that is operating in primary mode. These two databases are kept in sync via synchronous replication. Additionally, there are two databases in the secondary data center. These databases are updated real time through asynchronous replication. This model allows for high performance while also ensuring protection of data. See response to Question 33 for greater detail.

24.2.15 Compliance with Specification 6 Section 1.2

The SRS implementation for .WEB is fully compliant with Specification 6, including section 1.2. EPP Standards are described and embodied in a number of IETF RFCs, ICANN contracts and practices, and registry-registrar agreements. Extensible Provisioning Protocol or EPP is defined by a core set of RFCs that standardize the interface that make up the registry-registrar model. The SRS interface supports EPP 1.0 as defined in the following RFCs shown in Table 24-1 attached.

Additional information on the EPP implementation and compliance with RFCs can be found in the response to Question 25.

24.2.16 Compliance with Specification 10

Specification 10 of the New TLD Agreement defines the performance specifications of the TLD, including service level requirements related to DNS, RDDS (WHOIS), and EPP. The requirements include both availability and transaction response time measurements. As an experienced registry operator, Neustar has a long and verifiable track record of providing registry services that consistently exceed the performance specifications stipulated in ICANN agreements. This same high level of service will be provided for the .WEB Registry. The following section describes Neustar's experience and its capabilities to meet the requirements in the new agreement.

To properly measure the technical performance and progress of TLDs, Neustar collects data on key essential operating metrics. These measurements are key indicators of the performance and health of the registry. Neustar's current .biz SLA commitments are among the most stringent in the industry today, and exceed the requirements for new TLDs. Table 24-2 compares the current SRS performance levels compared to the requirements for new TLDs, and clearly demonstrates the ability of the SRS to exceed those requirements.

Their ability to commit and meet such high performance standards is a direct result of their philosophy towards operational excellence. See response to Question 31 for a full description of their philosophy for building and managing for performance.

24.3 Resourcing Plans

The development, customization, and on-going support of the SRS are the responsibility of a combination of technical and operational teams, including:

- Development/Engineering
- Database Administration
- Systems Administration
- Network Engineering.

Additionally, if customization or modifications are required, the Product Management and Quality Assurance teams will be involved in the design and testing. Finally, the Network Operations and Information Security play an important role in ensuring the systems involved are operating securely and reliably.

The necessary resources will be pulled from the pool of operational resources described in detail in the response to Question 31. Neustar's SRS implementation is very mature, and has been in production for over 10 years. As such, very little new development related to the SRS will be required for the implementation of the .WEB registry. The following resources are available from those teams:

- Development/Engineering - 19 employees
- Database Administration- 10 employees
- Systems Administration - 24 employees
- Network Engineering - 5 employees

The resources are more than adequate to support the SRS needs of all the TLDs operated by Neustar, including the .WEB registry.

25. Extensible Provisioning Protocol (EPP)

25.1 Introduction

NU DOTCO LLC's back-end registry operator, Neustar, has over 10 years of experience operating EPP based registries. They deployed one of the first EPP registries in 2001 with the launch of .biz. In 2004, they were the first gTLD to implement EPP 1.0. Over the last ten years Neustar has implemented numerous extensions to meet various unique TLD requirements. Neustar will leverage its extensive experience to ensure NU DOTCO LLC is provided with an unparalleled EPP based registry. The following discussion explains the EPP interface which will be used for the .WEB registry. This interface exists within the protocol farm layer as described in Question 24 and is depicted in Figure 25-1 attached.

25.2 EPP Interface

Registrars are provided with two different interfaces for interacting with the registry. Both are EPP based, and both contain all the functionality necessary to provision and manage domain names. The primary mechanism is an EPP interface to connect directly with the registry. This is the interface registrars will use for most of their interactions with the registry.

However, an alternative web GUI (Registry Administration Tool) that can also be used to perform EPP transactions will be provided. The primary use of the Registry Administration Tool is for performing administrative or customer support tasks.

The main features of the EPP implementation are:

- Standards Compliance: The EPP XML interface is compliant to the EPP RFCs. As future EPP RFCs are published or existing RFCs are updated, Neustar makes changes to the implementation keeping in mind of any backward compatibility issues.
- Scalability: The system is deployed keeping in mind that it may be required to grow and shrink the footprint of the Registry system for a particular TLD.
- Fault-tolerance: The EPP servers are deployed in two geographically separate data centers to provide for quick failover capability in case of a major outage in a particular data center. The EPP servers adhere to strict availability requirements defined in the SLAs.
- Configurability: The EPP extensions are built in a way that they can be easily configured to turn on or off for a particular TLD.
- Extensibility: The software is built ground up using object oriented design. This allows for easy extensibility of the software without risking the possibility of the change rippling through the

whole application.

-Auditable: The system stores detailed information about EPP transactions from provisioning to DNS and WHOIS publishing. In case of a dispute regarding a name registration, the Registry can provide comprehensive audit information on EPP transactions.

-Security: The system provides IP address based access control, client credential-based authorization test, digital certificate exchange, and connection limiting to the protocol layer.

25.3 Compliance with RFCs and Specifications

The registry-registrar model is described and embodied in a number of IETF RFCs, ICANN contracts and practices, and registry-registrar agreements. As shown in Table 25-1 attached, EPP is defined by the core set of RFCs that standardize the interface that registrars use to provision domains with the SRS. As a core component of the SRS architecture, the implementation is fully compliant with all EPP RFCs.

Neustar ensures compliance with all RFCs through a variety of processes and procedures. Members from the engineering and standards teams actively monitor and participate in the development of RFCs that impact the registry services, including those related to EPP. When new RFCs are introduced or existing ones are updated, the team performs a full compliance review of each system impacted by the change. Furthermore, all code releases include a full regression test that includes specific test cases to verify RFC compliance.

Neustar has a long history of providing exceptional service that exceeds all performance specifications. The SRS and EPP interface have been designed to exceed the EPP specifications defined in Specification 10 of the Registry Agreement and profiled in Table 25-2 attached. Evidence of Neustar's ability to perform at these levels can be found in the .biz monthly progress reports found on the ICANN website.

25.3.1 EPP Toolkits

Toolkits, under open source licensing, are freely provided to registrars for interfacing with the SRS. Both Java and C++ toolkits will be provided, along with the accompanying documentation. The Registrar Tool Kit (RTK) is a software development kit (SDK) that supports the development of a registrar software system for registering domain names in the registry using EPP. The SDK consists of software and documentation as described below.

The software consists of working Java and C++ EPP common APIs and samples that implement the EPP core functions and EPP extensions used to communicate between the registry and registrar. The RTK illustrates how XML requests (registration events) can be assembled and forwarded to the registry for processing. The software provides the registrar with the basis for a reference implementation that conforms to the EPP registry-registrar protocol. The software component of the SDK also includes XML schema definition files for all Registry EPP objects and EPP object extensions. The RTK also includes a "dummy" server to aid in the testing of EPP clients.

The accompanying documentation describes the EPP software package hierarchy, the object data model, and the defined objects and methods (including calling parameter lists and expected response behavior). New versions of the RTK are made available from time to time to provide support for additional features as they become available and support for other platforms and languages.

25.4 Proprietary EPP Extensions

The .WEB registry will not include proprietary EPP extensions. Neustar has implemented various EPP extensions for both internal and external use in other TLD registries. These extensions use the standard EPP extension framework described in RFC 5730. Table 25-3 attached provides a list of extensions developed for other TLDs. Should the .WEB registry require an EPP extension at some point in the future, the extension will be implemented in compliance with all RFC specifications including RFC 3735.

The full EPP schema to be used in the .WEB registry is attached in the document titled "EPP Schema Files."

25.5 Resourcing Plans

The development and support of EPP is largely the responsibility of the Development/Engineering and Quality Assurance teams. As an experience registry operator with a fully developed EPP solution, on-going support is largely limited to periodic updates to the standard and the implementation of TLD specific extensions.

The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

- Development/Engineering - 19 employees
- Quality Assurance - 7 employees.

These resources are more than adequate to support any EPP modification needs of the .WEB registry.

26. Whois

26.1 Introduction

.WEB recognizes the importance of an accurate, reliable, and up-to-date WHOIS database to governments, law enforcement, intellectual property holders and the public as a whole and is firmly committed to complying with all of the applicable WHOIS specifications for data objects, bulk access, and lookups as defined in Specifications 4 and 10 to the Registry Agreement. .WEB's back-end registry services provider, Neustar, has extensive experience providing ICANN and RFC-compliant WHOIS services for each of the TLDs that it operates both as a Registry Operator for gTLDs, ccTLDs and back-end registry services provider. As one of the first "thick" registry operators in the gTLD space, Neustar's WHOIS service has been designed from the ground up to display as much information as required by a TLD and respond to a very stringent availability and performance requirement.

Some of the key features of .WEB's solution include:

- Fully compliant with all relevant RFCs including 3912
- Production proven, highly flexible, and scalable with a track record of 100% availability over the past 10 years
- Exceeds current and proposed performance specifications
- Supports dynamic updates with the capability of doing bulk updates
- Geographically distributed sites to provide greater stability and performance
- In addition, .WEB's thick-WHOIS solution also provides for additional search capabilities and mechanisms to mitigate potential forms of abuse as discussed below. (e.g., IDN, registrant data).

26.2 Software Components

The WHOIS architecture comprises the following components:

- An in-memory database local to each WHOIS node: To provide for the performance needs, the WHOIS data is served from an in-memory database indexed by searchable keys.
- Redundant servers: To provide for redundancy, the WHOIS updates are propagated to a cluster of WHOIS servers that maintain an independent copy of the database.
- Attack resistant: To ensure that the WHOIS system cannot be abused using malicious queries or DOS attacks, the WHOIS server is only allowed to query the local database and rate limits on queries based on IPs and IP ranges can be readily applied.
- Accuracy auditor: To ensure the accuracy of the information served by the WHOIS servers, a daily audit is done between the SRS information and the WHOIS responses for the domain names which are updated during the last 24-hour period. Any discrepancies are resolved proactively.
- Modular design: The WHOIS system allows for filtering and translation of data elements between the SRS and the WHOIS database to allow for customizations.

-Scalable architecture: The WHOIS system is scalable and has a very small footprint. Depending on the query volume, the deployment size can grow and shrink quickly.

-Flexible: It is flexible enough to accommodate thin, thick, or modified thick models and can accommodate any future ICANN policy, such as different information display levels based on user categorization.

-SRS master database: The SRS database is the main persistent store of the Registry information. The Update Agent computes what WHOIS updates need to be pushed out. A publish-subscribe mechanism then takes these incremental updates and pushes to all the WHOIS slaves that answer queries.

26.3 Compliance with RFC and Specifications 4 and 10

Neustar has been running thick-WHOIS Services for over 10+ years in full compliance with RFC 3912 and with Specifications 4 and 10 of the Registry Agreement. RFC 3912 is a simple text based protocol over TCP that describes the interaction between the server and client on port 43. Neustar built a home-grown solution for this service. It processes millions of WHOIS queries per day.

Table 26-1 attached describes Neustar's compliance with Specifications 4 and 10.

Neustar ensures compliance with all RFCs through a variety of processes and procedures. Members from the engineering and standards teams actively monitor and participate in the development of RFCs that impact the registry services, including those related to WHOIS. When new RFCs are introduced or existing ones are updated, the team performs a full compliance review of each system impacted by the change. Furthermore, all code releases include a full regression test that includes specific test cases to verify RFC compliance.

26.4 High-level WHOIS System Description

26.4.1 WHOIS Service (port 43)

The WHOIS service is responsible for handling port 43 queries. Our WHOIS is optimized for speed using an in-memory database and master-slave architecture between the SRS and WHOIS slaves.

The WHOIS service also has built-in support for IDN. If the domain name being queried is an IDN, the returned results include the language of the domain name, the domain name's UTF-8 encoded representation along with the Unicode code page.

26.4.2 Web Page for WHOIS queries

In addition to the WHOIS Service on port 43, Neustar provides a web based WHOIS application (www.whois.WEB). It is an intuitive and easy to use application for the general public to use. WHOIS web application provides all of the features available in the port 43 WHOIS. This includes full and partial search on:

- Domain names
- Nameservers
- Registrant, Technical and Administrative Contacts
- Registrars

It also provides features not available on the port 43 service. These include:

1. Redemption Grace Period calculation: Based on the registry's policy, domains in pendingDelete can be restorable or scheduled for release depending on the date/time the domain went into pendingDelete. For these domains, the web based WHOIS displays "Restorable" or "Scheduled for Release" to clearly show this additional status to the user.
2. Extensive support for international domain names (IDN)
3. Ability to perform WHOIS lookups on the actual Unicode IDN
4. Display of the actual Unicode IDN in addition to the ACE-encoded name
5. A Unicode to Punycode and Punycode to Unicode translator

6. An extensive FAQ

7. A list of upcoming domain deletions

26.5 IT and Infrastructure Resources

As described above the WHOIS architecture uses a workflow that decouples the update process from the SRS. This ensures SRS performance is not adversely affected by the load requirements of dynamic updates. It is also decoupled from the WHOIS lookup agent to ensure the WHOIS service is always available and performing well for users. Each of Neustar's geographically diverse WHOIS sites use:

- Firewalls, to protect this sensitive data
- Dedicated servers for MQ Series, to ensure guaranteed delivery of WHOIS updates
- Packetshaper for source IP address-based bandwidth limiting
- Load balancers to distribute query load
- Multiple WHOIS servers for maximizing the performance of WHOIS service.

The WHOIS service uses HP BL 460C servers, each with 2 X Quad Core CPU and a 64GB of RAM. The existing infrastructure has 6 servers, but is designed to be easily scaled with additional servers should it be needed.

Figure 26-1 attached depicts the different components of the WHOIS architecture.

26.6 Interconnectivity with Other Registry System

As described in Question 24 about the SRS and further in response to Question 31, "Technical Overview", when an update is made by a registrar that impacts WHOIS data, a trigger is sent to the WHOIS system by the external notifier layer. The update agent processes these updates, transforms the data if necessary and then uses messaging oriented middleware to publish all updates to each WHOIS slave. The local update agent accepts the update and applies it to the local in-memory database. A separate auditor compares the data in WHOIS and the SRS daily and monthly to ensure accuracy of the published data.

26.7 Frequency of Synchronization between Servers

Updates from the SRS, through the external notifiers, to the constellation of independent WHOIS slaves happens in real-time via an asynchronous publish/subscribe messaging architecture. The updates are guaranteed to be updated in each slave within the required SLA of 95%, less than or equal to 60 minutes. Please note that Neustar's current architecture is built towards the stricter SLAs (95%, less than or equal to 15 minutes) of .BIZ. The vast majority of updates tend to happen within 2-3 minutes.

26.8 Provision for Searchable WHOIS Capabilities

Neustar will create a new web-based service to address the new search features based on requirements specified in Specification 4 Section 1.8. The application will enable users to search the WHOIS directory using any one or more of the following fields:

-Domain name

-Registrar ID

-Contacts and registrant's name

-Contact and registrant's postal address, including all the sub-fields described in EPP (e.g., street, city, state or province, etc.)

-Name server name and name server IP address

-The system will also allow search using non-Latin character sets which are compliant with IDNA specification.

The user will choose one or more search criteria, combine them by Boolean operators (AND, OR, NOT) and provide partial or exact match regular expressions for each of the criterion name-value pairs. The domain names matching the search criteria will be returned to the user.

Figure 26-2 attached shows an architectural depiction of the new service.

To mitigate the risk of this powerful search service being abused by unscrupulous data miners, a layer of security will be built around the query engine which will allow the registry to identify rogue activities and then take appropriate measures. Potential abuses include, but are not limited to:

- Data Mining
- Unauthorized Access
- Excessive Querying
- Denial of Service Attacks

To mitigate the abuses noted above, Neustar will implement any or all of these mechanisms as appropriate:

- Username-password based authentication
- Certificate based authentication
- Data encryption
- CAPTCHA mechanism to prevent robo invocation of Web query
- Fee-based advanced query capabilities for premium customers.

The searchable WHOIS application will adhere to all privacy laws and policies of the .WEB registry.

26.9 Resourcing Plans

As with the SRS, the development, customization, and on-going support of the WHOIS service is the responsibility of a combination of technical and operational teams. The primary groups responsible for managing the service include:

- Development/Engineering - 19 employees
- Database Administration - 10 employees
- Systems Administration - 24 employees
- Network Engineering - 5 employees

Additionally, if customization or modifications are required, the Product Management and Quality Assurance teams will also be involved. Finally, the Network Operations and Information Security play an important role in ensuring the systems involved are operating securely and reliably. The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. Neustar's WHOIS implementation is very mature, and has been in production for over 10 years. As such, very little new development will be required to support the implementation of the .WEB registry. The resources are more than adequate to support the WHOIS needs of all the TLDs operated by Neustar, including the .WEB registry.

27. Registration Life Cycle

27.1 Registration Life Cycle

27.1.1 Introduction

.WEB will follow the lifecycle and business rules found in the majority of gTLDs today. Our back-end operator, Neustar, has over ten years of experience managing numerous TLDs that utilize standard and unique business rules and lifecycles. This section describes the business rules, registration states, and the overall domain lifecycle that will be use for .WEB.

27.1.2 Domain Lifecycle - Description

The registry will use the EPP 1.0 standard for provisioning domain names, contacts and hosts. Each domain record is comprised of three registry object types: domain, contacts, and hosts.

Domains, contacts and hosts may be assigned various EPP defined statuses indicating either a particular state or restriction placed on the object. Some statuses may be applied by the Registrar; other statuses may only be applied by the Registry. Statuses are an integral part of the domain lifecycle and serve the dual purpose of indicating the particular state of the domain and indicating

any restrictions placed on the domain. The EPP standard defines 17 statuses, however only 14 of these statuses will be used in the .WEB registry per the defined .WEB business rules.

The following is a brief description of each of the statuses. Server statuses may only be applied by the Registry, and client statuses may be applied by the Registrar.

- OK - Default status applied by the Registry.
- Inactive - Default status applied by the Registry if the domain has less than 2 nameservers.
- PendingCreate - Status applied by the Registry upon processing a successful Create command, and indicates further action is pending. This status will not be used in the .WEB registry.
- PendingTransfer - Status applied by the Registry upon processing a successful Transfer request command, and indicates further action is pending.
- PendingDelete - Status applied by the Registry upon processing a successful Delete command that does not result in the immediate deletion of the domain, and indicates further action is pending.
- PendingRenew - Status applied by the Registry upon processing a successful Renew command that does not result in the immediate renewal of the domain, and indicates further action is pending. This status will not be used in the .WEB registry.
- PendingUpdate - Status applied by the Registry if an additional action is expected to complete the update, and indicates further action is pending. This status will not be used in the .WEB registry.
- Hold - Removes the domain from the DNS zone.
- UpdateProhibited - Prevents the object from being modified by an Update command.
- TransferProhibited - Prevents the object from being transferred to another Registrar by the Transfer command.
- RenewProhibited - Prevents a domain from being renewed by a Renew command.
- DeleteProhibited - Prevents the object from being deleted by a Delete command.

The lifecycle of a domain begins with the registration of the domain. All registrations must follow the EPP standard. Upon registration a domain will either be in an active or inactive state. Domains in an active state are delegated and have their delegation information published to the zone. Inactive domains either have no delegation information or their delegation information is not published in the zone. Following the initial registration of a domain, one of five actions may occur during its lifecycle:

- Domain may be updated
- Domain may be deleted, either within or after the add-grace period
- Domain may be renewed at anytime during the term
- Domain may be auto-renewed by the Registry
- Domain may be transferred to another registrar.

Each of these actions may result in a change in domain state. This is described in more detail in the following section. Every domain must eventually be renewed, auto-renewed, transferred, or deleted. A registrar may apply EPP statuses described above to prevent specific actions such as updates, renewals, transfers, or deletions.

27.2 Registration States

27.2.1 Domain Lifecycle - Registration States

As described above the .WEB registry will implement a standard domain lifecycle found in most gTLD registries today. There are five possible domain states:

- Active
- Inactive
- Locked
- Pending Transfer
- Pending Delete.

All domains are always in either an Active or Inactive state, and throughout the course of the lifecycle may also be in a Locked, Pending Transfer, and Pending Delete state. Specific conditions such as applied EPP policies and registry business rules will determine whether a domain can be transitioned between states. Additionally, within each state, domains may be subject to various timed events such as grace periods, and notification periods.

27.2.2 Active State

The active state is the normal state of a domain and indicates that delegation data has been provided and the delegation information is published in the zone. A domain in an Active state may also be in the Locked or Pending Transfer states.

27.2.3 Inactive State

The Inactive state indicates that a domain has not been delegated or that the delegation data has not been published to the zone. A domain in an Inactive state may also be in the Locked or Pending Transfer states. By default all domain in the Pending Delete state are also in the Inactive state.

27.2.4 Locked State

The Locked state indicates that certain specified EPP transactions may not be performed to the domain. A domain is considered to be in a Locked state if at least one restriction has been placed on the domain; however up to eight restrictions may be applied simultaneously. Domains in the Locked state will also be in the Active or Inactive, and under certain conditions may also be in the Pending Transfer or Pending Delete states.

27.2.5 Pending Transfer State

The Pending Transfer state indicates a condition in which there has been a request to transfer the domain from one registrar to another. The domain is placed in the Pending Transfer state for a period of time to allow the current (losing) registrar to approve (ack) or reject (nack) the transfer request. Registrars may only nack requests for reasons specified in the Inter-Registrar Transfer Policy.

27.2.6 Pending Delete State

The Pending Delete State occurs when a Delete command has been sent to the Registry after the first 5 days (120 hours) of registration. The Pending Delete period is 35-days during which the first 30-days the name enters the Redemption Grace Period (RGP) and the last 5-days guarantee that the domain will be purged from the Registry Database and available to public pool for registration on a first come, first serve basis.

27.3 Typical Registration Lifecycle Activities

27.3.1 Domain Creation Process

The creation (registration) of domain names is the fundamental registry operation. All other operations are designed to support or compliment a domain creation. The following steps occur when a domain is created.

1. Contact objects are created in the SRS database. The same contact object may be used for each contact type, or they may all be different. If the contacts already exist in the database this step may be skipped.
2. Nameservers are created in the SRS database. Nameservers are not required to complete the registration process; however any domain with less than 2 name servers will not be resolvable.
3. The domain is created using the each of the objects created in the previous steps. In addition, the term and any client statuses may be assigned at the time of creation.

The actual number of EPP transactions needed to complete the registration of a domain name can be as few as one and as many as 40. The latter assumes seven distinct contacts and 13 nameservers, with Check and Create commands submitted for each object.

27.3.2 Update Process

Registry objects may be updated (modified) using the EPP Modify operation. The Update transaction updates the attributes of the object.

For example, the Update operation on a domain name will only allow the following attributes to be updated:

-Domain statuses

- Registrant ID
- Administrative Contact ID
- Billing Contact ID
- Technical Contact ID
- Nameservers
- AuthInfo
- Additional Registrar provided fields.

The Update operation will not modify the details of the contacts. Rather it may be used to associate a different contact object (using the Contact ID) to the domain name. To update the details of the contact object the Update transaction must be applied to the contact itself. For example, if an existing registrant wished to update the postal address, the Registrar would use the Update command to modify the contact object, and not the domain object.

27.3.4 Renew Process

The term of a domain may be extended using the EPP Renew operation. ICANN policy general establishes the maximum term of a domain name to be 10 years, and .WEB will follow that term restriction. A domain may be renewed/extended at any point time, even immediately following the initial registration. The only stipulation is that the overall term of the domain name may not exceed 10 years. If a Renew operation is performed with a term value will extend the domain beyond the 10 year limit, the Registry will reject the transaction entirely.

27.3.5 Transfer Process

The EPP Transfer command is used for several domain transfer related operations:

- Initiate a domain transfer
- Cancel a domain transfer
- Approve a domain transfer
- Reject a domain transfer.

To transfer a domain from one Registrar to another the following process is followed:

1. The gaining (new) Registrar submits a Transfer command, which includes the AuthInfo code of the domain name.
2. If the AuthInfo code is valid and the domain is not in a status that does not allow transfers the domain is placed into pendingTransfer status
3. A poll message notifying the losing Registrar of the pending transfer is sent to the Registrar's message queue
4. The domain remains in pendingTransfer status for up to 120 hours, or until the losing (current) Registrar Acks (approves) or Nack (rejects) the transfer request
5. If the losing Registrar has not Acked or Nacked the transfer request within the 120 hour timeframe, the Registry auto-approves the transfer
6. The requesting Registrar may cancel the original request up until the transfer has been completed.

A transfer adds an additional year to the term of the domain. In the event that a transfer will cause the domain to exceed the 10 year maximum term, the Registry will add a partial term up to the 10 year limit. Unlike with the Renew operation, the Registry will not reject a transfer operation.

27.3.6 Deletion Process

A domain may be deleted from the SRS using the EPP Delete operation. The Delete operation will result in either the domain being immediately removed from the database or the domain being placed in pendingDelete status. The outcome is dependent on when the domain is deleted. If the domain is deleted within the first five days (120 hours) of registration, the domain is immediately removed from the database. A deletion at any other time will result in the domain being placed in pendingDelete status and entering the Redemption Grace Period (RGP). Additionally, domains that are deleted within five days (120) hours of any billable (add, renew, transfer) transaction may be deleted for credit.

27.4 Applicable Time Elements

The following section explains the time elements that are involved.

27.4.1 Grace Periods

There are six grace periods:

- Add-Delete Grace Period (AGP)
- Renew-Delete Grace Period
- Transfer-Delete Grace Period
- Auto-Renew-Delete Grace Period
- Auto-Renew Grace Period
- Redemption Grace Period (RGP).

The first four grace periods listed above are designed to provide the Registrar with the ability to cancel a revenue transaction (add, renew, or transfer) within a certain period of time and receive a credit for the original transaction.

The following describes each of these grace periods in detail.

27.4.2 Add-Delete Grace Period

The APG is associated with the date the Domain was registered. Domains may be deleted for credit during the initial 120 hours of a registration, and the Registrar will receive a billing credit for the original registration. If the domain is deleted during the Add Grace Period, the domain is dropped from the database immediately and a credit is applied to the Registrar's billing account.

27.4.3 Renew-Delete Grace Period

The Renew-Delete Grace Period is associated with the date the Domain was renewed. Domains may be deleted for credit during the 120 hours after a renewal. The grace period is intended to allow Registrars to correct domains that were mistakenly renewed. It should be noted that domains that are deleted during the renew grace period will be placed into pendingDelete and will enter the RGP (see below).

27.4.4 Transfer-Delete Grace Period

The Transfer-Delete Grace Period is associated with the date the Domain was transferred to another Registrar. Domains may be deleted for credit during the 120 hours after a transfer. It should be noted that domains that are deleted during the renew grace period will be placed into pendingDelete and will enter the RGP. A deletion of domain after a transfer is not the method used to correct a transfer mistake. Domains that have been erroneously transferred or hijacked by another party can be transferred back to the original registrar through various means including contacting the Registry.

27.4.5 Auto-Renew-Delete Grace Period

The Auto-Renew-Delete Grace Period is associated with the date the Domain was auto-renewed. Domains may be deleted for credit during the 120 hours after an auto-renewal. The grace period is intended to allow Registrars to correct domains that were mistakenly auto-renewed. It should be noted that domains that are deleted during the auto-renew delete grace period will be placed into pendingDelete and will enter the RGP.

27.4.6 Auto-Renew Grace Period

The Auto-Renew Grace Period is a special grace period intended to provide registrants with an extra amount of time, beyond the expiration date, to renew their domain name. The grace period lasts for 45 days from the expiration date of the domain name. Registrars are not required to provide registrants with the full 45 days of the period.

27.4.7 Redemption Grace Period

The RGP is a special grace period that enables Registrars to restore domains that have been inadvertently deleted but are still in pendingDelete status within the Redemption Grace Period. All domains enter the RGP except those deleted during the AGP.

The RGP period is 30 days, during which time the domain may be restored using the EPP RenewDomain command as described below. Following the 30day RGP period the domain will remain in pendingDelete status for an additional five days, during which time the domain may NOT be restored. The domain is released from the SRS, at the end of the 5 day non-restore period. A restore fee applies and is detailed in the Billing Section. A renewal fee will be automatically applied for any domain past expiration.

Neustar has created a unique restoration process that uses the EPP Renew transaction to restore the domain and fulfill all the reporting obligations required under ICANN policy. The following describes the restoration process.

27.5 State Diagram

Figure 27 1 attached provides a description of the registration lifecycle.

The different states of the lifecycle are active, inactive, locked, pending transfer, and pending delete. Please refer to section 27.2 for detailed descriptions of each of these states. The lines between the states represent triggers that transition a domain from one state to another.

The details of each trigger are described below:

- Create: Registry receives a create domain EPP command.
- WithNS: The domain has met the minimum number of nameservers required by registry policy in order to be published in the DNS zone.
- WithoutNS: The domain has not met the minimum number of nameservers required by registry policy. The domain will not be in the DNS zone.
- Remove Nameservers: Domain's nameserver(s) is removed as part of an update domain EPP command. The total nameserver is below the minimum number of nameservers required by registry policy in order to be published in the DNS zone.
- Add Nameservers: Nameserver(s) has been added to domain as part of an update domain EPP command. The total number of nameservers has met the minimum number of nameservers required by registry policy in order to be published in the DNS zone.
- Delete: Registry receives a delete domain EPP command.
- DeleteAfterGrace: Domain deletion does not fall within the add grace period.
- DeleteWithinAddGrace: Domain deletion falls within add grace period.
- Restore: Domain is restored. Domain goes back to its original state prior to the delete command.
- Transfer: Transfer request EPP command is received.
- Transfer Approve/Cancel/Reject: Transfer requested is approved or cancel or rejected.
- TransferProhibited: The domain is in clientTransferProhibited and/or serverTransferProhibited status. This will cause the transfer request to fail. The domain goes back to its original state.
- DeleteProhibited: The domain is in clientDeleteProhibited and/or serverDeleteProhibited status. This will cause the delete command to fail. The domain goes back to its original state.

Note: the locked state is not represented as a distinct state on the diagram as a domain may be in a locked state in combination with any of the other states: inactive, active, pending transfer, or pending delete.

27.5.1 EPP RFC Consistency

As described above, the domain lifecycle is determined by ICANN policy and the EPP RFCs. Neustar has been operating ICANN TLDs for the past 10 years consistent and compliant with all the ICANN policies and related EPP RFCs.

27.6 Resources

The registration lifecycle and associated business rules are largely determined by policy and business requirements; as such the Product Management and Policy teams will play a critical role in working with NU DOTCO LLC to determine the precise rules that meet the requirements of the TLD. Implementation of the lifecycle rules will be the responsibility of Development/Engineering team, with testing performed by the Quality Assurance team. Neustar's SRS implementation is very flexible and configurable, and in many case development is not required to support business rule changes.

The .WEB registry will be using standard lifecycle rules, and as such no customization is anticipated. However should modifications be required in the future, the necessary resources will be

pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

- Development/Engineering - 19 employees
- Registry Product Management - 4 employees

These resources are more than adequate to support the development needs of all the TLDs operated by Neustar, including the .WEB registry.

28. Abuse Prevention and Mitigation

28.1 Abuse Prevention and Mitigation

Strong abuse prevention of a new gTLD is an important benefit to the internet community. .WEB and its registry operator and back end registry services provider, Neustar agree that a registry must not only aim for the highest standards of technical and operational competence, but also needs to act as a steward of the space on behalf of the Internet community and ICANN in promoting the public interest. Neustar brings extensive experience establishing and implementing registration policies. This experience will be leveraged to help .WEB combat abusive and malicious domain activity within the new gTLD space.

One of those public interest functions for a responsible domain name registry includes working towards the eradication of abusive domain name registrations, including but not limited to those resulting from:

- Illegal or fraudulent actions
 - Spam
- Phishing
- Pharming
- Distribution of malware
 - Fast flux hosting
- Botnets
- Distribution of child pornography
- Online sale or distribution of illegal pharmaceuticals.

More specifically, although traditionally botnets have used Internet Relay Chat (IRC) servers to control registry and the compromised PCs, or bots, for DDoS attacks and the theft of personal information, an increasingly popular technique, known as fast-flux DNS, allows botnets to use a multitude of servers to hide a key host or to create a highly available control network. This ability to shift the attacker's infrastructure over a multitude of servers in various countries creates an obstacle for law enforcement and security researchers to mitigate the effects of these botnets. But a point of weakness in this scheme is its dependence on DNS for its translation services. By taking an active role in researching and monitoring these sorts of botnets, NU DOTCO LLC's partner, Neustar has developed the ability to efficiently work with various law enforcement and security communities to begin a new phase of mitigation of these types of threats.

28.1.1 Policies and Procedures to Minimize Abusive Registrations

A Registry must have the policies, resources, personnel, and expertise in place to combat such abusive DNS practices. As .WEB's registry provider, Neustar is at the forefront of the prevention of such abusive practices and is one of the few registry operators to have actually developed and implemented an active "domain takedown" policy. We also believe that a strong program is essential given that registrants have a reasonable expectation that they are in control of the data associated with their domains, especially its presence in the DNS zone. Because domain names are sometimes used as a mechanism to enable various illegitimate activities on the Internet often the best preventative measure to thwart these attacks is to remove the names completely from the DNS before they can impart harm, not only to the domain name registrant, but also to millions of unsuspecting Internet users.

Removing the domain name from the zone has the effect of shutting down all activity associated with the domain name, including the use of all websites and e-mail. The use of this technique should not be entered into lightly. .WEB has an extensive, defined, and documented process for taking the necessary action of removing a domain from the zone when its presence in the zone poses a threat to the security and stability of the infrastructure of the Internet or the registry.

28.1.2 Abuse Point of Contact

As required by the Registry Agreement, .WEB will establish and publish on its website a single abuse point of contact responsible for addressing inquiries from law enforcement and the public related to malicious and abusive conduct. .WEB will also provide such information to ICANN prior to the delegation of any domain names in the TLD. This information shall consist of, at a minimum, a valid e-mail address dedicated solely to the handling of malicious conduct complaints, and a telephone number and mailing address for the primary contact. We will ensure that this information will be kept accurate and up to date and will be provided to ICANN if and when changes are made. In addition, with respect to inquiries from ICANN-Accredited registrars, our registry services provider, Neustar shall have an additional point of contact, as it does today, handling requests by registrars related to abusive domain name practices.

28.2 Policies Regarding Abuse Complaints

One of the key policies each new gTLD registry will need to have is an Acceptable Use Policy that clearly delineates the types of activities that constitute "abuse" and the repercussions associated with an abusive domain name registration. In addition, the policy will be incorporated into the applicable Registry-Registrar Agreement and reserve the right for the registry to take the appropriate actions based on the type of abuse. This will include locking down the domain name preventing any changes to the contact and nameserver information associated with the domain name, placing the domain name "on hold" rendering the domain name non-resolvable, transferring to the domain name to another registrar, and/or in cases in which the domain name is associated with an existing law enforcement investigation, substituting name servers to collect information about the DNS queries to assist the investigation.

.WEB will adopt an Acceptable Use Policy that clearly defines the types of activities that will not be permitted in the TLD and reserves the right of NU DOTCO LLC to lock, cancel, transfer or otherwise suspend or take down domain names violating the Acceptable Use Policy and allow the Registry where and when appropriate to share information with law enforcement. Each ICANN-Accredited Registrar must agree to pass through the Acceptable Use Policy to its Resellers (if applicable) and ultimately to the TLD registrants. Below is the Registry's initial Acceptable Use Policy that we will use in connection with .WEB.

28.2.1 .WEB Acceptable Use Policy

This Acceptable Use Policy gives the Registry the ability to quickly lock, cancel, transfer or take ownership of any .WEB domain name, either temporarily or permanently, if the domain name is being used in a manner that appears to threaten the stability, integrity or security of the Registry, or any of its registrar partners - and/or that may put the safety and security of any registrant or user at risk. The process also allows the Registry to take preventive measures to avoid any such criminal or security threats.

The Acceptable Use Policy may be triggered through a variety of channels, including, among other things, private complaint, public alert, government or enforcement agency outreach, and the on-going monitoring by the Registry or its partners. In all cases, the Registry or its designees will alert Registry's registrar partners about any identified threats, and will work closely with them to bring offending sites into compliance.

The following are some (but not all) activities that may be subject to rapid domain compliance:

- Phishing: the attempt to acquire personally identifiable information by masquerading as a website other than .WEB's own.
- Pharming: the redirection of Internet users to websites other than those the user intends to visit, usually through unauthorized changes to the Hosts file on a victim's computer or DNS records in DNS servers.
- Dissemination of Malware: the intentional creation and distribution of "malicious" software designed to infiltrate a computer system without the owner's consent, including, without limitation, computer viruses, worms, key loggers, and Trojans.
- Fast Flux Hosting: a technique used to shelter Phishing, Pharming and Malware sites and networks from detection and to frustrate methods employed to defend against such practices, whereby the IP address associated with fraudulent websites are changed rapidly so as to make the true location of the sites difficult to find.
- Botnetting: the development and use of a command, agent, motor, service, or software which is

implemented: (1) to remotely control the computer or computer system of an Internet user without their knowledge or consent, (2) to generate direct denial of service (DDOS) attacks.

-Malicious Hacking: the attempt to gain unauthorized access (or exceed the level of authorized access) to a computer, information system, user account or profile, database, or security system.

-Child Pornography: the storage, publication, display and/or dissemination of pornographic materials depicting individuals under the age of majority in the relevant jurisdiction.

The Registry reserves the right, in its sole discretion, to take any administrative and operational actions necessary, including the use of computer forensics and information security technological services, among other things, in order to implement the Acceptable Use Policy. In addition, the Registry reserves the right to deny, cancel or transfer any registration or transaction, or place any domain name(s) on registry lock, hold or similar status, that it deems necessary, in its discretion; (1) to protect the integrity and stability of the registry; (2) to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process; (3) to avoid any liability, civil or criminal, on the part of Registry as well as its affiliates, subsidiaries, officers, directors, and employees; (4) per the terms of the registration agreement or (5) to correct mistakes made by the Registry or any Registrar in connection with a domain name registration. Registry also reserves the right to place upon registry lock, hold or similar status a domain name during resolution of a dispute. \

28.2.2 Taking Action Against Abusive and/or Malicious Activity

The Registry is committed to ensuring that those domain names associated with abuse or malicious conduct in violation of the Acceptable Use Policy are dealt with in a timely and decisive manner. These include taking action against those domain names that are being used to threaten the stability and security of the TLD, or is part of a real-time investigation by law enforcement.

Once a complaint is received from a trusted source, third-party, or detected by the Registry, the Registry will use commercially reasonable efforts to verify the information in the complaint. If that information can be verified to the best of the ability of the Registry, the sponsoring registrar will be notified and be given 12 hours to investigate the activity and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the Registry to keep the name in the zone. If the registrar has not taken the requested action after the 12-hour period (i.e., is unresponsive to the request or refuses to take action), the Registry will place the domain on "ServerHold". Although this action removes the domain name from the TLD zone, the domain name record still appears in the TLD WHOIS database so that the name and entities can be investigated by law enforcement should they desire to get involved.

28.2.2.1 Coordination with Law Enforcement

With the assistance of Neustar as its back-end registry services provider, .WEB can meet its obligations under Section 2.8 of the Registry Agreement where required to take reasonable steps to investigate and respond to reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of its TLD. The Registry will respond to legitimate law enforcement inquiries within one business day from receiving the request. Such response shall include, at a minimum, an acknowledgement of receipt of the request, Questions or comments concerning the request, and an outline of the next steps to be taken by .WEB for rapid resolution of the request.

In the event such request involves any of the activities which can be validated by the Registry and involves the type of activity set forth in the Acceptable Use Policy, the sponsoring registrar is then given 12 hours to investigate the activity further and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the registry to keep the name in the zone. If the registrar has not taken the requested action after the 12-hour period (i.e., is unresponsive to the request or refuses to take action), the Registry will place the domain on "serverHold".

28.2.3 Monitoring for Malicious Activity

.WEB's partner, Neustar is at the forefront of the prevention of abusive DNS practices. Neustar is one of only a few registry operators to have actually developed and implemented an active "domain takedown" policy in which the registry itself takes down abusive domain names.

Neustar's approach is quite different from a number of other gTLD Registries and the results have been unmatched. Neustar targets verified abusive domain names and removes them within 12 hours regardless of whether or not there is cooperation from the domain name registrar. This is because

Neustar has determined that the interest in removing such threats from the consumer outweighs any potential damage to the registrar/registrant relationship.

Neustar's active prevention policies stem from the notion that registrants in the TLD have a reasonable expectation that they are in control of the data associated with their domains, especially its presence in the DNS zone. Because domain names are sometimes used as a mechanism to enable various illegitimate activities on the Internet, including malware, bot command and control, pharming, and phishing, the best preventative measure to thwart these attacks is often to remove the names completely from the DNS before they can impart harm, not only to the domain name registrant, but also to millions of unsuspecting Internet users.

28.2.3.1 Rapid Takedown Process

Since implementing the program, Neustar has developed two basic variations of the process. The more common process variation is a light-weight process that is triggered by "typical" notices. The less-common variation is the full process that is triggered by unusual notices. These notices tend to involve the need for accelerated action by the registry in the event that a complaint is received by Neustar which alleges that a domain name is being used to threaten the stability and security of the TLD, or is part of a real-time investigation by law enforcement or security researchers. These processes are described below:

28.2.3.2 Lightweight Process

In addition to having an active Information Security group that, on its own initiatives, seeks out abusive practices in the TLD, Neustar is an active member in a number of security organizations that have the expertise and experience in receiving and investigating reports of abusive DNS practices, including but not limited to, the Anti-Phishing Working Group, Castle Cops, NSP-SEC, the Registration Infrastructure Safety Group and others. Each of these sources are well-known security organizations that have developed a reputation for the prevention of harmful agents affecting the Internet. Aside from these organizations, Neustar also actively participates in privately run security associations whose basis of trust and anonymity makes it much easier to obtain information regarding abusive DNS activity.

Once a complaint is received from a trusted source, third-party, or detected by Neustar's internal security group, information about the abusive practice is forwarded to an internal mail distribution list that includes members of the operations, legal, support, engineering, and security teams for immediate response ("CERT Team"). Although the impacted URL is included in the notification e-mail, the CERT Team is trained not to investigate the URLs themselves since often times the URLs in Question have scripts, bugs, etc. that can compromise the individual's own computer and the network safety. Rather, the investigation is done by a few members of the CERT team that are able to access the URLs in a laboratory environment so as to not compromise the Neustar network. The lab environment is designed specifically for these types of tests and is scrubbed on a regular basis to ensure that none of Neustar's internal or external network elements are harmed in any fashion.

Once the complaint has been reviewed and the alleged abusive domain name activity is verified to the best of the ability of the CERT Team, the sponsoring registrar is given 12 hours to investigate the activity and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the registry to keep the name in the zone.

If the registrar has not taken the requested action after the 12-hNeustar's period (i.e., is unresponsive to the request or refuses to take action), Neustar places the domain on "ServerHold". Although this action removes the domain name from the TLD zone, the domain name record still appears in the TLD WHOIS database so that the name and entities can be investigated by law enforcement should they desire to get involved.

28.2.3.3 Full Process

In the event that Neustar receives a complaint which claims that a domain name is being used to threaten the stability and security of the TLD or is a part of a real-time investigation by law enforcement or security researchers, Neustar follows a slightly different course of action.

Upon initiation of this process, members of the CERT Team are paged and a teleconference bridge is immediately opened up for the CERT Team to assess whether the activity warrants immediate action. If the CERT Team determines the incident is not an immediate threat to the security and the stability of

critical internet infrastructure, they provide documentation to the Neustar Network Operations Center to clearly capture the rationale for the decision and either refers the incident to the Lightweight process set forth above. If no abusive practice is discovered, the incident is closed.

However, if the CERT TEAM determines there is a reasonable likelihood that the incident warrants immediate action as described above, a determination is made to immediately remove the domain from the zone. As such, Customer Support contacts the responsible registrar immediately to communicate that there is a domain involved in a security and stability issue. The registrar is provided only the domain name in Question and the broadly stated type of incident. Given the sensitivity of the associated security concerns, it may be important that the registrar not be given explicit or descriptive information in regards to data that has been collected (evidence) or the source of the complaint. The need for security is to fully protect the chain of custody for evidence and the source of the data that originated the complaint.

28.2.3.3.1 Coordination with Law Enforcement & Industry Groups

One of the reasons for which Neustar was selected to serve as the back-end registry services provider by .WEB is Neustar's extensive experience with its industry-leading abusive domain name and malicious monitoring program and its close working relationship with a number of law enforcement agencies, both in the United States and internationally. For example, in the United States, Neustar is in constant communication with the Federal Bureau of Investigation, US CERT, Homeland Security, the Food and Drug Administration, and the National Center for Missing and Exploited Children.

Neustar is also a participant in a number of industry groups aimed at sharing information amongst key industry players about the abusive registration and use of domain names. These groups include the Anti-Phishing Working Group and the Registration Infrastructure Safety Group (where Neustar served for several years as on the Board of Directors). Through these organizations and others, Neustar shares information with other registries, registrars, ccTLDs, law enforcement, security professionals, etc. not only on abusive domain name registrations within its own TLDs, but also provides information uncovered with respect to domain names in other registries' TLDs. Neustar has often found that rarely are abuses found only in the TLDs for which it manages, but also within other TLDs, such as .com and .info. Neustar routinely provides this information to the other registries so that it can take the appropriate action.

With the assistance of Neustar as its back-end registry services provider, .WEB can meet its obligations under Section 2.8 of the Registry Agreement where required to take reasonable steps to investigate and respond to reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of its TLD. .WEB and/or Neustar will respond to legitimate law enforcement inquiries within one business day from receiving the request. Such response shall include, at a minimum, an acknowledgement of receipt of the request, Questions or comments concerning the request, and an outline of the next steps to be taken by .WEB and/or Neustar for rapid resolution of the request.

In the event such request involves any of the activities which can be validated by .WEB and/or Neustar and involves the type of activity set forth in the Acceptable Use Policy, the sponsoring registrar is then given 12 hours to investigate the activity further and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the registry to keep the name in the zone. If the registrar has not taken the requested action after the 12-hour period (i.e., is unresponsive to the request or refuses to take action), Neustar places the domain on "serverHold".

28.3 Measures for Removal of Orphan Glue Records

As the Security and Stability Advisory Committee of ICANN (SSAC) rightly acknowledges, although orphaned glue records may be used for abusive or malicious purposes, the "dominant use of orphaned glue supports the correct and ordinary operation of the DNS." See <http://www.icann.org/en/committees/security/sac048.pdf>.

While orphan glue often support correct and ordinary operation of the DNS, we understand that such glue records can be used maliciously to point to name servers that host domains used in illegal phishing, bot-nets, malware, and other abusive behaviors. Problems occur when the parent domain of the glue record is deleted but its children glue records still remain in DNS. Therefore, when the Registry has written evidence of actual abuse of orphaned glue, the Registry will take action to remove those records from the zone to mitigate such malicious conduct.

Neustar run a daily audit of entries in its DNS systems and compares those with its provisioning system. This serves as an umbrella protection to make sure that items in the DNS zone are valid. Any DNS record that shows up in the DNS zone but not in the provisioning system will be flagged for investigation and removed if necessary. This daily DNS audit serves to not only prevent orphaned hosts but also other records that should not be in the zone.

In addition, if either .WEB or Neustar become aware of actual abuse on orphaned glue after receiving written notification by a third party through its Abuse Contact or through its customer support, such glue records will be removed from the zone.

28.4 Measures to Promote WHOIS Accuracy

.WEB acknowledges that ICANN has developed a number of mechanisms over the past decade that are intended to address the issue of inaccurate WHOIS information. Such measures alone have not proven to be sufficient and therefore .WEB will put forth additional efforts to address this by undertaking the following measures:

- 1) A mechanism a procedures to address domain names with inaccurate or incomplete WHOIS data
- 2) Policies and Procedures to ensure compliance including include audits

- Mechanism to address with inaccurate WHOIS data: a procedure whereby third parties can submit complaints directly to the Applicant (as opposed to ICANN or the sponsoring Registrar) about inaccurate or incomplete WHOIS data. Such information shall be forwarded to the sponsoring Registrar, who shall be required to address those complaints with their registrants. Thirty days after forwarding the complaint to the registrar, .WEB will examine the current WHOIS data for names that were alleged to be inaccurate to determine if the information was corrected, the domain name was deleted, or there was some other disposition. If the Registrar has failed to take any action, or it is clear that the Registrant was either unwilling or unable to correct the inaccuracies, Applicant reserves the right to suspend the applicable domain name(s) until such time as the Registrant is able to cure the deficiencies.

- Policies and Procedures to ensure compliance: .WEB shall on its own initiative, no less than twice per year, perform a manual review of a random sampling of .WEB domain names to test the accuracy of the WHOIS information. Although this will not include verifying the actual information in the WHOIS record, .WEB will be examining the WHOIS data for prima facie evidence of inaccuracies. In the event that such evidence exists, it shall be forwarded to the sponsoring Registrar, who shall be required to address those complaints with their registrants. Thirty days after forwarding the complaint to the registrar, the Applicant will examine the current WHOIS data for names that were alleged to be inaccurate to determine if the information was corrected, the domain name was deleted, or there was some other disposition. If the Registrar has failed to take any action, or it is clear that the Registrant was either unwilling or unable to correct the inaccuracies, .WEB reserves the right to suspend the applicable domain name(s) until such time as the Registrant is able to cure the deficiencies.

28.5 Resourcing Plans

Responsibility for abuse mitigation rests with a variety of functional groups. The Abuse Monitoring team is primarily responsible for providing analysis and conducting investigations of reports of abuse. The customer service team also plays an important role in assisting with the investigations, responded to customers, and notifying registrars of abusive domains. Finally, the Policy/Legal team is responsible for developing the relevant policies and procedures.

The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

- Customer Support - 12 employees
- Policy/Legal - 2 employees

The resources are more than adequate to support the abuse mitigation procedures of the .WEB registry.

29. Rights Protection Mechanisms

29.1 Rights Protection Mechanisms

NU DOTCO LLC is firmly committed to the protection of Intellectual Property rights and to implementing the mandatory rights protection mechanisms contained in the Applicant Guidebook and detailed in Specification 7 of the Registry Agreement. .WEB recognizes that although the New gTLD program includes significant protections beyond those that were mandatory for a number of the current TLDs, a key motivator for .WEB's selection of Neustar as its registry services provider is Neustar's experience in successfully launching a number of TLDs with diverse rights protection mechanisms, including many the ones required in the Applicant Guidebook. More specifically, .WEB will implement the following rights protection mechanisms in accordance with the Applicant Guidebook as further described below:

- Trademark Clearinghouse: a one-stop shop so that trademark holders can protect their trademarks with a single registration.
- Sunrise and Trademark Claims processes for the TLD.
- Implementation of the Uniform Dispute Resolution Policy to address domain names that have been registered and used in bad faith in the TLD.
- Uniform Rapid Suspension: A quicker, more efficient and cheaper alternative to the Uniform Dispute Resolution Policy to deal with clear cut cases of cybersquatting.
- Implementation of a Thick WHOIS making it easier for rights holders to identify and locate infringing parties

29.1.1 Trademark Clearinghouse Including Sunrise and Trademark Claims

The first mandatory rights protection mechanism ("RPM") required to be implemented by each new gTLD Registry is support for, and interaction with, the trademark clearinghouse. The trademark clearinghouse is intended to serve as a central repository for information to be authenticated, stored and disseminated pertaining to the rights of trademark holders. The data maintained in the clearinghouse will support and facilitate other RPMs, including the mandatory Sunrise Period and Trademark Claims service. Although many of the details of how the trademark clearinghouse will interact with each registry operator and registrars, .WEB is actively monitoring the developments of the Implementation Assistance Group ("IAG") designed to assist ICANN staff in firming up the rules and procedures associated with the policies and technical requirements for the trademark clearinghouse. In addition, .WEB's back-end registry services provider is actively participating in the IAG to ensure that the protections afforded by the clearinghouse and associated RPMs are feasible and implementable.

Utilizing the trademark clearinghouse, all operators of new gTLDs must offer: (i) a sunrise registration service for at least 30 days during the pre-launch phase giving eligible trademark owners an early opportunity to register second-level domains in new gTLDs; and (ii) a trademark claims service for at least the first 60 days that second-level registrations are open. The trademark claim service is intended to provide clear notice" to a potential registrant of the rights of a trademark owner whose trademark is registered in the clearinghouse.

.WEB's registry service provider, Neustar, has already implemented Sunrise and/or Trademark Claims programs for numerous TLDs including .biz, .us, .travel, .tel and .co and will implement the both of these services on behalf of .WEB.

29.1.1.1 Neustar's Experience in Implementing Sunrise and Trademark Claims Processes

In early 2002, Neustar became the first registry operator to launch a successful authenticated Sunrise process. This process permitted qualified trademark owners to pre-register their trademarks as domain names in the .us TLD space prior to the opening of the space to the general public. Unlike any other "Sunrise" plans implemented (or proposed before that time), Neustar validated the authenticity of Trademark applications and registrations with the United States Patent and Trademark Office (USPTO).

Subsequently, as the back-end registry operator for the .tel gTLD and the .co ccTLD, Neustar launched validated Sunrise programs employing processes. These programs are very similar to those that are to be employed by the Trademark Clearinghouse for new gTLDs.

Below is a high level overview of the implementation of the .co Sunrise period that demonstrates Neustar's experience and ability to provide a Sunrise service and an overview of Neustar's experience in implementing a Trademark Claims program to trademark owners for the launch of .BIZ. Neustar's experience in each of these rights protection mechanisms will enable it to seamlessly provide these

services on behalf of .WEB as required by ICANN.

a) Sunrise and .co

The Sunrise process for .co was divided into two sub-phases:

-Local Sunrise giving holders of eligible trademarks that have obtained registered status from the Colombian trademark office the opportunity apply for the .CO domain names corresponding with their marks

-Global Sunrise program giving holders of eligible registered trademarks of national effect, that have obtained a registered status in any country of the world the opportunity apply for the .CO domain names corresponding with their marks for a period of time before registration is open to the public at large.

Like the new gTLD process set forth in the Applicant Guidebook, trademark owners had to have their rights validated by a Clearinghouse provider prior to the registration being accepted by the Registry. The Clearinghouse used a defined process for checking the eligibility of the legal rights claimed as the basis of each Sunrise application using official national trademark databases and submitted documentary evidence.

Applicants and/or their designated agents had the option of interacting directly with the Clearinghouse to ensure their applications were accurate and complete prior to submitting them to the Registry pursuant to an optional "Pre-validation Process". Whether or not an applicant was "pre-validated", the applicant had to submit its corresponding domain name application through an accredited registrar. When the Applicant was pre-validated through the Clearinghouse, each was given an associated approval number that it had to supply the registry. If they were not pre-validated, applicants were required to submit the required trademark information through their registrar to the Registry.

As the registry level, Neustar, subsequently either delivered the:

-Approval number and domain name registration information to the Clearinghouse
-When there was no approval number, trademark information and the domain name registration information was provided to the Clearinghouse through EPP (as is currently required under the Applicant Guidebook).

Information was then used by the Clearinghouse as either further validation of those pre-validated applications, or initial validation of those that did not go through pre-validation. If the applicant was validated and their trademark matched the domain name applied-for, the Clearinghouse communicated that fact to the Registry via EPP.

When there was only one validated sunrise application, the application proceeded to registration when the .co launched. If there were multiple validated applications (recognizing that there could be multiple trademark owners sharing the same trademark), those were included in the .co Sunrise auction process. Neustar tracked all of the information it received and the status of each application and posted that status on a secure Website to enable trademark owners to view the status of its Sunrise application.

Although the exact process for the Sunrise program and its interaction between the trademark owner, Registry, Registrar, and IP Clearinghouse is not completely defined in the Applicant Guidebook and is dependent on the current RFI issued by ICANN in its selection of a Trademark Clearinghouse provider, Neustar's expertise in launching multiple Sunrise processes and its established software will implement a smooth and compliant Sunrise process for the new gTLDs.

b) Trademark Claims Service Experience

With Neustar's biz TLD launched in 2001, Neustar became the first TLD with a Trademark Claims service. Neustar developed the Trademark Claim Service by enabling companies to stake claims to domain names prior to the commencement of live .biz domain registrations.

During the Trademark Claim process, Neustar received over 80,000 Trademark Claims from entities around the world. Recognizing that multiple intellectual property owners could have trademark rights in a particular mark, multiple Trademark Claims for the same string were accepted. All applications were logged into a Trademark Claims database managed by Neustar. The Trademark Claimant was required to provide various information about their trademark rights, including the:

- Particular trademark or service mark relied on for the trademark Claim
- Date a trademark application on the mark was filed, if any, on the string of the domain name
- Country where the mark was filed, if applicable
- Registration date, if applicable
- Class or classes of goods and services for which the trademark or service mark was registered
- Name of a contact person with whom to discuss the claimed trademark rights.

Once all Trademark Claims and domain name applications were collected, Neustar then compared the claims contained within the Trademark Claims database with its database of collected domain name applications (DNAs). In the event of a match between a Trademark Claim and a domain name application, an e-mail message was sent to the domain name applicant notifying the applicant of the existing Trademark Claim. The e-mail also stressed that if the applicant chose to continue the application process and was ultimately selected as the registrant, the applicant would be subject to Neustar's dispute proceedings if challenged by the Trademark Claimant for that particular domain name.

The domain name applicant had the option to proceed with the application or cancel the application. Proceeding on an application meant that the applicant wanted to go forward and have the application proceed to registration despite having been notified of an existing Trademark Claim. By choosing to "cancel," the applicant made a decision in light of an existing Trademark Claim notification to not proceed.

If the applicant did not respond to the e-mail notification from Neustar, or elected to cancel the application, the application was not processed. This resulted in making the applicant ineligible to register the actual domain name. If the applicant affirmatively elected to continue the application process after being notified of the claimant's (or claimants') alleged trademark rights to the desired domain name, Neustar processed the application.

This process is very similar to the one ultimately adopted by ICANN and incorporated in the latest version of the Applicant Guidebook. Although the collection of Trademark Claims for new gTLDs will be by the Trademark Clearinghouse, many of the aspects of Neustar's Trademark Claims process in 2001 are similar to those in the Applicant Guidebook. This makes Neustar uniquely qualified to implement the new gTLD Trademark Claims process.

29.1.2 Uniform Dispute Resolution Policy (UDRP) and Uniform Rapid Suspension (URS)

29.1.2.1 UDRP

Prior to joining Neustar, Mr. Neuman was a key contributor to the development of the Uniform Dispute Resolution Policy ("UDRP") in 1998. This became the first "Consensus Policy" of ICANN and has been required to be implemented by all domain name registries since that time. The UDRP is intended as an alternative dispute resolution process to transfer domain names from those that have registered and used domain names in bad faith. Although there is not much of an active role that the domain name registry plays in the implementation of the UDRP, Neustar has closely monitored UDRP decisions that have involved the TLDs for which it supports and ensures that the decisions are implemented by the registrars supporting its TLDs. When alerted by trademark owners of failures to implement UDRP decisions by its registrars, Neustar either proactively implements the decisions itself or reminds the offending registrar of its obligations to implement the decision.

29.1.2.2 URS

In response to complaints by trademark owners that the UDRP was too cost prohibitive and slow, and the fact that more than 70 percent of UDRP cases were "clear cut" cases of cybersquatting, ICANN adopted the IRT's recommendation that all new gTLD registries be required, pursuant to their contracts with ICANN, to take part in a Uniform Rapid Suspension System ("URS"). The purpose of the URS is to provide a more cost effective and timely mechanism for brand owners than the UDRP to protect their trademarks and to promote consumer protection on the Internet.

The URS is not meant to address Questionable cases of alleged infringement (e.g., use of terms in a generic sense) or for anti-competitive purposes or denial of free speech, but rather for those cases in which there is no genuine contestable issue as to the infringement and abuse that is taking place.

Unlike the UDRP which requires little involvement of gTLD registries, the URS envisages much more of an active role at the registry-level. For example, rather than requiring the registrar to lock down a domain name subject to a UDRP dispute, it is the registry under the URS that must lock the domain

within 24 hours of receipt of the complaint from the URS Provider to restrict all changes to the registration data, including transfer and deletion of the domain names.

In addition, in the event of a determination in favor of the complainant, the registry is required to suspend the domain name. This suspension remains for the balance of the registration period and would not resolve the original website. Rather, the nameservers would be redirected to an informational web page provided by the URS Provider about the URS.

Additionally, the WHOIS reflects that the domain name will not be able to be transferred, deleted, or modified for the life of the registration. Finally, there is an option for a successful complainant to extend the registration period for one additional year at commercial rates.

.WEB is fully aware of each of these requirements and will have the capability to implement these requirements for new gTLDs. In fact, during the IRT's development of the URS, Neustar began examining the implications of the URS on its registry operations and provided the IRT with feedback on whether the recommendations from the IRT would be feasible for registries to implement.

Although there have been a few changes to the URS since the IRT recommendations, Neustar continued to participate in the development of the URS by providing comments to ICANN, many of which were adopted. As a result, Neustar is committed to supporting the URS for all of the registries that it provides back-end registry services.

29.1.3 Implementation of Thick WHOIS

The .WEB registry will include a thick WHOIS database as required in Specification 4 of the Registry agreement. A thick WHOIS provides numerous advantages including a centralized location of registrant information, the ability to more easily manage and control the accuracy of data, and a consistent user experience.

29.1.4 Policies Handling Complaints Regarding Abuse

In addition to the Rights Protection mechanisms addressed above, NU DOTCO LLC will implement a number of measures to handle complaints regarding the abusive registration of domain names in its TLD as described in .WEB's response to Question 28.

29.1.4.1 Registry Acceptable Use Policy

One of the key policies each new gTLD registry is the need to have is an Acceptable Use Policy that clearly delineates the types of activities that constitute "abuse" and the repercussions associated with an abusive domain name registration. The policy must be incorporated into the applicable Registry-Registrar Agreement and reserve the right for the registry to take the appropriate actions based on the type of abuse. This may include locking down the domain name preventing any changes to the contact and nameserver information associated with the domain name, placing the domain name "on hold" rendering the domain name non-resolvable, transferring to the domain name to another registrar, and/or in cases in which the domain name is associated with an existing law enforcement investigation, substituting name servers to collect information about the DNS queries to assist the investigation. .WEB's Acceptable Use Policy, set forth in our response to Question 28, will include prohibitions on phishing, pharming, dissemination of malware, fast flux hosting, hacking, and child pornography. In addition, the policy will include the right of the registry to take action necessary to deny, cancel, suspend, lock, or transfer any registration in violation of the policy.

29.1.4.2 Monitoring for Malicious Activity

.WEB is committed to ensuring that those domain names associated with abuse or malicious conduct in violation of the Acceptable Use Policy are dealt with in a timely and decisive manner. These include taking action against those domain names that are being used to threaten the stability and security of the TLD, or is part of a real-time investigation by law enforcement.

Once a complaint is received from a trusted source, third-party, or detected by the Registry, the Registry will use commercially reasonable efforts to verify the information in the complaint. If that information can be verified to the best of the ability of the Registry, the sponsoring registrar will be notified and be given 12 hours to investigate the activity and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the Registry to keep the name in the zone. If the registrar has not taken the requested action after the 12-hour period (i.e., is unresponsive to the request or refuses to take action), the Registry will place the domain on "ServerHold". Although this action removes the domain

name from the TLD zone, the domain name record still appears in the TLD WHOIS database so that the name and entities can be investigated by law enforcement should they desire to get involved.

29.3 Resourcing Plans

The rights protection mechanisms described in the response above involve a wide range of tasks, procedures, and systems. The responsibility for each mechanism varies based on the specific requirements. In general the development of applications such as sunrise and IP claims is the responsibility of the Engineering team, with guidance from the Product Management team. Customer Support and Legal play a critical role in enforcing certain policies such as the rapid suspension process. These teams have years of experience implementing these or similar processes.

The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

- Development/Engineering - 19 employees
- Product Management- 4 employees
- Customer Support - 12 employees

The resources are more than adequate to support the rights protection mechanisms of the .WEB registry.

30(a). Security Policy: Summary of the security policy for the proposed registry

30.(a).1 Security Policies

NU DOTCO LLC and our back-end operator, Neustar recognize the vital need to secure the systems and the integrity of the data in commercial solutions. The .WEB registry solution will leverage industry-best security practices including the consideration of physical, network, server, and application elements.

Neustar's approach to information security starts with comprehensive information security policies. These are based on the industry best practices for security including SANS (SysAdmin, Audit, Network, Security) Institute, NIST (National Institute of Standards and Technology), and CIS (Center for Internet Security). Policies are reviewed annually by Neustar's information security team.

The following is a summary of the security policies that will be used in the .WEB registry, including:

1. Summary of the security policies used in the registry operations
2. Description of independent security assessments
3. Description of security features that are appropriate for .WEB
4. List of commitments made to registrants regarding security levels

All of the security policies and levels described in this section are appropriate for the .WEB registry.

30.(a).2 Summary of Security Policies

Neustar has developed a comprehensive Information Security Program in order to create effective administrative, technical, and physical safeguards for the protection of its information assets, and to comply with Neustar's obligations under applicable law, regulations, and contracts. This Program establishes Neustar's policies for accessing, collecting, storing, using, transmitting, and protecting electronic, paper, and other records containing sensitive information.

- The policies for internal users and our clients to ensure the safe, organized and fair use of information resources.
- The rights that can be expected with that use.
- The standards that must be met to effectively comply with policy.
- The responsibilities of the owners, maintainers, and users of Neustar's information resources.
- Rules and principles used at Neustar to approach information security issues

The following policies are included in the Program:

1. Acceptable Use Policy

The Acceptable Use Policy provides the “rules of behavior” covering all Neustar Associates for using Neustar resources or accessing sensitive information.

2. Information Risk Management Policy

The Information Risk Management Policy describes the requirements for the on-going information security risk management program, including defining roles and responsibilities for conducting and evaluating risk assessments, assessments of technologies used to provide information security and monitoring procedures used to measure policy compliance.

3. Data Protection Policy

The Data Protection Policy provides the requirements for creating, storing, transmitting, disclosing, and disposing of sensitive information, including data classification and labeling requirements, the requirements for data retention. Encryption and related technologies such as digital certificates are also covered under this policy.

4. Third Party Policy

The Third Party Policy provides the requirements for handling service provider contracts, including specifically the vetting process, required contract reviews, and on-going monitoring of service providers for policy compliance.

5. Security Awareness and Training Policy

The Security Awareness and Training Policy provide the requirements for managing the on-going awareness and training program at Neustar. This includes awareness and training activities provided to all Neustar Associates.

6. Incident Response Policy

The Incident Response Policy provides the requirements for reacting to reports of potential security policy violations. This policy defines the necessary steps for identifying and reporting security incidents, remediation of problems, and conducting “lessons learned” post-mortem reviews in order to provide feedback on the effectiveness of this Program. Additionally, this policy contains the requirement for reporting data security breaches to the appropriate authorities and to the public, as required by law, contractual requirements, or regulatory bodies.

7. Physical and Environmental Controls Policy

The Physical and Environment Controls Policy provides the requirements for securely storing sensitive information and the supporting information technology equipment and infrastructure. This policy includes details on the storage of paper records as well as access to computer systems and equipment locations by authorized personnel and visitors.

8. Privacy Policy

Neustar supports the right to privacy, including the rights of individuals to control the dissemination and use of personal data that describes them, their personal choices, or life experiences. Neustar supports domestic and international laws and regulations that seek to protect the privacy rights of such individuals.

9. Identity and Access Management Policy

The Identity and Access Management Policy covers user accounts (login ID naming convention, assignment, authoritative source) as well as ID lifecycle (request, approval, creation, use, suspension, deletion, review), including provisions for system/application accounts, shared/group accounts, guest/public accounts, temporary/emergency accounts, administrative access, and remote access. This policy also includes the user password policy requirements.

10. Network Security Policy

The Network Security Policy covers aspects of Neustar network infrastructure and the technical controls in place to prevent and detect security policy violations.

11. Platform Security Policy

The Platform Security Policy covers the requirements for configuration management of servers, shared systems, applications, databases, middle-ware, and desktops and laptops owned or operated by Neustar Associates.

12. Mobile Device Security Policy

The Mobile Device Policy covers the requirements specific to mobile devices with information storage or processing capabilities. This policy includes laptop standards, as well as requirements for PDAs,

mobile phones, digital cameras and music players, and any other removable device capable of transmitting, processing or storing information.

13. Vulnerability and Threat Management Policy

The Vulnerability and Threat Management Policy provides the requirements for patch management, vulnerability scanning, penetration testing, threat management (modeling and monitoring) and the appropriate ties to the Risk Management Policy.

14. Monitoring and Audit Policy

The Monitoring and Audit Policy covers the details regarding which types of computer events to record, how to maintain the logs, and the roles and responsibilities for how to review, monitor, and respond to log information. This policy also includes the requirements for backup, archival, reporting, forensics use, and retention of audit logs.

15. Project and System Development and Maintenance Policy

The System Development and Maintenance Policy covers the minimum security requirements for all software, application, and system development performed by or on behalf of Neustar and the minimum security requirements for maintaining information systems.

30.(a).3 Independent Assessment Reports

Neustar IT Operations is subject to yearly Sarbanes-Oxley (SOX), Statement on Auditing Standards #70 (SAS70) and ISO audits. Testing of controls implemented by Neustar management in the areas of access to programs and data, change management and IT Operations are subject to testing by both internal and external SOX and SAS70 audit groups. Audit Findings are communicated to process owners, Quality Management Group and Executive Management. Actions are taken to make process adjustments where required and remediation of issues is monitored by internal audit and QM groups. External Penetration Test is conducted by a third party on a yearly basis. As authorized by Neustar, the third party performs an external Penetration Test to review potential security weaknesses of network devices and hosts and demonstrate the impact to the environment. The assessment is conducted remotely from the Internet with testing divided into four phases:

- A network survey is performed in order to gain a better knowledge of the network that was being tested
- Vulnerability scanning is initiated with all the hosts that are discovered in the previous phase
- Identification of key systems for further exploitation is conducted
- Exploitation of the identified systems is attempted.

Each phase of the audit is supported by detailed documentation of audit procedures and results. Identified vulnerabilities are classified as high, medium and low risk to facilitate management's prioritization of remediation efforts. Tactical and strategic recommendations are provided to management supported by reference to industry best practices.

30.(a).4 Augmented Security Levels and Capabilities

There are no increased security levels specific for .WEB. However, Neustar will provide the same high level of security provided across all of the registries it manages. A key to Neustar's Operational success is Neustar's highly structured operations practices. The standards and governance of these processes:

- Include annual independent review of information security practices
- Include annual external penetration tests by a third party
- Conform to the ISO 9001 standard (Part of Neustar's ISO-based Quality Management System)
- Are aligned to Information Technology Infrastructure Library (ITIL) and CoBIT best practices
- Are aligned with all aspects of ISO IEC 17799
- Are in compliance with Sarbanes-Oxley (SOX) requirements (audited annually)
- Are focused on continuous process improvement (metrics driven with product scorecards reviewed monthly).

A summary view to Neustar's security policy in alignment with ISO 17799 can be found in section 30.(a).5 below.

30.(a).5 Commitments and Security Levels

The .WEB registry commits to high security levels that are consistent with the needs of the TLD.

These commitments include:

Compliance with High Security Standards

- Security procedures and practices that are in alignment with ISO 17799
- Annual SOC 2 Audits on all critical registry systems
- Annual 3rd Party Penetration Tests
- Annual Sarbanes Oxley Audits

Highly Developed and Document Security Policies

- Compliance with all provisions described in section 30.(b) and in the attached security policy document.
- Resources necessary for providing information security
- Fully documented security policies
- Annual security training for all operations personnel

High Levels of Registry Security

- Multiple redundant data centers
- High Availability Design
- Architecture that includes multiple layers of security
- Diversified firewall and networking hardware vendors
- Multi-factor authentication for accessing registry systems
- Physical security access controls
- A 24x7 manned Network Operations Center that monitors all systems and applications
- A 24x7 manned Security Operations Center that monitors and mitigates DDoS attacks
- DDoS mitigation using traffic scrubbing technologies

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EXHIBIT C-17



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1. Consent Agenda:

a. Appointment of Independent Audit Firm for FY23

Whereas, the Board Audit Committee has discussed a recommendation from ICANN org to engage [Redacted – Confidential Negotiation Information] to carry out the independent audit for the fiscal year ending 30 June 2023 and has recommended that the Board authorize the Interim President and CEO, or her designee(s), to take all steps necessary to carry out the engagement.

Resolved (2023.04.30.01), the Board authorizes the Interim President and CEO, or her designee(s), to take all steps necessary to engage Moss Adams and Moss Adams member firms as the audit firm(s) for the financial statements for the fiscal year ending 30 June 2023.

Resolved (2023.04.30.02), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN Bylaws until the Interim President and CEO, or her designee(s), determines that the confidential information may be released.

Rationale for Resolutions 2023.04.30.01 – 2023.04.30.02

The audit firm [Redacted – Confidential Negotiation Information]. Based on the report from the organization and the Audit Committee's evaluation [Redacted – Confidential Negotiation Information], the Committee has recommended that the Board authorize the Interim President and CEO, or her designee(s), to take all steps necessary to engage [Redacted – Confidential Negotiation Information] as ICANN's

independent audit firm(s) for fiscal year 2023 for any annual independent audit requirements in any jurisdiction.

This furthers ICANN's accountability to its Mission and processes, and the results of the independent auditors' work will be publicly available. Taking this decision is both consistent with ICANN's Mission and in the public interest as the engagement of an independent audit firm is in fulfillment of ICANN's obligations to undertake an audit of ICANN's financial statements and helps serve ICANN's stakeholders in a more accountable manner.

This decision will have a fiscal impact on ICANN, which is accounted for in the FY23 ICANN Operating Plan and Budget. This decision should not have any direct impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

b. Recommendation on Board Committee Appointment

Whereas, the Board Governance Committee has recommended that the Board appoint Nicolas Caballero to the Board Technical Committee (BTC) and the Chair of the BTC agrees with the recommendation.

Resolved (2023.04.30.03), the Board appoints Nicolas Caballero to the Board Technical Committee.

Rationale for Resolution 2023.04.30.03

Article 7, Section 7.2 and Article 14 of the ICANN Bylaws call for the Board to appoint, among other things, membership of each Board Committee. Nicolas “Nico” Caballero joined the Board in March 2023 as the non-voting Governmental Advisory Committee Liaison to the Board. Upon joining the Board, Nico expressed interest in serving on the Board Technical Committee (BTC). His experience as outlined in his [biography](#) shows that he will bring valuable skills to the BTC.

The appointment of the Board Committee membership is consistent with ICANN’s Mission and is in the public interest as it is important to ensure that the Board and its Committees have the properly skilled expertise to carry forth ICANN’s Mission, Commitments and Core Values. This decision will have no direct fiscal impact on the organization and no impact on the security, stability, or resiliency of the domain name system.

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

2. Main Agenda:

a. Amendments to Registrar Accreditation Agreement & Registry Agreement for RDAP

Whereas, the ICANN Board [accepted](#) the advice from SAC051 on 28 October 2011 and directed ICANN organization to produce, in consultation with the community, a roadmap for the coordination of the technical and policy discussions necessary to evaluate and adopt a replacement for the WHOIS protocol.

Whereas, the [Base gTLD Registry Agreement \(RA\)](#) and [2013 Registrar Accreditation Agreement \(RAA\)](#) both provide that, until ICANN requires a different protocol, the contracted party will operate a WHOIS service available via port 43 in accordance with RFC 3912, and a web-based Directory Service providing free public query-based access in the required format. The RA and RAA further provide that ICANN reserves the right to specify alternative formats and protocols, and upon such specification, the contracted party will implement such alternative specification as soon as reasonably practicable.

Whereas, ICANN org and members of the gTLD Registries Stakeholder Group (RySG) and the Registrar Stakeholder Group (RrSG), collectively the Contracted Party House Negotiating Team (CPH-NT), worked together to draft proposed Global Amendments to the RA and RAA to specify the operational requirements for providing Registration Data Directory Services (RDDS) via the Registration Data Access Protocol (RDAP).

Whereas, the proposed Global Amendments include reporting requirements for registries that include changes to address the advice from the ICANN Security and Stability Advisory Committee in [SAC097](#) related to inconsistent reporting of RDDS queries.

Whereas, the proposed Global Amendments include a change to the language of Specification 4, Section 3.1 of the RA that will enable ICANN org to use the existing Bulk Registration Data Access (BRDA) for research purposes.

Whereas, the proposed Global Amendments were posted for the contracted parties' approval and received Registry Operator Approval, Registrar Approval, and Brand Registry Operator Approval, as defined in each of the RA, RAA, and Specification 13 of the RA.

Whereas, the Board determined that no further revisions to the proposed Global Amendments are necessary after taking the public comments and voting results into account.

Resolved (2023.04.30.04), the Board approves the proposed Global Amendments to the Base gTLD Registry Agreement, the 2013 Registrar Accreditation Agreement, and Specification 13 to the Base gTLD Registry Agreement.

Resolved (2023.04.30.05), the Board directs the ICANN Interim President and CEO, or her designee(s), to take the actions necessary to finalize and effect the Global Amendments.

Rationale for Resolutions 2023.04.30.04 – 2023.04.30.05

Why is the Board addressing the issue now?

In 2010, the ICANN community held [discussions](#) about the need for the technical evolution of the WHOIS system, citing that the WHOIS protocol did not meet the community's needs. On 19 September 2011, the Security and Stability Advisory Committee (SSAC) issued [SAC051](#) advising the ICANN community to evaluate and adopt a replacement for the WHOIS protocol. The SSAC made the recommendation based on the shortcomings found with the WHOIS protocol such as the lack of (1) support for internationalization, (2) secure access to data, (3) differentiated access, and (4) standardized query, response, and error responses.

In 2011, the ICANN Board passed a [resolution](#) directing staff to produce, in consultation with the community, a roadmap for the

coordination of the technical and policy discussions necessary to implement the recommendations outlined in SAC051.

Subsequently, RDAP was developed by the technical community through the Internet Engineering Task Force (IETF) as described in [STD95](#). In 2017, ICANN launched the voluntary [RDAP pilot program](#) at the [request](#) of the gTLD Registries Stakeholder Group and with the support of the Registrar Stakeholder Group.

On 17 May 2018, the ICANN Board passed a [resolution](#) adopting a [Temporary Specification for gTLD Registration Data](#) requiring (1) registry operators and registrars to operate a RDAP service, (2) ICANN org and the community to define the appropriate RDAP profile(s), and (3) registry operators and registrars to implement the service no later than 135 days after being requested by ICANN. Both the 2013 RAA and the RA include an obligation to implement the new RDDS protocol within 135 days of ICANN's request once the IETF produces a standard; and for registries, the implementation of the standard must be considered commercially reasonable in the context of the overall operation of the registry.

In February 2019, pursuant to requirements in the RA, RAA, and the Temporary Specification for gTLD Registration Data, ICANN org triggered the obligations for all registries and registrars to implement RDAP by [26 August 2019](#). Subsequently in October 2019, ICANN org initiated negotiations with the RySG and RrSG to develop amendments to the [RA](#) and the [RAA](#) to specify the operating requirements for RDAP and to define the plan to sunset obligations to provide RDDS via the WHOIS protocol.

In July 2022, ICANN and the CPH-NT reached agreement on the proposed amendments and the amendments were posted for [public comment](#) from 6 September through 16 November 2022. As set out in

the Public Comment Summary [Report](#), ICANN org and the CPH-NT confirmed that the proposed amendments met the stated objective of creating clear contractual obligations for registry operators and registrars to provide RDDS via RDAP and phasing out certain obligations to provide RDDS via the WHOIS protocol.

On 4 January 2023, ICANN org notified applicable registries, applicable brand registries, and applicable registrars of their eligibility to vote on the proposed Global Amendments to the RA, Specification 13 of the RA, and RAA. The 60-day voting period opened at 17:00 UTC on 19 January 2023 and closed at 23:59 UTC on 20 March 2023. Table 1 below provides an overview of the required thresholds to be considered approved by Applicable Registry Operators, Applicable Brand Registry Operators, and Applicable Registrars, respectively. All calculations of the vote were conducted pursuant to Section 7.6(j)(ii) of the RA, Section 9 of Specification 13 to the RA, and Section 1.18.1 of the RAA.

Table 1: Global Amendment Vote Thresholds and Tabulations

	Required Threshold	Final Vote Tabulations
Applicable Registry Operator - Fee Threshold	\$25,668,185.81	\$28,559,070.20
Applicable Brand Registry Operator - Fee Threshold	\$6,639,529.04	\$6,827,060.77
Applicable Registry Operator - Majority Threshold	581	856

Applicable Brand Registry Operator - Majority Threshold	202	272
Applicable Registrar Approval - Threshold	90%	91.74%

What is the proposal being considered?

The contractual amendments negotiated between ICANN org and the CPH-NT include:

- A requirement to comply with the RDAP profile.
- Updated definitions for RDDS-related terms; this includes updating Specification 13 for .BRAND Registry Operators.
- Reporting requirements for registries that include changes to address the advice from the SSAC in [SAC097](#) related to inconsistent reporting of RDDS queries.
- Service Level Requirements for RDAP availability, round-trip time, and update time.
- The sunset of the requirements to provide RDDS via the WHOIS protocol over a period of 18 months from the amendment effective date.
- The requirement for registrars to provide RDAP for all gTLD Domains Under Management, eliminating the option for registrars supporting registries that provide complete contact information in their RDDS to relay the registration data from the registry.

- A change to the language of Specification 4, Section 3.1 of the RA that will permit ICANN org to use the existing Bulk Registration Data Access (BRDA) for research purposes. This amendment will enable ICANN to use BRDA data to conduct important research for projects such as the [Domain Abuse Activity Reporting System \(DAAR\)](#). DAAR is a system for studying and reporting on domain name registration and security threats. The overarching purpose of DAAR is to develop a robust, reliable, and reproducible methodology for [analyzing security threat activity](#), which the ICANN community may use to make informed policy decisions.
- Updates to Uniform Resource Locator (URL) web addresses in the RA and miscellaneous changes (e.g., URLs updated to “https” from “http”) to address outdated links.

Which stakeholders or others were consulted?

ICANN org conducted a Public Comment proceeding on the proposed Global Amendments from 06 September 2022 through 16 November 2022. The Global Amendments received Registry Operator Approval, Brand Registry Operator Approval, and Registrar Approval in accordance with Section 7.6(j)(ii) of the RA, Section 9 of Specification 13 to the RA, and Section 1.18.1 of the RAA.

What concerns or issues were raised by the community?

ICANN org received five (5) comments from five (5) organizations. Comments noted in the Public Comment Summary [Report](#) provided general support for the proposed amendments with three (3) organizations offering feedback for ICANN org to consider before additional steps were taken. Two organizations, the SSAC and the

Business Constituency, raised the concern that the sunseting of web-based WHOIS may have a negative impact for end users as the deployment of RDAP lookup services may vary by registry and the loss of human-readable output to queries via web-based WHOIS may be lost in the transition.

However, tools such as <https://lookup.icann.org> from ICANN org provides a domain name registration data lookup tool, freely available to the general public. This tool uses the RDAP protocol to perform domain registration data queries and provides results in a human-friendly output and similar tools are also readily available. The advantages of the RDAP protocol and the provisions contained in the proposed Global Amendment, such as adherence to certain output requirements (i.e., the RDAP Profile), allow for tools such as these mentioned to exist.

Following a review of the public comments by ICANN org and the CPH-NT, the comments confirmed that the proposed amendments met the stated objective of creating clear contractual obligations for registry operators and registrars to provide RDDS via RDAP and phasing out certain obligations to provide RDDS via the WHOIS protocol. ICANN org and the CPH NT also determined that based on the comment from the SSAC, a modification to the proposed RA Specification 3 was appropriate and was made before the amendments were posted for the contracted parties' approval.

What significant materials did the Board review?

As part of its deliberations, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- [Base gTLD Registry Agreement \(RA\)](#)

- [Proposed Global Amendment to the Base gTLD Registry Agreement](#)
- [Proposed REDLINE of the Base gTLD Registry Agreement](#)
- [Proposed CLEAN Base gTLD Registry Agreement](#)
- [2013 Registrar Accreditation Agreement \(RAA\)](#)
- [Proposed Global Amendment to the 2013 Registrar Accreditation Agreement](#)
- [Proposed REDLINE of the 2013 Registrar Accreditation Agreement](#)
- [Proposed CLEAN 2013 Registrar Accreditation Agreement](#)
- [Specification 13 to the Base gTLD Registry Agreement \(Spec 13\)](#)
- [Proposed Global Amendment to Specification 13 of the Base gTLD Registry Agreement](#)
- [Proposed REDLINE of Specification 13 of the Base New gTLD Registry Agreement](#)
- [Proposed CLEAN Specification 13 of the Base gTLD Registry Agreement](#)
- [Public Comment Summary Report](#)

What factors has the Board found to be significant?

The Board carefully considered the public comments received for the proposed Global Amendments, along with the summary and analysis of those comments. The Board also considered the terms agreed upon by the CPH-NT as part of the negotiations with ICANN org. The Board appreciates the general support from the ICANN community for the new contractual obligations for RDAP negotiated between ICANN and the CPH-NT and for the steps taken to enable the use of BRDA for research purposes, e.g., to combat DNS abuse.

The Board also acknowledges the concern expressed by some community members regarding the sunset of the WHOIS protocol and that the proposed RAA amendment removes the “interactive web page” currently offered by registrars. However, the Board notes that users will have suitable, if not improved, tools to conduct queries for domain name registration data based on the current implementation of RDAP by all registries and registrars, the lookup tool from ICANN and other similar offerings, and furthered by the requirements set forth in the proposed Global Amendments. This is because Domain Name Registration Data is decentralized, meaning it is held at each of the relevant ICANN Accredited registrars and gTLD registry operators. After the transition to RDAP, the individual, interactive web-pages offered by each registrar and registry for WHOIS queries are no longer necessary because the RDAP protocol allows for user-friendly lookup queries from a centralized client such as the ICANN lookup tool (<https://lookup.icann.org>). Thus, finding sources to look up registration data should not be a challenge as searching for “domain registration lookup” in most search engines today will offer free tools, frequently with the ICANN org tool as the first result. Guiding users to centralized tools where the only required knowledge is the domain name they seek registration date for (as opposed to the user needing to know which registrar was used to register the name, as is the case with the WHOIS protocol) is a better solution than explaining the

number of steps required to find the correct sponsoring registrar and its interactive web page for querying domain name registration data.

The Board further recognizes the input from the SSAC regarding SAC097 and that the originally proposed language in Specification 13 of the amendment to the RA may still report per-TLD statistics inaccurately for TLDs under shared registry systems. While ICANN and the CPH-NT were satisfied that the originally proposed language was a significant improvement over the existing language of the RA, additional language has been added to the RA amendment to further clarify (see below in blue). Once implemented this will provide additional accuracy for reporting for TLDs in this scenario.

For gTLDs that are part of a single-instance Shared Registry System: (1) the fields whois43-queries, web-whois-queries, searchable-whois-queries and rdap-queries in the Registry Functions Activity Report should match the sum of queries reported for the gTLDs in the single-instance Shared Registry System; (2) in case of queries related to the fields in (1) above for which the Registry Operator cannot determine the TLD to count the query to (e.g., a registrar lookup query for a registrar operating in more than one TLD sharing the same RDAP base URL), registries have the flexibility to choose how to allocate those queries across the gTLDs utilizing the single-instance Shared Registry System; and (3) the Registry Functions Activity Report may include the total contact or host transactions for all the gTLDs in the system.

The Board is confident the contractual language added by ICANN org and the CPH-NT following the Public Comment period adequately clarifies what is required and, once implemented, will provide additional accuracy for reporting for TLDs under share registry systems.

Are there fiscal impacts or ramifications on ICANN org (e.g., strategic plan, operating plan, and budget), the community, and/or the public?

There is no significant fiscal impact expected from the approved amendments to the RA, Specification 13, or the RAA. In February 2019, pursuant to requirements in the RA, RAA, and the Temporary Specification for gTLD Registration Data, ICANN org triggered the obligations for all registries and registrars to implement RDAP by [26 August 2019](#) and no additional cost considerations or impacts to registries and registrars should be incurred.

Are there any security, stability or resiliency issues relating to the DNS?

The approved amendments to the RA, Specification 13, and RAA are not expected to create any security, stability, or resiliency issues related to the DNS.

b. ICANN FY24-28 Operating and Financial Plan, ICANN FY24 Operating Plan and Budget

Whereas, the draft ICANN FY24-28 Operating and Financial Plan and draft ICANN FY24 Operating Plan and Budget were posted for public comment in accordance with the Bylaws on 14 December 2022.

Whereas, the public comments received were considered and revisions were applied as appropriate and feasible to the Proposed for Adoption ICANN FY24-28 Operating and Financial Plan and Proposed for Adoption ICANN FY24 Operating Plan and Budget.

Whereas, in addition to the public comment process, ICANN organization actively solicited community feedback and consultation with the ICANN Community by other means, including a public session during ICANN 76.

Whereas, the Board Finance Committee (BFC) has discussed and oversaw ICANN organization's development of the Proposed for Adoption ICANN FY24-28 Operating and Financial Plan and the Proposed for Adoption ICANN FY24 Operating Plan and Budget.

Whereas, the BFC reviewed and discussed suggested changes to the ICANN FY24-28 Operating and Financial Plan and the ICANN FY24 Operating Plan and Budget resulting from public comment and consultations, as well as those resulting from recent Board decisions, and recommended that the Board approve the Proposed for Adoption ICANN FY24-28 Operating and Financial Plan and the Proposed for Adoption ICANN FY24 Operating Plan and Budget.

Whereas, per section 3.9 of the 2013 Registrar Accreditation Agreements, the Board is to establish the Registrar Accreditation Fees and Variable Accreditation Fees, which must be established to develop the annual budget.

Whereas, the description of the Registrar fees, including the recommended Registrar Accreditation Fees Variable Accreditation Fees, for FY24 are included in the Proposed for Adoption ICANN FY24 Operating Plan and Budget.

Resolved (2023.04.30.06), the Board adopts the ICANN FY24-28 Operating and Financial Plan, which describes the activities ICANN will undertake and the resources needed to achieve the Board-adopted ICANN Strategic Plan for Fiscal Years 2021-2025.

Resolved (2023.04.30.07), the Board adopts the ICANN FY24 Operating Plan and Budget including the FY24 ICANN Caretaker Budget that would be in effect in the event the FY24 ICANN Operating Plan and Budget is not in effect at the beginning of FY24.

Rationale for Resolutions 2023.04.30.06 – 2023.04.30.07

On 14 December 2022, a draft of the ICANN FY24-28 Operating and Financial Plan and draft ICANN FY24 Operating Plan and Budget were posted for public comment. The published draft ICANN FY24-28 Operating and Financial Plan and draft ICANN FY24 Operating Plan and Budget were based on numerous discussions with members of ICANN organization and the ICANN community, including extensive consultations with ICANN Supporting Organizations, Advisory Committees, and other stakeholder groups throughout the prior several months.

Public comments received were considered, as well as recent decisions by the ICANN Board, and revisions were applied as appropriate and feasible to the Proposed for Adoption ICANN FY24-28 Operating and Financial Plan and Proposed for Adoption ICANN FY24 Operating Plan and Budget.

In addition, the following consultation activities were carried out:

- 8 September 2022 – Community webinar held at ICANN 75 Prep Week on the Planning and Finance Update
- 15 December 2022 – Community webinars were held to review the draft ICANN FY24-28 Operating and Financial Plan and draft

ICANN FY24 Operating Plan and Budget published for public comment

- 28 February 2023 – the summary of comments received through the public comment process were shared in a public session during the ICANN 76 Prep week, including with representatives of the ICANN bodies that submitted the public comments, to help ensure the comments were adequately understood and appropriate consideration was given to them.
- In addition to the public comment process, from December 2022 – February 2023 ICANN actively solicited community feedback and consulted with the ICANN community by other means, including attendance and presentations for At-Large Operations, Finance, and Budget Working Group, Generic Names Supporting Organization Standing Committee on ICANN Budget and Operations Plan, and Country Code Names Supporting Organisation Strategic and Operational Planning Standing Committee.

All comments received were considered in developing the Proposed for Adoption ICANN FY24-28 Operating and Financial Plan and the Proposed for Adoption ICANN FY24 Operating Plan and Budget. Where feasible and appropriate these inputs have been incorporated into the Proposed for Adoption ICANN FY24-28 Operating and Financial Plan and the Proposed for Adoption ICANN FY24 Operating Plan and Budget.

There were no changes to the Operating Plans, Funding or Expenses for the Proposed for Adoption ICANN FY24-28 Operating and Financial Plan and the Proposed for Adoption ICANN FY24 Operating Plan and Budget as a result of public comment. The only changes made to the

Proposed for Adoption Plans were the result of Board passing resolutions for the New gTLD Program Next Round and Registration for Data Request implementations after the Draft Plans were posted for public comment. The remainder of the changes were in narrative and presentation only.

In addition to the day-to-day operational requirements, the ICANN FY24 Operating Plan and Budget allocates amounts to various FY24 budget requests received from community leadership. The ICANN FY24 Operating Plan and Budget also discloses financial information on the 2012 Round of the New gTLD Program, relative to expenses, funding and net remaining funds. Further, because the Registrar Fees are key to the development of the Budget, the ICANN FY24 Operating Plan and Budget sets out and establishes those fees, which are consistent with recent years, and will be reviewed for approval by the Registrars.

The ICANN FY24-28 Operating and Financial Plan and the ICANN FY24 Operating Plan and Budget will have a positive impact on ICANN in that together they provide a proper framework by which ICANN will be managed and operated, which also provides the basis for the organization to be held accountable in a transparent manner.

This decision is in the public interest and within ICANN's mission, as it is fully consistent with ICANN's strategic and operational plans, and the results of which allow ICANN to satisfy its mission.

This decision will have a fiscal impact on ICANN org and the Community as is intended. This should have a positive impact on the security, stability and resiliency of the domain name system (DNS) with respect to any funding that is dedicated to those aspects of the DNS.

This is an Organizational Administrative Function that has already been subject to public comment as noted above.

c. Policy Recommendations concerning Curative Rights Protections for International Governmental Organizations (IGOs)

Whereas, on 5 June 2014, the Generic Names Supporting Organization (GNSO) Council resolved¹ to initiate a Policy Development Process (PDP) to evaluate whether ICANN's second-level dispute resolution mechanisms, the Uniform Domain Name Dispute Resolution Policy (UDRP) and the Uniform Rapid Suspension System (URS), should be amended to enable their access and use by International Governmental Organizations (IGOs) and International Non-Governmental Organizations (INGOs), or if a separate, narrowly-tailored procedure modeled on these curative rights protection measures should be developed to apply only to protected IGO and INGO identifiers.

Whereas, on 17 July 2018, the GNSO IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process (PDP) Working Group completed its work and submitted its Final Report² to the GNSO Council.

Whereas, on 18 April 2019, the GNSO Council approved³ the first four recommendations from the PDP Working Group. With respect to Recommendation #5, the GNSO Council directed the Review of All

¹ <https://gns0.icann.org/en/council/resolutions#20140605-2>.

² <https://gns0.icann.org/en/issues/igo-ingo-crp-access-final-17jul18-en.pdf>.

³ <https://gns0.icann.org/en/council/resolutions#201905>.

Rights Protection Mechanisms (RPMs) PDP Working Group to consider, as part of its Phase 2 work, whether an appropriate policy solution can be developed that is generally consistent with the four recommendations that the GNSO Council approved and in line with specific considerations laid out by the GNSO Council, including recognizing the possibility that an IGO may have jurisdictional immunity in some circumstances and preserving a registrant's right to a judicial review of a UDRP or URS panel decision.

Whereas, on 19 August 2021, in view of its decision to review the scope of Phase 2 of the RPMs PDP, the GNSO Council took the procedural step⁴ of initiating an Expedited Policy Development Process (EPDP) on Specific Curative Rights Protections for IGOs, to continue the work originally launched as a separate IGO Work Track within the RPMs PDP and with the same scope of work.⁵

Whereas, on 4 April 2022, the EPDP on Specific Curative Rights Protections for IGOs completed its work and submitted its Final Report⁶ to the GNSO Council.

Whereas, on 15 June 2022, the GNSO Council unanimously approved⁷ all five Full Consensus recommendations from the EPDP on Specific Curative Rights Protections for IGOs and transmitted its Recommendations Report⁸ to the Board on 21 July 2022.

⁴ <https://gns0.icann.org/en/council/resolutions/2020-current#20210819-2>.

⁵ <https://gns0.icann.org/en/issues/specific-crp-igo-epdp-charter-16aug21-en.pdf>.

⁶ <https://gns0.icann.org/en/issues/epdp-specific-crp-igo-final-report-02apr22-en.pdf>.

⁷ <https://gns0.icann.org/en/council/resolutions/2020-current#202206>.

⁸ <https://gns0.icann.org/sites/default/files/policy/2022/draft/draft-epdp-specific-curative-rights-protections-for-igos-report-11jul22-en.pdf>.

Whereas, the IGO-INGO Access to Curative Rights Protection Mechanisms PDP and the EPDP on Specific Curative Rights Protections for IGOs have followed all the necessary steps and processes required by the ICANN Bylaws, the GNSO PDP Manual and the GNSO Working Group Guidelines, including the publication of Initial Reports⁹ for Public Comments and consideration of the public comments received.

Whereas, on 11 July 2019 and 28 November 2022, respectively, the Final Reports of the IGO-INGO Access to Curative Rights Protection Mechanisms PDP and the EPDP on Specific Curative Rights Protections for IGOs were published for Public Comment¹⁰ to inform Board action on the reports, in accordance with the Bylaws.

Whereas, on 11 July 2019, the ICANN Board notified¹¹ the Governmental Advisory Committee (GAC) of the GNSO Council's approval of four of the five recommendations from the IGO-INGO Access to Curative Rights Protection Mechanisms PDP, in accordance with the Bylaws, and on 20 August 2019, the GAC advised the Board to abstain from taking a decision to allow the parties sufficient time to explore possible ways forward.¹²

Whereas, on 14 October 2019, the Board informed the GAC that the Board had formed a new Caucus Group on the topic, and it did not intend to act at the time on the four PDP recommendations until the

⁹ <https://gns0.icann.org/en/issues/igo-ingo-crp-access-initial-19jan17-en.pdf> and <https://gns0.icann.org/en/issues/specific-crp-igo-epdp-initial-report-preliminary-recommendations-14sep21-en.pdf>.

¹⁰ <https://www.icann.org/public-comments/igo-ingo-crp-recommendations-2019-07-11-en> and <https://www.icann.org/en/public-comment/proceeding/final-report-from-the-epdp-on-specific-curative-rights-protections-for-igos-28-11-2022>.

¹¹ <https://www.icann.org/en/system/files/correspondence/chalaby-to-ismail-11jul19-en.pdf>.

¹² See <https://www.icann.org/en/system/files/correspondence/ismail-to-chalaby-20aug19-en.pdf>.

Caucus Group has reviewed and formulated suggestions for possible paths forward¹³.

Whereas, on 1 December 2022, the Board notified¹⁴ the GAC of the GNSO Council's approval of all five recommendations from the EPDP on Specific Curative Rights Protections for IGOs.

Whereas, on 20 March 2023, in its Cancun Communiqué,¹⁵ the GAC advised the Board, to proceed with the approval of the recommendations of the EPDP on Specific Curative Rights Protections for IGOs for implementation.

Whereas, following review of the matter by the Board's Caucus Group, the Board has considered the recommendations that the GNSO Council approved from the two policy development processes as well as the Public Comments submitted.

Resolved (2023.04.30.08) the Board thanks the members of the IGO-INGO Access to Curative Rights Protection Mechanisms PDP Working Group and the members of the EPDP team on Specific Curative Rights Protections for IGOs for their dedication and work on these longstanding policy issues.

Resolved (2023.04.30.09), the ICANN Board adopts the four recommendations that the GNSO Council approved from the IGO-INGO Access to Curative Rights Protection Mechanisms PDP and the five recommendations that the GNSO Council approved from the EPDP on Specific Curative Rights Protections for IGOs.

¹³ See <https://www.icann.org/en/system/files/correspondence/chalaby-to-ismail-14oct19-en.pdf>.

¹⁴ See <https://www.icann.org/en/system/files/correspondence/sinha-to-ismail-01dec22-en.pdf>.

¹⁵ See <https://gac.icann.org/advice/communiques/ICANN76%20Cancun%20Communique.pdf>.

Resolved (2023.04.30.10), the ICANN Board directs the ICANN Interim President and CEO, or her designee(s), to proceed with the implementation of these recommendations as soon as feasible. The Board further directs the ICANN Interim President and CEO, or her designee(s), to develop and submit to the Board an implementation plan, including estimates on staffing, resources and timelines, to inform the Board as to how the implementation of these recommendations fit into ICANN org’s operational planning and prioritization of its ongoing work to implement other community-developed recommendations that the Board has adopted.

Rationale for Resolutions 2023.04.30.08 – 2023.04.30.10

Why is the Board addressing the issue?

The appropriate nature and scope of policy protections for the names and acronyms associated with International Governmental Organizations (IGOs) has been a longstanding issue in the community. In April 2014, following an initial GNSO PDP on Protection of IGO and INGO Identifiers in All gTLDs conducted between October 2012 and November 2013, the Board voted to adopt several GNSO PDP recommendations concerning top and second level protections for the full names of IGOs on a list prepared by the GAC. Those recommendations are now the subject of an ICANN Consensus Policy (effective 1 August 2018).¹⁶

The GNSO PDP had also recommended that the GNSO Council consider policy work to explore possible amendments to the UDRP

¹⁶ The full text of the Policy can be found at <https://www.icann.org/resources/pages/igo-ingo-protection-policy-2020-02-18-en>.

and URS, to enable their use by protected IGOs and INGOs. The GNSO Council initiated the IGO-INGO Access to Curative Rights Protection Mechanisms PDP to consider the issue in June 2014. In July 2019, the GNSO Council approved four of the five recommendations from the GNSO IGO-INGO Access to Curative Rights Protection Mechanisms PDP and directed that additional policy work be conducted on the subject of the fifth recommendation that it decided not to approve. This resulted in the GNSO Council's chartering of the EPDP on Specific Curative Rights Protections for IGOs in August 2021.

Throughout the various policy processes, the GAC had provided Consensus Advice to the Board on the overall topic of IGO protections, including, specifically, on the question of second-level curative rights protections in the Los Angeles (October 2014), Hyderabad (November 2016) and Johannesburg (June 2017) Communiqués. In its most recent Cancun Communiqué (March 2023), the GAC advised the Board to proceed to adopt the EPDP recommendations and noted that this advice superseded those from the previous Communiqués insofar as the EPDP recommendations propose "targeted amendments to the UDRP Rules to accommodate IGOs in addressing the abuse of IGO identifiers in the DNS".

Under Section 11.3(i)(x) of the ICANN Bylaws, the GNSO Council's Supermajority support for the four PDP recommendations and its unanimous approval of the five subsequent EPDP recommendations obligates the Board to adopt the recommendations unless, by a vote of more than two-thirds, the Board determines that the policy is not in the best interests of the ICANN community or ICANN.

What is the proposal being considered?

The four recommendations that the GNSO Council approved from the 2019 PDP included specific recommendations not to create a new and separate dispute resolution mechanism for IGOs and INGOs. For INGOs (but not IGOs), there was an additional recommendation not to amend the UDRP or URS. The remainder of the recommendations focused on the provision of Policy Guidance on the UDRP and URS by ICANN org to IGOs, registrants and the GAC, noting the procedural options available to IGOs that do not hold trademarks in their acronyms.

The five recommendations that the GNSO Council approved from the 2022 EPDP achieved Full Consensus across the EPDP team, which included participants from the GAC and several IGOs. The recommendations include the addition of a definition of “IGO Complainant” and a voluntary arbitration component to both the UDRP and URS Rules, without affecting the respondent-registrant’s ability to file judicial proceedings against an IGO at any time during a UDRP or URS proceeding. The recommendations also address the question of what the applicable law in an arbitration proceeding should be, and the EPDP team provided high-level implementation guidance regarding the selection of arbitration provider(s) and the applicable arbitration rules.

As required by Article 3, Section 6.a.iii of the ICANN Bylaws, the GNSO Council-approved recommendations from both the PDP and EPDP were posted for Public Comment to inform Board action on the final recommendations. In considering the recommendations, the Board also reviewed the Public Comments and received briefings from ICANN org as well as a briefing from the GNSO Council on the EPDP outcomes.

Which stakeholders or others were consulted?

In accordance with the requirements of the GNSO PDP Manual, the Working Group for the IGO-INGO Access to Curative Rights Protection Mechanisms PDP solicited early input from the Supporting Organizations and Advisory Committees as well as the GNSO's Stakeholder Groups and Constituencies. It also engaged an external legal expert, Professor Edward Swaine of the George Washington University Law School in the United States, to provide advice on the topic of IGO jurisdictional immunity.

Concerns expressed by several GNSO Council members representing different sectors of the community regarding the one recommendation from the IGO-INGO Access to Curative Rights Protection Mechanisms PDP that the GNSO Council did not approve meant that the scope of work for the EPDP on Specific Curative Rights Protections for IGOs was the subject of extensive deliberations within the GNSO Council. The Council also consulted with the GAC and IGO representatives in drawing up the final charter for the work.

As mandated by the GNSO's PDP Manual, the PDP Working Group and the EPDP team both published their Initial Reports for Public Comments. There were 46 comments submitted to the Initial Report from the PDP Working Group on IGO-INGO Access to Curative Rights Protection Mechanisms, 21 of which were from IGOs, with five from different ICANN community structures. The EPDP team on Specific Curative Rights for IGOs received 33 comments, including six from IGOs and six from various ICANN community groups. Both the PDP Working Group and EPDP team considered all the input received in finalizing their recommendations, in some cases amending their preliminary proposals due to the Public Comments received.

As required by the ICANN Bylaws, additional Public Comment proceedings for both Final Reports were conducted, to allow the public to comment on the proposed recommendations prior to Board action. In addition, as also required by the Bylaws, the Board notified the GAC of the recommendations that the GNSO Council had transmitted to the Board, to allow the GAC to provide timely advice on any public policy concerns that it may have with the recommendations.

What concerns or issues were raised by the community?

The community provided feedback through Public Comments on the Initial and Final Reports from both the PDP Working Group and the EPDP team. ICANN org provided the Board with a summary report of all the Public Comments received to both sets of final recommendations.

In general, the community was divided in its support for the recommendations from the IGO-INGO Access to Curative Rights Protection Mechanisms PDP, with IGOs considering that the recommendations did not go far enough to protect IGO identifiers against abuse at the second level of the domain name system, while commentators representing registrants welcomed the PDP Working Group's recommendation not to create a new and separate dispute resolution procedure for IGOs and INGOs as well as its decision not to amend the UDRP and URS. For the subsequent EPDP recommendations, which will, if implemented, result in modifications to the UDRP and URS Rules, commentators representing registrants focused on the risk that registrant rights could be adversely affected or reduced if the recommendations were implemented in a way as to restrict a registrant's ability to file judicial proceedings against an IGO or to effectively compel a registrant to agree to arbitration. Those

commentators representing the domain investor community were largely against the recommendations, while the IGO community and those ICANN community groups that submitted input were generally supportive.

What significant materials did the Board review?

The Board reviewed the following materials:

- From the IGO-INGO Access to Curative Rights Protection Mechanisms PDP:
 - Initial Report: <https://gnso.icann.org/en/issues/igo-ingo-crp-access-initial-19jan17-en.pdf>
 - Final Report: <https://gnso.icann.org/en/issues/igo-ingo-crp-access-final-17jul18-en.pdf>
 - GNSO Council resolution approving four of the five final recommendations:
<https://gnso.icann.org/en/council/resolutions#201905>
 - GNSO Council Recommendations Report to the Board:
<https://gnso.icann.org/sites/default/files/file/field-file-attach/council-recommendations-pdp-igo-ingo-crp-access-final-16may19-en.pdf>
 - Report of Public Comments on the Final Report:
<https://www.icann.org/en/system/files/files/report-comments-igo-ingo-crp-recommendations-04sep19-en.pdf>

- From the EPDP on Specific Curative Rights Protections for IGOs:
 - Initial Report: <https://gnso.icann.org/en/issues/specific-crp-igo-epdp-initial-report-preliminary-recommendations-14sep21-en.pdf>
 - Final Report: <https://gnso.icann.org/en/issues/epdp-specific-crp-igo-final-report-02apr22-en.pdf>
 - GNSO Council resolution approving all five final recommendations:
<https://gnso.icann.org/en/council/resolutions/2020-current#202206>
 - GNSO Council Recommendations Report to the Board:
<https://gnso.icann.org/sites/default/files/policy/2022/draft/draft-epdp-specific-curative-rights-protections-for-igos-report-11jul22-en.pdf>
 - Report of Public Comments on the Final Report:
<https://itp.cdn.icann.org/en/files/generic-names-supporting-organization-council-gnso-council/public-comment-summary-report-final-report-epdp-specific-curative-rights-protections-igos-01-03-2023-en.pdf>

What factors did the Board find to be significant?

The Board appreciates the extensive work from across the community, including the GAC and IGOs, that resulted in the two sets of GNSO policy recommendations that are the subject of this vote, as well as the input provided throughout the policy process from numerous stakeholders, including individuals and governments. The

Board notes that the community's policy work on the topic of curative rights protections for IGOs has spanned over ten years, culminating in the recent EPDP in which the GAC and IGO representatives participated, and which saw Full Consensus amongst all the members of the EPDP team on the final outcomes.

Are there positive or negative community impacts?

Adopting the final recommendations will have a positive impact on ICANN in that it will demonstrate that ICANN will have addressed complex issues and public policy concerns that have been the subject of longstanding and extensive community work. Board adoption of the recommendations will mean that IGOs that meet the criteria in the updated UDRP and URS Rules will be able to use these second-level dispute resolution mechanisms to address abusive registrations and use of domain names relating to their missions.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

Implementing the two sets of recommendations is expected to have financial and resourcing impacts on ICANN org. Modifying the UDRP and URS Rules will impact the various dispute resolution service providers as well as ICANN-accredited gTLD registrars who will have to implement the new requirements and update their processes. To ensure successful implementation, it will be necessary to seek the cooperation and guidance of ICANN's current dispute resolution service providers.

In addition, as implementing the earlier PDP recommendations will require drafting of Policy Guidance to numerous parties and implementing the subsequent EPDP recommendations will require

drafting of new provisions and the selection of appropriate arbitration rules and providers, it may be necessary to engage the services of external vendors and legal experts. Using third-party services will likely facilitate more efficient and timelier implementation of the relevant recommendations, but will result in increased costs to ICANN org.

Are there any security, stability or resiliency issues relating to the DNS?

None.

Is this decision in the public interest and within ICANN's mission?

This action is within ICANN's Mission and mandate and in the public interest as set forth in the ICANN Bylaws. The multistakeholder policy development process of bottom-up, consensus policies and guidelines helps advance the stable and secure operation of the Internet's unique identifier systems.

Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?

As required by the ICANN Bylaws and the GNSO's policy procedures, the recommendations were published for Public Comment as discussed above.

d. Further Consideration of the Issues Regarding the .GCC Application

Whereas, GCCIX, W.L.L. (the applicant for .GCC) initiated an Independent Review Process (.GCC IRP) challenging the ICANN Board's acceptance of Governmental Advisory Committee (GAC) consensus advice that the .GCC application should not proceed (GAC Advice).

Whereas, in light of certain findings in prior IRP final declarations, the Board [resolved to](#) "authoriz[e] the President and CEO, or his designee(s), to seek a stay of the .GCC IRP and open an informal dialogue with the GAC regarding the rationale for the GAC consensus advice on the .GCC application."

Whereas, ICANN organization sought but was not granted a stay of the .GCC IRP; and ICANN org [asked](#) the GAC Chair to open the "informal dialogue."

Whereas, the GAC Chair [responded](#) to ICANN org, indicating that the GAC had reviewed "GAC discussions from 2013" and that the rationale for the GAC Advice was as follows (and as expressed in the [GAC Early Warning](#)): (i) "The applied-for string (GCC) is an exact match of the known acronym for an Intergovernmental Organization (IGO), the Gulf Cooperation Council and as such, warrants special protection to its name and acronym."; and (ii) "The application clearly targeted the GCC community without any support from the GCC, its six members or its community."

Whereas, following a recommendation from the Board Accountability Mechanisms Committee (BAMC) in May 2022, the Board, in a [resolution](#): (a) "ask[ed] the BAMC to review, consider, and evaluate the underlying basis for the GAC consensus advice that the .GCC application should not proceed, the Board's acceptance of that

advice, and relevant related materials; and (b) ask[ed] the BAMC to provide the Board with recommendations regarding next steps.”

Whereas, in furtherance of the Board’s resolution, the BAMC reviewed and considered the GAC Advice, the .GCC application, and relevant related materials as set forth in the Rationale and the Reference Materials, and carefully considered and discussed what is in the public interest.

Whereas, the BAMC has recommended that the analysis of the GAC Advice and other issues relating to the .GCC application be conducted now, rather than waiting for the completion of the .GCC IRP, in light of certain findings in prior IRP declarations and for the sake of efficiency.

Whereas, the BAMC has further recommended that the Board reaffirm its acceptance of the GAC Advice and its decision to not proceed with the .GCC application based on the second issue identified in the GAC’s rationale for the GAC Advice, based on information contained in other materials relevant to the .GCC application as set forth in the Rationale and the Reference Materials, and based on consideration of whether proceeding with the .GCC application is in the public interest.

Resolved (2023.04.30.11), the Board: (a) has analyzed the GAC Advice and other issues relating to the .GCC application, as well as the BAMC’s recommendation; (b) reaffirms its acceptance of the GAC Advice and its decision to not proceed with the .GCC application based on the second issue identified in the GAC’s rationale for the GAC Advice, based on the Board’s evaluation of other materials relevant to the .GCC application, which are set forth in the Rationale and the Reference Materials, and based on the Board’s determination that proceeding with the .GCC application is not in the public interest;

and (c) directs the Interim President and CEO, or her designee(s), to continue to not proceed with the .GCC application.

Rationale for Resolution 2023.04.30.11

After careful review of the underlying facts, prior applicable Independent Review Process (IRP) final declarations and the importance of respecting ICANN's accountability mechanisms, information from the Governmental Advisory Committee (GAC), the public interest, materials relevant to the .GCC application, and the Board Accountability Mechanisms Committee's (BAMC) recommendations, the Board decided to conduct an independent analysis of the GAC consensus advice that the .GCC application should not proceed (GAC Advice) and other issues relating to the .GCC application now, rather than waiting for the completion of the *GCCIX, W.L.L. v. ICANN* IRP (.GCC IRP). After having conducted said analysis, the Board has reaffirmed its acceptance of the GAC Advice and its decision to not proceed with the .GCC application based on the concern raised in the GAC's rationale for the GAC Advice regarding lack of support and involvement from the relevant community, based on the Board's evaluation of the GAC Advice and other inputs and materials relevant to the .GCC application as set forth in this Rationale and the Reference Materials, and based on the Board's determination that proceeding with the .GCC application is not in the public interest. Accordingly, the Board has directed ICANN org's Interim President and CEO, or her designee(s), to continue to not proceed with the .GCC application.

Background Information

Additional background information regarding GCCIX, W.L.L.'s .GCC application, the objections to the .GCC application, the GAC Advice,

the prior applicable IRP final declarations, and the current .GCC IRP initiated by GCCIX, W.L.L. (Claimant or GCCIX) can be found in the supporting Board materials for this Resolution and for Board Resolutions [2021.09.12.08](#) and [2022.06.12.18](#), and is incorporated herein by reference.

In furtherance of the Board’s September 2021 [Resolution](#) “authoriz[ing] the President and CEO, or his designee(s), to seek a stay of the .GCC IRP and open an informal dialogue with the GAC regarding the rationale for the GAC consensus advice on the .GCC application,” ICANN org sought a stay of the .GCC IRP and engaged in an informal dialogue with the GAC regarding the GAC Advice. ICANN org sent a [letter](#) to the GAC Chair on 9 November 2021 to open the informal dialogue, seek input from the GAC regarding how it would like to engage with ICANN org in this dialogue, and asking whether the GAC would like to receive any additional information from ICANN org on the topic. As an initial response, the GAC requested that ICANN org provide some factual background to the GAC on the matter, which ICANN org did on 14 December 2021. The GAC discussed the matter on 14 December 2021 and on 20 January 2022.

On 25 January 2022, the GAC Chair sent a [letter](#) to ICANN org indicating that the GAC had reviewed “GAC discussions from 2013 held in closed sessions at ICANN46 in Beijing on the .GCC application, which helped inform the language included in the Beijing Communiqué consensus advice text.” In the letter, while acknowledging that the GAC did not provide a written rationale in the Beijing Communiqué for its advice relating to .GCC (properly noting that such a written rationale was not required to be included with the advice in 2013), the GAC Chair explained that: in November 2012, “the governments of Bahrain, Oman, Qatar and UAE issued a GAC Early Warning to the Applicant expressing serious concerns against

the application”; in February 2013, “the GAC received requests from several GAC members (Bahrain, Oman, Qatar and UAE) as well as the Gulf Cooperation Council (GCC) to include ‘.GCC’ in a GAC Objection Advice that the application should not proceed for the reasons highlighted in the GAC Early Warning”; and “that the GAC, during ICANN46 Beijing (April 2013) deliberated and reached consensus on ‘GAC Objection Advice’ [...] for the reasons expressed by the concerned GAC members” as follows (and as expressed in the [GAC Early Warning](#)): (i) “The applied-for string (GCC) is an exact match of the known acronym for an Intergovernmental Organization (IGO), the Gulf Cooperation Council and as such, warrants special protection to its name and acronym.”; and (ii) “The application clearly targeted the GCC community without any support from the GCC, its six members or its community.”

Following a recommendation from the BAMC in May 2022, the Board passed a [resolution](#): (a) “ask[ing] the BAMC to review, consider, and evaluate the underlying basis for the GAC consensus advice that the .GCC application should not proceed, the Board's acceptance of that advice, and relevant related materials; and (b) ask[ing] the BAMC to provide the Board with recommendations regarding next steps.” In furtherance of the Board’s resolution, the BAMC provided GCCIX with an opportunity to submit a response to the GAC’s January 2022 communication (which the GCCIX submitted on 7 September 2022). As noted in further detail below, the BAMC proceeded to review, consider and evaluate the GAC Advice, the Board’s acceptance of the GAC Advice, other inputs and materials relevant to the .GCC application, as well as what is in the public interest.

Discussion of the BAMC’s Consideration and Recommendation

Pursuant to the Board's directive, the BAMC reviewed, considered and discussed the .GCC application, the GAC Advice, other relevant materials, and the public interest in order to be able to provide an informed recommendation to the Board. With regard to the .GCC application, of particular interest to both the BAMC and the Board were the statements in the [application](#) that:

- “.GCC is an open Top Level Domain (TLD) created specifically to enhance and develop the provision of Internet services for users in the Gulf and Middle East region.”
- “We are committed to providing exemplary functional utility as well as an opportunity for Internet users with a connection to the Gulf and Middle East to secure a domain name in a new, innovative and competitive TLD.”
- “.GCC will create a region-specific new TLD that allows previously excluded and disadvantaged users to take a stake in a meaningful cultural and economic tool that is specifically designed to respond to their linguistic, cultural and specific business needs.”
- “GCC refers generally, but not exclusively, to the Cooperation Council for the Arab States of the Gulf. Formed in May 1981 as a regional organization, it consists of six Gulf countries including Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates. Its main objectives are to enhance coordination, integration and inter-connection between its members in different spheres. This application is not connected with or sponsored by the Council. .GCC does not purport to represent the Council.”

- “.GCC represents a strong competitive alternative to existing regional ccTLDs by providing instant registration and delegation under the most liberal framework permitted by law, within a TLD which has local significance.”
- “.GCC will be a valuable digital asset dedicated [to] residents living and working in the region.”
- .GCC is “[a] unique and meaningful three letter string.”

The BAMC also considered the [public comments](#) regarding the .GCC application, as did the Board. While some of the comments were in support of a .GCC gTLD generally, the vast majority of comments were opposed to GCCIX’s application for .GCC. For instance, the United Arab Emirates (UAE) stated that the application “is targeting the GCC community which basically covers the 6 member states of the GCC,” but that the applicant “did not consult the targeted community in regards to launch of the proposed TLD, its strategy and policies.” Likewise, a representative of Saudi Arabia stated that “[s]ince the applicant is not endorsed by the GCC or a majority of its members we strongly request ICANN not to accept this application.” And several other commenters stated that the application is “sensitive” because “[t]he applicant (GCCIX WLL) is clearly not known as GCC and is not endorsed by the GCC (Gulf Cooperation Council).”

In addition, the BAMC and the Board considered the GAC [Early Warning](#) stating that the governments of Bahrain, Oman, Qatar and United Arab Emirates, and the GCC, expressed “serious concerns” with Claimant’s .GCC application. Of particular import were the statements that the .GCC application “[lacks] . . . community involvement and support” and that “the applicant did not consult the targeted community in regards to launch of the proposed TLD, its

strategy and policies. The applicant did not obtain any endorsement from the GCC Secretariat General or any of its organizations, or any governmental or nongovernmental organization within the GCC member states.”

The BAMC, and the Board, also reviewed the ICANN Independent Objector’s (IO) comments regarding the .GCC application. In particular, the IO stated his “opinion that the applied for gTLD string explicitly targets the community of the Arab States of the Gulf, even if the applicant indicates that the application does not intend to represent the international organization itself.” “[T]hat [since] five of the six governments as well as the international organization directly targeted by the gTLD expressed their disagreement with the application, it must be considered that there is an obvious and substantial opposition from a significant portion of the community.” The IO also noted that use of a .GCC gTLD without the endorsement of the GCC or its member states could lead to confusion and “adverse effects on the mission pursued by the [GCC]” and “could interfere with the legitimate interests of the community of the [GCC], especially since the gTLD is not expected to be managed on behalf of the organization and its interests.”

Ultimately, the IO chose not to file an objection to the .GCC application because “the Gulf Cooperation Council is an established institution representing and associated with a significant part of the targeted community. The Gulf Cooperation Council is already fully aware of the controversial issues and is better placed than the IO to file an objection, if it deems appropriate[,]” which the GCC did when it initiated a Legal Rights Objection (LRO) proceeding against GCCIX’s

.GCC application. Although the LRO filings of GCCIX and the GCC¹⁷ focused mainly on intellectual property rights, which are beyond the scope of the BAMC's and the Board's consideration, the filings provided some helpful insights. For instance, the GCC's LRO brief set forth the founding and history of the GCC as well as the GCC's view that use of .GCC by GCCIX could cause confusion and the impression that the GCC has endorsed the operation of the .GCC gTLD and/or the content on domains using the .GCC gTLD. In its LRO filing, GCCIX argued that it "does not expect confusion."

In addition, the BAMC and the Board further considered the [GAC Advice](#) contained in the April 2013 Beijing Communiqué as well as the GAC's [25 January 2022 letter](#), which delineated the GAC's rationale for that advice. Of particular importance was the portion of the GAC's rationale that the .GCC "application clearly targeted the GCC community without any support from the GCC, its six members or its community," which is a view expressed in public comments on the .GCC application, in the GAC Early Warning on the .GCC application, and in the IO's comments on the .GCC application. Moreover, this view does not appear to have been meaningfully addressed by GCCIX in any of its communications to ICANN. For example, the BAMC and the Board considered several communications from GCCIX about its application, including: (i) GCCIX's [15 April 2013 letter](#) to ICANN in response to the GAC Advice in the Beijing Communiqué; (ii) GCCIX's further [response](#) to the Beijing Communiqué, submitted on or around 10 May 2013; (iii) GCCIX's [Reconsideration Request 13-17](#); and (iv) GCCIX's [7 September 2022 letter](#) to ICANN regarding the GAC's 25 January 2022 letter. Despite these various communications that have spanned the past several years, as well as GCCIX's IRP filings, there

¹⁷ The LRO filings the BAMC had access to are those attached to GCCIX's Amended IRP Request of 19 May 2022.

has been no substantive response from GCCIX to the particular claim that the .GCC application is (and the selection of “GCC” for its applied-for string seems) aimed at attracting and engaging with members of the community represented by the GCC and its member states without the support of that community, the GCC, or the GCC member states, which represent approximately 60 million people in the Gulf and Middle East region.

The BAMC and the Board also considered materials relating to previous IRPs and to the current .GCC IRP. In particular, the IRP panels’ findings in the .AFRICA and .AMAZON IRPs and their recommendations regarding the steps ICANN should have taken regarding GAC consensus advice that, when presented, did not include a written rationale, and regarding the independent analysis ICANN should have done in evaluating such advice. The BAMC and the Board also considered the actions ICANN took after the Final Declarations were issued in the .AFRICA and .AMAZON IRPs and evaluated the claims asserted by GCCIX in its Amended IRP Request. Specifically, GCCIX claims that: (i) ICANN should have sought from the GAC a rationale for the GAC Advice; (ii) that ICANN should have done an independent evaluation of that rationale; (iii) that ICANN should have provided GCCIX with treatment equal to that provided to similarly situated applicants, such as those for .AFRICA and .AMAZON; and (iv) that ICANN should provide a rationale for any action it takes on account of the GAC Advice regarding the .GCC application.

After extensive analysis and discussion, and after considering several options regarding the .GCC application, the BAMC has recommended that the independent analysis of the GAC Advice and other issues relating to the .GCC application be conducted now, rather than waiting for the completion of the .GCC IRP. Notwithstanding the fact that ICANN’s acceptance of the GAC Advice in 2013 was consistent

with the terms of Guidebook, two subsequent IRP panels have held that the Board should have conducted a further evaluation of the issues raised in the respective GAC Communiqués. In light of those findings, conducting such a further evaluation now in the .GCC matter is the prudent course of action, demonstrates the seriousness with which the Board considers ICANN's Accountability Mechanisms, and should allow the current IRP to proceed more efficiently. This is also in keeping with ICANN's Core Value to "remain accountable to the Internet community through mechanisms defined in [the] Bylaws that enhance ICANN's effectiveness."

The BAMC has further recommended that the Board reaffirm its acceptance of the GAC Advice and its decision to not proceed with the .GCC application based on the second issue identified in the GAC's rationale for the GAC Advice (regarding lack of support and involvement from the relevant community), based on information contained in other inputs and materials relevant to the .GCC application as set forth in this Rationale and the Reference Materials, and based on consideration of whether proceeding with the .GCC application is in the public interest.

Consistent with certain of the concerns raised in the GAC Early Warning, in the GAC's rationale for the GAC Advice, in the IO's comments, as well as by members of the community, the BAMC and the Board note that GCCIX's .GCC application appears to be directly aimed at attracting and engaging with members of the community represented by the GCC and its member states without the support of that community, the GCC, or the GCC's member states. And, in fact, it is not a mere lack of support, the GCC and its member states have repeatedly objected to GCCIX's .GCC application. Moreover, the BAMC noted its concern that GCCIX's selection of the term "GCC" for its applied-for string seems intentional in order to attract (and/or will

have the effect of attracting) the relevant community as a result of the association of the Gulf Cooperation Council with the “GCC” acronym and the reputation and goodwill that the GCC and its member states have developed through their representation of over 60 million people in the Gulf and Middle East region over the last forty years, despite the fact that the application is not sponsored or endorsed by the GCC or its member states. Indeed, the .GCC application explicitly states that its intention is to target Internet “users in the Gulf and Middle East.” In addition, the BAMC and the Board agree with the IO’s comment that this dichotomy between appearances and actual support could lead to confusion as to what entity or group is behind the .GCC gTLD and its content, and it could interfere with the legitimate interests, mission, and community outreach of the GCC and its member states because they do not endorse the .GCC gTLD and will have no role in evaluating or moderating its operation or content. While official “support” is not necessarily required by the Guidebook because “GCC” is not a geographic name, as defined in the Guidebook, the lack of support from the relevant community, the GCC, and the GCC member states (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates) was relevant to both the BAMC’s and the Board’s analysis of whether this .GCC application is in the public interest.

The BAMC and the Board are committed to ICANN’s Mission and Core Values as set forth in the Bylaws, including ensuring that this decision is in the public interest. The community most likely impacted by the proposed .GCC gTLD has voiced their concerns through the public comments received regarding the .GCC application, the GAC Early Warning and the GAC Advice regarding the .GCC application, correspondence, and the LRO materials, which “reflect [both] the interests of [the] affected parties and the roles of bodies internal to ICANN.” In addition, the IO’s comments as well as the GCC’s own

comments specifically note that use of .GCC by GCCIX could cause confusion and the false impression that the GCC has endorsed the operation of the .GCC gTLD and/or the content on domains using the .GCC gTLD. Potentially causing confusion for Internet users both within the relevant community as well as more broadly is not in the global public interest. Even more so when it appears that GCCIX intentionally chose the “GCC” string in an effort to benefit from the reputation and goodwill that the GCC and its member states have developed through their representation of over 60 million people in the Gulf and Middle East region over the last forty years. Similarly, ICANN’s decisions should be guided by the Core Value of “recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities.” Here, the GAC, through its GAC Advice and subsequent rationale supporting that advice, set forth its public policy position, and the Board is obligated under the Bylaws to consider the GAC’s input as part of the Board’s independent evaluation of the .GCC application, the GAC Advice, and other relevant materials. For all of these reasons, the BAMC and the Board are of the view that proceeding with GCCIX’s .GCC application is not in the public interest.

The BAMC’s recommendations are consistent with the approach ICANN has taken regarding other gTLD applications that were lacking support in the communities targeted by the applications, such as .ISLAM, .HALAL and .PERSIANGULF. And these recommendations are generally consistent with the findings and recommendations in the .AFRICA and .AMAZON IRP Final Declarations as well as the actions taken by ICANN in addressing those IRP Final Declarations.

The BAMC also made clear that its recommendation to reaffirm acceptance of the GAC Advice is not based on the GAC’s reference to

intergovernmental organization (IGO) acronyms at the top-level. While the BAMC respects the GAC's view, the BAMC did not want or intend to recommend that the Board set any type of precedent regarding the level or source of IGO name and acronym protections in gTLDs, which has been and continues to be the subject of community-driven policy work.

Board Decision

The Board agrees with the BAMC's recommendations and reaffirms the Board's acceptance of the GAC Advice and its decision to not proceed with the .GCC application based on the concern raised in the GAC's rationale for the GAC Advice regarding lack of support and involvement from the relevant community, based on the Board's evaluation of the GAC Advice and other inputs and materials relevant to the .GCC application, which are set forth in this Rationale and the Reference Materials, and based on the Board's determination that proceeding with the .GCC application is not in the public interest. The Board also agrees that it is important to do this analysis now, rather than waiting for the .GCC IRP to be completed, because taking these steps is appropriate in light of certain findings in prior IRP final declarations and in light of ICANN's actions in response to those prior IRP declarations, and will benefit the community, including GCCIX, the GCC and the people it represents. This analysis, Resolution, and Rationale provides the parties and the .GCC IRP Panel with a complete picture of the BAMC and Board evaluation of the GAC Advice and the .GCC application, and these steps are generally consistent with the Board's actions in response to the .AFRICA and .AMAZON IRP Final Declarations and address several of the claims raised in the current .GCC IRP. Moreover, taking this action now is consistent with the purposes of the IRP, as set forth in ICANN's Bylaws, in that this action may narrow and focus the claims in the .GCC IRP, should avoid having

multiple IRPs regarding the same application, and should lead to the just resolution of the claims in the .GCC IRP in the most efficient manner possible. In furtherance of the aim of limiting the issues in dispute in the .GCC IRP, the Board acknowledges, as did the GAC, that there was no written rationale for the GAC Advice in the Beijing Communiqué in 2013 and that the NGPC did not provide a written rationale when it accepted the GAC Advice beyond reliance on Section 3.1 of the Applicant Guidebook. The GAC has now detailed its rationale for the 2013 GAC Advice in its January 2022 letter and, in this Resolution and Rationale, the Board has described the independent analysis that the BAMC and the Board have conducted regarding the GAC Advice and the .GCC application.

The Board, in exercising its independent judgment, thinks that not proceeding with GCCIX's .GCC application is the right thing to do and is in the public interest. This view is based upon the Board's review, analysis, and discussion of the BAMC's analysis and recommendations, and the Board's independent analysis of the GAC Advice, the .GCC application and other materials relevant to the .GCC application, and what is in the public interest, while taking into consideration the Mission and Core Values set forth in ICANN's Bylaws.

Based on the Board's review and analysis of GCCIX's .GCC application, public comments regarding the .GCC application, the GAC Early Warning regarding the .GCC application, the IO's comments on the .GCC application, the available LRO filings, the GAC Advice in the Beijing Communiqué, the GAC's 25 January 2022 letter to ICANN regarding the Beijing Communiqué, and various communications from GCCIX to ICANN (including GCCIX's 15 April 2013 letter to ICANN in response to the GAC Advice; GCCIX's further response to the Beijing Communiqué, submitted on or around 10 May 2013; GCCIX's

Reconsideration Request 13-17; and GCCIX's 7 September 2022 letter to ICANN regarding the GAC's 25 January 2022 letter), GCCIX's .GCC application appears to be directly aimed at attracting and engaging with members of the community represented by the GCC and the GCC member states (as stated in GCCIX's .GCC application) without the support of that community, the GCC, or the GCC's member states. And it is noteworthy that it is not a mere lack of support; the GCC and its member states have repeatedly objected to GCCIX's .GCC application. While official "support" is not necessarily required by the Guidebook because "GCC" is not a geographic name as defined in the Guidebook, the lack of support from the relevant community, the GCC, and the GCC member states is relevant to the Board's analysis of whether or not ICANN should proceed with this .GCC application.

Based on consideration of these materials, it also appears that GCCIX's selection of the "GCC" string is intended to attract, and/or will have the effect of attracting, the relevant community as a result of the association that the Gulf Cooperation Council and its member states have with the "GCC" acronym and the region within which the GCC operates. Further, GCCIX's selection of .GCC also appears to capitalize on the reputation and goodwill that the GCC and its member states have developed through their representation of over 60 million people in the Gulf and Middle East region over the last 40 years, even though the application is not sponsored or endorsed by the GCC or its member states.

Based on its analysis of these materials, the Board believes that this dichotomy between appearances and actual support could lead to confusion and could create the false impression that the GCC and its member states have endorsed the operation of the .GCC gTLD and/or the content of domains using the .GCC gTLD, which the GCC and its member states have not done. In addition, this confusion could

interfere with the legitimate interests, mission, and community outreach of the GCC and its member states since they do not endorse or support, and in fact have objected to, this .GCC application and will have no role in evaluating or moderating its operation or content, as mentioned in the IO's comments on the .GCC application.

The Board takes this action based not only on its due diligence and care in reviewing the relevant materials, but also on its adherence to ICANN's Mission, Commitments, and Core Values set forth in the Bylaws, including ensuring that this decision is in the public interest and that it respects the concerns raised by the community likely impacted by the proposed .GCC gTLD. The Board is of the view that proceeding with GCCIX's .GCC application is not in the public interest.

This action is consistent with the approach ICANN has taken with regard to other gTLD applications that were lacking support in the communities specifically targeted by the applications, such as .ISLAM, .HALAL and .PERSIANGULF. Further, this action is generally consistent with certain findings and recommendations in the .AFRICA and .AMAZON IRP Final Declarations as well as the actions taken by ICANN in addressing those IRP Final Declarations. Moreover, this action addresses several of GCCIX's claims in the current .GCC IRP, including its claims that ICANN should have sought from the GAC a written rationale for the GAC Advice, should have done an independent evaluation of that rationale, should have provided GCCIX with treatment equal to that provided to similarly situated applicants (such as .AFRICA and .AMAZON), and should provide a rationale for any action it takes on account of the GAC Advice regarding the .GCC application.

To be clear, however, the Board is not basing its decision to reaffirm acceptance of the GAC Advice on the GAC's reference to IGO

acronyms at the top-level. While the Board respects the GAC's view, the Board does not want or intend to set any type of precedent regarding the level or source of IGO name and acronym protections in gTLDs, which has been and continues to be the subject of community-driven policy work.

Taking the decision to continue to not proceed with GCCIX's .GCC application, after reviewing and considering the aims of the application, the materials relevant to the application, and the objections of those most likely to be impacted by a .GCC gTLD, is in the public interest and reflects the Board's adherence to ICANN's Mission, Commitments, and Core Values as set forth in the Bylaws.

More specifically with regard to ICANN's Core Values as set forth in the Bylaws, this decision takes into consideration the broad, informed participation of the Internet community and those members most affected, it respects ICANN's Accountability Mechanisms, and it recognizes the concerns expressed by the countries and entities representing the majority of the affected community (noted in the Bylaws applicable to the .GCC IRP, <https://www.icann.org/resources/pages/bylaws-2012-02-25-en>; and similarly reflected in the current Bylaws, <https://www.icann.org/resources/pages/governance/bylaws-en>):

- 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.
- Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

- Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
- While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

While the Board strives to follow all the Core Values in making its decisions, it is also the Board's duty to exercise its independent judgment to determine if certain Core Values are particularly relevant to a given situation. And, in fact, the Bylaws anticipate and acknowledge that ICANN may not be able to comply with all the Core Values in every decision made and allows for the Board to exercise its judgment in the best interests of the Internet community: "...because [the Core Values] are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values." (Bylaws, <https://www.icann.org/resources/pages/bylaws-2012-02-25-en>.)

Taking this decision is within ICANN's Mission as the ultimate result of ICANN's consideration of this matter is a key aspect of coordinating the allocation and assignment of names in the root zone of the domain name system (DNS). Further, the Board's decision is in the public interest, taking into consideration and balancing the goals of resolving outstanding new gTLD disputes, respecting ICANN's accountability mechanisms and advisory committees, recognizing the

input received from the Internet community, and abiding by the policies and procedures set forth in the Guidebook, which were developed through a bottom-up consensus-based multistakeholder process over numerous years of community efforts and input, and is consistent with ICANN's Core Values.

Taking this decision is not expected to have any immediate direct financial impact on the ICANN organization and will not have any direct impact on the security, stability or resiliency of the domain name system.

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

e. Further Consideration of the Afilias Domains No. 3 Ltd. v. ICANN (.WEB) Independent Review Process Final Declaration

Whereas, on 16 January 2022, the Board considered the Final Declaration in the Afilias Domains No. 3 Ltd. (Altanovo)¹⁸ v. ICANN Independent Review Process regarding .WEB (.WEB IRP) and, in part, resolved that further consideration was needed regarding the IRP Panel's non-binding recommendation.

Whereas, pursuant to its 16 January 2022 [resolution](#), the Board asked the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel's Final Declaration and recommendation, and to provide the Board with its findings to

¹⁸ Afilias Domains No. 3 Ltd. is now known as Altanovo Domains Limited and will be referred to herein as "Altanovo."

consider and act upon before the organization takes any further action toward contracting for or delegation of .WEB.

Whereas, the BAMC complied with the Board's request and recommended next steps related to the .WEB applications.

Whereas, on 10 March 2022, the Board considered the BAMC's recommendation, as well as the relevant related materials, and resolved to: (a) ask the BAMC to review, consider and evaluate the claims relating to the Domain Acquisition Agreement (DAA) between Nu Dotco LLC (NDC) and Verisign, Inc. and the claims relating to Altanovo's conduct during the Auction Blackout Period; (b) ask the BAMC to provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Altanovo warrant disqualification or other consequences, if any, related to any relevant .WEB application; and (c) direct ICANN organization to continue refraining from contracting for or delegation of .WEB until ICANN has made its determination regarding the .WEB application(s).

Whereas, in furtherance of that resolution, the BAMC requested that Altanovo, NDC and Verisign provide comprehensive written summaries of their claims and the materials supporting their claims, which they did in July and August 2022.

Whereas, after the BAMC reviewed and considered the parties' July/August 2022 submissions and supporting materials, as well as relevant related materials, and discussed the matter extensively, the BAMC recommended that the Board: (a) determine that NDC did not violate the Guidebook or the Auction Rules, either through entering into the DAA or through its participation in the .WEB auction; (b) direct the Interim President and CEO, or her designee(s), to continue processing NDC's .WEB application; and (c) in light of the above,

conclude that is not necessary to make a final determination at this time as to whether Altanovo violated the “Blackout Period” of the .WEB auction.

Whereas, noting the questions raised regarding certain conduct by both both NDC and Altanovo, the BAMC further recommended that the Board direct the Interim President and CEO, or her designee(s), to carefully consider the issues raised by the parties and the Panel in the .WEB IRP with regard to agreements similar to the DAA and communications prior to an ICANN auction when developing the Guidebook and auction rules for the next round of the New gTLD Program in order to provide greater clarity to applicants regarding the transparency and notification requirements throughout the application and auction processes.

Resolved (2023.04.30.12), the Board hereby: (a) determines that NDC did not violate the Guidebook or the Auction Rules, either through entering into the DAA or through its participation in the .WEB auction; (b) directs the Interim President and CEO, or her designee(s), to continue processing NDC’s .WEB application; and (c) in light of the above, concludes that is not necessary to make a final determination at this time as to whether Altanovo violated the “Blackout Period” of the .WEB auction.

Resolved (2023.04.30.13), the Board hereby notes the questions raised regarding certain conduct by both NDC and Altanovo and directs the Interim President and CEO, or her designee(s), to carefully consider the issues raised by the parties and the Panel in the .WEB IRP with regard to agreements similar to the DAA and communications prior to an ICANN auction when developing the Guidebook and auction rules for the next round of the New gTLD Program in order to provide greater clarity to applicants regarding the transparency and

notification requirements throughout the application and auction processes.

Resolved (2023.04.30.14), specific items within this resolution shall remain confidential pursuant to Article 3, section 3.5(b) of the ICANN Bylaws unless and until the Interim President and CEO, or her designee(s), determines that the confidential information may be released.

Rationale for Resolutions 2023.04.30.12 – 2023.04.30.14

After careful review of the underlying facts, the submissions and supporting materials provided by Altanovo Domains Limited (Altanovo),¹⁹ Nu Dotco LLC (NDC) and Verisign, Inc. in July and August 2022, including, but not limited to, the Domain Acquisition Agreement (DAA) between NDC and Verisign and affiliated documents, NDC's .WEB application, relevant provisions of the Guidebook, Auction Rules and Bidder Agreement, and various other materials, as well as the Board Accountability Mechanisms Committee's (BAMC) analysis and recommendations, the Board has determined that NDC did not violate the Guidebook or the Auction Rules, either through entering into the DAA or through its participation in the .WEB auction. In addition, and in light of the above determination, the Board has also concluded that it is not necessary to make a final determination at this time as to whether Altanovo violated the "Blackout Period" of the .WEB auction.

The Board, however, does note the claims asserted regarding NDC's non-disclosure of its arrangement with Verisign and regarding Altanovo's communications prior to the ICANN auction and, thus, has

¹⁹ Afilias Domains No. 3 Ltd. is now known as Altanovo Domains Limited and will be referred to herein as "Altanovo."

directed ICANN organization to carefully consider such issues when developing the Guidebook and the auction rules for the next round of the New gTLD Program. It would be beneficial to both the applicants and the application process as a whole to provide greater clarity in the next iteration of the Guidebook and auction rules regarding the transparency and notification requirements throughout the application and auction processes, in particular with regard to proposed registry agreement assignments and/or arrangements similar to the DAA as well as communications during the Blackout Period.

Background Information

Additional background information regarding the .WEB applications and the .WEB auction, the Independent Review Process initiated by Altanovo (.WEB IRP), and the IRP Panel's Final Declaration can be found in the Resolution, Rationale and supporting Board materials for Board Resolutions [2022.01.16.12 - 2022.01.16.15](#) and [2022.03.10.06](#), and is incorporated herein by reference.

The .WEB Auction and the DAA:

Seven applicants submitted applications for the right to operate .WEB, including Altanovo and NDC. The members of the .WEB contention set did not privately resolve contention; accordingly, the applicants went to an ICANN auction of last resort. An auction was held on 27-28 July 2016, which concluded with NDC prevailing with a bid of US\$135 million. Shortly thereafter, Verisign publicly disclosed (through both a press release and a filing with the Securities and Exchange Commission) that, pursuant to an agreement it had entered with NDC, Verisign provided the funds for NDC's auction bid in

exchange for, among other things, NDC's future assignment of the .WEB registry agreement to Verisign, subject to ICANN's consent.

The commitment Verisign referenced arose out of an agreement between NDC and Verisign known as the Domain Acquisition Agreement (DAA). The DAA "sets forth the terms and conditions upon which [Verisign] proposes for Verisign and [NDC] to work together to effect (i) [NDC's] award to be the sole and exclusive operator of [.WEB] ...; (ii) the consummation of a registry agreement between [NDC] and ICANN for [NDC's] right to be the registry operator of [.WEB]; and (iii) the subsequent sale, assignment, grant, transfer, and conveyance to Verisign of all of [NDC's] right, title, interest in and to being the registry operator for [.WEB], including, without limitation, the sale, assignment, grant, transfer, and conveyance of the Registry Agreement and all materials and information related thereto," subject to ICANN's consent to an assignment request regarding the Registry Agreement.

Under the terms of the DAA, NDC agreed that it "will not alter or modify [its .WEB] Application without Verisign's prior written consent," that it "will not take any action to participate in a Private Auction for the Domain without the prior written consent of Verisign," and that it will not "participate in any discussions or negotiations with, any party (other than Verisign) regarding (a) [NDC] participating in the Auction for the benefit of any person or entity or otherwise resolving the [.WEB] contention set], or (b) the sale, assignment, grant, transfer or conveyance of any of [NDC's] right, title or interest in, to or under the Registry Agreement or the operation of the registry for [.WEB] to any person or entity."

NDC and Verisign agreed that "the existence and terms" of the DAA would be kept confidential, except that: (1) Verisign had sole

discretion to discuss or share the terms of the DAA with ICANN or to disclose that “it is indirectly participating in the resolution of the .WEB Contention Set or otherwise seeking to become the registry operator for the Domain”; and (2) NDC had the right to communicate with ICANN and provide information “to the extent required to preserve [NDC’s] rights with respect to the Application or being the registry operator for the Domain,” provided that NDC notifies Verisign in advance and affords Verisign a reasonable opportunity to comment, except that NDC “shall in no case reference or disclose the existence of [the DAA] without Verisign’s consent.”

Upon learning of an agreement between Verisign and NDC, Altanovo sent ICANN a letter asking ICANN to disqualify NDC’s .WEB application and its bid for .WEB, and award .WEB to Altanovo as the next highest bidder. ICANN undertook an initial investigation, which was followed by a competition investigation by the United States Department of Justice Antitrust Division (DOJ). The DOJ process took approximately a year and a half. In early 2018, the DOJ closed its investigation and took no action. Thereafter, ICANN proceeded to the contracting phase with NDC for .WEB.

IRP Panel Final Declaration:

Altanovo initiated the .WEB IRP in November 2018, alleging that NDC had violated the Guidebook and/or Auction Rules as a result of its arrangement with Verisign, and that ICANN had violated the Bylaws by failing to disqualify NDC. NDC and Verisign asked to participate as *amici curiae* in the IRP, which the Panel granted. The merits hearing took place on 3-11 August 2020, and the IRP Panel issued its Final Declaration on 20 May 2021, which the Panel later corrected for certain typographical errors, effective 15 July 2021. Altanovo then filed a further challenge to the Final Declaration, which the Panel

denied in its entirety in December 2021, at which time the Final Declaration was deemed “final.”

In its Final Declaration, the Panel accepted Altanovo’s claim that ICANN violated provisions in its Articles of Incorporation (Articles) and Bylaws by proceeding toward entering a Registry Agreement with NDC without having reached a determination about whether the DAA or NDC’s conduct warranted rejection of NDC’s application for .WEB. The Panel also found that ICANN violated its Bylaws’ obligation to operate in an open and transparent manner and consistent with procedures to ensure fairness by not advising Altanovo of the ICANN Board’s choice in November 2016 to defer consideration of the .WEB matter while an Accountability Mechanism regarding .WEB was pending.

The Panel, however, denied Altanovo’s requested relief that the Panel issue a binding declaration that ICANN must disqualify NDC’s bid for .WEB, that the Panel specify a winning bid price, and that the Panel order ICANN to proceed with contracting for .WEB with Altanovo. The Panel found that the questions raised by Altanovo were “serious and deserving of [ICANN’s] consideration,” but the Panel expressed no view as to the proper resolution of those questions. Instead, the Panel found that the resolution of those questions is a matter within the discretion of ICANN. The Panel noted that: “it is for [ICANN], that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC’s application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules.”

The Panel also stated that it “accepts the submission that ICANN does not have the power, authority, or expertise to act as a competition

regulator by challenging or policing anticompetitive transactions or conduct.” The Panel further noted that “[c]ompelling evidence to that effect” was presented by several of the ICANN witnesses at the final hearing, and “it is consistent with a public statement once endorsed by [Altanovo], in which it was asserted [that] ‘[...] Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.’”

Board Resolutions and BAMC Review:

Once the Final Declaration became “final,” after resolution of Afiliat’s separate request for “interpretation and correction” (which the Panel determined was “frivolous”) on 21 December 2021, the Board considered the Final Declaration at its 16 January 2022 meeting. The Board acknowledged the Panel’s findings, directed payment to Altanovo of the amount set forth by the Panel, and determined that further consideration of the Panel’s recommendation was needed. Accordingly, the Board asked the BAMC to “review, consider, and evaluate the IRP Panel’s Final Declaration and recommendation, and to provide the Board with its findings to consider and act upon before the organization takes any further action toward contracting for or delegation of .WEB.”

After conducting its initial review of the IRP Panel’s Final Declaration and recommendation, and related materials, the BAMC recommended that the Board: (a) ask the BAMC to review, consider and evaluate the claims relating to the DAA, and the claims relating to Altanovo’s conduct during the Auction Blackout Period; (b) ask the BAMC to provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Altanovo warrant disqualification or other consequences, if any, related to any relevant .WEB application; and (c) direct ICANN organization to continue

refraining from contracting for or delegation of .WEB until the Board has made its determination regarding the .WEB application(s).

As set forth in Board Resolution [2022.03.10.06](#), the Board agreed with the BAMC's recommendation and noted that, "in light of certain of the Panel's determinations, it is appropriate and prudent for ICANN to undertake an analysis of the allegations regarding the DAA as well as the allegations regarding the Auction Blackout Period in order to determine if any consequences are warranted with respect to any of the .WEB applications" before proceeding further.

In furtherance of the Board's Resolution, the BAMC [requested](#) that the interested parties (Altanovo, NDC and Verisign) "provide a comprehensive written summary of their claims and the materials supporting their claims." On 29 July 2022, Altanovo and NDC/Verisign provided their initial submissions. Altanovo also submitted two supporting declarations with its submission. On 29 August 2022, Altanovo submitted its reply submission, and NDC/Verisign submitted their reply submission along with two supporting declarations.

The BAMC reviewed and considered the submissions and supporting materials including, but not limited to, the DAA and affiliated documents, NDC's .WEB application, relevant provisions of the Guidebook, Auction Rules and Bidder Agreement, and various other materials. The BAMC carefully considered the parties' positions and supporting materials, and the BAMC extensively discussed the matter and options regarding next steps relating to the .WEB gTLD during at least four separate meetings.

Summary of the Parties' Positions

The following is a summary of the parties' positions but does not capture the entirety of their positions, which are set forth in their submissions to the BAMC and are available on ICANN's [.WEB IRP webpage](#).

Altanovo's Position Regarding the .WEB Auction and the DAA:

Altanovo contends that the gTLD application process is designed to promote fairness, transparency and non-discrimination and that it requires key parts of each application to be posted for a public comment period, which guarantees that other applicants and the Internet community at large know what entity is applying for a gTLD and the purpose for which it is sought and have an opportunity to comment on the application. Altanovo claims that transparency is required so that all applicants know who they are competing against. Altanovo argues that the DAA "decimate[s] [the] fundamental principles underlying the New gTLD Program" and that, according to Altanovo, "the DAA was specifically designed to evade and subvert the most basic purposes that the Program was meant to serve." Further, Altanovo argues that, by submitting an application to ICANN through the New gTLD Program, the applicant enters into a contract with ICANN; and that ICANN enters into these contracts and promulgates the rules in the Guidebook to carry out its Mission on behalf of the Internet community as a whole.

Altanovo argues that the Guidebook prohibits the sale, assignment, or transfer of "any of applicant's rights or obligations in connection with the application," referencing Paragraph 10 of Module 6 of the Applicant Guidebook, which states:

Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that

it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.

Altanovo argues that this provision is not merely limited to the total sale or transfer of an application but, rather, prohibits the transfer of individual rights or obligations in an application. And, according to Altanovo, the DAA constituted a resale, assignment and/or transfer of several of NDC's individual rights and/or obligations relating to its .WEB application.

Specifically, Altanovo asserts that NDC transferred to Verisign the right and obligation to negotiate and enter into a Registry Agreement with ICANN and to operate .WEB because the terms of the DAA require that NDC "follow Verisign's instructions concerning the completion, negotiation and execution of the Registry Agreement," and to "obtain Verisign's prior written approval" before executing the Registry Agreement with ICANN. According to Altanovo, the "most basic right under a gTLD application is . . . the applicant's opportunity

to operate the applied-for registry,” but the DAA operates as “an absolute bar to NDC” acquiring the right to operate .WEB, citing to the portion of the DAA that indicates that, if NDC was unable to assign the Registry Agreement to Verisign, NDC “will seek ICANN’s permission to withdraw the Application or terminate the Registry Agreement (as the case may be).”

Altanovo argues that NDC also transferred to Verisign its right to participate in the .WEB auction on its own behalf by agreeing that it would do so only upon “Verisign’s election, in Verisign’s sole discretion, and only upon Verisign’s prior written approval.” Altanovo also argues that NDC transferred this right by agreeing to participate in the auction “solely as directed by Verisign” and “from Verisign’s corporate headquarters.” According to Altanovo, each and every bid at the .WEB auction was made “on behalf of Verisign, using Verisign’s money, . . . at Verisign’s direction” and from Verisign’s headquarters.

Altanovo disagrees with NDC/Verisign’s contention that the DAA comprises a “future” assignment of rights because Verisign exercised its then-existing rights to “prevent NDC from participating in the planned private auction for .WEB,” and to “instruct NDC to enter into a Bidder Agreement for the ICANN Auction for .WEB.” Verisign, according to Altanovo, also controlled NDC’s bids at the ICANN Auction.

Altanovo also contends that “virtually all” of the information in NDC’s application became untrue, inaccurate, and incomplete when NDC entered into the DAA and “deprived” the Internet community of the ability to submit public comments on Verisign’s involvement in .WEB. For instance, in Section 18 (Mission/Purpose) of the application, NDC stated that “[p]rospective users benefit from the long-term commitment of a proven executive team that has a track-record of

building and successfully marketing affinity TLD's," and that NDC plans to implement "a very similar strategy for .WEB to the one that it used for .CO." But, according to Altanovo, that was no longer accurate once the DAA was signed because, under the DAA, there was no circumstance where NDC could operate .WEB. Thus, the mission and purpose, including the "long-term commitment of a proven executive team," became an "outright lie," according to Altanovo. Altanovo asserts that this information was published for the members of the Internet community so that they can understand who is applying for a given gTLD, regardless of whether Section 18 is part of ICANN's evaluation. Altanovo contends that this is the reason that Paragraph 1 of the Applicant Guidebook requires applicants to notify ICANN of "any change in circumstances that would render any information in the application false or misleading."

Position of NDC and Verisign Regarding the .WEB Auction and the DAA:

NDC and Verisign claim that Altanovo has lodged a series of attacks designed to disqualify NDC from the .WEB contention set since even before the .WEB auction, and the IRP was yet another such attack. NDC and Verisign also note that Altanovo sought to exclude NDC and Verisign from participating in the IRP while simultaneously asking the IRP Panel to disqualify NDC and its .WEB application. NDC and Verisign contend that Altanovo's proposed relief and proposed reading of the Guidebook are "draconian" and "would create uncertain and destabilizing precedent far beyond this matter." For instance, they assert that ICANN is bound by the Bylaws to act in a non-discriminatory manner, and that awarding Altanovo the relief it seeks would amount to singling out NDC and Verisign because ICANN has approved hundreds of assignments of Registry Agreements, some similar to the assignment envisioned by the DAA, including

assignments that change the mission and purpose of the original application. They further claim that numerous applicants have entered into agreements with third parties and that ICANN has never disqualified an applicant on that basis.

NDC and Verisign argue that Paragraph 10 of Guidebook Module 6 does not apply to the DAA because the paragraph only prohibits the sale of a total application itself; it does not address agreements, such as the DAA, “to support an application, finance a resolution of a contention set, or assign a registry agreement post-delegation (upon consent of ICANN).” NDC and Verisign argue that the DAA did not transfer NDC’s rights or obligations under the application to Verisign. The DAA contemplates only “a possible, contingent, future assignment of the registry agreement following (i) resolution of the contention set, (ii) execution of a registry agreement, and (iii) ICANN’s consent to the assignment.” Moreover, the DAA confirmed that NDC did not need Verisign’s consent to “take any action or to communicate with ICANN to the extent required to preserve [NDC’s] rights in the Application or avoid being in material default of the Registry Agreement.”

According to NDC and Verisign, the DAA fails to meet the legal elements for an assignment, which requires “(1) a specific *intention* to make (2) a *present transfer of ownership* of the application, and (3) the transferor have *no remaining interest* in the application.” Instead, the Confirmation of Understanding (a subsequent agreement dated 26 July 2016 between NDC and Verisign relating to the DAA) states that the parties “do not assign or transfer, any rights or obligations between ICANN and NDC regarding the Application”; and that NDC does not need Verisign’s consent to “take any action or to communicate with ICANN to the extent required to preserve [NDC’s] rights in the Application or avoid being in material default of the

Registry Agreement.” NDC and Verisign argue that the only transfer contemplated by the DAA was a future, conditional assignment of a Registry Agreement.

NDC and Verisign also rely upon the Auction Rules, which they contend implicitly authorize agreements such as the DAA. The Auction Rules state that pre-auction agreements regarding post-auction ownership transfer arrangements cannot be discussed during the Blackout Period, impliedly permitting such arrangements to be discussed at other times. Finally, NDC and Verisign argue that when drafting the Applicant Guidebook, ICANN “rejected” a proposal to limit agreements for post-delegation assignments of Registry Agreements, which further confirms that the Guidebook was not intended to limit these assignments.

NDC and Verisign argue that NDC made the bids for itself as the applicant, and that the DAA provisions to which Altanovo cites were designed to protect Verisign because of the amount of money involved. For instance, the DAA was designed to make sure NDC would not engage in a deal with anyone else. Further, NDC and Verisign claim that not only do the Auction Rules not govern the extent to which an applicant may obtain third-party financing for an auction, but Altanovo even admitted that it received a loan for its participation in the .WEB auction, much like other participants in both private auctions and other ICANN auctions.

NDC and Verisign further contend that NDC is still the applicant for .WEB, and that NDC may become the registry operator because Verisign’s rights under the DAA are subject to numerous contingencies. For instance, Verisign could terminate the DAA “for any or no reason,” which would allow NDC to operate .WEB. NDC also could breach the DAA and keep the .WEB registry for itself (even if

that action would carry its own consequences). Additionally, if ICANN did not consent to the assignment, NDC and Verisign could modify the DAA such that NDC would remain the registry operator.

NDC and Verisign further contend that new gTLDs have been transferred “hundreds of times post-delegation,” and that “ICANN has never objected or refused to consent to an assignment on the grounds that: (i) the pre-delegation agreement provided for a post-delegation assignment of the registry agreement, and/or (ii) there was a lack of pre-delegation public scrutiny of the registry operator because the assignment was effected after the application evaluation period had closed.”

NDC and Verisign argue that ICANN has never applied the Guidebook in the manner proposed by Altanovo, and that new gTLDs have been transferred numerous times after execution of a Registry Agreement. NDC and Verisign refer to Christine Willett’s testimony at the IRP hearing that “‘applicants all the time were assigning rights and designating third parties to operate on their behalf,’ with respect to ‘all sorts of aspects of their application and future gTLD operations,’ including assigning new gTLDs immediately upon execution of the registry agreement.”

NDC and Verisign argue that the DAA did not render any statements in the application false or misleading. NDC and Verisign contend that ICANN is generally unconcerned with third-party agreements like the DAA and only is concerned with the ownership, management, and contact personnel for the applicant. The representations regarding NDC’s ownership, management, and contact personnel remain accurate.

Additionally, NDC and Verisign argue that there were no changes to Section 18 (Mission/Purpose) of the application about which NDC was required to notify ICANN. The DAA did not alter the mission or purpose as stated in NDC's application, where NDC described "its general strategy at the time [in 2012] as to how .WEB might be successfully and productively introduced and used to benefit consumers." That general strategy was not "intended to be a definitive statement of NDC's plans for .WEB," and, according to NDC and Verisign, they were not "required to be" definitive statements under the Guidebook. NDC and Verisign further contend that any purported inaccuracy in Section 18 is immaterial because Module 2 of the Guidebook states that the information provided in response to Question 18 "is not used as part of the evaluation or scoring of the application."

Allegations regarding the .WEB Auction Blackout Period:

Clause 68 of the Auction Rules and Sections 2.6 and 2.10 of the Bidder Agreement prohibit members of a contention set from, among other things, "cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements" during the period from the deposit deadline for the auction until full payment has been received from the auction winner. This is referred to as the "Blackout Period." According to NDC and Verisign, an agreement had been reached to resolve .WEB through a "private auction" by all members of the contention set except NDC, which refused to participate in a private auction. The proposed private auction would have been structured so that the proceeds of the winning bid would be distributed to the losing bidders. On 7 June 2016, a representative of Altanovo asked NDC to reconsider entering

into a private auction and offered to guarantee that NDC would receive at least \$16 million if NDC participated in a private auction and lost. NDC declined. Altanovo offered to increase the guaranteed payment to \$17.02 million. NDC declined again.

On 20 July 2016, the deposit deadline for the .WEB action passed, and the Blackout Period began. On 22 July 2016, Altanovo sent a text message to NDC stating:

If ICANN delays the auction next week would you again consider a private auction? Y-N

NDC did not respond to the text message. NDC and Verisign contend that Altanovo's communication violated the Blackout Period.

NDC and Verisign argue that Altanovo's 22 July 2016 message asking if NDC would consider a private auction in the event that the .WEB auction were to be postponed amounted to seeking a "settlement of" the .WEB contention set in breach of paragraph 68 of the Auction Rules and Section 2.6 of the Bidder Agreement. They argue that the text message "unambiguously referred back to Altanovo's prior attempts days earlier to induce NDC to agree to a private auction for .WEB by guaranteeing NDC over \$17 million to go to such an auction and lose." NDC and Verisign further argue that Altanovo's text message also intended to probe NDC's strategies for the upcoming auction, which NDC and Verisign contend the Bidder Agreement prohibits.

Altanovo argues that the first two texts NDC and Verisign identified occurred six weeks prior to the Blackout Period, and that while the 22 July 2016 text occurred during the Blackout Period, it did not violate any rules. According to Altanovo, the Blackout Period is "designed to

prevent bid rigging by prohibiting bidders from coordinating in advance of the auction.” According to Altanovo, its text message did not seek to coordinate or otherwise rig auction bids and did not violate the terms or spirit of the Blackout Period; and the text did not relate to bids, bidding strategies, settlement agreements or post-Auction ownership transfer agreements.

Parties’ Request for Remedies:

The parties’ submissions propose radically different remedies in the event the Board were to find a violation of the Guidebook or Auction Rules, notwithstanding the fact that the IRP Panel found that the Guidebook and Auction Rules provide ICANN with considerable discretion to address and to remedy breaches of their terms.

Altanovo contends that, if a violation is found, the Articles and Bylaws require the Board to exercise its discretion to disqualify NDC’s application/bids and deem NDC ineligible to enter into a Registry Agreement for .WEB, based on Guidebook Module 6 (which provides that ICANN may reject an application if an applicant makes a “material misstatement or misrepresentation” in the application or omits any “material information” from the application). Altanovo further argues that its bid (which was the second highest bid) should be declared the winning bid because certain provisions of the Auction Rules indicate that a bidder may be subject to various penalties, including forfeiture of its application, and that ICANN may make a determination that a winning applicant is “ineligible” to enter into a Registry Agreement.

NDC’s and Verisign’s overarching theme is that granting Altanovo the relief it seeks would amount to treating NDC and Verisign differently from all other similarly situated new gTLD applicants that have assigned their Registry Agreements to third parties, or otherwise

entered into financing agreements related to their applications. NDC and Verisign further argue that Altanovo's argument implies that the Board has no discretion but to award Altanovo its "draconian" relief, thereby resulting in Altanovo obtaining the right to operate .WEB for "far less than its market value." NDC and Verisign, however, assert that Altanovo's argument is contrary to the Guidebook and the IRP Panel's Final Declaration, which held that ICANN has "the requisite knowledge, expertise, and experience to pronounce . . . on the question of whether NDC's application should be rejected and its bid at the auction disqualified."

NDC and Verisign also argue that, even if the DAA violated Paragraph 10 of the Guidebook, forfeiture is not the appropriate remedy and is inconsistent with how ICANN has interpreted Paragraph 10 in the past. Moreover, the fundamental purpose of Paragraph 10 is to ensure that the applicant continues to have responsibility for the application, and the DAA did not interfere with that fundamental purpose, according to NDC and Verisign. As to the alleged violation of NDC's disclosure obligations, again NDC and Verisign argue that the remedy cannot be forfeiture, in part because there is no evidence that the result of the .WEB auction would have been different had the arrangement been disclosed. And conceding to Altanovo's demand "would be singling out NDC for disqualification based on the same conduct by other applicants for which ICANN took no action." Finally, NDC and Verisign argue that the alleged violations of the Auction Rules or the Bidder Agreement cannot support forfeiture because they relate only to the mechanics of the ICANN Auction, and the DAA did not interfere with those mechanics.

Discussion of the BAMC's Consideration and Recommendation

Pursuant to the Board's directive in [Resolution 2022.03.10.06](#), the BAMC, and then the Board, considered various materials relevant to this matter including, but not limited to, the IRP Panel's Final Declaration and the submissions and supporting materials submitted to the BAMC in July and August 2022 by Altanovo, NDC and Verisign.

After careful review of and discussion regarding the Guidebook and Auction Rules, the BAMC, and the Board, found that there is no Guidebook or Auction Rules provision that directly addresses arrangements such as the DAA, despite the parties' respective contentions. The BAMC believes, and the Board agrees, that the DAA falls into a gray area that the Guidebook and Auction Rules do not specifically address. Thus, while both sides make plausible arguments, none of those arguments exactly fits the DAA and the parties' conduct under the current Guidebook and Auction Rules.

More specifically, the BAMC and the Board found that the DAA does not violate Paragraph 10 of the Guidebook, including the last sentence, which states that "Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the Application." NDC remains the applicant of its .WEB application because NDC did not sell or transfer the application. While NDC has agreed that the DAA grants Verisign various rights with respect to how NDC proceeds, including with respect to a possible private or ICANN auction, NDC did not resell, assign, or transfer its rights or obligations with regard to the .WEB application itself, and retained the right to communicate with ICANN and to provide information "to the extent required to preserve [NDC's] rights with respect to the Application or being the registry operator for the Domain." In the event NDC negotiates with and enters into a Registry Agreement with ICANN for .WEB, NDC would become the Registry Operator for .WEB. Only after NDC secures a Registry Agreement (if it does) can NDC then

submit a request to ICANN to have the agreement assigned to Verisign.

Accordingly, the BAMC and the Board agree with NDC and Verisign that no assignment of NDC's application has occurred and the information provided in NDC's application has not been rendered false. Instead, the DAA contemplates a possible future assignment of the Registry Agreement that NDC might enter into with ICANN, not an assignment of NDC's .WEB application. NDC remains the applicant and, if NDC enters into a Registry Agreement with ICANN, NDC will become the Registry Operator for .WEB. Whether or not NDC then attempts to assign the Registry Agreement to Verisign is, at this point, an event that has not occurred and conceivably may not occur depending on the circumstances at the time. And if NDC subsequently decides to request such an assignment, there are processes in place to review such a request, including the need for ICANN's approval of that request. Such an assignment does not equate to a "circumvention" of the application process but, rather, is a necessary component for servicing Registry Operators and allowing the continued operation of gTLDs.

The BAMC also noted, as does the Board, that Registry Agreements for new gTLDs have been assigned dozens of times, if not more, following contracting and/or delegation of the gTLD and that, generally, there have been no formal objections regarding possible pre-contracting agreements that provided for a post-delegation transfer subject to ICANN approval.²⁰ Although ICANN does not know

²⁰ For instance, in 2012, Demand Media publicly announced an agreement regarding 107 of Donuts' gTLD applications before any Registry Agreements were executed, stating that "it ha[d] entered into a strategic arrangement with Donuts Inc. [...], through which it may acquire rights in certain gTLDs after they have been awarded to Donuts by ICANN. These rights are shared equally with Donuts and are associated with 107 gTLDs for

the circumstances or details of other potential pre-contracting agreements that may have been in place, the BAMC and the Board note that there are examples where assignment requests were submitted shortly after (even as short as one week after) contracting, including for gTLDs that had been the subject of auctions.

Furthermore, if such pre-contracting agreements occurred between private companies, ICANN might not have any direct knowledge of the extent of those agreements because private companies do not have a public disclosure requirement and the Guidebook does not contain a disclosure requirement for such agreements. The primary reason that ICANN and Altanovo became aware of the DAA was due to the fact that Verisign is a public company that was required to make a public disclosure. Verisign should not be treated differently because it is a public company that has a disclosure requirement as compared to private companies that do not have a public disclosure requirement. That being said, the BAMC thinks it is important for applicants and the application process as a whole that ICANN provide greater clarity to applicants regarding the transparency requirements and the notification requirements applicable throughout the various stages of the application process and the ICANN auction process. The Board agrees and has directed ICANN org to consider these issues when developing the Guidebook and auction rules for the next round of the New gTLD Program.

In terms of any Guidebook requirement to update an application for a gTLD, the BAMC and the Board found that NDC did not violate that requirement by entering into the DAA. First and foremost, NDC is still

which Donuts is the applicant.” Ultimately, approximately 24 new gTLDs that Donuts applied for were subsequently transferred via Registry Agreement assignment to Demand Media.

the applicant; that has not changed. And, if NDC enters into a Registry Agreement with ICANN, NDC will become the Registry Operator for .WEB. Second, NDC and Verisign are correct that ICANN does not use the mission and purpose information (set forth in Section 18 of the application) as part of the evaluation or scoring of an application. In this regard, NDC and Verisign also noted that numerous other applicants have changed the mission and purpose for their gTLDs over the course of time without revising those applications and without ICANN taking any punitive action in such circumstances. Moreover, as noted above, it is not uncommon for a Registry Agreement to be assigned to a different Registry Operator, which may have a different mission or purpose for the gTLD. Such an assignment does not equate to a “circumvention” of the application process but, rather, is a necessary component for servicing Registry Operators and allowing the continued operation of gTLDs.

In terms of the Auction Rules and the Bidder Agreement, the BAMC and the Board found that NDC did not violate those provisions because NDC always remained the bidder, the bids that it submitted were legitimate, and NDC was in fact able to fulfill its bid when it became the prevailing party at the auction. The Auction Rules and Bidder Agreement primarily relate to the mechanics of the auction, not the qualifications of an applicant, and the BAMC found that the language in these documents to which Altanovo points was not intended to disqualify an otherwise qualified applicant in these circumstances, a conclusion with which the Board agrees.

With regard to Altanovo’s claims regarding ICANN’s Core Value relating to competition, the BAMC and the Board note that the Panel understood and explicitly accepted that ICANN “does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct.” The

Panel further noted that this “is consistent with a public statement once endorsed by [Altanovo], in which it was asserted [that] ‘[...] Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.’” The BAMC and the Board note that ICANN’s Commitment and Core Value are directed at “enabl[ing] competition and open entry in Internet-related markets” 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.” This sets the table for innovation and ensuring a stable, secure and interoperable Internet. This does not equate to being a competition “regulator,” as explicitly stated in the Bylaws (“For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”).

Based on the BAMC’s extensive review and discussion of the allegations relating to the DAA, the BAMC has recommended that the Board determine that NDC did not violate the Guidebook or the Auction Rules, either through entering into the DAA or through its participation in the .WEB auction, and that the Board direct the Interim President and CEO, or her designee(s), to continue processing NDC’s .WEB application.

The BAMC then discussed the allegations regarding Altanovo’s conduct during the “Blackout Period” of the .WEB auction but, ultimately, concluded and recommended that the Board need not make a final determination at this time as to whether Altanovo violated the Auction Rules. The Board agrees, but notes that auction participants have sufficient time in advance of an ICANN auction to discuss potential private resolution and, thus, should respect the no-communication rule during the designated Blackout Period.

Finally, there was considerable discussion within the BAMC regarding the fact that, in the next round of the New gTLD Program, ICANN org should consider whether to provide more guidance, in the Applicant Guidebook or otherwise, regarding agreements similar to the DAA, including whether those agreements should be disclosed and, if so, when, as well as what communications are and are not permissible leading up to an ICANN auction. The BAMC believes, and the Board agrees, that it is important for both the applicants and the application process as a whole that ICANN provide greater clarity in the next iteration of the Guidebook and auction rules regarding the transparency and notification requirements applicable throughout the various stages of the application and auction processes. Accordingly, the BAMC has recommended that the Board direct ICANN org to carefully consider such issues when developing the Guidebook and auction rules for the next round of the New gTLD Program.

Board Decision:

The BAMC requested, received, and considered the parties' submissions, and it devoted considerable portions of four separate meetings to this matter before issuing its recommendation. The auction for .WEB generated more money than any other ICANN auction but, regrettably, the ensuing disputes have also generated millions of dollars in legal fees by each of the relevant parties and delayed the delegation of .WEB for more than six years. The BAMC's work and recommendations on this matter were critical to the Board's evaluation of this matter.

The Board thanks Altanovo, NDC and Verisign for their participation in this process. It has been somewhat unique in ICANN's history for ICANN to request submissions from the interested parties, and Altanovo, NDC and Verisign participated fully and in good faith. The

Board respects the differences of opinion and has worked diligently to address the issues that the Panel recommended the Board address.

In consideration of the underlying facts, the submissions and supporting materials provided by the parties in July and August 2022 including, but not limited to, the DAA and affiliated documents, NDC's .WEB application, relevant provisions of the Guidebook, Auction Rules and Bidder Agreement, and various other materials, as well as the BAMC's analysis and recommendations, the Board has determined that NDC did not violate the Guidebook or the Auction Rules, either through entering into the DAA or through its participation in the .WEB auction.

No assignment of NDC's application has occurred and the information provided in NDC's application has not been rendered false. Rather, the DAA contemplates a possible future assignment of the Registry Agreement that NDC might enter into with ICANN, not an assignment of NDC's .WEB application. NDC remains the applicant and, in the event NDC enters into a Registry Agreement with ICANN, NDC will become the Registry Operator of .WEB. Whether or not NDC requests and is able to assign that agreement to Verisign is, at this point, an event that has not yet occurred. If NDC subsequently decides to request such an assignment, there are processes in place to review such a request, including the need for ICANN's approval of that request. Assignment of a Registry Agreement is not uncommon and it does not equate to a "circumvention" of the application process but, rather, is a necessary component for servicing Registry Operators and allowing the continued operation of gTLDs.

The Board further finds that NDC did not violate any Guidebook provision by not updating its application as a result of entering into the DAA. The Board notes that numerous other applicants have

changed the mission and purpose for their requested gTLDs over the course of time without revising those applications; in addition to the numerous occasions in which the mission and purpose for a gTLD has changed as a result of assignment of the Registry Agreement to a new Registry Operator. The Board further finds that NDC did not violate the Auction Rules or Bidder Agreement in that NDC always remained the bidder, the bids that it submitted were legitimate, and NDC was in fact able to fulfill its bid when it became the prevailing party at the auction, and as set forth above.

With regard to the Blackout Period claims, while the Board notes the issue raised regarding Altanovo's conduct during the Blackout Period, the Board has concluded that, in light of the Board's decision to continue processing NDC's .WEB application, it is not necessary to make a final determination at this time as to whether Altanovo violated the Blackout Period of the .WEB auction.

Finally, the Board acknowledges and agrees with the BAMC's recommendation regarding the importance of greater clarity regarding the transparency and notification requirements in the application and auction processes. The Board recognizes that numerous new gTLD Registry Agreements have been assigned and the Applicant Guidebook applicable to the 2012 round of the New gTLD Program does not address the myriad of circumstances under which such assignments might occur, and when such agreements may be entered into. In this respect, the Board has determined that it is prudent to take that into consideration when developing the guidelines, rules and procedures for the next round of the New gTLD Program. Thus, the Board is directing ICANN org to carefully consider the issues raised by the parties and the Panel in the .WEB IRP with regard to agreements similar to the DAA and communications prior to an ICANN auction when developing the Guidebook and auction rules

for the next round of the New gTLD Program in order to provide greater clarity to applicants regarding the transparency and notification requirements throughout the application and auction processes.

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, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially and adversely affected by a Board or organization action or inaction may challenge that action or inaction.

Taking this decision is not expected to have any immediate direct financial impact on ICANN. Further, this action should not have any direct impact on the security, stability or resiliency of the domain name system.

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

3. Executive Session:

a. Confidential Matter

The Board entered into a confidential discussion and took action that shall remain confidential pursuant to Article 3, section 3.5.b of the ICANN Bylaws unless and until it is decided that the information be publicly released.

Published on 2 May 2023

EXHIBIT C-18



Generic Names Supporting Organization

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Final Report - Introduction of New Generic Top-Level Domains

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08 August 2007

ICANN Generic Names Supporting Organisation

Final Report

Introduction of New Generic Top-Level Domains

8 August 2007

Part A: Final Report

Introduction of New Generic Top-Level Domains

ABSTRACT

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FINAL REPORT: PART B

ABSTRACT

This is the Generic Names Supporting Organization's Final Report on the Introduction of New Top-Level Domains. The Report is in two parts. Part A contains the substantive discussion of the Principles, Policy Recommendations and Implementation Guidelines and Part B contains a range of supplementary materials that have been used by the Committee during the course of the Policy Development Process.

The GNSO Committee on New Top-Level Domains consisted of all GNSO Council members. All meetings were open to a wide range of interested stakeholders and observers. A set of participation data is found in Part B.

Many of the terms found here have specific meaning within the context of ICANN and new top-level domains discussion. A full glossary of terms is available in the Reference Material section at the end of Part A.

BACKGROUND

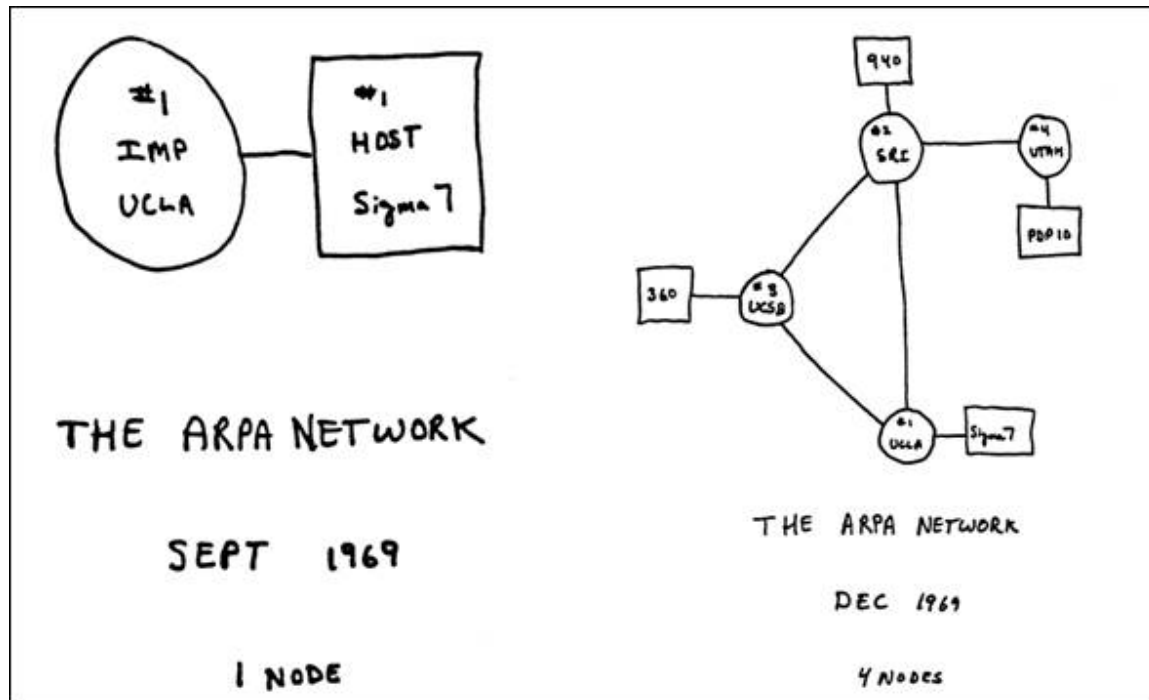
1. The Internet Corporation for Assigned Names and Numbers (ICANN) is responsible for the overall coordination of "the global Internet's system of unique identifiers" and ensuring the "stable and secure operation of the Internet's unique identifier systems. In particular, ICANN coordinates the "allocation and assignment of the three sets of unique identifiers for the Internet". These are "domain names"(forming a system called the DNS); Internet protocol (IP) addresses and autonomous system (AS) numbers and Protocol port and parameter numbers". ICANN is also responsible for the "operation and evolution of the DNS root name server system and policy development reasonably and appropriately related to these technical functions". These elements are all contained in ICANN's Mission and Core Values[1] in addition to provisions which enable policy development work that, once approved by the ICANN Board, become binding on the organization. The results of the policy development process found here relate to the introduction of new generic top-level domains.

2. This document is the *Final Report* of the Generic Names Supporting Organisation's (GNSO) Policy Development Process (PDP) that has been conducted using ICANN's Bylaws and policy development guidelines that relate to the work of the GNSO. This *Report* reflects a comprehensive examination of four Terms of Reference designed to establish a stable and ongoing process that facilitates the introduction of new top-level domains. The policy development process (PDP) is part of the Generic Names Supporting Organisation's (GNSO) mandate within the ICANN structure. However, close consultation with other ICANN Supporting Organisations and Advisory Committees has been an integral part of the process. The consultations and negotiations have also included a wide range of interested stakeholders from within and outside the ICANN community[2].

3. The *Final Report* is in two parts. This document is Part A and contains the full explanation of each of the Principles, Recommendations and Implementation Guidelines that the Committee has developed since December 2005[3]. Part B of the *Report* contains a wide range of supplementary materials which have been used in the policy development process including Constituency Impact Statements (CIS), a series of Working

Group Reports on important sub-elements of the Committee's deliberations, a collection of external reference materials, and the procedural documentation of the policy development process[4].

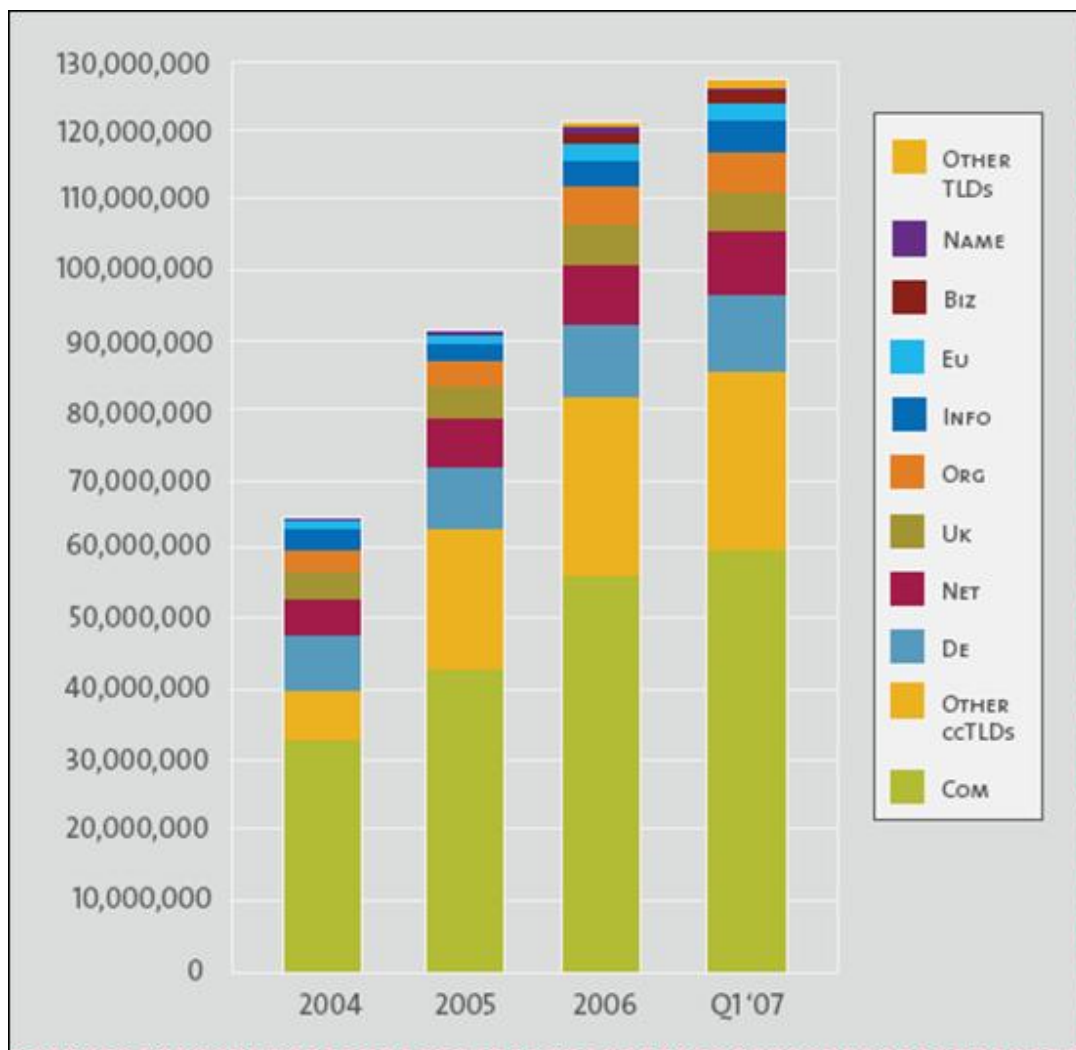
4. The finalisation of the policy for the introduction of new top-level domains is part of a long series of events that have dramatically changed the nature of the Internet. The 1969 ARPANET diagram shows the initial design of a network that is now global in its reach and an integral part of many lives and businesses. The policy recommendations found here illustrate the complexity of the Internet of 2007 and, as a package, propose a system to add new top-level domains in an orderly and transparent way. The ICANN Staff Implementation Team, consisting of policy, operational and legal staff members, has worked closely with the Committee on all aspects of the policy development process[5]. The ICANN Board has received regular information and updates about the process and the substantive results of the Committee's work.



5. The majority of the early work on the introduction of new top-level domains is found in the IETF's Request for Comment series. RFC 1034[6] is a fundamental resource that explains key concepts of the naming system. Read in conjunction with RFC920[7], an historical picture emerges of how and why the domain name system hierarchy has been organised. Postel & Reynolds set out in their RFC920 introduction about the "General Purpose Domains" that ... "While the initial domain name "ARPA" arises from the history of the development of this system and environment, in the future most of the top level names will be very general categories like "government", "education", or "commercial". The motivation is to provide an organization name that is free of undesirable semantics."

6. In 2007, the Internet is multi-dimensional and its development is driven by widespread access to inexpensive communications technologies in many parts of the world. In addition, global travel is now relatively inexpensive, efficient and readily available to a diverse range of travellers. As a consequence, citizens no longer automatically associate themselves with countries but with international communities of linguistic, cultural or professional interests independent of physical location. Many people now exercise multiple citizenship rights, speak many different languages and quite often live far from where they were born or educated. The 2007 OECD *Factbook*[8] provides comprehensive statistics about the impact of migration on OECD member countries. In essence, many populations are fluid and changing due in part to easing labour movement restrictions but also because technology enables workers to live in one place and work in

another relatively easily. As a result, companies and organizations are now global and operate across many geographic borders and jurisdictions. The following illustration[9] shows how rapidly the number of domain names under registration has increased and one could expect that trend to continue with the introduction of new top-level domains.



7. A key driver of change has been the introduction of competition in the registration of domain names through ICANN Accredited Registrars[10]. In June 2007, there were more than 800 accredited registrars who register names for end users with ongoing downward pressure on the prices end-users pay for domain name registration.

8. ICANN's work on the introduction of new top-level domains has been underway since 1999. By mid-1999, Working Group C[11] had quickly reached consensus on two issues, namely that "...ICANN should add new gTLDs to the root. The second is that ICANN should begin the deployment of new gTLDs with an initial rollout of six to ten new gTLDs, followed by an evaluation period". This work was undertaken throughout 2000 and saw the introduction of, for example, .coop, .aero and .biz.

9. After an evaluation period, a further round of sponsored TLDs was introduced during 2003 and 2004 which included, amongst others, .mobi and .travel[12].

10. The July 2007 zone file survey statistics from www.registrarstats.com[13] shows that there are slightly more than 96,000,000 top level domains registered across a selection of seven top-level domains including

.com, .net and .info. Evidence from potential new applicants provides more impetus to implement a system that enables the ongoing introduction of new top level domains[14]. In addition, interest from Internet users who could use Internationalised Domain Names (IDNs) in a wide variety of scripts beyond ASCII is growing rapidly.

11. To arrive at the full set of policy recommendations which are found here, the Committee considered the responses to a Call for Expert Papers issued at the beginning of the policy development process[15], and which was augmented by a full set of GNSO Constituency Statements[16]. These are all found in Part B of the *Final Report* and should be read in conjunction with this document. In addition, the Committee received detailed responses from the Implementation Team about proposed policy recommendations and the implementation of the recommendations package as an on-line application process that could be used by a wide array of potential applicants.

12. The Committee reviewed and analysed a wide variety of materials including Working Group C's findings, the evaluation reports from the 2003 & 2004 round of sponsored top-level domains and a full range of other historic materials[17].

13. In the past, a number of different approaches to new top level domains have been considered including the formulation of a structured taxonomy[18] of names, for example, .auto, .books, .travel and .music. The Committee has opted to enable potential applicants to self-select strings that are either the most appropriate for their customers or potentially the most marketable. It is expected that applicants will apply for targeted community strings such as .travel for the travel industry and .cat for the Catalan community as well as some generic strings. The Committee identified five key drivers for the introduction of new top-level domains.

- (i) It is consistent with the reasons articulated in 1999 when the first proof-of-concept round was initiated
- (ii) There are no technical impediments to the introduction of new top-level domains as evidenced by the two previous rounds
- (iii) Expanding the domain name space to accommodate the introduction of both new ASCII and internationalised domain name (IDN) top-level domains will give end users more choice about the nature of their presence on the Internet. In addition, users will be able to use domain names in their language of choice.
- (iv) There is demand for additional top-level domains as a business opportunity. The GNSO Committee expects that this business opportunity will stimulate competition at the registry service level which is consistent with ICANN's Core Value 6.
- (v) No compelling reason has been articulated to not proceed with accepting applications for new top-level domains.

14. The remainder of this Report is structured around the four *Terms of Reference*. This includes an explanation of the Principles that have guided the work taking into account the Governmental Advisory Committee's March 2007 *Public Policy Principles for New gTLDs*[19]; a comprehensive set of Recommendations which has majority Committee support and a set of Implementation Guidelines which has been discussed in great detail with the ICANN Staff Implementation Team. The Implementation Team has released two *ICANN Staff Discussion Points* documents (in November 2006 and June 2007). Version 2 provides detailed analysis of the proposed recommendations from an implementation standpoint and provides suggestions about the way in which the implementation plan may come together. The ICANN Board will make the final decision about the actual structure of the application and evaluation process.

15. In each of the sections below the Committee's recommendations are discussed in more detail with an explanation of the rationale for the decisions. The recommendations have been the subject of numerous

public comment periods and intensive discussion across a range of stakeholders including ICANN's GNSO Constituencies, ICANN Supporting Organisations and Advisory Committees and members of the broader Internet-using public that is interested in ICANN's work[20]. In particular, detailed work has been conducted through the Internationalised Domain Names Working Group (IDN-WG)[21], the Reserved Names Working Group (RN-WG)[22] and the Protecting the Rights of Others Working Group (PRO-WG) [23]. The Working Group Reports are found in full in Part B of the *Final Report* along with the March 2007 GAC Public Policy Principles for New Top-Level Domains, Constituency Impact Statements. A minority statement from the NCUC about Recommendations 6 & 20 are found Annexes for this document along with individual comments from Nominating Committee appointee Ms Avri Doria.

SUMMARY -- PRINCIPLES, RECOMMENDATIONS & IMPLEMENTATION GUIDELINES

1. This section sets out, in table form, the set of Principles, proposed Policy Recommendations and Guidelines that the Committee has derived through its work. The addition of new gTLDs will be done in accordance with ICANN's primary mission which is to ensure the security and stability of the DNS and, in particular, the Internet's root server system[24].
2. The Principles are a combination of GNSO Committee priorities, ICANN staff implementation principles developed in tandem with the Committee and the March 2007 GAC Public Policy Principles on New Top-Level Domains. The Principles are supported by all GNSO Constituencies.[25]
3. ICANN's Mission and Core Values were key reference points for the development of the Committee's Principles, Recommendations and Implementation Guidelines. These are referenced in the right-hand column of the tables below.
4. The Principles have support from all GNSO Constituencies.

	PRINCIPLES	MISSION & CORE VALUES
A	New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.	M1 & CV1 & 2, 4-10
B	Some new generic top-level domains should be internationalised domain names (IDNs) subject to the approval of IDNs being available in the root.	M1-3 & CV 1, 4 & 6
C	The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.	M3 & CV 4-10
D	A set of technical criteria must be used for assessing a new gTLD registry applicant to minimise the risk of harming the operational stability, security and global interoperability of the Internet.	M1-3 & CV 1
E	A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the	M1-3 & CV 1

	capability to meets its obligations under the terms of ICANN's registry agreement.	
F	A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.	M1-3 & CV 1
G	The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.	

	RECOMMENDATIONS[26]	MISSION & CORE VALUES
1	<p>ICANN must implement a process that allows the introduction of new top-level domains.</p> <p>The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.</p> <p>All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.</p>	M1-3 & CV1-11
2	Strings must not be confusingly similar to an existing top-level domain or a Reserved Name.	M1-3 & C1-6-11
3	<p>Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.</p> <p>Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).</p>	CV3
4	Strings must not cause any technical instability.	M1-3 & CV 1
5	Strings must not be a Reserved Word[27].	M1-3 & CV 1 & 3
6*	<p>Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.</p> <p>Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).</p>	M3 & CV 4

7	Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.	M1-3 & CV1
8	Applicants must be able to demonstrate their financial and organisational operational capability.	M1-3 & CV1
9	There must be a clear and pre-published application process using objective and measurable criteria.	M3 & CV6-9
10	There must be a base contract provided to applicants at the beginning of the application process.	CV7-9
11	[Replaced with Recommendation 20 and Implementation Guideline P and inserted into Term of Reference 3 Allocation Methods section]	
12	Dispute resolution and challenge processes must be established prior to the start of the process.	CV7-9
13	Applications must initially be assessed in rounds until the scale of demand is clear.	CV7-9
14	The initial registry agreement term must be of a commercially reasonable length.	CV5-9
15	There must be renewal expectancy.	CV5-9
16	Registries must apply existing Consensus Policies and adopt new Consensus Policies as they are approved.	CV5-9
17	A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.	M1 & CV1
18	If an applicant offers an IDN service, then ICANN's IDN guidelines ^[28] must be followed.	M1 & CV1
19	Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.	M1 & CV1
20*	An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.	

* The NCUC submitted Minority Statements on Recommendations 6 and 20. The remainder of the Recommendations have support from all GNSO Constituencies.

	IMPLEMENTATION GUIDELINES	MISSION & CORE VALUES
IG A	The application process will provide a pre-defined roadmap for applicants that encourages the submission of applications for new top-level domains.	CV 2, 5, 6, 8 & 9
IG B	Application fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process. Application fees may differ for applicants.	CV 5, 6, 8 & 9
IG C	ICANN will provide frequent communications with applicants and the public including comment forums.	CV 9 & 10
IG D	A first come first served processing schedule within the application round will be implemented and will continue for an ongoing process, if necessary. Applications will be time and date stamped on receipt.	CV 8-10
IG E	The application submission date will be at least four months after the issue of the Request for Proposal and ICANN will promote the opening of the application round.	CV 9 & 10
IG F*	If there is contention for strings, applicants may[29]: i) resolve contention between them within a pre-established timeframe ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and; iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.	CV 7-10
IG H*	Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exceptions:	CV 7 - 10

	<p>(i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application; and</p> <p>(ii) a formal objection process is initiated.</p> <p>Under these exceptions, Staff Evaluators will devise criteria and procedures to investigate the claim.</p> <p>Under exception (ii), an expert panel will apply the process, guidelines, and definitions set forth in IG P.</p>	
IG H	External dispute providers will give decisions on objections.	CV 10
IG I	An applicant granted a TLD string must use it within a fixed timeframe which will be specified in the application process.	CV 10
IG J	The base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing market place.	CV 4-10
IG K	ICANN should take a consistent approach to the establishment of registry fees.	CV 5
IG L	The use of personal data must be limited to the purpose for which it is collected.	CV 8
IG M	ICANN may establish a capacity building and support mechanism aiming at facilitating effective communication on important and technical Internet governance functions in a way that no longer requires all participants in the conversation to be able to read and write English[30].	CV 3 - 7
IG N	ICANN may put in place a fee reduction scheme for gTLD applicants from economies classified by the UN as least developed.	CV 3 - 7
IG O	ICANN may put in place systems that could provide information about the gTLD process in major languages other than English, for example, in the six working languages of the United Nations.	CV 8 -10
IG P*	<p>The following process, definitions and guidelines refer to Recommendation 20.</p> <p>Process</p>	

Opposition must be objection based.

Determination will be made by a dispute resolution panel constituted for the purpose.

The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).

Guidelines

The task of the panel is the determination of substantial opposition.

- a) **substantial** – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment
- b) **significant portion** – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.
- c) **community** – community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted.
- d) **explicitly targeting** – explicitly targeting means there is a description of the intended use of the TLD in the application.
- e) **implicitly targeting** – implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use.
- f) **established institution** – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.

Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.

	<p>The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.</p> <p style="padding-left: 40px;">g) formal existence – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.</p> <p style="padding-left: 40px;">h) detriment – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely.</p>	
IG Q	<p>ICANN staff will provide an automatic reply to all those who submit public comments that will explain the objection procedure.</p>	
IG R	<p>Once formal objections or disputes are accepted for review there will be a cooling off period to allow parties to resolve the dispute or objection before review by the panel is initiated.</p>	

* The NCUC submitted Minority Statements on Implementation Guidelines F, H & P. The remainder of the Implementation Guidelines have support from all GNSO Constituencies.

1. This set of implementation guidelines is the result of detailed discussion, particularly with respect to the two *ICANN Staff Discussion Points*[31] documents that were prepared to facilitate consultation with the GNSO Committee about the implementation impacts of the proposed policy Recommendations. The Implementation Guidelines will be used to inform the final Implementation Plan which is approved by the ICANN Board

2. The *Discussion Points* documents contain draft flowcharts which have been developed by the Implementation Team and which will be updated, based on the final vote of the GNSO Council and the direction of the ICANN Board. The *Discussion Points* documents have been used in the ongoing internal implementation discussions that have focused on ensuring that draft recommendations proposed by the Committee are implementable in an efficient and transparent manner[32]. The flowchart setting out the proposed Contention Evaluation Process is a more detailed component within the Application Evaluation Process and will be amended to take into account the inputs from Recommendation 20 and its related Implementation Guidelines.

3. This policy development process has been designed to produce a systemised and ongoing mechanism for applicants to propose new top-level domains. The Request for Proposals (RFP) for the first round will include scheduling information for the subsequent rounds to occur within one year. After the first round of new applications, the application system will be evaluated by ICANN's TLDs Project Office to assess the effectiveness of the application system. Success metrics will be developed and any necessary adjustments made to the process for subsequent rounds.

4. The following sections set out in detail the explanation for the Committee's recommendations for each Term of Reference.

TERM OF REFERENCE ONE -- WHETHER TO INTRODUCE NEW TOP-LEVEL DOMAINS

1. **Recommendation 1 Discussion – All GNSO Constituencies supported the introduction of new top-level domains.**
2. The GNSO Committee was asked to address the question of whether to introduce new top-level domains. The Committee recommends that ICANN should implement a process that allows the introduction of new top level domains and that work should proceed to develop policies that will enable the introduction of new generic top-level domains, taking into account the recommendations found in the latter sections of the *Report* concerning Selection Criteria (Term of Reference 2), Allocation Methods (Term of Reference 3) and Policies for Contractual Conditions (Term of Reference 4).
3. ICANN's work on the introduction of new top-level domains has been ongoing since 1999. The early work included the 2000 Working Group C Report[33] that also asked the question of "whether there should be new TLDs". By mid-1999, the Working Group had quickly reached consensus on two issues, namely that "...ICANN should add new gTLDs to the root. The second is that ICANN should begin the deployment of new gTLDs with an initial rollout of six to ten new gTLDs, followed by an evaluation period". This work was undertaken throughout 2000 and saw the introduction of, for example, .coop, .aero and .biz.
4. After an evaluation period, a further round of sponsored TLDs was introduced during 2003 and 2004 which included, amongst others, .mobi and .travel.
5. In addressing Term of Reference One, the Committee arrived at its recommendation by reviewing and analysing a wide variety of materials including Working Group C's findings; the evaluation reports from the 2003-2004 round of sponsored top-level domains and full range of other historic materials which are posted at <http://gns0.icann.org/issues/new-gtlds/>
6. In addition, the Committee considered the responses to a Call for Expert Papers issued at the beginning of the policy development process[34]. These papers augmented a full set of GNSO Constituency Statements[35] and a set of Constituency Impact Statements[36] that addressed specific elements of the Principles, Recommendations and Implementation Guidelines.
7. The Committee was asked, at its February 2007 Los Angeles meeting, to confirm its rationale for recommending that ICANN introduce new top-level domains. In summary, there are five threads which have emerged:
 - (i) It is consistent with the reasons articulated in 1999 when the first proof-of-concept round was initiated
 - (ii) There are no technical impediments to the introduction of new top-level domains as evidenced by the two previous rounds
 - (iii) It is hoped that expanding the domain name space to accommodate the introduction of both new ASCII and internationalised domain name (IDN) top-level domains will give end users more choice about the nature of their presence on the Internet. In addition, users will be able to use domain names in their language of choice.
 - (iv) In addition, the introduction of a new top-level domain application process has the potential to promote competition in the provision of registry services, and to add to consumer choice, market differentiation and geographic and service-provider diversity which is consistent with ICANN's Core Value 6.

(v) No compelling reason has been articulated to not proceed with accepting applications for new top-level domains.

8. Article X, Part 7, Section E of the GNSO's Policy Development Process requires the submission of "constituency impact statements" which reflect the potential implementation impact of policy recommendations. By 4 July 2007 all GNSO Constituencies had submitted Constituency Impact Statements (CIS) to the gtld-council mailing list[37]. Each of those statements is referred to throughout the next sections[38] and are found in full in Part B of the *Report*. The NCUC submitted Minority Statements on Recommendations 6 & 20 and on Implementation Guidelines F, H & P. These statements are found in full here in Annex A & C, respectively, as they relate specifically to the finalised text of those two recommendations. GNSO Committee Chair and Nominating Committee appointee Ms Avri Doria also submitted individual comments on the recommendation package. Her comments are found in Annex B here.

9. All Constituencies support the introduction of new TLDs particularly if the application process is transparent and objective. For example, the ISPCP said that, "...the ISPCP is highly supportive of the principles defined in this section, especially with regards to the statement in [principle A] (A): New generic top-level domains must be introduced in an orderly, timely and predictable way. Network operators and ISPs must ensure their customers do not encounter problems in addressing their emails, and in their web searching and access activities, since this can cause customer dissatisfaction and overload help-desk complaints. Hence this principle is a vital component of any addition sequence to the gTLD namespace. The various criteria as defined in D, E and F, are also of great importance in contributing to minimise the risk of moving forward with any new gTLDs, and our constituency urges ICANN to ensure they are scrupulously observed during the applications evaluation process". The Business Constituency's (BC) CIS said that "...if the outcome is the best possible there will be a beneficial impact on business users from: a reduction in the competitive concentration in the Registry sector; increased choice of domain names; lower fees for registration and ownership; increased opportunities for innovative on-line business models." The Registrar Constituency (RC) agreed with this view stating that "...new gTLDs present an opportunity to Registrars in the form of additional products and associated services to offer to its customers. However, that opportunity comes with the costs if implementing the new gTLDs as well as the efforts required to do the appropriate business analysis to determine which of the new gTLDs are appropriate for its particular business model."

10. The Registry Constituency (RyC) said that "...Regarding increased competition, the RyC has consistently supported the introduction of new gTLDs because we believe that: there is a clear demand for new TLDs; competition creates more choices for potential registrants; introducing new TLDs with different purposes increases the public benefit; new gTLDs will result in creativity and differentiation in the domain name industry; the total market for all TLDs, new and old, will be expanded." In summary, the Committee recommended, "ICANN must implement a process that allows the introduction of new top-level domains. The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process". Given that this recommendation has support from all Constituencies, the following sections set out the other Terms of Reference recommendations.

TERM OF REFERENCE -- SELECTION CRITERIA

1. Recommendation 2 Discussion -- Strings must not be confusingly similar to an existing top-level domain.

- i) This recommendation has support from all the GNSO Constituencies. Ms Doria accepted the recommendation with the concern expressed below[39].
- ii) The list of existing top-level domains is maintained by IANA and is listed in full on ICANN's website[40]. Naturally, as the application process enables the operation of new top-level domains this list will get much longer and the test more complex. The RyC, in its Impact Statement, said that "...This recommendation is especially important to the RyC. ... It is of prime concern for the RyC that the introduction of new gTLDs results in a ubiquitous experience for Internet users that minimizes user confusion. gTLD registries will be impacted operationally and financially if new gTLDs are introduced that create confusion with currently existing gTLD strings or with strings that are introduced in the future. There is a strong possibility of significant impact on gTLD registries if IDN versions of existing ASCII gTLDs are introduced by registries different than the ASCII gTLD registries. Not only could there be user confusion in both email and web applications, but dispute resolution processes could be greatly complicated." The ISPCP also stated that this recommendation was "especially important in the avoidance of any negative impact on network activities." The RC stated that "...Registrars would likely be hesitant to offer confusingly similar gTLDs due to customer demand and support concerns. On the other hand, applying the concept too broadly would inhibit gTLD applicants and ultimately limit choice to Registrars and their customers".
- iii) There are two other key concepts within this recommendation. The first is the issue of "confusingly similar" [41] and the second "likelihood of confusion". There is extensive experience within the Committee with respect to trademark law and the issues found below have been discussed at length, both within the Committee and amongst the Implementation Team.
- iv) The Committee used a wide variety of existing law[42], international treaty agreements and covenants to arrive at a common understanding that strings should not be confusingly similar either to existing top-level domains like .com and .net or to existing trademarks[43]. For example, the Committee considered the World Trade Organisation's TRIPS agreement, in particular Article 16 which discusses the rights which are conferred to a trademark owner.[44] In particular, the Committee agreed upon an expectation that strings must avoid increasing opportunities for entities or individuals, who operate in bad faith and who wish to defraud consumers. The Committee also considered the Universal Declaration of Human Rights[45] and the International Covenant on Civil and Political Rights which address the "freedom of expression" element of the Committee's deliberations.
- v) The Committee also benefited from the work of the Protecting the Rights of Others Working Group (PRO-WG). The PRO-WG presented its *Final Report*[46] to the Committee at the June 2007 San Juan meeting. The Committee agreed that the Working Group could develop some reference implementation guidelines on rights protection mechanisms that may inform potential new TLD applicants during the application process. A small ad-hoc group of interested volunteers are preparing those materials for consideration by the Council by mid-October 2007.
- vi) The Committee had access to a wide range of differing approaches to rights holder protection mechanisms including the United Kingdom, the USA, Jordan, Egypt and Australia[47].
- vii) In addition, the Committee referred to the 1883 *Paris Convention on the Protection of Industrial Property*[48]. It describes the notion of confusion and describes creating confusion as "to create confusion by any means whatever" {Article 10bis (3) (1)} and, further, being "liable to mislead the public" {Article 10bis (3) (3)}. The treatment of confusingly similar is also contained in

European Union law (currently covering twenty-seven countries) and is structured as follows. "...because of its identity with or similarity to...there exists a likelihood of confusion on the part of the public...; the likelihood of confusion includes the likelihood of association..." {Article 4 (1) (b) of the 1988 EU Trade Mark directive 89/104/EEC}. Article 8 (1) (b) of the 1993 European Union Trade Mark regulation 40/94 is also relevant.

- viii) In the United States, existing trade mark law requires applicants for trademark registration to state under penalty of perjury that "...to the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive..." which is contained in Section 1051 (3) (d) of the US Trademark Act 2005 (found at <http://www.bitlaw.com/source/15usc/1051.html>).[49]
- ix) In Australia, the Australian Trade Marks Act 1995 Section 10 says that "...For the purposes of this Act, a trade mark is taken to be deceptively similar to another trade mark if it so nearly resembles that other trade mark that it is likely to deceive or cause confusion" (found at http://www.ipaustralia.gov.au/resources/legislation_index.shtml)
- x) A number of different trademark offices provide guidance on how to interpret confusion. For example, the European Union Trade Mark Office provides guidance on how to interpret confusion. "...confusion may be visual, phonetic or conceptual. A mere aural similarity may create a likelihood of confusion. A mere visual similarity may create a likelihood of confusion. Confusion is based on the fact that the relevant public does not tend to analyse a word in detail but pays more attention to the distinctive and dominant components. Similarities are more significant than dissimilarities. The visual comparison is based on an analysis of the number and sequence of the letters, the number of words and the structure of the signs. Further particularities may be of relevance, such as the existence of special letters or accents that may be perceived as an indication of a specific language. For words, the visual comparison coincides with the phonetic comparison unless in the relevant language the word is not pronounced as it is written. It should be assumed that the relevant public is either unfamiliar with that foreign language, or even if it understands the meaning in that foreign language, will still tend to pronounce it in accordance with the phonetic rules of their native language. The length of a name may influence the effect of differences. The shorter a name, the more easily the public is able to perceive all its single elements. Thus, small differences may frequently lead in short words to a different overall impression. In contrast, the public is less aware of differences between long names. The overall phonetic impression is particularly influenced by the number and sequence of syllables." (found at <http://oami.europa.eu/en/mark/marque/direc.htm>).
- xi) An extract from the United Kingdom's Trade Mark Office's Examiner's Guidance Manual is useful in explaining further the Committee's approach to developing its Recommendation. "For likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average consumer. Likelihood of association is not an alternative to likelihood of confusion, "but serves to define its scope". Mere association, in the sense that the later mark brings the earlier mark to mind is insufficient to find a likelihood of confusion, unless the average consumer, in bringing the earlier mark to mind, is led to expect the goods or services of both marks to be under the control of one single trade source. "The risk that the public might believe that the goods/services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion..." (found at <http://www.patent.gov.uk/tm/t-decisionmaking/t-law/t-law-manual.htm>)

- xii) The Committee also looked in detail at the existing provisions of ICANN's Registrar Accreditation Agreement, particularly Section 3.7.7.9[50] which says that "...The Registered Name Holder shall represent that, to the best of the Registered Name Holder's knowledge and belief, neither the registration of the Registered Name nor the manner in which it is directly or indirectly used infringes the legal rights of any third party."
- xiii) The implications of the introduction of Internationalised Domain Names (IDNs) are, in the main, the same as for ASCII top-level domains. On 22 March 2007 the IDN-WG released its *Outcomes Report*[51] that the Working Group presented to the GNSO Committee. The Working Group's exploration of IDN-specific issues confirmed that the new TLD recommendations are valid for IDN TLDs. The full IDN WG Report is found in Part B of the *Report*.
- xiv) The technical testing for IDNs at the top-level is not yet completed although strong progress is being made. Given this and the other work that is taking place around the introduction of IDNs at the top-level, there are some critical factors that may impede the immediate acceptance of new IDN TLD applications. The conditions under which those applications would be assessed would remain the same as for ASCII TLDs.
- xv) Detailed work continues on the preparation of an Implementation Plan that reflects both the Principles and the Recommendations. The proposed Implementation Plan deals with a comprehensive range of potentially controversial (for whatever reason) string applications which balances the need for reasonable protection of existing legal rights and the capacity to innovate with new uses for top level domains that may be attractive to a wide range of users[52].
- xvi) The draft Implementation Plan (included in the *Discussion Points* document), illustrates the flow of the application and evaluation process and includes a detailed dispute resolution and extended evaluation tracks designed to resolve objections to applicants or applications.
- xvii) There is tension between those on the Committee who are concerned about the protection of existing TLD strings and those concerned with the protection of trademark and other rights as compared to those who wish, as far as possible, to preserve freedom of expression and creativity. The *Implementation Plan* sets out a series of tests to apply the recommendation during the application evaluation process.

2. Recommendation 3 Discussion -- Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).

- i. This recommendation has support from all GNSO Constituencies. Ms Doria supported the recommendation with concern expressed below[53].
- ii. This recommendation was discussed in detail in the lead up to the Committee's 7 June 2007 conference call and it was agreed that further work would be beneficial. That work was conducted through a series of teleconferences and email exchanges. The Committee decided to leave the recommendation text as it had been drafted and insert a new Principle G that reads "...The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law."

- iii. Prior to this, the Committee engaged in comprehensive discussion about this recommendation and took advice from a number of experts within the group^[54]. The original text of the recommendation has been modified to recognise that an applicant would be bound by the laws of the country where they are located and an applicant may be bound by another country that has jurisdiction over them. In addition, the original formulation that included "freedom of speech" was modified to read the more generally applicable "freedom of expression".
- iv. Before reaching agreement on the final text, the IPC and the NCUC, in their respective Constituency Impact Statements (CIS), had differing views. The NCUC argued that "...there is no recognition that trade marks (and other legal rights have legal limits and *defenses*." The IPC says "agreed [to the recommendation], and, as stated before, appropriate mechanisms must be in place to address conflicts that may arise between any proposed new string and the IP rights of others."

3. Recommendation 4 Discussion -- Strings must not cause any technical instability.

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. It was agreed by the Committee that the string should not cause any technical issues that threatened the stability and security of the Internet.
- iii. In its CIS, the ISPCP stated that "...this is especially important in the avoidance of any negative impact on network activities...The ISPCP considers recommendations 7 and 8 to be fundamental. The technical, financial, organizational and operational capability of the applicant are the evaluators' instruments for preventing potential negative impact on a new string on the activities of our sector (and indeed of many other sectors)." The IPC also agreed that "technical and operational stability are imperative to any new gTLD introduction." The RC said "...This is important to Registrars in that unstable registry and/or zone operations would have a serious and costly impact on its operations and customer service and support."
- iv. The Security and Stability Advisory Committee (SSAC) has been involved in general discussions about new top level domains and will be consulted formally to confirm that the implementation of the recommendations will not cause any technical instability.
- v. A reserved word list, which includes strings which are reserved for technical reasons, has been recommended by the RN-WG. This table is found in the section below.

4. Recommendation 5 Discussion -- Strings must not be a Reserved Word.^[55]

- i. This recommendation is supported by all GNSO Constituencies. Ms Doria supported the recommendation but expressed some concerns outlined in the footnote below.^[56]
- ii. The RN WG developed a definition of "reserved word" in the context of new TLDs which said "...depending on the specific reserved name category as well as the type (ASCII or IDN), the reserved name requirements recommended may apply in any one or more of the following levels as indicated:
 - 1. At the top level regarding gTLD string restrictions
 - 2. At the second-level as contractual conditions
 - 3. At the third-level as contractual conditions for any new gTLDs that offer domain name registrations at the third-level.
- iii. The notion of "reserved words" has a specific meaning within the ICANN context. Each of the existing ICANN registry contracts has provisions within it that govern the use of reserved words. Some

of these recommendations will become part of the contractual conditions for new registry operators.

- iv. The Reserved Names Working Group (RN-WG) developed a series of recommendations across a broad spectrum of reserved words. The Working Group's *Final Report*[57] was reviewed and the recommendations updated by the Committee at ICANN's Puerto Rico meeting and, with respect to the recommendations relating to IDNs, with IDN experts. The final recommendations are included in the following table.

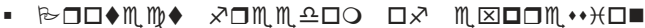
	Reserved Name Category	Domain Name Level(s)	Recommendation
1	ICANN & IANA	All ASCII	The names listed as ICANN and IANA names will be reserved at all levels.
2	ICANN & IANA	Top level, IDN	Any names that appear in the IDN evaluation facility[58] which consist exclusively of translations of 'example' or 'test' that appear in the document at http://www.icann.org/topics/idn/idn-evaluation-plan-v2%209.pdf shall be reserved.
3	ICANN & IANA	2 nd & 3 rd levels, IDN	Any names that appear in the IDN evaluation facility which consist exclusively of translations of 'example' or 'test' that appear in the document at http://www.icann.org/topics/idn/idn-evaluation-plan-v2%209.pdf shall be reserved.
4	Symbols	All	We recommend that the current practice be maintained, so that no symbols other than the '-' [hyphen] be considered for use, with further allowance for any equivalent marks that may explicitly be made available in future revisions of the IDNA protocol.
5	Single and Two Character IDNs	IDNA-valid strings at all levels	Single and two-character U-labels on the top level and second level of a domain name should not be restricted in general. At the top level, requested strings should be analyzed on a case-by-case basis in the new gTLD process depending on the script and language used in order to determine whether the string should be granted for allocation in the DNS with particular caution applied to U-labels in Latin script (see Recommendation 10 below). Single and two character labels at the second level and the third level if applicable should be available for registration, provided they are consistent with the IDN Guidelines.

	Reserved Name Category	Domain Name Level(s)	Recommendation
6	Single Letters	Top Level	We recommend reservation of single letters at the top level based on technical questions raised. If sufficient research at a later date demonstrates that the technical issues and concerns are addressed, the topic of releasing reservation status can be reconsidered.
7	Single Letters and Digits	2 nd Level	In future gTLDs we recommend that single letters and single digits be available at the second (and third level if applicable).
8	Single and Two Digits	Top Level	A top-level label must not be a plausible component of an IPv4 or IPv6 address. (e.g., .3, .99, .123, .1035, .0xAF, .1578234)
9	Single Letter, Single Digit Combinations	Top Level	Applications may be considered for single letter, single digit combinations at the top level in accordance with the terms set forth in the new gTLD process. Examples include .3F, .A1, .u7.
10	Two Letters	Top Level	We recommend that the current practice of allowing two letter names at the top level, only for ccTLDs, remains at this time. [59] Examples include .AU, .DE, .UK.
11	Any combination of Two Letters, Digits	2 nd Level	Registries may propose release provided that measures to avoid confusion with any corresponding country codes are implemented.[60] Examples include ba.aero, ub.cat, 53.com, 3M.com, e8.org.
12	Tagged Names	Top Level ASCII	In the absence of standardization activity and appropriate IANA registration, all labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved at the top-level.[61]
13	N/A	Top Level IDN	For each IDN gTLD proposed, applicant must provide both the "ASCII compatible encoding" ("A-label") and the "Unicode display form" ("U-label")[62] For example:

	Reserved Name Category	Domain Name Level(s)	Recommendation
			<ul style="list-style-type: none"> If the Chinese word for 'Beijing' is proposed as a new gTLD, the applicant would be required to provide the A-label (xn--1lq90i) and the U-label (北京). If the Japanese word for 'Tokyo' is proposed as a new gTLD, the applicant would be required to provide the A-label (xn--1lqs71d) and the U-label (東京).
14	Tagged Names	2 nd Level ASCII	The current reservation requirement be reworded to say, " <i>In the absence of standardization activity and appropriate IANA registration, all labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved in ASCII at the second (2nd level.</i> [63] – added words in <i>italics</i> . (Note that names starting with "xn--" may only be used if the current ICANN IDN Guidelines are followed by a gTLD registry.)
15	Tagged Names	3 rd Level ASCII	All labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved in ASCII at the third (3 rd level) for gTLD registries that register names at the third level." <i>[64] – added words in italics</i> . (Note that names starting with "xn--" may only be used if the current ICANN IDN Guidelines are followed by a gTLD registry.)
16	NIC, WHOIS, WWW	Top ASCII	The following names must be reserved: nic, whois, www.
17	NIC, WHOIS, WWW	Top IDN	Do not try to translate nic, whois and www into Unicode versions for various scripts or to reserve any ACE versions of such translations or transliterations if they exist.
18	NIC, WHOIS, WWW	Second and Third* ASCII	The following names must be reserved for use in connection with the operation of the registry for the Registry TLD: nic, whois, www Registry Operator may use them, but upon conclusion of Registry Operator's designation as operator of the registry for the Registry TLD, they shall be transferred as specified by ICANN. (*Third level only applies in cases where a registry offers registrations at the third level.)
19	NIC, WHOIS, WWW	Second and Third* IDN	Do not try to translate nic, whois and www into Unicode versions for various scripts or to reserve any ACE versions of such translations or transliterations if they exist, except on a case by case basis as proposed by given registries. (*Third

	Reserved Name Category	Domain Name Level(s)	Recommendation
			level only applies in cases where a registry offers registrations at the third level.)
20	Geographic and geopolitical	Top Level ASCII and IDN	<p>There should be no geographical reserved names (i.e., no exclusionary list, no presumptive right of registration, no separate administrative procedure, etc.). The proposed challenge mechanisms currently being proposed in the draft new gTLD process would allow national or local governments to initiate a challenge, therefore no additional protection mechanisms are needed. Potential applicants for a new TLD need to represent that the use of the proposed string is not in violation of the national laws in which the applicant is incorporated.</p> <p>However, new TLD applicants interested in applying for a TLD that incorporates a country, territory, or place name should be advised of the GAC Principles, and the advisory role vested to it under the ICANN Bylaws. Additionally, a summary overview of the obstacles encountered by previous applicants involving similar TLDs should be provided to allow an applicant to make an informed decision. Potential applicants should also be advised that the failure of the GAC, or an individual GAC member, to file a challenge during the TLD application process, does not constitute a waiver of the authority vested to the GAC under the ICANN Bylaws.</p> <p><i>Note New gTLD Recommendation 20</i></p>
21	Geographic and geopolitical	All Levels ASCII and IDN	<p>The term 'geopolitical names' should be avoided until such time that a useful definition can be adopted. The basis for this recommendation is founded on the potential ambiguity regarding the definition of the term, and the lack of any specific definition of it in the WIPO Second Report on Domain Names or GAC recommendations.</p> <p><i>Note New gTLD Recommendation 20</i></p>
22	Geographic and geopolitical	Second Level & Third Level if applicable,	<p>The consensus view of the working group is given the lack of any established international law on the subject, conflicting legal opinions, and conflicting recommendations emerging from various governmental fora, the current geographical reservation provision contained in the sTLD contracts during the 2004 Round should be removed, and harmonized with the</p>

	Reserved Name Category	Domain Name Level(s)	Recommendation
		ASCII & IDN	<p>more recently executed .COM, .NET, .ORG, .BIZ and .INFO registry contracts. The only exception to this consensus recommendation is those registries incorporated/organized under countries that require additional protection for geographical identifiers. In this instance, the registry would have to incorporate appropriate mechanisms to comply with their national/local laws.</p> <p>For those registries incorporated/organized under the laws of those countries that have expressly supported the guidelines of the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications as adopted by the WIPO General Assembly, it is strongly recommended (but not mandated) that these registries take appropriate action to promptly implement protections that are in line with these WIPO guidelines and are in accordance with the relevant national laws of the applicable Member State.</p> <p><i>Note New gTLD Recommendation 20</i></p>
23	gTLD Reserved Names	Second & Third Level ASCII and IDN (when applicable)	Absent justification for user confusion[65], the recommendation is that gTLD strings should no longer be reserved from registration for new gTLDs at the second or when applicable at the third level. Applicants for new gTLDs should take into consideration possible abusive or confusing uses of existing gTLD strings at the second level of their corresponding gTLD, based on the nature of their gTLD, when developing the startup process for their gTLD.
24	Controversial Names	All Levels, ASCII & IDN	There should not be a new reserved names category for Controversial Names.
25	Controversial Names	Top Level, ASCII & IDN	<p>There should be a list of disputed names created as a result of the dispute process to be created by the new gTLD process.</p> <p><i>Note New gTLD Recommendation 6</i></p>
26	Controversial Names	Top Level, ASCII & IDN	In the event of the initiation of a CN-DRP process, applications for that label will be placed in a HOLD status that

	Reserved Name Category	Domain Name Level(s)	Recommendation
			<p>work allowed for the dispute to be further examined. If the dispute is dismissed or otherwise resolved favorably, the applications will reenter the processing queue. The period of time allowed for dispute should be finite and should be relegated to the CN-DRP process. The external dispute process should be defined to be objective, neutral, and transparent. The outcome of any dispute shall not result in the development of new categories of Reserved Names.[66]</p> <p><i>Note New gTLD Recommendation 6</i></p>
27	Controversial Names	Top Level, ASCII & IDN	<p>The new GTLD Controversial Names Dispute Resolution Panel should be established as a standing mechanism that is convened at the time a dispute is initiated. Preliminary elements of that process are provided in this report but further work is needed in this area.</p> <p><i>Note New gTLD Recommendation 6</i></p>
28	Controversial Names	Top Level, ASCII & IDN	<p>Within the dispute process, disputes would be initiated by the ICANN Advisory Committees (e.g, ALAC or GAC) or supporting organizations (e.g, GNSO or ccNSO). As these organizations do not currently have formal processes for receiving, and deciding on such activities, these processes would need to be defined:</p> <ul style="list-style-type: none"> o The Advisory Groups and the Supporting Organizations, using their own processes and consistent with their organizational structure, will need to define procedures for deciding on any requests for dispute initiation. o Any consensus or other formally supported position from an ICANN Advisory Committee or ICANN Supporting Organization must document the position of each member within that committee or organization (i.e., support, opposition, abstention) in compliance with both the spirit and letter of the ICANN bylaws regarding openness and transparency. <p><i>Note New gTLD Recommendation 6</i></p>
29	Controversial Names	Top Level, ASCII & IDN	<p>Further work is needed to develop predictable and transparent criteria that can be used by the Controversial Resolution Panel. These criteria must take into account the need to:</p> <ul style="list-style-type: none"> ▪ 

- i. This Recommendation is supported by all GNSO Constituencies except the NCUC. The NCUC has submitted a Minority Statement which is found in full in Annex A. The NCUC's earlier Constituency Impact Statement is found, along with all the GNSO Constituency Impact Statements, in Part B of this report. Ms Doria has submitted individual comments^[67]. The Committee has discussed this recommendation in great detail and has attempted to address the experiences of the 2003-2004 sTLD round and the complex issues surrounding the .xxx application. The Committee has also recognised the GAC's Public Policy Principles, most notably Principle 2.1 a) and b) which refer to both freedom of expression and terms with significance in a variety of contexts. In addition, the Committee recognises the tension respecting freedom of expression and being sensitive to the legitimate concerns others have about offensive terms. The NCUC's earlier CIS says "...we oppose any string criteria based on morality and public order".
- ii. Other Constituencies did not address this recommendation in their CISs. The Implementation Team has tried to balance these views by establishing an Implementation Plan that recognises the practical effect of opening a new top-level domain application system that will attract applications that some members of the community do not agree with. Whilst ICANN does have a technical co-ordination remit, it must also put in place a system of handling objections to strings or to applicants, using pre-published criteria, that is fair and predictable for applicants. It is also necessary to develop guidance for independent evaluators tasked with making decisions about objections.
- iii. In its consideration of public policy aspects of new top-level domains the Committee examined the approach taken in a wide variety of jurisdictions to issues of morality and public order. This was done not to make decisions about acceptable strings but to provide a series of potential tests for independent evaluators to use should an objection be raised to an application. The use of the phrase "morality and public order" within the recommendation was done to set some guidelines for potential applicants about areas that may raise objections. The phrasing was also intended to set parameters for potential objectors so that any objection to an application could be analysed within the framework of broadly accepted legal norms that independent evaluators could use across a broad spectrum of possible objections. The Committee also sought to ensure that the objections process would have parameters set for who could object. Those suggested parameters are found within the Implementation Guidelines.
- iv. In reaching its decision about the recommendation, the Committee sought to be consistent with, for example, Article 3 (1) (f) of the 1988 European Union Trade Mark Directive 89/104/EEC and within Article 7 (1) (f) of the 1993 European Union Trade Mark Regulation 40/94. In addition, the phrasing "contrary to morality or public order and in particular of such a nature as to deceive the public" comes from Article 6quinques (B)(3) of the 1883 *Paris Convention*. The reference to the *Paris Convention* remains relevant to domain names even though, when it was drafted, domain names were completely unheard of.
- v. The concept of "morality" is captured in Article 19 United Nations Convention on Human Rights (<http://www.unhcr.ch/udhr/lang/eng.htm>) says "...Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 29 continues by saying that "...In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

- vi. The EU Trade Mark Office's Examiner's guidelines provides assistance on how to interpret morality and deceit. "...Contrary to morality or public order. Words or images which are offensive, such as swear words or racially derogatory images, or which are blasphemous are not acceptable. There is a dividing line between this and words which might be considered in poor taste. The latter do not offend against this provision." The further element is deception of the public which is treated in the following way. "...Deceive the public. To deceive the public, is for instance as to the nature, quality or geographical origin. For example, a word may give rise to a real expectation of a particular locality which is untrue." For more information, see Sections 8.7 and 8.8 at <http://oami.europa.eu/en/mark/marque/direc.htm>
- vii. The UK Trade Mark office provides similar guidance in its Examiner's Guidance Manual. "Marks which offend fall broadly into three types: those with criminal connotations, those with religious connotations and explicit/taboo signs. Marks offending public policy are likely to offend accepted principles of morality, e.g. illegal drug terminology, although the question of public policy may not arise against marks offending accepted principles of morality, for example, taboo swear words. If a mark is merely distasteful, an objection is unlikely to be justified, whereas if it would cause outrage or would be likely significantly to undermine religious, family or social values, then an objection will be appropriate. Offence may be caused on matters of race, sex, religious belief or general matters of taste and decency. Care should be taken when words have a religious significance and which may provoke greater offence than mere distaste, or even outrage, if used to parody a religion or its values. Where a sign has a very sacred status to members of a religion, mere use may be enough to cause outrage." For more information, see <http://www.patent.gov.uk/tm/t-decisionmaking/t-law/t-law-manual.htm>)
- viii. This recommendation has been the subject of detailed Committee and small group work in an attempt to reach consensus about both the text of the recommendation and the examples included as guidance about generally accepted legal norms. The work has been informed by detailed discussion within the GAC and through interactions between the GNSO Committee and the GAC.

6. Recommendation 7 Discussion -- Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. The Committee agreed that the technical requirements for applicants would include compliance with a minimum set of technical standards and that this requirement would be part of the new registry operator's contractual conditions included in the proposed base contract. The more detailed discussion about technical requirements has been moved to the contractual conditions section.
- iii. Reference was made to numerous Requests for Comment (RFCs) and other technical standards which apply to existing registry operators. For example, Appendix 7 of the June 2005 .net agreement^[68] provides a comprehensive listing of technical requirements in addition to other technical specifications in other parts of the agreement. These requirements are consistent with that which is expected of all current registry operators. These standards would form the basis of any new top-level domain operator requirements.
- iv. This recommendation is referred to in two CISs. "The ISPCP considers recommendations 7 and 8 to be fundamental. The technical, financial, organisational and operational capabilities of the applicant are the evaluators' instruments for preventing potential negative impact on a new string on the activities of our sector (and indeed of many other sectors)." The NCUC submitted "...we record that this must be limited to transparent, predictable and minimum technical

requirements only. These must be published. They must then be adhered to neutrally, fairly and without discrimination."

v. The GAC supported this direction in its Public Policy Principles 2.6, 2.10 and 2.11.

7. Recommendation 8 Discussion -- Applicants must be able to demonstrate their financial and organisational operational capability.

i. This recommendation is supported by all GNSO Constituencies and accepted with concern by Ms Doria[69].

ii. The Committee discussed this requirement in detail and determined that it was reasonable to request this information from potential applicants. It was also consistent with past practices including the prior new TLD rounds in 2000 and 2003-2004; the .net and .org rebids and the conditions associated with ICANN registrar accreditation.

iii. This is also consistent with best practice procurement guidelines recommended by the World Bank (www.worldbank.org), the OECD (www.oecd.org) and the Asian Development Bank (www.adb.org) as well as a range of federal procurement agencies such as the UK telecommunications regulator, Ofcom; the US Federal Communications Commission and major public companies.

iv. The challenging aspect of this recommendation is to develop robust and objective criteria against which applicants can be measured, recognising a vast array of business conditions and models. This will be an important element of the ongoing development of the Implementation Plan.

v. The ISPCP discussed the importance of this recommendation in its CIS, as found in Recommendation 7 above.

vi. The NCUC's CIS addressed this recommendation by saying "...we support this recommendation to the extent that the criteria is truly limited to minimum financial and organizational operational capability...All criteria must be transparent, predictable and minimum. They must be published. They must then be adhered to neutrally, fairly and without discrimination."

vii. The GAC echoed these views in its Public Policy Principle 2.5 that said "...the evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process."

8. Recommendation 9 Discussion -- There must be a clear and pre-published process using objective and measurable criteria.

i. This recommendation is supported by all GNSO Constituencies and by Ms Doria. It is consistent with ICANN's previous TLD rounds in 2000 and 2003-2004 and with its re-bid of both the .net and .org registry contracts.

ii. It is also consistent with ICANN's Mission and Core Values especially 7, 8 and 9 which address openness in decision-making processes and the timeliness of those processes.

iii. The Committee decided that the "process" criteria for introducing new top-level domains would follow a pre-published application system including the levying of an application fee to

recover the costs of the application process. This is consistent with ICANN's approach to the introduction of new TLDs in the previous 2000 and 2004 round for new top-level domains.

iv. The RyC reiterated its support for this recommendation in its CIS. It said that "...this Recommendation is of major importance to the RyC because the majority of constituency members incurred unnecessarily high costs in previous rounds of new gTLD introductions as a result of excessively long time periods from application submittal until they were able to start their business. We believe that a significant part of the delays were related to selection criteria and processes that were too subjective and not very measurable. It is critical in our opinion that the process for the introduction of new gTLDs be predictable in terms of evaluation requirements and timeframes so that new applicants can properly scope their costs and develop reliable implementation plans." The NCUC said that "...we strongly support this recommendation and again stress the need for all criteria to be limited to minimum operational, financial, and technical considerations. We all stress the need that all evaluation criteria be objective and measurable."

9. Recommendation 10 Discussion -- There must be a base contract provided to applicants at the beginning of the process.

- i. This recommendation is supported by all GNSO Constituencies and by Ms Doria.
- ii. The General Counsel's office has been involved in discussions about the provision of a base contract which would assist applicants both during the application process and in any subsequent contract negotiations.
- iii. A framework for the base contract was developed for discussion at the June 2007 ICANN meeting in Puerto Rico. The base contract will not be completed until the policy recommendations are in place. Completion of the policy recommendations will enable the completion of a draft base contract that would be available to applicants prior to the start of the new gTLD process, that is, prior to the beginning of the four-month window preceding the application submittal period.
- iv. The RyC, in its CIS, said, "...like the comments for Recommendation 9, we believe that this recommendation will facilitate a more cost-effective and timely application process and thereby minimize the negative impacts of a process that is less well-defined and objective. Having a clear understanding of base contractual requirements is essential for a new gTLD applicant in developing a complete business plan."

10. Recommendation 11 Discussion -- (This recommendation has been removed and is left intentionally blank. Note Recommendation 20 and its Implementation Guidelines).

11. Recommendation 12 Discussion -- Dispute resolution and challenge processes must be established prior to the start of the process.

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
 - ii. The Committee has provided clear direction on its expectations that all the dispute resolution and challenge processes would be established prior to the opening of the application round. The full system will be published prior to an application round starting. However, the finalisation of this process is contingent upon a completed set of recommendations being agreed; a public comment period and the final agreement of the ICANN Board.
 - iii. The draft Implementation Plan in the Implementation Team *Discussion Points* document sets out the way in which the ICANN Staff proposes that disputes between applicants and challenge

processes may be handled. Expert legal and other professional advice from, for example, auctions experts is being sought to augment the Implementation Plan.

TERM OF REFERENCE THREE -- ALLOCATION METHODS

12. Recommendation 13 Discussion -- Applications must initially be assessed in rounds until the scale of demand is clear.

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. This recommendation sets out the principal allocation methods for TLD applications. The narrative here should be read in conjunction with the draft flowcharts and the draft Request for Proposals.
- iii. An application round would be opened on Day 1 and closed on an agreed date in the future with an unspecified number of applications to be processed within that round.
- iv. This recommendation may be amended, after an evaluation period and report that may suggest modifications to this system. The development of objective "success metrics" is a necessary part of the evaluation process that could take place within the new TLDs Project Office.
- v. The ISPCP expressed its support for this recommendation. Its CIS said that "...this is an essential element in the deployment of new gTLDs, as it enables any technical difficulties to be quickly identified and sorted out, working with reduced numbers of new strings at a time, rather than many all at once. Recommendation 18 on the use of IDNs is also important in preventing any negative impact on network operators and ISPs."

13. Recommendation 20 Discussion -- An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.

- i. This recommendation is supported by the majority of GNSO Constituencies. Ms Doria supports the recommendation but has concerns about its implementation^[70]. The NCUC has submitted a Minority Statement which is found in full in Annex C about the recommendation and its associated Implementation Guidelines F, H and P.
- ii. This recommendation was developed during the preparations for the Committee's 7 June 2007 conference call and during subsequent Committee deliberations. The intention was to factor into the process the very likely possibility of objections to applications from a wide variety of stakeholders.
- iii. The language used here is relatively broad and the implementation impact of the proposed recommendation is discussed in detail in the Implementation Team's *Discussion Points* document.
- iv. The NCUC's response to this recommendation in its earlier CIS says, in part, "...recommendation 20 swallows up any attempt to narrow the string criteria to technical, operational and financial evaluations. It asks for objections based on entirely subjective and unknowable criteria and for unlimited reasons and by unlimited parties." This view has, in part, been addressed in the Implementation Team's proposed plan but this requires further discussion and agreement by the Committee.

TERM OF REFERENCE FOUR -- CONTRACTUAL CONDITIONS

14. Recommendation 14 Discussion -- The initial registry agreement term must be of a commercially reasonable length.

- i. The remainder of the recommendations address Term of Reference Four on policies for contractual conditions and should be read in conjunction with Recommendation 10 on the provision of a base contract prior to the opening of an application round. The recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. This recommendation is consistent with the existing registry contract provisions found in, for example, the .com and .biz agreements.
- iii. These conditions would form the baseline conditions of term length for new TLD operators. It was determined that a term of ten years would reasonably balance the start up costs of registry operations with reasonable commercial terms.
- iv. The RyC commented on this recommendation in its CIS saying that "...the members of the RyC have learned first hand that operating a registry in a secure and stable manner is a capital intensive venture. Extensive infrastructure is needed both for redundant registration systems and global domain name constellations. Even the most successful registries have taken many years to recoup their initial investment costs. The RyC is convinced that these two recommendations [14 & 15] will make it easier for new applicants to raise the initial capital necessary and to continue to make investments needed to ensure the level of service expected by registrants and users of their TLDs. These two recommendations will have a very positive impact on new gTLD registries and in turn on the quality of the service they will be able to provide to the Internet community."

15. Recommendation 15 -- There must be renewal expectancy.

- i. This recommendation is consistent with the existing registry contract provisions found in, for example, the .com and .biz agreements and is supported by all Constituencies. Ms Doria supported the recommendation and provided the comments found in the footnote below.[71]
- ii. These conditions would form the baseline conditions of term length for new TLD operators. It was determined that a term of ten years would reasonably balance the start up costs of registry operations with reasonable commercial terms.
- iii. See the CIS comments from the RyC in the previous section.

16. Recommendation 16 -- Registries must apply existing Consensus Policies[72] and adopt new Consensus Policies as they are approved.

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. The full set of existing ICANN registry contracts can be found here <http://www.icann.org/registries/agreements.htm> and ICANN's seven current Consensus Policies are found at <http://www.icann.org/general/consensus-policies.htm>.
- iii. ICANN develops binding Consensus Policies through its policy development processes, in this case, through the GNSO[73].

17. Recommendation 17 -- A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. Referring to the recommendations on contractual conditions above, this section sets out the discussion of the policies for contractual conditions for new top-level domain registry operators. The recommendations are consistent with the existing provisions for registry operators which were the subject of detailed community input throughout 2006[74].
- iii. The Committee developed its recommendations during the Brussels and Amsterdam face-to-face consultations, with assistance from the ICANN General Counsel's office. The General Counsel's office has also provided a draft base contract which will be completed once the policy recommendations are agreed. Reference should also be made to Recommendation 5 on reserved words as some of the findings could be part of the base contract.
- iv. The Committee has focused on the key principles of consistency, openness and transparency. It was also determined that a scalable and predictable process is consistent with industry best practice standards for services procurement. The Committee referred in particular to standards within the broadcasting, telecommunications and Internet services industries to examine how regulatory agencies in those environments conducted, for example, spectrum auctions, broadcasting licence distribution and media ownership frameworks.
- v. Since then ICANN has developed and published a new approach to its compliance activities. These are found on ICANN's website at <http://www.icann.org/compliance/> and will be part of the development of base contract materials.
- vi. The Committee found a number of expert reports[75] beneficial. In particular, the World Bank report on mobile licensing conditions provides some guidance on best practice principles for considering broader market investment conditions. "...A major challenge facing regulators in developed and developing countries alike is the need to strike the right balance between ensuring certainty for market players and preserving flexibility of the regulatory process to accommodate the rapidly changing market, technological and policy conditions. As much as possible, policy makers and regulators should strive to promote investors' confidence and give incentives for long-term investment. They can do this by favouring the principle of 'renewal expectancy', but also by promoting regulatory certainty and predictability through a fair, transparent and participatory renewal process. For example, by providing details for license renewal or reissue, clearly establishing what is the discretion offered to the licensing body, or ensuring sufficient lead-times and transitional arrangements in the event of non-renewal or changes in licensing conditions. Public consultation procedures and guaranteeing the right to appeal regulatory decisions maximizes the prospects for a successful renewal process. As technological changes and convergence and technologically neutral approaches gain importance, regulators and policy makers need to be ready to adapt and evolve licensing procedures and practices to the new environment."
- vii. The Recommendations which the Committee has developed with respect to the introduction of new TLDs are consistent with the World Bank principles.

18. Recommendation 18 Discussion -- If an applicant offers an IDN service, then ICANN's IDN guidelines must be followed.

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria. The introduction of internationalised domain names at the root presents ICANN with a series of implementation challenges. This recommendation would apply to any new gTLD (IDN or ASCII

TLD) offering IDN services. The initial technical testing[76] has been completed and a series of live root tests will take place during the remainder of 2007.

ii. The Committee recognises that there is ongoing work in other parts of the ICANN organisation that needs to be factored into the application process that will apply to IDN applications. The work includes the President's Committee on IDNs and the GAC and ccNSO joint working group on IDNs.

19. Recommendation 19 Discussion -- Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. There is a long history associated with the separation of registry and registrar operations for top-level domains. The structural separation of VeriSign's registry operations from Network Solutions registrar operations explains much of the ongoing policy to require the use of ICANN accredited registrars.
- iii. In order to facilitate the stable and secure operation of the DNS, the Committee agreed that it was prudent to continue the current requirement that registry operators be obliged to use ICANN accredited registrars.
- iv. ICANN's Registrar Accreditation Agreement has been in place since 2001[77]. Detailed information about the accreditation of registrars can be found on the ICANN website[78]. The accreditation process is under active discussion but the critical element of requiring the use of ICANN accredited registrars remains constant.
- v. In its CIS, the RyC noted that "...the RyC has no problem with this recommendation for larger gTLDs; the requirement to use accredited registrars has worked well for them. But it has not always worked as well for very small, specialized gTLDs. The possible impact on the latter is that they can be at the mercy of registrars for whom there is no good business reason to devote resources. In the New gTLD PDP, it was noted that this requirement would be less of a problem if the impacted registry would become a registrar for its own TLD, with appropriate controls in place. The RyC agrees with this line of reasoning but current registry agreements forbid registries from doing this. Dialog with the Registrars Constituency on this topic was initiated and is ongoing, the goal being to mutually agree on terms that could be presented for consideration and might provide a workable solution."

NEXT STEPS

1. Under the GNSO's Policy Development Process, the production of this *Final Report* completes Stage 9. The next steps are to conduct a twenty-day public comment period running from 10 August to 30 August 2007. The GNSO Council is due to meet on 6 September 2007 to vote on the package of principles, policy recommendations and implementation guidelines.
2. After the GNSO Council have voted the Council Report to the Board is prepared. The GNSO's PDP guidelines stipulate that "the Staff Manager will be present at the final meeting of the Council, and will have five (5) calendar days after the meeting to incorporate the views of the Council into a report to be submitted to the Board (the "Board Report"). The Board Report must contain at least the following:
 - a. A clear statement of any Supermajority Vote recommendation of the Council;

- b. If a Supermajority Vote was not reached, a clear statement of all positions held by Council members. Each statement should clearly indicate (i) the reasons underlying each position and (ii) the constituency(ies) that held the position;
 - c. An analysis of how the issue would affect each constituency, including any financial impact on the constituency;
 - d. An analysis of the period of time that would likely be necessary to implement the policy;
 - e. The advice of any outside advisors relied upon, which should be accompanied by a detailed statement of the advisor's (i) qualifications and relevant experience; and (ii) potential conflicts of interest;
 - f. The Final Report submitted to the Council; and
 - g. A copy of the minutes of the Council deliberation on the policy issue, including the all opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.
3. It is expected that, according to the Bylaws, "...The Board will meet to discuss the GNSO Council recommendation as soon as feasible after receipt of the Board Report from the Staff Manager. In the event that the Council reached a Supermajority Vote, the Board shall adopt the policy according to the Council Supermajority Vote recommendation unless by a vote of more than sixty-six (66%) percent of the Board determines that such policy is not in the best interests of the ICANN community or ICANN. In the event that the Board determines not to act in accordance with the Council Supermajority Vote recommendation, the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council. The Council shall review the Board Statement for discussion with the Board within twenty (20) calendar days after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for its current recommendation. In the event that the Council is able to reach a Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than sixty-six (66%) percent of the Board determines that such policy is not in the interests of the ICANN community or ICANN. In any case in which the Council is not able to reach Supermajority, a majority vote of the Board will be sufficient to act. When a final decision on a GNSO Council Recommendation or Supplemental Recommendation is timely, the Board shall take a preliminary vote and, where practicable, will publish a tentative decision that allows for a ten (10) day period of public comment prior to a final decision by the Board."
4. The final stage in the PDP is the implementation of the policy which is also governed by the Bylaws as follows, "...Upon a final decision of the Board, the Board shall, as appropriate, give authorization or direction to the ICANN staff to take all necessary steps to implement the policy."

Annex A – NCUC Minority Statement: Recommendation 6

STATEMENT OF DISSENT ON RECOMMENDATION #6 OF

GNSO'S NEW GTLD REPORT FROM

the Non-Commercial Users Constituency (NCUC)

20 July 2007

NCUC supports most of the recommendations in the GNSO's Final Report, but Recommendation #6 is one we cannot support.[79]

We oppose Recommendation #6 for the following reasons:

- 1) It will completely undermine ICANN's efforts to make the gTLD application process predictable, and instead make the evaluation process arbitrary, subjective and political;
- 2) It will have the effect of suppressing free and diverse expression;
- 3) It exposes ICANN to litigation risks;
- 4) It takes ICANN too far away from its technical coordination mission and into areas of legislating morality and public order.

We also believe that the objective of Recommendation #6 is unclear, in that much of its desirable substance is already covered by Recommendation #3. At a minimum, we believe that the words "relating to morality and public order" must be struck from the recommendation.

1) Predictability, Transparency and Objectivity

Recommendation #6 poses severe implementation problems. It makes it impossible to achieve the GNSO's goals of predictable and transparent evaluation criteria for new gTLDs.

Principle 1 of the New gTLD Report states that the evaluation process must be "predictable," and Recommendation #1 states that the evaluation criteria must be transparent, predictable, and fully available to applicants prior to their application.

NCUC strongly supports those guidelines. But no gTLD applicant can possibly know in advance what people or governments in a far away land will object to as "immoral" or contrary to "public order." When applications are challenged on these grounds, applicants cannot possibly know what decision an expert panel – which will be assembled on an ad hoc basis with no precedent to draw on – will make about it.

Decisions by expert panels on "morality and public order" *must* be subjective and arbitrary, because there is no settled and well-established international law regarding the relationship between TLD strings and morality and public order. There is no single "community standard" of morality that ICANN can apply to all applicants in every corner of the globe. What is considered "immoral" in Teheran may be easily accepted in Los Angeles or Stockholm; what is considered a threat to "public order" in China and Russia may not be in Brazil and Qatar.

2) Suppression of expression of controversial views

gTLD applicants will respond to the uncertainty inherent in a vague "morality and public order" standard and lack of clear standards by suppressing and avoiding any ideas that might generate controversy. Applicants will have to invest sizable sums of money to develop a gTLD application and see it through the ICANN process. Most of them will avoid risking a challenge under Recommendation #6. In other words, the presence of Recommendation #6 will result in self-censorship by most applicants.

That policy would strip citizens everywhere of their rights to express controversial ideas because someone else finds them offensive. This policy recommendation ignores international and national laws, in particular

freedom of expression guarantees that permit the expression of "immoral" or otherwise controversial speech on the Internet.

3) Risk of litigation

Some people in the ICANN community are under the mistaken impression that suppressing controversial gTLDs will protect it from litigation. Nothing could be further from the truth. By introducing subjective and culturally divisive standards into the evaluation process Recommendation #6 will increase the likelihood of litigation.

ICANN operates under authority from the US Commerce Department. It is undisputed that the US Commerce Department is prohibited from censoring the expression of US citizens in the manner proposed by Recommendation #6. The US Government cannot "contract away" the constitutional protections of its citizens to ICANN any more than it can engage in the censorship itself.

Adoption of Recommendation #6 invites litigation against ICANN to determine whether its censorship policy is compatible with the US First Amendment. An ICANN decision to suppress a gTLD string that would be permitted under US law could and probably would lead to legal challenges to the decision as a form of US Government action.

If ICANN left the adjudication of legal rights up to courts, it could avoid the legal risk and legal liability that this policy of censorship brings upon it.

4) ICANN's mission and core values

Recommendation #6 exceeds the scope of ICANN's technical mission. It asks ICANN to create rules and adjudicate disputes about what is permissible expression. It enables it to censor expression in domain names that would be lawful in some countries. It would require ICANN and "expert panels" to make decisions about permitting top-level domain names based on arbitrary "morality" judgments and other subjective criteria. Under Recommendation #6, ICANN will evaluate domain names based on ideas about "morality and public order" -- concepts for which there are varying interpretations, in both law and culture, in various parts of the world. Recommendation #6 risks turning ICANN into the arbiter of "morality" and "appropriate" public policy through global rules.

This new role for ICANN conflicts with its intended narrow technical mission, as embodied in its mission and core values. ICANN holds no legitimate authority to regulate in this entirely non-technical area and adjudicate the legal rights of others. This recommendation takes the adjudication of people's rights to use domain names out of the hands of democratically elected representatives and into the hands of "expert panels" or ICANN staff and board with no public accountability.

Besides exceeding the scope of ICANN's authority, Recommendation #6 seems unsure of its objective. It mandates "morality and public order" in domain names, but then lists, as examples of the type of rights to protect, the WTO TRIPS Agreement and all 24 World Intellectual Property (WIPO) Treaties, which deal with economic and trade rights, and have little to do with "morality and public order". Protection for intellectual property rights was fully covered in Recommendation #3, and no explanation has been provided as to why intellectual property rights would be listed again in a recommendation on "morality and public order", an entirely separate concept.

In conclusion Recommendation #6 exceeds ICANN's authority, ignores Internet users' free expression rights, and its adoption would impose an enormous burden on and liability for ICANN. It should not be adopted by the Board of Directors in the final policy decision for new gTlds.

Annex B – Nominating Committee Appointee Avri Doria[80]: Individual Comments

Comments from Avri Doria

The "Personal level of support" indications fall into 3 categories:

I Support: these are principles, recommendations or guidelines that are compatible with my personal opinions

I Support with concerns: While these principles, recommendations and guidelines are not incompatible with my personal opinions, I have some concerns about them.

I Accept with concern: these recommendations and guidelines do not necessarily correspond to my personal opinions, but I am able to accept them in that they have the broad support of the committee. I do, however, have concerns with these recommendations and guideline.

I believe these comments are consistent with comments I have made throughout the process and do not constitute new input.

Principles

#	Personal level of support	Explanation
A	Support	
B	Support with concerns	While I strongly support the introduction of IDN TLDS, I am concerned that the unresolved issues with IDN ccTLD equivalents may interfere with the introduction of IDN TLDS. I am also concerned that some of these issues could impede the introduction of some new ASCII TLDS dealing with geographically related identifiers.
C	Support	
D	Support with concerns	While I favor the establishment of a minimum set of necessary technical criteria, I am concerned that this set actually be the basic minimum set necessary to protect the stability, security and global interoperability.
E-G	Support	

Recommendations

#	Level of support	Explanation
1	Support	<p>My concern involves using definitions that rely on legal terminology established for trademarks for what I believe should be a policy based on technical criteria.</p> <p>I In the first instance I believe that this is essentially a technical issue that should have been resolved with reference to typography, homologies, orthographic neighbourhood, transliteration and other technically defined attributes of a name that would make it unacceptable. There is a large body of scientific and technical knowledge and description in this field that we could have drawn on.</p>
2	Accept with concern	<p>I By using terms that rely on the legal language of trademark law, I believe we have created an implicit redundancy between recommendations 2 and 3. I.e., I believe both 2 and 3 can be used to protect trademarks and other intellectual property rights, and while 3 has specific limitations, 2 remains open to full and varied interpretation.</p> <p>I As we begin to consider IDNs, I am concerned that the interpretations of confusingly similar may be used to eliminate many potential TLDs based on translation. That is, when a translation may have the same or similar meaning to an existing TLD, that the new name may be eliminated because it is considered confusing to users who know both languages.</p>
3	Support with concerns	<p>My first concern relates to the protection of what can be called the linguistic commons. While it is true that much of trademark law and practice does protect general vocabulary and common usage from trademark protection, I am not sure that this is always the case in practice.</p> <p>I am also not convinced that trademark law and policy that applies to specific product type within a specific locale is entirely compatible with a general and global naming system.</p>
4	Support	
5	Support with concerns	<p>Until such time as the technical work on IDNAbis is completed, I am concerned about establishing reserved name rules connected to IDNs. My primary concern involves policy decisions made in ICANN for reserved names becoming hard coded in the IDNAbis technical solution and thus becoming technical constraints that are no longer open to future policy reconsideration.</p>
6	Accept with concern	<p>My primary concern focuses on the term 'morality'. While public order is frequently codified in national laws and occasionally in international law and conventions, the definition of what constitutes morality is not generally codified, and when it is, I believe it could be referenced as public order.</p>

#	Level of support	Explanation
		<p>This concern is related to the broad set of definitions used in the world to define morality. By including morality in the list of allowable exclusions we have made the possible exclusion list indefinitely large and have subjected the process to the consideration of all possible religious and ethical systems. ICANN or the panel of reviewers will also have to decide between different sets of moral principles, e.g, a morality that holds that people should be free to express themselves in all forms of media and those who believe that people should be free from exposure to any expression that is prohibited by their faith or moral principles. This recommendation will also subject the process to the fashion and occasional demagoguery of political correctness. I do not understand how ICANN or any expert panel will be able to judge that something should be excluded based on reasons of morality without defining, at least de-facto, an ICANN definition of morality? And while I am not a strict constructionist and sometimes allow for the broader interpretation of ICANN's mission, I do not believe it includes the definition of a system of morality.</p>
7	Support	
8	Accept with concern	<p>While I accept that a prospective registry must show adequate operational capability, creating a financial criteria is of concern. There may be many different ways of satisfying the requirement for operational capability and stability that may not be demonstrable in a financial statement or traditional business plan. E.g., in the case of an less developed community, the registry may rely on volunteer effort from knowledgeable technical experts.</p> <p>Another concern I have with financial requirements and high application fees is that they may act to discourage applications from developing nations or indigenous and minority peoples that have a different set of financial opportunities or capabilities than those recognized as acceptable within an expensive and highly developed region such as Los Angeles or Brussels.</p>
9,10,12-14	Support	
15	Support with concerns	<p>In general I support the idea that a registry that is doing a good job should have the expectancy of renewal. I do, however, believe that a registry, especially a registry with general market dominance, or specific or local market dominance, should be subject to comment from the relevant user public and to evaluation of that public comment before renewal. When performance is satisfactory, there should an expectation of renewal. When performance is not satisfactory, there should be some procedure for correcting the situation before renewal.</p>
16-19	Support	

#	Level of support	Explanation
20	Support with concerns	In general I support the policy though I do have concerns about the implementation which I discuss below in relation to IG (P)

Implementation Guidelines

#	Level of support	Explanation
A-E	Support	
F	Accept with concern	In designing a New gTLD process, one of the original design goals had been to design a predictable and timely process that did not include the involvement of the Board of Directors except for very rare and exceptional cases and perhaps in the due diligence check of a final approval. My concern is that the use of Board in step (iii) may make them a regular part of many of the application procedure and may overload both the Board and the process. If every dispute can fall through to Board consideration in the process sieve, then the incentive to resolve the dispute earlier will be lessened.
G-M	Support	
N	Support with concerns	I strongly support the idea of financial assistance programs and fee reduction for less developed communities. I am concerned that not providing pricing that enables applications from less developed countries and communities may serve to increase the divide between the haves and the have nots in the Internet and may lead to a foreign 'land grab' of choice TLD names, especially IDN TLD names in a new form of resource colonialism because only those with well developed funding capability will be able to participate in the process as currently planned.
O	Support	
P	Support with concerns	<p>While I essentially agree with the policy recommendation and its implementation guideline, its social justice and fairness depends heavily on the implementation issues. While the implementation details are not yet settled, I have serious concerns about the published draft plans of the ICANN staff in this regard. The current proposal involves using fees to prevent vexatious or unreasonable objections. In my personal opinion this would be a cause of social injustice in the application of the policy as it would prejudice the objection policy in favor of the rich. I also believe that an objection policy based on financial means would allow for well endowed entities to object to any term they found objectionable, hence enabling them to be as vexatious as they wish to be.</p> <p>In order for an objection system to work properly, it must be fair and it must allow for any applicant to understand the basis on which they might have to answer an</p>

#	Level of support	Explanation
		<p>objection. If the policy and implementation are clear about objections only being considered when they can be shown to cause irreparable harm to a community then it may be possible to build a just process. In addition to the necessity for there to be strict filters on which potential objections are actually processed for further review by an objections review process, it is essential that an external and impartial professional review panel have a clear basis for judging any objections.</p> <p>I do not believe that the ability to pay for a review will provide a reasonable criteria, nor do I believe that financial barriers are an adequate filter for stopping vexatious or unreasonable objections though they are a sufficient barrier for the poor.</p> <p>I believe that ICANN should investigate other methods for balancing the need to allow even the poorest to raise an issue of irreparable harm while filtering out unreasonable disputes. I believe, as recommend in the Reserved Names Working group report, that the ALAC and GAC may be an important part of the solution. IG (P) currently includes support for treating ALAC and GAC as established institutions in regard to raising objections to TLD concerns. I believe this is an important part of the policy recommendation and should be retained in the implementation. I believe that it should be possible for the ALAC or GAC, through some internal procedure that they define, to take up the cause of the individual complainant and to request a review by the external expert review panel. Some have argued that this is unacceptable because it operationalizes these Advisory Committees. I believe we do have precedence for such an operational role for volunteers within ICANN and that it is in keeping with their respective roles and responsibilities as representatives of the user community and of the international community of nations. I strongly recommend that such a solution be included in the Implementation of the New gTLD process.</p>
Q	Support	

Annex C – NCUC Minority Statement: Recommendation 20 and Implementation Guidelines F, H & P

STATEMENT OF DISSENT ON RECOMMENDATION #20 &

IMPLEMENTATION GUIDELINES F, H, & P IN THE

GNSO NEW GTLD COMMITTEE'S FINAL REPORT

FROM THE

NON-COMMERCIAL USERS CONSTITUENCY (NCUC)

RE: Domain Name Objection and Rejection Process

25 July 2007

Text of Recommendation #20:

"An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted."

Text of Implementation Guideline F:

If there is contention for strings, applicants may:

- i) resolve contention between them within a pre-established timeframe
- ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and;
- iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

Text of Implementation Guideline H:

External dispute providers will give decisions on complaints.

Text of Implementation Guideline P:

The following process, definitions, and guidelines refer to Recommendation 20.

Process

Opposition must be objection based.

Determination will be made by a dispute resolution panel constituted for the purpose.

The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).

Guidelines

The task of the panel is the determination of substantial opposition.

a) substantial

In determining substantial the panel will assess the following: significant portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment.

b) significant portion:

In determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.

c) community

Community should be interpreted broadly and will include for example an economic sector, a cultural community, or a linguistic community. It may also be a closely related community which believes it is impacted.

d) explicitly targeting

Explicitly targeting means there is a description of the intended use of the TLD in the application.

e) implicitly targeting

Implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use.

f) established institution

An institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years. Exceptional circumstance include but are not limited to reorganisation, merger, or an inherently younger community. The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.

g) formal existence

Formal existence may be demonstrated by: appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organisation or similar.

h) detriment

<< A >> Evidence of detriment to the community or to users more widely must be provided.

<< B >> [A likelihood of detriment to the community or to users more widely must be provided.]

Recommendation #20

The Non-Commercial Users Constituency (NCUC) Dissenting Statement on Recommendation #20 of the New GTLD Committee's Final Report[81] should be read in combination with Implementation Guidelines F, H & P, which detail the implementation of Recommendation #20. This statement should also be read in conjunction with its statement[82] of 13 June 2007 on the committee's draft report.

NCUC cannot support the committee's proposal for ICANN to establish a broad objection and rejection process for domain names that empowers ICANN and its "experts" to adjudicate the legal rights of domain name applicants (and objectors). The proposal would also empower ICANN and its "experts" to invent entirely new rights to domain names that do not exist in law and that will compete with existing legal rights to domains.

However "good-intentioned", the proposal would inevitably set up a system that decides legal rights based on subjective beliefs of "expert panels" and the amount of insider lobbying. The proposal would give "established institutions" veto power over applications for domain names to the detriment of innovators and start-ups. The proposal is further flawed because it makes no allowances for generic words to which no community claims exclusive "ownership" of. Instead, it wants to assign rights to use language based on subjective standards and will over-regulate to the detriment of competition, innovation, and free expression.

There is no limitation on the type of objections that can be raised to kill a domain name, no requirement that actual harm be shown to deny an application, and no recourse for the wrongful denial of legal rights by ICANN and its experts under this proposal. An applicant must be able to appeal decisions of ICANN and its experts to courts, who have more competence and authority to decide the applicant's legal rights. Legal due process requires maintaining a right to appeal these decisions to real courts.

The proposal is hopelessly flawed and will result in the improper rejection of many legitimate domain names. The reasons permitted to object to a domain are infinite in number. Anyone may make an objection; and an application will automatically be rejected upon a very low threshold of "detriment" or an even lower standard of "a likelihood of detriment" to anyone. Not a difficult bar to meet.

If ICANN attempted to put this policy proposal into practice it would intertwine itself in general policy debates, cultural clashes, business feuds, religious wars, and national politics, among a few of the disputes ICANN would have to rule on through this domain name policy.

The proposal operates under false assumptions of "communities" that can be defined, and that parties can be rightfully appointed representatives of "the community" by ICANN. The proposal gives preference to "established institutions" for domain names, and leaves applicants' without the backing of "established institutions" with little right to a top-level domain. The proposal operates to the detriment of small-scale start-ups and innovators who are clever enough to come up with an idea for a domain first, but lack the insider-connections and financial resources necessary to convince an ICANN panel of their worthiness.

It will be excessively expensive to apply for either a controversial or a popular domain name, so only well-financed "established institutions" will have both the standing and financial wherewithal to be awarded a top-level domain. The proposal privileges who is awarded a top-level domain, and thus discourages diversity of thought and the free flow of information by making it more difficult to obtain information on controversial ideas or from innovative new-comers.

Implementation Guideline F

NCUC does not agree with the part of Implementation Guideline F that empowers ICANN identified "communities" to support or oppose applications. Why should all "communities" agree before a domain name can be issued? How to decide who speaks for a "community"?

NCUC also notes that ICANN's Board of Directors would make the final decisions on applications and thus the legal rights of applicants under proposed IG-F. ICANN Board Members are not democratically elected, accountable to the public in any meaningful way, or trained in the adjudication of legal rights. Final decisions regarding legal rights should come from legitimate law-making processes, such as courts.

"Expert panels" or corporate officers are not obligated to respect an applicant's free expression rights and there is no recourse for a decision by the panel or ICANN for rights wrongfully denied. None of the "expert" panelists are democratically elected, nor accountable to the public for their decisions. Yet they will take decisions on the boundaries between free expression and trademark rights in domain names; and "experts" will decide what ideas are too controversial to be permitted in a domain name under this process.

Implementation Guideline H

Implementation Guideline H recommends a system to adjudicate legal rights that exists entirely outside of legitimate democratic law-making processes. The process sets up a system of unaccountable "private law" where "experts" are free to pick and choose favored laws, such as trademark rights, and ignore disfavored laws, such as free expression guarantees.

IG-H operates under the false premise that external dispute providers are authorized to adjudicate the legal rights of domain name applicants and objectors. It further presumes that such expert panels will be qualified to adjudicate the legal rights of applicants and others. But undertaking the creation of an entirely new international dispute resolution process for the adjudication of legal rights and the creation of new rights is not something that can be delegated to a team of experts. Existing international law that takes into account conflict of laws, choice of laws, jurisdiction, standing, and due process must be part of any legitimate process; and the applicant's legal rights including freedom of expression rights must be respected in the process.

Implementation Guideline P

"The devil is in the details" of Implementation Guideline P as it describes in greater detail the proposed adversarial dispute process to adjudicate legal rights to top-level domain names in Recommendation #20. IG-P mandates the rejection of an application if there is "substantial opposition" to it according to ICANN's expert panel. But "substantial" is defined in such a way so as to actually mean "insubstantial" and as a result many legitimate domain names would be rejected by such an extremely low standard for killing an application.

Under IG-P, opposition against and support for an application must be made by an "established institution" for it to count as "significant", again favoring major industry players and mainstream cultural institutions over cultural diversity, innovative individuals, small niche, and medium-sized Internet businesses.

IG-P states that "community" should be interpreted broadly, which will allow for the maximum number of objections to a domain name to count against an application. It includes examples of "the economic sector, cultural community or linguistic community" as those who have a right to complain about an application. It also includes any "related community which believes it is impacted." So anyone who claims to represent a community and believes to be impacted by a domain name can file a complaint and have standing to object to another's application.

There is no requirement that the objection be based on legal rights or the operational capacity of the applicant. There is no requirement that the objection be reasonable or the belief about impact to be

reasonable. There is no requirement that the harm be actual or verifiable. The standard for "community" is entirely subjective and based on the personal beliefs of the objector.

The definition of "implicitly targeting" further confirms this subjective standard by inviting objections where "the objector makes the assumption of targeting" and also where "the objector believes there may be confusion by users". Such a subjective process will inevitably result in the rejection of many legitimate domain names.

Picking such a subjective standard conflicts with Principle A in the Final Report that states domain names must be introduced in a "predictable way", and also with Recommendation 1 that states "All applicants for a new gTLD registry should be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process." The subjectivity and unpredictability invited into the process by Recommendation #20 turn Principle A and Recommendation 1 from the same report upside down.

Besides the inherent subjectivity, the standard for killing applications is remarkably low. An application need not be intended to serve a particular community for "community-based" objections to kill the application under the proposal. Anyone who believed that he or she was part of the targeted community or who believes others face "detriment" have standing to object to a domain name, and the objection weighs in favor of "significant opposition". This standard is even lower than the "reasonable person" standard, which would at least require that the belief be "reasonable" for it to count against an applicant. The proposed standard for rejecting domains is so low it even permits unreasonable beliefs about a domain name to weigh against an applicant.

If a domain name does cause confusion, existing trademark law and unfair competition law have dealt with it for years and already balanced intellectual property rights against free expression rights in domain names. There is neither reason nor authority for ICANN processes to overtake the adjudication of legal rights and invite unreasonable and illegitimate objections to domain names.

IG-P falsely assumes that the number of years in operation is indicative of one's right to use language. It privileges entities over 5 years old with objection rights that will effectively veto innovative start-ups who cannot afford the dispute resolution process and will be forced to abandon their application to the incumbents.

IG-P sets the threshold for harm that must be shown to kill an application for a domain name remarkably low. Indeed harm need not be actual or verified for an application to be killed based on "substantial opposition" from a single objector.

Whether the committee selects the unbounded definition for "detriment" that includes a "likelihood of detriment" or the narrower definition of "evidence of detriment" as the standard for killing an application for a domain name is largely irrelevant. The difference is akin to re-arranging the deck chairs on the Titanic. ICANN will become bogged down with the approval of domain names either way, although it is worth noting that "likelihood of detriment" is a very long way from "substantial harm" and an easy standard to meet, so will result in many more domain names being rejected.

The definitions and guidelines detailed in IG-P invite a lobby-fest between competing businesses, instill the "heckler's veto" into domain name policy, privilege incumbents, price out of the market non-commercial applicants, and give third-parties who have no legal rights to domain names the power to block applications for those domains. A better standard for killing an application for non-technical reasons would be for a domain name to be shown to be illegal in the applicant's jurisdiction before it can be rejected.

In conclusion, the committee's recommendation for domain name objection and rejection processes are far too broad and unwieldy to be put into practice. They would stifle freedom of expression, innovation, cultural diversity, and market competition. Rather than follow existing law, the proposal would set up an illegitimate process that usurps jurisdiction to adjudicate peoples' legal rights (and create new rights) in a process

designed to favor incumbents. The adoption of this "free-for-all" objection and rejection process will further call into question ICANN's legitimacy to govern and its ability to serve the global public interest that respects the rights of all citizens.

NCUC respectfully submits that ICANN will best serve the global public interest by resisting the temptation to stray from its technical mandate and meddle in international lawmaking as proposed by Rec. #20 and IG-F, IG-H, and IG-P of the New GTLD Committee Final Report.

REFERENCE MATERIAL -- GLOSSARY[83]

TERM	ACRONYM & EXPLANATION
A-label	The A-label is what is transmitted in the DNS protocol and this is the ASCII-compatible (ACE) form of an IDNA string; for example "xn--11b5bs1di".
ASCII Compatible Encoding	ACE ACE is a system for encoding Unicode so each character can be transmitted using only the letters a-z, 0-9 and hyphens. Refer also to http://www.ietf.org/rfc/rfc3467.txt?number=3467
American Standard Code for Information Exchange	ASCII ASCII is a common numerical code for computers and other devices that work with text. Computers can only understand numbers, so an ASCII code is the numerical representation of a character such as 'a' or '@'. See above referenced RFC for more information.
Advanced Research Projects Agency	ARPA http://www.darpa.mil/body/arpa_darpa.html
Commercial & Business Users Constituency	CBUC http://www.bizconst.org/
Consensus Policy	A defined term in all ICANN registry contracts usually found in Article 3 (Covenants). See, for example, http://www.icann.org/tlds/agreements/biz/registry-agmt-08dec06.htm

Country Code Names Supporting Organization	<p>ccNSO</p> <p>http://ccnso.icann.org/</p>
Country Code Top Level Domain	<p>ccTLD</p> <p>Two letter domains, such as .uk (United Kingdom), .de (Germany) and .jp (Japan) (for example), are called country code top level domains (ccTLDs) and correspond to a country, territory, or other geographic location. The rules and policies for registering domain names in the ccTLDs vary significantly and ccTLD registries limit use of the ccTLD to citizens of the corresponding country.</p> <p>Some ICANN-accredited registrars provide registration services in the ccTLDs in addition to registering names in .biz, .com, .info, .name, .net and .org, however, ICANN does not specifically accredit registrars to provide ccTLD registration services.</p> <p>For more information regarding registering names in ccTLDs, including a complete database of designated ccTLDs and managers, please refer to http://www.iana.org/cctld/cctld.htm.</p>
Domain Names	<p>The term domain name has multiple related meanings: A name that identifies a computer or computers on the internet. These names appear as a component of a Web site's URL, e.g. www.wikipedia.org. This type of domain name is also called a hostname.</p> <p>The product that Domain name registrars provide to their customers. These names are often called registered domain names.</p> <p>Names used for other purposes in the Domain Name System (DNS), for example the special name which follows the @ sign in an email address, or the Top-level domains like .com, or the names used by the Session Initiation Protocol (VoIP), or DomainKeys.</p> <p>http://en.wikipedia.org/wiki/Domain_names</p>
Domain Name System	<p>The Domain Name System (DNS) helps users to find their way around the Internet. Every computer on the Internet has a unique address - just like a telephone number - which is a rather complicated string of numbers. It is called its "IP address" (IP stands for "Internet Protocol"). IP Addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of the arcane IP address. So instead of typing 207.151.159.3, you can type www.internic.net. It is a "mnemonic" device that makes addresses easier to remember.</p>
Generic Top Level Domain	<p>gTLD</p>

	<p>Most TLDs with three or more characters are referred to as "generic" TLDs, or "gTLDs". They can be subdivided into two types, "sponsored" TLDs (sTLDs) and "unsponsored TLDs (uTLDs), as described in more detail below.</p> <p>In the 1980s, seven gTLDs (.com, .edu, .gov, .int, .mil, .net, and .org) were created. Domain names may be registered in three of these (.com, .net, and .org) without restriction; the other four have limited purposes.</p> <p>In 2001 & 2002 four new unsponsored TLDs (.biz, .info, .name, and .pro) were introduced. The other three new TLDs (.aero, .coop, and .museum) were sponsored.</p> <p>Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD.</p>
Governmental Advisory Committee	<p>GAC</p> <p>http://gac.icann.org/web/index.shtml</p>
Intellectual Property Constituency	<p>IPC</p> <p>http://www.ipconstituency.org/</p>
Internet Service & Connection Providers Constituency	<p>ISPCP</p>
Internationalized Domain Names	<p>IDNs</p> <p>IDNs are domain names represented by local language characters. These domain names may contain characters with diacritical marks (required by many European languages) or characters from non-Latin scripts like Arabic or Chinese.</p>
Internationalized Domain Names in Application	<p>IDNA</p> <p>IDNA is a protocol that makes it possible for applications to handle domain names with non-ASCII characters. IDNA converts domain names with non-ASCII characters to ASCII labels that the DNS can accurately understand. These standards are developed within the IETF (http://www.ietf.org)</p>

<p>Internationalized Domain Names – Labels</p>	<p>IDN A Label</p> <p>The A-label is what is transmitted in the DNS protocol and this is the ASCII-compatible ACE) form of an IDN A string. For example "xn-1lq90i".</p> <p>IDN U Label</p> <p>The U-label is what should be displayed to the user and is the representation of the IDN in Unicode. For example "北京" ("Beijing" in Chinese).</p> <p>LDH Label</p> <p>The LDH-label strictly refers to an all-ASCII label that obeys the "hostname" (LDH) conventions and that is not an IDN; for example "icann" in the domain name "icann.org"</p>
<p>Internationalized Domain Names Working Group</p>	<p>IDN-WG</p> <p>http://forum.icann.org/lists/gnso-idn-wg/</p>
<p>Letter Digit Hyphen</p>	<p>LDH</p> <p>The hostname convention used by domain names before internationalization. This meant that domain names could only practically contain the letters a-z, digits 0-9 and the hyphen "-". The term "LDH code points" refers to this subset. With the introduction of IDNs this rule is no longer relevant for all domain names.</p> <p>The LDH-label strictly refers to an all-ASCII label that obeys the "hostname" (LDH) conventions and that is not an IDN; for example "icann" in the domain name "icann.org".</p>
<p>Nominating Committee</p>	<p>NomCom</p> <p>http://nomcom.icann.org/</p>
<p>Non-Commercial Users Constituency</p>	<p>NCUC</p> <p>http://www.ncdnhc.org/</p>
<p>Policy Development Process</p>	<p>PDP</p> <p>See http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#AnnexA</p>

Protecting the Rights of Others Working Group	<p>PRO-WG</p> <p>See the mailing list archive at http://forum.icann.org/lists/gnso-pro-wg/</p>
Punycode	<p>Punycode is the ASCII-compatible encoding algorithm described in Internet standard [RFC3492]. This is the method that will encode IDNs into sequences of ASCII characters in order for the Domain Name System (DNS) to understand and manage the names. The intention is that domain name registrants and users will never see this encoded form of a domain name. The sole purpose is for the DNS to be able to resolve for example a web-address containing local characters.</p>
Registrar	<p>Domain names ending with .aero, .biz, .com, .coop, .info, .museum, .name, .net, .org, and .pro can be registered through many different companies (known as "registrars") that compete with one another. A listing of these companies appears in the Accredited Registrar Directory.</p> <p>The registrar asks registrants to provide various contact and technical information that makes up the domain name registration. The registrar keeps records of the contact information and submits the technical information to a central directory known as the "registry."</p>
Registrar Constituency	<p>RC</p> <p>http://www.icann-registrars.org/</p>
Registry	<p>A registry is the authoritative, master database of all domain names registered in each Top Level Domain. The registry operator keeps the master database and also generates the "zone file" which allows computers to route Internet traffic to and from top-level domains anywhere in the world. Internet users don't interact directly with the registry operator. Users can register names in TLDs including .biz, .com, .info, .net, .name, .org by using an ICANN-Accredited Registrar.</p>
Registry Constituency	<p>RyC</p> <p>http://www.gtldregistries.org/</p>
Request for Comment	<p>RFC</p> <p>ftp://ftp.rfc-editor.org/in-notes/rfc1591.txt</p>

<p>A full list of all Requests for Comment http://www.rfc-editor.org/rfcxx00.html</p> <p>Specific references used in this report are shown in the next column.</p> <p>This document uses language, for example, "should", "must" and "may", consistent with RFC2119.</p>	<p>ftp://ftp.rfc-editor.org/in-notes/rfc2119.txt</p> <p>ftp://ftp.rfc-editor.org/in-notes/rfc2606.txt</p>
<p>Reserved Names Working Group</p>	<p>RN-WG</p> <p>See the mailing list archive at http://forum.icann.org/lists/gnso-rn-wg/</p>
<p>Root server</p>	<p>A root nameserver is a DNS server that answers requests for the root namespace domain, and redirects requests for a particular top-level domain to that TLD's nameservers. Although any local implementation of DNS can implement its own private root nameservers, the term "root nameserver" is generally used to describe the thirteen well-known root nameservers that implement the root namespace domain for the Internet's official global implementation of the Domain Name System.</p> <p>All domain names on the Internet can be regarded as ending in a full stop character e.g. "en.wikipedia.org.". This final dot is generally implied rather than explicit, as modern DNS software does not actually require that the final dot be included when attempting to translate a domain name to an IP address. The empty string after the final dot is called the root domain, and all other domains (i.e. .com, .org, .net, etc.) are contained within the root domain.</p> <p>http://en.wikipedia.org/wiki/Root_server</p>
<p>Sponsored Top Level Domain</p>	<p>sTLD</p> <p>A Sponsor is an organization to which some policy making is delegated from ICANN. The sponsored TLD has a Charter, which defines the purpose for which the sponsored TLD has been created and will be operated. The Sponsor is responsible for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders, known as the Sponsored TLD Community, that are most directly interested in the operation of the TLD. The Sponsor also is responsible for selecting the registry operator and to varying degrees for establishing the roles played by registrars and their relationship with the registry operator. The Sponsor must exercise its delegated authority according to fairness standards</p>

	and in a manner that is representative of the Sponsored TLD Community.
U-label	The U-label is what should be displayed to the user and is the representation of the Internationalized Domain Name (IDN) in Unicode.
Unicode Consortium	A not-for-profit organization found to develop, extend and promote use of the Unicode standard. See http://www.unicode.org
Unicode	Unicode is a commonly used single encoding scheme that provides a unique number for each character across a wide variety of languages and scripts. The Unicode standard contains tables that list the code points for each local character identified. These tables continue to expand as more characters are digitalized.

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[1] <http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#1>

[2] The ICANN "community" is a complex matrix of intersecting organizations and which are represented graphically here. <http://www.icann.org/structure/>

[3] The *Final Report* is Step 9 in the GNSO's policy development process which is set out in full at <http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#AnnexA>.

[4] Found here <http://gnso.icann.org/issues/new-gtlds/>.

[5] The ICANN Staff *Discussion Points* documents can be found at <http://gnso.icann.org/drafts/GNSO-PDP-Dec05-StaffMemo-14Nov06.pdf> and <http://gnso.icann.org/drafts/PDP-Dec05-StaffMemo-19-jun-07.pdf>

[6] Authored in 1987 by Paul Mockapetris and found at <http://www.ietf.org/rfc/rfc1034>

[7] Authored in October 1984 by Jon Postel and J Reynolds and found at <http://www.ietf.org/rfc/rfc920>

[8] Found at <http://www.oecd.org/dataoecd/15/37/38336539.pdf>

[9] From Verisign's June 2007 *Domain Name Industry Brief*.

[10] The full list is available here <http://www.icann.org/registrar/accredited-list.html>

[11] Report found at <http://www.icann.org/dnso/wgc-report-21mar00.htm>

[12] Found at <http://www.icann.org/announcements/announcement-31aug04.htm>

[13] <http://www.registrarstats.com/Public/ZoneFileSurvey.aspx>

[14] Verisign produce a regular report on the domain name industry. http://www.verisign.com/Resources/Naming_Services_Resources/Domain_Name...

[15] The announcement is here <http://icann.org/announcements/announcement-03jan06.htm> and the results are here <http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

[16] Found here <http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

[17] <http://gnso.icann.org/issues/new-gtlds/>

[18] For example, see the GA List discussion thread found at <http://gnso.icann.org/mailling-lists/archives/ga/msg03337.html> & earlier discussion on IANA lists <http://www.iana.org/comments/26sep1998-02oct1998/msg00016.html>. The 13 June 2002 paper regarding a taxonomy for non-ASCII TLDs is also illuminating <http://www.icann.org/committees/idn/registry-selection-paper-13jun02.htm>

[19] Found here http://gac.icann.org/web/home/gTLD_principles.pdf

[20] A list of the working materials of the new TLDs Committee can be found at <http://gnso.icann.org/issues/new-gtlds/>.

[21] The Outcomes Report for the IDN-WG is found <http://gnso.icann.org/drafts/idn-wg-fr-22mar07.htm>. A full set of resources which the WG is using is found at <http://gnso.icann.org/issues/idn-tlds/>.

[22] The Final Report of the RN-WG is found at <http://gnso.icann.org/drafts/rn-wg-fr19mar07.pdf>

[23] The Final Report of the PRO-WG is found at <http://gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf>

[24] The root server system is explained here <http://en.wikipedia.org/wiki/Rootserver>

[25] Ms Doria supports all of the Principles but expressed concern about Principle B by saying "...While I strongly support the introduction of IDN TLDS, I am concerned that the unresolved issues with IDN ccTLD equivalents may interfere with the introduction of IDN TLDs. I am also concerned that some of these issues could impede the introduction of some new ASCII TLDs dealing with geographically related identifiers" and Principle D "...While I favor the establishment of a minimum set of necessary technical criteria, I am concerned that this set actually be the basic minimum set necessary to protect the stability, security and global interoperability."

[26] Note the updated recommendation text sent to the gtld-council list after the 7 June meeting. <http://forum.icann.org/lists/gtld-council/msg00520.html>

[27] Reserved word limitations will be included in the base contract that will be available to applicants prior to the start of the application round.

[28] <http://www.icann.org/general/idn-guidelines-22feb06.htm>

[29] The Implementation Team sought advice from a number of auction specialists and examined other industries in which auctions were used to make clear and binding decisions. Further expert advice will be used in developing the implementation of the application process to ensure the fairest and most appropriate method of resolving contention for strings.

[30] Detailed work is being undertaken, lead by the Corporate Affairs Department, on establishing a translation framework for ICANN documentation. This element of the Implementation Guidelines may be addressed separately.

[31] <http://gnso.icann.org/drafts/GNSO-PDP-Dec05-StaffMemo-14Nov06.pdf>

[32] Consistent with ICANN's commitments to accountability and transparency found at <http://www.icann.org/announcements/announcement-26jan07b.htm>

[33] Found at <http://www.icann.org/dns/wgc-report-21mar00.htm>

[34] The announcement is here <http://www.icann.org/announcements/announcement-03jan06.htm> and the results are here <http://gns0.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

[35] Found here <http://gns0.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

[36] Found here <http://forum.icann.org/lists/gtld-council/>

[37] Archived at <http://forum.icann.org/lists/gtld-council/>

[38] Business Constituency <http://forum.icann.org/lists/gtld-council/msg00501.html>, Intellectual Property Constituency <http://forum.icann.org/lists/gtld-council/msg00514.html>, Internet Service Providers <http://forum.icann.org/lists/gtld-council/msg00500.html>, NCUC <http://forum.icann.org/lists/gtld-council/msg00530.html>, Registry Constituency <http://forum.icann.org/lists/gtld-council/msg00494.html>

[39] "My concern involves using definitions that rely on legal terminology established for trademarks for what I believe should be a policy based on technical criteria.

In the first instance I believe that this is essentially a technical issue that should have been resolved with reference to typography, homologues, orthographic neighbourhood, transliteration and other technically defined attributes of a name that would make it unacceptable. There is a large body of scientific and technical knowledge and description in this field that we could have drawn on.

By using terms that rely on the legal language of trademark law, I believe we have created an implicit redundancy between recommendations 2 and 3. I.e., I believe both 2 and 3 can be used to protect trademarks and other intellectual property rights, and while 3 has specific limitations, 2 remains open to full and varied interpretation.

As we begin to consider IDNs, I am concerned that the interpretations of confusingly similar may be used to eliminate many potential TLDs based on translation. That is, when a translation may have the same or similar meaning to an existing TLD, that the new name may be eliminated because it is considered confusing to users who know both languages."

[40] <http://data.iana.org/TLD/tlds-alpha-by-domain.txt>

[41] See section 4A -- <http://www.icann.org/udrp/udrp-policy-24oct99.htm>.

[42] In addition to the expertise within the Committee, the NCUC provided, as part of its Constituency Impact Statement expert outside advice from Professor Christine Haight Farley which said, in part, "...A determination about whether use of a mark by another is "confusingly similar" is simply a first step in the analysis of infringement. As the committee correctly notes, account will be taken of visual, phonetic and conceptual similarity. But this determination does not end the analysis. Delta Dental and Delta Airlines are confusingly similar, but are not like to cause confusion, and therefore do not infringe. ... In trademark law, where there is confusing similarity and the mark is used on similar goods or services, a likelihood of confusion will usually be found. European trademark law recognizes this point perhaps more readily than U.S. trademark law. As a result, sometimes "confusingly similar" is used as shorthand for "likelihood of confusion". However, these concepts must remain distinct in domain name policy where there is no opportunity to consider how the mark is being used."

[43] In addition, advice was sought from experts within WIPO who continue to provide guidance on this and other elements of dispute resolution procedures.

[44] Kristina Rosette provided the reference to the *Agreement on Trade-Related Aspects of Intellectual Property Rights* which is found online at http://www.wto.org/english/tratop_e/trips_e/t_agm1_e.htm

"...Article 16^[SEP] Rights Conferred^[SEP]1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use...."

[45] <http://www.ohchr.org/english/bodies/hrc/comments.htm>

[46] <http://gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf>

[47] Charles Sha'ban provided a range of examples from Arabic speaking countries. For example, in Jordan, Article 7^[SEP] Trademarks eligible for registration are^[SEP]1- A trademark shall be registered if it is distinctive, as to words, letters, numbers, figures, colors, or other signs or any combination thereof and visually perceptible.^[SEP]2- For the purposes of this Article, "distinctive" shall mean applied in a manner which secures distinguishing the goods of the proprietor of the trademark from those of other persons. Article 8^[SEP] Marks which may not be registered as trademarks. The following may not be registered as trademarks: 10- A mark identical with one belonging to a different proprietor which is already entered in the register in respect of the same goods or class of goods for which the mark is intended to be registered, or so closely resembling such trademark to the extent that it may lead to deceiving third parties.

12- The trademark which is identical or similar to, or constitutes a translation of, a well-known trademark for use on similar or identical goods to those for which that one is well-known for and whose use would cause confusion with the well-known mark, or for use of different goods in such a way as to prejudice the interests of the owner of the well-known mark and leads to believing that there is a connection between its owner and those goods as well as the marks which are similar or identical to the honorary badges, flags, and other insignia as well as the names and abbreviations relating to international or regional organizations or those that offend our Arab and Islamic age-old values.

In Oman for example, Article 2 of the Sultan Decree No. 38/2000 states:

"The following shall not be considered as trademarks and shall not be registered as such: ^[SEP]If the mark is identical, similar to a degree which causes confusion, or a translation of a trademark or a commercial name known in the Sultanate of Oman with respect to identical or similar goods or services belonging to another business, or if it is known and registered in the Sultanate of Oman on goods and service which are neither identical nor similar to those for which the mark is sought to be registered provided that the usage of the mark on those goods or services in this last case will suggest a connection between those goods or services and the owner of the known trademark and such use will cause damage to the interests of the owner of the known trademark."

Although the laws In Egypt do not have specific provisions regarding confusion they stress in great detail the importance of distinctiveness of a trade mark.

Article 63 in the IP Law of Egypt No.82 for the year 2002 states:

"A trademark is any sign distinguishing goods, whether products or services, and include is particular names represented in a distinctive manner, signatures, words, letters, numerals, design, symbols, signposts, stamps, seal, drawings, engravings, a combination of distinctly formed colors and any other combination of these elements if used, or meant to be used, to distinguish the precedents of a particular industry, agriculture,

forest or mining venture or any goods, or to indicate the origin of products or goods or their quality, category, guarantee, preparation process, or to indicate the provision of any service. In all cases, a trademark shall be a sign that is recognizable by sight."

[48] Found at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.ht with 171 contracting parties.

[49] Further information can be found at the US Patent and Trademark Office's website <http://www.uspto.gov/>

[50] Found at <http://www.icann.org/registrars/ra-agreement-17may01.htm#3>

[51] Found at <http://gnso.icann.org/drafts/idn-wg-fr-22mar07.htm>.

[52] The 2003 correspondence between ICANN's then General Counsel and the then GAC Chairman is also useful <http://www.icann.org/correspondence/touton-letter-to-tarmizi-10feb03.htm>.

[53] "My first concern relates to the protection of what can be called the linguistic commons. While it is true that much of trademark law and practice does protect general vocabulary and common usage from trademark protection, I am not sure that this is always the case in practice. I am also not convinced that trademark law and policy that applies to specific product type within a specific locale is entirely compatible with a general and global naming system."

[54] For example, David Maher, Jon Bing, Steve Metalitz, Philip Sheppard and Michael Palage.

[55] Reserved Word has a specific meaning in the ICANN context and includes, for example, the reserved word provisions in ICANN's existing registry contracts. See <http://www.icann.org/registries/agreements.htm>.

[56] "Until such time as the technical work on IDNAbis is completed, I am concerned about establishing reserved name rules connected to IDNs. My primary concern involves policy decisions made in ICANN for reserved names becoming hard coded in the IDNAbis technical solution and thus becoming technical constraints that are no longer open to future policy reconsideration."

[57] Found online at <http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm> and in full in Part B of the *Report*.

[58] The Committee are aware that the terminology used here for the purposes of policy recommendations requires further refinement and may be at odds with similar terminology developed in other context. The terminology may be imprecise in other contexts than the general discussion about reserved words found here.

[59] The subgroup was encouraged by the ccNSO not to consider removing the restriction on two-letter names at the top level. IANA has based its allocation of two-letter names at the top level on the ISO 3166 list. There is a risk of collisions between any interim allocations, and ISO 3166 assignments which may be desired in the future.

[60] The existing gTLD registry agreements provide for a method of potential release of two-character LDH names at the second level. In addition, two character LDH strings at the second level may be released through the process for new registry services, which process involves analysis of any technical or security concerns and provides opportunity for public input. Technical issues related to the release of two-letter and/or number strings have been addressed by the RSTEP Report on GNR's proposed registry service. The GAC has previously noted the WIPO II Report statement that "If ISO 3166 alpha-2 country code elements are to be registered as domain names in the gTLDs, it is recommended that this be done in a manner that minimises the potential for confusion with the ccTLDs."

[61] Considering that the current requirement in all 16 registry agreement reserves "All labels with hyphens in the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n")", this requirement reserves any names having any of a combination of 1296 different prefixes (36x36).

[62] Internet Draft IDNAbis Issues: <http://www.ietf.org/internet-drafts/draft-klensin-idnabis-issues-01.txt> (J. Klensin), Section 3.1.1.1

[63] Considering that the current requirement in all 16 registry agreement reserves "All labels with hyphens in the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n")", this requirement reserves any names having any of a combination of 1296 different prefixes (36x36).

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[65] With its recommendation, the sub-group takes into consideration that justification for potential user confusion (i.e., the minority view) as a result of removing the contractual condition to reserve gTLD strings for new TLDs may surface during one or more public comment periods.

[66] Note that this recommendation is a continuation of the recommendation in the original RN-WG report, modified to synchronize with the additional work done in the 30-day extension period.

[67] Ms Doria said "...My primary concern focuses on the term 'morality'. While public order is frequently codified in national laws and occasionally in international law and conventions, the definition of what constitutes morality is not generally codified, and when it is, I believe it could be referenced as public order. This concern is related to the broad set of definitions used in the world to define morality. By including morality in the list of allowable exclusions we have made the possible exclusion list indefinitely large and have subjected the process to the consideration of all possible religious and ethical systems. ICANN or the panel of reviewers will also have to decide between different sets of moral principles, e.g, a morality that holds that people should be free to express themselves in all forms of media and those who believe that people should be free from exposure to any expression that is prohibited by their faith or moral principles. This recommendation will also subject the process to the fashion and occasional demagoguery of political correctness. I do not understand how ICANN or any expert panel will be able to judge that something should be excluded based on reasons of morality without defining, at least de-facto, an ICANN definition of morality? And while I am not a strict constructionist and sometimes allow for the broader interpretation of ICANN's mission, I do not believe it includes the definition of a system of morality."

[68] <http://www.icann.org/tlds/agreements/net/appendix7.html>

[69] 'While I accept that a prospective registry must show adequate operational capability, creating a financial criteria is of concern. There may be many different ways of satisfying the requirement for operational capability and stability that may not be demonstrable in a financial statement or traditional business plan. E.g., in the case of an less developed community, the registry may rely on volunteer effort from knowledgeable technical experts.

Another concern I have with financial requirements and high application fees is that they may act to discourage applications from developing nations or indigenous and minority peoples that have a different set of financial opportunities or capabilities than those recognized as acceptable within an expensive and highly developed region such as Los Angeles or Brussels."

[70] "In general I support the policy though I do have concerns about the implementation which I discuss below in relation to IG (P)".

[71] "In general I support the idea that a registry that is doing a good job should have the expectancy of renewal. I do, however, believe that a registry, especially a registry with general market dominance, or specific or local market dominance, should be subject to comment from the relevant user public and to evaluation of that public comment before renewal. When performance is satisfactory, there should an

expectation of renewal. When performance is not satisfactory, there should be some procedure for correcting the situation before renewal."

[72] Consensus Policies has a particular meaning within the ICANN environment. Refer to <http://www.icann.org/general/consensus-policies.htm> for the full list of ICANN's Consensus Policies.

[73] <http://www.icann.org/general/bylaws.htm#AnnexA>

[74] <http://www.icann.org/registries/agreements.htm>

[75] The full list of reports is found in the Reference section at the end of the document.

[76] <http://www.icann.org/announcements/announcement-4-07mar07.htm>

[77] Found at <http://www.icann.org/registrars/ra-agreement-17may01.htm>

[78] Found at <http://www.icann.org/registrars/accreditation.htm>.

[79] Text of Recommendation #6: "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law. Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)."

[80] Ms Doria took over from former GNSO Council Chairman (and GNSO new TLDs Committee Chairman) Dr Bruce Tonkin on 7 June 2007. Ms Doria's term runs until 31 January 2008.

[81] Available at: <http://forum.icann.org/lists/gtld-council/pdfOQqgaRNrXf.pdf>

[82] Available at: <http://ipjustice.org/wp/2007/06/13/ncuc-newgtld-stmt-june2007/>

[83] This glossary has been developed over the course of the policy development process. Refer here to ICANN's glossary of terms <http://www.icann.org/general/glossary.htm> for further information.

EXHIBIT C-19



INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

INTERNATIONAL DISPUTE RESOLUTION PROCEDURES

(Including Mediation and Arbitration Rules)

Rules Amended and Effective March 1, 2021

available online at
[icdr.org](https://www.icdr.org)

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International Dispute Resolution Procedures

(Including Mediation and Arbitration Rules)



Introduction

The International Centre for Dispute Resolution® (“ICDR®”) is the international division of the American Arbitration Association® (“AAA®”). The ICDR provides dispute resolution services around the world in locations chosen by the parties. ICDR arbitrations and mediations may be conducted in any language chosen by the parties. The ICDR Procedures reflect best international practices that are designed to deliver efficient, economic, and fair proceedings.

These Procedures are designed to provide a complete dispute resolution framework for parties to a dispute, their counsel, arbitrators, and mediators. They provide a balance between the autonomy of the parties to agree to the dispute resolution process they want and the need for process management by mediators and arbitrators.

The UNCITRAL (The United National Commission on International Trade Law) Model Law’s definition of an international arbitration has been incorporated by the ICDR for the purpose of determining whether a case is international. An arbitration may be deemed international and administered by the ICDR if the parties to an arbitration agreement have:

- their places of business in different countries;
- the place where a substantial part of the obligations of their commercial relationship to be performed is situated outside the country of any party;
- the place with which the subject-matter of the dispute is most closely connected is situated outside the country of any party;
- the place of arbitration is situated outside the country of any party; or
- one party with more than one place of business (including parent and/or subsidiary) is situated outside the country of any party.

Whenever a singular term is used in the International Mediation Rules or International Arbitration Rules, such as “party,” “claimant,” or “arbitrator,” that

term shall include the plural if there is more than one such entity. Whenever any party is not participating, the reference to the “parties” shall mean the participating party or parties.

The English-language version of these Rules is the official text.

International Mediation

The parties may seek to settle their dispute through mediation. Mediation may be scheduled independently of arbitration or concurrently with the scheduling of the arbitration. In mediation, an impartial and independent mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. The updated International Mediation Rules provide an enhanced framework that allows for a broad range of practices, cultures and approaches towards the resolution of international disputes from parties located around the world.

Features of the International Mediation Rules:

- Focus on how the ICDR will assist the parties in finding and appointing a mediator to best meet their needs;
- More clearly reference the duties and responsibilities of the mediator to expand party participation and authority;
- Contains a rule “Mediation Proceedings,” emphasizing party control and a focus on an efficient and effective mediation process by considering a preparatory conference, the use of technology, document exchange, *ex parte* meetings, communications, and more;
- Refer to the Singapore Convention (United Nations Convention on International Settlement Agreements Resulting from Mediation);
- Provide that the parties and the mediator consider compliance and practice related to cybersecurity, privacy, and data protection; and
- The International Arbitration Rules now provide for the presumptive application of the International Mediation Rules during the arbitration proceeding.

The following pre-dispute mediation clause may be included in contracts:

In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its International Mediation Rules, before

resorting to arbitration, litigation, or some other dispute resolution procedure.

The parties should consider adding:

- a. *The place of mediation shall be [city, (province or state), country]; and*
- b. *The language of the mediation shall be _____.*

If the parties want to use a mediator to resolve an existing dispute, they may enter into the following submission agreement:

The parties hereby submit the following dispute to mediation administered by the International Centre for Dispute Resolution in accordance with its International Mediation Rules. (The clause may also provide for the qualifications of the mediator(s), the place of mediation, and any other item of concern to the parties.)

International Arbitration

A dispute can be submitted to an arbitral tribunal for a final and binding decision. In ICDR arbitration, each party is given the opportunity to make a case presentation following the process provided by these Rules and the tribunal.

Features of the International Arbitration Rules:

- Codify the ICDR's practice of having the International Administrative Review Council, which is comprised of current and former ICDR executives, decide arbitrator challenges and other administrative disputes;
- Give the arbitral tribunal the authority to decide issues of arbitrability and jurisdiction without any need to refer such matters first to a court;
- Provide that the parties and tribunal shall discuss in the procedural hearing issues related to cybersecurity, privacy, and data protection;
- Create a presumption that parties will mediate during the arbitration, with any party being able to opt out;
- Allow parties to request permission to submit an early disposition application for issues that have a reasonable possibility of success, will dispose of or narrow issues, or add economy;
- Authorize access to a special emergency arbitrator for urgent measures of protection within three (3) business days of filing with a criteria for the filing party to set forth reasoning why relief is likely to be found and what injury will be suffered if relief is not granted;

- Allow tribunal to manage the scope of document and electronic document requests and to manage, limit, or avoid U.S. litigation-style discovery practices;
- Permit a party or the tribunal to request disclosure of third-party funders and other non-parties;
- Contain express provisions allowing for “video, audio or other electronic means” during the proceedings;
- Provide that electronically-signed orders and awards can be issued unless law, the administrator, or party agreement provides otherwise; and
- Permit a party to request the tribunal make a separate award for any fees the party pays in advance on behalf of another party.

Parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.

The parties should consider adding:

- The number of arbitrators shall be (one or three);*
- The place of arbitration shall be [city, (province or state), country]; and*
- The language of the arbitration shall be _____.*

For more complete clause-drafting guidance, please refer to the *ICDR Guide to Drafting International Dispute Resolution Clauses* on the Clause Drafting page at **www.icdr.org**. When writing a dispute resolution clause or agreement, the parties may choose to confer with the ICDR on useful options. Please see the contact information provided in *How to File a Case with the ICDR*. The AAA and ICDR have also developed the ClauseBuilder® (**www.clausebuilder.org**) online tool, a simple, self-guided process to assist individuals and organizations in developing clear and effective arbitration and mediation agreements.

International Expedited Procedures

The Expedited Procedures provide parties with an expedited and simplified arbitration procedure designed to reduce the time and cost of an arbitration.

The Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds \$500,000 USD exclusive of interest and the costs of arbitration. The parties may agree to the application of these Expedited Procedures on matters of any claim size.

Features of the International Expedited Procedures:

- May apply to cases of any size with party agreement;
- Set forth comprehensive filing requirements;
- Provide for expedited arbitrator appointment process with party input;
- Access to and appointment from an experienced pool of arbitrators ready to serve on an expedited basis;
- Call for an early procedural hearing with the arbitrator requiring participation of parties and their representatives;
- Presume that cases up to \$100,000 USD will be decided on documents only;
- Provide for an expedited schedule and limited hearing days, if any; and
- Require an award within 30 calendar days of the close of the hearing or the date established for the receipt of the parties' final statements and proofs.

Where parties intend that the Expedited Procedures shall apply regardless of the amount in dispute, they may consider the following clause:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Expedited Procedures.

The parties should consider adding:

- The place of arbitration shall be (city, [province or state], country); and*
- The language of the arbitration shall be _____.*

How to File a Case with the ICDR

Parties initiating a case with the International Centre for Dispute Resolution or the American Arbitration Association may file online via AAA WebFile® (File & Manage a Case) at **www.icdr.org**, by email, mail, courier, or facsimile (fax). For filing assistance, parties may contact the ICDR directly at any ICDR or AAA office.

Mail:

International Centre for Dispute Resolution Case Filing Services
1101 Laurel Oak Road, Suite 100
Voorhees, NJ, 08043
United States

AAA WebFile: www.icdr.org

Email: casefiling@adr.org

Phone: +1.856.435.6401

Fax: +1.212.484.4178

Toll-free phone in the U.S. and Canada: +1.877.495.4185

Toll-free fax in the U.S. and Canada: +1.877.304.8457

For further information about these Rules, visit the ICDR website at **www.icdr.org** or call +1.212.484.4181.

International Mediation Rules

M-1. Agreement of Parties

Whenever parties have agreed in writing to mediate disputes under these International Mediation Rules, or have provided for mediation or conciliation of existing or future international disputes under the auspices of either the International Centre for Dispute Resolution (“ICDR”), the international division of the American Arbitration Association (“AAA”), or the AAA without designating particular rules, they shall be deemed to have made these International Mediation Rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement. The parties by mutual agreement may vary any part of these Rules including, but not limited to, agreeing to conduct all or part of the mediation via video, audio, or other electronic means.

M-2. Initiation of Mediation

1. Any party or parties to a dispute may initiate mediation under the ICDR’s auspices by filing a request for mediation to any of the ICDR’s regional offices or case management centers via email, mail, courier, or fax. Requests for mediation may also be filed online through the ICDR’s AAA WebFile at www.icdr.org or via email at casefiling@adr.org.
2. The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the ICDR and the other party or parties as applicable:
 - a. the names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation;
 - b. a copy of the mediation provision of the parties’ contract or the parties’ stipulation to mediate;
 - c. a brief statement of the nature of the dispute and the relief requested; and
 - d. any recommendations for a specific mediator or qualifications the mediator should possess.
3. Where there is no pre-existing stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the ICDR, a party may request the ICDR to invite another party to participate in “mediation by voluntary submission.” Upon receipt of such a request, the ICDR will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the ICDR.

M-4. Appointment of the Mediator

The ICDR shall assist the parties in finding a mutually agreeable mediator. If the parties are not able to agree on the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

- a. Upon receipt of a request for mediation, the ICDR will send to each party a list of mediators from the ICDR's Panel of Mediators. The parties are encouraged to agree on a mediator from the submitted list and to advise the ICDR of their agreement.
- b. If the parties are unable to agree on a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the ICDR. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. The ICDR shall appoint a mutually acceptable mediator from the list, based upon the parties' designated preferences.
- c. If for any reason the appointment cannot be made from the submitted list, the ICDR shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

1. ICDR mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the *Model Standards* and any provision of these Mediation Rules, these Mediation Rules shall govern. The *Model Standards* require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.
2. Prior to accepting an appointment, ICDR mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. ICDR mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time frame desired by the parties. Upon receipt of such disclosures,

the ICDR shall immediately communicate the disclosures to the parties for their comments.

3. The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the ICDR will appoint another mediator, unless the parties agree otherwise, in accordance with Rule M-4.

M-7. Language

If the parties have not agreed otherwise, the language of the mediation shall be that of the documents containing the mediation agreement.

M-8. Duties and Responsibilities of the Mediator

1. The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
2. The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute.
3. The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-9. Mediation Proceedings

1. The mediator shall conduct the proceedings with a view to expediting the resolution of the dispute. The mediator may conduct a preparatory conference with the parties promptly after being appointed for the purpose of organizing the proceedings of the case. In establishing procedures for the case, the mediator and the parties may conduct all or part of the mediation via video, audio, or other electronic means to increase the efficiency and economy of the proceedings.
2. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

3. The mediator may conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted in person, in writing, via video, audio or other electronic means.
4. The mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.
5. In the event that a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation conference(s), the mediator may continue to communicate with the parties for a period of time in an ongoing effort to facilitate a complete settlement.
6. Early in the proceeding or at the preparatory conference, the mediator and the parties shall consider cybersecurity, privacy, and data protection to provide for an appropriate level of security and compliance in connection with the proceeding.

M-10. Responsibilities of the Parties

1. The parties shall ensure that appropriate representatives of each party, having authority to commit to the execution of a settlement agreement, attend the mediation conference.
2. Prior to and during the scheduled mediation conference(s), the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-11. Privacy

Mediation conferences and related mediation communications are private proceedings. The parties and their representatives may attend mediation conferences. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-12. Confidentiality

1. Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.
2. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.
3. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

- a. views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
- b. admissions made by a party or other participant in the course of the mediation proceedings;
- c. proposals made or views expressed by the mediator; or
- d. the fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-13. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-14. Termination of Mediation

The mediation shall be terminated:

- a. By the execution of a settlement agreement by the parties; or
- b. By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- c. By a written or verbal declaration of any party to the effect that the mediation proceedings are terminated; or
- d. When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference; or
- e. The parties may request the mediator (by signing the settlement agreement or otherwise) or the ICDR to issue an attestation that a settlement was reached in the course of a mediation to assist in the enforcement of such settlement agreement under the United Nations Convention on International Settlement Agreements Resulting from Mediation or other applicable law.

M-15. Exclusion of Liability

Neither the ICDR nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the ICDR nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these Rules.

M-16. Interpretation and Application of Rules

The mediator shall interpret and apply these Rules insofar as they relate to the mediator's duties and responsibilities. All other Rules shall be interpreted and applied by the ICDR.

M-17. Deposits

Unless otherwise directed by the mediator, the ICDR will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation, and the ICDR shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-18. Expenses

All expenses of the mediation, including required travel and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-19. Costs of Mediation

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT
www.adr.org/internationalfeeschedule.

International Arbitration Rules

Article 1: Scope of these Rules

1. Where parties have agreed to arbitrate disputes under these International Arbitration Rules (“Rules”), or have provided for arbitration of an international dispute by either the International Centre for Dispute Resolution (“ICDR”), the international division of the American Arbitration Association (“AAA”), or the AAA without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. The ICDR is the Administrator of these Rules.
2. These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.
3. When parties agree to arbitrate under these Rules, or when they provide for arbitration of an international dispute by the ICDR or the AAA without designating particular rules, they thereby authorize the ICDR to administer the arbitration. These Rules specify the duties and responsibilities of the ICDR as the Administrator. The Administrator may provide services through any of the ICDR’s case management offices or through the facilities of the AAA or arbitral institutions with which the ICDR or the AAA has agreements of cooperation. Arbitrations administered under these Rules shall be administered only by the ICDR or by an individual or organization authorized by the ICDR to do so.
4. Unless the parties agree or the Administrator determines otherwise, the International Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds \$500,000 USD exclusive of interest and the costs of arbitration. The parties may also agree to use the International Expedited Procedures in other cases. The International Expedited Procedures shall be applied as described in Articles E-1 through E-10 of these Rules, in addition to any other portion of these Rules that is not in conflict with the Expedited Procedures. Where no party’s claim or counterclaim exceeds \$100,000 USD exclusive of interest, attorneys’ fees, and other arbitration costs, the dispute shall be resolved by written submissions only unless the arbitrator determines that an oral hearing is necessary.

Commencing the Arbitration

Article 2: Notice of Arbitration and Statement of Claim

1. The party initiating arbitration (“Claimant”) shall, in compliance with Article 11, give written Notice of Arbitration to the Administrator and at the same time to the party against whom a claim is being made (“Respondent”). The Claimant may also initiate the arbitration online through the Administrator’s AAA WebFile at **www.icdr.org** or via email at **casefiling@adr.org**.

2. The arbitration shall be deemed to commence on the date on which the Administrator receives the Notice of Arbitration.
3. The Notice of Arbitration shall contain the following information:
 - a. a demand that the dispute be referred to arbitration;
 - b. the names, addresses, telephone numbers, fax numbers, and email addresses of the parties and, if known, of their representatives;
 - c. a copy of the entire arbitration clause or agreement being invoked, and, where claims are made under more than one arbitration agreement, a copy of the arbitration agreement under which each claim is made;
 - d. a reference to any contract out of or in relation to which the dispute arises;
 - e. a description of the claim and of the facts supporting it;
 - f. the relief or remedy sought and any amount claimed; and
 - g. optionally, proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of arbitration, the language of the arbitration, and whether the party filing the Notice of Arbitration is willing to mediate the dispute prior to or concurrently with the arbitration.
4. The Notice of Arbitration shall be accompanied by the appropriate filing fee.
5. Upon receipt of the Notice of Arbitration, the Administrator shall communicate with all parties with respect to the arbitration and shall acknowledge the commencement of the arbitration.

Article 3: Answer and Counterclaim

1. Within 30 days after the Administrator confirms receipt of the Notice of Arbitration, Respondent shall submit to Claimant, to any other parties, and to the Administrator a written Answer to the Notice of Arbitration.
2. At the time Respondent submits its Answer, Respondent may make any counterclaims covered by the agreement to arbitrate or assert any setoffs and Claimant shall within 30 days submit to Respondent, to any other parties, and to the Administrator a written Answer to the counterclaim or setoffs.
3. A counterclaim or setoff shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.
4. Respondent shall within 30 days after the Administrator confirms receipt of the Notice of Arbitration submit to Claimant, to any other parties, and to the Administrator a response to any proposals by Claimant not previously agreed upon, or submit its own proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of the arbitration, the language of the arbitration, and whether Respondent is willing to mediate the dispute prior to or concurrently with the arbitration.

5. The arbitral tribunal, or the Administrator if the tribunal has not yet been constituted, may extend any of the time limits established in this Article if it considers such an extension justified.
6. Failure of Respondent to submit an Answer shall not preclude the arbitration from proceeding.
7. In arbitrations with multiple parties, Respondent may make claims or assert setoffs against another Respondent and Claimant may make claims or assert setoffs against another Claimant in accordance with the provisions of this Article 3.

Article 4: Administrative Conference

The Administrator may conduct an administrative conference before the arbitral tribunal is constituted to facilitate party discussion and agreement on issues such as arbitrator selection, mediating the dispute, process efficiencies, and any other administrative matters.

Article 5: International Administrative Review Council

When the Administrator is called upon to act under these Rules, the Administrator may act through its International Administrative Review Council (IARC) to take any action. Such actions may include determining challenges to the appointment or continuing service of an arbitrator, deciding disputes regarding the number of arbitrators to be appointed, or determining whether a party has met the administrative requirements to initiate or file an arbitration contained in the Rules. If the parties do not agree on the place of arbitration, the IARC may make an initial determination as to the place of arbitration, subject to the power of the arbitral tribunal to make a final determination.

Article 6: Mediation

Subject to (a) any agreement of the parties otherwise or (b) the right of any party to elect not to participate in mediation, the parties shall mediate their dispute pursuant to the ICDR's International Mediation Rules concurrently with the arbitration.

Article 7: Emergency Measures of Protection

1. A party may apply for emergency relief before the constitution of the arbitral tribunal by submitting a written application to the Administrator and to all other parties setting forth:
 - a. the nature of the relief sought;

- b. the reasons why such relief is required on an emergency basis before the tribunal is appointed;
- c. the reasons why the party is likely to be found to be entitled to such relief; and
- d. what injury or prejudice the party will suffer if relief is not provided.

The application shall be submitted concurrent with or following the submission of a Notice of Arbitration. Such application may be filed by email, or as otherwise permitted by Article 11, and must include payment of any applicable fees and a statement certifying that all parties have been notified or an explanation of the steps taken in good faith to notify all parties.

2. Within one business day of receipt of the application for emergency relief as provided in Article 7(1), and upon being satisfied that the requirements of Article 7(1) have been met, the Administrator shall appoint a single emergency arbitrator. Upon accepting appointment, a prospective emergency arbitrator shall, in accordance with Article 14, disclose to the Administrator any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the Administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.
3. The emergency arbitrator shall as soon as possible, and in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard and may provide for proceedings by telephone, video, written submissions, or other suitable means, as alternatives to an in-person hearing. The emergency arbitrator shall have the authority vested in the arbitral tribunal under Article 21, including the authority to rule on the emergency arbitrator's jurisdiction, and shall resolve any disputes over the applicability of this Article.
4. The emergency arbitrator shall have the power to order or award any interim or conservatory measures that the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measures may take the form of an interim award or an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order. Any interim award or order shall have the same effect as an interim measure made pursuant to Article 27 and shall be binding on the parties when rendered. The parties shall undertake to comply with such an interim award or order without delay.
5. The emergency arbitrator shall have no further power to act after the arbitral tribunal is constituted. Once the tribunal has been constituted, the tribunal may affirm, reconsider, modify, or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.

6. Any interim award or order of emergency relief may be conditioned on provision of appropriate security by the party seeking such relief.
7. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Article 7 or with the agreement to arbitrate or a waiver of the right to arbitrate.
8. The costs associated with applications for emergency relief shall be addressed by the emergency arbitrator, subject to the power of the arbitral tribunal to determine finally the allocation of such costs.

Article 8: Joinder

1. A party wishing to join an additional party to the arbitration shall submit to the Administrator a Notice of Arbitration against the additional party. No additional party may be joined after the appointment of any arbitrator, unless (a) all parties, including the additional party, otherwise agree, or (b) the arbitral tribunal once constituted determines that the joinder of an additional party is appropriate, and the additional party consents to such joinder. The party wishing to join the additional party shall, at that same time, send the Notice of Arbitration to the additional party and all other parties. The date on which such Notice of Arbitration is received by the Administrator shall be deemed to be the date of the commencement of arbitration against the additional party. Any joinder shall be subject to the provisions of Articles 13 and 21.
2. The request for joinder shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.
3. The additional party shall submit an Answer in accordance with the provisions of Article 3.
4. The additional party may make claims, counterclaims, or assert setoffs against any other party in accordance with the provisions of Article 3.

Article 9: Consolidation

1. At the request of a party or on its own initiative, the Administrator may appoint a consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules, or these and other arbitration rules administered by the AAA or ICDR, into a single arbitration where:
 - a. the parties have expressly agreed to appoint a consolidation arbitrator; or
 - b. all of the claims and counterclaims in the arbitrations are made under the same arbitration agreement; or
 - c. the claims, counterclaims, or setoffs in the arbitrations are made under more than one arbitration agreement; the arbitrations involve the same or related parties; the disputes in the arbitrations arise in connection with the same legal relationship; and the arbitration agreements may be compatible.

2. A consolidation arbitrator shall be appointed as follows:
 - a. The Administrator shall notify the parties in writing of its intention to appoint a consolidation arbitrator and invite the parties to agree upon a procedure for the appointment of a consolidation arbitrator.
 - b. If the parties have not within 15 days of such notice agreed upon a procedure for appointment of a consolidation arbitrator, the Administrator shall appoint the consolidation arbitrator.
 - c. Absent the agreement of all parties, the consolidation arbitrator shall not be an arbitrator who is appointed to any pending arbitration subject to potential consolidation under this Article.
 - d. The provisions of Articles 14-16 of these Rules shall apply to the appointment of the consolidation arbitrator.
3. In deciding whether to consolidate, the consolidation arbitrator shall consult the parties, may consult the arbitral tribunal(s), and may take into account all relevant circumstances, including:
 - a. applicable law;
 - b. whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed;
 - c. the progress already made in the arbitrations;
 - d. whether the arbitrations raise common issues of law and/or facts; and
 - e. whether the consolidation of the arbitrations would serve the interests of justice and efficiency.
4. The consolidation arbitrator may order that any or all arbitrations subject to potential consolidation be stayed pending a ruling on a request for consolidation.
5. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties or the consolidation arbitrator decides otherwise.
6. Where the consolidation arbitrator decides to consolidate an arbitration with one or more other arbitrations, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator. The consolidation arbitrator may revoke the appointment of any arbitrators and may select one of the previously-appointed tribunals to serve in the consolidated proceeding. The Administrator shall, as necessary, complete the appointment of the tribunal in the consolidated proceeding. Absent the agreement of all parties, the consolidation arbitrator shall not be appointed in the consolidated proceedings.
7. The decision as to consolidation, which need not include a statement of reasons, shall be rendered within 15 days of the date for final submissions on consolidation.

Article 10: Amendment or Supplement of Claim, Counterclaim, or Defense

Any party may amend or supplement its claim, counterclaim, setoff, or defense unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties, or any other circumstances. A party may not amend or supplement a claim or counterclaim if the amendment or supplement would fall outside the scope of the agreement to arbitrate. The tribunal may permit an amendment or supplement subject to an award of costs and/or the payment of filing fees as determined by the Administrator.

Article 11: Notices

1. Unless otherwise agreed by the parties or ordered by the arbitral tribunal, all notices and written communications may be transmitted by any means of communication that allows for a record of its transmission, including email, mail, courier, fax, or other written forms of electronic communication addressed to the party or its representative at its last-known address, or by personal service.
2. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is made. If the last day of such period is an official holiday at the place received, the period is extended until the first business day that follows. Official holidays occurring during the running of the period of time are included in calculating the period.

The Tribunal

Article 12: Number of Arbitrators

If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the Administrator determines that three arbitrators are appropriate because of the size, complexity, or other circumstances of the case.

Article 13: Appointment of Arbitrators

1. The parties may agree upon any procedure for appointing arbitrators and shall inform the Administrator as to such procedure. In the absence of party agreement as to the method of appointment, the Administrator may use the ICDR list method as provided in Article 13(6).
2. The parties may agree to select arbitrators, with or without the assistance of the Administrator. When such selections are made, the parties shall take into account the arbitrators' availability to serve and shall notify the Administrator so that a Notice of Appointment can be communicated to the arbitrators, together with a copy of these Rules.

3. If within 45 days after the commencement of the arbitration, all parties have not agreed on a procedure for appointing the arbitrator(s) or have not agreed on the selection of the arbitrator(s), the Administrator shall, at the written request of any party, appoint the arbitrator(s). Where the parties have agreed upon a procedure for selecting the arbitrator(s), but all appointments have not been made within the time limits provided by that procedure, the Administrator shall, at the written request of any party, perform all functions provided for in that procedure that remain to be performed.
4. In making appointments, the Administrator shall, after inviting consultation with the parties, endeavor to appoint suitable arbitrators, taking into account their availability to serve. At the request of any party or on its own initiative, the Administrator may appoint or submit a list(s) including nationals of a country other than that of any of the parties.
5. If there are more than two parties to the arbitration, the Administrator may appoint all arbitrators unless the parties have agreed otherwise no later than 45 days after the commencement of the arbitration.
6. If the parties have not selected an arbitrator(s) and have not agreed upon any other method of appointment, the Administrator, at its discretion, may appoint the arbitrator(s) in the following manner using the ICDR list method. The Administrator shall send simultaneously to each party an identical list of names of persons for consideration as arbitrator(s). The parties are encouraged to agree to an arbitrator(s) from the submitted list and shall advise the Administrator of their agreement. If, after receipt of the list, the parties are unable to agree upon an arbitrator(s), each party shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the Administrator. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on the parties' lists, and in accordance with the designated order of mutual preference, the Administrator shall invite an arbitrator(s) to serve. If the parties fail to agree on any of the persons listed, or if acceptable arbitrators are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have the power to make the appointment without the submission of additional lists. The Administrator shall, if necessary, designate the presiding arbitrator in consultation with the tribunal.
7. The appointment of an arbitrator is effective upon receipt by the Administrator of the Administrator's Notice of Appointment completed and signed by the arbitrator.

Article 14: Impartiality and Independence of Arbitrator

1. Arbitrators acting under these Rules shall be impartial and independent and shall act in accordance with these Rules, the terms of the Notice of Appointment provided by the Administrator, and with *The Code of Ethics for Arbitrators in Commercial Disputes*.

2. Upon accepting appointment, an arbitrator shall sign the Notice of Appointment provided by the Administrator affirming that the arbitrator is available to serve and is independent and impartial. The arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence and any other relevant facts the arbitrator wishes to bring to the attention of the parties.
3. If, at any stage during the arbitration, circumstances arise that may give rise to such doubts, an arbitrator or party shall promptly disclose such information to all parties and to the Administrator. Upon receipt of such information from an arbitrator or a party, the Administrator shall communicate it to all parties and to the tribunal.
4. Disclosure by an arbitrator or party does not necessarily indicate belief by the arbitrator or party that the disclosed information gives rise to justifiable doubts as to the arbitrator's impartiality or independence.
5. Failure of a party to disclose any circumstances that may give rise to justifiable doubts as to an arbitrator's impartiality or independence within a reasonable period after the party becomes aware of such information constitutes a waiver of the right to challenge an arbitrator based on those circumstances.
6. No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or impartiality and independence in relation to the parties, or to discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any candidate for presiding arbitrator.
7. On the application of a party, or on its own initiative after consulting the parties, the tribunal may require the parties to disclose:
 - a. Whether any non-party (such as a third-party funder or an insurer) has undertaken to pay or to contribute to the cost of a party's participation in the arbitration, and if so, to identify the person or entity concerned and to describe the nature of the undertaking.
 - b. Whether any non-party (such as a funder, insurer, parent company, or ultimate beneficial owner) has an economic interest in the outcome of the arbitration, and if so, to identify the person or entity concerned and to describe the nature of the interest.

Article 15: Challenge of an Arbitrator

1. A party may challenge an arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality, or independence, or for failing to perform the arbitrator's duties. Unless a shorter time period is otherwise agreed by the parties, specified by law, or determined by the Administrator, a party shall

send a written notice of the challenge to the Administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party. The challenge shall state in writing the reasons for the challenge. The party shall not send this notice to any member of the arbitral tribunal.

2. Upon receipt of such a challenge, the Administrator shall notify the other party of the challenge and give such party an opportunity to respond. The Administrator shall not send the notice of challenge to any member of the tribunal but shall notify the tribunal that a challenge has been received, without identifying the party challenging. When an arbitrator has been challenged by a party, the other party may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall be removed. The Administrator may advise the challenged arbitrator of the challenge and request information from the challenged arbitrator relating to the challenge. The challenged arbitrator, after consultation with the Administrator, also may withdraw in the absence of such agreement. In neither case does withdrawal imply acceptance of the validity of the grounds for the challenge.
3. If the other party does not agree to the challenge or the challenged arbitrator does not withdraw, the Administrator shall make the decision on the challenge.
4. The Administrator, on its own initiative, may remove an arbitrator for failing to perform or if the arbitrator becomes incapable of performing the duties of an arbitrator.

Article 16: Replacement of an Arbitrator

1. If an arbitrator withdraws, is incapable of performing the duties of an arbitrator, or is removed for any reason, and the office becomes vacant, a substitute arbitrator, if needed, shall be appointed pursuant to the provisions of Article 13, unless the parties otherwise agree.
2. If a substitute arbitrator is appointed under this Article, unless the parties otherwise agree the arbitral tribunal shall determine at its sole discretion whether all or part of the case shall be repeated.
3. If an arbitrator on a three-person arbitral tribunal fails to participate in the arbitration for any reason, and unless otherwise agreed to by the parties, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling, order, or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling, order, or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such non-participation and such other matters as they consider appropriate in the circumstances of the case.
4. In the event that the two other arbitrators do not agree to continue the arbitration without the participation of the third arbitrator, the Administrator on proof

satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 13, unless the parties otherwise agree.

Article 17: Arbitral Tribunal Secretary

The tribunal may, with the consent of the parties, appoint an arbitral tribunal secretary, who will serve in accordance with ICDR guidelines.

General Conditions

Article 18: Party Representation

Any party may be represented in the arbitration. The names, addresses, telephone numbers, fax numbers, and email addresses of representatives shall be communicated in writing to the other party and to the Administrator. Unless instructed otherwise by the Administrator, once the arbitral tribunal has been established, the parties or their representatives may communicate in writing directly with the tribunal with simultaneous copies to the other party and, unless otherwise instructed by the Administrator, to the Administrator. The conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject.

Article 19: Place of Arbitration

1. If the parties do not agree on the place of arbitration by a date established by the Administrator, the Administrator may initially determine the place of arbitration, subject to the power of the arbitral tribunal to determine finally the place of arbitration within 45 days after its constitution.
2. The tribunal may meet at any location it deems appropriate for any purpose, including to conduct hearings, hold conferences, hear witnesses, inspect property or documents, or deliberate, and, if done elsewhere than the place of arbitration, the arbitration shall be deemed conducted at the place of arbitration and any award shall be deemed made at the place of arbitration.

Article 20: Language

If the parties have not agreed otherwise, the language(s) of the arbitration shall be the language(s) of the documents containing the arbitration agreement, subject to the power of the arbitral tribunal to determine otherwise. The tribunal may order that any documents delivered in another language shall be accompanied by a translation into the language(s) of the arbitration.

Article 21: Arbitral Jurisdiction

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to arbitrability, to the existence, scope, or validity of the arbitration agreement(s), or with respect to whether all of the claims, counterclaims, and setoffs made in the arbitration may be determined in a single arbitration, without any need to refer such matters first to a court.
2. The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
3. A party must object to the jurisdiction of the tribunal or to arbitral jurisdiction respecting the admissibility of a claim, counterclaim, or setoff no later than the filing of the Answer, as provided in Article 3, to the claim, counterclaim, or setoff that gives rise to the objection. The tribunal may extend such time limit and may rule on any objection under this Article as a preliminary matter or as part of the final award.
4. Issues regarding arbitral jurisdiction raised prior to the constitution of the tribunal shall not preclude the Administrator from proceeding with administration and shall be referred to the tribunal once constituted for determination.

Article 22: Conduct of Proceedings

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
2. The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. The tribunal may, promptly after being constituted, conduct a procedural hearing with the parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting of deadlines for any submissions by the parties. In establishing procedures for the case, the tribunal and the parties may consider how technology, including video, audio, or other electronic means, could be used to increase the efficiency and economy of the proceedings.
3. At the procedural hearing, the tribunal shall discuss with the parties cybersecurity, privacy, and data protection to provide for an appropriate level of security and compliance in connection with the proceeding.
4. The tribunal may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case.

5. At any time during the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate. Unless the parties agree otherwise in writing, the tribunal shall apply Article 24.
6. Documents or information submitted to the tribunal by one party shall at the same time be transmitted by that party to all parties and, unless instructed otherwise by the Administrator, to the Administrator.
7. The tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.
8. The parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration.

Article 23: Early Disposition

1. A party may request leave from the arbitral tribunal to submit an application for disposition of any issue presented by any claim or counterclaim in advance of the hearing on the merits ("early disposition"). The tribunal shall allow a party to submit an application for early disposition if it determines that the application (a) has a reasonable possibility of succeeding, (b) will dispose of, or narrow, one or more issues in the case, and (c) that consideration of the application is likely to be more efficient or economical than leaving the issue to be determined with the merits.
2. Each party shall have the right to be heard and a fair opportunity to present its case regarding whether or not such application should be heard and, if permission to make the application is given, whether early disposition should be granted.
3. The arbitral tribunal shall have the power to make any order or award in connection with the early disposition of any issue presented by any claim or counterclaim that the tribunal deems necessary or appropriate. The tribunal shall provide reasoning for any award.

Article 24: Exchange of Information

1. The arbitral tribunal shall manage the exchange of information between the parties with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time avoiding surprise, assuring equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.
2. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority. To the extent that the parties wish to depart from this Article, they may do so only by written agreement and in consultation with the tribunal.
3. The parties shall exchange all documents upon which each intends to rely on a schedule set by the tribunal.

4. The tribunal may, upon application, require a party to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.
5. The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.
6. When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the tribunal determines, on application, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The tribunal may direct testing or other means of focusing and limiting any search.
7. The tribunal may, on application, require a party to permit inspection on reasonable notice of relevant premises or objects.
8. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.
9. In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.
10. Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.

Article 25: Privilege

The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. When the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.

Article 26: Hearing

1. The arbitral tribunal shall give the parties reasonable notice of the date, time, and place of any oral hearing.
2. A hearing or a portion of a hearing may be held by video, audio, or other electronic means when: (a) the parties so agree; or (b) the tribunal determines, after allowing the parties to comment, that doing so would be appropriate and would not compromise the rights of any party to a fair process. The tribunal may at any hearing direct that witnesses be examined through means that do not require their physical presence.
3. The tribunal shall determine the manner in which witnesses are examined and who shall be present during witness examination.
4. Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses should be presented in the form of written statements signed by them. In accordance with a schedule set by the tribunal, each party shall notify the tribunal and the other parties of the names of any witnesses who have presented a witness statement whom it requests to examine. The tribunal may require any witness to appear at a hearing. If a witness whose appearance has been requested fails to appear without valid excuse as determined by the tribunal, the tribunal may make such order it deems appropriate, which may include reducing the weight to be given to the statement(s) or disregarding such statement(s).
5. At least 15 days before the hearings, each party shall give the tribunal and the other parties the names and contact information of any witnesses it intends to present, the subject of their testimony, and the languages in which such witnesses will give their testimony.
6. Hearings are private unless the parties agree otherwise or the law provides to the contrary.

Article 27: Interim Measures

1. At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
2. Such interim measures may take the form of an interim order or award, and the tribunal may require security for the costs of such measures.
3. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.
4. The arbitral tribunal may allocate costs associated with applications for interim relief in any interim order or award or in the final award.
5. An application for emergency relief prior to the constitution of the arbitral tribunal may be made as provided for in Article 7.

Article 28: Tribunal-Appointed Expert

1. The arbitral tribunal, after consultation with the parties, may appoint one or more independent experts to report to it, in writing, on issues designated by the tribunal and communicated to the parties.
2. The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision.
3. Upon receipt of an expert's report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion of the report. A party may examine any document on which the expert has relied in such a report.
4. At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.

Article 29: Default

1. If a party fails to submit an Answer in accordance with Article 3, the arbitral tribunal may proceed with the arbitration.
2. If a party, duly notified under these Rules, fails to appear at a hearing without showing sufficient cause for such failure, the tribunal may proceed with the hearing.
3. If a party, duly invited or ordered to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it.

Article 30: Closure of Hearing

1. The arbitral tribunal may ask the parties if they have any further submissions and upon receiving negative replies or if satisfied that the record is complete, the tribunal may declare the arbitral hearing closed.
2. The tribunal on its own motion, or upon application of a party, may reopen the arbitral hearing at any time before the award is made.

Article 31: Waiver

A party who knows of any non-compliance with any provision or requirement of the Rules or the arbitration agreement, and proceeds with the arbitration without promptly stating an objection in writing, waives the right to object.

Article 32: Awards, Orders, Decisions and Rulings

1. In addition to making a final award, the arbitral tribunal may make interim, interlocutory, or partial awards, orders, decisions, and rulings.
2. When there is more than one arbitrator, any award, order, decision, or ruling of the tribunal shall be made by a majority of the arbitrators.
3. When the parties or the tribunal so authorize, the presiding arbitrator may make orders, decisions, or rulings on questions of procedure, including exchanges of information, subject to revision by the tribunal.
4. An order or award may be signed electronically, unless (a) the applicable law requires a physical signature, (b) the parties agree otherwise, or (c) the arbitral tribunal or Administrator determines otherwise.

Article 33: Time, Form, and Effect of the Award

1. Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties. The tribunal shall make every effort to deliberate and prepare the award as quickly as possible after the hearing. Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the final award shall be made no later than 60 days from the date of the closing of the hearing pursuant to Article 30. The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made. The tribunal shall state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given.
2. An award shall be signed by the arbitrator(s) and shall state the date on which the award was made and the place of arbitration pursuant to Article 19. Where there is more than one arbitrator and any of them fails to sign an award, the award shall include or be accompanied by a statement of the reason for the absence of such signature.
3. The award shall be transmitted in draft form by the tribunal to the Administrator. The award shall be communicated to the parties by the Administrator.
4. If applicable law requires an award to be filed or registered, the tribunal shall cause such requirement to be satisfied. It is the responsibility of the parties to bring such requirements or any other procedural requirements of the place of arbitration to the attention of the tribunal.

Article 34: Applicable Laws and Remedies

1. The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.
3. The tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorized it to do so.
4. A monetary award shall be in the currency or currencies of the contract unless the tribunal considers another currency more appropriate, and the tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s).
5. Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary, or similar damages unless any applicable law(s) requires that compensatory damages be increased in a specified manner. This provision shall not apply to an award of arbitration costs to a party to compensate for misconduct in the arbitration.

Article 35: Settlement or Other Reasons for Termination

1. If the parties settle the dispute before a final award is made, the arbitral tribunal shall terminate the arbitration and, if requested by all parties, may record the settlement in the form of a consent award on agreed terms. The tribunal is not obliged to give reasons for such an award.
2. If continuation of the arbitration becomes unnecessary or impossible due to the non-payment of deposits required by the Administrator, the arbitration may be suspended or terminated as provided in Article 39(3).
3. If continuation of the arbitration becomes unnecessary or impossible for any reason other than as stated in Sections 1 and 2 of this Article, the tribunal shall inform the parties of its intention to terminate the arbitration. The tribunal shall thereafter issue an order terminating the arbitration, unless a party raises justifiable grounds for objection.

Article 36: Interpretation and Correction of Award

1. Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.
2. If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.
3. The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.

4. The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.

Article 37: Costs of Arbitration

The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case.

Such costs may include:

- a. the fees and expenses of the arbitrators, including applicable taxes;
- b. the costs of any assistance required by the tribunal;
- c. the fees and expenses of the Administrator;
- d. the reasonable legal and other costs incurred by the parties;
- e. any costs incurred in connection with a request for interim or emergency relief pursuant to Articles 7 or 27;
- f. any costs incurred in connection with a request for consolidation pursuant to Article 9; and
- g. any costs associated with information exchange pursuant to Article 24.

Article 38: Fees and Expenses of Arbitral Tribunal

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the time spent by the arbitrators, the size and complexity of the case, and any other relevant circumstances.
2. As soon as practicable after the commencement of the arbitration, the Administrator shall designate an appropriate daily or hourly rate of compensation in consultation with the parties and all arbitrators, taking into account the arbitrators' stated rate of compensation and the size and complexity of the case.
3. Any dispute regarding the fees and expenses of the arbitrators shall be determined by the Administrator.

Article 39: Deposits

1. The Administrator may request that the parties deposit appropriate amounts as an advance for the costs referred to in Article 37.
2. During the course of the arbitration, the Administrator may request supplementary deposits from the parties.

3. Failure of a party asserting a claim or counterclaim to pay the required fees or deposits shall be deemed a withdrawal of the claim or counterclaim. In no event, however, shall a party be precluded from defending a claim or counterclaim.
4. If the deposits requested as referred to in Article 37(a) and 37(b) are not paid promptly and in full, the Administrator shall so inform the parties in order that one or more of them may make the required deposits. If any such deposit is made by one or more of the parties, the tribunal may, upon request, make a separate award in favor of the paying party(s) for recovery of the deposit, together with any interest.
5. If no party is willing to make the requested deposits, the arbitral tribunal may order the suspension or termination of the proceedings. If the tribunal has not yet been appointed, the Administrator may suspend or terminate the proceedings.
6. After the final award has been made, the Administrator shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Article 40: Confidentiality

1. Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator. Except as provided in Article 40.3, unless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award.
2. Unless the parties agree otherwise, the tribunal may make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.
3. An award may be made public only with the consent of all parties or as required by law, except that the Administrator may publish or otherwise make publicly available selected awards, orders, decisions, and rulings that have become public in the course of enforcement or otherwise.
4. The ICDR may also publish selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details unless a party has objected in writing to publication within 6 months from the date of the award.

Article 41: Exclusion of Liability

The members of the arbitral tribunal, any emergency arbitrator appointed under Article 7, any consolidation arbitrator appointed under Article 9, any arbitral tribunal secretary, and the Administrator shall not be liable to any party for any act or omission in connection with any arbitration under these Rules, except to the extent that such a limitation of liability is prohibited by applicable law. The

parties agree that no arbitrator, emergency arbitrator, consolidation arbitrator, or arbitral tribunal secretary, nor the Administrator shall be under any obligation to make any statement about the arbitration, and no party shall seek to make any of these persons a party or witness in any judicial or other proceedings relating to the arbitration.

Article 42: Interpretation of Rules

The arbitral tribunal, any emergency arbitrator appointed under Article 7, and any consolidation arbitrator appointed under Article 9, shall interpret and apply these Rules insofar as they relate to their powers and duties. The Administrator shall interpret and apply all other Rules.

International Expedited Procedures

Article E-1: Scope of Expedited Procedures

These Expedited Procedures supplement the International Arbitration Rules as provided in Article 1(4).

Article E-2: Detailed Submissions

Parties are to present detailed submissions on the facts, claims, counterclaims, setoffs and defenses, together with all of the evidence then available on which such party intends to rely, in the Notice of Arbitration and the Answer. The arbitrator, in consultation with the parties, shall establish a procedural order, including a timetable, for completion of any written submissions.

Article E-3: Administrative Conference

The Administrator may conduct an administrative conference with the parties and their representatives to discuss the application of these procedures, arbitrator selection, mediating the dispute, and any other administrative matters.

Article E-4: Objection to the Applicability of the Expedited Procedures

If an objection is submitted before the arbitrator is appointed, the Administrator may initially determine the applicability of these Expedited Procedures, subject to the power of the arbitrator to make a final determination. The arbitrator shall take into account the amount in dispute and any other relevant circumstances.

Article E-5: Changes of Claim or Counterclaim

If, after filing of the initial claims and counterclaims, a party amends its claim or counterclaim to exceed \$500,000 USD exclusive of interest and the costs of arbitration, the case will continue to be administered pursuant to these Expedited Procedures unless the parties agree otherwise, or the Administrator or the arbitrator determines otherwise. After the arbitrator is appointed, no new or different claim, counterclaim or setoff and no change in amount may be submitted except with the arbitrator's consent.

Article E-6: Appointment and Qualifications of the Arbitrator

A sole arbitrator shall be appointed as follows. The Administrator shall simultaneously submit to each party an identical list of five proposed arbitrators.

The parties may agree to an arbitrator from this list and shall so advise the Administrator. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list, number the remaining names in order of preference, and return the list to the Administrator within 10 days from the transmittal date of the list to the parties. The parties are not required to exchange selection lists. If the parties fail to agree on any of the arbitrators or if acceptable arbitrators are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator may make the appointment without the circulation of additional lists. The parties will be given notice by the Administrator of the appointment of the arbitrator, together with any disclosures.

Article E-7: Procedural Hearing and Order

After the arbitrator's appointment, the arbitrator may schedule a procedural hearing with the parties, their representatives, and the Administrator to discuss the procedure and schedule for the case. Within 14 days of appointment, the arbitrator shall issue a procedural order.

Article E-8: Proceedings by Written Submissions

In expedited proceedings based on written submissions, all submissions are due within 60 days of the date of the procedural order, unless the arbitrator determines otherwise. The arbitrator may require an oral hearing if deemed necessary.

Article E-9: Proceedings with an Oral Hearing

In expedited proceedings in which an oral hearing is to be held, the arbitrator shall set the date, time, and location of the hearing. The oral hearing shall take place within 60 days of the date of the procedural order unless the arbitrator deems it necessary to extend that period. Hearings may take place in person or via video, audio, or other electronic means, at the discretion of the arbitrator. Generally, there will be no transcript or stenographic record. Any party desiring a stenographic record may arrange for one. The oral hearing shall not exceed one day unless the arbitrator determines otherwise. The Administrator will notify the parties in advance of the hearing date.

Article E-10: The Award

Awards shall be made in writing and shall be final and binding on the parties. Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the award shall be made not later than 30 days from the date of the closing of the hearing or from the time established for final written submissions.

Administrative Fees

Administrative Fee Schedules

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT
www.adr.org/internationalfeeschedule.

EXHIBIT C-20

Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP)¹

Adopted 25 October 2018

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These interim procedures (Interim Supplementary Procedures) supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article 4, Section 4.3 of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after 1 May 2018.

In drafting these Interim Supplementary Procedures, the IRP Implementation Oversight Team (IOT) applied the following principles: (1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016²; (2) to the extent public comments received in response to the USP reflected clear movement away from either the current Supplementary Procedures or the

¹ CONTEXTUAL NOTE: These Interim Supplementary Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

² See <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>.

USP, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the IOT has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

1. Definitions

In these Interim Supplementary Procedures:

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

COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS violated ICANN's Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

- 1) exceeded the scope of the Mission;
- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN's contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief (ICDR RULES Article 6).

IANA refers to the Internet Assigned Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN's Board of Directors as the IRP Provider (IRPP) under Article 4, Section 4.3 of ICANN's Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant's filing of a written statement of a DISPUTE with the ICDR.

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN's Articles and Bylaws.

ICDR RULES refers to the ICDR's International Arbitration rules in effect at the time the relevant request for independent review is submitted.

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and/or participation as an *amicus*, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for consolidation (ICDR Rules Article 8)

PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article 4, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.

2. Scope

The ICDR will apply these Interim Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article 4, Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect. In the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern. These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced. IRPs commenced prior to the adoption of these Interim Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

In the event that any of these Interim Supplementary Procedures are subsequently amended, the rules surrounding the application of those amendments will be defined therein.

3. Composition of Independent Review Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated. The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is Independent and Impartial pursuant to the ICDR RULES. In addition to disclosing relationships with parties to the DISPUTE, IRP PANEL members must also disclose the existence of any material relationships with ICANN, and/or an ICANN Supporting Organization or Advisory Committee. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the ICDR RULES shall apply to selection of the third panelist. In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Interim Supplementary Procedures.

4. Time for Filing³

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

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

In the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief pursuant to the Bylaws, Article 4, Section 4.3(p), the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate.

5A. Nature of IRP Proceedings

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible.

Hearings shall be permitted as set forth in these Interim Supplementary Procedures. Where necessary, the IRP PANEL may conduct hearings via telephone, video conference or similar technologies). The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. For purposes of these Interim Supplementary Procedures, an “in-person hearing” refers to any IRP proceeding held face-to-face, with participants physically present in the same location. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-

³ The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.

person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing. In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

All hearings shall be limited to argument only unless the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness testimony and cross examination.

All evidence, including witness statements, must be submitted in writing 15 days in advance of any hearing.

With due regard to ICANN Bylaws, Article 4, Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Interim Supplementary Procedures.

5B. Translation

As required by ICANN Bylaws, Article 4, Section 4.3(l), "All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for CLAIMANTS if needed." Translation may include both translation of written documents/transcripts as well as interpretation of oral proceedings.

The IRP PANEL shall have discretion to determine (i) whether the CLAIMANT has a need for translation services, (ii) what documents and/or hearing that need relates to, and (iii) what language the document, hearing or other matter or event shall be translated into. A CLAIMANT not determined to have a need for translation services must submit all materials in English (with the exception of the request for translation services if the request includes CLAIMANT's certification to the IRP PANEL that submitting the request in English would be unduly burdensome).

In determining whether a CLAIMANT needs translation, the IRP PANEL shall consider the CLAIMANT's proficiency in spoken and written English and, to the extent that the CLAIMANT is represented in the proceedings by an attorney or other agent, that representative's proficiency

in spoken and written English. The IRP PANEL shall only consider requests for translations from/to English and the other five official languages of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish).

In determining whether translation of a document, hearing or other matter or event shall be ordered, the IRP PANEL shall consider the CLAIMANT's proficiency in English as well as in the requested other language (from among Arabic, Chinese, French, Russian or Spanish). The IRP PANEL shall confirm that all material portions of the record of the proceeding are available in English.

In considering requests for translation, the IRP PANEL shall consider the materiality of the particular document, hearing or other matter or event requested to be translated, as well as the cost and delay incurred by translation, pursuant to ICDR Article 18 on Translation, and the need to ensure fundamental fairness and due process under ICANN Bylaws, Article 4, Section 4.3(n)(iv).

Unless otherwise ordered by the IRP PANEL, costs of need-based translation (as determined by the IRP PANEL) shall be covered by ICANN as administrative costs and shall be coordinated through ICANN's language services providers. Even with a determination of need-based translation, if ICANN or the CLAIMANT coordinates the translation of any document through its legal representative, such translation shall be considered part of the legal costs and not an administrative cost to be born by ICANN. Additionally, in the event that either the CLAIMANT or ICANN retains a translator for the purpose of translating any document, hearing or other matter or event, and such retention is not pursuant to a determination of need-based translation by the IRP PANEL, the costs of such translation shall not be charged as administrative costs to be covered by ICANN.

6. Written Statements

A CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary and available evidence in support of the CLAIMANT'S claim(s) should be part of the initial written submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

In addition, the IRP PANEL may grant a request for additional written submissions from any person or entity who is intervening as a CLAIMANT or who is participating as an amicus upon the showing of a compelling basis for such request. In the event the IRP PANEL grants a request for additional written submissions, any such additional written submission shall not exceed 15 pages, double-spaced and in 12-point font.

For any DISPUTE resulting from a decision of a process-specific expert panel that is claimed to be inconsistent with ICANN's Articles of Incorporation or Bylaws, as specified at Bylaw Section 4.3(b)(iii)(A)(3), any person, group or entity that was previously identified as within a contention set with the CLAIMANT regarding the issue under consideration within such expert panel proceeding shall reasonably receive notice from ICANN that the INDEPENDENT REVIEW PROCESS has commenced. ICANN shall undertake reasonable efforts to provide notice by electronic message within two business days (calculated at ICANN's principal place of business) of receiving notification from the ICDR that the IRP has commenced.

7. Consolidation, Intervention and Participation as an *Amicus*

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, requests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an *Amicus Curiae*

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an *amicus* before the IRP PANEL:

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and
- iii. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.⁴ The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

⁴ During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in then considering the scope of participation from *amicus curiae*, the IRP PANEL shall lean in favor of allowing broad participation of an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

8. Exchange of Information

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of requests for exchange of information.

On the motion of either Party and upon finding by the IRP PANEL that such exchange of information is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party's possession, custody, or control that the Panel determines are reasonably likely to be relevant and material to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law (including, without limitation, disclosures to competitors of the disclosing person, group or entity, of any competition-sensitive information of any kind). Where such method(s) for exchange of information are allowed, all Parties shall be granted the equivalent rights for exchange of information.

A motion for exchange of documents shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.

In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.

10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article 4, Section 4.3(o)(iv).

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.

Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

11. Standard of Review

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

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN'S Articles or Bylaws.

- b. All DISPUTES shall be decided in compliance with ICANN's Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- c. For Claims arising out of the Board's exercise of its fiduciary duties, the IRP PANEL shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.
- d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN's obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article 4, Section 4.3(a)(iv) of ICANN's Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.

12. IRP PANEL Decisions

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.

13. Form and Effect of an IRP PANEL DECISION

- a. IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties. IRP PANEL DECISIONS shall be issued in English, and the English version will be authoritative over any translations.
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.
- c. Subject to Article 4, Section 4.3 of ICANN's Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN's Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under

the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP PANEL Decisions

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision. The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention.

15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

EXHIBIT C-21



APPLICATION UPDATE HISTORY

Application ID: 1-1013-6638

String: WEB

Applicant: Afilias Domains No. 3 Limited.

Posting Date	Summary	From	To	Comment
20 January 2022	null	1-1013-6638_WEB.html (v4)	1-1013-6638_WEB.html (v5)	
10 September 2021	Updates were made to application questions 1, 2, 4, 5, 6, 7, 8, 11, 12, 16, 18, 23, 45, 46, 47, 48, 49, and 50. Additionally, new attachments were added to application question numbers 45, 48, 49 and 50. These updates were made as a result of ICANN approving an application change request submitted by the applicant. Updates were made to confidential portions of the application and therefore specific details are not being posted. These updates are available for public comment for 30 days, beginning on the posting date.	1-1013-6638_WEB.html (v3)	1-1013-6638_WEB.html (v4)	
10 February 2021	Updates were made to application question 6. These updates were made as a result of ICANN approving an application change request submitted by the applicant. Updates are reflected in the HTML file posted to the right. These corresponding updates will not be available for public comment.	1-1013-6638_WEB.html (v2)	1-1013-6638_WEB.html (v3)	
29 July 2016	Auction Result Report Updated		Auction C-WEB-WEBS-Final-Results.pdf (v1)	
21 March 2013	Updates were made to application question number 7. These updates were made as a result of ICANN approving an application change request submitted by the applicant. Question number 7 contains public and confidential data. Updates to the public data are reflected in the HTML file posted to the right. These updates are available for public comment for 30 days, beginning on the posting date.	1-1013-6638_WEB.html (v1)	1-1013-6638_WEB.html (v2)	
11 January 2013	Updates were made to application question number 11g. These updates were made as a result of ICANN approving an application change request submitted by the applicant. Question number 11g contains confidential data and therefore updates of the data are not being posted. There is no public comment available for these changes	Not Available	Not Available	

EXHIBIT C-22

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

AFILIAS DOMAINS NO. 3 LIMITED,

Claimants

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. _____

**EXPERT REPORT BY JONATHAN ZITTRAIN
ICANN INDEPENDENT REVIEW PROCESS**

September 26, 2018

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1. OBJECTIVE AND SUMMARY OF OPINIONS

1. I have been asked by Dechert LLP, counsel to the Claimants, to describe the history of the Internet Corporation for Assigned Names and Numbers (“**ICANN**”), its mandate to introduce and promote competition in the provision and supply of generic domain names (ICANN’s “**Competition Mandate**”),¹ and the unique importance that the .WEB registry plays in achieving ICANN’s Competition Mandate in the context of ICANN’s New gTLD Program. Although this expert opinion has been requested by Claimants’ counsel, I understand that my duty is to the IRP Panel.

2. As set forth in greater detail below, ICANN was conceived with objectives to, and has operated to, expand the Internet namespace and to introduce and promote competition in the provision and supply of generic domain names, which are fundamental to the architecture of the Internet. Competition in fundamental Internet naming provisioning, while maintaining interoperability, has been a touchstone for the Internet technical community, digital entrepreneurs, telecommunications regulators, and end-users—those who formed and remain stakeholders of ICANN—since the commercialization of the Internet in the early 1990s. ICANN’s Competition Mandate represents an obligation by ICANN to do more than just comply with applicable antitrust and competition laws. Rather, it is an affirmative undertaking by ICANN to

¹ “The launch of the new gTLD program was part of ICANN’s founding mandate when it was formed by the U.S. Government over 12 years ago. That **mandate is to introduce competition** and choice into the domain name system in a stable and secure manner”. Statement of Kurt Pritz (ICANN Senior Vice President for Shareholder Relations) (“**Pritz Statement**”), S. Hrg. 112-394, ICANN’s Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112th Congress, First Session, December 8, 2011, *available at* <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg74251/html/CHRG-112shrg74251.htm> (“**December 2011 Senate Hearing**”), [Ex. JZ-2], at 8 (emphasis added). Herein, I refer to the “mandate” identified by Mr. Pritz as ICANN’s “**Competition Mandate**”.

ensure that its decisions and actions are consistent with its mission to create a competitive environment within the DNS in which market forces can operate without restraint.

3. In the late 1990s, when ICANN was formed, the mandate to introduce and promote competition for the provision and supply of domain names meant creating competition for Network Solutions, Inc. (“**NSI**”), which controlled the .COM registry among others, and which was acquired in 2000 by VeriSign, Inc. (“**VeriSign**”).

4. To realize its Competition Mandate, ICANN launched a program that would allow for the formation of new registries (the “**New gTLD Program**”) to compete with NSI/VeriSign. Since the first round of the New gTLD Program in 2000, the industry has recognized that the most important new registry could be .WEB, which, of all existing and potential new gTLDs, is the closest and best potential competitor to VeriSign.

5. VeriSign’s presumptive acquisition of .WEB runs counter to ICANN’s Competition Mandate, is inapposite to the intent and purpose of the New gTLD Program, and is contrary to ICANN’s fundamental objective of adopting and acting pursuant to processes that are transparent, fair, and non-discriminatory. A recent analyst report from JP Morgan described the current situation thusly:

Verisign is paying \$135M for the ownership rights to be the registry operator of .web. This could offer a new growth opportunity for the company into the future, but just as important, we think it is a very good defensive strategic move keeping .web out of the hands of the potential competitor as we believe .web could be the closest thing to .com in the minds of customers looking for domain names.²

² J.P.Morgan, *VeriSign (VRSN US): DoJ Clears Way for VRSN to Close .web Purchase*, January 10, 2018, [Ex. JZ-3], at 1.

2. QUALIFICATIONS AND EXPERIENCE

6. I am the George Bemis Professor of International Law and Professor of Computer Science at Harvard University, holding faculty appointments at Harvard Law School, the Harvard John F. Kennedy School of Government, and the Harvard John A. Paulson School of Engineering and Applied Sciences. I co-founded and served as executive director of the Berkman Center for Internet and Society at Harvard Law School from 1996 to 2000. I was an assistant professor of law at Harvard Law School from 2000 to 2005, the Professor of Internet Governance and Regulation at the University of Oxford from 2005 to 2008, when I rejoined the Harvard Law School faculty as professor of law.

7. I write and teach about the impact of the Internet on society and on law. Some of my relevant works include *The Future of the Internet and How to Stop It*³ and numerous articles, such as “The Generative Internet,”⁴ published in the *Harvard Law Review*; “A History of Online Gatekeeping,”⁵ published in the *Harvard Journal of Law & Technology*; “Better Data for a Better Internet,”⁶ published in *Science*; and “ICANN: Between the Public and the Private,”⁷ published in *The Best in E-Commerce Law*.

8. In addition to my academic appointments, I was the Distinguished Scholar in Residence at the Federal Communications Commission (“FCC”) in 2011 and chaired the FCC’s Open Internet Advisory Committee from 2012 to 2014. In July 1999, I testified before the United

³ Jonathan Zittrain, *The Future of the Internet: and How to Stop It* (2009).

⁴ Jonathan Zittrain, “The Generative Internet,” *Harvard Law Review* 174 (2006).

⁵ Jonathan Zittrain, “A History of Online Gatekeeping,” *Harvard Journal of Law and Technology* 253 (2005).

⁶ Jonathan Zittrain, “Better Data for a Better Internet,” *Science* 1210 (2011).

⁷ Jonathan Zittrain, “ICANN: Between the Public and the Private,” in *The Best in E-Commerce Law* (2001).

States House of Representatives Subcommittee on Investigations and Oversight about ICANN's role in domain name system privatization. I testified before the United States House of Representatives Subcommittee on Courts and Intellectual Property in June 2000 about issues and obstacles relating to the Internet and federal courts. In April 2000, I testified before the United States Senate Committee on Commerce, Science, and Technology about the Internet Tax Freedom Act, and in October 2006 I testified before the British House of Lords Select Committee on Science and Technology on cybersecurity. I served on the board of trustees of The Internet Society, which facilitates the development of Internet standards, from 2009 through 2012, and I am currently a board member of the Electronic Frontier Foundation, which advances digital rights in the public interest.

9. I was a member of ICANN's Membership Advisory Committee, which advised the ICANN board on the creation of its membership framework in the organization's early years. I participated in the discussions that gave rise to ICANN, and the Berkman Klein Center (then the Berkman Center) hosted ICANN's first public meeting in 1998.

10. A copy of my *curriculum vitae* is attached as **Exhibit JZ-1**.

11. Although I am participating in this case on a paid basis, the views expressed in this report are my own, and do not represent any organization or institution. I reserve the right to supplement or amend this report if additional evidence comes to my attention.

3. INTRODUCTION

12. Competition is a recurring concern in the communications space. When the goal of a system is to ensure the ability of any person to communicate with any other person, the easiest way to do that often entails assigning the coordination of that system to a single entity.

With a single party at the reins, the argument goes, we could be sure that everybody will be properly interconnected. For decades this was the argument made by AT&T in its insistent defense of its monopoly for U.S. telephonic communication. And it's true that calls from California to Connecticut did go through reliably. But those calls, made on universally-rented, company-issued telephones, were expensive. Innovation was limited, and, when companies like Hush-A-Phone tried to make things better, AT&T would use its dominant position to ensure that nothing happened on its system without its consent.⁸

13. Looking back from a world with dozens of smartphone makers and four major wireless networks in the U.S. alone, it is clear that there are alternatives to centralized proprietary coordination. And it seemed that way as well in the mid- to late 1990s, when the community that created the modern Internet was rapidly building a governance infrastructure for the most significant digital communications platform in history. At nearly every step of the process of developing our current Internet governance infrastructure, ensuring competition has not just been a factor but a primary objective when making decisions, including the design of technical architectures. Stakeholders remain vigilant regarding anticompetitive behavior in the context of major Internet infrastructure issues like the assignment of new generic Top Level Domains (“gTLDs”).

4. ORIGIN AND DEVELOPMENT OF THE DOMAIN NAME SYSTEM

14. The Internet started out as an academic experiment aimed at connecting geographically separated computer networks. In these early days, it was easy to connect to other

⁸ Matthew Lasar, “Any lawful device: Revisiting Carterfone on the eve of the Net Neutrality vote”, *Ars Technica*, December 13, 2017, available at <https://arstechnica.com/tech-policy/2017/12/carterfone-40-years/>, [Ex. JZ-4].

Internet users because there were so few people on the network. However, as the Internet began to expand, users developed ways to make navigation on the Internet more straightforward. As a result, the domain name system (“DNS”) was created by a handful of researchers, including Paul Mockapetris.⁹ In short, the DNS is a hierarchical distributed database that serves as a “directory” for points of presence on the Internet.¹⁰ Every website has a numeric “IP address” that corresponds to its location on the Internet. IP addresses are usually represented in dot-decimal notation, consisting of four decimal numbers, each ranging from 0 to 255, separated by dots, *e.g.*, 172.16.254.1. Because IP addresses are difficult to remember, the DNS uses human-friendly “domain names” such as www.google.com. The DNS translates these domain names into IP addresses and directs us to the website we have requested.¹¹

15. DNS records are stored on servers all over the world that are organized in a hierarchical structure. At the very top of the DNS hierarchy are thirteen “root” servers that store DNS information about all top-level domains (“TLDs”).¹² Top-level domains are found at the far right end of any given domain name. For example, the TLD of www.google.com is .COM. Next in the DNS chain of command are top-level domain nameservers which keep DNS records for all subdomains within that TLD. For example, the .COM domain nameserver contains all DNS records for www.google.com, while the .EDU domain name server contains DNS records for

⁹ See Cricket Liu and Paul Albitz, *DNS and BIND* (5th ed. 2006), [Ex. JZ-5], Ch. 1, Secs. 1-2, 4 (“A (Very) Brief History of the Internet”, “On the Internet and Internets”, and “The History of BIND”).

¹⁰ The DNS performs a variety of functions, but for the purposes of this document, we focus on its role as a directory. For example, in addition to translating domain names into IP addresses, DNS servers can also be used to direct and balance Internet traffic so that no individual server is burdened by too many requests. These types of functions are called load balancing and traffic steering. See *id.*, Ch. 10, Sec. 7 (“Round-Robin Load Distribution”).

¹¹ Keith Shaw, “What is DNS and how does it work?”, *Network World*, April 11, 2018, available at <https://www.networkworld.com/article/3268449/internet/what-is-dns-and-how-does-it-work.html>, [Ex. JZ-6].

¹² Cricket Liu and Paul Albitz, *DNS and BIND*, [Ex. JZ-5], Ch. 2, Sec. 6 (“Resolution”).

www.harvard.edu and www.berkeley.edu. These second level domains store the DNS records for websites within that second level domain and so on and so forth.¹³

16. At the dawn of TLD creation and assignment in 1984, the Internet community thought of TLDs in terms of general purpose categories: commercial, education, government, etc. The seven original TLDs (.COM, .NET, .ORG, .EDU, .MIL, .INT, .GOV) reflect this approach. .COM was designated for commercial businesses, .EDU was reserved for education institutions like universities, .GOV was set aside for U.S. government organizations, .MIL was created for U.S. military groups, .NET was designated for “organizations providing network infrastructure,” .ORG was created for non-profits, and the seventh TLD, .INT, was set aside for international organizations.¹⁴ These seven were the original members of a set of TLDs which would later become known as gTLDs. .COM, .NET, and .ORG were open gTLDs, meaning that anyone could register a second-level domain in one or more of these gTLDs, while .INT, .MIL, .EDU, and .GOV were closed gTLDs, meaning that only registrants meeting certain criteria could own a second-level domain in that gTLD.

17. .COM emerged as the dominant gTLD even for non-commercial use. From the outset, gTLDs were confusing to most users. They were too technical for the general public to fully understand. The difference between .COM and .NET, for instance, was lost on many. Many early users did not understand how to use domain names and URLs to navigate the Web. Instead,

¹³ Keith Shaw, “What is DNS and how does it work?”, [Ex. JZ-6]; Cricket Liu and Paul Albitz, *DNS and BIND*, [Ex. JZ-5], Ch. 1, Sec. 3 (“The Domain Name System, in a Nutshell”).

¹⁴ Cricket Liu and Paul Albitz, *DNS and BIND*, [Ex. JZ-5], Ch. 2, Sec. 2 (“The Internet Domain Namespace”). See also Jon Postel and J. Reynolds, Network Working Group, Request for Comments: 920, Domain Requirements, October 1984, available at <https://tools.ietf.org/pdf/rfc920.pdf>, [Ex. JZ-7], at 2. Note that .net was eventually opened to commercial traffic as well.

they treated their browsers' URL bars as search engines and simply typed in the name of the entity they were looking for. In an attempt to make their browsers more user-friendly, developers designed browsers to append ".COM" to any non-URL the user typed into the browser window. This increased the commercial value of .COM domains and further cemented .COM's status in the hierarchy of gTLDs in this formative era of the Web in the 1990s.¹⁵

18. .COM continues to be the dominant gTLD today, but in many ways it is an imperfect flag-bearer for the general-purpose Internet. Colloquially, when we think of .COM, we think of businesses, start-ups, and the "dot com bubble". Though .COM is semantically associated as a commercial gTLD, many .COM domains are not commercial, and no test for commercial use is applied for acquisition or renewal of a domain.

5. THE BIRTH OF NSI/VERISIGN

19. In the beginning of the Internet age, gTLDs were managed and domain names were assigned by one man, Jon Postel, acting in a non-commercial capacity. The fact that there was just one man responsible for managing gTLDs and acting as the root may seem bewildering today, and it was remarkable even back then. In an effort to become more formal, Postel's work was formalized under an entity known as **IANA**—the Internet Assigned Number Authority—(informally, he was sometimes referred to as the "Internet Main Man"¹⁶ or even the "God" of the Internet¹⁷). Postel did not wish to be the "owner" of the franchise, but rather saw himself as

¹⁵ Milton L. Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace* (2006), [Ex. JZ-8], Sec. 6.1.2.

¹⁶ "Fallout over Unsanctioned DNS Test", *Wired News Report*, May 2, 1999, available at <https://www.wired.com/1998/02/fallout-over-unsanctioned-dns-test/>, [Ex. JZ-9].

¹⁷ "The Internet: A peace of sorts", *The Economist*, November 17, 2005, available at <https://www.economist.com/node/5178973>, [Ex. JZ-10].

performing a task that was necessary for the greater community. IANA was not merely a formalization but also a recognition that this essential function existed independently of Postel as an individual.

20. Despite having a more formal-sounding moniker, Postel could not scale his work at the rate of the Internet, and eventually the task of managing gTLDs and assigning domain names became too burdensome for one person to manage. Postel's insufficient scale became acutely evident in 1991, when the United States government officially opened the Internet to commercial traffic. The commercialization of the Internet resulted in a massive spike in demand for domains.¹⁸ To help manage the increased demand, the National Science Foundation ("NSF") in 1993 entered into a five year, \$5.2 million agreement with NSI to manage its gTLD registries.¹⁹

21. In 1995, NSI was acquired by defense contractor Science Applications International Corporation ("SAIC") for \$4.7 million.²⁰ Shortly thereafter, NSF agreed to arrange for the company to charge a domain registration fee rather than have the government pay for domain name management services.²¹ As a result of being the sole source of generic domain names, NSI started earning a significant amount of money from registration fees (NSI charged \$100 for the initial registration and a \$50 annual renewal fee after the first two years). Over a period of a few years, NSI's income from registration fees would escalate from tens to hundreds

¹⁸ Heather N. Mewes, "Memorandum of Understanding on the Generic Top-Level Domain Name Space of the Internet Domain Name System", 13(1) *Berkeley Technology Law Journal* 235 (1998), [Ex. JZ-11], at 236.

¹⁹ ICANN, Cooperative Agreement between NSI and U.S. Government, Agreement No. NCR-9218742, January 1, 1993, available at <https://archive.icann.org/en/nsi/coopagmt-01jan93.htm>, [Ex. JZ-12].

²⁰ Craig Simon, The Technical Construction of Globalism: Internet Governance and the DNS Crisis, A case study for *Bandwidth Rules*, October 1998, available at <https://web.archive.org/web/20000815211830/http://www.flywheel.com/ircw/dnsdraft.html>, [Ex. JZ-13], at 8.

²¹ ICANN's Early Days, *ICANN History Project*, available at <https://www.icann.org/en/history/early-days>, [Ex. JZ-14].

of millions of dollars.²² Five short years after its acquisition by SAIC, VeriSign would acquire NSI for \$21 billion.²³

22. The shift from free to paid domain registration marks the point at which Internet stakeholders started to think critically about the importance of competition in the domain assignment space. Given that NSI was the sole source of generic domain names, Internet stakeholders became concerned that the company could and would adopt aggressive and predatory behavior. Jon Postel himself said:

I think this introduction of charging . . . for domain registrations is sufficient cause to take steps to set up a small number of alternate top level domains managed by other registration centers. I'd like to see some competition between registration services to encourage good service at low prices.²⁴

As NSI's five-year contract with the NSF was running out, calls were made to break the NSI monopoly and introduce meaningful competition into the domain name space.²⁵

23. NSI, however, resisted efforts to force it to relinquish its control of domain registration at the end of its contract. The company argued that it owned its registry of domains and should be allowed to continue its registration business unencumbered.²⁶ Ultimately,

²² David S. Hilzenrath, "Network Solutions Dropped as Registrar of Internet Domains", *The Washington Post*, April 24, 1997, available at https://www.washingtonpost.com/archive/business/1997/04/24/network-solutions-dropped-as-registrar-of-internet-domains/dafcf9ef-e875-4d68-83b1-232823d8aadf/?utm_term=.a645a444e70a, [Ex. JZ-15], at 1.

²³ "VeriSign buys Network Solutions in \$21 billion deal", *CNet*, January 2, 2002, available at <https://www.cnet.com/news/verisign-buys-network-solutions-in-21-billion-deal/>, [Ex. JZ-16].

²⁴ Postel Note, September 15, 1995, available at <https://web.archive.org/web/20020624231348/https://wia.org/pub/postel-iana-draft13.htm>, [Ex. JZ-17].

²⁵ Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 6.3.2; David S. Hilzenrath, "Network Solutions Dropped as Registrar of Internet Domains", [Ex. JZ-15].

²⁶ David S. Hilzenrath, "Network Solutions Dropped as Registrar of Internet Domains", [Ex. JZ-15].

however, NSI did endorse the basic concept of introducing competition by adding new gTLDs to the root.

24. The urgent need for competition in the gTLD space was a position also endorsed by Jon Postel, who saw competition as a necessary step to prevent an abuse of monopolistic market power by NSI. Writing in 1996, he said:

What are the priorities here? My list is:

1. Introduce competition in the domain name registry business.
2. Everything else.

So lets [sic] focus on how to accomplish the top priority.

General observation: Changing things is hard, introducing separate new things is easier.²⁷

Postel's comment reflected his frustration with the development of how the DNS was being managed: NSI had leveraged its position as the sole source of generic domain names for private gain whereas Postel had managed the DNS as an academic in the public interest. Postel's concerns were reflected throughout the Internet community and NSI encountered a significant amount of criticism.²⁸ Notably, the president of the Internet Society ("ISOC"), Donald Heath, accused NSI of "tak[ing] the low road" and valuing its market position above what was in "the

²⁷ Postel Priorities, July 3, 1996, available at <https://web.archive.org/web/19970227141952/Http://www.iiia.org/lists/newdom/current/0233.html>, [Ex. JZ-18], at 1-2.

²⁸ According to *Ruling the Root*, "[a] rift was growing between Network Solutions and the Internet technical community. The community had reacted uncomfortably to the acquisition of the InterNIC registry by a multibillion-dollar defense contractor in March 1996. Many of its participants did not approve of the commercialization of domain names generally". Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 6.3.2 (citation omitted).

best interest of the Internet”.²⁹ By 1997, the Internet community and the U.S. government were starting to consider proposals to break NSI’s monopoly.³⁰

6. THE ORIGIN OF THE NEW GTLD PROGRAM: DRAFT-POSTEL, THE GTLD-MOU, THE GREEN PAPER, AND THE WHITE PAPER

25. As noted above, Jon Postel was one of the first to suggest expanding the number of gTLDs as a mechanism to promote competition among registries. In 1996, Postel submitted a draft Request for Comment titled, “New Registries and the Delegation of International Top-Level Domains,” that became popularly known as the “**draft-postel**”.³¹ The draft proposed to create fifty new registries to compete with NSI and allow each to control three new gTLDs.³² Every year, ten new registries would be designated to manage new gTLDs in order to keep up with the demand for domain names.³³ Although the draft-postel was never adopted, it was the first of many proposals that suggested adding new gTLDs to the root as a means of introducing competition in the provision and supply of generic domain names.³⁴

26. Soon after the draft-postel was issued, eleven representatives from several Internet governance groups, led by ISOC and including Postel, formed the International Ad Hoc Committee (“**IAHC**”) to create a “global governance structure for the domain name system” as

²⁹ David S. Hilzenrath, “Network Solutions Dropped as Registrar of Internet Domains”, [Ex. JZ-15], at 2, “They’ve taken the low road and tried to protect their monopoly instead of taking a leadership role in the best interest of the Internet,” quoting Donald Heath.

³⁰ Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 7.3.1.

³¹ Jon Postel, New Registries and the Delegation of International Top Level Domains, June 1996, *available at* <https://tools.ietf.org/html/draft-postel-iana-itld-admin-01>, [Ex. JZ-19], at 6.

³² *Id.*, at 13.

³³ Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 6.3.2.

³⁴ *Id.*, Sec. 6.4.3.

an alternative to NSI.³⁵ The Committee’s ultimate proposal (the “gTLD-MOU”) differed from the draft-postel in that it planned to initially add only seven new gTLDs rather than hundreds and to create a “global monopoly registry” that would operate as a non-profit.³⁶ This registry would be owned by a group of registrars (the Council of Registrars (“CORE”))³⁷ that would share control over all of the gTLDs instead of dividing exclusive control of different gTLDs among various registries.³⁸

27. The gTLD-MOU was an important step for the Internet community. Before the gTLD-MOU, Internet governance groups had focused on developing technical standards, not policymaking. But it had become increasingly clear to members of the IAHC that the commercialization of Internet infrastructure, and NSI, in particular, posed a challenge to a free and open Internet. With the gTLD-MOU, the leaders of the Internet community recognized that policy neutrality was no longer a viable model and that they had to take a position that directly opposed NSI’s *existing* business model.³⁹ This should not be understood to reflect an opposition

³⁵ Other members of the IAHC were from the International Trademark Association, the World Intellectual Property Association, Intellectual property attorney, Keio University, Japan, WIDE Project, Telstra, Australia education and research Internet, IBM Israel, International Telecommunication Union, Internet Engineering Task Force, and the National Science Foundation. *See id.*, Sec. 7.1 (citation omitted).

³⁶ The gTLD-MoU defined a new role in the domain name registration process called a registrar in an attempt to separate the “wholesale” function of operating the registry database from the “retail” function of selling second-level domains to consumers. *Id.* A TLD’s registry is responsible for maintaining databases of all of the domain names allocated under that TLD. Registrars facilitate the process of selling domains within a TLD’s namespace to companies and individuals. A registry can serve as the registrar for the TLDs under its control, or it may delegate that function to other registrars (GoDaddy, etc.). In effect, registries function as domain name wholesalers whereas registrars function as consumer-facing retailers. *See* GoDaddy, *Domain Help: What is the difference between a registry, registrar and registrant?*, available at <https://www.godaddy.com/help/what-is-the-difference-between-a-registry-registrar-and-registrant-8039>, [Ex. JZ-20].

³⁷ Domain Names, *gTLD-MoU*, available at <https://cs.stanford.edu/people/eroberts/cs201/projects/1997-98/domain-names/proposals/gtldmou.html>, [Ex. JZ-21].

³⁸ Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 7.1.

³⁹ *Id.*, Sec. 7.2.

to NSI in general. In fact, the IAHC publicly encouraged NSI to join the Council of Registrars so that it could fully participate in a new, more evenly distributed world of gTLD administration.⁴⁰

28. NSI, however, refused to participate in this effort to democratize the Internet's infrastructure.⁴¹ NSI thus walked away from the position of its former partner, the U.S. government. Up until the gTLD-MoU, the U.S. government had remained silent on struggles over domain name registration. However, the controversy over the gTLD-MoU, as well as the looming expiration of the NSF-NSI agreement, pushed a change of course.⁴² In 1997, the NSF announced that it did not intend to renew its agreement with NSI.

29. In a congressional subcommittee hearing, the deputy director of NSF, Joseph Bordogna, told the committee, "Today, the vast majority of domain name registrants are commercial interests whose activities go far beyond the research and education community that NSF is chartered to serve".⁴³ Bordogna later went on to emphasize that "the Internet community and others will eventually develop mechanisms to handle Internet registration without NSF's involvement".⁴⁴ In the same statement, Bordogna spoke highly of IAHC as one entity in the community that could address the domain name controversy, which IAHC Chair Donald Heath interpreted as support for IAHC's gTLD-MoU. "This is NSF's way of saying that domain names

⁴⁰ *Id.*, Sec. 7.1.

⁴¹ *Id.*, Sec. 7.2.1.

⁴² *Id.*, Sec. 7.4.

⁴³ Peyman Pejman, "NSF is tired of the name game", *GCN*, October 20, 1997, available at <https://gcn.com/articles/1997/10/20/nsf-is-tired-of-the-name-game.aspx>, [Ex. JZ-22], at 1, quoting Joseph Bordogna.

⁴⁴ "NSF bows out of domain names", *CNet*, April 23, 1997, available at <https://www.cnet.com/news/nsf-bows-out-of-domain-names/>, [Ex. JZ-23], at 1, quoting Joseph Bordogna.

should be handled by the IAHC,” said Heath.⁴⁵ Even without officially endorsing the gTLD-MoU, Bordogna made clear that NSF would no longer play a role in domain name assignment.

30. Once NSF decided against renewing the NSF-NSI agreement, Ira Magaziner, President Clinton’s chief Internet Policy Advisor, assumed responsibility to set policy regarding domain name assignment moving forward. Magaziner formed the Interagency Working Group (“**IWG**”) on domain names in March 1997. When NSF officially bowed out of its role overseeing management of the DNS, the working group, with the help of the U.S. Department of Commerce, designated the National Telecommunications and Information Administration (“**NTIA**”) to take NSF’s place and assist in determining what role the government should play in domain registration.⁴⁶

31. For Magaziner, NSI’s market dominance was a serious problem. He said in 1998 that for whatever solution was ultimately reached,

The goal should be to get NSI to a competitive playing field. I would welcome suggestions on how to create this competitive playing field, whereby other registries can compete and commence.⁴⁷

Magaziner further commented:

Right now, there already seems to be some consensus i.e. 1) people want the US government to move aside, 2) most agree that it should be a private not-for-profit organization and 3) most agree that NSI is a monopoly that should be ended and competition be introduced.⁴⁸

⁴⁵ *Id.*, quoting Donald Heath.

⁴⁶ ICANN, *ICANN History Project: Interview with Ira Magaziner*, October 19, 2017, video available at <https://www.icann.org/news/multimedia/3219>; Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 7.4.2.

⁴⁷ Senki, *ICANN History – Transcript of an open meeting, APRICOT 98, Manila, Philippines (Part One)*, February 17, 1998, available at <http://www.senki.org/icann-history-apricot-98-part-1/>, [Ex. JZ-24], at 5.

⁴⁸ *Id.*, at 8.

Magaziner’s IWG on domain names and the NTIA did not have any alternative solutions. The NTIA issued a “Request for Comment on the Registration and Administration of Internet Domain Names” that asked “for comment on the appropriate principles to use to guide the transition and on the proper organizational framework, and for suggestions on specific issues such as new TLD creation, shared vs. exclusive top-level domains, and trademark protection”.⁴⁹ The NITA received over 430 comments between July and August of 1997,⁵⁰ which were incorporated into a Notice of Proposed Rulemaking, technically called “A Proposal to Improve the Technical Management of Internet Names and Addresses” but more commonly known as the “**Green Paper**”.⁵¹

32. The Green Paper, released in 1998, officially rejected the draft-postel and the gTLD-MoU, proposing instead that a new, private, non-profit organization be established and take on domain registration responsibility, gTLD creation, and management of the root. To the disappointment of the IAHC, the Green Paper firmly established U.S. government control over the DNS and the transfer of responsibility to the to-be-determined new entity. However, like the IAHC and Jon Postel, the Green Paper emphasized the need for competition in the new system.

33. The Green Paper expressly stated, “we believe that consumers will benefit from competition among market oriented registries. . .”;⁵² however, some of the comments received in response to the Green Paper indicated some disagreement about what form competition

⁴⁹ Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 7.4.2.

⁵⁰ NTIA, Registration and Administration of Internet Domain Names -- Summary of Comments [Docket No. 97061337-7137-01], August 18, 1997, available at <https://www.ntia.doc.gov/other-publication/1997/registration-and-administration-internet-domain-names-summary-comments-docket>, [Ex. JZ-25], at 1-2.

⁵¹ Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 7.5.

⁵² NTIA, Improvement of Technical Management of Internet Names and Addresses; Proposed Rule [Docket No. 980212036-8036-01], February 20, 1998, available at <https://www.ntia.doc.gov/federal-register-notice/1998/improvement-technical-management-internet-names-and-addresses-proposed->, [Ex. JZ-26], at 7.

among registries should take.⁵³ Specifically, there was a debate as to whether competitive registries should be made non-profit, in order to avoid the type of price-gouging and domain price bait-and-switch that made people concerned about NSI's business model in the first place.⁵⁴ In an effort to recognize that there was a lack of consensus and to gather more information, the Green Paper proposal planned to create five new gTLDs and assign each to a new registry. By adding only a small number of gTLDs and authorizing a limited number of new registries, the Green Paper authors hoped to conduct a low-risk experiment in registry competition.⁵⁵

34. The process of transitioning from the "God of the Internet" model to one with robust competition was inevitably going to be messy. Businesses, governments, and the public at large had all witnessed the Internet's growth and wanted to have a say.⁵⁶ As a result, the volume and variety of stakeholders was extraordinary, and there was no way that the Green Paper would be able to satisfy all or even most of them, as many stakeholder positions seemed to be directly at odds with one another. Some groups lamented the slight drift from the

⁵³ *Id.*: "Some have made a strong case for establishing a market-driven registry system. Competition among registries would allow registrants to choose among TLDs rather than face a single option. Competing TLDs would seek to heighten their efficiency, lower their prices, and provide additional value-added services. Investments in registries could be recouped through branding and marketing. The efficiency, convenience, and service levels associated with the assignment of names could ultimately differ from one TLD registry to another. Without these types of market pressures, they argue, registries will have very little incentive to innovate. Others feel strongly, however, that if multiple registries are to exist, they should be undertaken on a not-for-profit basis. They argue that lack of portability among registries (that is, the fact that users cannot change registries without adjusting at least part of their domain name string) could create lock-in problems and harm consumers. For example, a registry could induce users to register in a top-level domain by charging very low prices initially and then raise prices dramatically, knowing that name holders will be reluctant to risk established business by moving to a different top-level domain".

⁵⁴ *Id.*

⁵⁵ *Id.*: "On balance, we believe that consumers will benefit from competition among market oriented registries, and we thus support limited experimentation with competing registries during the transition to private sector administration of the domain name system".

⁵⁶ Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Table 8.1.

theoretically more egalitarian, simple gTLD-MOU approach. Others simply resented the U.S. government's continued outsized role in the proposed processes.⁵⁷

35. The response to the Green Paper demonstrated to the U.S. government that it would better serve the cause by remaining in the background rather than leading the charge for change. In June 1998, after a series of negotiations with members of the Internet community and telecommunications companies, the Clinton Administration released a non-binding statement of policy titled, "The Management of Internet Names and Addresses," also known as the "**White Paper**".⁵⁸ Unlike the Green Paper, the White Paper did not dictate exactly how the new entity would function. Rather it left all major decisions, such as gTLD creation and the authorization of new registries, up to the yet-to-be-created organization.⁵⁹ Although the White Paper set general guidelines regarding the structure of the new organization, the authors refrained from establishing any set policy. Instead, the paper directed the private sector to produce a consensus-based proposal by the time that the NSI-NSF contract expired on September 30, 1998.⁶⁰ This approach largely removed the U.S. government from the process of creating what would become ICANN and pushed various stakeholders in the Internet community to come to some resolution on their own.

36. The release of the White Paper started conversations in the Internet community about the nature and policies of the new domain name registration entity. There were several

⁵⁷ *Id.*, Sec. 8.1.

⁵⁸ *Id.*

⁵⁹ NTIA, Statement of Policy on the Management of Internet Names and Addresses [Docket No. 980212036-8146.02], June 5, 1998, available at <https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses>, [Ex. JZ-27], at 23.

⁶⁰ Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 8.1.3.

groups working on different proposals in parallel: The International Forum on the White Paper, IANA and ISOC, the Boston Working Group (an offshoot of the International Forum on the White Paper), Network Solutions (which later teamed up with IANA),⁶¹ and the Open Root Server Confederation. The lack of collaboration among these groups generated considerable tension and meant that the government's expectation that it would receive exactly one consensus-based proposal failed.⁶² Instead, the government received multiple proposals, each produced by a different group within the community.

37. One of these groups, IANA-NSI led by Jon Postel, had moved forward with its proposed bylaws and articles of incorporation and had formed an initial board of directors for an organization called a "new IANA," which was later renamed the Internet Corporation for Assigned Names and Numbers ("ICANN").⁶³ Because there was no consensus on any proposal, the government solicited comments from the community on all the proposals it received in an attempt to make the process as inclusive as possible.

38. In the end, the government chose Postel's plan with NSI for the "new IANA" called ICANN.⁶⁴ On November 25, 1998, ICANN signed a MoU with the Department of Commerce in

⁶¹ "New Internet Government Forged", *Wired*, September 17, 1998, available at <https://www.wired.com/1998/09/new-internet-government-forged/>, [Ex. JZ-28].

⁶² Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 8.2.2.

⁶³ *Id.*, Sec. 8.2.

⁶⁴ *See id.*

which it agreed to take over DNS maintenance and name/number assignment functions.⁶⁵ And on December 24, 1998, ICANN officially assumed responsibility for the IANA function.⁶⁶

7. ICANN EMERGES, AND PROPOSES TO INTRODUCE NEW gTLDs AS A MEANS FOR CREATING COMPETITION

39. Once ICANN assumed responsibility, subject to its agreement with the NTIA, for performing the IANA functions, it quickly turned its attention to developing policies and programs that would introduce and promote competition for the provision and supply of generic domain names. Concerns about NSI specifically dominated the conversation. Mere months after ICANN's formation, Esther Dyson, the first Chairman of ICANN, accused NSI of attempting to thwart ICANN's initial efforts to introduce competition:

Of course, 'I want to protect my monopoly' is hardly an attractive slogan, and so NSI uses the language of democracy instead. In addition, [NSI] encourages and supports others who have a variety of reasons[,] economic, philosophical or political to be unhappy with the way the community consensus has formed.⁶⁷

40. Following the lead of its Chairman, ICANN took steps to reduce the influence of NSI on issues related to competition. These efforts took a variety of forms, but the first was to designate NSI as an accredited ICANN registry. Due to a renegotiation between the Department

⁶⁵ ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, November 25, 1998, *available at* <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en>, [Ex. JZ-29].

⁶⁶ ICANN, Transition Agreement between University of Southern California and Internet Corporation for Assigned Names and Numbers, February 25, 2012, *available at* <https://www.icann.org/resources/unthemed-pages/usc-icann-transition-2012-02-25-en>, [Ex. JZ-30].

⁶⁷ ICANN, Esther Dyson's Response to Ralph Nader's Questions, June 15, 1999, *available at* <https://www.icann.org/resources/unthemed-pages/dyson-response-to-nader-1999-06-15-en>, [Ex. JZ-31], at 2.

of Commerce and NSI, NSI remained the official gTLD registry. But as part of the new agreement, NSI was now required to allow nascent competing registrars to sell domain registrations.⁶⁸

41. Despite the entry of dozens of registrars, consumer choice at the retail registrar level did not create a competitive environment consistent with ICANN's Competition Mandate. Indeed, although ICANN's policies had greatly increased consumer choice at the registrar (retail) level, ICANN leadership continued to express concerns about the lack of competition at the registry (that is, wholesale) level. NSI was still the only gTLD registry and, in the growing consensus that was forming in the broader Internet community, the best way to introduce competition to NSI at the registry level was to create new gTLDs.⁶⁹

42. There was disagreement, however, about the number of new domains that should be created. Some argued that adding as many as 500 gTLDs would do more to increase competition whereas others worried that adding more than just a few domains would trigger trademark disputes and cause regulatory problems.⁷⁰ In response to the debate, the Domain

⁶⁸ As part of the new contract, NSI agreed to become an ICANN accredited registry and adhere to ICANN's policies and fees in exchange for continued operation as the registry for the .COM, .NET, and .ORG TLDs for four years. If NSI also separated its registry and registrar functions within the first 18 months of the arrangement, which would further break up its monopoly, NSI could extend its control of .COM, .NET, and .ORG for an additional four years or until ICANN designated a Successor Registry to assume NSI's responsibilities. Both parties also agreed not to "unreasonably restrain competition" and to re-evaluate the agreement if ICANN failed to recruit competing accredited registries or if NSI was "adversely affected from a competitive perspective". See ICANN, Registry Agreement between Internet Corporation for Assigned Names and Numbers and Network Solutions, Inc., November 10, 1999, *available at* <https://archive.icann.org/en/nsi/nsi-registry-agreement-04nov99.htm>, [Ex. JZ-32], at 4, 9; Prepared Testimony of Esther Dyson (Interim Chairman of the Board of Directors, ICANN), U.S. House of Representatives, Committee on Commerce, Subcommittee on Oversight and Investigations, July 22, 1999, *available at* <https://www.icann.org/resources/unthemed-pages/dyson-testimony-1999-07-22-en>, [Ex. JZ-33]; Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 9.3.

⁶⁹ ICANN, ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains, June 13, 2000, *available at* <https://archive.icann.org/en/meetings/yokohama/new-tld-topic.htm>, [Ex. JZ-34], II(C) (at 5-8).

⁷⁰ ICANN, Report (Part One) of Working Group C (New gTLDs) Presented to Names Council, March 21, 2000, *available at* <https://archive.icann.org/en/dnso/wgc-report-21mar00.htm>, [Ex. JZ-35], at 3.

Name Supporting Organization (“DNSO”), a supporting organization of ICANN,⁷¹ created a working group to devise a compromise. The working group suggested “that a limited number of new top-level domains be introduced initially and that the future introduction of additional top-level domains be done only after careful evaluation of the initial introduction”.⁷² The group also proposed creating several different types of new domains including “fully open top-level domains, restricted and chartered top-level domains with limited scope, non-commercial domains and personal domains”.⁷³ The DNSO proposal proved persuasive to the larger ICANN Board, which ultimately “invite[d] expressions of interest from parties seeking to operate and/or sponsor any new TLD registry”.⁷⁴

43. In August 2000, ICANN began accepting applications from registries to operate new gTLDs. Throughout the application process, ICANN leadership emphasized that the introduction of new gTLDs was “a proof of concept” intended to explore the technical, business, and legal impact of adding new gTLDs to the root. The criteria for evaluating applications clearly indicated that ICANN was not only intent on introducing competition for NSI: evaluators were instructed to consider how likely it was that the proposed gTLD and registry would be competitive with existing gTLDs given their “proposed pricing and service levels”.⁷⁵ They were also

⁷¹ ICANN has three supporting organizations that were formed to advise the ICANN board of directors on issues directly related to their area of expertise. The three supporting organizations include: the Generic Names Supporting Organization (the successor to the DNSO), the Country Code Names Supporting Organization, and the Address Supporting Organization. See ICANN, *Groups*, February 6, 2012, available at <https://www.icann.org/resources/pages/groups-2012-02-06-en>, [Ex. JZ-36].

⁷² DNSO Names Council Statement on new gTLDs, April 19, 2000, available at <http://www.dnso.org/dnso/notes/20000419.NCgtlds-statement.html>, [Ex. JZ-37].

⁷³ *Id.*

⁷⁴ ICANN, ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains, [Ex. JZ-34], at 13.

⁷⁵ ICANN, Criteria for Assessing TLD Proposals, August 15, 2000, available at <https://archive.icann.org/en/tlds/tld-criteria-15aug00.htm>, [Ex. JZ-38], at 3.

encouraged to think about whether the proposed gTLD would meet a consumer need not currently addressed by existing gTLDs, how it might impact competition among registrars, and whether the new gTLD could have a broader negative impact on competition by, for example, “lead[ing] to lock-in of domain-name holders[] so that inter-TLD competition is constrained”.⁷⁶

44. ICANN received 47 applications for over 200 different gTLD strings by the deadline in October 2000.⁷⁷ The application review team prepared a report explaining their evaluation of each application given the aforementioned criteria. It is apparent from the report that the evaluators were most concerned with a given applicant’s ability to compete with .COM. For that reason, the evaluators favored more established entities such as Afilias, LLC and NeuStar, Inc. that could show that they had the resources to operate a larger, more competitive gTLD and were willing to charge a registration price that was comparable to fees⁷⁸ charged by VeriSign, which, as mentioned earlier, had recently agreed to acquire NSI.⁷⁹ Smaller entities were therefore less likely to be granted a gTLD because their limited resources made it less likely that they would be able to compete with VeriSign.

45. After careful consideration of all of the proposals, on November 16, 2000, ICANN announced seven new gTLDs and their registries:⁸⁰

⁷⁶ *Id.*

⁷⁷ ICANN, TLD Applications Lodged, October 2, 2000 (corrected through October 10, 2000), available at <https://archive.icann.org/en/tlds/tld-applications-lodged-02oct00.htm>, [Ex. JZ-39].

⁷⁸ VeriSign charged \$6 per year to register a .COM domain. See ICANN, Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group, November 9, 2000, available at <https://archive.icann.org/en/tlds/report/report-iiib1a-09nov00.htm>, [Ex. JZ-40], at 12.

⁷⁹ *Id.*; “VeriSign buys Network Solutions in \$21 billion deal”, [Ex. JZ-16].

⁸⁰ ICANN, *Announcements: ICANN Announces Selections for New Top-Level Domains*, November 16, 2000, available at <https://www.icann.org/news/icann-pr-2000-11-16-en>, [Ex. JZ-41].

TLD	Operator(s)
.AERO	Societe Int'l de Telecommunications Aeronautiques SC, (SITA)
.BIZ	JVTeam, LLC
.COOP	National Cooperative Bus. Assn, (NCBA)
.INFO	Afilias, LLC
.MUSEUM	Museum Domain Management Association, (MDMA)
.NAME	Global Name Registry, Ltd.
.PRO	RegistryPro, Ltd.

8. .WEB IS THE BEST AND CLOSEST POTENTIAL COMPETITOR FOR VERISIGN

46. In addition to its high brand awareness, there are other reasons why .WEB is the strongest potential competitor of all new gTLDs: .WEB has a unique association with the Internet. The explosion in the mid 1990s of the World Wide Web⁸¹ lent massive semantic weight to the word “web”. As the public increasingly adopted web-based technology, “web” came to be something of a catch-all term for the services and technologies constituting the Internet as a whole.⁸² In the minds of many in the 1990s, everything from AOL to Compuserve was “on the web,” even if it had nothing to do with the web. It is worth noting, therefore, that the terminological power of “web” had and continues to have the potential to meaningfully compete with .COM as a standard-bearer for web-based entities.

⁸¹ While it is difficult to pinpoint the exact moment at which the World Wide Web was invented, it is the product of research and development originally conducted by Tim Berners Lee at CERN in the early 1990s. CERN, *Topic: The birth of the web*, available at <https://home.cern/topics/birth-web>, [Ex. JZ-42].

⁸² Milton L. Mueller, *Ruling the Root*, [Ex. JZ-8], Sec. 6.1.2.

47. At the time of the 2000 trial round, there was a lot of discussion about the purpose of .WEB. Many believed that .WEB would serve as an alternative to .COM because .COM still had a commercial connotation and .WEB could be used more broadly. On the message board where public commenters debated the merits of .WEB, one commenter listed eight reasons why the .WEB gTLD should be chosen:

Why .WEB ?

1. All inclusive (unlike .Mall, .Biz, .news, et)
2. Non controversial (Unlike .Sex, .XXX, .Aids, et)
3. Most recognized and well known prefix (unlike .nom, .wap, .ypi, .svc, etc)
4. Poses as a serious contender to the already depleted .com, .net, .org suffixes
5. .WEB registry has been in continuous operation since July 31, 1996
6. .WEB already holds a strong following and tremendous support all over the world, from Internet and non-Internet users
7. Image Online Design's .WEB application meets all of ICANN's criteria
8. Over 20,000 registrants have approved of .WEB a their TLD selection⁸³

Not only was .WEB thought to be one of the most generic of all potential gTLDs, its name was intrinsically related to the Internet, which, following the invention of the World Wide Web, was now commonly referred to as “**the Web**,” built around a series of “websites,” each with its own unique “web address”. As many argued at the time, and continue to do so today, .WEB, because

⁸³ ICANN, *Forum: Why IOD? Over 20,025 Reasons Why*, October 30, 2000, available at <https://forum.icann.org/tldapps/39FDEC910000D1C.html>, [Ex. JZ-43], at 1. .WEB was created in 1996 by Christopher Ambler of Image Online Design (“IOD”) specifically to compete with .COM. Ambler had launched a .WEB registry on an alternative root, and despite the limited appeal of that platform, had registered over 20,000 .WEB domains by 2000. Although IOD had applied for .WEB in 2000, ICANN had rejected IOD’s application on the grounds that IOD was not equipped to operate a major registry that would be “a vigorous competitor with .com.” See ICANN, *Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group*, November 9, 2000, available at <https://archive.icann.org/en/tlds/report/report-iiib1a-09nov00.htm>, [Ex. JZ-40].

of its strong association with the Web, would be a natural choice for users seeking to register a web address for their website, competing on equal footing with .COM.

48. Although Afilias had applied for and had been initially awarded .WEB in 2000, ICANN ultimately chose not award .WEB to Afilias, in part due to concerns about VeriSign's non-controlling ownership stake in Afilias. Indeed, certain Board members, including Chairman Dyson, had expressed some "queasiness" about awarding .WEB to an entity that was associated with VeriSign, the very entity that the .WEB registry was supposed to compete with.⁸⁴ Afilias was instead awarded .INFO, its second choice. Since that time, however, VeriSign has sold all of its equity in Afilias and there is no longer any ownership link between the two companies.

49. WEB would not be available for acquisition for another 12 years. In 2012, .WEB again attracted the most applications and the greatest interest from the community. Indeed, the strong association between .WEB and the Web was cited by multiple applicants for .WEB in 2012 as a reason why the proposed gTLD would be a strong competitor for VeriSign. For example, Web.com wrote:

In looking to expand the gTLD landscape beyond the existing robustness of gTLD offerings, an easy-to-remember and intuitively logical gTLD such as .web is a relevant addition. Consumers will instantly understand that a .web domain is an Internet website thereby ensuring quick adoption by users. Due to its ubiquitous nature, .web will compete directly with all gTLDs, both existing

⁸⁴ Patrick Thibodeau, ".com gets company; controversy flares," *Computer World*, November 20, 2000, available at <https://www.computerworld.com/article/2589104/enterprise-applications/-com-gets-company---controversy-flares.html>, [Ex. JZ-49], at 3 ("Particularly controversial was a proposal by Afilias LLC, an organization that includes 19 registrars, including Herndon, Va.-based Network Solutions Inc., the domain registration unit of VeriSign Inc., to run the registry for a .web domain. Dyson said the formation of the Afilias consortium could potentially impede competition among domain names. "The whole thing gives me a queasy feeling, is the short way to say it," she said.").

ones and others to be approved by ICANN. It has universal appeal to anyone looking to operate on the World Wide Web.⁸⁵

9. VERISIGN'S PRESUMPTIVE ACQUISITION OF .WEB RUNS COUNTER TO ICANN'S COMPETITION MANDATE AND IS INCONSISTENT WITH THE INTENT OF THE NEW GTLD PROGRAM

9.1 *The Meaning of ICANN's Competition Mandate*

50. As a U.S. government official testified in 2011, “[s]ince its inception in 1998, ICANN has been charged with promoting competition in the registration of domain names while ensuring the security and stability of the DNS”.⁸⁶ As former ICANN Chairwoman Esther Dyson would later recall during her Senate testimony at the same hearing: “***our primary mission was to break the monopoly of Network Solutions*** (which managed .com among other registries), first by separating the functions of registry (which manages the list of names in a particular top-level domain) and registrar (which resells second-level domain names to the public)”.⁸⁷ Yet, as Dyson conceded, even following ICANN’s separation of registry and registrar functions and two trial rounds of the New gTLD Program, “it’s fair to say that .com retained its first-mover advantage as by far the leading TLD”.⁸⁸ This view was shared by ICANN institutionally. In approving the New gTLD Program, the ICANN Board conceded that, “[t]o date, ICANN has not created meaningful competition at the registry level”.⁸⁹

⁸⁵ ICANN, New gTLD Application Submitted to ICANN by Web.com Group, Inc., Application ID: 1-1009-97005, June 13, 2012, [Ex. JZ-44], at 7.

⁸⁶ Statement of Fiona M. Alexander (Associate Administrator Office of International Affairs, National Telecommunications and Information Administration, U.S. Department of Commerce) at December 2011 Senate Hearing, [Ex. JZ-2], at 4. See also fn. 1, *supra*.

⁸⁷ Statement of Esther Dyson (Founding Chairman of ICANN, 1998-2000) (“**Dyson Statement**”) at December 2011 Senate Hearing, [Ex. JZ-2], at 46 (emphasis added).

⁸⁸ *Id.*

⁸⁹ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, June 21, 2011, [Ex. JZ-45], at 27.

51. For this reason, ICANN’s Competition Mandate required, and indeed envisioned, that ICANN must do more. Kurt Pritz, ICANN Senior Vice-President, testified at the U.S. Senate’s hearing on the New gTLD Program that the New gTLD Program was intrinsically intertwined with ICANN’s Competition Mandate: “The launch of the new gTLD program was part of ICANN’s founding mandate when it was formed by the U.S. Government over 12 years ago. That mandate is to introduce competition and choice into the domain name system in a stable and secure manner”.⁹⁰ Pritz would go on to specifically testify that the “founding mandate for ICANN, included within the United States Government’s ‘White Paper’ . . . is to create competition in the domain name market and specifically[] to ‘oversee policy for determining the circumstances under which new TLDs are added to the root system.’”⁹¹ ICANN’s Board agreed. In explaining its rationale to approve the launch of the New gTLD Program, the Board wrote:

The launch of the new gTLD program is in fulfillment of a core part of ICANN’s Bylaws: the introduction of competition and consumer choice in the DNS. . . . This decision represents ICANN’s continued adherence to its mandate to introduce competition in the DNS, and also represents the culmination of an ICANN community policy recommendation of how this can be achieved.⁹²

52. ICANN’s Board was crystal clear that the purpose of the New gTLD Program was to create competition for VeriSign. As the ICANN Board wrote in approving the launch of the full round of the New gTLD Program in 2011:

- “When ICANN was formed in 1998 . . . [its] purpose was to promote competition in the DNS marketplace, including by developing a process for the introduction of new generic top-level domains. . . . The introduction of new top-level domains into the DNS has thus been a fundamental part of ICANN’s mission from its

⁹⁰ Pritz Statement at December 2011 Senate Hearing, [Ex. JZ-2], at 8.

⁹¹ *Id.*, at 11.

⁹² ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, [Ex. JZ-45], at 7.

inception, and was specified in ICANN's [MOU] with the U.S. Department of Commerce".⁹³

- "ICANN's Bylaws and other foundational documents articulate that the promotion of competition in the registration of domain names is one of ICANN's core missions. See ICANN Bylaws, Article 1, Section 2.6. One part of this mission is fostering competition by allowing additional Top Level Domains ("TLDs") to be created".⁹⁴
- "ICANN's mission statement and one of its founding principles is to promote competition. The expansion of gTLDs will allow for more innovation and choice in the Internet's addressing system".⁹⁵
- ICANN's "economic studies indicated that . . . the introduction of new gTLDs will bring benefits in the form of increased competition, choice and new services to Internet users".⁹⁶
- "A broad consensus was achieved [within the GNSO] that new gTLDs should be added to the root in order to stimulate competition further . . .".⁹⁷
- "[A]n important objective of the new [g]TLD process is to diversify the namespace, with different registry . . . models . . .".⁹⁸
- "[T]he addition of new gTLDs to the root in order to stimulate competition at the registry level[]".⁹⁹
- "The launch of the new gTLD program is anticipated to result in improvements to consumer choice and competition in the DNS".¹⁰⁰
- "New gTLDs would promote consumer welfare".¹⁰¹

⁹³ *Id.*, at 4.

⁹⁴ *Id.*, at 79.

⁹⁵ *Id.*, at 114.

⁹⁶ *Id.*, at 4.

⁹⁷ *Id.*, at 9.

⁹⁸ *Id.*, at 12.

⁹⁹ *Id.*, at 14.

¹⁰⁰ *Id.*, at 17.

¹⁰¹ *Id.*, at 119.

53. In its planning process for the New gTLD Program, ICANN retained Dennis Carlton, the former Deputy Attorney General for Economic Analysis for the Antitrust Division of the U.S. Department of Justice, to study ICANN's proposal to introduce new gTLDs as a means to "promote competition".¹⁰² Dr. Carlton opined that: "ICANN's plan to introduce new gTLDs is likely to benefit consumers by facilitating entry which would be expected to both bring new services to consumers and *mitigate market power associated with .com* and the other major TLDs and to increase competition".¹⁰³ Dr. Carlton's views are consistent with Ms. Dyson's interpretation of ICANN's Competition Mandate, namely that ICANN's "primary mission was to break the monopoly of Network Solutions".¹⁰⁴

54. ICANN's Competition Mandate, which is intrinsic to ICANN's mission, must therefore be considered and reflected in all significant decisions and actions taken by ICANN: given the choice, ICANN must pursue the option that "promotes" competition as opposed to an option that lessens competition or even simply preserves the status quo. As the ICANN Board observed:

ICANN's "default" position should be for creating more competition as opposed to having rules that restrict the ability of Internet stakeholders to innovate. New gTLDs offer new and innovative opportunities to Internet stakeholders.¹⁰⁵

¹⁰² ICANN, *Rationale for Board Decision on Economic Studies Associated with the New gTLD Program*, March 21, 2011, available at <https://www.icann.org/en/system/files/bm/rationale-economic-studies-21mar11-en.pdf>, [Ex. JZ-46], at 8.

¹⁰³ Dennis Carlton (Compass Lexecon), Report regarding ICANN's Proposed Mechanism for Introducing New gTLDs, June 5, 2009, available at <https://archive.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf>, [Ex. JZ-47], at ¶ 23 (emphasis added).

¹⁰⁴ Dyson Statement at December 2011 Senate Hearing, [Ex. JZ-2], at 46 (emphasis added).

¹⁰⁵ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, [Ex. JZ-45], at 62.

9.2 VeriSign's Presumptive Acquisition of .WEB Violates ICANN's Competition Mandate

55. As Esther Dyson succinctly summarized in her Senate testimony, ICANN's mission to promote competition has been specifically tied to breaking the NSI/VeriSign monopoly—with so far mixed results. Further to and as an intrinsic element of its Competition Mandate, ICANN created a process to add new gTLDs to the root: the New gTLD Program. The primary purpose of the New gTLD Program was create “meaningful competition at the registry level”.¹⁰⁶ By VeriSign's own survey, from the end of 2017, .COM had 131.9 million registrations. The next most popular gTLD is VeriSign's .NET at 14.5 million registrations or 11% of the size of the .COM registry.¹⁰⁷ The third most popular gTLD is .ORG, still predominately used by non-profits in accordance with its original purpose, with only 10.3 million registrations.¹⁰⁸

56. ICANN's procedures, decisions and actions taken in connection with its New gTLD Program therefore must be evaluated in the broader context of ICANN's Competition Mandate. In that regard, ICANN's decision to award the exclusive license to operate the .WEB registry to NDC/VeriSign is inconsistent with ICANN's obligations under its Competition Mandate. .WEB is the best and closest potential competitor to VeriSign. Allowing this unique asset to fall under VeriSign's control does nothing to promote competition. If anything, ICANN's proposed course of conduct will only strengthen VeriSign's market position, contrary to the objectives of the New gTLD Program.

¹⁰⁶ *Id.*, at 27.

¹⁰⁷ Verisign, Fourth Quarter 2017 Domain Report, *The Domain Name Industry Brief*, Vol. 15, Issue 1, February 2018, [Ex. JZ-48], at 2.

¹⁰⁸ *Id.*

Jonathan L. Zittrain

JONATHAN ZITTRAIN

Date: September 26, 2018

GLOSSARY

CORE – Council of Registries. An association of domain name registries originating from the gTLD-MoU.

DNS – Domain Name System. A distributed hierarchical database that functions as a directory for the Internet, mapping human-readable domain names to computer-readable numerical IP addresses. For example, an IP address for the Google search website at www.google.com is 216.58.193.196.

Domain name – A string of characters which defines a section of the Internet namespace. A domain name comprises a top level domain (TLD) (e.g., .com) and a unique second level domain (SLD) (e.g., google). Thus, “google.com” is the domain name for the Google search website.

DNSO – Domain Name Supporting Organization. An ICANN supporting organization which, among other activities, generated early proposals for gTLD expansion.

GNSO – Generic Names Supporting Organization. Successor to the DNSO. ICANN supporting organization responsible for monitoring and developing proposals for ICANN’s management of gTLDs.

gTLD – Generic Top-Level Domain (e.g., .COM, .NET, .WEB). Only gTLDs may be used by all users, regardless of geography and purpose. Some gTLDs may be less “generic” than others, such as location-specific gTLDs (e.g., .NYC); sponsored gTLDs made on behalf of a specific community (e.g., .EDU) or otherwise have limited relevance beyond a particular industry or subject (e.g., .WINE).

gTLD-MOU – Generic Top-Level Domain Memorandum of Understanding. A document prepared by the IAHC that proposed the introduction of new gTLDs as a mechanism for introducing competition for the provision and supply of generic domain names. Many of the principles and policies outlined in gTLD-MOU were formally embraced by the U.S. government in the Green Paper and the White Paper, as well as by ICANN in its New gTLD Program.

IAHC – International Ad Hoc Committee. A group formed from a wide range of Internet stakeholders including ISOC, IANA, and WIPO to create proposals for the introduction of new TLDs. While it was initially largely dismissed by the U.S. government, the group’s ultimate proposal (the gTLD-MoU) contained many of the principles that would later find a place in the Green Paper and White Paper, and, ultimately, the New gTLD Program.

IANA – Internet Assigned Numbers Authority. An ICANN affiliate responsible for the allocation of several key numerical identification and addressing systems, including IP addresses. Originally administered by Jon Postel, IANA traces its history to the early days of the pre-ICANN Internet.

ICANN – Internet Corporation for Assigned Names and Numbers. A non-profit founded in 1998 which, among other responsibilities, coordinates numerous aspects of the DNS. ICANN is also responsible for authorizing and managing the introduction of new gTLDs.

IETF – Internet Engineering Task Force. A group under the umbrella of the ISOC that develops Internet standards.

IOD – Image Online Design. A private company which has repeatedly claimed the rights to .WEB, running its own .WEB registry on an alternate root not approved by ICANN. It has repeatedly and unsuccessfully applied for ownership of the .WEB gTLD.

IP address – Internet Protocol address. A number assigned to a networked device which serves as its address on the Internet, allowing it to be identified and to send and receive web traffic.

ISOC – Internet Society. A group formed in 1992 to contribute to the development and governance of the Internet. Umbrella for the unincorporated Internet Engineering Task Force (IETF), which develops Internet standards.

IWG - Interagency working group. The government working group created by the U.S. Clinton Administration to set policy for domain name assignment.

Nameserver – A server within the DNS hierarchy which either provides the IP address corresponding to a domain name or otherwise points to another nameserver at a lower level of the hierarchy.

NSF – National Science Foundation. A U.S. government agency tasked with supporting scientific research and development efforts. Supported the development of the early Internet through grants and logistical coordination but abdicated its central role in Internet governance prior to the rise of ICANN.

NSI – Network Solutions, Inc. A technology company which held an NSF-sanctioned monopoly over domain name registration services from 1993 to 1998. Became the target of significant criticism from the Internet community and was acquired by VeriSign in 2000 for \$21 billion.

NTIA – National Telecommunications and Information Administration. A U.S. government agency tasked by the Clinton Administration with developing a plan for scalable and competition-friendly Internet governance. Its work led to the publication of the Green Paper and White Paper, which laid the groundwork for the introduction of ICANN.

Registry – The registry operator (such as VeriSign or Afilias) for a gTLD is responsible for maintaining a database of all domains allocated under that gTLD.

Registrar – A registrar contracts with one or more registries to sell domains within gTLD namespaces to individuals and organizations. A registry may act as its own registrar, or it may empower other registrars to sell domains within its namespace in exchange for compensation.

Registrant – A registrant is an individual or organization which contracts with a registrar to purchase control of a domain name for its use.

RFC – Request for Comment. A type of document published by the Internet Engineering Task Force to foster public discussion and deliberation on proposed changes or additions to the structures and protocols governing the Internet.

Root – The authoritative “root” of the Internet is a collection of mirrored servers administered by a range of governmental and civilian organizations. Root servers provide authoritative nameserver listings for gTLDs, pointing to the uppermost rung of the DNS hierarchy and allowing users to access domains within the namespaces of those gTLDs. In other words, an authoritative root nameserver would provide a user looking to access the Google search home page with instructions for accessing the “.com” nameservers, which would in turn provide instructions for accessing “google.com”. ICANN is responsible for managing the list of gTLDs in the root zone.

SLD – Second-Level Domain. The second highest rung in the DNS hierarchy, located to the left of the TLD string (e.g., the “example” in <https://www.example.com>).

TLD – Top-Level Domain. The uppermost rung in the DNS hierarchy, TLDs can be found at the rightmost end of a URL (e.g., the “com” in <https://www.example.com>). So that the DNS can function, the manager of a TLD’s registry is responsible for maintaining a database of the domains (such as “example,” in this case) registered under that TLD.

URL – Uniform Resource Locator. A structured identifier for referencing the location of a resource on the Internet (e.g., <https://www.example.com/page.html>). URLs can be used to retrieve web pages, files, and other types of content.

WIPO – World Intellectual Property Organization. A specialized agency of the United Nations tasked with supporting intellectual property rights on a global level. Participated as a stakeholder in debates surrounding Internet governance.

LIST OF EXHIBITS

Exhibit No.	Description
JZ-1	Jonathan Zittrain <i>Curriculum Vitae</i>
JZ-2	S. Hrg. 112-394, ICANN’s Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112 th Congress, First Session, December 8, 2011, <i>available at</i> https://www.gpo.gov/fdsys/pkg/CHRG-112shrg74251/html/CHRG-112shrg74251.htm
JZ-3	J.P.Morgan, <i>VeriSign (VRSN US): DoJ Clears Way for VRSN to Close .web Purchase</i> , January 10, 2018
JZ-4	Matthew Lasar, “Any lawful device: Revisiting Carterfone on the eve of the Net Neutrality vote”, <i>Ars Technica</i> , December 13, 2017, <i>available at</i> https://arstechnica.com/tech-policy/2017/12/carterfone-40-years/
JZ-5	Cricket Liu and Paul Albitz, <i>DNS and BIND</i> (5th ed. 2006)
JZ-6	Keith Shaw, “What is DNS and how does it work?”, <i>Network World</i> , April 11, 2018, <i>available at</i> https://www.networkworld.com/article/3268449/internet/what-is-dns-and-how-does-it-work.html
JZ-7	Jon Postel and J. Reynolds, Network Working Group, Request for Comments: 920, Domain Requirements, October 1984, <i>available at</i> https://tools.ietf.org/pdf/rfc920.pdf
JZ-8	Milton L. Mueller, <i>Ruling the Root: Internet Governance and the Taming of Cyberspace</i> (2006)
JZ-9	“Fallout over Unsanctioned DNS Test”, <i>Wired News Report</i> , May 2, 1999, <i>available at</i> https://www.wired.com/1998/02/fallout-over-unsanctioned-dns-test/
JZ-10	“The Internet: A peace of sorts”, <i>The Economist</i> , November 17, 2005, <i>available at</i> https://www.economist.com/node/5178973
JZ-11	Heather N. Mewes, “Memorandum of Understanding on the Generic Top-Level Domain Name Space of the Internet Domain Name System”, 13(1) <i>Berkeley Technology Law Journal</i> 235 (1998)
JZ-12	ICANN, Cooperative Agreement between NSI and U.S. Government, Agreement No. NCR-9218742, January 1, 1993, <i>available at</i> https://archive.icann.org/en/nsi/coopagmt-01jan93.htm

Exhibit No.	Description
JZ-13	Craig Simon, The Technical Construction of Globalism: Internet Governance and the DNS Crisis, A case study for <i>Bandwidth Rules</i> , October 1998, available at https://web.archive.org/web/20000815211830/http://www.flywheel.com/ircw/dnsdraft.html
JZ-14	ICANN's Early Days, <i>ICANN History Project</i> , available at https://www.icann.org/en/history/early-days
JZ-15	David S. Hilzenrath, "Network Solutions Dropped as Registrar of Internet Domains", <i>The Washington Post</i> , April 24, 1997, available at https://www.washingtonpost.com/archive/business/1997/04/24/network-solutions-dropped-as-registrar-of-internet-domains/dafcf9ef-e875-4d68-83b1-232823d8aadf/?utm_term=.a645a444e70a
JZ-16	"VeriSign buys Network Solutions in \$21 billion deal", <i>CNet</i> , January 2, 2002, available at https://www.cnet.com/news/verisign-buys-network-solutions-in-21-billion-deal/
JZ-17	Postel Note, September 15, 1995, available at https://web.archive.org/web/20020624231348/https://wia.org/pub/postel-iana-draft13.htm
JZ-18	Postel Priorities, July 3, 1996, available at https://web.archive.org/web/19970227141952/Http://www.iiia.org/lists/newdom/current/0233.html
JZ-19	Jon Postel, New Registries and the Delegation of International Top Level Domains, June 1996, available at https://tools.ietf.org/html/draft-postel-iana-itld-admin-01
JZ-20	GoDaddy, <i>Domain Help: What is the difference between a registry, registrar and registrant?</i> , available at https://www.godaddy.com/help/what-is-the-difference-between-a-registry-registrar-and-registrant-8039
JZ-21	Domain Names, <i>gTLD-MoU</i> , available at https://cs.stanford.edu/people/eroberts/cs201/projects/1997-98/domain-names/proposals/gtldmou.html
JZ-22	Peyman Pejman, "NSF is tired of the name game", <i>GCN</i> , October 20, 1997, available at https://gcn.com/articles/1997/10/20/nsf-is-tired-of-the-name-game.aspx
JZ-23	"NSF bows out of domain names", <i>CNet</i> , April 23, 1997, available at https://www.cnet.com/news/nsf-bows-out-of-domain-names/
JZ-24	Senki, ICANN History – Transcript of an open meeting, APRICOT 98, Manila, Philippines (Part One), February 17, 1998, available at http://www.senki.org/icann-history-apricot-98-part-1/

Exhibit No.	Description
JZ-25	NTIA, Registration and Administration of Internet Domain Names -- Summary of Comments [Docket No. 97061337-7137-01], August 18, 1997, <i>available at</i> https://www.ntia.doc.gov/other-publication/1997/registration-and-administration-internet-domain-names-summary-comments-docket
JZ-26	NTIA, Improvement of Technical Management of Internet Names and Addresses; Proposed Rule [Docket No. 980212036-8036-01], February 20, 1998, <i>available at</i> https://www.ntia.doc.gov/federal-register-notice/1998/improvement-technical-management-internet-names-and-addresses-proposed-
JZ-27	NTIA, Statement of Policy on the Management of Internet Names and Addresses [Docket No. 980212036-8146.02], June 5, 1998, <i>available at</i> https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses
JZ-28	"New Internet Government Forged", <i>Wired</i> , September 17, 1998, <i>available at</i> https://www.wired.com/1998/09/new-internet-government-forged/
JZ-29	ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, November 25, 1998, <i>available at</i> https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en
JZ-30	ICANN, Transition Agreement between University of Southern California and Internet Corporation for Assigned Names and Numbers, February 25, 2012, <i>available at</i> https://www.icann.org/resources/unthemed-pages/usc-icann-transition-2012-02-25-en
JZ-31	ICANN, Esther Dyson's Response to Ralph Nader's Questions, June 15, 1999, <i>available at</i> https://www.icann.org/resources/unthemed-pages/dyson-response-to-nader-1999-06-15-en
JZ-32	ICANN, Registry Agreement between Internet Corporation for Assigned Names and Numbers and Network Solutions, Inc., November 10, 1999, <i>available at</i> https://archive.icann.org/en/nsi/nsi-registry-agreement-04nov99.htm
JZ-33	Prepared Testimony of Esther Dyson (Interim Chairman of the Board of Directors, ICANN), U.S. House of Representatives, Committee on Commerce, Subcommittee on Oversight and Investigations, July 22, 1999, <i>available at</i> https://www.icann.org/resources/unthemed-pages/dyson-testimony-1999-07-22-en
JZ-34	ICANN, ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains, June 13, 2000, <i>available at</i> https://archive.icann.org/en/meetings/yokohama/new-tld-topic.htm

Exhibit No.	Description
JZ-35	ICANN, Report (Part One) of Working Group C (New gTLDs) Presented to Names Council, March 21, 2000, <i>available at</i> https://archive.icann.org/en/dnso/wgc-report-21mar00.htm
JZ-36	ICANN, <i>Groups</i> , February 6, 2012, <i>available at</i> https://www.icann.org/resources/pages/groups-2012-02-06-en
JZ-37	DNSO Names Council Statement on new gTLDs, April 19, 2000, <i>available at</i> http://www.dnso.org/dnso/notes/20000419.NCglds-statement.html
JZ-38	ICANN, Criteria for Assessing TLD Proposals, August 15, 2000, <i>available at</i> https://archive.icann.org/en/tlds/tld-criteria-15aug00.htm
JZ-39	ICANN, TLD Applications Lodged, October 2, 2000 (corrected through October 10, 2000), <i>available at</i> https://archive.icann.org/en/tlds/tld-applications-lodged-02oct00.htm
JZ-40	ICANN, Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group, November 9, 2000, <i>available at</i> https://archive.icann.org/en/tlds/report/report-iiib1a-09nov00.htm
JZ-41	ICANN, <i>Announcements: ICANN Announces Selections for New Top-Level Domains</i> , November 16, 2000, <i>available at</i> https://www.icann.org/news/icann-pr-2000-11-16-en
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JZ-43	ICANN, <i>Forum: Why IOD? Over 20,025 Reasons Why</i> , October 30, 2000, <i>available at</i> https://forum.icann.org/tldapps/39FDEC9100000D1C.html
JZ-44	ICANN, New gTLD Application Submitted to ICANN by Web.com Group, Inc., Application ID: 1-1009-97005, June 13, 2012
JZ-45	ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, June 21, 2011
JZ-46	ICANN, <i>Rationale for Board Decision on Economic Studies Associated with the New gTLD Program</i> , March 21, 2011, <i>available at</i> https://www.icann.org/en/system/files/bm/rationale-economic-studies-21mar11-en.pdf
JZ-47	Dennis Carlton (Compass Lexecon), Report regarding ICANN's Proposed Mechanism for Introducing New gTLDs, June 5, 2009, <i>available at</i> https://archive.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf
JZ-48	Verisign, Fourth Quarter 2017 Domain Report, <i>The Domain Name Industry Brief</i> , Vol. 15, Issue 1, February 2018

Exhibit No.	Description
JZ-49	Patrick Thibodeau, “.com gets company; controversy flares”, <i>Computer World</i> , November 20, 2000, available at https://www.computerworld.com/article/2589104/enterprise-applications/-com-gets-company---controversy-flares.html

EXHIBIT C-23

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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)	
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Claimant,)	
)	
vs.)	ICDR Case No.
)	01-18-0004-
INTERNET CORPORATION FOR)	2702
ASSIGNED NAMES AND NUMBERS,)	
)	
Respondent.)	
)	

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TUESDAY, AUGUST 4, 2020

ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME II (Pages 249-421)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
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(916) 922-5777 Sacramento	(800) 222-1231 Martinez	(702) 366-0500 Las Vegas	(800) 222-1231 Monterey
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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)
)
 Claimant,)
)
 vs.) ICDR Case No.
) 01-18-0004-
 INTERNET CORPORATION FOR) 2702
 ASSIGNED NAMES AND NUMBERS,)
)
 Respondent.)
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TUESDAY, AUGUST 4, 2020
ARBITRATION HEARING HELD BEFORE
PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME II (Pages 249-421)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR

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1 CALIFORNIA, CALIFORNIA, AUGUST 4, 2020

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3 ARBITRATOR BIENVENU: Welcome, everyone,
4 to Day 2 of this hearing. Can you hear me?

5 MR. LITWIN: Yes, Mr. Chairman.

6 MR. ENSON: Yes.

7 ARBITRATOR BIENVENU: Welcome, everyone.
8 We parted yesterday with Mr. Ali requesting an
9 opportunity to say a very brief word. I believe it
10 is in response to a comment by Mr. Johnston.

11 So Mr. Ali.

12 MR. ALI: Thank you, Mr. Chairman. Good
13 morning to you and to Mr. Chernick and good
14 afternoon to Professor Kessedjian.

15 Yesterday, Mr. Chairman, Mr. Johnston
16 referred to the fact that I had used the word
17 "bribery" and alluded to or, in fact, said that I
18 accused ICANN or VeriSign of bribery or that our
19 client Afilias had.

20 I think that he misspoke or misremembered
21 what was on the transcript. I would simply ask
22 that Mr. Johnston be directed to review the
23 transcript carefully to verify that I did not make
24 any such accusations or, in fact, use the word
25 "bribery" or "blackmail" or anything of that

1 nature.

2 I ask this because all of this entire
3 transcript is going to be made public, with some
4 appropriate redactions.

5 However, knowing that it will be made
6 public and that people can get up to all sorts of
7 mischief, I would be grateful if Mr. Johnston could
8 retract his statement or make whatever comment he
9 sees fit, and I'll respond thereafter. Thank you.

10 ARBITRATOR BIENVENU: My recollection is
11 that Mr. Johnston was looking for the word that you
12 had used. And if my memory serves me right, I
13 think the word he was looking for but couldn't
14 remember was the word "sinister" that Mr. Enson had
15 used during one of our procedural hearings.

16 But what I propose is that Mr. Johnston
17 take the next break to consider your request and
18 maybe ask to briefly address the Tribunal on this
19 question when we resume after the first break.

20 But your comments are noted and are now on
21 the record, Mr. Ali.

22 MR. ALI: Thank you.

23 MR. JOHNSTON: If I might comment, I have
24 looked at the transcript, and because Mr. Ali
25 raised this yesterday afternoon, and what my

1 argument related to is what I do regard as a
2 reckless accusation without any support that ICANN
3 is a regulator and specifically Ms. Willett, of
4 course, did not ask and the policy was don't ask,
5 not tell, quote, when you're getting millions of
6 dollars to not say anything.

7 And that comment by Mr. Ali was at Page
8 49, Lines 13 through 18 of the rough transcript,
9 Line 13 through Line 18 on Page 49 -- 46 of the
10 final last night, I guess, transcript.

11 The Panel Chair is also correct that
12 Mr. Ali did accuse and adopt a word used in another
13 context by Mr. Enson to accuse Mr. Enson and I of
14 having a sinister conversation, which I also
15 addressed yesterday.

16 MR. ALI: Mr. Chairman, if I may respond.
17 This is going on longer than I would have expected.
18 I would have thought that Mr. Johnston would have
19 done the right thing. Obviously I did not use the
20 word "bribery," number one.

21 Number two, Mr. Johnston might actually
22 want to read the transcript carefully because what
23 I was referring to, don't ask, don't tell, that was
24 money that was being paid to NDC rather than --

25 ARBITRATOR CHERNICK: Can you speak up,

1 please, Mr. Ali?

2 MR. ALI: I was referring to money that
3 was being paid to NDC. With respect to the first
4 point, would you like me to repeat it again whoever
5 said they couldn't hear me?

6 ARBITRATOR CHERNICK: Not necessary.

7 MR. ALI: So my second point was, again,
8 to clarify the context in which a 15 million --
9 when I was referring to the 15 million. So -- and
10 the third point in terms of the inappropriateness
11 of this phone call at a point in time when ICANN
12 didn't know -- apparently didn't know about the DAA
13 but nonetheless felt it was appropriate for
14 counsel, litigation counsel to call VeriSign's
15 litigation counsel to request information as
16 opposed to the actual applicant is something that I
17 stand by. Thank you.

18 ARBITRATOR BIENVENU: Very well. So we
19 begin, then, with the witness evidence, and the
20 first witness called is Ms. J. Beckwith Burr.

21 Ms. Burr, are you with us? I don't see
22 you on my screen.

23 Good morning, Ms. Burr, this is Pierre
24 Bienvenu. I serve as the Chair of the Panel
25 hearing in this case. I am joined by my colleagues

1 Catherine Kessedjian and Richard Chernick. Now, I
2 cannot see you on my screen.

3 JD, could you help us out here?

4 (Discussion off the record.)

5 ARBITRATOR BIENVENU: So good morning,
6 Ms. Burr, and welcome. Ms. Burr, you have filed in
7 relation to this case a witness statement dated
8 31st May 2019.

9 THE WITNESS: That's correct.

10 ARBITRATOR BIENVENU: At the end of this
11 statement, you swear that the content of the
12 statement is true and correct?

13 THE WITNESS: Correct.

14 ARBITRATOR BIENVENU: May I ask you,
15 Ms. Burr, in relation to the evidence that you will
16 give today to this panel, likewise, solemnly to
17 affirm that it will be the truth, the whole truth
18 and nothing but the truth.

19 THE WITNESS: I do.

20 ARBITRATOR BIENVENU: Thank you very much.

21 Mr. Enson, your witness. Please proceed.

22 MR. ENSON: Thank you very much. Good
23 morning, Ms. Burr.

24 THE WITNESS: Morning.

25 MR. ENSON: We are going to try to do this

1 anyway, is put a copy of your witness statement up
2 on the screen so that you can see it.

3 THE WITNESS: That looks like the
4 document.

5 MR. ENSON: Okay. Ms. Burr, do you wish
6 to make any corrections to this witness statement
7 before we proceed?

8 THE WITNESS: No.

9 MR. ENSON: I'm sorry?

10 THE WITNESS: No.

11 MR. ENSON: Okay. Then, Mr. Chairman, we
12 tender Ms. Burr for cross-examination and reserve
13 time for redirect as it stands necessary.

14 ARBITRATOR BIENVENU: Thank you,
15 Mr. Enson. I believe the cross-examination will be
16 conducted by Mr. Litwin.

17 MR. LITWIN: That is correct,
18 Mr. Chairman.

19 ARBITRATOR BIENVENU: Good morning,
20 Mr. Litwin.

21 MR. LITWIN: Good morning.

22 ARBITRATOR BIENVENU: Please proceed.

23 //

24 //

25 //

1 CROSS-EXAMINATION

2 BY MR. LITWIN

3 Q. Good morning, Ms. Burr. My name is Ethan
4 Litwin. I am from the law firm of Constantine
5 Cannon here in New York City.

6 How are you today?

7 A. I am good.

8 Q. Okay. Can you please confirm that you
9 have received the exhibit bundle in a box or a
10 package or something of that sort?

11 A. I have received it.

12 Q. Okay. Can you please open it on camera,
13 please? Thank you.

14 MR. LITWIN: While you're doing that, I
15 would ask, Mr. Chairman, that the Panel confirm
16 with counsel for ICANN that counsel has also not
17 looked at the bundle for Ms. Burr yet.

18 MR. ENSON: I have not. I'd like to open
19 it up as the witness opens it up.

20 MR. LITWIN: Please do so. Thank you,
21 Mr. Enson.

22 THE WITNESS: I have got it.

23 ARBITRATOR BIENVENU: I can confirm that
24 we have received the -- "we" being the members of
25 the Tribunal -- have received the cross-examination

1 bundle.

2 MR. LITWIN: Thank you, Mr. Chairman.

3 Q. Ms. Burr, from time to time I will direct
4 your attention to a particular document in that
5 bundle. When I do that, I will refer to the tab
6 number in the binder that you have just opened.

7 And if you just open it to a random page,
8 you'll see that we have marked each page of each of
9 those documents in the lower right-hand corner with
10 a new, unique page number. So for everyone's
11 reference, I am going to refer to those page
12 numbers in the binder, even if the original page
13 number is different. That way it is clear in the
14 transcript and to everybody here today.

15 If you have any questions as to what page
16 I'm referring to, please ask and I will clarify.

17 A. Okay.

18 Q. So before we begin, Ms. Burr, I just
19 wanted to clarify one small point in your witness
20 statement. I would direct your attention to Page 7
21 of your witness statement, and at the end of
22 Paragraph 20, at the top of the page, I think you
23 write that, you know, "which had acquired
24 VeriSign." I think what you mean is that VeriSign
25 had acquired NSI.

1 So that second reference should be NSI; is
2 that correct?

3 A. Correct, yes.

4 Q. Okay. Now, Ms. Burr, what documents did
5 you review in preparation for your testimony here
6 today?

7 A. I reviewed my witness statement. I
8 reviewed a witness statement submitted by George
9 Sadowsky and Jonathan Zittrain. I looked through
10 the various requests and responses for independent
11 review.

12 Q. Anything --

13 A. And then a couple of other -- I looked at
14 the bylaws. I looked at the 2008 bylaws and the
15 current bylaws, and I looked at a couple of letters
16 from Afilias to Akram Atallah and I think a couple
17 of other documents that counsel may have shown me
18 during prep.

19 Q. Do you recall what those couple other
20 documents were?

21 A. I think there were -- there were two
22 letters from Afilias to Akram. I think I also
23 looked at a letter from the acting Attorney General
24 for Antitrust to the associate administrator of
25 NTIA.

1 Q. That's the 2008 letter from Ms. Garza?

2 I'm sorry, I didn't get your response.

3 A. Yes, that's correct.

4 Q. Okay. Did you review the Domain
5 Acquisition Agreement that was executed between
6 VeriSign and NDC in August of 2005 -- '15, rather?

7 A. I did not.

8 Q. Okay. Have you ever reviewed it?

9 A. No.

10 Q. Now, Ms. Burr, you're an attorney,
11 correct?

12 A. I am.

13 Q. Have you ever represented Afiliias or any
14 subsidiary in any capacity?

15 A. I think in 2007 or something like that
16 Afiliias and Neustar and one other participant hired
17 me to discuss some of the vertical integration
18 issues. I don't know if I was ever paid by
19 Afiliias, but I was certainly speaking with an
20 Afiliias representative.

21 Q. When did that representation -- I'll just
22 generally call it a representation -- conclude?

23 A. Honestly, over a decade ago.

24 Q. Okay. Have you ever represented VeriSign
25 or any of its subsidiaries or any of its affiliates

1 in any capacity?

2 A. I have never represented VeriSign. When I
3 was a partner at WilmerHale, I had partners who did
4 represent VeriSign. Again, I have not been at
5 WilmerHale since 2012, and that representation
6 would have been much earlier, in any case.

7 Q. Have you ever represented NU DOT CO or any
8 of its subsidiaries or affiliates in any capacity?

9 A. No.

10 Q. And you were employed by Neustar for
11 several years ending in 2019; is that correct?

12 A. That's correct.

13 Q. And Neustar is an Internet registry
14 company much like Afilias and VeriSign; is that
15 right?

16 A. Well, it was until yesterday. It sold its
17 registry business.

18 Q. Okay. At the time that you were there,
19 though, it was an Internet registry company?

20 A. Yes. I started there as chief privacy
21 counsel. So my -- my primary job was deputy job
22 counsel, chief privacy counsel. I started there in
23 June of 2012.

24 Q. And I guess until yesterday Neustar was
25 one of the larger Internet registry companies; is

1 that right?

2 A. Yes.

3 Q. And, in fact, Neustar was identified as
4 the entity that would be providing back-end
5 registry services in NDC's .WEB application; is
6 that right?

7 A. I believe that's correct. I was not
8 involved in those contracting documents, but I did
9 come to learn that after.

10 Q. When you say "after," what do you mean?

11 A. Well, once I -- once I joined the Board, I
12 looked at all of the back end, all of the
13 registry -- actually it was before that, as I was
14 going on the Board. But there would have been a
15 list after the 2012 -- after everybody tendered
16 their applications, there was a list that came out
17 that said Afilias is the back-end registry for
18 these applications, Neustar is for these, et
19 cetera.

20 So shortly after the submission, that list
21 would have been available to me.

22 Q. Sorry. Which submission are you talking
23 about?

24 A. Submission of new gTLD applications.

25 Q. I see. This is not your first time

1 testifying in an IRP, is it?

2 A. It is not.

3 Q. Which other IRPs have you testified in?

4 A. I testified in an IRP in 2010, I believe,
5 between ICANN and ICM Registry with respect to
6 ICM's application to operate .XXX.

7 Q. Any others?

8 A. I don't think so. Not that I recall.

9 Q. Did you review your testimony from the ICM
10 IRP in preparation for your testimony here today?

11 A. I looked briefly at it.

12 Q. You also served as an attorney advisor to
13 the United States Federal Trade Commission; is that
14 correct?

15 A. Correct.

16 Q. And the United States Federal Trade
17 Commission, or FTC, is one of the two U.S. agencies
18 authorized to enforce U.S. antitrust laws; is that
19 correct?

20 A. That's correct. I am not -- I have never
21 practiced antitrust law or competition law. I was
22 largely involved in privacy-related issues but also
23 the DNS issues and worked on competition issues
24 from a policy perspective.

25 Chairman Pitofsky in 2005 and '6 had a

1 long series of hearings on innovation economy and
2 competition and consumer protection. So I have
3 some familiarity, but I am not an antitrust lawyer.

4 Q. You are currently a member of the ICANN
5 Board; is that right?

6 A. That's correct.

7 Q. And you are also a member of the BAMC, the
8 Board Accountability Mechanisms Committee; is that
9 right?

10 A. Yes.

11 Q. That committee reviews all reconsideration
12 requests; is that right?

13 A. It reviews -- it essentially reviews all
14 reconsideration requests. During the new gTLD
15 Program, there may have been times when, for a
16 variety of reasons, largely to get people who had
17 no relationship to the new gTLD Program,
18 reconsiderations may have come directly to the
19 board as opposed to through the BAMC, but the
20 standard practice is it would come to the BAMC.

21 Q. And what about IRP decisions, is the
22 standard practice that the BAMC reviews IRP
23 decisions as well?

24 A. Yes.

25 Q. And you have been on the board since

1 November of 2016; is that correct?

2 A. Yes. I was seated at the end of the
3 annual general meeting in Hyderabad in 2016.

4 Q. And in November 2016 you were still
5 employed by Neustar; is that right?

6 A. That's correct.

7 Q. Did you participate in any Board
8 discussions regarding .WEB?

9 A. In 2016, no. I observed a Board
10 discussion at a Board workshop before I was on the
11 Board. I did not participate in that discussion.

12 Q. Is that the November 3rd, 2016, workshop
13 session?

14 A. Sounds like it.

15 Q. Okay. Did you receive or review any
16 documents regarding .WEB prior to attending that
17 workshop session?

18 A. Not that I recall.

19 Q. Did you receive any documents as a Board
20 member regarding .WEB after the November 3rd, 2016,
21 workshop session?

22 A. I don't have a specific recollection.
23 It's possible that in connection -- well, it is
24 almost certain that in connection with the DIDP
25 request, the document request, there was some

1 material that the BAMC received and I would have
2 received.

3 Q. And those were Afilias's DIDP requests in
4 2018; is that right?

5 A. Yeah. I don't remember exactly the
6 documentation what the Board received, but I am
7 certain that we got the information we needed for
8 the reconsideration request.

9 Q. Okay. At the Board workshop session on
10 November 3rd, 2016 -- and before I ask my
11 questions, I want to instruct you not to reveal the
12 substance of anything that was discussed there
13 pursuant to the Panel's ruling regarding privilege.

14 But I would like to ask if the Board
15 members who attended that workshop session were
16 shown a copy of the Domain Acquisition Agreement
17 between VeriSign and NDC?

18 A. I honestly have no idea. I do not believe
19 that I have ever seen it, but I have no idea
20 whether Board members saw it or not. I don't
21 recall any documents being circulated.

22 Q. Okay. Now, you stated in Paragraph 31 of
23 your witness statement that you are aware of the
24 DOJ's .WEB investigation. How did you learn about
25 it?

1 A. Neustar received a CID, and I coordinated
2 the response.

3 Q. Board members have an obligation to be
4 familiar with the governing documents of their
5 organization; is that correct?

6 A. Correct.

7 Q. And that would include bylaws or articles
8 of incorporation, right?

9 A. Absolutely.

10 Q. And nonprofit Board members in particular
11 have an obligation to understand the organization's
12 mission; is that correct?

13 A. I am not going to opine on what California
14 law requires. I certainly think that members of a
15 Board should understand what the mission of the
16 organization is.

17 Q. Thank you. And to be clear, if I -- I am
18 not going to ask you for a legal opinion. I am
19 only asking you about your views as a witness here
20 today.

21 A. Okay.

22 Q. Now, in your view, again, nonprofit Board
23 members need to understand the mission because the
24 primary duty of a nonprofit Board member is to
25 protect the organization's mission; is that

1 correct?

2 A. Again, "primary duties" sounds like legal
3 terms. Let me just tell you, ICANN is an
4 organization with a specified mission and a limited
5 mission and limited authority. It is absolutely
6 incumbent on members of the Board to understand
7 that and to ensure that ICANN stays within its
8 mission.

9 Q. And, in fact, the bylaws provide that
10 directors have a duty to act in what they
11 reasonably believe are the best interests of ICANN;
12 is that right?

13 A. Yes, I believe that's correct.

14 Q. Now, Section 7 of the bylaws -- and
15 that's, for your reference, Tab 2 in your bundle.
16 Section 7 concerns the Board of Directors
17 specifically; is that correct?

18 A. Yes.

19 ARBITRATOR CHERNICK: Do you have a cite
20 to the pages?

21 MR. LITWIN: It starts on Page 42,
22 Mr. Chernick.

23 ARBITRATOR CHERNICK: Thank you.

24 ARBITRATOR BIENVENU: Which tab,
25 Mr. Litwin?

1 MR. LITWIN: This is Tab 2, and the next
2 series of questions will relate to Article 7 of the
3 bylaws that begin on Page 42 of that exhibit.

4 Q. Now, the bylaws provide that the directors
5 should be provided with notice for all Board
6 meetings; is that correct?

7 A. I'm sure that that is correct for all
8 formal Board meetings. You'd have to point me to
9 the specifics.

10 Q. So if you can look at Article 7.16, which
11 is on Page 51, that's the section on notices.

12 A. Okay.

13 Q. Again, I'll ask that the bylaws,
14 particularly Section 7.16, provides that directors
15 shall be provided with notice for all Board
16 meetings; is that correct?

17 A. Notice of time and place of all meetings.

18 Q. And that would -- I'm sorry. Is there
19 anything else that you wanted to add?

20 A. That is in turn referring back to 7.13,
21 14 and 15, annual meetings, regular meetings and
22 special meetings.

23 Q. You just obviated the next three questions
24 I had. Thank you.

25 Now, annual meetings, which are at 7.13,

1 are held for the purpose of electing officers and
2 for the transaction of any other business that may
3 come before the meeting; is that correct?

4 A. Yes.

5 Q. And regular meetings, which is Section
6 7.14, those are meetings that are held periodically
7 on dates that the Board determines, correct?

8 A. Yes, formal Board meetings where they are
9 noticed and agendas and resolutions are distributed
10 and the like.

11 Q. And the bylaws also provide for special
12 meetings at Section 7.15, which may be called at
13 any time at the request of 25 percent of the Board
14 by the Chair or by the president of ICANN; is that
15 correct?

16 A. Correct. Again, this would be for formal
17 meetings, where people are voting on resolutions
18 and the like.

19 Q. Okay. Now, turning to Section 7.17. Just
20 wait a minute to get that up on the screen.

21 7.17, which is the quorum provision,
22 provides that at annual, regular or special
23 meetings, that a quorum is comprised of a majority
24 of the total number of directors then in office and
25 that an act of the majority of the directors

1 present in any meeting at which there is a quorum
2 shall be the act of the Board; is that correct?

3 A. Yes. Again, this is referring to formal
4 meetings.

5 Q. Now, the bylaws also provide that the
6 Board is able to act without a meeting, correct?

7 A. Yes.

8 Q. I refer you to Section 7.19.

9 A. Correct.

10 Q. But the Board can only act without a
11 meeting if all the directors entitled to vote
12 thereat shall individually or collectively consent
13 in writing to such action; is that right?

14 A. Correct, at a formal meeting where there's
15 going to be resolution and votes.

16 Q. Okay. I would now refer you to Section 3
17 of the bylaws. And I'll wait a minute for that to
18 come up on the screen. We can start at, I believe,
19 Page 8, which is Section 3.1.

20 MR. ENSON: Ethan, may I ask, is this a
21 complete copy of the ICANN bylaws?

22 MR. LITWIN: I believe what is in here is
23 excerpts that I am referring to. We do have a
24 complete set of the bylaws electronically if the
25 witness would like to refer to anything I am not

1 showing her.

2 MR. ENSON: Thank you.

3 MR. LITWIN: Sure.

4 Q. So at 3.1 the bylaws provide that ICANN
5 shall operate to the maximum extent feasible in an
6 open and transparent manner and consistent with
7 procedures designed to ensure fairness; is that
8 correct?

9 A. That's what it says.

10 Q. And if you look further down in Section
11 3.1, part of ICANN's obligation to operate open and
12 transparently provides that, "ICANN shall also
13 implement procedures for the documentation and
14 public disclosure of the rationale for decisions
15 made by the Board."

16 Do you see that?

17 A. Yes.

18 Q. Now, ICANN's bylaws don't just say you
19 have to act transparently. They say you have to
20 act transparently to the maximum extent feasible,
21 correct?

22 A. That's what the words say, yes.

23 Q. You would agree that "feasible" means, in
24 general, possible, right?

25 A. Yes.

1 Q. So what the bylaws provide is that ICANN
2 must act transparently to the maximum extent if
3 it's possible to do so; is that fair?

4 A. I think that this is a general admonition
5 that goes all the way through the bylaws and all
6 the way through ICANN's operating procedures that
7 basically says you should act in an open and
8 transparent way. It doesn't mean you can't have
9 conversations and discussions that are not public.

10 Q. Well, it says to the "maximum extent
11 feasible," correct?

12 A. If you are asking me, does this stand for
13 the proposition that the ICANN should meet in
14 public at all times, the answer to that is no.
15 ICANN Board has to have the opportunity to meet in
16 workshops, for example, to get its work done. From
17 time to time we'll provide information to the
18 community before or after about the general topics
19 that we are looking at during our workshop, but I
20 have never understood the requirement to act in an
21 open and transparent way to mandate that every
22 single interaction of the Board and every Board
23 discussion be public.

24 Q. Well, let me ask you this, Ms. Burr: As a
25 member of the Board, when you understand -- what do

1 you understand the bylaw requirement that ICANN
2 should operate in the maximum extent feasible to
3 mean?

4 A. I think there's a practical -- essentially
5 ICANN should act openly. It should be informed,
6 and it should act openly and transparently.

7 Q. And that includes the disclosure of
8 rationales for the Board's decisions, correct?

9 A. That certainly includes an explanation of
10 the rationale for formal decisions for all votes it
11 takes. So that is why ICANN goes to great length
12 to publish significant, detailed documents that
13 explain what information the Board had when it
14 resolved to do one thing or another, yes.

15 We also, you know, have blogs,
16 conversations with different parts of the community
17 and the community as a whole. That is all part of
18 ensuring that there's as much information exchange
19 with the community as makes sense.

20 Q. And these bylaws are disclosed publicly,
21 correct?

22 A. Yes, they are.

23 Q. And, in fact, they are available on
24 ICANN's website?

25 A. Yes.

1 Q. And it's reasonable for members of the
2 global Internet community to expect that ICANN will
3 operate transparently, correct?

4 A. They not only expect it, they demand it,
5 and they have mechanisms to enforce that as well.

6 Q. And those are the accountability
7 mechanisms?

8 A. Accountability mechanisms, DIDP
9 mechanisms.

10 Q. So turning to Section 3.2, ICANN is
11 required to maintain a website, correct?

12 A. Correct.

13 Q. And ICANN is also required to post
14 information about its policy development
15 activities?

16 ARBITRATOR BIENVENU: Are you referring to
17 a specific provision in 3.2, Mr. Litwin?

18 MR. LITWIN: Yes, I am, Mr. Chairman,
19 sub --

20 ARBITRATOR BIENVENU: What is it?

21 MR. LITWIN: Yes, it is --

22 THE WITNESS: (b), I believe.

23 MR. LITWIN: Yes, (b), I believe, correct.

24 THE WITNESS: Of course, you understand
25 that it is the community, not the Board, that

1 develops policy at ICANN?

2 Q. BY MR. LITWIN: And yet -- but just in
3 general, the development of Internet policy, there
4 needs to be disclosure about what's going on on
5 ICANN's website; is that right?

6 A. Well, policy development matters is a very
7 specific reference to a bylaws-described provision
8 for the process for policy development. That is a
9 bottom-up community process that involves different
10 supporting organizations and sometimes advisory
11 committees. There's a very specific proposal.

12 I believe this refers to a docket of
13 pending -- what we would call PDP, Policy
14 Development Process, matters.

15 Q. In fact, part of ICANN's development of
16 policy is to allow for public comment on draft
17 policies, correct?

18 A. Yes. Again, "policies" meaning policies
19 developed by a community.

20 Q. And Section 3.2 requires ICANN to post on
21 its website public comments on draft policies?

22 A. Again, yes, on things that fall within the
23 Policy Development Process mandate for policy to
24 the community.

25 Q. And the bylaws also require ICANN to post

1 on its website notice of upcoming Board meetings?

2 A. Correct, formal Board meetings.

3 Q. And agendas for upcoming Board meetings;
4 is that correct?

5 A. Correct. And I presume -- I don't recall,
6 but we probably did have a formal Board meeting in
7 November, and it probably was -- and if we did, it
8 was noticed.

9 Q. And minutes from those Board meetings,
10 correct?

11 A. Correct.

12 Q. Those have to be posted as well?

13 A. From the formal Board meetings, yes.

14 Q. And any resolution passed by the Board at
15 a formal Board meeting also has to be produced --
16 published on the website, correct?

17 A. Yes. A resolution passed at a Board
18 meeting must be posted, yes.

19 Q. And the bylaws require these documents to
20 be publicly posted because ICANN is obligated to
21 act transparently, correct?

22 A. Uh-huh, yes.

23 Q. And it's fair to say that because it's
24 important for the public to know when the Board is
25 meeting, what the Board will be considering, what

1 the Board discussed, and what decisions the Board
2 has taken, correct?

3 A. Correct. And as I said, this very
4 specific -- yes. All of the very specific
5 procedural requirements for transparency and
6 posting and agendas and explanations and all of
7 that, yes, are applied to decisions taken at
8 annual, specific or general meetings of the Board
9 of Directors.

10 Q. And when you say "general," you're
11 referring to regular Board meetings?

12 A. Regular Board meetings, yes.

13 Q. Okay. Now, ICANN holds three public
14 meetings a year; is that correct?

15 A. Yes. They have been virtual so far this
16 year.

17 Q. Understood. And I think earlier in your
18 testimony we were referring to the Hyderabad
19 meeting in November 2016. That was one of those
20 public meetings, correct?

21 A. Correct.

22 Q. Now, the ICANN Board meets during those
23 public meetings, correct?

24 A. Yes. So there are several ways in which
25 the Board works. We have a workshop beforehand.

1 It sometimes happens that there is a Board meeting
2 at the end of the workshop before the annual
3 general meeting itself opens.

4 We then have a variety of meetings with
5 the community as a whole and with different parts
6 of the community throughout the course of the
7 meeting, and generally we will have -- if this
8 doesn't take place at one of the policy meetings,
9 then at two of the three meetings, and indeed at
10 the end of the general meeting, there is a Board
11 meeting at the end of the workshop. In fact, there
12 are two, because the new Board is seated, and
13 there's a brief meeting of the new Board as well.

14 Q. Okay. Let me just unpack that a little
15 bit. So these workshops are not regular Board
16 meetings; is that right?

17 A. Correct.

18 Q. And they are not special meetings, and
19 they are certainly not an annual meeting, right?

20 A. No.

21 Q. There's no bylaw provision that provides
22 for Board workshops; is that right?

23 A. Not that I'm aware of.

24 Q. And these workshops don't require a quorum
25 of Board members to be in attendance, do they?

1 A. No. The workshops are essentially working
2 sessions for the Board. Generally all members of
3 the Board are there, but since no -- you know, we
4 are not passing resolutions and the like, I don't
5 suppose there's a requirement for a quorum, but
6 again, that's -- yeah.

7 Q. Do you take attendance?

8 A. I do not take attendance. Certainly we
9 know who is participating, and they are in the
10 room.

11 Q. Because you can see them; is that right?

12 A. Yes, or Zoom them.

13 Q. Okay. It is a brave new world we are all
14 in.

15 There aren't minutes taken at workshop
16 sessions, are there?

17 A. I don't believe so. I mean, they are
18 really working sessions. We go through a variety
19 of discussions, you know, about the work that's
20 ongoing in the community, the work that's going to
21 be -- our discussions with the community in the
22 coming week during the meeting. It's preparing to
23 interact with the community and move forward and
24 various things and getting caught up and briefed on
25 other matters.

1 Q. So is it fair to say that the Board uses
2 these workshops to make its formal Board meetings
3 more efficient?

4 A. Well, we don't actually spend most of the
5 time at the workshop on the formal Board meetings.
6 We spend much more time on understanding policy
7 development, work that is ongoing in the community,
8 conversations that we will have with the community
9 in the coming week, topics that are important to
10 them.

11 But it is -- I would say, you know, a --
12 we get resolution, we get draft resolution in
13 advance of any formal Board meeting. And to the
14 extent that -- I think we probably review them
15 quickly, but that is a tiny percentage of the time,
16 and I don't think it happens all the time.

17 Q. Okay. I think I wasn't clear. If the
18 Board didn't have those workshop sessions, you'd
19 have to do all of what you described that the Board
20 does in a workshop session at a regular Board
21 meeting, correct?

22 A. No, that's not true. Right now we
23 basically have Board informational meetings a
24 couple of times a week. We have sort of changed
25 the workshop schedule around so that rather than

1 packing it into three days with very complex time
2 zones, because the Board of Directors is global, we
3 in the post-COVID era have spread out those
4 informational calls and discussions over the course
5 of the weeks in between the meeting.

6 It was a convenience to sort of pack them
7 into a three-day workshop, but that's not an
8 inviolate process. Really the question is what's
9 the way for the Board to work together, exchange
10 information, get up to speed on what's going on in
11 the community, take care of various Board
12 housekeeping matters and the like.

13 Q. Now, the Board doesn't vote during
14 workshop sessions, does it?

15 A. The Board does -- I think there's one
16 exception, which is we have a straw poll at the
17 September workshop on the elections for the Board
18 officers. It is not -- it is a straw poll.

19 Q. Other than the straw poll, the Board
20 doesn't actually vote during the workshop session?

21 A. The Board is not taking formal
22 resolutions, not passing formal resolutions, and we
23 work on consensus.

24 Q. Right. That's because the bylaws, I
25 think, clearly provide that the Board can only act

1 at one of the formal meetings we discussed and only
2 if a quorum is present; is that correct?

3 A. So the Board act is absolute, yes, the
4 Board can only act in a formal sense. It can only
5 adopt a resolution at a formal meeting.

6 You know, the Board can decide to follow
7 procedures that it typically follows. There's lots
8 of housekeeping issues that the Board can decide.
9 I am uncomfortable with the absoluteness of the
10 term "act."

11 Q. Okay. Let's look back --

12 A. The formal Board resolution, that must be
13 taken at a formal Board meeting.

14 Q. Okay. Let's look back at Section 7.17.

15 Chuck, if you can put that back up on the
16 screen, please.

17 This is the quorum section again. What it
18 provides here is that the act of a majority of
19 directors present at any meeting -- and I think we
20 clarified that the term "meeting" there refers to
21 the three types of formal meetings -- at which
22 there is a quorum shall be the act of the Board,
23 right? That's what it says, it uses the term
24 "act."

25 A. Yes.

1 Q. And if we look at Section 7.19 -- Chuck,
2 if you could throw that up on the screen again --
3 what it says here is that the Board can act, this
4 is action without a meeting, but it can only do
5 that if the directors entitled to vote all consent
6 in writing to the Board taking an act outside of
7 one of those formal meetings; is that right?

8 A. Yes. If the Board wants to take a formal
9 action, it can do it outside of the meeting under
10 these circumstances.

11 Q. Well, Section 7.19 doesn't say formal
12 action; it says "action," right?

13 A. Right. And I think that actions here
14 applies to formal actions that the Board takes
15 during its annual regular or special meeting or a
16 formal action without a meeting.

17 Q. Can you point me to a provision of the
18 bylaws that defines "action" as formal actions
19 limited to resolutions?

20 A. No. But if you're suggesting that every
21 time the Board decides to follow a practice that it
22 has always followed, it has to take a formal vote,
23 then we would be voting constantly. I mean, it is
24 just not practical to insist that every time the
25 Board makes a decision, including a decision to

1 follow its standard practice, that it has to have a
2 formal vote. That's -- I don't -- I don't
3 understand that to be typical of any organization,
4 of any Board of Directors.

5 Q. Do other Boards of Directors have these
6 same provisions in their bylaws regarding
7 transparency and accountability to a broader
8 community?

9 A. I suspect that there are lots of
10 California corporations that have these, but I have
11 not read all of their bylaws.

12 Q. Okay. Now, you were a member of the Cross
13 Community Working Group on Accountability, or the
14 CCWG-Accountability, right?

15 A. I was, indeed.

16 Q. Now, I am just going to --

17 MR. ALI: Ethan -- sorry, Ms. Burr.

18 Mr. Chairman, may I take a 30-second break
19 to speak with Mr. Litwin before he continues since
20 he's moving on to a different topic?

21 ARBITRATOR BIENVENU: Yes, you may. Is JD
22 available to put you in a separate room, or do you
23 have means to communicate with one another?

24 MR. ALI: We have means to communicate
25 with one another. We don't need to be put in a

1 separate room.

2 ARBITRATOR BIENVENU: We'll just pause for
3 a few seconds to let you do that.

4 (Whereupon a recess was taken.)

5 ARBITRATOR BIENVENU: Go ahead and
6 proceed.

7 Q. BY MR. LITWIN: Ms. Burr, I ask you just
8 to turn, before we move subjects, to Page 10 in Tab
9 2, which is Section 3.5(c) of ICANN's bylaws. And
10 there you'll see that the bylaws require that
11 ICANN, within seven days of concluding a meeting,
12 must post any action taken by the Board, and that
13 shall be made publicly available in a preliminary
14 report.

15 So that seems to go far beyond -- any
16 actions goes far beyond just a formal Board
17 resolution; would you agree with that?

18 A. No.

19 Q. How do you --

20 A. It is the same word, "any actions." I am
21 reading "actions" throughout this section to refer
22 to the formal decisions that the Board makes by
23 resolution during Board meetings. And that's the
24 way this has always been interpreted from the
25 beginning of time.

1 I don't know if this changed, but the
2 Board has always had an obligation to post the
3 results of its Board meeting within this period. I
4 don't know "always," but for many years.

5 Q. And how did you come to learn that the
6 Board has interpreted the term "any actions" to
7 encompass Board resolution only?

8 A. I think personally it is plain-text
9 reading of the bylaws. It is consistent with words
10 used throughout the -- when they are talking about
11 formal actions by the Board, and it is consistent
12 with ICANN's practice for many years --

13 Q. Okay. So --

14 A. -- at our Board meetings.

15 Q. So when the Panel is reviewing the bylaws
16 and they see references to actions taken by the
17 Board, they should understand that to mean only
18 action by Board resolution; is that what you're
19 saying?

20 A. I have not memorized the 250 pages of the
21 bylaws. In this section where they are talking
22 about the operations of the Board, I read this in
23 the same way that I read the provisions related to
24 regular, annual and other meetings, meaning the
25 formal action by the Board in a Board meeting by

1 resolution.

2 Q. Well, is there a reference that you are
3 aware of in the bylaws to an action, a Board action
4 that does not refer to a formal resolution?

5 A. Well, there are inactions in the IRP
6 context, which would not rise to the form of a
7 formal action, I suspect, right, because it
8 wouldn't be by resolution. These provisions of the
9 bylaws that you're talking about are about how the
10 Board operates when it is formal.

11 If you read this to say anything the Board
12 thinks about, decides to move on with in the way
13 that it, you know, decides to have another meeting
14 to discuss further, all of this has to be contained
15 on the publicly available and the preliminary
16 report seven days later, the Board would spend all
17 of its time approving these preliminary reports.

18 Q. Actually --

19 A. It is a very active Board.

20 Q. Yeah, actually, your reference to the IRP
21 is interesting. There in Section 4.3 the members
22 of the Internet community are given standing to
23 challenge ICANN actions; is that right?

24 A. And failure to act.

25 Q. Yes. In particular, ICANN Board actions

1 and failures to act, correct?

2 A. Yes, and/or, yes.

3 Q. Yes. Just focusing in on the Board
4 actions there, does that mean by using the word
5 "actions" there, that it is limited to challenging
6 a resolution of the Board?

7 A. It's -- I mean, IRPs are specifically -- I
8 want to say, I am not going to make a case that all
9 256 pages of these bylaws are absolutely
10 consistent, having had a huge role in the creation
11 of the post-transition bylaws and the fact that the
12 bylaws went from 50 pages to 250 pages.

13 I will say that with respect to the IRP,
14 the question is did the Board do something or fail
15 to do something? Did the Board do something that
16 violated the bylaws or the articles of
17 incorporation? Did the Board fail to take an
18 action that it was bound to take lest it violate
19 the bylaws and the articles of incorporation?

20 Q. Okay. So in Section 4.3, the word
21 "action," Board action, the phrase "Board action,"
22 refers to did the Board do something.

23 And then looking back at Section 3.5, it
24 says, "Any Board action has to be posted to the
25 website." So --

1 MR. ENSON: Mr. Litwin, I apologize for
2 interrupting, but if you are going to represent
3 something is in 4.3 of the bylaws, I request that
4 you point it out to Ms. Burr so she can review it.

5 Q. BY MR. LITWIN: So, for example, Ms. Burr,
6 I would direct your attention to Page 28 of Tab 2,
7 which is Section 4.3(o). And looking at little
8 Roman numeral iii, this provision gives the IRP
9 Panel the authority to declare whether a covered
10 action constituted an action or inaction that
11 violated the articles or bylaws; is that right?

12 A. Right. I think you have to refer back to
13 the definition of "covered action," which is in
14 4.3(b), which is -- includes actions or inactions
15 by the Board, individual directors, officers or
16 staff members.

17 So I do not believe that this is -- that
18 it's limited to -- I mean, the words are in
19 different -- the word "action" has a different
20 context here.

21 Q. So let me see if I can break this down.
22 Section 3.1, which we referred to earlier,
23 requires ICANN to operate in an open and
24 transparent manner, correct?

25 A. Correct.

1 Q. And open and transparent to the maximum
2 extent feasible, correct?

3 A. Correct. Which to me does not mean it has
4 to do everything in public.

5 Q. I understand what your prior testimony
6 was. I am just asking about the plain text of the
7 bylaw.

8 And Section 4.3(b)(ii), which you just
9 referred us to, maybe it is -- yeah, (b)(ii), says
10 that a covered action is an action or failure to
11 act within ICANN committed by the Board, correct?
12 So that would encompass Board actions, right?

13 A. No. If you go to (b) in the packet,
14 covered actions include the actions or failure to
15 act by within ICANN committed by the Board,
16 individual directors, officers or staff members
17 that give rise to a dispute.

18 Q. Right. It says "or." It can refer to
19 simply an action by the Board, correct?

20 A. Correct. Although I think it is in a
21 different context than the context of the Board
22 voting in the course of a formal Board meeting.

23 Q. Your testimony, therefore, is that when it
24 says "Board action" in 4.3(b)(ii), that is, you
25 know, did the Board do anything?

1 A. Well, I can't -- I don't want to
2 speculate. I believe that most of the ways in
3 which the IRP has been invoked with respect to the
4 Board is a formal action of the Board, but I do not
5 rule out the possibility that the Board could do
6 something outside of a formal Board meeting that
7 would violate the bylaws or exceed the mission.

8 Q. Well, if the Board did something outside
9 of a formal meeting and nothing was posted to the
10 website about it, how would the members of the
11 Internet community know that they had grounds to
12 bring an IRP?

13 A. Well, I am a little confused about this,
14 because it is my understanding that Afilias
15 received notice in writing about the Board's
16 decision in the November workshop to honor its
17 standard practice, so I don't understand the
18 transparency issue.

19 Q. Okay. I was talking generally, but I am
20 happy to talk specifically with you.

21 What is the basis for your statement that
22 Afilias received notice from ICANN that the Board
23 had made a decision during a November 3rd, 2016,
24 workshop session about its complaint?

25 A. I believe that Afilias received a written

1 communication from Akram saying that the matter was
2 on hold because one of the accountability
3 mechanisms had been invoked.

4 The Board in November, as I recall -- as I
5 said, I was not on the Board then, but I was in the
6 room -- continued to follow its usual practice of
7 not intervening once an accountability mechanism
8 has been invoked so as to respect the
9 accountability mechanisms themselves. That is what
10 the Board typically does. That is what org
11 typically does.

12 Q. So did you review Mr. Akram's letter?

13 A. I didn't review it in advance of this. I
14 have seen it in the past. I believe it was posted.

15 Q. Okay. Now, I'll represent to you,
16 Ms. Burr, that Mr. Atallah's letter was dated
17 September 30th, 2016.

18 Do you recall that?

19 A. I don't recall the date of the letter.

20 Q. Okay. This isn't in your binder. I
21 didn't expect to ask you about this.

22 But I would ask that Chuck put up on the
23 screen Exhibit C-61, please. If you can focus in
24 on just the date, please, so that everybody can see
25 it. Thank you.

1 You can see here, Ms. Burr, Mr. Atallah --
2 let me first ask, is this the letter that you are
3 referring to?

4 MR. ENSON: Mr. Litwin, she needs to be
5 able to see the letter.

6 Q. BY MR. LITWIN: Can you see the letter?

7 A. I can.

8 Q. You are doing better than I can. I can
9 barely see it.

10 So does this refresh your recollection
11 that Mr. Atallah's letter was sent to Afilias on
12 September 30th, 2016?

13 A. Yes. That doesn't change the fact that
14 this letter reflects what ICANN org typically does
15 when an accountability mechanism has been invoked,
16 and the Board -- the practice of the Board is to
17 respect and follow that.

18 Q. So I would --

19 A. And that would be the Board deciding in
20 November that it was going to continue to follow
21 its practice.

22 Q. Okay. So stating the obvious here,
23 September 30th is before November 3rd, correct?

24 A. Correct.

25 Q. Focusing in on the second-to-last

1 paragraph -- if you could blow that up, Chuck -- it
2 says, "We will continue to take Afilias' comments,
3 and other inputs that we have sought, into
4 consideration as we consider this matter," correct?

5 A. That's what it says, yes.

6 Q. Did you understand that Mr. Atallah was
7 referring, when he says "Afilias' comments," to the
8 two letters from Mr. Hemphill that you reviewed in
9 preparation for your testimony here today?

10 A. I have no basis for thinking that it's
11 limited to the two letters to Afilias. There was
12 general noise about the auction, and Ruby Glen, for
13 example, had filed an accountability mechanism. I
14 would think that would be wrapped up in this, and
15 it would be in a larger bundle of issues.

16 Q. Well, I appreciate that, Ms. Burr, but
17 what it says, particularly here in the highlighted
18 language, is that, "We will continue to take
19 Afilias' comments into consideration as we continue
20 to consider this matter."

21 And what my question is just very simply,
22 really yes or no, do you understand, when he says
23 "Afilias' comments," he's referring to the two
24 letters that Mr. Hemphill had sent to him in August
25 and September of 2018 -- 2016, rather?

1 A. I would imagine that they were among the
2 things that would be Afiliias' comments.

3 Q. Is there anything else?

4 A. I don't know. I have seen those two
5 letters.

6 Q. Okay.

7 Chuck, can you pull up the first
8 paragraph, please.

9 So Mr. Atallah begins his letter by
10 saying, "Thank you for your letters of August 8th,
11 2016, and September 9th, 2016. We note your
12 comments regarding the NU DOT CO application for
13 .WEB in the ICANN auction of July 27, 2016."

14 Does that help refresh your recollection
15 that when Mr. Atallah is referring to Afiliias'
16 comments, he's referring to Mr. Hemphill's two
17 letters?

18 MR. ENSON: Mr. Chairman, this is Eric
19 Enson. I apologize for the interruption, but I
20 feel I need to make an objection at this point.

21 Ms. Burr has no way of knowing what
22 Mr. Atallah meant when he wrote this letter. She
23 didn't write it.

24 ARBITRATOR BIENVENU: Mr. Litwin, do you
25 want to respond to that objection?

1 MR. LITWIN: I think it is pretty clear
2 what I am asking is just Ms. Burr's understanding
3 based on her earlier testimony that this -- about
4 Mr. Atallah's letter, and I am just trying to
5 understand what Ms. Burr understood about it. I am
6 not asking Ms. Burr to get inside Mr. Atallah's
7 head. I am just asking on -- her understanding
8 based on reading the letter.

9 ARBITRATOR BIENVENU: I'll allow the
10 question, but I think you have gone as far -- as,
11 in my view, as useful in trying to elicit an
12 interpretation of this letter from this witness,
13 but I'll allow the question.

14 Please answer the question, Ms. Burr.

15 THE WITNESS: I am aware that in addition
16 to those two letters, we had litigation that had
17 been filed, a CEP had been filed by Ruby Glen. I
18 take this to reference to the broader matter.

19 Afilias' comments certainly include those
20 two letters that are noted, but I have no idea if
21 that's all that he's referencing with respect to
22 Afilias' comments or not.

23 Q. BY MR. LITWIN: Okay. Is there a portion
24 of this letter that, in your mind, refers to the
25 broader dispute with Ruby Glen and other comments,

1 other than what was specifically referred to in the
2 first paragraph?

3 A. The .WEB/.WEBS contention set was placed
4 on the 19th of August. That's clearly reflecting
5 the pending ICANN accountability mechanism
6 initiated by another member of the contention set.
7 So yes.

8 MR. LITWIN: I will move on, Mr. Chairman.
9 I take your point.

10 Q. So when we left off earlier, we were
11 talking about your role on CCWG-Accountability, and
12 I was about to say that CCWG-Accountability is kind
13 of a mouthful, so I am just going to refer to the
14 CCWG. I am aware that there are other CCWGs, but
15 I'd like you to understand that when I refer to the
16 CCWG, I am referring only to CCWG-Accountability;
17 is that okay?

18 A. Sure.

19 Q. Okay. Now, the CCWG was formed in
20 response to the United States government's
21 announced intention in 2014 to transition
22 stewardship of the Internet, that is, the IANA
23 functions, to the global multistakeholder
24 community; is that correct?

25 A. Yes.

1 Q. And ICANN would become the new steward of
2 the Internet on behalf of the community; is that
3 right?

4 A. Well, ICANN has throughout its life been
5 charged with responsibility for coordinating policy
6 development. It would, following the transition,
7 do that without a formal backstop agreement with
8 the United States government.

9 Q. And when you mean a backstop agreement,
10 just in lay terms, that means that the United
11 States government was no longer going to provide
12 oversight of ICANN; is that right?

13 A. Not separate from whatever role it
14 participated in in the Government Advisory
15 Committee, correct.

16 Q. So the CCWG was created to determine how
17 ICANN's then accountability mechanisms could be
18 strengthened to compensate for the absence of U.S.
19 government oversight; is that right?

20 A. Among other things, yes.

21 Q. And the CCWG submitted its recommendations
22 to the ICANN Board; is that right?

23 A. Correct.

24 Q. And one of those recommendations concerned
25 enhancements to the IRP; is that right?

1 A. That is correct.

2 Q. So the CCWG's recommendations for
3 strengthening or enhancing the IRP were contained
4 in its 2016 report; is that correct?

5 A. Yes. The CCWG was split up into two work
6 streams. One was the accountability mechanisms and
7 the mission, commitment for value statement of the
8 bylaws, and then there were other issues that
9 another work stream took. I was the rapporteur for
10 the accountability work stream.

11 Q. And the ICANN Board was engaged and had
12 monitored the development of its 2016 report,
13 right?

14 A. Yes. There were ICANN Board members who
15 were liaisons on the CCWG. I was part of the CCWG.
16 I was not on the Board at that time.

17 Q. And the Board actually provided comments
18 on two prior drafts of the 2016 report, correct?

19 A. That seems reasonable. I haven't gone
20 back and reviewed it. So I don't know.

21 Q. Fair enough. The work stream one report,
22 the one that contained the proposal to enhance the
23 IRP was presented to the Board in 2016, correct?

24 A. Yes. The final report of
25 CCWG-Accountability was in February of 2016.

1 Q. And the Board accepted by resolution the
2 CCWG 2016 report, correct?

3 A. Correct.

4 Q. And the Board actually approved the
5 transmission of the CCWG report to the NTIA to
6 accompany ICANN's proposal regarding the transition
7 of stewardship responsibilities from the U.S.
8 government to ICANN; is that right?

9 A. I actually don't know if a report went --
10 I assume the report did go along with the revised
11 bylaws that were a product of the report.

12 Q. And that's because improving ICANN's
13 accountability was an important part of the
14 transition, right?

15 A. That is correct.

16 Q. And the Board instructed ICANN to
17 implement the CCWG's recommendations that were set
18 forth in its report, correct?

19 A. I don't have firsthand knowledge of what
20 the Board did. The Board accepted them, and I
21 assume that means it directed the Board to
22 implement. There certainly were implementation
23 efforts. I don't know what the specific wording of
24 the Board's resolution says.

25 Q. Okay. Now, in the ICANN bylaws -- and I

1 would refer you, again, in Tab 2, to Section
2 1.2(a)(v).

3 Give Chuck a minute to throw that up on
4 the screen.

5 MR. ENSON: Sorry, Ethan, would you repeat
6 that?

7 MR. LITWIN: Yes, Section 1.2(a)(v), which
8 is on Page 6 of Tab 2.

9 MR. ENSON: Got it. Thank you.

10 MR. LITWIN: You're welcome.

11 Q. Do you see that, Ms. Burr? It is up on
12 the screen, too.

13 A. I do.

14 Q. Okay. Now, that require -- that bylaw
15 requires that -- or in that bylaw, rather, ICANN
16 commits to make decisions by applying documented
17 policies consistently, neutrally, objectively and
18 fairly; is that right?

19 A. Correct.

20 Q. That's because -- sorry.

21 A. No, I just was going to read the rest of
22 it.

23 Q. And that's because the global Internet
24 community needs to have confidence that ICANN is
25 going to abide by the plain meaning of its rules

1 and not treat anyone differently; is that right?

2 A. That particular language has been in the
3 ICANN bylaws, I think, since the original bylaws.
4 So I had -- I was very significantly involved in
5 rewriting Article 1 and Article 4 of the bylaws for
6 the accountability CCWG.

7 This particular language was in the old
8 bylaws. It was in a separate section. We moved
9 things around, and we split what had been core
10 values into two kinds of things, commitments and
11 core values. And we moved this, which had been in
12 neither of those places, up into the commitments.

13 So yes, it is a commitment -- continuation
14 of its commitment to apply documented policies
15 consistently, neutrally, objectively and fairly
16 without singling out any particular party for
17 discriminatory treatment.

18 Q. And I appreciate that answer, but I would
19 ask that you actually answer the question that I
20 asked, which is: ICANN makes this commitment
21 because it's important to the global Internet
22 community to have confidence that ICANN is going to
23 abide by the plain meaning of its rules?

24 A. Yes. And it has been from the beginning
25 of time, right.

1 Q. Now, the applicant guidebook for the new
2 gTLD Program is an example of ICANN's documented
3 policies; is that correct?

4 A. Well, there was a policy that the
5 community developed, the new gTLD policy.

6 The applicant guidebook, strictly
7 speaking, is implementation of a
8 community-developed policy.

9 Q. So are you aware that a previous IRP Panel
10 interpreted the guidebook's reference to itself as
11 the implementation of Board-approved consensus
12 policy, as the, quote, crystallization of
13 Board-approved consensus policy concerning the
14 introduction of new gTLDs?

15 A. I am not aware of that statement. I mean,
16 I believe you that that was the case, but I am not
17 aware of it.

18 Q. Would you also agree that ICANN must
19 implement the various procedures and rules and
20 policies set forth in the guidebook consistently,
21 neutrally, objectively and fairly?

22 A. Yes, I believe ICANN is obligated to make
23 decisions by applying documented policies
24 consistently, neutrally, objectively and fairly in
25 accordance with the bylaws.

1 Q. Now, in general, the basic procedure
2 that's set forth in the guidebook -- and I am going
3 to speak very generally -- is the applicant submits
4 an application. ICANN publishes the
5 nonconfidential parts of that application for
6 public view. ICANN evaluates the application while
7 the community is given an opportunity to comment on
8 or file objections to the application. The
9 application is then rejected or approved.

10 If it's approved and it is the only one to
11 have applied for the gTLD, then the applicant moves
12 on to execute a registry agreement with ICANN.

13 But if more than one application is
14 approved for that gTLD, a contention set is
15 created. The applicants are expected to try to
16 resolve the contention set among themselves, and if
17 they cannot, then ICANN will auction the gTLD among
18 them and the winner will proceed to contracting.

19 Is that just a fair general overview of
20 the process?

21 A. Yes, at a very high level. There are, of
22 course, many different moving parts in the
23 applicant guidebook and in the application process,
24 but yes.

25 Q. So you note in your witness statement that

1 nothing in the guidebook prevents VeriSign for
2 applying for any gTLD that it wanted; is that what
3 you -- is that a fair statement of what you
4 testified to?

5 A. Yes, the community-developed policy did
6 not impose limitations on who could apply for what.

7 Q. And, in fact, VeriSign did apply for
8 several gTLDs, correct?

9 A. I actually don't know the answer to that.
10 I know they were the back end for several of them,
11 but I don't know if they applied for independent --
12 individual ones as well.

13 Q. To the extent that VeriSign did, in fact,
14 apply for an applicant for a gTLD, its application
15 or the nonconfidential portions of its application
16 would have been published for public view; is that
17 correct?

18 A. That's correct, if it did apply to be a
19 registry operator as opposed to a back end.

20 Q. Understood. So if they apply to be the
21 registry operator, for example, for the Arabic form
22 of .COM, that application would be published on
23 ICANN's website for public view, right?

24 A. Right.

25 Q. But VeriSign did not submit an application

1 for .WEB, did it?

2 A. That's my understanding.

3 Q. So there would have been no .WEB
4 application from VeriSign for ICANN to publish,
5 right?

6 A. Correct.

7 Q. And because there was no VeriSign .WEB
8 application published, there would have been no
9 reason for anyone to believe at any time prior to
10 the .WEB auction that VeriSign was pursuing the
11 acquisition of .WEB, was there?

12 A. There was no published application. I
13 have no way of knowing what anybody believed about
14 anything.

15 Q. Now, one member of the Internet community
16 that comments routinely on new gTLD applications is
17 ICANN's Government Advisory Committee, right?

18 A. Right.

19 Q. And I am just going to refer to that as
20 the GAC; is that okay?

21 A. Yeah.

22 Q. Now, GAC members have lodged what they
23 call early-warning notices regarding various
24 applications; is that correct?

25 A. Yes. Those are expressions of individual

1 governments within the GAC as opposed to a GAC
2 statement of any kind of consensus policy or
3 anything like that. So the members had the ability
4 to raise their hand and say, "We have a problem
5 with that," very early in the process to give
6 applicants a heads-up.

7 Q. And, in fact, I'll just give you a quote,
8 what the GAC says, that, "An early-warning notice
9 is a notice from members of ICANN's Government
10 Advisory Committee that an application is seen as
11 potentially sensitive or problematic by one or more
12 governments."

13 Is that a fair statement about what an
14 early notice is?

15 A. Yes.

16 Q. I'm sorry --

17 A. Yes.

18 Q. So I'd like to direct your attention to
19 Tab 4 in your binder and to the first page of that.
20 It is a copy of the early-warning notice filed by
21 the GAC regarding Google's pursuit of .BLOG through
22 its Charleston Road subsidiary.

23 Do you see that?

24 A. Yes.

25 Q. And in this early-warning notice, the

1 government of Australia writes -- and, Chuck, if
2 you could bring up the box that's marked, "Reason/
3 Rationale for the Warning."

4 "Charleston Road Registry is proposing to
5 exclude other entities, including potential
6 competitors, from using the TLD. Restricting
7 common generic strings for the exclusive use of a
8 single entity could have unintended consequences,
9 including a negative impact on competition."

10 That's what they wrote, correct?

11 A. Yes. And I believe this was one among
12 many of the -- objections to closed generic
13 applications.

14 Q. And those objections remain on competition
15 grounds, right?

16 A. That's what the government of Australia --
17 how they described it. It was the exclusive access
18 to a common generic string that generally -- that
19 generally perturbed individual members of the GAC
20 and ultimately -- ultimately resulted in advice
21 from the GAC on closed generics and a temporary
22 prohibition on closed generics in the first round.

23 Q. So Chuck, if you could bring up the box
24 above that.

25 I'll repeat my question, Ms. Burr.

1 The basis for the government of
2 Australia's early-warning notice regarding Google's
3 proposed acquisition of .BLOG was, as it says,
4 "competition," correct?

5 A. That's how the government of Australia
6 described its concern.

7 Q. Now, it is true that every member of the
8 .WEB contention set submitted an application for
9 .WEB, correct?

10 A. Yes, yes.

11 Q. And the nonconfidential portions of those
12 applications were posted to ICANN's website,
13 correct?

14 A. Yes.

15 Q. And each of those applications were
16 evaluated by ICANN, correct?

17 A. Yes. I assume so, that would be the
18 process.

19 Q. Well, you couldn't get into a contention
20 set unless you had been evaluated by ICANN and
21 passed that evaluation, right?

22 A. Right. Which is why I said that's the
23 process.

24 Q. And the community, including the GAC,
25 would have had an opportunity to comment on each of

1 those .WEB applications during the evaluation
2 period, correct?

3 A. Yes. Individual members of the GAC -- so
4 this is not GAC advice, this is an individual
5 member of the GAC expressing a concern -- could
6 have filed an early warning. And the GAC also had
7 the ability to provide consensus advice.

8 Q. Now, you state in your witness
9 statement --

10 MR. LITWIN: Before I move on,
11 Mr. Chairman, we have been going for about an hour
12 and a half. I want to check as to when the Panel
13 and the witness want to break.

14 ARBITRATOR CHERNICK: Mr. Litwin, before
15 we do that, can I ask a question about the document
16 that's on the screen?

17 MR. LITWIN: Absolutely, Mr. Chernick.

18 ARBITRATOR CHERNICK: Is there a record
19 reference to this document, an exhibit reference so
20 that we can keep track of these things?

21 MR. LITWIN: There is. It is not on my
22 copy. I will have someone on my team email you
23 that directly.

24 ARBITRATOR CHERNICK: All right. Thank
25 you.

1 Go ahead, Mr. Chairman.

2 ARBITRATOR BIENVENU: Yes, well, I was
3 saying to Mr. Litwin that he had read my mind. I
4 was about to ask him to advise when would be an
5 appropriate time for our first break, and I take it
6 from your intervention, Mr. Litwin, that it would
7 be.

8 MR. LITWIN: This would be an opportune
9 time. I am happy that I am able to, even under the
10 small Zoom screen, ascertain when it might be time
11 for a break.

12 ARBITRATOR BIENVENU: Right. So we will
13 break for 15 minutes.

14 Ms. Burr, you, of course, are familiar
15 with a process like this one, and you would know
16 that throughout the course of your
17 cross-examination, and that includes any redirect
18 examination, you are not to discuss your testimony
19 or the case with anyone.

20 THE WITNESS: Yes, sir.

21 ARBITRATOR BIENVENU: Thank you very much.
22 So we'll take a 15-minute break.

23 (Whereupon a recess was taken.)

24 ARBITRATOR BIENVENU: Mr. Litwin, please
25 proceed.

1 Q. BY MR. LITWIN: Hello, Ms. Burr. Are you
2 ready to proceed?

3 A. I am.

4 Q. Okay. So you state in your witness
5 statement that ICANN has various ways in which it
6 holds itself accountable to the global Internet
7 community; is that correct?

8 A. Yes.

9 Q. And those are called accountability
10 mechanisms, correct?

11 A. Correct.

12 Q. And the IRP, the Independent Review
13 Process, is one of those accountability mechanisms,
14 right?

15 A. Absolutely.

16 Q. I would like to direct your attention now
17 to Tab 5 in your binder. This is a copy of Annex 7
18 to the CCWG report that we were discussing before
19 we went on break.

20 Annex 7 provides for -- Chuck, if you can
21 turn to Annex 7, please -- the CCWG's proposal for
22 the enhanced IRP?

23 A. Correct.

24 Q. So if you could turn to Page 10, and I
25 will direct your attention to Paragraph 34, and

1 I'll wait a minute for that to come up on the
2 screen here. This is under the heading "Standard
3 of Review."

4 MR. ENSON: Ethan, I am sorry to
5 interrupt. There's two sets of page numbers on my
6 copy. There's the exhibit page number and the
7 exhibit number of the actual document.

8 MR. LITWIN: Yes. Hopefully I have it all
9 correct in my notes, but I am referring to the
10 exhibit page numbers only.

11 MR. ENSON: Okay. Thank you.

12 MR. LITWIN: You're welcome.

13 Q. Ms. Burr, under "Standard of Review," the
14 CCWG states that "The IRP Panel shall decide the
15 issues presented to it based on its own independent
16 determination of ICANN's articles of incorporation
17 and bylaws in the context of applicable governing
18 law and prior IRP decisions. The standard of
19 review shall be an objective examination as to
20 whether the complained-of action exceeds the scope
21 of ICANN's mission and/or violates ICANN's articles
22 of incorporation and/or bylaws and prior IRP
23 decisions. Decisions will be based on each IRP
24 panelist's assessment of the merits of the
25 claimant's case. The Panel may undertake a de novo

1 review of the case, make findings of fact, and
2 issue decisions based on those facts."

3 Do you see that there?

4 A. I see that paragraph, yes.

5 Q. Okay. Let's just break that down. The
6 IRP Panel is supposed to decide disputes based on
7 its own independent interpretation of ICANN's
8 articles and bylaws; is that right?

9 A. I think we need to look -- I mean, this
10 is -- so Annex 7 is sort of an explication of the
11 recommendations that the CCWG-Accountability Group
12 put together with respect to those accountability
13 mechanisms. They were then translated into the
14 ICANN bylaws.

15 So this is a description where the actual
16 absolute standard of review, I would -- we should
17 refer to the bylaws. I believe it's quite -- I
18 believe it is a -- did an action or inaction
19 violate the -- exceed the mission or violate the
20 bylaws with respect to these.

21 I am just -- the official source has to be
22 the bylaws, because that's where the rules come
23 from.

24 Q. So the CCWG report, as we talked about
25 earlier today, was transmitted by ICANN to the NTIA

1 as part of the transition process; is that right?

2 A. As I said, I don't know the answer to
3 that. I think that's right, but I have no idea.
4 But bylaws certainly would have been as well. And
5 the bylaws, the language in the bylaws is the final
6 implementation of the CCWG's recommendations, and
7 those were, in fact -- I worked on the writing of
8 the bylaws as the rapporteur for this provision,
9 and those were, again, submitted to that community
10 for comment and the like.

11 All I'm saying is to the extent there's
12 any discrepancy between this document and the
13 bylaws, the bylaws is the relevant document.

14 Q. And we are going to look at the bylaws in
15 a minute, but right now I just want to ask you
16 questions about what the CCWG intended. And the
17 CCWG intended that the IRP Panel is supposed to
18 decide disputes based on its own independent
19 interpretation of ICANN's articles and bylaws,
20 correct?

21 A. That is what this says. I have no idea if
22 that particular sentence is in the bylaws itself,
23 but it is definitely --

24 Q. I am not asking --

25 A. -- a de novo review.

1 Q. I am not asking you about the bylaws. I
2 am only asking you in the context of the next
3 several questions about what the CCWG intended --

4 A. Okay.

5 Q. -- as reflected in Annex 7.

6 And the CCWG intended that the decisions
7 of the Panel should be based on each panelist's
8 individual assessments of the merits of the claim,
9 right?

10 A. Presented on the Panel's independent
11 interpretation of the bylaws and articles of
12 incorporation and examination, objective
13 examination of whether the complaint of action
14 exceeds the scope of ICANN's missions or violates
15 the bylaws, and it is based on each IRP's
16 assessment of those.

17 Q. Each IRP panelist's assessment of the
18 merits of the claimant's case, correct?

19 A. Right. And the case is if this act or
20 failure to act violated the bylaws.

21 Q. And this standard of review that the CCWG
22 provided for here says that the Panel should
23 undertake a de novo review of the case, correct?

24 A. Correct. That is in the bylaws, I know.

25 Q. And by "de novo," that essentially means

1 that the Panel should start anew, right, that's
2 what "de novo" means?

3 A. Yes. In other words, it is not acting --
4 it evaluates the facts.

5 Q. And you understand that a de novo review
6 is a nondeferential standard of review, correct?

7 A. I have to say I am not a litigator, but I
8 think this is with respect to the findings of the
9 facts about what happened.

10 Q. Well, it says here that the Panel may
11 undertake a de novo review of the case. And solely
12 as to that provision, I am saying that where it
13 says "de novo review," that means nondeferential
14 standard of review; it is not an abuse of
15 discretion standard?

16 A. That's a legal conclusion that -- I mean,
17 it may be true, but I have no idea.

18 All I'm saying is what this says to me is
19 you get to -- the IRP Panel gets to decide what the
20 facts are.

21 Q. Wait. So you were on the CCWG, right?

22 A. Yes. But you're asking me for a sort of
23 legal term-of-art conclusion. I am not a
24 litigator. I can tell you what that means to me.
25 Yes, ICANN doesn't get to say, "Here are the facts.

1 You must accept them."

2 So to that extent, they are not deferring
3 to ICANN's -- ICANN's articulation of what the
4 facts are, that's correct.

5 Q. Right. And the Panel should make its
6 decisions based on the facts as the Panel finds
7 them, right?

8 A. Yes. That is what this is saying.

9 Q. Okay. Let's turn back to Page 5 in this
10 exhibit and look at the first bullet point, which
11 starts with "Standing."

12 A. Yes.

13 Q. You see that, Ms. Burr? Here what the
14 CCWG is saying is that, "Any person, group or
15 entity that has been materially affected by" --
16 here's your language -- "an ICANN action or
17 inaction in violation of ICANN's articles of
18 incorporation or bylaws shall have a right to file
19 a complaint under the IRP and seek redress."

20 Do you see that? Ms. Burr?

21 A. Yes, I am just looking at this.

22 Q. Okay.

23 A. This is Page 5?

24 ARBITRATOR BIENVENU: It is Page 5 of the
25 exhibit, 3 of the document.

1 MR. LITWIN: Yes. So there's Exhibit C-1,
2 Page 5.

3 Thank you, Mr. Chairman.

4 THE WITNESS: Yes.

5 Q. BY MR. LITWIN: So what it says here at
6 the second bullet -- and it is up on the screen for
7 your ease of reference, Ms. Burr -- is that if an
8 entity is materially affected by an ICANN action or
9 inaction that violates ICANN's articles of
10 incorporation or bylaws, that that entity shall
11 have a right to file a complaint under the IRP and
12 to seek redress.

13 That's what it says, right?

14 A. That's what it says.

15 Q. So the CCWG is providing for those
16 entities a due-process right to file an IRP; is
17 that right?

18 A. I mean, it is saying if you have been
19 materially affected, you have a right to file a
20 complaint under the IRP.

21 Q. And to seek redress?

22 A. Yes, for the violation of the bylaws.

23 Q. Right. And "redress" means to remedy,
24 right?

25 A. The bylaws are clear, and this was always

1 the intention. I was the rapporteur for this, and
2 I was the person who wrote the -- was fundamentally
3 charged with a relevant bylaws provision.

4 This means -- and it is very clear in the
5 bylaws, and that is what the CCWG meant -- that
6 they had a right to get a decision about whether an
7 action or an inaction violated the bylaws.

8 This does not say to me, it was never the
9 intention of the CCWG, in my hearing, that the
10 Panel could prescribe a remedy. And that totally
11 makes sense in the context of ICANN IRPs, because
12 often there are many, many parties who are affected
13 by this. There are a lot of moving parts.

14 So I do not see that as a statement, and I
15 participated in both the CCWG discussions and the
16 bylaws' drafting, which was not intended to, you
17 know, damages, recovery, remedy, that kind of
18 stuff, but the -- the IRP's authority is limited to
19 finding -- making a determination about whether an
20 action or inaction violated the articles of
21 incorporation and bylaws, and that's what's binding
22 on ICANN.

23 Q. Ms. Burr, I really must ask that you
24 respond to the question that I'm asking, otherwise
25 we are just never going to get done today.

1 What I'm asking here is that in Annex 7 on
2 Page 5, at the second bullet point, the CCWG
3 provided that, "Entities shall have standing if
4 they are materially affected by an ICANN action or
5 inaction that violates ICANN's articles of
6 incorporation or bylaws, that they shall have a
7 right to file a complaint and to seek redress."

8 That's what it says, correct?

9 A. That's what it says in the annex
10 explicating the recommendation.

11 Q. That's all I'm asking.

12 If we could turn to Page 6.

13 ARBITRATOR BIENVENU: Just for the record,
14 Mr. Litwin, you were referring to the first bullet
15 point, not the second bullet point.

16 MR. LITWIN: Oh, I'm sorry about that.
17 Yes, first bullet point.

18 Q. If you could please, Ms. Burr, turn to
19 Page 6, Paragraph 9, please. And here the CCWG
20 states in its explicative Annex 7 that the role of
21 the IRP will be to hear and resolve claims,
22 correct?

23 A. That ICANN has acted or failed to act in
24 violation of its articles and bylaws.

25 Q. And that resolution of claims are intended

1 to be both final and binding, correct?

2 A. Yes, with respect to binding of a bylaws
3 violation or an action exceeding the mission.

4 Q. Okay. Now, Ms. Burr, earlier today, you
5 testified about the Ruby Glen litigation concerning
6 .WEB.

7 Do you recall that testimony?

8 A. I think I mentioned that litigation had
9 been filed and a CEP was filed.

10 Q. In that litigation, ICANN defended its
11 conduct by reference to the litigation waiver in
12 the new gTLD guidebook's terms and conditions in
13 Module 6; is that correct?

14 A. I have not read the pleadings in the Ruby
15 Glen litigation.

16 Q. Are you aware that the new gTLD guidebook
17 provides for a litigation waiver?

18 A. My understanding is that the application
19 itself includes a litigation waiver and refers to
20 the accountability mechanisms to resolve disputes.

21 Q. Okay. In fact, what the guidebook says is
22 that, "The applicant agrees not to challenge in
23 court or in any other judicial forum any final
24 decision made by ICANN with respect to its
25 application, provided that the applicant may

1 utilize any accountability mechanism set forth in
2 ICANN's bylaws for the purpose of challenging any
3 final decision made by ICANN with respect to the
4 application."

5 Is that right?

6 A. I don't have the applicant guidebook in
7 front of me. That sounds right. You read it, so I
8 assume it's correct, but I don't have it.

9 Q. I'll represent to you that I have read it.
10 In general -- let me just -- now, in terms of that
11 application waiver, is it ICANN's position,
12 therefore, that applicants are not left with any
13 form -- without any form of redress because they
14 can initiate the accountability mechanisms in the
15 bylaws?

16 A. I don't believe that is a correct
17 statement of ICANN's position. You'd have to ask
18 ICANN itself about that.

19 Here's what I think: That bylaws provide
20 accountability mechanisms for -- in order to
21 identify instances where ICANN -- either ICANN or
22 the Board has acted in violation of the bylaws, and
23 the Board must -- if there is a finding that ICANN
24 has violated its bylaws, the Board must act to
25 resolve that, to fix that.

1 Q. So I am not sure of the difference. Would
2 it be a fair statement that applicants in the new
3 gTLD Program are not left without any form of
4 redress because of the litigation waiver because
5 the litigation waiver provides that they may
6 initiate an accountability mechanism, including the
7 Independent Review Process?

8 A. Right. And the result of the Independent
9 Review Process is if the Independent Review Panel
10 finds that the bylaws have been violated, the Board
11 has to take appropriate action to fix that.

12 Q. And the IRP is effectively an arbitration
13 that is operated by the ICDR, correct?

14 A. It is operated by the ICDR, and it very
15 much follows arbitration forms, yes.

16 Q. And the IRP gives an applicant, therefore,
17 the ability to have independent third parties
18 evaluate its challenges to ICANN's actions or
19 inactions under ICANN's articles and bylaws in
20 addition to claims under the guidebook; is that a
21 fair statement?

22 A. Its claims under the guidebook that ICANN
23 has violated its bylaws. The IRP is limited to
24 claims that ICANN has -- in this context, there's
25 the IANA and different things, but in this context,

1 the authority -- the purpose of the IRP is to
2 determine whether or not, in taking some action or
3 inaction or failing to act, ICANN has violated its
4 bylaws, and that would be including in its -- in
5 its application of the rules of the applicant
6 guidebook if it's violated the bylaws somehow.

7 Q. Would you also agree that, you know, that
8 the applicants have not been left without any form
9 of redress because ICANN has provided for a robust
10 form of review in which these challenges could be
11 addressed, namely the IRP; is that a fair
12 statement?

13 A. Yes. And the point is that the violations
14 of ICANN's bylaws can be identified through an IRP.

15 Q. So just to be clear here, where the limits
16 of a court's jurisdiction for review of ICANN's
17 conduct ends because of the litigation waiver,
18 ICANN is essentially saying that the IRP Panel's
19 jurisdiction starts; is that fair?

20 A. Only if there's a question about whether
21 the way ICANN has administered the applicant
22 guidebook is in violation of the bylaws or articles
23 of incorporation or exceeds ICANN's mission.

24 Q. Let me try this another way.

25 So in light of the litigation waiver, an

1 IRP Panel's jurisdiction must cover all matters
2 that could not be addressed by a court of
3 competition -- competent jurisdiction, otherwise a
4 new gTLD applicant who was required to agree to the
5 waiver would have no effective means of redress; is
6 that fair?

7 A. So there's a contract here, right, and
8 people are applying for a new gTLD, and the
9 contract, the application, includes a provision
10 that says, "We are not going to sue you in a court.
11 To the extent we have a complaint about violations
12 of the bylaws, we'll use the -- the bylaws-provided
13 remedies."

14 You're passing this in, like -- sort of in
15 big terms, but I think the issue is there's an
16 agreement here, when you apply for a new gTLD, you
17 are agreeing that disputes related to violation of
18 the bylaws are going to be decided through ICANN's
19 accountability mechanism, and otherwise you don't
20 have a contractual right to sue.

21 Q. So when Ruby Glen sought to enforce its
22 contractual rights in court, ICANN's position was,
23 "You can't do that. You have waived your right to
24 seek judicial review. And that's okay because we
25 have provided a robust form of independent review

1 by way of the IRP"; isn't that right?

2 A. I don't know what the Court in Ruby Glen
3 said. I haven't reviewed that for this. I haven't
4 reviewed it in ages.

5 MR. ENSON: Mr. Chairman, I would request
6 that we move on. This is an area where Mr. Litwin
7 is seeking legal conclusions on topics that were
8 not in Ms. Burr's witness statement, and I think in
9 light of the time estimates for Ms. Burr's cross, I
10 think our time is best spent on matters that are
11 within her witness statement.

12 ARBITRATOR BIENVENU: Mr. Litwin.

13 MR. LITWIN: Well, I was just about to
14 move on, so that's perfectly fine with me.

15 MR. ALI: Sorry, Mr. Chairman.

16 Before you do, I'd like to consult with
17 you.

18 Secondly, Mr. Chairman, I think you made
19 it very clear in your -- in a recent procedure
20 ruling --

21 ARBITRATOR BIENVENU: Mr. Ali, I am going
22 to cut you off. You don't need to respond to that.
23 I will give you an opportunity to consult with
24 Mr. Litwin. He said he was planning on moving on.
25 So consult about that, and we'll go from there.

1 MR. ALI: Sure, but, Mr. Chairman, you
2 will understand that we will need to do this fairly
3 often because we are not in the same place.
4 Mr. Litwin is in New York, and I am in Washington,
5 D.C.

6 ARBITRATOR BIENVENU: That's fine. No one
7 has a problem with that, Mr. Ali.

8 MR. ALI: All right. Mr. Chairman, thank
9 you.

10 ARBITRATOR BIENVENU: Thank you.

11 (Whereupon a recess was taken.)

12 Q. BY MR. LITWIN: Ms. Burr, I would like to
13 direct your attention to Page 13 of the CCWG
14 report, Paragraph 57.

15 A. Yes.

16 Q. Now, here the CCWG provided -- and I will
17 again stipulate that this is in Annex 7, which was
18 an explication on the CCWG report and its
19 recommendations -- that if a Panel determines that
20 an action or inaction by Board staff violates the
21 bylaws or articles, then that decision is binding
22 and the ICANN Board and staff shall be directed to
23 take appropriate action to remedy the breach.

24 Do you see that?

25 A. Yes.

1 Q. Okay. So the CCWG intended that an IRP
2 Panel, if it were to find that ICANN breached its
3 bylaws or articles, should issue a binding
4 declaration that ICANN breached its articles and
5 bylaws and further that the Panel should direct
6 ICANN how to remedy that breach, correct?

7 A. That is not what the CCWG intended. What
8 the CCWG intended is that the Panel would issue a
9 binding determination regarding a bylaws violation,
10 and in response to that finding, ICANN must take
11 appropriate action to remedy the breach.

12 Q. Now, I guess I'm confused by this. The
13 CCWG obviously put a lot of work into preparing its
14 report in this Annex 7, correct?

15 A. Yes. We spent a lot of time doing it.

16 Q. I know, because I have been through all
17 those materials, and they are quite voluminous.

18 And here in Annex 7, the CCWG refers to
19 itself, it says, "We intend that the Panel shall
20 issue a binding decision and that ICANN's Board and
21 staff shall be directed to take appropriate action
22 to remedy the breach."

23 Did the CCWG just not mean what it says
24 here?

25 A. Well, so, first of all, I can read that

1 construction, which is passive and which was put up
2 as we were working this out. I do not read it to
3 say that the Panel is going to direct ICANN to take
4 a specific action to remedy the breach.

5 The Panel, by making a finding that ICANN
6 has violated its articles, ICANN must take -- then
7 take appropriate action to remedy the breach.

8 That is not the same as saying that the
9 Panel has the authority to say what the appropriate
10 action is to remedy the breach.

11 And the reason is there are so many moving
12 parts and parties here, imagine if this Panel said
13 "ICANN violated the bylaws, and you must award this
14 to, you know, X, Y or Z." There are going to be
15 two or three other parties who then have a cause of
16 action.

17 So ICANN must -- ICANN has an obligation
18 to take appropriate action, but the CCWG did not
19 contemplate that the Panel, the IRP Panel would
20 decide what that appropriate action was.

21 Q. Okay. Why don't we look at the bylaws.
22 So if you could turn back to Tab 2 in your binder,
23 and I would refer you to Page 30 at Section 4.3(x).
24 And there the bylaws provide that the IRP is
25 intended to be a final binding arbitration process;

1 is that correct?

2 A. Yes.

3 Q. And that IRP Panel's decisions are binding
4 final decisions to the extent allowed by law,
5 correct?

6 A. Yes. And that, of course, is subject to
7 the authority of the IRP Panel in Section (o).

8 Q. Well, I think we can all agree that
9 arbitral bodies, in fact, any judicial body must
10 act within its jurisdiction, correct?

11 A. Right. All I am saying is Section (o)
12 specifies what the IRP has authority to do, and
13 within that context its decisions regarding
14 binding -- about a bylaws violation is binding.

15 Q. Okay. So can we turn to Page 24, Rule
16 4.3(i), please. Here, much like the CCWG report we
17 just referred to earlier, the bylaws provide that
18 the IRP Panel shall conduct an objective de novo
19 examination of the dispute, correct?

20 A. Correct.

21 Q. And under Roman Numeral i, the bylaws
22 provide that the IRP Panel shall make findings of
23 fact to determine whether the covered action
24 constituted an action or inaction that violated the
25 articles of incorporation or the bylaws, correct?

1 A. Yes.

2 Q. And it says that the Panel should make
3 those findings pursuant to a de novo examination,
4 correct?

5 A. Yes. The Panel makes a finding of the
6 facts that determine whether or not the action or
7 inaction violated the bylaws. That's the fact that
8 they are determining, whether the covered action
9 constituted an action or inaction that violates the
10 articles of incorporation or bylaws.

11 Q. Well, what this says is that the Panel
12 shall make findings of fact to determine --

13 A. Right.

14 Q. -- whether or not there was a violation,
15 correct?

16 A. Correct.

17 Q. Okay. Now, let's look at Roman Numeral
18 iii that talks about claims arising out of the
19 Board's exercise of its fiduciary duties.

20 So this provision relates only to those
21 claims that arise out of a Board's exercise of its
22 fiduciary duties, correct?

23 A. Yes. Although, a Board -- it is very hard
24 for me to see that a Board can act without respect
25 for its fiduciary duties, but yes.

1 Q. Let's talk about the ICANN Board's
2 fiduciary duties.

3 Would you agree that each member of
4 ICANN's Board is accountable to the participating
5 community as a whole through his or her fiduciary
6 duties and is required to make decisions that are
7 in the best interest of the corporation and the
8 community at large; is that fair?

9 A. It is certainly true that the members of
10 the Board are each obligated to act in the interest
11 of the organization, including the organization's
12 commitment to the community. You started this out
13 by saying it has a fiduciary duty to individual
14 members.

15 I think there's a fiduciary duty to the
16 organization that encompasses staying within its
17 mission and acting in the global public interest
18 and all those other things that individual
19 participants in ICANN have an interest in.

20 But I am not sure I have a fiduciary duty
21 to an individual member of the community, if that's
22 what you're asking me, and I suspect that's a
23 matter of California law.

24 Q. Yeah, I think that's right. I think
25 ICANN, in fact, has said that the general legal

1 duties of an ICANN director are owed to the
2 corporation itself, that is to ICANN itself, and
3 the public at large, not to the individual
4 interests within the ICANN community; is that
5 right?

6 A. That's my understanding. I certainly do
7 not reflect any individual interest.

8 Q. So ICANN doesn't act as Afilias'
9 fiduciary, right?

10 A. I am not comfortable with this
11 construction because it is -- ICANN is acting --
12 the ICANN Board, when it acts, has an obligation to
13 the organization, including to the global public
14 interest, through the bylaws.

15 I don't know -- you're asking me to make a
16 legal conclusion about whether ICANN is Afilias'
17 fiduciary, and I just don't quite know what to make
18 of that.

19 Q. Okay. Well, let me ask you this, then:
20 In terms of your understanding of bylaws, and
21 particularly with respect to the bylaw that's on
22 the screen, little Roman Numeral iii, that says,
23 "For claims arising out of the Board's exercise of
24 its fiduciary duties," can Afilias or any
25 individual member of the ICANN community bring

1 claims for breach of fiduciary duty against ICANN?

2 A. Anybody can bring a claim that says that
3 ICANN, either the Board or org, violated the
4 bylaws. So if something that violated the bylaws
5 had something to do with fiduciary duties, you
6 would still be able to bring that.

7 But the fiduciary issue here doesn't
8 swallow the ultimate fact that the determination
9 about whether something violates the ICANN bylaws
10 or not is left to the IRP Panel.

11 The question is: In the course of acting
12 there are, at every step of the way, a bunch of
13 potentially reasonable courses of action. And to
14 me this says unless the Panel finds that ICANN
15 violated its -- the bylaws, it's not -- it doesn't
16 have the authority to say, you know, you should
17 have done it a different way if that -- if failing
18 to do it a different way does not amount to a
19 violation of the bylaws.

20 So this doesn't swallow anything. If
21 there's a violation of the bylaws, there's a
22 violation of the bylaws. This is only sort of in
23 the decision-making and carrying things out that --
24 activities that -- actions that do not violate the
25 bylaws that the Board should -- substitute its

1 judgment for the Board's reasonable judgment.

2 Q. Let me see if I can come across this in a
3 different way.

4 If the IRP's jurisdiction is limited in
5 the way that you have just described, do matters
6 falling outside of the IRP's jurisdiction fall
7 within the jurisdiction of a court of competent
8 jurisdiction?

9 A. There are -- in the contracts with
10 contracted parties, there are provisions for how
11 disputes are resolved. I don't -- I mean, I think
12 that calls for a legal conclusion I am not prepared
13 to make.

14 With respect to the applicant guidebook,
15 the applicant guidebook and the application
16 provided for a waiver of a lawsuit and reversion to
17 a -- these accountability mechanisms for
18 determination about whether the bylaws and articles
19 of incorporation were complied with, and that seems
20 to me it is sort of a contractual resolution.

21 Q. So I guess what I'm trying to figure out
22 is if there is a gap. Is there a gap between what
23 applicants are prevented from bringing to a court
24 and between -- and what an IRP Panel can decide?
25 Are there claims simply that an applicant can't

1 bring anywhere because it's waived its right to a
2 court hearing and the IRP Panel can't decide it?

3 A. Again, that's a legal conclusion that I
4 don't think I can make. I am telling you that with
5 respect to anything that involves an alleged
6 violation of the bylaws, the IRP is the process
7 that's available.

8 Q. Well, you were a member of the CCWG that
9 developed the process for the enhanced IRP.

10 What I'm asking is just in general terms,
11 was there an intent by the CCWG to fill the gap for
12 applicants where courts were prevented from hearing
13 a claim due to litigation waiver?

14 MR. ENSON: Mr. Chairman, if I might
15 interject for a moment. We do object to this
16 continued line of questioning. He's asking for a
17 legal conclusion from Ms. Burr that she's not
18 prepared to give, and she's said three or four
19 times she cannot do it.

20 I think it is appropriate for us to move
21 on to something else at this point in time.

22 MR. LITWIN: Mr. Chairman, if I can
23 respond to this. This is a really important line
24 of questioning. Ms. Burr talked about ICANN's
25 accountability mechanisms in her witness statement.

1 She was a member of the CCWG that drafted the
2 report that we have been referring to today. She
3 was the rapporteur for the translation of those
4 recommendations by the CCWG into the bylaws. Those
5 bylaws were discussed extensively yesterday by
6 ICANN's counsel.

7 And what I'm simply trying to get an
8 understanding of is not in a legal sense, but in
9 Ms. Burr's sense, as a member of the CCWG and as
10 the rapporteur, as she's testified here today,
11 whether she intended and whether the CCWG intended
12 there to be a gap or whether or not they saw the
13 enhanced IRP as filling that gap. It is that
14 simple.

15 ARBITRATOR BIENVENU: I'll allow the
16 question directed to Ms. Burr's understanding of
17 the intent of the CCWG insofar as the risk of an
18 existence of a gap between the litigation privilege
19 and the scope of the accountability mechanisms.
20 You can ask her about her understanding.

21 MR. LITWIN: Thank you, Mr. Chairman.

22 Q. Ms. Burr, as a member of the CCWG, did you
23 have an understanding as to whether or not the CCWG
24 intended the enhanced IRP to be a gap-filler in
25 light of the litigation waiver provided for in the

1 applicant guidebook?

2 A. No, I do not believe there was a
3 discussion about a gap-filler. The CCWG intended
4 that, and I don't recall any specific obligations
5 with the applicant guidebook, although there could
6 have been.

7 The point here was that if ICANN violated
8 the bylaws, if it exercised -- if it separated out
9 somebody for disparate treatment unfairly without
10 just cause, that the IRP would be there to provide
11 a recourse for the applicant.

12 In other words, ICANN could not immunize
13 itself from a bylaws violation through a contract.
14 That's -- to the extent that there's any
15 gap-filling, it is that -- and this is, like, so
16 central to what the IRP is about.

17 It's about saying to ICANN, no, you can't
18 make people agree that you're allowed to violate
19 the bylaws.

20 But it did not go to other issues that
21 were outside of the bylaws. The IRP is so
22 absolutely specific over and over and over again
23 about what it's intended to address. So to the
24 extent there was a gap-filling, it was, we are not
25 going to allow you to say you get to violate your

1 bylaws via a contract provision.

2 ARBITRATOR BIENVENU: Ms. Burr, was there,
3 so far as you can recollect, a discussion of the
4 fact of a gap between the litigation waiver and the
5 scope of the accountability mechanisms, including
6 any possible limitation on the remedies that an IRP
7 Panel could award? Do you recall a discussion of
8 that topic?

9 THE WITNESS: I don't recall a discussion
10 of that topic. It was several years ago, so I
11 apologize. We were -- completed nearly four --
12 maybe more than four years ago.

13 ARBITRATOR BIENVENU: Thank you.

14 Q. BY MR. LITWIN: Is it possible in your
15 view, given the litigation waiver in the guidebook
16 and the limited role of the IRP Panel that you have
17 just explained, that applicants may, in fact, be
18 left without a form of redress if their claim does
19 not rise to the level that you have discussed
20 that's appropriate for an IRP Panel's
21 determination?

22 A. All I can tell you is the exercise here in
23 the CCWG -- first of all, it wasn't a specific
24 reference to the applicant guidebook. It was in
25 reference to ICANN's overall accountability.

1 And second, I can tell you personally that
2 I was motivated by making sure that ICANN could not
3 say that it had the ability to insulate itself from
4 violations of its bylaws. That's what I was
5 thinking about as I was working on this and
6 drafting it. It is what you will recall -- well,
7 you won't recall, but Arif will recall I took
8 objection to in the ICM case.

9 But here there's no issue here. It is
10 quite clear that if there's a breach of the bylaws,
11 that's -- the IRP Panel is entitled to identify
12 that in a binding way.

13 So you're asking me a question. I don't
14 think that we ever talked about -- I don't recall
15 talking about it, but it was not intended to be --
16 it was intended to address violations of the
17 bylaws. That's what the IRP was about.

18 Q. So if a claimant -- if an IRP doesn't have
19 jurisdiction to decide a claim, then you have to be
20 able to bring it to court, right, because it is not
21 arbitral? If it is not arbitral, you have to be
22 able to bring it to court?

23 A. This is a matter of equitable law. I
24 don't know the answer to that. I don't know.

25 Q. Okay. I will move on, subject to any

1 comments from my team.

2 Okay. I am going to move on.

3 MR. ALI: No comments. Thank you.

4 Q. BY MR. LITWIN: So, Ms. Burr, you state in
5 your witness statement, and I am going to quote
6 from it, that, "ICANN'S core mission is the
7 technical coordination of the Internet's DNS," that
8 is, the Domain Name Space, "on behalf of the
9 Internet community, ensuring the DNS's continued
10 security, stability and integrity."

11 Is that correct?

12 MR. ENSON: Ethan, sorry, where are you in
13 the witness statement?

14 MR. LITWIN: I actually don't have the
15 reference to it, Eric. Let me pull it up real
16 quick.

17 MR. ENSON: Is it Paragraph 11?

18 MR. LITWIN: Yes, thank you. Paragraph
19 11.

20 MR. ENSON: Thank you.

21 Q. BY MR. LITWIN: Is that a correct reading
22 of your testimony?

23 A. It's as originally envisioned by NTIA,
24 ICANN's core mission is the technical coordination,
25 that is correct.

1 Q. Are you aware that ICANN's Board has
2 stated in one of its rationales that, quote,
3 ICANN's mission statement and one of its founding
4 principles is to promote user choice, consumer
5 trust and competition?

6 A. Yes. As somebody who was deeply involved
7 in the global international process that led to the
8 creation of ICANN, that has -- the notion that
9 increasing the table for innovation and competition
10 is that ICANN, in carrying out its DNS security
11 mission, should do so in a way that creates
12 opportunities for competition and innovation.

13 Q. Okay. I'd like to direct your attention
14 to Tab 7 of your binder. This is a copy of ICANN's
15 articles of incorporation. And if you look at
16 Section 2, Roman iii, which I think is on the
17 second page, "ICANN's articles provide that the
18 corporation shall operate in a manner consistent
19 with these articles and its bylaws for the benefit
20 of the Internet community as a whole, carrying out
21 its activities in conformity with the relevant
22 principles of international law and international
23 conventions and applicable local law and through
24 open and transparent processes that enable
25 competition and open entry into Internet-related

1 markets."

2 That's what it says, correct?

3 A. That is what it says, yes.

4 Q. It is this same open and transparent
5 processes that the bylaws talk about at Section
6 3.1, correct?

7 A. Sorry, 3.1 of the bylaws?

8 Q. Yes, that we referred to earlier today
9 that talks about open and transparent processes.

10 A. I would have to look at the words side by
11 side to know if they are exact.

12 Q. I withdraw the question, Ms. Burr.

13 Now, this paragraph of the articles states
14 that ICANN must carry out its activities in
15 conformity with principles of international law,
16 correct?

17 A. Yes.

18 Q. In your view as a lawyer, as a Board
19 member, what are the relevant principles of
20 international law and applicable international
21 conventions that are referenced here?

22 A. You know, this would be based on relevant
23 treaties, respect for trademark treaties,
24 international conventions on -- I mean, I don't
25 know in particular, but -- because I am also not an

1 international law expert, nor am I an arbitrator.

2 So I --

3 Q. Okay.

4 A. -- I am not able to say all of these, what
5 they all are.

6 Q. There's a reference to competition here,
7 and the articles clearly say "enable competition,"
8 not "comply with U.S. antitrust law," correct?

9 A. Correct. And enabling competition has
10 always from the white paper -- so just to put this
11 in context, which I think is really important, in
12 1998 the United States government actually proposed
13 to add new top-level domains to expand the name
14 space to enable competition by expanding the name
15 space by creating five new top-level domains.

16 The global community came back to us and
17 said, "Forget it. We don't want you to do that,
18 USG." We want the community to develop the
19 policies that will -- for enabling competition
20 through new gTLDs.

21 So we were asked specifically about
22 antitrust immunity in the green paper, and we said,
23 "No, we are not going to -- we think that's a bad
24 idea because all of this should be -- continue to
25 be subject to applicable law relating to

1 competition," but ICANN's role is setting a table
2 where competition can take place. ICANN's role, as
3 it says in the -- as the RSEP process with respect
4 to competition, is to refer issues where
5 competition is a concern to relevant authorities.

6 But ICANN is not a regulator, and ICANN
7 does not have competition law competence, whether
8 it is U.S. or otherwise.

9 Q. Thank you, Ms. Burr. I will ask again --
10 and I think I have been quite indulgent in letting
11 you speak your mind here today because we all do
12 want to hear what you have to say, but I would ask
13 you again to not respond to something that's a
14 yes-or-no question with a monologue that does not
15 respond to the question.

16 Because what I asked is that Article 3
17 that we are looking at here does not say "comply
18 with U.S. antitrust law," does it?

19 A. No.

20 Q. Thank you. Now, I'd like to direct your
21 attention back to Tab 2 in your binder, which is
22 the bylaws, and if you could please turn to Section
23 1.2 on Page 5.

24 Again, this is ICANN's commitment and core
25 values section. If you can turn to the next page,

1 Page 6, that's where the core values begin. And
2 what the bylaws state is that the core values are
3 intended to guide ICANN's decisions and actions,
4 correct?

5 A. Are we talking about commitments or core
6 values?

7 Q. Core values on Page 6, under (b), "Core
8 Values."

9 A. Yes.

10 Q. Okay. Now, turning to the next page, I am
11 going to direct your attention to Paragraph 4,
12 where the bylaws provide that "One of ICANN's core
13 values is the introduction and promotion of
14 competition into the registration of domain names."

15 Do you see that?

16 A. Yes. "Where practical and beneficial to
17 the public interest as identified through the
18 bottom-up multistakeholder Policy Development
19 Process."

20 Q. Correct. Now, in other words, putting
21 those two concepts together, the bylaws provide
22 that ICANN should consider how its actions and
23 decisions will help further the objectives of this
24 Paragraph 4, the introduction and promotion of
25 competition, correct?

1 A. Where practical and beneficial as
2 identified through the bottom-up multistakeholder
3 Policy Development Process, yes.

4 Q. And the competition concerns identified in
5 Paragraph 4 are those competition concerns or
6 issues or maxims as identified through the Policy
7 Development Process, correct?

8 A. I'm sorry. Could you repeat that?

9 Q. Sorry. That was a horrible question. I
10 apologize.

11 In particular, when ICANN is making its
12 decisions and taking actions and has to consider
13 and be guided by this Paragraph 4, it needs to
14 identify those competition concerns that are
15 specifically identified in ICANN's policies,
16 correct?

17 A. This is saying in the public interest
18 through the bottom-up multistakeholder Policy
19 Development Process.

20 The point here is the public interest is
21 the product. The Policy Development Process is the
22 process by which the public interest is identified,
23 and that would be -- so here, introducing and
24 promoting competition in domain name registration
25 where practical and beneficial to the public

1 interest.

2 And then it says -- and that public
3 interest, by the way, is identified through the
4 Policy Development Process.

5 Q. Correct. And there is a public interest
6 in competition, right?

7 A. Yes, of course there's a public interest
8 in competition. The question is in terms of how
9 that works into the new gTLD process.

10 Q. Okay.

11 A. One has to take into mind the
12 consideration of the Policy Development Process and
13 what public interest is identified in the Policy
14 Development Process. It is important because, of
15 course, competition is in the public interest. So
16 are 10,000 other things.

17 So the question is: In any case when
18 you're deciding what's practical and beneficial, we
19 are looking to the Policy Development Process to
20 identify that.

21 Q. Okay. I'd like to direct your attention
22 to Section 2.3.

23 Chuck, if you can put that up.

24 So here the bylaws provide that, "ICANN
25 shall not apply its standards, policies, procedures

1 or practices inequitably or single out any
2 particular party for disparate treatment unless
3 justified by a substantial and reasonable cause,
4 such as the promotion of effective competition."

5 That's what it says, right?

6 A. Yes.

7 Q. What do you understand -- strike that.

8 By "inequitably," do you understand that
9 to mean unjustly or unfairly?

10 A. Yes.

11 Q. And what this particular bylaw provides is
12 that although ICANN must in general apply its
13 standards, policies, procedures and practices
14 equitably, it does not have to do so in a
15 particular instance where justified by the
16 promotion of effective competition; is that fair?

17 A. This is an example where there might be
18 substantial and reasonable cause. I am just a
19 little bit confused because we -- we moved -- so
20 this particular 2.3 was an issue, and we moved it
21 into the commitment statement. I didn't realize we
22 had also left it in Section 2.

23 But in the commitment statement there's
24 also an obligation to apply "documented policies
25 consistently, neutrally, objectively, and fairly,

1 without singling out any particular party for
2 discriminatory treatment, making an unjustified
3 prejudicial distinction between or among different
4 parties."

5 Q. Okay. But what I'm really referring you
6 to, Ms. Burr, is Section 2.3, which says you have
7 got to treat everybody the same, but you can treat
8 one party differently if there's a substantial and
9 reasonable cause to do that, that's what 2.3
10 provides, right?

11 A. Yes, if there's a substantial or
12 reasonable cause.

13 Q. In fact, the only example provided in the
14 bylaws is the promotion of effective competition.
15 The bylaws state that the promotion of effective
16 competition is, in fact, a substantial and
17 reasonable cause to treat somebody differently,
18 right?

19 A. Yes. I have to say that I thought we had
20 moved this statement out, but apparently it is
21 still there, at least based on this document.

22 Q. Okay. I'll represent to you that this is
23 a copy of the bylaws that appears on ICANN's
24 website, and again, I would ask you to confirm, yes
25 or no, that the bylaws, Section 2.3, provides that

1 ICANN must treat everybody the same and can't treat
2 anybody differently unless there's a substantial
3 and reasonable cause to do so. The only example
4 given of that is the promotion of effective
5 competition, correct?

6 A. Yes, that is what 2.3 says.

7 Q. Okay. Now, in your witness statement you
8 state that ICANN has historically referred
9 competition concerns to the Department of Justice
10 for analysis and possible government response or
11 action, correct?

12 A. Correct.

13 MR. ENSON: Ethan, again, I just ask for a
14 cite in the declaration.

15 MR. LITWIN: I apologize, Eric.

16 MR. ENSON: 23, perhaps.

17 MR. LITWIN: 23, yes. You beat me by a
18 second.

19 Q. Now, and I'll apologize if I mispronounce
20 his name, but, Ms. Burr, do you know John Kneuer,
21 formerly of the U.S. Commerce Department?

22 A. Yes.

23 Q. Did I pronounce his name correctly?

24 A. Kneuer.

25 Q. Thank you. Are you aware that Mr. Kneuer

1 submitted an expert report in this IRP on behalf of
2 Amici?

3 A. I did see that, yes.

4 Q. Did you review it?

5 A. I did not review it in depth. I took a
6 quick look at it.

7 Q. Okay. Well, in his report Mr. Kneuer
8 opines -- this is Page 3, Paragraph 4(a) of his
9 report.

10 A. Is that in one of these tabs?

11 Q. Yes. I can give you the cite. It is a
12 pretty basic point, but if you'd like to refer, it
13 is Tab 9 on Page 3, and there at the bottom of
14 Paragraph (a), and I will read it to you. It says,
15 "ICANN is obligated to refer relevant matters of
16 competitive concern to appropriate government
17 authorities, such as the U.S. Department of
18 Justice."

19 Do you agree with that?

20 A. I am not aware of any place where it says
21 it must do that.

22 ICANN does, for example, in the registry
23 services approval process, reserve the right to
24 refer things to appropriate antitrust competition
25 authority.

1 Q. Well, if I can just summarize, what I
2 think Mr. Kneuer is saying there is that where
3 ICANN finds a competitive concern, it is obligated
4 to refer those concerns to DOJ or another
5 competition regulator; is that your understanding
6 of what ICANN is obligated to do where it finds
7 competition concerns?

8 A. That is my personal view about what ICANN
9 can do. I am not aware of a place where it says it
10 must do that.

11 Q. Okay. Now, where ICANN does do this, I'd
12 just like to get a better sense of how the process
13 works. Perhaps we can just use a recent example, a
14 recent request or referral as an example. When was
15 the last time ICANN asked the DOJ to advise ICANN
16 on a competition issue?

17 A. I don't know the answer to that question.

18 Q. Are you aware of any instances where ICANN
19 has asked DOJ to advise it on a competition issue?

20 A. The place where it is most likely to come
21 up is when somebody seeks -- when a registry
22 operator seeks authority to introduce a new
23 registry service.

24 In that case, if the registry service that
25 they were proposing raised competition concerns,

1 they have the right -- ICANN has the ability to
2 refer.

3 Q. Has ICANN ever done that, do you know?

4 A. I don't know the answer to that question.

5 Q. If ICANN was going to refer something to
6 the Department of Justice, would it use the
7 business review letter process?

8 A. I have no idea how -- I don't know what
9 ICANN would do.

10 Q. So you don't know if they would send a
11 letter, pick up the phone and call somebody?

12 A. I don't know.

13 Q. Okay. If ICANN were to ask the DOJ to
14 opine, would it ask the DOJ to opine on whether
15 something violated its obligation to introduce and
16 promote competition?

17 A. At least in the RSEP program, the question
18 is whether the service -- and I would have to look
19 at the exact words, but whether it poses -- I don't
20 know, whether it raises competition concerns. So
21 I'd have to look at that RSEP, because that's where
22 I would have to look to find out what they would
23 ask about.

24 Q. Now, a new registry service would be
25 potentially, and most likely introduced globally,

1 correct, because the Internet is global, right?

2 A. It certainly could be.

3 Q. And in the event that it was global, would
4 ICANN be obligated to take a survey of competition
5 regulators globally to determine whether or not
6 that service raised competition concerns?

7 A. I don't believe ICANN is obligated to do a
8 global survey.

9 Q. Well, how would ICANN determine whether an
10 action complied with competition law across
11 multiple jurisdictions?

12 A. I think in the RSEP context, the referral
13 is whether a proposed service or arrangement raises
14 competition concerns, and that it would be
15 reviewing it -- referring it to the relevant
16 competition authorities, which could be Europe,
17 could be the U.S., could be someplace else.

18 Q. Well, because competition law varies,
19 right?

20 A. Correct.

21 Q. By jurisdiction?

22 MR. ENSON: Mr. Litwin, the RSEP Policy is
23 attached as Exhibit D to Ms. Burr's witness
24 statement. Our staff referred to it a couple
25 times. If you want to examine her on that, I would

1 request that you would allow her to look at the
2 document.

3 MR. LITWIN: I am done with this. If you
4 want to take that up on redirect, you can be my
5 guest.

6 MR. ENSON: Very well.

7 Q. BY MR. LITWIN: So would ICANN be
8 obligated to post communications that it's had with
9 a relevant competition regulator on its website?

10 A. I am quite certain that would depend on
11 the circumstances. So general correspondence ICANN
12 posts on its website. I suspect ICANN does not
13 post CIDs on its website.

14 Q. Are you aware -- I think you said that you
15 referred, in preparing for your testimony here
16 today, to a 2008 letter that the United States
17 Department of Justice wrote to the U.S. Department
18 of Commerce, correct?

19 A. Correct.

20 Q. That's Tab 8 of your binder, and I'd ask
21 you to open that to the first page, please.

22 Now, is it fair to say that in this letter
23 the Department of Justice is opining on competition
24 concerns raised by ICANN's proposal to launch the
25 new gTLD Program, which, in fact, it did several

1 years later; is that correct?

2 A. So this is a letter from Deb Garza, acting
3 assistant Attorney General for Antitrust, to
4 Meredith Baker, who was the acting assistant
5 Secretary for Communications at NTIA, conveying to
6 Meredith Baker the Justice Department's
7 observations regarding the very earliest version of
8 the policy. I don't even know if there was an -- a
9 draft applicant guidebook out at this point.

10 But yes, this is an input to NTIA, which I
11 believe was forwarded, regarding the Justice
12 Department's recommendations at that point in time.

13 Q. Okay.

14 A. This is part of the process.

15 Q. So essentially NTIA had asked the
16 Department of Justice -- and I am referring to the
17 first paragraph of Ms. Garza's letter. The
18 Department of Commerce was simply asking advice
19 concerning competition issues raised by the draft
20 request for proposal that would govern the issuance
21 of new generic top-level domains, correct?

22 A. Uh-huh.

23 Q. I'm sorry, you need to answer "yes" or
24 "no" for the record.

25 A. Sorry. Yes. Sorry.

1 Q. No worries. We all fall into that.

2 This is a request made by the Department
3 of Commerce, not ICANN, right?

4 A. Apparently, yes.

5 Q. And I think I heard you testify a moment
6 ago that this letter was subsequently sent by
7 Ms. Baker to ICANN, correct?

8 A. That's my understanding.

9 Q. In fact, I will represent to you that
10 Ms. Baker sent this letter on December 18, 2008, to
11 Mr. Peter Dengate-Thrush, who at the time was the
12 chairman of the Board of ICANN?

13 A. Peter Dengate-Thrush, yes.

14 Q. Now, I'd like to direct you to a few
15 points in Ms. Garza's letter, just to a few points
16 because I know Mr. Enson and I are very familiar
17 with Ms. Garza.

18 Ms. Garza was the head of DOJ's Antitrust
19 Division, correct?

20 A. Yes, she's the acting assistant Attorney
21 General at the end of the second Bush
22 administration.

23 Q. Okay. So in the world of DOJ, in just
24 general parlance, she was the top dog in the
25 Antitrust Division, right, she was the one that ran

1 the show?

2 A. Yes.

3 Q. Now, Ms. Garza -- I'd like to direct your
4 attention to Page 4 of her letter in the section
5 entitled "Recommendations."

6 A. Uh-huh.

7 Q. You'll see there that under
8 "Recommendations," Ms. Garza writes that, "ICANN is
9 obligated to manage gTLDs in the interest of
10 registrants and to protect the public interest in
11 competition," correct?

12 A. That is what she says.

13 Q. This conforms to what you said earlier,
14 that there's a public interest in competition,
15 correct?

16 A. She is citing to the articles of
17 incorporation, and I want to go back to the
18 specific language about enabling competition that's
19 in the articles of incorporation.

20 Q. Now, turning to Page 6, I would direct
21 your attention to Footnote 10, at the bottom of the
22 page, obviously, and they are in quite small type.

23 Ms. Garza writes that, "ICANN has
24 consistently told us that its primary concern is
25 with DNS management from a technical perspective,

1 that it does not have the expertise or inclination
2 to protect or preserve the public interest in
3 competition and low domain costs, preferring
4 instead to allow government competition authorities
5 to take whatever action may be necessary to address
6 issues of competitive abuse."

7 This is, in fact, what you said in your
8 witness statement was ICANN's historical practice,
9 correct?

10 A. Correct. ICANN refers out -- it certainly
11 is my consistent view throughout this that ICANN
12 has neither the authority nor expertise to serve as
13 a competition regulator.

14 Q. And you state at Paragraph 23 of your
15 witness statement that ICANN was not designed to
16 and does not have specific expertise in antitrust
17 for competition law, right?

18 A. I'd have to look at Paragraph 23, but yes.

19 Q. Continuing on to Paragraph 24, you write,
20 "ICANN has historically referred competition
21 concerns to DOJ for analysis and possible
22 government response or actions," correct?

23 A. Uh-huh.

24 Q. I'm sorry. I need a "yes" or "no" for the
25 record.

1 A. Yes. I'm so sorry. Yes. I'm so sorry.

2 Q. No worries.

3 What you write in your witness statement
4 is consistent with what Ms. Garza writes in
5 Footnote 10, correct? It is the highlighted
6 portion on the screen about what ICANN has
7 consistently told the DOJ.

8 A. I don't know what ICANN has consistently
9 told the DOJ, but that's consistent with my views
10 on ICANN's expertise.

11 Q. That was, in fact, the question. Thank
12 you.

13 Continuing on in Footnote 10 in
14 Ms. Garza's letter, "The problem with ICANN's
15 preferred approach is that antitrust laws," meaning
16 U.S. antitrust laws, "do not prescribe a registry
17 operator's unilateral decisions." "And
18 accordingly," skipping to the end of the paragraph,
19 "ICANN should create rules fostering a competitive
20 environment to the greatest extent possible."

21 So in other words, the DOJ disagreed with
22 ICANN's preferred approach to handling competition
23 concerns, correct?

24 A. Well, she is certainly citing what she
25 describes as a problem with ICANN's views, yes,

1 that's what she's saying. I mean, in creating
2 rules, fostering a competitive environment to the
3 greatest extent possible, for example, in this
4 case, this is largely in 2008, this is largely
5 about trademark concerns and the implication for
6 consumers and trademark holders through the
7 introduction of new top-level domains.

8 And before the new gTLD Program launched,
9 there were any number of steps taken to address the
10 kinds of issues she is talking about in here, such
11 as the Trademark Clearinghouse and stuff. So it
12 is -- so, you know, this is a letter that ICANN
13 received and fed into the policy and implementation
14 process.

15 Q. What Ms. Garza's really getting at here is
16 there are certain blind spots in U.S. antitrust
17 law, such as the failure to proscribe a registry
18 operator's unilateral decisions, correct?

19 A. Well, she is certainly saying that the
20 antitrust laws generally do not proscribe a
21 registry operator's unilateral decisions, yes.

22 Q. And because of that, ICANN should create
23 rules for fostering a competitive environment to
24 the greatest extent possible, right?

25 A. That's what she says, yes.

1 Q. In fact, you note at Footnote 11 of your
2 witness statement, which is on Page 8, you say
3 that, "The pressure of competition is likely to be
4 the most effective means of discouraging registries
5 from acting monopolistically," correct?

6 A. I believe this is a quote -- sorry, I just
7 need to understand where this is coming from.

8 Yes, this is from the white paper, and
9 this was in response -- this was in response -- I
10 mean, this had very particular genesis because this
11 goes back to the proposal in the green paper that
12 the United States government was going to
13 unilaterally introduce five new top-level domains
14 to add competition.

15 Q. Ms. Burr, I'm sorry, I am just asking a
16 very basic question.

17 When you write at paragraph -- at Footnote
18 11 that, "The pressure of competition is likely to
19 be the most effective means of discouraging
20 registries from acting monopolistically," do you
21 agree with that statement?

22 MR. ENSON: Mr. Litwin, I have to object.
23 Ms. Burr was in the middle of a response to your
24 question.

25 ARBITRATOR BIENVENU: The objection is

1 sustained. Mr. Litwin, she does not write this.
2 She quotes from a response, as you can see. So if
3 you want to reformulate your question, you're at
4 liberty to do so, but she doesn't say that.

5 MR. LITWIN: I will reformulate. Thank
6 you, Mr. Chairman.

7 Q. Ms. Burr, you quote from the white paper
8 at Footnote 11 that, "The pressure of competition
9 is likely to be the most effective means of
10 discouraging registries from acting
11 monopolistically."

12 Do you agree with that statement in the
13 white paper?

14 A. As a general matter, the white paper was
15 saying that competition is -- more competition is
16 better, but it also goes on to say, "But we are
17 deferring to the community, who said we should not
18 be making that decision."

19 I mean, that's what this is about. It is
20 really, really, really -- yes, it was the United
21 States government's position in 1998 that the
22 pressure of competition is likely to be the most
23 effective way of discouraging registries from
24 acting monopolistically.

25 Q. Okay. Now, do you understand, as someone

1 who has some familiarity with competition laws as a
2 result of your work at the FTC, that acting
3 monopolistically is the same thing that Ms. Garza
4 writes in Footnote 10 of her letter about a
5 registry operator making unilateral decisions?

6 MR. ENSON: Mr. Chairman, again, I
7 apologize for interrupting, but I feel that I have
8 to object. We have established what Ms. Garza said
9 in the letter in 2008. We established what is said
10 in the white paper. Ms. Burr has answered these
11 questions. There's nothing more to examine her on.
12 Mr. Litwin is unfortunately seeking a legal
13 conclusion on these issues.

14 MR. LITWIN: If she doesn't have an
15 understanding, I am happy to move on.

16 ARBITRATOR BIENVENU: I think it goes to
17 weight. You can ask the question.

18 MR. LITWIN: Thank you, Mr. Chairman.

19 Q. Again --

20 A. Let me be very clear, I am not an
21 antitrust expert. She's talking about unilateral
22 decisions made under processes established by
23 ICANN. Those might or might not be monopolistic
24 behaviors. I have to know the circumstances. I
25 don't read those two sentences as saying the same

1 thing.

2 Q. Okay. When Ms. Garza writes that, "ICANN
3 should create rules for fostering a competitive
4 environment to the greatest extent possible," what
5 do you understand "to the greatest extent possible"
6 to mean?

7 A. I would go back and look at ICANN's bylaws
8 and articles of interpretation to parse that, which
9 is that where practical and feasible, consistent
10 with the global public interest as identified
11 through policy development processes.

12 Q. Is it possible that what Ms. Garza's
13 saying here is that where ICANN is faced with a
14 decision where one outcome may promote competition
15 and an alternative may harm competition, that ICANN
16 should err on the side of promoting competition
17 because antitrust laws have certain blind spots
18 when dealing with dominant entities?

19 MR. ENSON: Mr. Chairman, Ms. Burr cannot
20 answer or speculate about what Ms. Garza meant in
21 2008 with the use of that phrase. Ms. Garza wrote
22 it, not Ms. Burr.

23 ARBITRATOR BIENVENU: I'll allow the
24 question. I believe it goes to the weight of the
25 resulting evidence, but I'll allow the question.

1 Ms. Burr is a very sophisticated witness with
2 intimate knowledge of ICANN and its provenance.
3 I'll allow the question.

4 MR. ENSON: Thank you, your Honor.

5 Q. BY MR. LITWIN: Ms. Burr --

6 A. If you would, just give me a moment here.

7 Q. Sure.

8 A. To me this letter is really about
9 pressures on trademark owners who will feel
10 compelled to register in new gTLDs and that ICANN
11 should analyze that issue, the trademark issue, and
12 proceed cautiously in authorizing new gTLDs,
13 attempting to assess both the likely costs and
14 benefits of any new gTLD.

15 To me what this letter is about is -- it's
16 possible that new top-level domain operators will
17 be able to impose costs on trademark owners who
18 feel compelled to protect their marks, and you need
19 to do this analysis before you proceed with new
20 gTLDs.

21 Beyond -- this is in a very particular
22 context, and I have to respond to it in the context
23 in which it was written.

24 Q. Okay. Let's look at this from another
25 angle. So if you could turn to Tab 6 in your

1 binder, and this is a document called the
2 "Rationale for Board Decisions on Economic Studies
3 Associated with the new gTLD Program."

4 Do you see that?

5 A. Yes.

6 Q. And these are the explanatives of Board
7 resolution that the Board issues from time to time
8 to explain why it took certain actions; is that a
9 fair statement?

10 A. I actually don't know what this document
11 is. Could you give me a little bit more?

12 Q. Sure.

13 A. Could somebody tell me in what context or
14 what this was attached to?

15 Q. I can tell you that -- I'll represent to
16 you, Ms. Burr, that we downloaded it from ICANN's
17 website, and I'll also represent to you that even
18 though it is undated, it was issued in 2011, which
19 we know from the web address from it.

20 And you'll see, if you look at Page 3,
21 that refers to events that took place in 2009 and
22 2010 and was issued -- well, I won't testify to why
23 it was issued, but I would direct your attention to
24 Page 8, which is entitled "Board Determinations."

25 And there -- and the Board states that,

1 "ICANN's default position should be to foster
2 competition."

3 Do you see that?

4 A. "As opposed to having rules that restrict
5 the ability of gTLDs to innovate."

6 Q. Correct. I just want to ask this question
7 again. Because ICANN's default position, according
8 to the Board, should be to foster competition, that
9 where ICANN is faced with a choice, one of which
10 may promote competition, the other which may harm
11 competition, ICANN should act in conformity with
12 its default position to foster competition; is that
13 a fair statement?

14 A. So this is talking about a default
15 position to allow the introduction of new gTLDs,
16 set a table where competition can thrive through --
17 and innovation through the addition of new gTLDs.

18 I would read this also in the context of
19 other provisions of ICANN's bylaws that require to
20 rely on market mechanisms in the same -- you just
21 can't take this out of -- I mean, yes, foster
22 competition. Does that mean that ICANN should act
23 like a regulator? No. But it should make a choice
24 to allow competitive forces to go out and battle it
25 out and introduce innovation.

1 Q. But what I'm asking is that where ICANN
2 faces a choice, and we have already established
3 that you are not aware of any instance where ICANN,
4 in fact, has asked the advice of a competition
5 regulator and ICANN has to make a choice, isn't it
6 fair to say, based on what we have seen, that its
7 default position should be to make the choice that
8 promotes competition?

9 A. ICANN has -- ICANN must operate consistent
10 with the community-developed policies. I had not
11 seen this before. I don't know everything that it
12 goes through. I feel like I am speculating based
13 on one position. But basically this is consistent
14 with my view that in all cases, the point is to
15 allow an environment in which competition can take
16 place.

17 Q. Okay. Turning back to Page 6 of
18 Ms. Garza's letter.

19 ARBITRATOR BIENVENU: Mr. Litwin, I am
20 sorry to interrupt. We are beyond the point at
21 which the agenda provided you with a break for our
22 second break. And for planning purposes, I should
23 mention that, according to the administrative
24 secretary, you have reached and are a little bit
25 beyond your estimate of three hours for the cross.

1 So I don't want to break your flow, but
2 please bear this in mind as you proceed.

3 MR. LITWIN: Thank you, Mr. Chairman. I
4 am almost done here.

5 Q. So, Ms. Burr, are you back on Page 6 of
6 Ms. Garza's letter?

7 A. I am now, yes.

8 Q. I think I recall that you said that DOJ
9 said that -- you know, opined that ICANN should
10 consider competition as part of its evaluation of
11 each new gTLD application; is that fair?

12 I'll just turn your attention to right
13 above the Number 2 point heading on Page 6. It
14 refers to the evaluation of each new gTLD
15 application.

16 A. Yes. What they are saying there is you
17 should consider the impact of new gTLDs on
18 trademark owners and others who have marks that
19 they need to -- that they feel the need to protect.

20 Q. Okay. Now, the next section of
21 Ms. Garza's letter is captioned, "ICANN should
22 revise its RFP process and the proposed registry
23 agreement to protect consumers from the exercise of
24 market power."

25 Do you see that?

1 A. I do.

2 Q. And in that section, in fact, in the first
3 paragraph under that, Ms. Garza writes, "The RFP
4 process should require ICANN to consider and allow
5 objections for and retain authority to address any
6 adverse consumer welfare effects that may arise
7 during the new gTLD process."

8 Do you see that?

9 A. I do.

10 Q. So the view of the United States
11 Department of Justice was that ICANN had and should
12 retain the authority to address adverse consumer
13 welfare effects that may arise during its
14 administration of the new gTLD Program; isn't that
15 right?

16 A. That is what the Department of Justice
17 said in 2008, at the very beginning of the new gTLD
18 process, based on the very first applicant
19 guidebook.

20 Q. And that's consistent with what we looked
21 at earlier in Section 2.3 of the bylaws that allows
22 ICANN, in specific instances, to treat a party
23 differently to promote effective competition,
24 right?

25 A. That is what Section 2.3 says.

1 Q. Now, I'll direct your attention to the
2 last page of Ms. Garza's letter under the three
3 asterisks. She writes, "ICANN's approach to TLD
4 management demonstrates that it has adopted an
5 ineffective approach with respect to its obligation
6 to promote competition," right?

7 A. Yes, in December of 2008.

8 Q. Okay. Now, when we began discussing
9 Ms. Garza's letter, I represented to you, and I
10 think, as you recall, that the Commerce Department
11 had sent Ms. Garza's letter to ICANN.

12 Are you aware that the Commerce Department
13 also advised ICANN back in 2008 to revise, among
14 other things, its applicant guidebook, this first
15 iteration of the guidebook so that ICANN could, as
16 Ms. Garza says in her letter, "consider, allow
17 objections for, and retain authority to address any
18 adverse competitive welfare effects that may arise
19 during the approval of new gTLDs"?

20 A. I don't have the transmittal letter from
21 NTIA here, so I don't know if NTIA said that or
22 simply transmitted Deb Garza's letter. I'm sorry.
23 I don't have it in front of me.

24 Q. I'd like to direct your attention to Tab 3
25 of your binder, which is an excerpt from the

1 applicant guidebook, and if you could turn to
2 page -- I apologize. The page numbers here are
3 incredibly small -- to Pages 6 and 7, which are in
4 the upper right-hand corner. May be easier to
5 refer to the guidebook. It is A-11 and A-12 in the
6 guidebook.

7 Do you see that?

8 A. Yes, I am looking at the same chart, A-11
9 and -12.

10 Q. I will represent to you this is a section
11 from the guidebook that provides instructions on
12 how to complete the new gTLD application, and this
13 excerpt is taken out of Section 18, the
14 Mission/Purpose.

15 Do you see that?

16 A. Yes.

17 Q. And if you turn to the next page, A-12,
18 which is Exhibit Page 7, the guidebook states that
19 the answers to Section 18(b) should address the
20 following points, one of which is, "What do you
21 anticipate your proposed gTLD will add to the
22 current space, in terms of competition,
23 differentiation or innovation," correct?

24 A. I see that, yes.

25 Q. And that's exactly what DOJ asked for,

1 that ICANN should consider in each application how
2 it would affect competition, differentiation and
3 innovation, correct?

4 A. I think Deb Garza's admonition was
5 slightly different.

6 Q. Well, I will agree with you it is slightly
7 different, but it is the same concept, right, that
8 ICANN should consider competition concerns in
9 connection with its approval of new gTLD
10 applications, correct?

11 A. What it says, I think this is what you're
12 referring to, is that the letter says ICANN should
13 explicitly analyze the imposition of the possible
14 impetus -- imposition of costs on registrants who
15 feel compelled to register their names in the new
16 gTLD.

17 Q. Well, actually, what I was referring to --
18 and this is on Page 2 of Ms. Garza's letter. It
19 says, "The division makes two specific
20 recommendations. First, ICANN's general approach
21 to new gTLDs should be revised to give greater
22 consideration to consumer interests. ICANN should
23 more carefully weigh potential consumer harms
24 against potential consumer benefits before adding
25 new gTLDs and renewing new gTLD registry

1 agreements."

2 A. Yes.

3 Q. And all I am asking is that is consistent
4 with what ICANN eventually put in its guidebook to
5 require applicants to describe how their proposed
6 gTLD will add to the current space in terms of
7 competition, differentiation and innovation?

8 A. Yes. ICANN did ask for information in the
9 applicant guidebook about how it would contribute
10 to competition, differentiation or innovation, and
11 yes, in 2008, after the first of, you know, nine
12 versions of an applicant guidebook, the Justice
13 Department suggested that ICANN should look harder
14 at consumer interests and cost-benefit analysis
15 about adding new gTLDs.

16 It is really about a cost-benefit analysis
17 about new gTLDs all together. ICANN went through
18 eight more versions of the applicant guidebook, a
19 lot of policy development and practice around
20 protecting consumers and trademark holders and, you
21 know, the economic analysis that you referred me to
22 earlier.

23 So yes, that's what the Department of
24 Justice said in 2008, four years before the final
25 applicant guidebook.

1 Q. And if we could just turn briefly, again,
2 to that paragraph on Page 6 that I referred you to
3 earlier. Ms. Garza writes, "ICANN should
4 explicitly include this type of analysis as part of
5 its evaluation of each new gTLD application and
6 should proceed cautiously in authorizing new gTLDs,
7 attempting to assess both the likely costs and
8 benefits of any new gTLD."

9 So it is not just in the general, it is in
10 the specific, too, right?

11 A. And the community process calls for a
12 different approach. The community Policy
13 Development Process essentially said applicants
14 should resolve contention sets among themselves, as
15 opposed to a beauty contest.

16 Q. So in -- is your testimony here today that
17 the United States Department of Justice opined on
18 competition issues raised by the new gTLD Program
19 and then ICANN went a different route?

20 A. After four more years of community
21 development addressing a whole bunch of competition
22 issues that are raised in this letter, did ICANN
23 follow this letter to the -- did ICANN do
24 everything that Deb Garza wanted them to do? I
25 mean, I read this letter as Deb Garza essentially

1 saying, you know, you don't have the -- you have to
2 work through the cost-benefits of what this is
3 going to do to trademark holders, and then that was
4 the motivation, and ICANN spent four more years
5 working on that.

6 Q. Okay. After which they introduced the
7 language of the guidebook that instructed
8 applicants on how to complete 18(b), correct?

9 A. Yes. I saw that language as well.

10 Q. Right. And that section, Section 18, and
11 18(b) in particular is part of the nonconfidential
12 portion of the application that ICANN posted on its
13 website, correct?

14 A. Correct.

15 Q. So --

16 A. I don't know the answer to that, but I
17 assume that.

18 ARBITRATOR BIENVENU: Mr. Litwin, I hate
19 to do it, but I think there are many participants
20 looking at their watch and wondering when we are
21 going to take our break. I didn't want to break
22 your flow, but I feel indebted to others.

23 MR. LITWIN: Mr. Chairman, if I could just
24 indulge your time for two more minutes, I am
25 virtually at the end.

1 ARBITRATOR BIENVENU: Very well.

2 Q. BY MR. LITWIN: So during the evaluation
3 process, Ms. Burr, members of the global Internet
4 community would be able to see what the applicant
5 believed the applied-for gTLD would contribute
6 competitively to the DNS, right?

7 A. Yes, if that provision was part of the
8 public application.

9 Q. And that's the entire point of ICANN's
10 obligation to act transparently, right, to post
11 this stuff for public view?

12 A. It is certainly a point of ICANN's
13 transparency commitment.

14 Q. Because the global Internet community
15 needed to understand who was applying for which
16 gTLDs and why, correct?

17 A. The program -- I mean -- I think the
18 applicant guidebook speaks for itself in terms of
19 what you're required to produce and what will be
20 made public, and all of that was part of being as
21 transparent as possible in this process.

22 MR. LITWIN: Thank you, Ms. Burr. I have
23 no further questions. Thank you, members of the
24 Panel, for indulging me. And to everybody else on
25 the phone, I apologize that I went over the break

1 time.

2 ARBITRATOR BIENVENU: Thank you,
3 Mr. Litwin.

4 So we will take our 15-minute break, but
5 just before we do so, Mr. Enson, any redirect?

6 MR. ENSON: Yes, Mr. Chairman, not much,
7 but we will probably need 20 minutes or so.

8 ARBITRATOR BIENVENU: And to my
9 co-panelists, do you have questions for the witness
10 before the redirect?

11 ARBITRATOR CHERNICK: I do not.

12 ARBITRATOR KESSEDJIAN: I do not. Thank
13 you.

14 ARBITRATOR BIENVENU: I have a few
15 questions. I'll ask them before your redirect,
16 Mr. Enson, and then we'll proceed with Ms. Burr.

17 MR. ENSON: Very well. Thank you.

18 (Whereupon a recess was taken.)

19 ARBITRATOR BIENVENU: Thank you.
20 Ms. Burr, I have two questions, very brief
21 questions for you.

22 In Paragraph 23 of your witness statement,
23 you describe ICANN in relation to competition, I
24 believe, as a coordinator rather than a regulator.

25 Could I ask you to expand upon this?

1 THE WITNESS: Yes. So ICANN has very
2 specific authority in the bylaws, and with respect
3 to names, its job is to coordinate the development
4 of policy with respect to the introduction of new
5 gTLDs and other areas where stability and security
6 needs of the DNS and the Internet require
7 coordinated policy development.

8 So the ICANN Board, for example, and org
9 don't make policy. The community makes policy.
10 ICANN -- the ICANN Board gets that, accepts that
11 policy recommendation and will adopt it, but it
12 doesn't have policy authority itself.

13 And specifically in the context of the new
14 bylaws that were adopted in 2016 in anticipation of
15 the transition, there's a specific reference that
16 says ICANN -- ICANN's mission is enumerated, not
17 exemplary. So if ICANN doesn't have authority, it
18 is not articulated in here, ICANN doesn't have the
19 authority to do it.

20 And ICANN shall not regulate in certain
21 circumstances, and it specifically says that for
22 the avoidance of doubt, ICANN does not hold any
23 governmentally-authorized regulatory authority.

24 ICANN's role is policy -- coordination of
25 policy development and implementation.

1 ARBITRATOR BIENVENU: My second question
2 relates to evidence early in your testimony, when
3 you discussed participating as an observer in the
4 November 2016 Board workshop.

5 Do you remember being asked questions
6 about this?

7 THE WITNESS: Yes.

8 ARBITRATOR BIENVENU: And you said in
9 looking at Page 44 of the transcript, you said that
10 your understanding was that Afilias had received
11 notice of the Board's decision made during this
12 November workshop, the Board's decision not to act
13 upon the claims regarding the various claims
14 regarding .WEB.

15 Do you remember that?

16 THE WITNESS: Yes, and I probably misspoke
17 a bit.

18 ARBITRATOR BIENVENU: Right. So my
19 question is this: Was it your belief that Afilias
20 had, indeed, received a notice of the decision of
21 the Board in the course of that workshop in
22 November 2016?

23 THE WITNESS: So my reference -- what I
24 meant to say was that Afilias had received notice
25 that because of the pendency of the accountability

1 mechanism -- and I think at a certain point the
2 litigation became a CEP filed by Ruby Glen -- that
3 a contention set had been put on hold, consistent
4 with what ICANN always does.

5 The Board didn't change that. The Board
6 just in the -- again, I didn't participate. I
7 happened to have been in the room, but I wasn't on
8 the Board yet. And the Board did not change, did
9 not deviate from the standard practice, which was
10 once there is an accountability mechanism
11 litigation, the process goes on hold, pending
12 resolution.

13 ARBITRATOR BIENVENU: Ms. Burr, are you
14 aware as a Board member and perhaps because of your
15 participation in this case as a witness, are you
16 aware of the fact that it is the contention of
17 Afiliias that it was made aware of this Board
18 decision for the first time when ICANN filed its
19 rejoinder in this IRP, were you aware of that?

20 THE WITNESS: I am not aware of that.
21 Again, the Board was simply -- agreed to continue
22 to abide by the standard practice.

23 ARBITRATOR BIENVENU: So if I were to ask
24 you, Ms. Burr, as a Board member, does it come as a
25 surprise to you, having been a witness of the

1 workshop back in November 2016, does it come as a
2 surprise to you that Afiliias was never formally
3 advised of that decision?

4 THE WITNESS: Well, so it is complicated
5 because we are referring to this as a decision,
6 where what I observed was a confirmation to
7 continue to follow the standard practice, which was
8 that the contention set was on hold, and I believe
9 that Afiliias was well-aware of the fact that the
10 contention set was on hold.

11 Now, I don't -- if you're asking me
12 whether Afiliias was surprised to learn that the
13 Board had been updated on the situation in the
14 November workshop, I mean, I don't know. I don't
15 know when they may or may not have been aware of
16 that. But they certainly were aware -- my
17 understanding is that they were aware throughout
18 this process that -- that the contention set was on
19 hold.

20 ARBITRATOR BIENVENU: Thank you. Forgive
21 me. I have another question.

22 You have stated when you were questioned
23 about the CCWG final report that the bylaws have
24 precedence over the recommendations of the CCWG.

25 Do you remember that?

1 THE WITNESS: Yes.

2 ARBITRATOR BIENVENU: Now, what is your
3 understanding -- and can you help us by pointing,
4 if one exists, to a statement of the status of the
5 CCWG report, insofar as the bylaws or their
6 interpretation are concerned?

7 THE WITNESS: So the bylaws' effort took
8 the recommendation -- and the process was over
9 several days -- the entire recommendation, all of
10 the aspects of the recommendation were reflected
11 back into the bylaws, and then those bylaws, the
12 draft bylaws were published for comment, that is my
13 recollection of those, to make sure that they
14 faithfully represented the input of the CCWG.

15 ARBITRATOR BIENVENU: Thank you. Thank
16 you, Ms. Burr.

17 So, Mr. Enson, you ready for your
18 redirect?

19 MR. ENSON: I am, Chairman.

20 ARBITRATOR BIENVENU: Please proceed.

21 MR. ENSON: Thank you very much.

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REDIRECT EXAMINATION

BY MR. ENSON

Q. Ms. Burr, thank you for the time you have given us this morning and --

(Discussion off the record.)

Q. BY MR. ENSON: Ms. Burr, several times in your testimony, you referred to ICANN org. What is ICANN org?

A. So we kind of think of this community at large as having a bit of a three-legged stool. So one leg is the Board. One leg is the community in the form of the supporting organizations and advisory committees, and one is ICANN the organization. When I refer to ICANN org, I mean the CEO, staff, the ICANN organization.

Q. Ms. Burr, what's your view of whether or not Board members exercise their fiduciary duties to ICANN outside of annual, regular, or special meetings?

MR. ALI: Mr. Chairman, this is Arif Ali here raising an objection.

This is redirect, and as I understand, the questions cannot be open-ended in a way which Mr. Enson is presenting.

ARBITRATOR BIENVENU: Mr. Enson, I think

1 Mr. Ali has a point. Perhaps you can direct the
2 witness to the part of her cross-examination about
3 which you wish to ask a clarifying question.

4 MR. ENSON: Sure.

5 Q. Mr. Litwin, Ms. Burr, asked you questions
6 about ICANN Board member fiduciary duties, correct?

7 A. Yes, he did.

8 Q. Okay. And he also asked you about certain
9 Board meetings, correct?

10 A. Correct.

11 Q. And he asked whether the Board is able to
12 take actions and make decisions in and out of
13 certain types of Board meetings, correct?

14 A. Yes.

15 Q. So what's your view of whether a Board
16 member must be within an annual, regular, or
17 special meeting in order to exercise his or her
18 fiduciary duties?

19 MR. ALI: Objection. Sorry, Eric, but you
20 have just done the same thing. This goes beyond
21 the customary practice for how redirect should be
22 conducted, Mr. Chairman.

23 ARBITRATOR BIENVENU: I'll allow the
24 question.

25 THE WITNESS: I believe I have an

1 obligation to exercise my fiduciary -- respect my
2 fiduciary obligations to ICANN in everything that I
3 do related to ICANN.

4 Q. BY MR. ENSON: Thank you, Ms. Burr.

5 I want to talk a little bit about the
6 redrafting, or the revising, I should say, of
7 ICANN's bylaws. Was the revising of the ICANN
8 bylaws in 2016 that you were involved in, was that
9 in connection with the new gTLD Program?

10 A. No, it was several years after the new
11 gTLD Program had launched.

12 Q. And would you --

13 Kelly, would you put up Exhibit C-11, and
14 in particular Page 28.

15 ARBITRATOR BIENVENU: Is that a document
16 in the document -- in the witness bundle,
17 Mr. Enson?

18 MR. ENSON: It is. It is. It is the
19 bylaws. I just have different page numbers than
20 Mr. Litwin does.

21 ARBITRATOR BIENVENU: It is in Tab 2.

22 MR. ENSON: It is 4.3(o), which is Page 28
23 of the exhibit. I believe it's --

24 ARBITRATOR BIENVENU: We are familiar with
25 the provision.

1 Q. BY MR. ENSON: Ms. Burr, were you involved
2 in the drafting of this particular provision?

3 A. Yes, I was.

4 Q. Sorry, go ahead.

5 A. I was involved in Section 4, Article 4.

6 Q. Would you describe for us what is set
7 forth here in Section 4.3(o)?

8 A. 4.3(o) is a statement of the authority of
9 the IRP Panel, and it includes the three provisions
10 that had been in the bylaws for some time, which is
11 to dismiss -- actually, that may have been a new
12 one, declare whether covered actions constituted an
13 action or inaction that violated the articles.

14 There was also an existing authority to
15 stay actions or decisions, and we then added a few
16 additional provisions relating to, for example, the
17 PTI, determining the shift of IRP costs and
18 expenses was actually moved from a different part
19 of the section.

20 So this was an attempt to gather the
21 authority of the Panel and articulate the full
22 authority of the Panel.

23 Q. Is Section 4.3(o) an exhaustive listing of
24 the IRP Panel's authority?

25 A. Of the authority which is binding on

1 ICANN, yes.

2 Q. Mr. Litwin spent a fair amount of time
3 with you with respect to Ms. Garza's 2008 letter.

4 Do you recall that?

5 A. Yes, I do.

6 Q. Do you have any idea the level of
7 familiarity Ms. Garza had of ICANN in 2008?

8 A. I really don't have any idea of her
9 familiarity with it.

10 Q. Do you know whether ICANN commissioned any
11 economic studies to evaluate some of the issues set
12 forth in Ms. Garza's letter?

13 A. Yes. ICANN did evaluate a study, I think
14 along the lines that was discussed in Ms. Garza's
15 letter. Over time that study evolved a bit, but
16 that paper that Mr. Litwin showed before that
17 discusses the -- was the basis for ICANN's
18 decision -- I can't remember which tab it is, Tab 8
19 or 6, sorry -- lists a bunch of the work that was
20 done there.

21 Q. Is it Tab 6, Ms. Burr?

22 A. Yeah, and there are -- the economic
23 studies are outlined in that on Page 4.

24 Q. Ms. Burr, in your testimony you referred
25 to the white paper several times.

1 Would you just explain for the Panel what
2 the white paper is?

3 A. Sure. In 1997 -- '6, really, when the
4 cooperative agreement between Network Solutions and
5 the National Science Foundation and a contract
6 between the University of Southern California
7 Information Sciences Institute and DARPA, the
8 Defense Advanced Research Project Agency, which had
9 provided initially the funding, but subsequently
10 the oversight for the work that was being done on
11 the Internet, those contracts were coming to the
12 end of their terms, but the National Science
13 Foundation and DARPA had indicated these -- the
14 project was no longer a research project and that
15 they did not intend to renew the contracts.

16 At that time the Clinton administration,
17 like governments around the world, was working on a
18 sort of policy statement on global electronic
19 commerce. One of the things that we heard quite a
20 lot about was the Domain Name System, the need to
21 internationalize but maintain private-sector
22 management of the system.

23 There was a proposal on the table that
24 those of us who were working in the administration
25 heard a number of concerns about. So we issued

1 essentially what we called the green paper. Here's
2 how we propose to handle this, how we propose to
3 transition this system into the private sector
4 management, tell us what you think.

5 And we got thousands of comments from
6 around the world, and we took those comments, and
7 we turned the green paper into a white paper, which
8 was the Clinton administration's policy statement
9 with respect to the process to transition
10 coordination management of the Domain Name System
11 out of the government into the global private
12 sector.

13 Q. And a copy of the white paper's attached
14 as an exhibit to your witness statement, correct?

15 A. I believe so.

16 Q. Final question, Ms. Burr. Are you aware
17 of ICANN ever taking affirmative action to block
18 potentially anticompetitive activity or
19 transactions?

20 A. No. As I said, I really believe that, you
21 know, ICANN's obligation with respect to
22 competition is to create a table in which -- and to
23 coordinate the development of policy under which
24 competition can emerge. But I am not aware of
25 ICANN blocking something.

1 I am just trying to think, and in truth, I
2 mean, as I have said, ICANN -- you know,
3 competition law, as we have talked about, is
4 highly -- requires a high degree of expertise.
5 There's a lot we don't know about these markets,
6 and the view always was that competition law and
7 competition authorities would provide a check on
8 the behavior of the organization and the players
9 that were valuable.

10 MR. ENSON: Thank you very much for your
11 time, Ms. Burr, for your time today.

12 Mr. Chairman, those are my questions. I
13 thank you for the opportunity.

14 ARBITRATOR BIENVENU: Thank you,
15 Mr. Enson.

16 Ms. Burr, there is a sequestration order
17 applicable to fact witnesses that extends to a
18 prohibition to communicate with other witnesses in
19 this case whose testimony has not yet been heard.

20 So in accordance with that order, I am
21 instructing you not to discuss your testimony or
22 this case with other fact witnesses who have not
23 yet testified before us.

24 THE WITNESS: Absolutely.

25 ARBITRATOR BIENVENU: Having said that, I

1 know that my co-panelists join me, Ms. Burr, in
2 thanking you for your evidence and for accepting to
3 participate in this IRP. We are very grateful.

4 THE WITNESS: Thank you, and thank you for
5 your service. So I'll just leave?

6 MR. ENSON: Yes, I think so.

7 MR. LITWIN: Thank you very much,
8 Ms. Burr.

9 ARBITRATOR BIENVENU: Very well. Can we
10 bring in the next witness, Ms. Samantha Eisner?

11 (Discussion off the record.)

12 ARBITRATOR BIENVENU: May I ask counsel
13 for the parties who will be introducing Ms. Eisner
14 and who will be conducting her cross-examination?

15 MR. WALLACH: This is David Wallach for
16 Jones Day for ICANN. I will be introducing
17 Ms. Eisner.

18 MR. LITWIN: Mr. Chairman, this is Ethan
19 Litwin again from Constantine Cannon. I will be
20 doing the cross-examination of Ms. Eisner.

21 ARBITRATOR BIENVENU: Welcome to you,
22 Mr. Wallach.

23 Ms. Eisner, my name is Pierre Bienvenu. I
24 serve as Chair of the Panel in this case. My
25 co-panelists are Catherine Kessedjian,

1 participating from Paris, and Mr. Richard Chernick
2 in Los Angeles.

3 First of all, welcome.

4 THE WITNESS: Thank you.

5 ARBITRATOR BIENVENU: You have contributed
6 a witness statement to this Independent Review
7 Process dated January 16, 2019, correct?

8 THE WITNESS: Yeah.

9 ARBITRATOR BIENVENU: In that statement at
10 the end you affirm that the content of your
11 statement is true and correct to the best of your
12 knowledge and belief.

13 Do you see that?

14 THE WITNESS: It is not on the screen.
15 May I open the packet of documents? I do confirm
16 that I submitted that in the declaration.

17 ARBITRATOR BIENVENU: Very well. May I
18 ask you, Ms. Eisner, in relation to the evidence
19 that you will give today to likewise solidly affirm
20 that it will be the truth, the whole truth and
21 nothing but the truth?

22 THE WITNESS: I do.

23 ARBITRATOR BIENVENU: Thank you very much.
24 Mr. Wallach, your witness.

25 MR. WALLACH: Hello, Ms. Eisner, and good

1 afternoon. I have only a couple of very brief
2 questions to ask before I will turn the floor over.

3 First, is the information in the witness
4 statement, which hopefully you have on the screen
5 in front of you, true and correct to the best of
6 your knowledge?

7 THE WITNESS: Yes.

8 MR. WALLACH: Okay. Could we turn to the
9 final page of the witness statement on the screen,
10 please.

11 Is that your signature that appears on
12 that page?

13 THE WITNESS: Yes, it is.

14 MR. WALLACH: Is there anything in your
15 witness statement that you would like to correct or
16 amend in any way?

17 THE WITNESS: No, there's not.

18 MR. WALLACH: I have no further questions.

19 ARBITRATOR BIENVENU: Thank you,
20 Mr. Wallach.

21 Mr. Litwin, your witness.

22 MR. LITWIN: Thank you, Mr. Chairman.

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1 CROSS-EXAMINATION

2 BY MR. LITWIN

3 Q. Ms. Eisner, can you please confirm that
4 you have not looked at any of the documents in the
5 exhibit bundle that was provided to you?

6 A. Yes, I can confirm. It is still sealed.

7 Q. Can you please open the bundle on camera
8 now, please?

9 MR. LITWIN: Again, Mr. Wallach, do you
10 want to open yours on camera as Mr. Enson did?

11 MR. WALLACH: Yeah.

12 Q. BY MR. LITWIN: Ms. Eisner, from time to
13 time during our discussion today, I will direct
14 your attention to a document. When I do that, I
15 will refer to the tab that's reflected in your
16 binder for that document and the binder that you
17 have in front of you right now, and you will see
18 that, generally on the bottom right-hand corner of
19 the page, we have given each page in the exhibit a
20 unique page number. So when I direct you to a
21 particular page, I will be referring to that
22 particular page number that we have provided, okay?

23 A. Yeah.

24 Q. Thank you. Ms. Eisner, you are a deputy
25 general counsel of ICANN; is that right?

1 A. Yes.

2 Q. Do you have particular areas of
3 responsibility as deputy general counsel for
4 litigation or something like that?

5 A. It is not appended to my title, but I am
6 responsible for a couple of different areas within
7 ICANN. I lead the support to our multistakeholder
8 strategic initiative team as well as our global
9 stakeholder engagement team and our governmental
10 engagement team.

11 As part of that work to the
12 multistakeholder strategic initiative team, I work
13 on many special projects that interact with the
14 community.

15 Q. And how long have you been in this role?

16 A. I have been in this role since 2014.

17 Q. How many lawyers are in the ICANN legal
18 department?

19 A. I believe we have 11 or 12.

20 Q. Do you have regular department meetings?

21 A. Yes.

22 Q. And is it fair to say -- and please do not
23 discuss the specifics of any of the discussions of
24 any of those meetings -- that you discuss sort of
25 the legal issues that the department is dealing

1 with at that time and provide status updates on
2 that; is that fair to say?

3 A. It depends -- in general, yes. We often
4 don't go into great detail about specifics because
5 we each have our own lines of discussion. So we
6 would speak about it enough to have some general
7 level of understanding amongst the deputies within
8 the department. We might not go into as much
9 detail with an all-hands departmental meeting. But
10 then each deputy also has their time with the
11 general counsel where you have much more in-depth
12 status discussions.

13 Q. Okay. You state in your witness statement
14 that you joined the IRP Implementation Oversight
15 Team -- which I will for convenience's sake refer
16 to as the IOT today because that's quite a
17 mouthful -- in November 2015; is that the right
18 date?

19 A. I believe so, yes.

20 Q. Okay. And you joined as a staff liaison,
21 correct?

22 A. Correct.

23 Q. The IOT was the committee and still is the
24 committee tasked with drafting the rules and
25 procedures and conduct for the IRP, right?

1 A. Yes.

2 Q. Please. In fact, ICANN's bylaws
3 explicitly provide for the establishment of the
4 IOT; is that right?

5 A. Yes, the bylaws that went into effect in
6 October 2016.

7 Q. So if you could draw your attention to Tab
8 2 in your binder and to Page 15 of that exhibit,
9 you'll see at the bottom Section 4.3(n)(i), which
10 it is continued on to the next page, Page 16. This
11 is, in fact, that paragraph that provides for the
12 creation of the IOT, correct?

13 A. Correct.

14 Q. And what it says is that the IOT should be
15 "comprised of members of the global Internet
16 community"; is that right?

17 A. Yes. In consultation --

18 Q. In consultation with what? You broke up.

19 A. The supporting organizations and advisory
20 committee.

21 Q. And the IOT, once the Standing Panel is
22 established, the IOT "in consultation with the
23 Standing Panel, shall develop clear published rules
24 for the IRP"; is that right?

25 A. Yes, that's what the bylaws say.

1 Q. And those rules of procedure need to
2 conform to international arbitration norms,
3 correct?

4 A. Yes.

5 Q. Now, the Standing Panel, as of today, has
6 not yet been established, correct?

7 A. That's correct.

8 Q. So the IOT did not follow the bylaws
9 provision that says that, "Once the Standing Panel
10 is established, the IOT in consultation with the
11 Standing Panel, shall develop" the rules of
12 procedure; is that right?

13 A. Well, there wasn't yet a Standing Panel to
14 coordinate with.

15 Q. The Standing Panel -- the establishment of
16 the Standing Panel is also entrusted to the IOT,
17 correct?

18 A. No, it is not.

19 Q. Is the IOT right now processing
20 applications for the Standing Panel?

21 A. No, it's not. ICANN is in the process of
22 receiving those applications and is also in the
23 process of coordinating with the more general
24 community through the leaders of the supporting
25 organizations and advisory committees to finalize

1 how those will be processed.

2 Q. So was there any discussion with the IOT
3 whether or not you should wait for the Standing
4 Panel to be created before developing rules of
5 procedure?

6 A. No, there was not. The IOT was actually
7 kicked into gear before the bylaws went into
8 effect, so that they are -- there could be work
9 done to get supplemental procedures in place that
10 would conform with the new bylaws, recognizing that
11 there was always the opportunity to update those
12 once a Standing Panel was in place, and we needed
13 to go back -- or if we needed to go back over them
14 with a Standing Panel.

15 Q. Okay. Now, the bylaws provide that the
16 rules of procedure shall conform with international
17 arbitration norms. So is that like the ICDR rules?

18 A. That surely is one example, yes.

19 Q. And the ICC rules, JAMS rules, these are
20 all norms of international arbitration, right?

21 A. Without being an international arbitration
22 provider, I assume so -- I am not a practitioner of
23 international arbitration, but yes, I assume so.

24 Q. So I'll represent that I have been a
25 frequent visitor to the IOT's Wiki page, and there

1 it shows that the IOT was provided with ten or so
2 examples of arbitration rules.

3 Do you recall that?

4 A. Yes.

5 Q. And that was for your reference in
6 drafting the rules of procedure, correct?

7 A. In part, yes.

8 Q. The U.S. Rules of Civil Procedure,
9 however, are not a norm of international
10 arbitration, are they?

11 A. Again, without being a practitioner of
12 international arbitrations, having done litigation
13 in the past, civil procedure rules go to our
14 federal court system and don't govern in
15 arbitration, right.

16 Q. And I am very much in the same boat as you
17 are, Ms. Eisner. I spend most of my time in
18 federal court.

19 At least I understand arbitration to be an
20 alternative dispute resolution to that federal
21 judicial process; is that fair to say?

22 A. Yes.

23 Q. In August of 2016, Afilias' general
24 counsel, Mr. Scott Hemphill, wrote to ICANN's Board
25 regarding Afilias' concern about the resolution of

1 the .WEB contention set. ICANN posted the letter
2 to its website.

3 Were you aware of Afilias' complaint at
4 the time?

5 A. I don't recall.

6 Q. Do you recall the first time you became
7 aware that Afilias had complained about the
8 resolution of the .WEB contention set?

9 A. It likely would have been in that period
10 of 2016, in that later period of it, but I don't
11 recall specifically what brought it to my
12 attention.

13 Q. Are you aware that ICANN sent a
14 questionnaire to Afilias, VeriSign, NDC and, as we
15 heard today, Neustar, in September of 2016
16 concerning Afilias' complaint, were you aware of
17 that?

18 A. No, I'm not.

19 Q. So you were not involved in the drafting
20 of that questionnaire?

21 A. I was not.

22 Q. Do you know who was?

23 A. No, I don't know who was.

24 Q. We have also heard about a November 3rd,
25 2016, Board workshop session where Afilias'

1 complaints were allegedly discussed. I'll
2 represent to you that that meeting -- at least the
3 testimony is that meeting took place in Hyderabad.
4 Are you aware of that meeting?

5 A. I am aware of the Board workshop that took
6 place in Hyderabad. I don't have specific
7 recollection of the specific subject matters that
8 were discussed at that meeting.

9 Q. Did you attend that meeting?

10 A. Yes. I was in Hyderabad, and I
11 participated in many, if not all, support workshop
12 sessions.

13 Q. Was there a Board workshop session that
14 specifically concerned Afiliias' complaint regarding
15 the resolution of the .WEB contention set?

16 A. I don't recall.

17 Q. Do you recall anything about -- and
18 without giving me any specifics, just a yes-or-no
19 question, Ms. Eisner, do you recall any specifics
20 about a Board workshop session in November of 2016
21 where Afiliias' complaints about the resolution of
22 the .WEB contention set were discussed?

23 A. I really don't recall specifics about it.
24 Our Board workshop sessions are basically done by
25 one- to two-hour blocks, and they go from

1 discussion to discussion to discussion, and so I --
2 without having any notes in front of me or
3 anything, and it is something -- it is a meeting I
4 haven't thought about in over three years, so I
5 really don't remember.

6 Q. Just for my edification and the Panel's
7 edification, Ms. Eisner, when you say the workshops
8 are organized into one- or two-hour blocks, is each
9 block devoted to a particular subject or to a group
10 of subjects?

11 A. Typically each block would be reserved for
12 a particular topic.

13 Q. On June 18, 2018, Afilias initiated the
14 cooperative engagement process with ICANN
15 concerning its complaints about the resolution of
16 the .WEB contention set.

17 Were you aware in June of 2018 that
18 Afilias had initiated a CEP?

19 A. I don't recall being aware at the time.

20 Q. Now, ICANN publicly discloses on a chart
21 who has initiated an accountability mechanism; is
22 that right?

23 A. Yes.

24 Q. So on that chart published after June
25 18th, there would be a section for CEPs, right?

1 A. Yes.

2 Q. Yes. And Afiliias' name would have been
3 listed under it, correct?

4 A. I presume it would have been, in
5 accordance with ICANN's general practice of
6 publishing that.

7 Q. Well, is it a practice -- let me rephrase.

8 Was it your practice to review those
9 charts from time to time to keep yourself informed
10 about who had initiated accountability mechanisms?

11 A. No, it is not my practice.

12 Q. Were -- was the status of accountability
13 mechanisms discussed in your legal department
14 meetings?

15 A. At times they were. Clearly when we have
16 IRPs going or other things of a large interest, I
17 could imagine we would discuss them.

18 Q. To the best of your recollection, when did
19 you become aware that Afiliias had requested CEP
20 regarding the -- its complaints about the
21 resolution of the .WEB contention set?

22 A. I'm really not sure, though I would say it
23 was some point in that latter half of 2018, but I
24 don't know when it occurred.

25 Q. Now, the CEP process is a process that's

1 voluntarily invoked by a party prior to filing an
2 IRP; is that correct?

3 A. Yes.

4 Q. And the stated purpose of a CEP is to
5 resolve or narrow issues that are contemplated as
6 issues that may be brought in an IRP; is that
7 right?

8 A. Yes.

9 Q. And the IOT from time to time has, in
10 fact, discussed the CEP and at least appears it is
11 on its to-do list to develop standards for the CEP,
12 correct?

13 A. Yes. It was a responsibility it took over
14 from a different community group.

15 Q. Now, if a complainant does not participate
16 in the CEP in good faith and ICANN prevails in a
17 subsequent IRP, the complainant is liable to pay
18 ICANN's legal fees; is that correct?

19 A. I believe that's correct. I'd have to go
20 back and look physically at the documents, but I
21 believe that's correct.

22 Q. Okay. Well, I'll represent to you that's
23 my understanding. And if my understanding's
24 correct, would you agree with me that's a pretty
25 strong incentive to initiate CEP prior to filing an

1 IRP; is that right?

2 A. Without a doubt, yeah.

3 Q. Yeah. So if you understood that someone
4 had initiated a CEP, is it fair to say that you
5 would also understand that that party was
6 considering filing an IRP in the future?

7 A. Yes.

8 Q. Now, I'll represent to you that ICANN
9 terminated the CEP that Afilias initiated on June
10 18 later that year, on November 13. Were you aware
11 that ICANN had terminated CEP on November 13th?

12 A. I don't recall specifically about that.
13 There was a period of time around there that I was
14 on vacation, too. I took a couple of weeks of
15 vacation after our ICANN meeting. So I can't
16 recall when I was back in the office.

17 Q. So that would have been the second half or
18 middle of November 2018; is that right?

19 A. My vacation?

20 Q. Yes.

21 A. Yes. It would have been directly after
22 the end of the ICANN meeting, and we traveled for a
23 period of at least ten days after that.

24 Q. Were you aware that on August 28th, 2018,
25 in the context of its CEP, Afilias offered to

1 provide ICANN with a draft of its IRP request?

2 A. No, I was not aware. The CEP discussions
3 are considered confidential, and we also consider
4 them confidential within ICANN. So as I am not on
5 the team that participates in those, I don't
6 participate in those discussions.

7 Q. Okay. Now, I'll represent to you,
8 Ms. Eisner, and I think you are aware of this
9 because of what you write in your witness
10 statement, that Afilias, in fact, provided this
11 draft IRP request to ICANN on October 10th, 2018.

12 Were you aware of that?

13 A. I became aware of that.

14 Q. When did you become aware of that?

15 A. I don't -- I don't recall when I became
16 aware of it. Can I refer back to my witness
17 statement?

18 Q. Absolutely. It is Tab 1 in your binder
19 for reference, Ms. Eisner.

20 A. Thank you. Thank you. I wanted to refer
21 back because I thought I heard you say that I had
22 mentioned that in my witness statement, but I
23 didn't recall mentioning that.

24 Q. I think you mentioned that you stated you
25 were not aware at the time; is that fair to say?

1 A. Yes, that's correct. I was not aware at
2 the time.

3 Q. Okay. And are you aware that three weeks,
4 approximately 19 days after receiving Afilias'
5 draft IRP request, ICANN terminated CEP without
6 engaging in any substantive discussion of Afilias'
7 claims?

8 A. No, I am not aware of the substance of the
9 conversations between ICANN and Afilias about the
10 CEP.

11 Q. So in general, based on your work on the
12 CEP in the context of the IOT, is it appropriate
13 for ICANN to refuse to engage on the merits of a
14 claim during CEP while at the same time dragging
15 that CEP out for five months?

16 A. Without knowing the specifics of the
17 conversation, I really can't testify to that.

18 Q. Okay. The IOT, as I understand, had a
19 meeting in June of 2018, but then did not hold any
20 meetings in July or August or September of 2018; is
21 that correct?

22 A. I know that we had difficulties bringing
23 people together for a quorum. I don't know the
24 exact dates that we did or did not have meetings,
25 but there was a significant period of time that we

1 didn't have meetings.

2 Q. Is it fair to say that when the IOT has a
3 meeting, the transcript of that meeting is
4 published on the IOT Wiki page?

5 A. Yes.

6 Q. I will represent to you that there are no
7 transcripts on the IOT Wiki page for either July,
8 August or September of 2018. If my representation
9 is correct, that would mean that the IOT didn't
10 meet during those months; is that fair to say?

11 A. Yes.

12 ARBITRATOR BIENVENU: Mr. Litwin, sorry to
13 interrupt you, but we have come to the end of the
14 scheduled time for the hearing today. As you know,
15 one Panel member is sitting in Paris, so it is
16 quite late for that Panel member.

17 So I think we will break.

18 Ms. Eisner, you are not to discuss your
19 evidence with anyone until you are completed giving
20 your evidence. So I will instruct you not to do
21 so.

22 We will resume tomorrow morning at 8:00
23 a.m. Pacific and continue with your
24 cross-examination, Mr. Litwin.

25 MR. LITWIN: Thank you very much,

1 Mr. Chairman.

2 MR. ALI: Mr. Chairman, if I can raise a
3 point. This addresses --

4 (Discussion off the record.)

5 MR. ALI: This is a point you now raised a
6 couple of times referring to the status of the
7 CCWG-Accountability.

8 ARBITRATOR BIENVENU: Sorry, I cannot hear
9 you, Mr. Ali. Can you speak a bit louder?

10 (Discussion off the record.)

11 MR. ALI: Mr. Chairman, there's a point
12 you have raised a couple times, actually a question
13 you put to, I think to us in -- during opening
14 presentations and then also to Ms. Burr, which is
15 the status of the CCWG-Accountability's reports.
16 And just as an FYI, and I don't know how you'd like
17 to handle this, but the CCWG-Accountability reports
18 were approved by the Board on 10 March 2016.

19 Now, that's not a document that is on
20 record in terms of the Board resolution, but the
21 Board resolution followed by what are known as
22 Board rationale is associated with the approval of
23 all the CCWG-Accountability and its reports and its
24 transmissions to the NTIA.

25 So if that's a document that the Panel

1 would be interested in, we can try to agree with
2 the other side that it be made part of the record,
3 given that this is a matter that seems to be of
4 interest to the Panel.

5 ARBITRATOR BIENVENU: Yeah, thank you.
6 That's helpful, especially if it addresses the
7 point I have raised.

8 I see Mr. LeVee -- Mr. LeVee, do you want
9 to clarify?

10 MR. LeVEE: All I would suggest,
11 Mr. Chairman, is that these types of things ought
12 to be addressed by counsel separately after the
13 hearing as opposed to proposing something to the
14 Panel that then should be discussed among the
15 lawyers.

16 ARBITRATOR KESSEDJIAN: Particularly
17 because the witness is still there, and I am not
18 sure she should hear all we are saying right now.

19 MR. LeVEE: I think this is something the
20 lawyers should be addressing privately and not
21 having argument about or even suggestions as to
22 what is or is not appropriate in the record.

23 ARBITRATOR BIENVENU: Okay. So that was,
24 I think, something that Mr. Ali referred to. So
25 why don't you take it up together and see if

1 something comes out of your consultations.

2 Thank you all, and we will resume tomorrow
3 morning.

4 (Whereupon the proceedings were
5 concluded at 1:05 p.m.)

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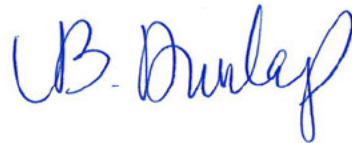
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Dated: 08/12/20



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EXHIBIT C-24



Resources

AMENDED AND RESTATED ARTICLES OF INCORPORATION OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

As approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016

The undersigned certify that:

1. They are the president and the secretary, respectively, of Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation.
2. The Articles of Incorporation of this corporation are amended and restated to read as follows:
 - I. The name of this corporation is Internet Corporation for Assigned Names and Numbers (the “**Corporation**”).
 - II. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law for charitable and public purposes. The Corporation is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “**Code**”), or the corresponding provision of any future United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any future United States tax code. In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article IV hereof, pursue the charitable and public purposes of lessening the burdens of

government and promoting the global public interest in the operational stability of the Internet by carrying out the mission set forth in the bylaws of the Corporation (“**Bylaws**”). Such global public interest may be determined from time to time. Any determination of such global public interest shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process.

- III. The Corporation shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.
- IV. Notwithstanding any other provision of these Articles:
 - a. The Corporation shall not carry on any other activities not permitted to be carried on (i) by a corporation exempt from United States income tax under § 501(c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under § 170(c)(2) of the Code.
 - b. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall be empowered to make the election under § 501 (h) of the Code.
 - c. The Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.
 - d. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its directors, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article II hereof.
- V. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter

in effect, no director of the Corporation shall be personally liable to the Corporation for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article V shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.

- VI. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article II hereof and, if possible, to a § 501(c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.
- VII. Any amendment to these Articles shall require (a) the affirmative vote of at least three-fourths of the directors of the Corporation, and (b) approval in writing by the Empowered Community, a California nonprofit association established by the Bylaws (the “**Empowered Community**”), following procedures set forth in Article 25.2 of the Bylaws.
- VIII. Any transaction or series of transactions that would result in the sale or disposition of all or substantially all of ICANN's assets shall require (a) the affirmative vote of at least three-fourths of the directors of the Corporation, and (b) approval in writing by the Empowered Community prior to the consummation of the transaction, following procedures set forth in Article 26 of the Bylaws.

3. The foregoing amendment and restatement of Articles of Incorporation has been duly approved by the board of directors.

4. The corporation has no members.

We further declare under penalty of perjury under the laws of the State of

California that the matters set forth in this certificate are true and correct of our own knowledge.

Date: 30 September 2016

Göran Marby, President

John Jeffrey, Secretary



YouTube



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Community Wiki



ICANN Blog

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[Help](#)

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EXHIBIT C-25

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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12

13 RUBY GLEN, LLC ,

14 Plaintiff,

15 v.

16 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND
 17 NUMBERS,

18 Defendant.
 19
 20
 21
 22
 23

Case No. 2:16-cv-5505 PA (ASx)

Assigned for all purposes to the
 Honorable Percy Anderson

**OPPOSITION TO *EX PARTE*
 APPLICATION FOR
 TEMPORARY RESTRAINING
 ORDER**

[Declarations of J. Rasco, N.
 Bezsonoff, C. Willett and R.
 Weinstein filed concurrently
 herewith]

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1 **I. INTRODUCTION**

2 Plaintiff Ruby Glen LLC and six other applicants are all vying to operate the
3 “.WEB” Internet generic top-level domain (“gTLD”). After a detailed review,
4 started in 2012, the Internet Corporation for Assigned Names and Numbers
5 (“ICANN”), the nonprofit public benefit corporation responsible for evaluating
6 such applications, determined that all .WEB applications met the established
7 criteria. But, because each unique gTLD can only have one operator, ICANN
8 placed the .WEB applications into a “Contention Set” according to procedures in
9 place since 2012. On April 27, 2016, again according to procedures in place since
10 2012, ICANN scheduled an auction for July 27, 2016 (“Auction”) to resolve which
11 application in the Contention Set will proceed. Now, to avoid this competition and
12 the auction procedures it agreed to, Plaintiff seeks a temporary restraining order
13 (“TRO”) against ICANN to halt the Auction.¹ But there is no basis in either the
14 Auction procedures, the law or the evidence to grant Plaintiff the relief it seeks.

15 In submitting their applications, Plaintiff and all other applicants agreed to a
16 detailed set of procedures for the application process, which ICANN developed
17 over several years with extensive public participation, including from Plaintiff’s
18 ultimate parent company Donuts, Inc., which through its subsidiaries like Plaintiff,
19 submitted over 300 new gTLD applications. Those procedures are embodied in a
20 338-page New gTLD Applicant Guidebook (“Guidebook”) and, of particular
21 importance here, a 22-page set of “Auction Rules.” Per the Auction Rules, an
22 auction *may* be postponed if all participants agree and each submits such a request
23 to ICANN at least 45 days before the auction. In addition, an ICANN auction can

24 ¹ Despite filing over three days ago, ***Plaintiff still has not served ICANN***
25 with the Complaint or TRO application. ICANN’s counsel had to obtain copies on
26 PACER. Moreover, it is inexplicable why Plaintiff, with its claims of such urgency,
27 would not serve ICANN in the hope of making its TRO application ripe for
28 decision under the Court’s Standing Order, which requires such service. (Standing
Order at ¶ 11 (“The Court will not rule on any application for [TRO] for at least 24
hours after the party subject to the requested order has been served; such party may
file opposing or responding papers in the interim.”).)

1 be avoided altogether, as ICANN encourages in the Guidebook, if all participants
2 agree to private resolution of a contention set.

3 Here, at least one Auction participant, Nu Dotco LLC (“Nu Dotco”), refused
4 to agree to postpone the Auction or private resolution of the Contention Set. As a
5 result, no postponement request was made by the deadline, and ultimately only
6 three participants requested a delay after the deadline. Plaintiff has nonetheless
7 sought to delay, and perhaps ultimately avoid, the Auction by making
8 unsubstantiated claims regarding Nu Dotco’s application for .WEB, arguing that
9 ICANN’s investigation of those claims was insufficient. Specifically, Plaintiff
10 asserts that, on June 7, 2016, it received an email from Nu Dotco’s CFO that,
11 according to Plaintiff, “indicated a potential change in both [Nu Dotco’s]
12 management and ownership.” Plaintiff contends that this – and this alone – should
13 have caused ICANN to postpone the Auction for further investigation.

14 But three separate ICANN bodies – ICANN’s staff, ICANN’s Ombudsman,
15 and ICANN’s Board – have already looked into the alleged change in Nu Dotco’s
16 ownership or management. All three found no credible evidence that any such
17 change had occurred within Nu Dotco, and therefore nothing supported a delay of
18 the Auction. Plaintiff’s TRO application, filed nearly three months after the
19 Auction was scheduled and just two business days before bidding is set to officially
20 begin, relies solely on a strained, and now completely discredited, interpretation of
21 the Nu Dotco CFO’s June 7 email. However, the evidence accompanying this
22 opposition – sworn declarations from ICANN and Nu Dotco executives – confirms
23 that Nu Dotco has not made any change in its ownership or management, much less
24 a “disqualifying” change that should derail the Auction processes already under
25 way or the official start of bidding.

26 Separate and apart from the fact that ICANN performed a thorough
27 investigation of Plaintiff’s allegations and confirmed that nothing had changed,
28 Plaintiff’s TRO application is deficient for other reasons. First, the “emergency”

1 that Plaintiff invokes is an emergency of Plaintiff's own making. **By June 7, 2016**,
2 Plaintiff had the email from Nu Dotco's CFO that forms the entire basis of this suit,
3 and which made clear that Nu Dotco did not consent to private resolution or
4 postponement. Yet Plaintiff waited over two weeks to raise the matter with
5 ICANN. **By July 13, 2016**, Plaintiff was well aware that, based on its investigation,
6 ICANN concluded that the Auction should proceed as scheduled. Yet Plaintiff
7 waited over another week to bring this action. Second, Plaintiff fails to satisfy any
8 of the four requirements for emergency injunctive relief: (1) Plaintiff is not likely
9 to succeed on the merits of its claims because its claims have no merit, particularly
10 since Plaintiff agreed to the Auction Rules that it now seeks to avoid; (2) Plaintiff
11 will not suffer irreparable harm in the absence of injunctive relief because the
12 Auction Rules provide means to address these issues post-Auction and any injuries
13 can be compensated by financial adjustments; (3) the balance of equities weighs
14 against injunctive relief because it would disrupt long-agreed gTLD-assignment
15 procedures that provide needed certainty to applicants; and (4) the public interest
16 strongly favors denying the TRO because the Guidebook and Auction Rules that
17 Plaintiff now seeks to upend have been in place for years and have been relied upon
18 by hundreds of applicants. Third, in its application for .WEB, like the over 300
19 applications submitted by other subsidiaries of Plaintiff's ultimate parent, Plaintiff
20 agreed to a covenant not to sue ICANN for claims associated with Plaintiff's
21 application. This lawsuit plainly violates Plaintiff's contractual obligation and bars
22 the relief sought.

23 To be clear, everything that Plaintiff complains about in this suit is an
24 express term or aspect of the New gTLD Program agreed to by Plaintiff when it
25 applied for .WEB in 2012. For instance, the contention set procedures, the auction
26 provisions, and the covenant not to sue ICANN, were acknowledged and accepted
27 by Plaintiff when it submitted its application pursuant to the Guidebook. Likewise,
28 the principle that ICANN will consider postponing an auction only when **all**

1 participants make such a request is express in the very Auction Rules that Plaintiff
2 accepted when it executed a “Bidder Agreement,” in May 2016, stating that
3 Plaintiff ***agrees to be bound by the Auction Rules.***

4 ICANN, as a nonprofit, has no financial motivation in the Auction
5 proceeding. As has been widely publicized, all auction funds will be utilized for
6 charitable goals to be determined by the broader Internet community. ICANN’s
7 only motivation in the Auction proceeding is ensuring that the Guidebook and
8 Auction Rules are followed, as Plaintiff and all applicants agreed long ago.

9 **II. FACTUAL BACKGROUND**

10 **A. ICANN AND THE NEW GTLD PROCESS.**

11 ICANN is a California non-profit public benefit corporation that oversees the
12 technical coordination of the Internet’s domain name system (“DNS”) on behalf of
13 the Internet community, ensuring the DNS’s continued security, stability and
14 integrity. *See Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795
15 F.3d 1124, 1127–28 (9th Cir. 2015). The DNS’s essential function is to convert
16 easily-remembered domain names, such as “uscourts.gov” or “icann.org,” into
17 numeric IP addresses understood by computers. (Willett Decl. ¶ 2.) The portion of
18 a domain name to the right of the last dot (such as “.gov” and “.org”) is known as a
19 generic top-level domain (“gTLD”). *Name.Space, Inc.*, 795 F.3d at 1127.

20 Throughout its history, ICANN has sought to expand the number of gTLDs
21 to promote consumer choice and competition. (Willett Decl. ¶ 3.) In 2012, ICANN
22 launched a “New gTLD Program” application round, in which it invited any
23 interested party to apply for the creation of a new gTLD and for the opportunity to
24 be designated as the operator of that gTLD. (Willett Decl. ¶ 3.) As the operator,
25 the applicant would be responsible for managing the assignment of names within
26 the gTLD and maintaining the gTLD’s database of names and IP addresses.
27 (Willett Decl. ¶ 3.)

28 In connection with the New gTLD Program, ICANN published the

1 Guidebook, which prescribes the requirements for new gTLD applications to be
2 approved, and the criteria by which they are evaluated. (Willett Decl. ¶ 4.) The
3 Guidebook was developed in a years-long public consultation process in which
4 numerous versions were published for public comment and revised based on
5 comments received from the public. (Willett Decl. ¶ 4.)

6 Because technical, operational and financial capabilities are critical to an
7 applicant's suitability to run a gTLD, applicants are required to identify the entities
8 and people who will be involved in the management of the gTLD applied for.
9 (Zecchini Decl., Ex. C [Guidebook § 2].) Each applicant must also be screened and
10 submit to certain background checks. (*Id.*, §§ 1.2.1, 2.1.) Important to this lawsuit
11 is the Guidebook's provision that, "[i]f at any time during the evaluation process
12 information previously submitted by an applicant becomes untrue or inaccurate, the
13 applicant must promptly notify ICANN." (*Id.*, § 1.2.7.)

14 In the event that more than one application for the same or similar gTLDs
15 passes all of the prescribed levels of evaluation, the applications are placed in a
16 string contention set (since only one registry operator can operate a gTLD
17 consisting of the exact same letters) that can be resolved through a number of
18 processes. (Zecchini Decl., Ex. C [Guidebook § 1.1.2.10].) The Guidebook
19 "encourage[s applicants] to resolve string contention cases among themselves prior
20 to the string contention resolution stage." (*Id.*) Should such a private resolution not
21 occur, the contention set will proceed to an auction of last resort governed by the
22 Auction Rules that all applicants agreed to by applying. (*Id.*)

23 The Auction Rules provide that an auction will be scheduled after ICANN
24 reviews and investigates the applications in a contention set. Then, to facilitate
25 private resolution, "if each and every member of the Contention Set submits a
26 postponement request through the ICANN Customer Portal, ICANN at its sole
27 discretion may postpone the Auction for that Contention Set to a future date."
28 (Zecchini Decl., Ex. J [Auction Rules ¶ 10].) The Auction Rules elaborate that the

1 request “must be submitted at least 45 days prior to the scheduled Auction Date [in
2 this instance, June 13, 2016] and ICANN must receive a request from each member
3 of the contention set.”

4 Any financial proceeds of such an auction initially flow to ICANN. (*Id.* §
5 4.3.) However, these auction proceeds have been fully segregated in separate bank
6 and investment accounts, and earmarked until the community develops and the
7 ICANN Board authorizes a plan for the appropriate use of the funds. (Weinstein
8 Decl. ¶ 12; *see also* Zecchini Decl., Ex. C [Guidebook § 4.3, n.1].) The ICANN
9 community has indicated that it will create a Cross-Community Working Group to
10 develop a proposal for eventual consideration by the ICANN Board on the manner
11 in which the new gTLD auction proceeds should be allocated, and the formation of
12 that working group was discussed at a June 28, 2016 meeting during the ICANN56
13 Public Meeting in Helsinki. (Weinstein Decl. ¶ 13.)²

14 The Guidebook includes critical terms and conditions that all applicants,
15 including Plaintiff, acknowledged and accepted by submitting a gTLD application.
16 (Zecchini Decl., Ex. C [Guidebook § 6].) For instance, the Guidebook contains a
17 release (the “Covenant Not to Sue”), which bars lawsuits against ICANN arising
18 out of its evaluation of any new gTLD application:

19 Applicant hereby releases ICANN and the ICANN Affiliated Parties
20 from any and all claims by applicant that arise out of, are based upon,
21 or are in any way related to, any action, or failure to act, by ICANN or
22 any ICANN Affiliated Party in connection with ICANN’s or an
23 ICANN Affiliated Party’s review of this application, investigation or
24 verification, any characterization or description of applicant or the
25 information in this application, any withdrawal of this application or

26
27 ² *See* <https://icann562016.sched.org/event/7NE0/cross-community-session-charter-for-the-ccwg-on-auction-proceeds?iframe=no&w=i:100;&sidebar=yes&bg=no>.
28

1 the decision by ICANN to recommend, or not to recommend, the
2 approval of applicant’s gTLD application. APPLICANT AGREES
3 NOT TO CHALLENGE, IN COURT OR IN ANY OTHER
4 JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN
5 WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY
6 WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR
7 ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER
8 LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED
9 PARTIES WITH RESPECT TO THE APPLICATION. . . .

10 (*Id.* § 6.6 (emphasis in original).)

11 Although all gTLD applicants agreed not to file lawsuits against ICANN
12 related to their applications, applicants are not left without recourse. ICANN’s
13 Bylaws provide for several accountability mechanisms to ensure that ICANN
14 operates in accordance with its Articles of Incorporation (“Articles”), Bylaws,
15 policies and procedures. (Zecchini Decl., Ex. B [Bylaws, Art. IV].) One such
16 provision establishes an Ombudsman to informally resolve disputes. In addition,
17 reconsideration requests may be used to challenge ICANN Board actions alleged to
18 have been undertaken “without consideration of material information” or with
19 “reliance on false or inaccurate material information,” or may be used to challenge
20 staff action alleged to contravene ICANN’s established policies. (*Id.*, Art. IV, § 2].)

21 Another accountability mechanism provided for in ICANN’s Bylaws is a
22 request for an independent review process (“IRP”), under which an aggrieved
23 applicant can ask independent panelists to evaluate whether an action of ICANN’s
24 Board was inconsistent with ICANN’s Articles and Bylaws. (*Id.*, Art. IV, § 2.)

25 **B. THE APPLICATIONS FOR .WEB AND PLAINTIFF’S CLAIMS**
26 **REGARDING NU DOTCO.**

27 In June 2012, Plaintiff, Nu Dotco, and five other applicants applied for .WEB.
28 Another applicant applied for .WEBS. The seven applications for .WEB and the

1 remaining application for .WEBS passed all applicable evaluations and were placed
2 in the Contention Set, pursuant to the procedures set forth in the Guidebook.
3 (Willet Decl. ¶ 6.)

4 Nu Dotco's application stated that it was a Delaware Limited Liability
5 Company, and listed three people as its officers: Jose Ignacio Rasco III, CFO; Juan
6 Diego Calle, CEO; and Nicolai Bezsonoff, COO. (Zecchini Decl., Ex. E.) It listed
7 Mr. Rasco as its "Primary Contact" and Mr. Bezsonoff as its "Secondary Contact."
8 (*Id.*) It identified two owners having at least 15% interests: Domain Marketing
9 Holdings, LLC and Nuco LP, LLC. (*Id.*)

10 On April 27, 2016, ICANN scheduled the Auction, notified all active
11 members of the Contention Set, and provided them with instructions and deadlines
12 to participate in the Auction. (Willet Decl. ¶ 7.) On May 24, 2016, Plaintiff
13 executed the Bidder Agreement thereby "agree[ing] to be bound by the Auction
14 Rules as published on ICANN's website." (Weinstein Decl., Exs. B-C.) Plaintiff
15 alleges that Nu Dotco is the only applicant in the Contention Set that did not agree
16 to resolve the Contention Set privately. (Compl. ¶ 36.) Thus, on or about June 7,
17 2016, Plaintiff contacted Nu Dotco and asked it to reconsider its decision to forego
18 private resolution of the Contention Set.

19 On June 7, 2016, Mr. Rasco, Nu Dotco's CFO, made clear in his response
20 that Nu Dotco would not be changing its position, explaining: "Nicolai [Bezsonoff]
21 is at NSR full-time and is no longer involved with our TLD applications. I am still
22 running our program and Juan [Diego Calle] sits on the board with me and several
23 others. Based on your request, I went back to check with all the powers that be and
24 there was no change in response and will not be seeking an extension." (Nevett
25 Decl., Ex. A.) Over two weeks later, on June 23, 2016, based solely on this email
26 from Nu Dotco's CFO, Plaintiff suggested to ICANN that Nu Dotco had changed
27 its ownership and/or management structure, but had not reported the change to
28 ICANN, as required. (Willet Decl. ¶ 12.) Plaintiff requested that the Auction be

1 delayed pending further investigation. Plaintiff also formally raised the issue with
2 the ICANN Ombudsman during the ICANN56 Public Meeting in late June 2016.
3 (Compl. ¶ 40; Willet Decl. ¶ 16.)

4 After receiving Plaintiff's allegations regarding Nu Dotco and the request to
5 postpone the Auction, ICANN investigated Plaintiff's claims. (Willett Decl. ¶¶ 12-
6 13.) On June 27, 2016, ICANN sent an email to Nu Dotco, asking it to confirm that
7 there had not been any "changes to your application or the [Nu Dotco] organization
8 that need to be reported to ICANN. This may include any information that is no
9 longer true and accurate in the application, including changes that occur as part of
10 regular business operations (*e.g.*, changes to officers and directors, application
11 contacts)." (Willett Decl. ¶ 13, Ex. B.) Mr. Rasco responded that same day to
12 "confirm that there have been no changes to the [Nu Dotco] organization that would
13 need to be reported to ICANN." (Willett Decl. ¶ 13, Ex. B.)

14 Subsequently, both ICANN staff and the Ombudsman contacted Mr. Rasco
15 to again inquire about the claims of potential changes in Nu Dotco's organization.
16 Specifically, ICANN staff interviewed Mr. Rasco by telephone on July 8, 2016
17 regarding the allegations. (Willett Decl. ¶ 18.) During that call, and later in a
18 confirming email on July 11, 2016, Mr. Rasco stated that: "Neither the ownership
19 nor the control of Nu Dotco, LLC has changed since we filed our application. The
20 Managers designated pursuant to the company's LLC operating agreement (the
21 LLC equivalent of a corporate Board) have not changed. And there have been no
22 changes to the membership of the LLC either." (Willett Decl. ¶ 18, Ex. F.) Mr.
23 Rasco also stated that he had already provided this same information to the ICANN
24 Ombudsman in responding to the Ombudsman's investigation of the complaint
25 lodged with him. (Willett Decl. ¶ 18.) After receiving information from Nu Dotco
26 and ICANN, the Ombudsman informed ICANN that, in his opinion, there was
27 nothing to justify a postponement of the Auction based on unfairness to the other
28 applicants. (Willett Decl. ¶ 21, Ex. G.)

1 After completing its investigation of the allegations regarding Nu Dotco's
2 application, on July 13, 2016, ICANN sent a letter to the members of the
3 Contention Set stating, among other things, that "in regards to potential changes of
4 control of [Nu Dotco], we have investigated the matter, and to date we have found
5 no basis to initiate the application change request process or postpone the auction."
6 (Zecchini Decl., Ex. G.)

7 On 17 July 2016, Plaintiff filed a reconsideration request ("Reconsideration
8 Request"), seeking postponement of the Auction and requesting a "thorough and
9 transparent investigation into the apparent discrepancies and/or changes in [Nu
10 Dotco's] .WEB/.WEBS application." (Zecchini Decl., Ex. H., § 9, Pg. 11.) On
11 July 21, 2016, ICANN's Board Governance Committee ("BGC") issued a twelve-
12 page determination denying Plaintiff's Reconsideration Request. ("Reconsideration
13 Request Determination," Zecchini Decl., Ex. I.) The Reconsideration Request
14 Determination explained that no postponement of the Auction was warranted
15 because: (1) ICANN had thoroughly investigated Plaintiff's claims and found that
16 Nu Dotco had not undergone a change in leadership or control; and (2) there was no
17 pending accountability mechanism (*i.e.*, a reconsideration request or IRP) that could
18 support a postponement of the Auction, because the accountability mechanisms
19 were not initiated before April 27, 2016, the day on which the Auction was
20 scheduled. As the BGC pointed out, under the agreed-upon Auction Rules, an
21 auction postponement is only warranted if there is a pending accountability
22 mechanism "prior to the scheduling of an Auction." (Zecchini Decl., Ex. J ¶ 10.)

23 Plaintiff is correct that the Auction is scheduled to officially begin on July 27,
24 2016 at 6:00 am Pacific time. But as Plaintiff knows well, many facets of the
25 Auction process ***are already underway***. For instance, by July 20, the Auction
26 participants transferred deposits into escrow accounts overseen by the Auction
27 provider, which may amount to as much as \$16 million in total. (Weinstein Decl. ¶
28 7.) Likewise, on July 20, the "blackout period" began, which is a period of time

1 called for in the Auction Rules during which auction participants are prohibited
2 from communicating, or cooperating, with one another in terms of the auction.
3 (Weinstein Decl. ¶ 7.) Tomorrow, on July 26, around 6:00 am Pacific time, the
4 Auction provider will conduct a “mock auction” in order to allow participants to
5 test connectivity and familiarize themselves with the system, if they are not already
6 familiar with it. (Weinstein Decl. ¶ 7.) About an hour later, the Auction provider
7 will open “early bidding,” which allows participants to submit their first round bids
8 in preparation for the start of the Auction. (Weinstein Decl. ¶ 7.) These early bids,
9 however, will not be accepted until after the Auction officially begins at 6:00 am
10 Pacific time on July 27. (Weinstein Decl. ¶ 7.)

11 **III. LEGAL STANDARD**

12 “The opportunities for legitimate ex parte applications are extremely
13 limited.” *Horne v. Wells Fargo Bank*, 969 F. Supp. 2d 1203, 1205 (C.D. Cal. 2013)
14 (citation and internal quotation marks omitted). A successful ex parte application
15 must demonstrate that there is good cause to allow the moving party to “go to the
16 head of the line in front of all other litigants and receive special treatment.”
17 *Mission Power Eng’g Co. v. Cont’l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal.
18 1995). “The use of such a procedure is justified only when (1) there is a threat of
19 immediate or irreparable injury; (2) there is danger that notice to the other party
20 may result in the destruction of evidence or the party’s flight; or (3) the party seeks
21 a routine procedural order that cannot be obtained through a regularly noticed
22 motion (*i.e.*, to file an overlong brief or shorten the time within which a motion may
23 be brought).” *Horne*, 969 F. Supp. 2d at 1205.

24 A temporary restraining order is available when the applicant may suffer
25 irreparable injury before the court can hear the application for a preliminary
26 injunction. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal*
27 *Practice and Procedure* § 2951 (3d. 1998); *see* Fed. R. Civ. P. 65(b). But requests
28 for temporary restraining orders are governed by the same general standards that

1 govern the issuance of a preliminary injunction. *See New Motor Vehicle Bd. Of*
2 *Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977); *L.A. Unified Sch. Dist. v.*
3 *U.S. Dist. Ct.*, 650 F.2d 1004, 1008 (9th Cir. 1981).

4 A preliminary injunction is an “extraordinary and drastic remedy” that is
5 never awarded as of right. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citation
6 omitted). The court must determine whether the plaintiff has established **all** of the
7 following: (1) it is likely to succeed on the merits; (2) it is likely to suffer
8 irreparable harm in the absence of preliminary relief; (3) the balance of equities tips
9 in its favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def.*
10 *Council, Inc.*, 555 U.S. 7, 20 (2008).

11 Before these standards were announced in *Winter*, courts in the Ninth Circuit
12 applied an alternative “sliding-scale” test for evaluating preliminary injunctions that
13 allowed the movant to offset the weakness of a showing on one factor with the
14 strength of another, which is what Plaintiff erroneously relies upon as an
15 “alternative” test. *See Mot. at 20-21; Alliance for Wild Rockies v. Cottrell*, 632
16 F.3d 1127, 1132-35 (9th Cir. 2011). The Ninth Circuit has since held, however,
17 that “[t]o the extent our cases have suggested a lesser standard, they are no longer
18 controlling, or even viable.” *Am. Trucking Assocs. v. City of L.A.*, 559 F.3d 1046,
19 1052 (9th Cir. 2009). Accordingly, Plaintiff must show it can meet all four of the
20 preliminary injunction requirements set forth above. Plaintiff has not.

21 **IV. ARGUMENT**

22 **A. PLAINTIFF SEEKS EMERGENCY RELIEF ONLY BECAUSE** 23 **OF ITS OWN DELAY.**

24 *Ex parte* relief may not be awarded if the “emergency” nature of the request
25 is of the plaintiff’s “own making.” *See, e.g., Pascascio v. New Century Mortg.*
26 *Corp.*, No. CV 12-839 PSG (FMOx), 2012 U.S. Dist. LEXIS 68533, at *7 (C.D.
27 Cal. May 16, 2012) (denying temporary restraining order). Here, the urgent timing
28 of Plaintiff’s *ex parte* TRO was caused by its own delay.

1 Plaintiff's Complaint squarely admits that as of June 7, 2016, it was in
2 possession of all facts that it now submits as support for this dispute. Namely, that
3 as of at least June 7, 2016, Plaintiff purportedly believed there was a discrepancy
4 between Nu Dotco's application and its current ownership or management, and that
5 Nu Dotco would not agree to postpone the Auction. (Compl. ¶ 38.) On June 29,
6 2016, ICANN met with Mr. Nevett to discuss a number of business matters,
7 including his claims regarding Nu Dotco's management. (Willett Decl. ¶ 15.)
8 During that meeting, Mr. Nevett requested that the Auction be postponed because
9 of his claimed concerns that Nu Dotco had undergone a change in ownership or
10 management. (Willett Decl. ¶ 15.) ICANN informed him that it had already
11 investigated the alleged management changes with Nu Dotco's representative, who
12 had confirmed that no such changes had occurred. (Willett Decl. ¶ 15.) Based on
13 the fact that ICANN had no evidence of such a management change, ICANN was
14 continuing to proceed with the Auction as scheduled. Thus, in *early June* Plaintiff
15 could have filed its action and sought the relief it now seeks on an *ex parte* basis.
16 And at the very latest, Plaintiff could have sought relief shortly after ICANN
17 informed Plaintiff, on July 13, 2016, that ICANN "has investigated the matter" and
18 had no intention of postponing the Auction. (Compl. ¶ 43.) Instead, Plaintiff
19 waited until July 22 to file this matter, after many facets of the Auction process had
20 already begun (*see* Weinstein Decl. ¶ 7), and just two business days before bidding
21 officially begins.

22 ICANN and the Court are both therefore forced to rush into this matter,
23 which Plaintiff could have commenced weeks earlier. Because the emergency
24 Plaintiff invokes is entirely of Plaintiff's own making, the relief must be denied.
25 *See, e.g., Carnero v. Wash. Mut.*, No. C 09-5330 JF (RS), 2009 U.S. Dist. LEXIS
26 123532, at *4 (N.D. Cal. Dec. 30, 2009) ("Plaintiffs would have had to receive
27 notice of any sale some time ago; accordingly, the 'emergency' nature of their
28 application appears to be of their own making.").

1 **B. PLAINTIFF DOES NOT MEET THE REQUIREMENTS FOR**
 2 **THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER.**

3 **1. Plaintiff Is Unlikely To Succeed On The Merits Of Its**
 4 **Claims.**

5 Plaintiff is not likely to succeed on the merits of its claims. Each of
 6 Plaintiff's causes of action is completely dependent on the assertion that there was a
 7 change to Nu Dotco's ownership or management that required ICANN to halt the
 8 Auction. The evidence submitted by ICANN with this Opposition—in particular,
 9 the sworn declarations of Nu Dotco's officers—demonstrate that Plaintiff's
 10 assertion is false and that ICANN reached the correct conclusion in finding no basis
 11 to delay the Auction. For instance, Nu Dotco's CFO, Mr. Rasco, has again
 12 confirmed, now under penalty of perjury, that "[t]here have been no changes or
 13 amendments made to Nu Dotco's management since the time that Nu Dotco
 14 submitted its .WEB application to ICANN" and that "[t]here have been no changes
 15 or amendments made to Nu Dotco's membership, nor has any transfer of
 16 membership otherwise occurred, since the time that Nu Dotco submitted its
 17 application to ICANN." (Rasco Decl. ¶¶ 6, 8.) Nu Dotco's COO, Mr. Bezsonoff,
 18 confirms the same in his declaration and explains that even though he is employed
 19 by another company currently, he is still performing his duties as an officer of Nu
 20 Dotco while they await resolution of the .WEB Contention Set. (Bezsonoff Decl.
 21 ¶¶ 5-6, 8-9.) Finally, Mr. Rasco explains in his declaration that the single email
 22 Plaintiff relies upon to support its claims was taken completely out of context and
 23 in no way communicated a change of ownership or management at Nu Dotco
 24 because there was no such change. (Rasco Decl. ¶¶ 11-15.)

25 Because there is no evidence justifying postponement of the Auction, each of
 26 Plaintiff's claims fail. And each claim is further deficient for the following reasons.

27 **(a) Plaintiff Is Unlikely To Succeed On The Merits Of The**
 28 **Contract Claim.**

 Plaintiff's breach of contract claim alleges that ICANN did not fulfill its

1 obligations set forth in the Bylaws, Articles or Guidebook in two ways, yet Plaintiff
2 will not succeed on the merits of either. (Compl. ¶¶ 54-63.)

3 First, Plaintiff alleges that ICANN breached its commitments under the
4 Bylaws to operate in a transparent, expedient, neutral and prompt manner. (Compl.
5 ¶ 60.) To start, the only contractual relationship between ICANN and Plaintiff is by
6 virtue of its status as an applicant for .WEB; Plaintiff does not cite any reasoning or
7 authority that suggests the terms of ICANN’s Bylaws are incorporated into the
8 contractual relationship between Plaintiffs and ICANN. *See Klein v. Chevron*
9 *U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1384 (2012) (courts “must determine whether
10 the alleged agreement is ‘reasonably susceptible’ to the meaning ascribed to it in
11 the complaint” for breach of contract claims) (citation omitted); *Republic Bank v.*
12 *Marine Nat’l Bank*, 45 Cal. App. 4th 919, 923 (1996) (“A secondary document
13 becomes part of a contract as though recited verbatim *when it is incorporated into*
14 *the contract by reference* provided that the terms of the incorporated document are
15 readily available to the other party.”) (emphasis added and citation omitted).
16 Indeed, this Court has considered this precise issue in connection with another case
17 filed by a disappointed applicant against ICANN, and held that ICANN is only
18 bound by the contractual obligations set forth in the application documents to which
19 ICANN agreed to be bound, not other extraneous materials. *See Image Online*
20 *Design, Inc. v. Internet Corp. for Assigned Names & Nos.*, No. CV 12-08968 DDP
21 (JCx), 2013 U.S. Dist. LEXIS 16896, at *9, 11 (C.D. Cal. Feb. 7, 2013) (dismissing
22 breach of contract claim because the contract’s “provisions give ICANN no
23 responsibilities with respect to [the plaintiff’s new gTLD] Application beyond its
24 initial consideration of the Application . . . [the applicant] has pointed to no contract
25 terms that ICANN has breached.”) (Pregerson, J.).

26 Moreover, ICANN did *not* breach any of the cited Bylaws. As discussed
27 above, and as is replete in the evidence, ICANN engaged in a thorough and
28 transparent investigation of Plaintiff’s claims about Nu Dotco’s ownership or

1 management. Through multiple steps, ICANN staff verified that this claim was
2 factually inaccurate, and transparently informed Plaintiff of the results of its
3 investigation in its July 13, 2016 letter. (Compl. ¶ 43.) In addition, ICANN’s
4 Ombudsman investigated Plaintiff’s claims and found there was no support for
5 them. (Willett Decl. ¶¶ 11, 17, 19, 21.) Finally, ICANN’s BGC independently
6 evaluated Plaintiff’s assertions and concluded that there was no evidence showing
7 that postponement was necessary. (Zecchini Decl., Ex. I.) And, tellingly, each of
8 these separate findings have been confirmed by the declarations of Nu Dotco
9 executives stating, under penalty of perjury, that no ownership or management
10 change has occurred. (*See generally* Rasco Decl.; Bezsonoff Decl.)

11 As to the second portion of Plaintiff’s breach of contract claim, Plaintiff
12 alleges that “ICANN also promised that a contention set would only proceed to
13 auction where all active applications in the contention set have ‘no pending ICANN
14 Accountability Mechanisms’.” (Compl. ¶ 61.) This argument ignores the plain text
15 of the Auction Rules. All applicants agreed to the terms of the Guidebook when
16 they applied, and Plaintiff has recently signed a Bidder’s Agreement agreeing that
17 the Auction is governed by the Auction Rules. The operative Auction Rules, dated
18 February 24, 2015, state that all “*pending* ICANN Accountability Mechanisms”
19 must be resolved “prior to the *scheduling* of an Auction.” (Zecchini Decl., Ex. J ¶
20 10 (emphasis added).) Here, the Auction was *scheduled* on April 27, well before
21 Plaintiff invoked any ICANN accountability mechanism. Plaintiff did not lodge a
22 complaint with the Ombudsman until late June, two months after the Auction was
23 scheduled. (Compl. ¶ 40.) Similarly, Plaintiff did not submit a Reconsideration
24 Request until July 17. (Compl. ¶ 49.) And Plaintiff did not even attempt to initiate
25 a Request for Independent Review until July 22, 2016. (Nevett Decl. ¶ 9.) Thus,
26 no ICANN accountability mechanisms were pending on April 27, 2016 when the
27 Auction was scheduled. Indeed, the Auction Rules were designed to, among other
28 things, prevent exactly this sort of late, unilateral attempt to delay an auction.

1 Finally, Plaintiff's allegation that ICANN was motivated by money to not
2 investigate Plaintiff's claims regarding Nu Dotco because ICANN receives the
3 financial proceeds of all new gTLD auctions (Compl. ¶ 62), is misguided. As a
4 nonprofit, ICANN has no interest in financial gain for its own sake. The plain text
5 of the Guidebook makes clear that ICANN will put all proceeds stemming from
6 new gTLD auctions toward charitable purposes: "Any proceeds from auctions will
7 be reserved and earmarked until the uses of funds are determined. Funds must be
8 used in a manner that supports directly ICANN's Mission and Core Values and also
9 allows ICANN to maintain its not for profit status." (Guidebook § 4.3, n.1.) More
10 specifically, the Guidebook provides that "[p]ossible uses of auction funds include
11 formation of a foundation with a clear mission and a transparent way to allocate
12 funds to projects that are of interest to the greater Internet community" (*Id.*)
13 As has been widely publicized, the auction proceeds will be utilized in a manner to
14 be determined by the community, which is likely to predominantly include various
15 global charitable purposes, as the Guidebook suggests. These auction proceeds
16 have been reserved until the ICANN Board authorizes a plan for the appropriate use
17 of the funds. (Weinstein Decl. ¶ 7.) The ICANN community has indicated that it
18 wants to create a Cross-Community Working Group to develop proposals for
19 eventual consideration by the ICANN Board. (Weinstein Decl. ¶ 7.) During the
20 ICANN56 Public Meeting, a meeting took place on June 28, 2016 to discuss the
21 formation of that Cross-Community Working Group.³

22 **(b) Plaintiff Is Unlikely To Succeed On The Merits Of The**
23 **Breach Of Implied Covenant Of Good Faith And Fair**
24 **Dealing Claim.**

25 Plaintiff's breach of the implied covenant of good faith and fair dealing claim
26 relies on the same allegations asserted in the breach of contract claims—that

27 ³ See <https://icann562016.sched.org/event/7NE0/cross-community-session-charter-for-the-ccwg-on-auction-proceeds?iframe=no&w=i:100;&sidebar=yes&bg=no>.

1 ICANN did not conduct an “adequate investigation” of Nu Dotco and improperly
2 failed to postpone the Auction. (Compl. ¶ 67.) Thus, Plaintiff’s breach of the
3 implied covenant claims is as deficient as its breach of contract claim.

4 **(c) Plaintiff Is Unlikely To Succeed On The Merits Of The**
5 **Negligence Claim.**

6 Plaintiff is on even less firm footing with respect to its negligence claim.
7 “Actionable negligence is traditionally regarded as involving the following: (a) a
8 legal duty to use due care; (b) a breach of such legal duty; (c) the breach as the
9 proximate or legal cause of the resulting injury.” *Jackson v. AEG Live, Inc.*, 233
10 Cal. App. 4th 1156, 1173 (2015) (citation omitted). ICANN, however, owes
11 Plaintiff no legal duty of care, and, in any event, ICANN did not breach any duty
12 owed to Plaintiff.

13 To start, the economic loss rule bars Plaintiff’s negligence claim, because
14 ICANN owes no legal duty to Plaintiff above and beyond its contractual
15 obligations. As the California Supreme Court has recognized, “[t]he economic loss
16 rule requires a [contractual party] to recover in contract for purely economic loss
17 due to disappointed expectations, unless he can demonstrate harm above and
18 beyond a broken contractual promise.” *Robinson Helicopter Co. v. Dana Corp.*, 34
19 Cal. 4th 979, 988 (2004); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040,
20 1064 (N.D. Cal. 2012) (“Purely economic damages to a plaintiff which stem from
21 disappointed expectations from a commercial transaction must be addressed
22 through contract law; negligence is not a viable cause of action for such claims.”).
23 Plaintiff has not alleged any harm other than purported damages stemming from its
24 contractual relationship with ICANN. The negligence claim must therefore fail as a
25 matter of law. *See In re Sony Gaming Networks & Customer Data Sec. Breach*
26 *Litig.*, 996 F. Supp. 2d 942, 973 (S.D. Cal. 2014) (granting motion to dismiss
27 negligence claim with prejudice based on economic loss rule).
28

1 **(d) Plaintiff Is Unlikely To Succeed On The Merits Of The**
2 **Unfair Competition Claim.**

3 Plaintiff makes allegations under all three prongs of Section 17200. First,
4 Plaintiff claims that ICANN acted in an “unlawful” manner by the including the
5 Covenant Not to Sue in the Guidebook. (Compl. ¶ 77.) Second, Plaintiff alleges
6 that ICANN acted “unfair[ly] when it conducted what Plaintiff views as a “cursory
7 investigation” into Plaintiff’s claims about Nu Dotco, and decided based on that
8 investigation not to postpone the Auction. (Compl. ¶ 78.) Third, Plaintiff alleges
9 that ICANN acted in a fraudulent manner when it represented that it would adhere
10 to the terms of its Bylaws and the Auction Rules. (Compl. ¶ 79.) All three claims
11 fail because there is nothing unlawful about the Covenant Not to Sue, as discussed
12 below, ICANN fully investigated Plaintiff’s claims regarding Nu Dotco and
13 ICANN’s conduct at all times complied with its obligations under its Bylaws and
14 the Guidebook. In addition, Plaintiff has not established standing to assert its
15 Section 17200 claim because Plaintiff has not “lost money or property” because of
16 the alleged violations of the statute, as required. Cal. Bus. & Prof. Code § 17203.

17 **(e) Plaintiff Is Unlikely To Succeed On The Merits Of The**
18 **Declaratory Relief Claim.**

19 Plaintiff’s declaratory relief claim seeks a judicial declaration concerning one
20 and only one matter: “the legality and effect” of the Covenant Not to Sue. Yet for
21 all of the reasons discussed below, the Covenant Not to Sue is fully enforceable.
22 *See generally Commercial Connect v. Internet Corp. for Assigned Names & Nos.*,
23 No. 3:16-cv-00012-JHM, 2016 U.S. Dist. LEXIS 8550 (W.D. Ky. Jan. 26, 2016)
24 (denying an application for emergency injunctive relief seeking to prevent a new
25 gTLD auction from taking place the next day). Moreover, the enforceability of the
26 Covenant Not to Sue has no bearing on whether the Auction should proceed. Even
27 if Plaintiff were successful in challenging the Covenant Not to Sue, Plaintiff has no
28 cause of action against ICANN. In other words, the Auction could and should

1 proceed while Plaintiff litigates whether it can litigate with ICANN.

2 **2. Plaintiff Will Not Suffer Irreparable Harm In The Absence**
3 **Of The Requested Injunctive Relief.**

4 Plaintiff will *not* suffer irreparable harm in the absence of the requested
5 injunctive relief. To start, monetary loss does not comprise irreparable injury for
6 purposes of assessing the propriety of injunctive relief. *Amylin Pharms., Inc. v. Eli*
7 *Lilly & Co.*, 456 F. App'x 676, 678 (9th Cir. 2011) (affirming denial of preliminary
8 injunction because “harm that is fully compensable through money damages . . .
9 does not support injunctive relief”). Whatever the results of the Auction, any harm
10 Plaintiff might claim to have suffered is purely financial. Indeed, Plaintiff may well
11 win the Auction for .WEB. Should that occur, its only claim would arise from the
12 presence of Nu Dotco in the Auction, possibly raising Plaintiff’s winning bid. But
13 the risk that an auction might include a participant subject to later disqualification is
14 already fully addressed in the agreed Auction Rules. In particular, paragraph 62 of
15 the Auction Rules concerns “Effect of Ineligibility of Winner To Sign a Registry
16 Agreement or To Be Delegated the Contention String.” It provides mechanisms to
17 address the situation when an auction took place with a participant that is later
18 disqualified. Having agreed to these mechanisms, Plaintiff has no basis to assert
19 that losses from such circumstances are irreparable. To the extent it is concerned
20 about “disclosure of how each of the applicant’s [sic] valued .WEB as well as the
21 bidding strategies for each bidder,” (Mot. at 28) it has already agreed that such
22 disclosure does not justify cancelling an auction.

23 Moreover, the results of an auction “could be undone” if a disqualification is
24 discovered even long afterward. (*Cf.* Mot. at 28.) There is no technological barrier
25 that would prevent the transfer of the Registry Agreement for a gTLD from one
26 registry operator to another after the gTLD is contracted or even delegated into the
27 root zone and in operation. (Weinstein Decl. ¶ 15.) In fact, Section 7.5 of the
28 Registry Agreement defines the rules and regulations regarding the process for

1 transferring a gTLD from one registry operator to another. (Weinstein Decl. ¶ 15.)
2 For that reason as well, Plaintiff cannot demonstrate that it will suffer irreparable
3 harm if the Auction goes forward.

4 Plaintiff has not shown irreparable harm, and that failure alone serves as a
5 basis to deny the requested relief. *ET Trading, Ltd. v. ClearPlex Direct, LLC*, No.
6 15-CV-00426-LHK, 2015 U.S. Dist. LEXIS 25894, at *8 (N.D. Cal. Mar. 2, 2015)
7 (“The Court need not address all of the *Winter* factors because the Court finds that
8 Plaintiff has failed to carry its burden of demonstrating that it would be irreparably
9 harmed absent a temporary restraining order”).

10 **3. The Balance Of The Equities Weighs Against The Issuance**
11 **Of Injunctive Relief.**

12 As for the balance of the harms, Plaintiff claims that “ICANN cannot claim
13 any actual harm” were the Auction to be postponed. Not so. If ICANN postpones
14 the Auction with no basis (and there is none here), it would be manifestly unfair to
15 the other applicants that have invested time and money in their applications, and
16 have deposited funds into an escrow account in preparation for the Auction. In
17 addition, should the Auction be cancelled, ICANN would suffer a monetary loss of
18 at least \$10,000, in the form of a fee the Auction provider would charge ICANN,
19 and then pay more fees and invest more administrative expense when the Auction is
20 almost certainly re-scheduled. (*See* Weinstein Decl. ¶ 13.) Others of the scheduled
21 participants, many of which did not join Plaintiff’s request to postpone, would also
22 be harmed by delay. They have made large deposits (up to \$2 million each) in
23 anticipation of the auction and have otherwise engaged in significant preparation.
24 (Weinstein Decl. ¶ 7.) In short, a delay in the Auction and resolution of the
25 Contention Set will disrupt the orderly progression of the New gTLD Program.

26 **4. The Public Interest Strongly Favors Denying Plaintiff’s**
27 **Application For A Temporary Restraining Order.**

28 Plaintiff bears the burden of showing that its requested injunctive relief is in

1 the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009).
2 Indeed, where rules are at play that all relevant parties have relied upon, the public
3 interest weighs in favor of enforcing those rules. *Id.* at 1140. Here, there is no
4 authority in the Guidebook, Auction Rules, elsewhere that requires ICANN to
5 postpone the Auction. Such delay would set a precedent that would upset the
6 orderly expansion of gTLDs. Should the Court award Plaintiff the relief it seeks,
7 any applicant headed to auction could concoct a minor discrepancy it claims exists
8 with respect to another applicant within the same contention set, and seek to rely on
9 this Court’s ruling to support postponement of the auction. When such widespread
10 harm could result from the issuance of injunctive relief, affecting public rights as
11 well as those of the parties to the lawsuit, “the court may in the public interest
12 withhold relief until a final determination of the rights of the parties, though the
13 postponement [of the requested relief] may be burdensome to the plaintiff.”
14 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted).

15 **C. THE COVENANT NOT TO SUE BARS THIS LAWSUIT.**

16 Apart from Plaintiff’s delay in bring this action and Plaintiff’s inability to
17 satisfy the elements required for issuance of the TRO, Plaintiff’s claims against
18 ICANN are barred by the Covenant Not to Sue, which Plaintiff acknowledged and
19 Plaintiff’s ultimate parent company accepted over 300 times through its
20 subsidiaries. Indeed, as the district court in the Western District of Kentucky
21 recently held under nearly identical circumstances, the Covenant Not to Sue is
22 “clear and comprehensive” and bars claims “aris[ing] out of ICANN’s review of [a
23 new gTLD application]” *Commercial Connect*, 2016 U.S. Dist. LEXIS 8550,
24 at *9-10.

25 A written release extinguishes any claim covered by its terms. *Skrbina v.*
26 *Fleming Cos.*, 45 Cal. App. 4th 1353, 1366 (1996). Further, “a general release can
27 be completely enforceable and act as a complete bar to all claims (known or
28 unknown at the time of the release) despite protestations by one of the parties that

1 he did not intend to release certain types of claims.” *San Diego Hospice v. Cty. of*
2 *San Diego*, 31 Cal. App. 4th 1048, 1053 (1995).

3 Plaintiff recognizes these principles, and argues that the Covenant Not to Sue
4 is unenforceable for one and only one reason: California Civil Code § 1668
5 (“Section 1668”). (See Mot. at 25, 27.) But Section 1668 only invalidates contracts
6 that “exempt anyone from responsibility for his own fraud, or willful injury to the
7 person or property of another.” Cal. Civ. Code § 1668. Courts have interpreted
8 Section 1668’s phrase “willful injury to the person or property of another” to mean
9 more than merely intentional conduct (such as breach of the contract), but instead
10 “**intentional wrongs.**” *Frittelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th
11 35, 43 (2011) (“Ordinarily, the statute invalidates contracts that purport to exempt
12 an individual or entity from liability for future intentional wrongs and gross
13 negligence.”) (emphasis added and citations omitted).

14 The most Plaintiff alleges in its Complaint is that ICANN failed to
15 thoroughly investigate Nu Dotco’s ownership and management because ICANN
16 preferred the Auction to proceed. (Compl. ¶ 68.) But even such wild accusations
17 do not comprise the kind of intentional wrongs covered by Section 1668. Indeed,
18 *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118 (2012),
19 is on point. There, a food-disinfectant equipment manufacturer alleged that a food-
20 safety equipment tester failed to test the equipment using agreed-upon standards, in
21 bad faith, and employed “slovenly procedures which seemed to be slanted towards
22 a preconceived conclusion.” *Id.* at 1125 (citation omitted). Despite these
23 allegations and an invocation of Section 1668, the court held that a limitation of
24 liability clause in the parties’ contract was enforceable and barred not only the
25 plaintiff’s claim for breach of contract but also plaintiff’s “bad faith” claim. *Id.* at
26 1125–27, 1130.

27 In addition, interpreting Section 1668 to invalidate the Covenant Not to Sue
28 runs contrary to the public interest. The Guidebook is not merely a contract

1 between two parties. It was adopted through an extensive public comment process
2 to govern the nearly 2,000 applications that ICANN received and was tasked with
3 evaluating—including competing applications for the same gTLD such as those of
4 Plaintiff and Nu Dotco. The Covenant Not to Sue ensures that the processing of
5 these applications does not get ensnared in endless litigation by disappointed
6 applicants. If Plaintiff’s argument is accepted, the Covenant Not to Sue could
7 become dead letter—and the important purposes it serves frustrated.

8 Plaintiff argues that the recent, unpublished district court decision in
9 *DotConnectAfrica Trust v. ICANN* supports its position. (See Mot. at 9 (citing
10 *DotConnectAfrica Trust v. Internet Corporation for Assigned Names & Nos., et al.*,
11 Case No. 2:16-cv-00862-RGK-JC (C.D. Cal. Apr. 12, 2016) (“*DCA*”).) That
12 argument is unavailing for three reasons. First, it cannot be squared with another
13 recent ruling upholding the Covenant Not to Sue, namely *Commercial Connect,*
14 *LLC v. Internet Corp. for Assigned Names and Numbers*, No. 3:16CV-00012-JHM,
15 2016 U.S. Dist. LEXIS 8550, at *1 (W.D. Ky. Jan. 26, 2016). In *Commercial*
16 *Connect*—which, unlike *DCA*, involved an effort to enjoin an auction – the court
17 denied a temporary restraining order requested by an applicant for the .SHOP gTLD
18 one day before the auction was to take place. *Id.* at *1, 11. The district court ruled
19 that the Covenant Not to Sue appeared enforceable and for that reason denied the
20 requested injunctive relief. *Id.* at *10-11. That Plaintiff does not cite the case from
21 Kentucky in its TRO is telling; it comprises a well-reasoned, directly on point
22 decision. Second, the district court’s ruling in *DCA* was issued at the preliminary
23 injunction stage, so it is merely the view of one court that there are “serious
24 questions” as to its enforceability. Third, that very ruling is currently on appeal to
25 the Ninth Circuit on an expedited basis.

26 **V. PLAINTIFF’S EXPEDITED DISCOVERY REQUEST MUST ALSO**
27 **BE DENIED.**

28 Plaintiff’s request for expedited discovery, from both ICANN and non-

1 parties alike, is unjustifiably onerous and there is no legal basis for the request.

2 Such an extreme demand may only be granted with good cause, which
3 exists only where the need for expedited discovery, in consideration of the
4 administration of justice, outweighs the prejudice to the responding party.
5 *Semitoool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002).
6 Here there is no good cause. To put it simply, whether Nu Dotco changed
7 ownership or management is a yes or no question. After a reasonable investigation,
8 ICANN determined that the answer is no.⁴ Now, Nu Dotco’s managers have
9 declared the same under penalty of perjury. No discovery could possibly aid the
10 Court in resolving the baseless claims Plaintiff raises here, and the request for
11 expedited discovery should therefore be denied, along with the TRO application.
12 *See Dimension Data N. Am., Inc. v. Netstar-1, Inc.*, 226 F.R.D. 528, 532 (E.D.N.C.
13 2005) (denying expedited discovery where requests not narrowly tailored to obtain
14 information relevant to requested preliminary injunction).

15 **VI. CONCLUSION**

16 For the foregoing reasons, Plaintiff’s TRO application must be denied.

17
18 Dated: July 25, 2016

JONES DAY

19 By: /s/ Eric P. Enson
Eric P. Enson

20 Attorneys for Defendant
21 INTERNET CORPORATION FOR
22 ASSIGNED NAMES AND NUMBERS

23 ⁴ Even if the answer were “yes,” the ordinary response would be to allow Nu
24 Dotco to amend its application. And even if Nu Dotco had submitted a change
25 request because it had undergone a change of control or ownership, it would not
26 have been disqualified from the auction set to take place on July 27, 2016. (Willett
27 Decl. ¶ 11.) In fact, a large number of applications have made a change the
28 questions pertaining to ownership or control of the applicant, and no application has
been disqualified to date over one of these changes. (Willett Decl. ¶ 11.) The
Auction Rules also provide that “ICANN reserves the right . . . to postpone a
scheduled Auction if a change request by one or more applicants in the Contention
Set is pending, *but believes that in most instances the Auction should be able to
proceed without further delay.*” (Zecchini Decl., Ex. C ¶ 8 (emphasis added).)

EXHIBIT C-26



.WEB Acquired for \$135 Million. Too much? How does it compare?



SHARE

Twitter

Linkedin

Email

At \$135 million, .WEB is the highest valued first round new Top Level Domain registry sold at auction. It sets a new high bar on the value of TLDs. Nu Dot Co and its investors, prevailed in an ICANN auction and are now the proud owners of the .WEB



TLD	VALUE (USD)	BUYER
.WEB	\$135,000,000	Nu Dot Co
.SHOP	\$41,500,000	GMO Registry, Inc.
.APP	\$25,000,000	Charleston Road Registry Inc. (Google)
.BLOG (1)	\$19,000,000	Automattic Inc. (Wordpress)
.TECH	\$6,760,000	Dot Tech LLC (Radix)

In the past two years, other TLD registries have sold for millions of dollars. Now that the big one (.WEB) is done, it is interesting to look at the relative value of these acquisitions and consider how these

investments make sense for the buyers. The top 5 new TLD acquisition prices are listed below and a discussion follows.

Source: <https://gtldresult.icann.org/application-result/applicationstatus/auctionresults>

¹ Reported but unverified

In March 2015, I wrote an article; [Did Google Overpay for .APP?](#) The conclusion was, “no they did not overpay”. This was based on Google’s leading mobile app market position and .APP would allow them to own a new channel, introduce a new paradigm on app discoverability, and leverage Google’s Android market position in the application distribution market.

Then there was .SHOP, purchased for \$41.5 million by GMO Registry. This one, I find to be a head scratcher in terms of the valuation. It is a good TLD, no question. It has clear meaning as an ecommerce destination but \$41.5 million for a niche or single purpose TLD seems rich to me. .SHOP operators and investors will need to take a long view, dedicate significant marketing spend to develop a value proposition to deliver a new, better, and different offering to ecommerce merchants, and gain market traction. Did GMO overpay? Probably.

How about .BLOG, purchased for a reported \$19 million by Automattic Inc., parent of WordPress? Wordpress is a leading website building and blogging software company. By various reports 25 – 27% of all websites use WordPress and millions of



to drive growth. They can offer services that are unique in the market, increasing the value of their entire business. Secondly, as a defensive position, they ensure competitors are not armed with a powerful digital asset to disrupt their respective positions. .BLOG gets a thumbs up and in my view a good buy for Automattic. Not only will they sell millions of .BLOG domains, they will dramatically increase the worldwide awareness of new TLDs. That's a win for the industry as well.

Where .APP and .BLOG have explicit meanings and added power due to the market positions of the acquirers, .SHOP is seeking to carve a new extension as an ecommerce destination alternative. This all makes sense but \$41.5 million is a big number to dig out of, from a return on investment perspective.

.WEB is a different animal. This acquisition valuation is proof. .WEB is what we call a "super generic" and arguably the best new TLD alternative to .COM. It is a word that is commonly used with intuitive meaning. WEB could make a serious dent to .COM over the long run. With an initial investment of \$135 million you have to assume the owners will follow their acquisition capital with serious marketing spend. Domain speculation in the .WEB space will be furious at launch. Premium domain sales for .WEB are likely to be orders of magnitude larger than in any other TLD introduced and as the .WEB space matures, those premium values will rise. Of course, this assumes Nu Dot Co drives forward with the now familiar premium domain strategy.

\$135 million is a shocking number. It can be a winner assuming funds to support a major marketing and communication plan as the best alternative to .COM, or if Verisign, a cozy super-generic companion to .COM. .CO positioned as a viable alternative and currently have under 2 million registrations versus .COM at 126 million. Recall, Neustar acquired .CO for \$109 million on \$21 million in revenue with approximately 1.5 million domains under management.

Let's assume Verisign is indeed the .WEB backer. Today, Verisign generates over \$1 billion in revenue and a +60% operating profit. Nice business. The challenge for Verisign is not EBITDA or cash flow, it is growth. In their recent quarterly financial release, Verisign grew by 9% in the quarter compared to the same quarter in 2015.



.WEB, the company now owns a new growth engine and they are uniquely positioned to drive it. Some suggest they would bury it to protect .COM. That is not in the best interest of shareholders. .COM is still king, will be for some time and .WEB can immediately contribute healthy operating profits out of the gate. If well executed, .WEB can add significant shareholder value.

If the tea leaves are misleading and everybody is wrong about Verisign, then we will have to write another blog on those implications. If it is Neustar, for example, then the market dynamics are entirely different. We are also likely to see a gun fight on how this all materialized with the secret backer of Nu Dot Co.

The Economics of a TLD Registry

Let's now assume it is not Verisign, the economics of a TLD registry are very good at scale from 1 million to 100 million Domains Under Management (DUM).

This chart models Domain Under Management (DUM), an assumed registry price of \$8, the annual revenue, (ignoring one-time premium domain revenues) and assumed EBITDA improving from 10% to 50% as economies of scale kick in for a well run registry. Then apply business valuations at 5 times revenue (conservative low bar) or 20 times EBITDA, whichever you prefer.



Revenue	\$8,000,000	\$16,000,000	\$40,000,000	\$80,000,000	\$800,000,000
EBITDA	\$800,000	\$3,200,000	\$12,000,000	\$32,000,000	\$400,000,000
<i>Operating Margins</i>	10%	20%	30%	40%	50%
Value @ 5x Revenue	\$40,000,000	\$80,000,000	\$200,000,000	\$400,000,000	\$4,000,000,000
Value @ 20x Profit	\$16,000,000	\$64,000,000	\$240,000,000	\$640,000,000	\$8,000,000,000

For comparison, Verisign with 126 million DUM, \$1B in revenue, generates 60% in profit and a \$9B Market Cap and .CO was acquired by Neustar for \$109 with revenue at \$21 million and 1.6 million DUM.

The trick of course is getting to scale, how much additional investment will be required to get to scale and will the market demand exist for .WEB. For the investors at Nu Dot Co, you now own a valuable asset that will take time and skilled execution to monetize. We will need a few years to determine if \$135 million was too much, just right or a home run investment. The potential to create a highly valuable business that generates tremendous profit and cash is there if they drive to scale.

If it is Verisign, it is a brilliant move, not unlike .BLOG and .APP, it extends Verisign's .COM position and is the growth engine they need.

The new TLD market continues to be increasingly dynamic and interesting with each passing day.



Contact Us

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EXHIBIT C-27



Technology

How a \$135 million auction affects the domain name industry and your business

The cost of protecting assets and creating a new revenue stream

By Cybele Negris | August 10, 2016, 11:24am



niroworld/Shutterstock

On July 27, the Internet Corporation for Assigned Names and Numbers (ICANN) ran an auction for the generic top-level domain (gTLD) .web that culminated in a winning bid of \$135 million. Nu Dot Co LLC produced the winning bid and on August 1, Verisign, a global leader in domain names and internet security, confirmed in a [press release](#) that they

provided the necessary funds for Nu Dot Co's successful bid. But wait one second, let's back this up - \$135 million for .web?

The previous highest public price for a gTLD happened just over seven months ago when GMO Registry of Japan acquired the .shop gTLD for \$41.5 million. While not a number to sneeze at, Verisign blew away the previous record high. And while we're making comparisons, remember that \$100 million venture capital investment in Shopify back in 2013? Shopify is now a public company and an absolute force in the e-commerce game while its value is soaring past a billion dollars.

So that brings us back to Verisign and their brand new \$135-million baby. What exactly are Verisign's plans for .web? To turn the new investment into a billion-dollar web sensation? According to their press release, "as the most experienced and reliable registry operator, Verisign is well-positioned to widely distribute .web." They plan on utilizing their "expertise, infrastructure, and partner relationships to quickly grow .web and establish it as an additional option for registrants worldwide." This can certainly hold true as .web is widely considered the gTLD with the most potential out of 1,930 applications for new domain extensions ICANN received to battle .com and .net for widespread adoption.

In the past 30 years, Verisign has registered over 127 million .com domain names and nearly 16 million .net domain names. These are two of the most popular top-level domains available while the most adopted new gTLD, .xyz, has garnered over six million registrations since entering the market a little over two years ago. If Verisign is able to average three million .web registrations year-over-year, like .xyz, at a guesstimated price of \$10 USD, with an annual renewal rate of 50%, they would break even on their investment in about 3 years (\$30,000,000 in year one, \$45,000,000 in year two and \$52,500,000 in year three). Of course, if renewal rates are lower or Verisign cannot achieve three million domains a year, it will take longer to reach break-even.

The runner-up in the .web auction, potentially a giant with immense resources such as Google, could eat into Verisign's top-level domain market share, taking aim at its .com and .net properties. Let's say Verisign bowed out of the auction early and allowed another registry to directly compete against .net with a synonymous .web domain name. With a stagnating stock price, Verisign would not be in a fantastic position to improve on that with a strong competitor nipping at its heels. From this perspective, the cost of doing business for Verisign is more than worthwhile, even if they happen to not generate a single dollar of revenue from .web for years to come.

What does this all mean for your business and web presence?

.Web will not be publicly available for some time; and while Verisign may or may not have acquired the gTLD mainly to keep competitors away, most pundits believe that they will make it publicly available. Once released, it would be prudent for all businesses that already own a .com and/or .net to register the .web variation for their business to avoid resellers from scooping them up and charging a premium.

Be sure to [pre-register for .web](#) domain names as soon as you can so that you are alerted as soon as .web launches and becomes publicly available.

If you are a trademark owner, be sure to register with the [Trademark Clearinghouse](#) in advance to ensure that yourtrademark.web can be secured during the [sunrise period](#)." This stretch of time is designed specifically for trademark holders to reserve their domain names before anyone else has access.

Perhaps you missed out on the .com or .net variation of your business; now you have an excellent opportunity to grab the .web version of your domain name and once you register the domain, a simple 301 redirect from your existing domain to the .web variation will provide a seamless transition to your ideal domain name.

Put your thinking cap on and begin generating lists of relevant generic domain names for your industry that will not infringe on another businesses' trademarks. Once .web launches, consider registering these domain names under the .web gTLD. These could be incredibly useful as landing pages for search engine marketing tactics or as a new revenue stream for your business as others may start knocking on your door looking to take these domain names off your hands for a price.

If you have a .com or .net domain name, keep a close eye on the costs of these as Verisign might be looking to boost their margins on these assets. While [Verisign cannot increase their price for .com](#) under their current contract with ICANN which ends in 2018, they are able to increase the price of .net by 10% every year until the end of that agreement in 2017.

Cybele Negris (cybele@webnames.ca) is president, CEO and co-founder of Webnames.ca, Canada's original .CA registrar. She serves on the boards of Small Business BC, Small Business Roundtable of BC, Capilano University and the Capilano University Foundation.

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EXHIBIT C-28

THIS WEEK IN SEO 60

BRANDS, DOMAINS, AND YOUTUBE

THE DEATH OF GENERICS AND THE DOMINANCE OF BRANDS

<http://www.seobook.com/brands-beat-generics>

Aaron Wall, the Cormac McCarthy of SEO (google it), published a great post looking at how generic domains like cooking.com and drugstore.com have failed to thrive, but the big brands behind them (Target and Walgreens, respectively) are doing just fine.

If you invest in zero-sum markets there needs to be some point of differentiation to drive switching. There might be opportunity for a cooking.com or a drugstore.com targeting emerging and frontier markets where brands are under-represented online (much like launching Drugstore.com in the US back in 1999), but it is unlikely pure-play ecommerce sites will be able to win in established markets if they use generically descriptive domains which make building brand awareness and perceived differentiation next to impossible.

Digging in to how brands succeed/fail in SEO (and business in general) is one of the topics that hasn't yet been beaten to death by the SEO conference-circuit (R.I.P., my interest in reading about content marketing).

I enjoyed this article, definitely give it a read.

THE NEXT BIG DOMAIN EXTENSION

<http://domainnamewire.com/2016/07/29/verisign-paid-135-million-web-top-level-domain/>
com

Speaking of domain names...

Verisign, the juggernaut of a company behind .com/.net (a.k.a.the big 3) just paid \$135,000,000 to acquire the .web extension.

You've seen these new extensions over the last few years—.ninja, .rent, .guru (side note: still waiting for <http://seo.guru> to be developed...).

Some of these new extensions are kind of garbage, like .FYI, but .web makes sense to a lot of people, and is poised to be one of the most popular new extensions.

Here's why Verisign paid 3x as much as any other new gTLD for .web:

It views it as competitive to .com – a handful of industry watchers and top level domain name companies have said that .web is the one domain that could unseat .com. While that's open to debate, Verisign might have viewed this as an opportunity to take the greatest threat from the new TLD program off the table.

It views it as competitive of .net – this might sound odd, but keep in mind .net is a 9-figure-a-year business for Verisign. You can argue that .web has a similar connotation to .net. It could be a viable alternative for people who traditionally buy a .net when the .com is taken.

So start coming up with those domain names now, so hit the ground running when this domain hits the registrars (no date on that yet).

EXHIBIT C-29



New Generic Top-Level Domains

ICANN APPLICANT GUIDEBOOK NAMING SERVICES PORTAL GLOBAL SUPPORT

NEW GTLD APPLICATION CHANGE REQUEST PROCESS AND CRITERIA

[Overview](#)

[Determination Criteria](#)

[How to Submit a Change Request](#)

[Change Request Process](#)

[Change Requests That Do Not Require A 30-day Comment Window](#)

[How Change Requests Impact Other New gTLD Program Processes](#)

[Statistics](#)

[Resources](#)

News & Views

Announcement: 30 September 2014 – [ICANN Updates Application Change Request Process](#)

Announcement: 30 September 2014 – [Change Request Advisory](#)

Change Request Overview

Per section 1.2.7 of the Applicant Guidebook:

If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.

This section of the Applicant Guidebook further states:

ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.

Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.

The Application Change Request ("ACR") process was created during the application window in order to allow applicants to notify ICANN of changes to application materials.

Change Request Determination Criteria

Determination of whether changes will be approved will balance the following factors:

1. **Explanation** – Is a reasonable explanation provided?
2. **Evidence that original submission was in error** – Are there indicia to support an assertion that the change merely corrects an error?
3. **Other third parties affected** – Does the change affect other third parties materially?
4. **Precedents** – Is the change similar to others that have already been approved? Could the change lead others to request similar changes that could affect third parties or result in undesirable effects on the program?
5. **Fairness to applicants** – Would allowing the change be construed as fair to the general community? Would disallowing the change be construed as unfair?
6. **Materiality** – Would the change affect the evaluation score or require re-evaluation of some or all of the application? Would the change affect string contention or community priority consideration?
7. **Timing** – Does the timing interfere with the evaluation process in some way? ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round. (AGB §1.2.7.)

These criteria were carefully developed to enable applicants to make necessary changes to their applications while ensuring a fair and equitable process for all applicants.

In evaluating each change request, all available information is considered against the seven criteria above. The weight of each criterion may vary on a case-by-case basis, depending on the facts and circumstances surrounding the change request, the application, and the string.

Explanation – This criterion requires that the applicant provide an explanation for the requested changes. If an explanation is not provided, the applicant is given an opportunity to remediate. As such, this criterion is always met and does not bear as much weight as the other criteria.

Evidence that original submission was in error – This criterion is applicable in cases where the applicant requests a change to correct an error. In this case, the criterion requires that the applicant provide adequate information to support the request. There are few cases of change requests to correct an error. However, when such a case is submitted, this criterion is heavily weighted.

Other third parties affected – This criterion evaluates whether the change request materially impacts other third parties, particularly other applicants. In cases where a change to application material has the potential to materially impact the status of another applicant's application, this criterion is heavily weighted.

Precedents – This criterion assesses whether approval of the change request would create a new precedent, or if it would be in-line with other similar requests that have been approved. At this stage of the New gTLD Program, it is unlikely that a change request that would create a new precedent would be approved.

Fairness to applicants – This criterion evaluates whether approving a change request would put the applicant in a position of advantage or disadvantage compared to other applicants. This criterion is related to the "Other third parties affected" criterion, and if a change request is found to materially impact other third parties, it will likely be found to cause issues of unfairness.

Materiality – This criterion assesses how the change request will impact the status of the application and its competing applications, the string, the contention set, and any additional Program processes that it or its competing applications must complete such as Community Priority Evaluation ("CPE"). A change that is determined to be material in and of itself will not cause a change request to be rejected. However, it will cause other criteria to weigh more when considered in conjunction with each other.

Timing – This criterion determines whether the timing of the change request impacts the materiality, fairness to applicants, and other third parties affected criteria. In cases where timing of the change request

is found to impact these criteria, it will be heavily weighted.

How to Submit a Change Request

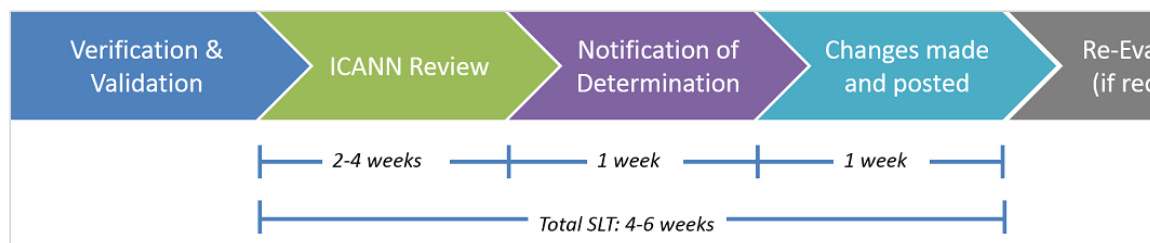
Requests for changes to application materials may be submitted to the [Naming Services Portal \(NSp\)](#) by following these 2 steps:

1. Download and complete a [gTLD Application Change Request Form](#) [DOCX, 564 KB].
2. Log into the NSp with the primary contact's credentials and submit the Form, along with redlines of the changes being requested. An example of a redline document can be viewed [here](#).

The standard change request process requires that any change to the application, including changes to the Primary Contact, be initiated by the Primary Contact and submitted via the appropriate login in the NSp. If the Primary Contact is no longer available to initiate the change, then the Secondary Contact may contact the GSC at newgtd@icann.org to submit the change request.

Change Request Process

Below is a graphic depicting the change request process.



Verification & Validation – In this step, ICANN verifies the applicant's credentials in order to ensure that only those authorized to make changes to the application are able to do so. Additionally, ICANN reviews the change request materials submitted by the applicant to ensure that a completed Change Request Form, appropriate redline documents, as well as all relevant supporting documentations are provided. This step is not counted in the 4-6 week Service Level Target ("SLT") for change requests, because the amount of time to complete this step is highly dependent upon the applicant providing the required information. ICANN's work during this step is minimal. ICANN typically performs its work within 2 business days of receiving the requests or information from the applicant. Submission of incomplete information, and non-response to ICANN's request for required information are typical causes of delay in this step. ICANN will inform the applicant once this step is completed.

ICANN Review – Once verification and validation of the change request is completed, ICANN reviews the change request materials against the seven criteria above. In the event that additional information is required before a determination can be made, ICANN will reach out to the applicant to request the information. The SLT for this step of the process is 2-4 weeks, depending on the complexity of the change request and whether additional information is required.

Notification of Determination – Once ICANN completes its review of the change request, the applicant will be informed of the determination. Possible determinations include approval of the change request, denial of the change request, or deferral of the change request to a later time. The SLT for this step is one week to account for the drafting of denial or deferral letters if the change request is denied or deferred.

Changes Made and Posted – In this step, ICANN makes the requested and approved changes to the application. Changes that require a 30-day comment window will be posted on the [Application Status page](#) of the New gTLD Microsite. Changes that do not require a 30-day comment window will not be posted. Refer to the "Change Requests Requiring 30-day Comment Window" section below for information on which changes will be posted for comments and which ones will not. Applicants will be notified once the

changes are made. The notification will also inform applicants whether the changes are posted for comments, and whether application re-evaluation will be required.

Re-evaluation – This step is applicable to those change requests that require re-evaluation of the application. Once ICANN notifies the applicant that the changes are made and that re-evaluation is required, the change request case will be closed and a new re-evaluation case will be opened to assist the applicant through the re-evaluation process. Under the re-evaluation step, the applicant will be sent an invoice for the re-evaluation fee. Once payment is made, ICANN will proceed with the re-evaluation of the application. The re-evaluation will follow the same process and timelines as Extended Evaluation:

- 3 weeks: evaluators review the updated application, and issue Clarifying Questions if required.
- 6 weeks: applicants respond to Clarifying Questions.
- 2 weeks: evaluators review response to Clarifying Questions and deliver results to ICANN.
- 1 week: ICANN reviews and processes the results for publication. Note that if the re-evaluation results in any scoring changes, ICANN will update either the Initial or Extended Evaluation report and post it on the [Application Status page](#) of the New gTLD Microsite. If the re-evaluation does not result in any scoring changes, no updates will be made.

Change Requests That Do Not Require A 30-day Comment Window

In the interest of allowing applicants to expeditiously move forward in the New gTLD Program, effective 1 October 2014, the following types of change requests will generally not be posted for comments for 30 days:

- Changes to confidential portions of the application
- Changes to primary and secondary contacts of the application
- Changes to the applicant's contact information (address, phone, fax, web address)
- Changes to applicant's stock symbol
- Changes to applicant's business/tax ID
- Changes to applicant's officers/directors
- Changes to name of applying entity*
- Changes to parent entity

Although these types of change requests generally will not be posted for comments, ICANN reserves the right to make exceptions in ICANN's discretion.

* This item refers to a simple name change of the applying entity only. It does not apply to changes in the applying entity itself such as the case of the application being assigned from a parent entity to a wholly-owned subsidiary.

How Change Requests Impact Other New gTLD Program Processes

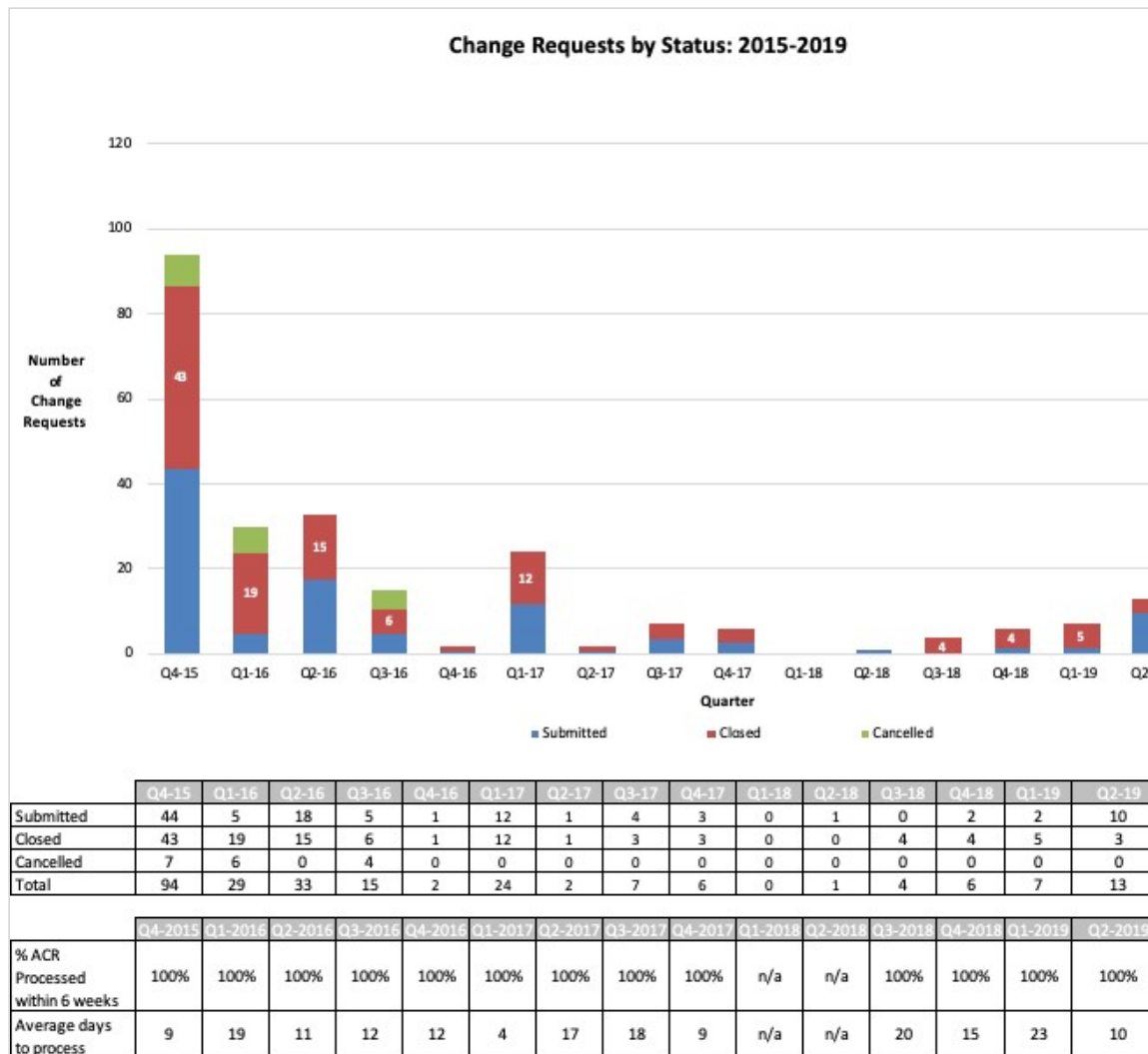
Contracting – If an applicant is eligible to be invited to Contracting, but there is a pending change request on the application, the applicant will not be invited until the change request completes processing. If the applicant has been invited to contracting and is progressing through the contracting process, a pending change request will cause delays and may impact the applicant's ability to execute the Registry Agreement in a timely manner. If the applicant anticipates not being able to execute the Registry Agreement by the Registry Agreement execution deadline, ICANN recommends that the applicant [submit an extension request](#) [DOCX, 565 KB] in order to avoid missing the Registry Agreement execution deadline. Applicants will not receive a Registry Agreement until the change request completes processing, and the 30-comment window (if required) has concluded.

Contention Resolution – For Community Priority Evaluation, the applicant will only be invited once the change request completes processing and the 30-day comment window (if required) has concluded. For

Auction, a pending change request will not prevent an Auction from being scheduled, but in some circumstances, the Auction may be delayed.

Statistics

Below are quarterly change request statistics (as of December 2019).



Resources

- [Change Request Form \[DOCX, 564 KB\]](#)
- [Naming Services Portal \(NSp\)](#)
- [Example Redline Document \[PDF, 50 KB\]](#)
- [Change Request Advisory](#)

EXHIBIT C-30

From: John Kane <Contact Information Redacted>
To: Bob Wiegand <Contact Information Redacted>
Sent: 7/8/2016 6:41:52 PM
Subject: Re: .WEB Applicants

C-30

Bob
Donuts is trying to see if they can get a delay based on a possible sale of an app. Guess we will see if it works.
Doubtful IMO
JLK

On Jul 8, 2016, at 6:13 PM, Bob Wiegand <Contact Information Redacted> wrote:

Depends on the grounds. Is there a chance that the private auction is still an option? We are prepped for the July 27th date...and I didn't know anyone was pushing for postponement. Let's touch base next week/when you have more details that you can share.

Bob <Contact Information Redacted>

From: Jon Nevett
Sent: Friday, July 8, 2016 5:19 PM
To: Bob Wiegand
Cc: John Kane <Contact Information Redacted>
Subject: Re: .WEB Applicants

Depends on the grounds. Are you supportive?

Jon <Contact Information Redacted>

On Jul 8, 2016, at 11:11 PM, Bob Wiegand wrote:

Don't all of the parties have to agree to a postponement?

From: Jon Nevett <Contact Information Redacted>
Sent: Thursday, July 7, 2016 3:21 AM
To: John Kane
Cc: Conrad Goldstein; Sandeep Ramchandani; Thomas Mörz; Sandeep Ramchandani; Bob Wiegand
Subject: Re: .WEB Applicants

Hi guys. Just so you are not surprised, we are seeking a postponement of the .web ICANN auction. I don't want to get into the details yet, but I didn't want you guys to be surprised either if a postponement was announced.

Best,

Jon

<Contact Information Redacted>

On May 11, 2016, at 10:30 AM, John Kane <> wrote:

Good news! I have spoken directly with most members of the contention set and/or saw confirmation in email that everyone is willing to participate in a .WEB only auction. If for any reason anyone's position has changed please let the group or the auction house know ASAP.

If we are to keep it on track I suggest to do an auction the week of June 13th.

I will now drop the mic and hand it over to Sheel and Lindsay to make it happen. I know we are all busy but please

respond promptly to their calls or emails.
Sorry I will miss seeing you all in Amsterdam.

Best
John

Contact Information Redacted

On May 9, 2016, at 1:55 PM, Conrad Goldstein wrote:

Hi Sandeep, thanks for the follow-up. My sense is that it will be more efficient and easier for Applicant Auctions to coordinate the logistics with applicants (confirm willingness to participate in private auctions, dates, etc.). Makes sense?

Thanks again,
Conrad.

Contact Information Redacted

On Mon, May 9, 2016 at 8:40 AM, Sandeep Ramchandani wrote:
Ok John? Conrad?

Contact Information Redacted

On Mon, May 9, 2016 at 8:48 PM, Jose Ignacio Rasco wrote:

Sandeep,
I am available for a call tomorrow if needed.

Regards,
Jose

Contact Information Redacted

On May 6, 2016, at 9:56 AM, Jon Nevett wrote:

I'm free for a call at that time, but it shouldn't be that hard to schedule the auction and decide what to do about .webs.

Contact Information Redacted

On May 6, 2016, at 7:32 AM, Sandeep Ramchandani wrote:

That would be an awful waste. Can we schedule a call next week? How about noon est Tuesday?

Jon, Jose, Brad, John, Conrad, Bob?

On 6 May 2016 15:45, "John Kane" wrote:

Sandeep

I will not be attending GDD but we will have people from AfiliAs in Amsterdam. Unfortunately it will be too late at that point to arrange a private auction and will head to an ICANN auction.

Best
JLK

Contact Information Redacted

On May 5, 2016, at 11:44 PM, Sandeep Ramchandani wrote:

The GDD is just around the corner. If most of us are going to be there, would be a good opportunity to catch-up face to face.

Jon and I are planning to be there. Who else from this group is planning to go?

Contact Information Redacted

On Mon, May 2, 2016 at 12:49 PM, Sandeep Ramchandani wrote:

Happy to discuss further over a call (prefer AM US time). In addition, wanted to make the point that given the relatively tight time-lines, it would be helpful if all applicants filed for a postponement of the ICANN auction. Just gives us all a contingency buffer. Something that might just come into use given the more complex situation we have here with the indirect contention set.

PS: Resort island works just as well too, so long as it is under 20hrs flying time from India :)

Contact Information Redacted

On Thu, Apr 28, 2016 at 6:58 PM, John Kane wrote:
Jon

Thanks for laying out options for including VistaPrint in an auction. I agree a call would be helpful to discuss that component. We could also meet on a resort island for 2-3 days to discuss as well:).

JLK

Contact Information Redacted

On Apr 28, 2016, at 9:22 AM, Jon Nevett wrote:

Thanks John. We are good with private auction as well. We agree that we need to get it done before ICANN Helsinki starts (week of June 27) and we need to do it in earlier than late June due to the Google-required 30 day notice to ICANN. Our first choice would be the week of June 6, but could do the week of June 13 or even early the week of June 20 if necessary.

As for Vistaprint, it seems like there are three options: 1) we include them and do an indirect contention set auction mirroring the ICANN auction, but with all sellers splitting the proceeds (there might be one buyer or two depending on the outcome); 2) we include them in a direct contention set auction and guarantee that there only would be one winner with all sellers splitting the proceeds; or 3) we exclude them and do a direct contention set auction of just the .WEB applicants (if web.com wins, they still are in contention with Vistaprint).

Happy to hop on a call to discuss.

Best,

Jon

Jonathon Nevett
Co-Founder & EVP, Donuts Inc.
Contact Information Redacted

Contact Information Redacted

On Apr 28, 2016, at 7:12 AM, John Kane wrote:

Guys

Most of you most likely have seen that ICANN just scheduled the .WEB/WEBS auction for July 27. If we are still in agreement for a private auction we can likely get one in done in late June before ICANN. That would allow the winner to announce it and discuss plans at the meeting with attendees.

Might make sense to take a straw poll to see if everyone is on the same page. Happy to arrange a call to discuss as a group as well.

Afilias would participate in a private auction for .Web. Open to including VistaPrint WEBS if others want to as well.

FYI-Vistaprint dropped their community Webs application and only have generic one left.

Auction schedule link:

<https://newgtlds.icann.org/en/applicants/auctions/schedule-27apr16-en.pdf>

Best
John

On Oct 18, 2015, at 9:43 PM, Jose Ignacio Rasco

All,
I won't be joining you in Dublin, but I'll support however I can. Just let me know. Have a great meeting
Jose

Contact Information Redacted

On Oct 12, 2015, at 4:20 PM, John Kane NOTE:

Jon,
I agree it makes sense to wrap up this auction between the .WEB applicants and get it launched by one of us.
I arrive Sunday AM and depart on Friday AM and would do my best to join a discussion in Dublin.
Best
JLK

From: Jon Nevett [mailto:Contact Information Redacted]
Sent: Monday, October 12, 2015 3:51 PM
To: Jose I. Rasco Contact Information Redacted; Sandeep Ramchandani Contact Information Redacted; John Kane Contact Information Redacted; Brad
Layous Contact Information Redacted; Conrad Goldstein Contact Information Redacted; Thomas Mörz Contact Information Redacted; Bob
Wiegand Contact Information Redacted
Subject: .WEB Applicants

Folks:

In light of the recent VistaPrint decision (<https://www.icann.org/resources/files/1194117-2015-10-09-en>), I thought it would be a good idea to get the .WEB applicants together to figure out if we can get this one resolved in the not-too-distant future. It's a string that we would love to see out there regardless of who operates it. I know that we all have discussed various options on how to get this resolved without it getting caught up in another round of ICANN policy hurdles -- CPE, indirect contention sets, string similarity appeals, etc.

Do you all think it makes sense to get together for a bit in Dublin to discuss next steps? If so, let's figure out a time that works with everyone. I arrive on Friday and leave the following Saturday.

Look forward to seeing folks over there.

Best,

Jon

Jonathon Nevett
Co-Founder & EVP, Donuts Inc.
Contact Information Redacted

--
Sandeep Ramchandani
Business Head
Contact Information Redacted

--

Sandeep Ramchandani
Business Head
Contact Information Redacted

--
Sandeep Ramchandani
Business Head
Contact Information Redacted

EXHIBIT C-31

1 Jeffrey A. LeVee (State Bar No. 125863)
 jlevee@Jonesday.com
 2 Eric Enson (State Bar No. 204447)
 eenson@jonesday.com
 3 Charlotte Wasserstein (State Bar No. 279442)
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 6 Telephone: +1.213.489.3939
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 7

8 Attorneys for Defendant
 9 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND NUMBERS

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12
 13 RUBY GLEN, LLC,
 14 Plaintiff,
 15 v.
 16 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND
 17 NUMBERS,
 18 Defendant.

Case No. 2:16-cv-5505 PA (ASx)
 Assigned for all purposes to the
 Honorable Percy Anderson

**DECLARATION OF CHRISTINE
 WILLETT IN SUPPORT OF
 ICANN'S OPPOSITION TO
 PLAINTIFF'S *EX PARTE*
 APPLICATION FOR
 TEMPORARY RESTRAINING
 ORDER**

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DECLARATION OF CHRISTINE WILLETT

I, Christine Willett, declare as follows:

1. I am the Vice President, gTLD Operations, Global Domains Division of the Internet Corporation for Assigned Names and Numbers (“ICANN”), the defendant in this action. I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN’s Opposition to Plaintiff Ruby Glen LLC’s (“Ruby Glen’s”) *Ex Parte* Application For A Temporary Restraining Order.

2. ICANN is a California non-profit public benefit corporation that oversees the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the Internet community, ensuring the DNS’s continued security, stability and integrity. The DNS’s essential function is to convert easily-remembered domain names, such as “uscourts.gov” or “icann.org,” into numeric IP addresses understood by computers. The portion of a domain name to the right of the last dot (such as, “.gov” and “.org”) is known as a generic top-level domain (“gTLD”).

3. Throughout its history, ICANN has sought to expand the number of gTLDs to promote consumer choice and competition. In 2012, ICANN launched a “New gTLD Program” application round, in which it invited any interested party to apply for the creation of a new gTLD and for the opportunity to be designated as the operator of that gTLD. As the operator, the applicant would be responsible for managing the assignment of names within the gTLD and maintaining the gTLD’s database of names and IP addresses.

4. In connection with the New gTLD Program, ICANN published an Applicant Guidebook (“Guidebook”), which prescribes the requirements for new gTLD applications to be approved, and the criteria by which they are evaluated. The Guidebook was developed in a years-long public consultation process in which numerous versions were published for public comment and revised based on

1 comments received from the public. A true and correct copy of the Guidebook is
2 attached to the declaration of Paula Zecchini (“Zecchini Decl.”) as Exhibit C.

3 5. In my role as Vice President, gTLD Operations, I have been
4 responsible for overseeing the evaluation of the 1,930 new gTLD applications that
5 ICANN received in 2012 as part of ICANN’s New gTLD Program.

6 6. In June 2012, Ruby Glen, Nu Dotco, and five other applicants applied
7 for .WEB. Another applicant applied for .WEBS. The seven applications for
8 .WEB and the remaining application for .WEBS passed all applicable evaluations
9 and were placed in a contention set (“Contention Set”), pursuant to the procedures
10 set forth in the Guidebook.

11 7. Upon the resolution of several accountability mechanisms relating to
12 the composition of the Contention Set, ICANN notified all active members of the
13 Contention Set on April 27, 2016 that the auction of last resort was scheduled for a
14 July 27, 2016 auction date (“Auction”). ICANN also provided them with
15 instructions and deadlines to participate in the Auction.

16 8. The auction rules governing indirect contention sets (“Auction Rules”)
17 set forth a prescribed and limited period of time within which members of a
18 contention set may request a postponement of an auction: “an applicant may
19 request an advancement/postponement request via submission of the Auction Date
20 Advancement/Postponement Request Form. The form must be submitted at least 45
21 days prior to the scheduled Auction Date and ICANN must receive a request from
22 each member of the contention set.” (Zecchini Decl., Ex. J [Auction Rules] ¶ 10.)
23 The last day to file any such requests for this Contention Set was June 12, 2016,
24 namely 45 days before July 27, 2016. ICANN did not receive any such request by
25 that date. After the deadline had passed, ICANN received requests, via email and
26 correspondence, to postpone the Auction from three of the seven applicants for
27 .WEB in the Contention Set (Ruby Glen, Radiz FZC, and Schlund Technologies
28 GmbH) on July 11, 2016. This correspondence did not comply with the Auction

1 Rules' requirements regarding postponement requests because they were sent
2 nearly a month after the deadline to do so passed, and requests were not submitted
3 by all of the members of the Contention Set, which is required for ICANN to
4 consider whether to postpone the Auction pursuant to such requests.

5 9. The application for new gTLDs requires applicants to provide the
6 names and positions of "directors," "officers and partners" and "shareholders
7 holding at least 15% of shares." (*See* Zecchini Decl., Ex. E [Nu Dot's application].)
8 This information is required so that ICANN can conduct a thorough background
9 check into the persons or entities that, on a practical level, control or own the
10 applicant entity. The precise title or position of each listed person or entity is not of
11 the utmost importance, so long as the persons or entities who control or own the
12 applicant are listed. Indeed, the terminology of the application form is tailored
13 towards a corporation, as opposed to an LLC such as Nu Dotco. Understandably,
14 Nu Dotco (like many other LLC applicants) sought to provide information about its
15 management and ownership that was analogous to the corporate information
16 requested. Nu Dotco listed its CEO, COO, and CFO by title and also as its
17 Directors (referring to them as its "managers"). Like many other applications
18 submitted by LLCs, this showed that those were the persons in control of the
19 company for all practical purposes (as a director would be at a corporation).

20 10. As for the background check, ICANN contracts with
21 PricewaterhouseCoopers to conduct a background check of each applicant. ICANN
22 also ensures that no person or entity that owns or controls an applicant for a new
23 gTLD is on the list of persons and entities with which the U.S. Office of Foreign
24 Assets Control restricts the ability to do business absent a license. Both checks
25 were conducted with respect to the names listed in Nu Dotco's application, as was
26 done with the same information listed in all other new gTLD applications.

27 11. Even if Nu Dotco had submitted a change request indicating that it had
28 undergone a change of control and/or ownership, Nu Dotco would not have been

1 disqualified from the auction set to take place on July 27, 2016. In fact, ICANN
2 has received over 2,700 application change requests. Nearly 800 of those requests
3 made changes to the responses provided to questions pertaining to ownership or
4 control of the applicant. No application has been disqualified to date in connection
5 with a change to responses to those questions.

6 12. ICANN was first notified that Ruby Glen had concerns that Nu Dotco
7 had undergone a change of control or ownership on June 23, 2016 by way of an
8 email from Donuts Inc.'s CEO, Jon Nevett, sent to ICANN's customer portal.
9 Donuts is the ultimate parent company of Ruby Glen. (ECF 4.) ICANN responded
10 that it was "reviewing the information provided" and would follow up with Nu
11 Dotco as needed. ICANN also informed Mr. Nevett that Ruby Glen should
12 continue to follow the "standard auction process" and that ICANN would inform
13 Mr. Nevett if any postponement of the Auction was going to take place. A true and
14 correct copy of that email exchange is attached hereto as **Exhibit A**.

15 13. In view of Ruby Glen's concerns, ICANN immediately investigated.
16 Upon receipt of Mr. Nevett's June 23, 2016 email, I instructed my staff to
17 investigate the claims raised therein. On June 27, 2016, a member of my staff sent
18 an email to Nu Dotco, asking it to confirm that "there have not been changes to
19 your application or the NU DOT CO LLC organization that need to be reported to
20 ICANN." Mr. Jose Ignacio Rasco III, Nu Dotco's Chief Financial Officer,
21 responded: "I can confirm that there have been no changes to the NU DOT CO
22 LLC organization that would need to be reported to ICANN." A true and correct
23 copy of this email exchange is attached hereto as **Exhibit B**.

24 14. One purpose of this investigation was to determine whether Nu Dotco
25 had any previously undisclosed owners or managers that should be subject to
26 background checks. I also instructed my staff that, if appropriate in view of the
27 investigation, they should request that Nu Dotco update its application with respect
28 to any change in ownership and/or control.

1 15. On June 29, 2016, during the ICANN56 Public Meeting in Helsinki, I
2 met with Mr. Nevett to discuss a number of business matters, including his claims
3 regarding Nu Dotco's management. During that meeting, Mr. Nevett requested that
4 the Auction be postponed because of his concerns that Nu Dotco had undergone a
5 change in ownership or management. During this meeting, I informed Mr. Nevett
6 that my team had already investigated the alleged management changes with Nu
7 Dotco's representative, and that Nu Dotco asserted that no such changes had
8 occurred. I further informed Mr. Nevett that, based on the fact that ICANN had
9 found no evidence of such a management change, ICANN was continuing to
10 proceed with the Auction as scheduled.

11 16. During my meeting with Mr. Nevett at the ICANN56 Public Meeting
12 in Helsinki, I suggested to Mr. Nevett that if he was not satisfied with ICANN's
13 course of action he had the option to invoke one of ICANN's accountability
14 mechanisms. Mr. Nevett indicated that he intended to contact ICANN's
15 Ombudsman, Mr. Chris LaHatte ("Ombudsman") while in Helsinki. He did so, and
16 the Ombudsman then asked me for the contact information for Nu Dotco's
17 application contact, Mr. Jose Ignacio Rasco III, which I provided. On July 6, 2016,
18 the Ombudsman sent an email to Nu Dotco on which I was blind-copied, inquiring
19 as to whether any change in ownership/control had taken place and noting that he
20 had "opened an ombudsman complaint file about this matter." A true and correct
21 copy of that email is attached hereto as **Exhibit C**, and a true and correct copy of
22 the email exchange that followed between the Ombudsman and Mr. Nevett is
23 attached hereto as **Exhibit D**.

24 17. On July 7, 2016, the Ombudsman sent another email to Mr Rasco
25 about this issue, and Mr. Rasco's response stated: "There have been no changes to
26 the Nu Dotco, LLC application. Neither the governance, management nor the
27 ownership in Nu Dotco has changed." A true and correct copy of that email
28 exchange is attached hereto as **Exhibit E**. At the time, on July 7, 2016, I was not

1 aware that Mr. Rasco had responded to the Ombudsman's email.

2 18. On July 8, 2016, I emailed Mr. Rasco to again inquire as to whether
3 Nu Dotco had undergone any change in ownership or control. A true and correct
4 copy of that email is attached hereto as **Exhibit F**. Mr. Rasco called me within a
5 few hours, and stated that neither the managers nor the members of the Nu Dotco
6 organization had changed since the application's submission. He further explained
7 that his June 27, 2016 email through the applicant portal confirming the same had
8 been rather brief because he had been under the impression that ICANN was simply
9 conducting a routine and automatic check of all applicants within the Contention
10 Set prior to the Auction; it was not until the Ombudsman reached out to Mr. Rasco
11 that he realized there had been a complaint made to ICANN about a possible
12 change in Nu Dotco's control or ownership. He also explained that his email to "a
13 competing applicant," which ultimately gave rise to this controversy, was not
14 intended to suggest that any change in ownership or control had taken place,
15 because none had, as further discussed in Mr. Rasco's declaration, filed
16 concurrently herewith.

17 19. On July 8, 2016 (received by the Ombudsman on July 9, 2016), I
18 emailed the Ombudsman to again provide information as to ICANN's investigation
19 of the matter, including a summary of my July 8, 2016 phone call with Mr. Rasco.
20 That email stated, among other things, "As you know, my team had reached out to
21 NU DOT CO LLC previously, and we received confirmation that NU DOT's
22 application materials were still true and accurate. In an effort to be extremely
23 cautious, I reached out to Mr. Jose Ignacio Rasco (the application primary contact
24 for NU DOT's .WEB application) again today to ensure that our understanding of
25 his previous response was accurate." A true and correct copy of that email is
26 attached hereto as **Exhibit D**.

27 20. On July 11, 2016, Mr. Rasco emailed me and again confirmed that
28 "[n]either the ownership nor the control of [Nu Dotco] has changed since we filed

1 our application.” Mr. Rasco further explained that: “The Managers designated
2 pursuant to the company’s LLC operating agreement (the LLC equivalent of a
3 corporate Board) have not changed. And there have been no changes to the
4 membership of the LLC either.” A true and correct copy of that email is attached
5 hereto as **Exhibit F**.

6 21. It is not accurate to say that Ruby Glen’s inquiry to the Ombudsman
7 remains pending. In fact, the Ombudsman informed me on July 12, 2016 that he
8 had determined there was no reason to postpone the Auction because he found no
9 evidence of a change to the ownership or control of Nu Dotco. A true and correct
10 copy of the Ombudsman’s email in this regard is attached hereto as **Exhibit G**.

11 22. On July 13, 2016, ICANN informed Ruby Glen and all applicants in
12 the Contention Set that it had “investigated the matter” and “found no basis to
13 initiate the application change request process or postpone the auction.” A true and
14 correct copy of that letter is attached to the Declaration of Paula Zecchini as Exhibit
15 G.

16 23. The Ombudsman re-confirmed that he has concluded his investigation
17 on July 23, 2016. A true and correct copy of the Ombudsman’s email in this regard
18 is attached hereto as **Exhibit H**.

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I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 25th day of July, 2016 at Los Angeles, California.

By: 
Christine Willett

EXHIBIT A

Case Detail

[Edit](#) [Clone](#) [SPAM](#)

▼ **Case Information**

Case Number	00225003 [View Hierarchy]	Internal Status	Closed
Account Name	Ruby Glen, LLC	Status	Closed
Contact Name	Daniel Schindler	Case Close Reason	Response Provided
Contact Type		Urgency	Moderate
Application ID	1-1527-54849	Severity	Sev 3
Registry		Case Record Type	General Case [Change]
Case Origin	Web	Category	Application Processing
Multiple Contacts Found	<input type="checkbox"/>	Sub Category	Initial Evaluation Process
Visible in Self-Service Portal	<input checked="" type="checkbox"/>	Case Owner	Jared Erwin [Change]
Suppress Notification	<input type="checkbox"/>	Assigned to	Jared Erwin
Updates On Case	<input type="checkbox"/>	Parent Case	
SLA Resolution status	SLA Exceeded		
Phone			

▼ **Additional Information**

Subject	.WEB Auction Postponement – Required Applicant Update
Description	<p>ICANN,</p> <p>It has come to our attention that one of the applicants for .WEB has failed to properly update its application. Upon information and belief, there have been changes to the Board of Directors and potential control of Nu Dot Co LLC ("NDC") that has materially changed its application. To our knowledge, however, NDC has not filed the required application change request.</p> <p>As you know, Section 1.2.7 of the Applicant Guidebook specifically states, "[i]f at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in the financial position and changes in ownership or control of the applicant... Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application." As you also know, ICANN has been clear that such requirements are in full force and effect until the registry agreement is executed with the successful applicant.</p> <p>Failure by No Dot Co LLC to maintain the accuracy of its application is detrimental to the other competing applicants, especially in light of the pending ICANN auction, creating an unfair competitive advantage for NDC.</p> <p>We request that ICANN investigate the change in NDC's Board and potential control and that the ICANN auction scheduled for July 27 be immediately postponed. The auction should be rescheduled after the final investigation is complete and NDC's requisite change request is resolved.</p> <p>We do not make this request lightly and haven't done so in well over 100 other scheduled ICANN auctions.</p> <p>Thank you and best regards, Jonathon Nevett</p>

Case Comments

[New](#)

[Case Comments Help](#) [?](#)

Action	Public	Comment
		<p>Created By: Jared Erwin (6/27/2016 3:42 PM) Dear Daniel Schindler,</p> <p>Thank you for bringing this to our attention. We are reviewing the information provided, and we will work with the applicant directly should action be required. We note your request to postpone the auction for the .WEB/WEBS contention set currently scheduled for 27 July 2016. Please continue to follow the standard auction process and monitor the Customer Portal for updates. If there are any changes to the auction date, we will notify you and all auction participants.</p>
Make Private	<input checked="" type="checkbox"/>	<p>Thank you for your attention. I will now resolve this case, but please do not hesitate to reopen it should you have any questions.</p> <p>Best regards, Jared Erwin New gTLD Operations</p>
		<p>Created By: Susan Yao (6/23/2016 10:17 AM) Dear Daniel Schindler,</p> <p>Thank you for your contacting ICANN Global Support on your request.</p>
Make Private	<input checked="" type="checkbox"/>	<p>Your request has been forwarded to our gTLD Team for processing. Someone from the team will be contacting you.</p> <p>Please do not hesitate to contact us if you have any other questions or concerns.</p> <p>Best regards, Susan Yao Global Support Analyst II ICANN Global Support</p>

EXHIBIT B

Case **00220793**

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Case Detail

Edit

▼ **Case Information**

Case Number	00220793 [View Hierarchy]	Internal Status	Closed
Account Name	NU DOT CO LLC	Status	Closed
Contact Name	Jose Ignacio Rasco	Case Close Reason	Response Provided
Contact Type		Urgency	Moderate
Contention Set Member	CSM-0746	Severity	Sev 3
Application ID	1-1296-36138	Case Record Type	Contention Set Case
Case Origin	Internal	Category	Auction Eligibility Notification
Visible in Self-Service Portal	<input checked="" type="checkbox"/>	Sub Category	
Suppress Notification	<input type="checkbox"/>	Case Owner	Jared Erwin [Change]
Updates On Case	<input type="checkbox"/>	Assigned to	Jared Erwin
Phone		Parent Case	

► **Additional Information**

► **System Information**

► **Attachment Upload**

Case Comments

New

[Case Comments Help](#)

Action	Public	Comment
		<p>Created By: Jared Erwin (6/27/2016 3:18 PM) Dear Jose Ignacio Rasco,</p>
Make Private	<input checked="" type="checkbox"/>	<p>Thank you for confirming. No further action is required of you at this time.</p> <p>Best regards,</p> <p>Jared Erwin New gTLD Operations</p>
		<p>Created By: Jose Ignacio Rasco (6/27/2016 12:48 PM) I can confirm that there have been no changes to the NU DOTCO LLC organization that would need to be reported to ICANN.</p>
Make Private	<input checked="" type="checkbox"/>	<p>Regards, Jose I. Rasco</p>
		<p>Created By: Jared Erwin (6/27/2016 12:02 PM) Dear Jose Ignacio Rasco,</p> <p>We would like to confirm that there have not been changes to your application or the NU DOT CO LLC organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors, application contacts). If there have been any such changes, please submit a new case via the Customer Portal (myicann.secure.force.com) with the requested changes so that we may begin processing.</p>
Make Private	<input checked="" type="checkbox"/>	<p>If a change request is required, please note Rule 8 of the Auction Rules for Indirect Contention (https://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf): "ICANN intends to initiate the Auction process once the composition of the contention set has stabilized. ICANN reserves the right not to send Intent to Auction notices and/or to postpone a scheduled Auction if a change request by one or more applicants in the Contention Set is pending, but believes that in most instances the Auction should be able to proceed without further delay."</p> <p>Let me know if you have any questions.</p> <p>Thank you and best regards,</p> <p>Jared Erwin New gTLD Operations</p>

EXHIBIT C

From: Chris LaHatte <chris.lahatte@icann.org>

Date: Wednesday, July 6, 2016 at 2:17 PM

To: [REDACTED]

Subject: Application for Dot Web

Dear Mr Rasco

I have received a complaint from one of the applicants for dot web as follows:-

One or more applicants for dot web made a complaint to the Ombudsman about changes to the dot web application by one of the applicants, being NU DOT CO LLC.

There is evidence from them (which I have seen) which reveals that there have been changes to the composition of NU DOT CO LLC's Board that require it to go through an ICANN change process.

The complaint is that because there has been a failure to disclose material changes, that it is unfair to the other applicants until the disclosure has been made and that accordingly, the auction ought to be postponed until disclosure has been made. So I have opened an ombudsman complaint file about this matter. It may be an issue where the enquiry ought to be directed to this applicant or they could contact this office if they wish to discuss the matter. I am not sure of their appropriate contact details, and it may be useful to pass this on to them. When I have this information, I can investigate the facts of this matter and be able to make a recommendation.

Regards

Chris LaHatte

Ombudsman

Blog <https://omblog.icann.org/>

Webpage <http://www.icann.org/en/help/ombudsman>

Please leave feedback on how I am doing <http://www.icannombudsman.feedback/>

Pronouns used: he, his, him

Confidentiality

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EXHIBIT D

Begin forwarded message:

From: Chris LaHatte <chris.lahatte@icann.org>

Subject: RE: Dot Web Auction

Date: July 10, 2016 at 1:58:48 PM PDT

To: Christine Willett <christine.willett@icann.org>

Cc: Amy Stathos <amy.stathos@icann.org>, Herb Waye <herb.waye@icann.org>

Thanks Christine. I have asked Jon Nevitt to comment at this stage

Regards

Chris LaHatte

Ombudsman

Blog <https://omblog.icann.org/>

Webpage <http://www.icann.org/en/help/ombudsman>

Please leave feedback on how I am doing <http://www.icannombudsman.feedback/>

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complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint.

From: Christine Willett
Sent: Saturday, July 09, 2016 4:02 AM
To: Chris LaHatte <chris.lahatte@icann.org>
Cc: Amy Stathos <amy.stathos@icann.org>; Herb Waye <herb.waye@icann.org>
Subject: Re: Dot Web Auction

Dear Chris,

I hope that this email finds you well. I know that you have been in communication with NU DOT CO LLC, to inquire about the recent complaint filed by Donuts regarding its ownership and potential impact on the .WEB/.WEBS auction.

As you know, my team had reached out to NU DOT CO LLC previously, and we received confirmation that NU DOT's application materials were still true and accurate. In an effort to be extremely cautious, I reached out to Mr. Jose Ignacio Rasco (the application primary contact for NU DOT's .WEB application) again today to ensure that our understanding of his previous response was accurate. During the call, he explained the following:

1. When ICANN previously contacted him about potential application changes, he assumed that the confirmation was part of the standard auction process, and his response was relatively brief. The email from the Ombudsman provided him with more context. Now that he has a better understanding about the complaint and what is going on, he can provide us with more detailed information.
2. NU DOT is structured as an LLC, which does not have "directors," but rather "managers" and "members." Neither the managers nor the members have changed since the application's submission.
3. NU DOT's operating agreement has not changed since the application's submission.
4. He understands that the .WEB/WEBS auction price is expected to be high, and that some of his competitors are upset that he was not willing to resolve contention outside of the ICANN auction.
5. He was contacted by a competitor who took some of his words out of context and is using them as evidence regarding the alleged change in ownership. In communicating with that competitor, he used language to give the impression that the decision to not resolve contention privately was not entirely his. However, this decision was in fact his. He does not believe that it is appropriate that this email conversation is being used as evidence.

Mr. Rasco indicated that he had provided you with similar information, but I wanted to share the details of our conversation in case they can provide you with a more complete picture. If you have any questions, please let me know.

Best,
Christine

Christine A. Willett

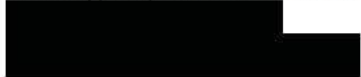
Vice President, GDD Operations

Global Domains Division

Internet Corporation for Assigned Names and Numbers (ICANN)

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536



From: Chris LaHatte <chris.lahatte@icann.org>

Date: Wednesday, July 6, 2016 at 2:18 PM

To: Jon Nevett [REDACTED], Christine Willett <christine.willett@icann.org>

Cc: Amy Stathos <amy.stathos@icann.org>, Herb Waye <herb.waye@icann.org>

Subject: RE: Dot Web Auction

Hi Jon

I have put this to the applicant and the ICANN team will decide once there has been a response.

Regards

Chris LaHatte

Ombudsman

Blog <https://omblog.icann.org/>

Webpage <http://www.icann.org/en/help/ombudsman>

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From: Jon Nevett [mailto: [REDACTED]]
Sent: Wednesday, July 06, 2016 10:43 PM
To: Christine Willett <christine.willett@icann.org>
Cc: Amy Stathos <amy.stathos@icann.org>; Herb Wayne <herb.wayne@icann.org>; Chris LaHatte <chris.lahatte@icann.org>
Subject: Re: Dot Web Auction

Hi folks. When do you think we will have a decision on this request? Time is really of the essence. Thanks. Jon

Jonathon Nevett
Co-Founder & EVP, Donuts Inc.
[REDACTED]

On Jul 3, 2016, at 11:09 AM, Jon Nevett [REDACTED] wrote:

Hi folks. I understand that Chris's paragraph may be sent verbatim to NU Dot Co, so I make the following suggested changes in redline form below. We would like to renew our request for an immediate postponement of the auction scheduled in just over three weeks time for the following reasons:

1. The auction is in about 3 weeks and there is credible evidence that one of the applicants has a material change to its application and hasn't gone through the ICANN change process. The material change includes a change to the Board of Directors and a potential change of control and/or ownership. Such a change may be in violation of Module 1, Section 1.2.7 and Module 6, Section 10 of the AGB.
2. It is unfair for the other applicants to be preparing for an auction against a party that has had non-public changes to its application and hasn't gone through the ICANN change process. We just have the transparency in the process to know with whom we are participating in an auction.
3. Most of the .web applicants already asked for a voluntary extension of the auction.
4. There is a pending ICANN accountability mechanism being utilized to investigate potential violations of the AGB and precedent dictates that ICANN should postpone the auction pending the result of the accountability mechanism.
5. .WEB likely will be one of the larger auctions and it is better that it be

conducted cleanly and not with a pending ICANN accountability mechanism or a cloud surrounding the TLD based on a potential change of control in violation of the AGB.

6. Even if the other applicant denies that any changes have been made, we have credible evidence that needs to be investigated and all the other applicants deserve at least 30 days from the end of the investigation to prepare for the auction.

Because of upcoming triggers and financial preparations necessary before this auction, please announce the postponement as soon as possible. It doesn't make sense to even wait to hear back from the other applicant before a postponement is announced because regardless of what they say, an extension is the appropriate action considering the time period before the auction. What they say and the result of the investigation should just go to when the auction is rescheduled.

Please let me know if you have any questions.

Thanks again for your help and consideration.

Best,

Jon

~~A visitor, who is a~~ **One or more** applicants for dot web, ~~has~~ made a complaint to the Ombudsman about changes to the dot web application by one of the applicants, being NU DOT CO LLC. ~~He says that~~ There is evidence from them (which I have seen) which reveals that **there have been changes to the composition of NU DOT CO LLC's Board that require it to go through an ICANN change process.** ~~one of the board members of this applicant company, is no longer taking an active part in the running of the company, and that there are several other directors, not specifically specified or named.~~ The complaint is that because there has been a failure to disclose material changes, that it is unfair to the other applicants until the disclosure has been made and that accordingly, the auction ought to be postponed until disclosure has been made. So I have opened an ombudsman complaint file about this matter. It may be an issue where the enquiry ought to be directed to this applicant or they could contact this office if they wish to discuss the matter. I am not sure of their appropriate contact details, and it may be useful to pass this on to them. When I have this information, I can investigate the facts of this matter and be able to make a recommendation.

Jonathon Nevett
Co-Founder & EVP, Donuts Inc.





On Jun 30, 2016, at 9:49 AM, Chris LaHatte <chris.lahatte@icann.org> wrote:

Hi

A visitor, who is an applicant for dot web, has made a complaint to the Ombudsman about changes to the dot web application by one of the applicants, being NU DOT CO LLC. He says that there is evidence from them (which I have seen) which reveals that one of the board members of this applicant company, is no longer taking an active part in the running of the company, and that there are several other directors, not specifically specified or named. His complaint is that because there has been a failure to disclose material changes, that it is unfair to the other applicants until the disclosure has been made and that accordingly, the auction ought to be postponed until disclosure has been made. So I have opened an ombudsman complaint file about this matter. It may be an issue where the enquiry ought to be directed to this applicant or they could contact this office if they wish to discuss the matter. I am not sure of their appropriate contact details, and it may be useful to pass this on to them. When I have this information, I can investigate the facts of this matter and be able to make a recommendation

Regards

Chris LaHatte
Ombudsman

Blog <https://omblog.icann.org/>

Webpage <http://www.icann.org/en/help/ombudsman>

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complaint.

EXHIBIT E

Mr. LaHatte,

Thank you for bringing this to my attention. There have been no changes to the Nu Dotco, LLC application. Neither the governance, management nor the ownership in Nu Dotco has changed. In an LLC, there are no directors, it is a manager managed company, as designated by the Members of the LLC within the Operating Agreement of the Limited Liability Company. There has never been an amendment to that operating agreement. There are no new "directors," nor have any left the company, and while the managers are ultimately responsible for the LLC, as a Manager, I take my duties very seriously and for major decisions, I confer with the Members (i.e. shareholders), which again for clarification, have never changed. I hope this clarification puts this matter to rest.

Regards,

Jose I. Rasco

Nu Dotco, LLC

On Jul 7, 2016, at 11:24 AM, Chris LaHatte <chris.lahatte@icann.org> wrote:

Dear Mr Rasco

I have been shown an email which suggests that one of your directors is no longer taking an active part in the application, and that there are other directors now involved. The complainant also suggested that your shareholders have changed since the original application. It was suggested that this would change the auction by making knowledge of your applicant company different, and therefore it was unfair to the other applicants. I'm sure you can clarify this.

What they were seeking was a postponement of the auction for a further period.

Chris LaHatte

Ombudsman

Blog <https://omblog.icann.org/>

Webpage <http://www.icann.org/en/help/ombudsman>

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EXHIBIT F

Case **00226316**

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Case Detail

[Edit](#) [Clone](#) [SPAM](#)

▼ **Case Information**

Case Number	00226316 [View Hierarchy]	Internal Status	Resolved
Account Name	NU DOT CO LLC	Status	Resolved
Contact Name	Jose Ignacio Rasco	Case Close Reason	Response Provided
Contact Type		Urgency	Moderate
Application ID	1-1236-36138	Severity	Sev 3
Registry		Case Record Type	General Case [Change]
Case Origin	Email	Category	String Contention
Web Name	Jose Ignacio Rasco	Sub Category	Auction Process
Web Email	[REDACTED]	Case Owner	Jared Erwin [Change]
Multiple Contacts Found	<input checked="" type="checkbox"/>	Assigned to	Jared Erwin
Visible in Self-Service Portal	<input checked="" type="checkbox"/>	Parent Case	
Suppress Notification	<input type="checkbox"/>		
Updates On Case	<input type="checkbox"/>		
SLA Resolution status	SLA at Risk		

Subject Re: ICANN Question regarding your .WEB New gTLD Application

Description Dear Christine:

Thank you for taking the time to speak with me last Friday, July 8, concerning the complaint that another applicant for the .web TLD made to the ICANN Ombudsman (Chris La Hatto) relating to an alleged change in the composition of Nu Dotco, LLC's "Board". I'm writing to reiterate the information I provided you on our call so the facts are clear.

Neither the ownership nor the control of Nu Dotco, LLC has changed since we filed our application. The Managers designated pursuant to the company's LLC operating agreement (the LLC equivalent of a corporate Board) have not changed. And there have been no changes to the membership of the LLC either. As you know, I provided this same information to Mr. La Hatto via email on July 7. Attached is a copy of that email for your records.

My understanding from our discussion is that ICANN is satisfied with the information I provided and has concluded there is no basis for any complaint, re-evaluation, or other process relating to our application, nor for any delay in the ICANN auction. Please let me know if that is not the case.

As you know, Rule 10 of the Auction Rules for New gTLDs (2014-11-03) requires (i) that "each and every member of the contention set" join in a request for postponement of the auction and (ii) that they do so by specified dates. The applicable date for any request to postpone the .web auction has come and gone. As we discussed, I share your understanding that the complaint was raised in order to get more time to convince us to resolve the contention set via a private auction, even though we have made it very clear to them (and all other applicants) that we will not participate in a private auction and that we are committed to participating in ICANN's auction as scheduled.

I appreciate your time and attention in getting this resolved. Please let me know immediately if ICANN has any other questions or concerns regarding this matter.

Regards,

Jose I. Rasco
Nu Dotco, LLC

> On Jul 8, 2016, at 6:22 PM, Christine Willett <christine.willett@icann.org> wrote:
>
> Dear Mr. Rasco,
>
> I'm not sure if you remember me or not. We spoke about 2 years ago regarding your company's .HEALTH application under the New gTLD Program.
>
> I'm contacting you regarding a question pertaining to your NU DOT CO LLC application for .WEB. I know that the New gTLD Program Team has already contacted you directly, via Case #220793. If you would please contact me at your earliest convenience, I would greatly appreciate it.
>
> I can be reached on my cell at [REDACTED]
>
> Best,
> Christine
>
>
> Christine A. Willett
>
> Vice President, GDD Operations
> Global Domains Division

EXHIBIT G

Subject: RE: Postponement of the .WEB auction
Date: July 12, 2016 at 8:25:25 PM PDT
To: Christine Willett <christine.willett@icann.org>
Cc: Amy Stathos <amy.stathos@icann.org>

Hi Christine

I have not seen any evidence which would satisfy me that there has been a material change to the application. So my tentative recommendation is that there is nothing which would justify a postponement of the auction based on unfairness to the other applicants. Is there any particular reason why a postponement could not be made anyway or is the preparation for the auction too far advanced? I make that suggestion not because I agree with the complaint made by Donuts, but because it would prevent them from perhaps taking further accountability action based on a refusal to postpone, as of course this company has demonstrated that they will be aggressive about use of such accountability functions.

Regards

Chris LaHatte
Ombudsman
Blog <https://omblog.icann.org/>
Webpage <http://www.icann.org/en/help/ombudsman>
Please leave feedback on how I am doing <http://www.icannombudsman.feedback/>
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EXHIBIT H

Begin forwarded message:

From: Chris LaHatte <chris.lahatte@icann.org>

Subject: Re: Donuts filed a lawsuit and motion for temporary restraining order re: .WEB/WEBS Auction

Date: July 23, 2016 at 7:41:43 PM PDT

To: Amy Stathos <amy.stathos@icann.org>

My investigation came to an end when they filed the reconsideration but really after I reported that could not see any issue with the ownership of NuCon. I haven't formally closed the file but effectively it is at an end. So any of the emails you describe which are to Christine and you are open and I agree to the use.

Sent from my iPhone

EXHIBIT C-32



The Internet Corporation for Assigned Names and Numbers

13 July 2016

Mr. Jose Ignacio Rasco, NU DOT CO LLC
 Ms. Sarah Falvey, Charleston Road Registry Inc.
 Mr. Robert Wiegand, Web.com Group, Inc
 Mr. Brijesh Joshi, DotWeb Inc.
 Mr. Daniel Schindler, Ruby Glen, LLC
 Mr. John Kane, Afilias Domains No. 3 Limited
 Mr. David Barron, Vistaprint Ltd
 Mr. Thomas Moerz, Schlund Technologies GmbH
 Mr. Jonathon Nevett, Ruby Glen, LLC

Re: .WEB/.WEBS Auction on 27 July 2016

Dear Members of the .WEB/.WEBS Contention Set,

We are writing in regards to inquiries we have received concerning potential changes of control of NU DOT CO LLC, an applicant in the .WEB/.WEBS contention set, and requests to postpone the auction to investigate the matter. We would like to provide some clarification regarding this issue and how it may or may not impact the .WEB/.WEBS auction scheduled for 27 July 2016.

Firstly, as a reminder, in regards to a request for postponement, Rule 10 of the Auction Rules for Indirect Contention states:

“...Postponement requests must be submitted by all members of the Contention Set by the due date specified within the ICANN Customer Portal, generally twenty eight (28) days after receipt of Intent to Auction notice from ICANN. If a postponement request is not submitted by the due date specified within the ICANN Customer Portal or is not accommodated by ICANN, an applicant may request an advancement/postponement request via submission of the Auction Date Advancement/Postponement Request Form. The form must be submitted at least 45 days prior to the scheduled Auction Date and ICANN must receive a request from each member of the contention set...” (<https://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf>)

The date to submit the postponement form passed on 12 June 2016, and we did not receive consensus from the contention set. As such, no postponement was granted.

Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.



The Internet Corporation for Assigned Names and Numbers

Finally, as you are aware, ICANN provided confirmation to all members of the .WEB/.WEBS contention set on 6 July 2016 that the auction will be proceeding as scheduled on 27 July 2016. Please follow all instructions provided to you by Power Auctions, the Auction Manager, regarding next steps, including mini and mock auctions as well as the deposit deadline.

Regarding the deposit deadline, Rule 28 of the Auction Rules for Indirect Contention states:

“All wires and all instructions associated with Deposits, including instructions regarding the allocation of funds among Contention Sets from wires and funds rolled over from previous Auctions, must be received no later than 16:00 UTC on the day that is seven (7) calendar days prior to the Commencement Date of the relevant Auction (the “Deposit Deadline”), unless this deadline is waived, at the Auction Manager’s sole discretion.”

As per Rule 28, the Deposit Deadline for the upcoming auction is 16:00 UTC on 20 July 2016.

While the auction is currently set to proceed as scheduled, applicants may continue to work toward self-resolution of the contention set. Applicants may withdraw their application up until the Deposit Deadline noted above. Once the Deposit Deadline is reached, there is a quiet period in which applicants are no longer allowed to withdraw their application until after conclusion of the auction.

I hope this information has been helpful to you. Please do not hesitate to respond with any additional questions or concerns. Should you have specific questions regarding next steps for the auction, you may submit a case to globalsupport@icann.org, and someone from my team will contact you promptly.

Sincerely,

Christine A. Willett
Vice President, GDD Operations
ICANN

EXHIBIT C-33

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549**

FORM 10-Q

(Mark One)

QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended June 30, 2016

OR

TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from to

Commission File Number: 000-23593

VERISIGN, INC.

(Exact name of registrant as specified in its charter)

Delaware

(State or other jurisdiction of
incorporation or organization)

12061 Bluemont Way, Reston, Virginia

(Address of principal executive offices)

94-3221585

(I.R.S. Employer
Identification No.)

20190

(Zip Code)

Registrant's telephone number, including area code: (703) 948-3200

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. YES NO

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Website, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). YES NO

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer Accelerated filer Non-accelerated filer Smaller reporting company

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act.): YES NO

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date:

<u>Class</u>	<u>Shares Outstanding as of July 22, 2016</u>
Common stock, \$.001 par value	106,766,527

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PART I-FINANCIAL INFORMATION

ITEM 1. FINANCIAL STATEMENTS

As required under Item 1-Financial Statements included in this section are as follows:

<u>Financial Statement Description</u>	<u>Page</u>
Condensed Consolidated Balance Sheets as of June 30, 2016 and December 31, 2015	4
Condensed Consolidated Statements of Comprehensive Income for the Three and Six Months Ended June 30, 2016 and 2015	5
Condensed Consolidated Statements of Cash Flows for the Six Months Ended June 30, 2016 and 2015	6
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VERISIGN, INC.
CONDENSED CONSOLIDATED BALANCE SHEETS
(In thousands, except par value)
(Unaudited)

	June 30, 2016	December 31, 2015
<u>ASSETS</u>		
Current assets:		
Cash and cash equivalents	\$ 170,966	\$ 228,659
Marketable securities	1,736,030	1,686,771
Accounts receivable, net	15,086	12,638
Other current assets	22,573	39,856
Total current assets	1,944,655	1,967,924
Property and equipment, net	277,942	295,570
Goodwill	52,527	52,527
Deferred tax assets	13,205	17,361
Other long-term assets	25,844	24,355
Total long-term assets	369,518	389,813
Total assets	\$ 2,314,173	\$ 2,357,737
<u>LIABILITIES AND STOCKHOLDERS' DEFICIT</u>		
Current liabilities:		
Accounts payable and accrued liabilities	\$ 144,361	\$ 188,171
Deferred revenues	699,456	680,483
Subordinated convertible debentures, including contingent interest derivative	632,308	634,326
Total current liabilities	1,476,125	1,502,980
Long-term deferred revenues	288,232	280,859
Senior notes	1,236,272	1,235,354
Deferred tax liabilities	326,112	294,194
Other long-term tax liabilities	114,762	114,797
Total long-term liabilities	1,965,378	1,925,204
Total liabilities	3,441,503	3,428,184
Commitments and contingencies		
Stockholders' deficit:		
Preferred stock-par value \$.001 per share; Authorized shares: 5,000; Issued and outstanding shares: none	-	-
Common stock-par value \$.001 per share; Authorized shares: 1,000,000; Issued shares: 323,941 at June 30, 2016 and 322,990 at December 31, 2015; Outstanding shares: 107,180 at June 30, 2016 and 110,072 at December 31, 2015	324	323
Additional paid-in capital	17,279,468	17,558,822
Accumulated deficit	(18,404,933)	(18,625,599)
Accumulated other comprehensive loss	(2,189)	(3,993)
Total stockholders' deficit	(1,127,330)	(1,070,447)
Total liabilities and stockholders' deficit	\$ 2,314,173	\$ 2,357,737

See accompanying Notes to Condensed Consolidated Financial Statements.

VERISIGN, INC.
CONDENSED CONSOLIDATED STATEMENTS OF COMPREHENSIVE INCOME
(In thousands, except per share data)
(Unaudited)

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
Revenues	\$ 286,466	\$ 262,539	\$ 568,342	\$ 520,961
Costs and expenses:				
Cost of revenues	48,753	48,221	99,335	96,574
Sales and marketing	19,757	24,329	39,784	46,711
Research and development	14,288	16,347	31,031	33,499
General and administrative	27,401	24,677	55,158	50,975
Total costs and expenses	110,199	113,574	225,308	227,759
Operating income	176,267	148,965	343,034	293,202
Interest expense	(28,859)	(28,503)	(57,663)	(50,520)
Non-operating income (loss), net	1,709	3,201	4,830	(2,354)
Income before income taxes	149,117	123,663	290,201	240,328
Income tax expense	(35,907)	(30,652)	(69,535)	(59,079)
Net income	113,210	93,011	220,666	181,249
Realized foreign currency translation adjustments, included in net income	85	(291)	85	(291)
Unrealized gain on investments	851	147	1,786	234
Realized gain on investments, included in net income	(1)	(69)	(67)	(73)
Other comprehensive income (loss)	935	(213)	1,804	(130)
Comprehensive income	\$ 114,145	\$ 92,798	\$ 222,470	\$ 181,119
Earnings per share:				
Basic	\$ 1.05	\$ 0.80	\$ 2.03	\$ 1.56
Diluted	\$ 0.87	\$ 0.70	\$ 1.68	\$ 1.36
Shares used to compute earnings per share				
Basic	108,067	115,656	108,829	116,394
Diluted	130,588	133,251	131,084	133,546

See accompanying Notes to Condensed Consolidated Financial Statements.

VERISIGN, INC.
CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS
(In thousands)
(Unaudited)

	Six Months Ended June 30,	
	2016	2015
Cash flows from operating activities:		
Net income	\$ 220,666	\$ 181,249
Adjustments to reconcile net income to net cash provided by operating activities:		
Depreciation of property and equipment	29,417	31,620
Stock-based compensation	22,891	22,129
Excess tax benefit associated with stock-based compensation	(12,708)	(11,366)
Unrealized (gain) loss on contingent interest derivative on Subordinated Convertible Debentures	(971)	4,311
Payment of contingent interest	(6,544)	(5,225)
Amortization of debt discount and issuance costs	6,590	5,941
Other, net	(1,414)	(1,099)
Changes in operating assets and liabilities		
Accounts receivable	(2,798)	(1,018)
Prepaid expenses and other assets	15,430	7,369
Accounts payable and accrued liabilities	(28,653)	(4,778)
Deferred revenues	26,346	41,247
Net deferred income taxes and other long-term tax liabilities	36,039	37,245
Net cash provided by operating activities	304,291	307,625
Cash flows from investing activities:		
Proceeds from maturities and sales of marketable securities	2,056,607	1,283,367
Purchases of marketable securities	(2,101,863)	(1,747,025)
Purchases of property and equipment	(13,458)	(21,891)
Other investing activities	206	(3,736)
Net cash used in investing activities	(58,508)	(489,285)
Cash flows from financing activities:		
Proceeds from issuance of common stock from option exercises and employee stock purchase plans	8,084	9,014
Repurchases of common stock	(324,235)	(335,885)
Proceeds from borrowings, net of issuance costs	-	492,237
Excess tax benefit associated with stock-based compensation	12,708	11,366
Net cash (used in) provided by financing activities	(303,443)	176,732
Effect of exchange rate changes on cash and cash equivalents	(33)	606
Net decrease in cash and cash equivalents	(57,693)	(4,322)
Cash and cash equivalents at beginning of period	228,659	191,608
Cash and cash equivalents at end of period	\$ 170,966	\$ 187,286
Supplemental cash flow disclosures:		
Cash paid for interest	\$ 57,636	\$ 42,839
Cash paid for income taxes, net of refunds received	\$ 13,994	\$ 14,342

See accompanying Notes to Condensed Consolidated Financial Statements.

VERISIGN, INC.
NOTES TO CONDENSED CONSOLIDATED FINANCIAL STATEMENTS
(Unaudited)

Note 1. Basis of Presentation

Interim Financial Statements

The accompanying unaudited Condensed Consolidated Financial Statements have been prepared by VeriSign, Inc. (“Verisign” or the “Company”) in accordance with the instructions to Form 10-Q pursuant to the rules and regulations of the Securities and Exchange Commission (“SEC”) and, therefore, do not include all information and notes normally provided in audited financial statements. In the opinion of management, all adjustments (consisting of normal recurring accruals and other adjustments) considered necessary for a fair presentation have been included. The results of operations for any interim period are not necessarily indicative of, nor comparable to, the results of operations for any other interim period or for a full fiscal year. These unaudited Condensed Consolidated Financial Statements should be read in conjunction with the Consolidated Financial Statements and related notes contained in Verisign’s fiscal 2015 Annual Report on Form 10-K (the “2015 Form 10-K”) filed with the SEC on February 19, 2016.

Recent Accounting Pronouncements

In May 2014, the Financial Accounting Standards Board (“FASB”) issued Accounting Standards Update (“ASU”) No. 2014-09, *Revenue from Contracts with Customers*, which requires an entity to recognize the amount of revenue to which it expects to be entitled for the transfer of promised goods or services to customers. The ASU will replace most existing revenue recognition guidance in U.S. GAAP when it becomes effective. The new standard will become effective for the Company on January 1, 2018. The standard permits the use of either the retrospective or cumulative effect transition method. The Company is evaluating the effect that ASU 2014-09 will have on its consolidated financial statements and related disclosures. The Company has not yet selected a transition method nor has it determined the effect of the standard on its ongoing financial reporting.

In February 2016, the FASB issued ASU No. 2016-02, *Leases*. The guidance introduces a lessee model that requires most leases to be reported on the balance sheet. This ASU will become effective for the Company on January 1, 2019 and requires the modified retrospective transition method. The Company is currently evaluating the impact of this ASU on its consolidated financial statements and related disclosures.

In March 2016, the FASB issued ASU No. 2016-09, *Improvements to Employee Share-Based Payment Accounting*, which simplifies several aspects of the accounting for share-based payment award transactions, including income tax consequences, classification of awards as either equity or liabilities, and classification on the statement of cash flows. The ASU requires that excess tax benefits and tax deficiencies (the difference between the deduction for tax purposes and the compensation cost recognized for financial reporting purposes) be recognized as income tax expense or benefit in the Consolidated Statement of Comprehensive Income. This change may lead to increased volatility in the provision for income taxes. There are different transition methods for different aspects of the standard. The new standard will be effective for the Company on January 1, 2017 with early adoption permitted. The Company is evaluating the timing of adoption, transition methods and the effect that this ASU will have on its consolidated financial statements and related disclosures.

Note 2. Cash, Cash Equivalents, and Marketable Securities

The following table summarizes the Company's cash, cash equivalents, and marketable securities:

	June 30, 2016	December 31, 2015
	(In thousands)	
Cash	\$ 37,588	\$ 99,027
Money market funds	141,209	137,593
Time deposits	3,932	4,007
Debt securities issued by the U.S. Treasury	1,733,258	1,685,882
Equity securities of public companies	2,772	890
Total	<u>\$ 1,918,759</u>	<u>\$ 1,927,399</u>
Included in Cash and cash equivalents	\$ 170,966	\$ 228,659
Included in Marketable securities	\$ 1,736,030	\$ 1,686,771
Included in Other long-term assets (Restricted cash)	\$ 11,763	\$ 11,969

The fair value of the debt securities held as of June 30, 2016 was \$1.7 billion, including less than \$0.6 million of gross and net unrealized gains. All of the debt securities held as of June 30, 2016 are scheduled to mature in less than one year.

Note 3. Fair Value of Financial Instruments

Assets and Liabilities Measured at Fair Value on a Recurring Basis

The following table summarizes the Company's financial assets and liabilities measured at fair value on a recurring basis as of June 30, 2016 and December 31, 2015:

	<u>Total Fair Value</u>	<u>Fair Value Measurement Using</u>		
		<u>(Level 1)</u>	<u>(Level 2)</u>	<u>(Level 3)</u>
(In thousands)				
As of June 30, 2016:				
Assets:				
Investments in money market funds	\$ 141,209	\$ 141,209	\$ -	\$ -
Debt securities issued by the U.S. Treasury	1,733,258	1,733,258	-	-
Equity securities of public companies	\$ 2,772	\$ 2,772	\$ -	\$ -
Foreign currency forward contracts (1)	563	-	563	-
Total	\$ 1,877,802	\$ 1,877,239	\$ 563	\$ -
Liabilities:				
Contingent interest derivative on the Subordinated Convertible Debentures	\$ 22,611	\$ -	\$ -	\$ 22,611
Foreign currency forward contracts (2)	65	-	65	-
Total	\$ 22,676	\$ -	\$ 65	\$ 22,611
As of December 31, 2015:				
Assets:				
Investments in money market funds	\$ 137,593	\$ 137,593	\$ -	\$ -
Debt securities issued by the U.S. Treasury	1,685,882	1,685,882	-	-
Equity securities of public companies	890	890	-	-
Foreign currency forward contracts (1)	230	-	230	-
Total	\$ 1,824,595	\$ 1,824,365	\$ 230	\$ -
Liabilities:				
Contingent interest derivative on the Subordinated Convertible Debentures	\$ 30,126	\$ -	\$ -	\$ 30,126
Foreign currency forward contracts (2)	164	-	164	-
Total	\$ 30,290	\$ -	\$ 164	\$ 30,126

(1) Included in Other current assets

(2) Included in Accounts payable and accrued liabilities

The fair value of the Company's investments in money market funds approximates their face value. Such instruments are classified as Level 1 and are included in Cash and cash equivalents. The fair value of the debt securities consisting of U.S. Treasury bills is based on their quoted market prices and are classified as Level 1. Debt securities purchased with original maturities in excess of three months are included in Marketable securities. The fair value of the equity securities of public companies is based on quoted market prices and are classified as Level 1. Investments in equity securities of public companies are included in Marketable securities. The fair value of the Company's foreign currency forward contracts is based on foreign currency rates quoted by banks or foreign currency dealers and other public data sources.

The Company utilizes a valuation model to estimate the fair value of the contingent interest derivative on the subordinated convertible debentures due 2037 ("the Subordinated Convertible Debentures"). The inputs to the model include stock price, bond price, risk free interest rates, volatility, and credit spread observations. As several significant inputs are not observable, the overall fair value measurement of the derivative is classified as Level 3. The volatility and credit spread assumptions used in the calculation are the most significant unobservable inputs. As of June 30, 2016, the valuation of the contingent interest derivative assumed a volatility rate of approximately 26% and a credit spread of approximately 6%. The fair value of the contingent interest derivative would not have significantly changed using a volatility rate of either 21% or 31%, or a credit spread of either 5% or 7%.

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The following table summarizes the change in the fair value of the Company's contingent interest derivative on the Subordinated Convertible Debentures during the three and six months ended June 30, 2016 and 2015:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
Beginning balance	\$ 22,517	\$ 28,549	\$ 30,126	\$ 26,755
Payment of contingent interest	-	-	(6,544)	(5,225)
Unrealized loss (gain)	94	(2,708)	(971)	4,311
Ending balance	\$ 22,611	\$ 25,841	\$ 22,611	\$ 25,841

On February 15, 2016, the Company paid contingent interest of \$6.5 million in addition to the normal coupon interest to holders of record of the Subordinated Convertible Debentures as of February 1, 2016. In February 2016, the upside trigger on the Subordinated Convertible Debentures was met for the six month interest period ending in August 2016. On August 15, 2016, the Company will pay contingent interest of \$6.8 million in addition to the normal coupon interest to holders of record of the Subordinated Convertible Debentures as of August 1, 2016. The \$6.8 million contingent interest payable in August 2016 is included in the balance of the contingent interest derivative on the Subordinated Convertible Debentures as of June 30, 2016.

The Company's other financial instruments include cash, accounts receivable, restricted cash, and accounts payable. As of June 30, 2016, the carrying value of these financial instruments approximated their fair value. The fair value of the Company's Subordinated Convertible Debentures was \$3.1 billion as of June 30, 2016. The fair values of the senior notes due 2023 (the "2023 Senior Notes") and the senior notes due 2025 (the "2025 Senior Notes") were \$761.3 million and \$512.8 million, respectively, as of June 30, 2016. The fair values of these debt instruments are based on available market information from public data sources and are classified as Level 2.

Note 4. Other Balance Sheet Items

Other Current Assets

Other current assets consist of the following:

	June 30, 2016	December 31, 2015
	(In thousands)	
Prepaid expenses	\$ 18,194	\$ 14,823
Income tax receivables	2,104	23,098
Other	2,275	1,935
Total other current assets	\$ 22,573	\$ 39,856

The Income tax receivables as of December 31, 2015 primarily consists of the remaining U.S. federal income tax overpayment from prior years. As of June 30, 2016, substantially all of the remaining overpayment has been used to offset current year income taxes.

Accounts Payable and Accrued Liabilities

Accounts payable and accrued liabilities consist of the following:

	June 30, 2016	December 31, 2015
	(In thousands)	
Accounts payable	\$ 17,661	\$ 23,298
Accrued employee compensation	40,118	51,851
Customer deposits, net	39,558	48,307
Interest Payable	27,701	27,701
Income taxes payable and other tax liabilities	4,485	16,943
Other accrued liabilities	14,838	20,071
Total accounts payable and accrued liabilities	\$ 144,361	\$ 188,171

Accrued employee compensation primarily consists of liabilities for employee leave, salaries, payroll taxes, employee contributions to the employee stock purchase plan, and incentive compensation. Accrued employee incentive compensation as of December 31, 2015, was paid during the six months ended June 30, 2016. Income taxes payable and other tax liabilities decreased in the six months ended June 30, 2016 as a result of payments made for income taxes in certain non-U.S. jurisdictions. Interest payable includes coupon interest on the Subordinated Convertible Debentures, the 2023 Senior Notes and the 2025 Senior Notes.

Note 5. Stockholders' Deficit

On February 11, 2016, the Company's Board of Directors authorized the repurchase of approximately \$611.2 million of its common stock, in addition to the \$388.8 million remaining available for repurchase under the previous share repurchase program for a total repurchase authorization of up to \$1.0 billion of its common stock. The share repurchase program has no expiration date. Purchases made under the program could be effected through open market transactions, block purchases, accelerated share repurchase agreements or other negotiated transactions. During the three and six months ended June 30, 2016 the Company repurchased 1.7 million and 3.5 million shares of its common stock, respectively, at an average stock price of \$86.46 and \$84.63, respectively. The aggregate cost of the repurchases in the three and six months ended June 30, 2016 was \$149.9 million and \$299.8 million, respectively. As of June 30, 2016, \$765.9 million remained available for further repurchases under the share repurchase program.

During the six months ended June 30, 2016, the Company placed 0.3 million shares, at an average stock price of \$80.92, and for an aggregate cost of \$24.4 million, into treasury stock for purposes related to tax withholding upon vesting of Restricted Stock Units ("RSUs").

Since inception the Company has repurchased 216.8 million shares of its common stock for an aggregate cost of \$7.8 billion, which is presented as a reduction of Additional paid-in capital.

Note 6. Calculation of Earnings per Share

The following table presents the computation of weighted-average shares used in the calculation of basic and diluted earnings per share:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
Weighted-average shares of common stock outstanding	108,067	115,656	108,829	116,394
Weighted-average potential shares of common stock outstanding:				
Conversion spread related to Convertible Debentures	21,872	16,973	21,472	16,392
Unvested RSUs, stock options, and ESPP	649	622	783	760
Shares used to compute diluted earnings per share	130,588	133,251	131,084	133,546

The calculation of diluted weighted average shares outstanding, excludes potentially dilutive securities, the effect of which would have been anti-dilutive, as well as performance based RSUs granted by the Company for which the relevant performance criteria have not been achieved. The number of potential shares excluded from the calculation was not significant in any period presented.

Note 7. Stock-based Compensation

Stock-based compensation is classified in the Condensed Consolidated Statements of Comprehensive Income in the same expense line items as cash compensation. The following table presents the classification of stock-based compensation:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
Cost of revenues	\$ 1,747	\$ 1,741	\$ 3,588	\$ 3,480
Sales and marketing	1,457	1,818	3,090	3,117
Research and development	1,587	1,691	3,290	3,412
General and administrative	6,341	6,751	12,923	12,120
Total stock-based compensation expense	\$ 11,132	\$ 12,001	\$ 22,891	\$ 22,129

The following table presents the nature of the Company's total stock-based compensation:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
RSUs	\$ 8,625	\$ 9,210	\$ 17,758	\$ 17,504
Performance-based RSUs	2,285	2,385	4,662	3,838
ESPP	822	1,113	1,670	2,194
Capitalization (Included in Property and equipment, net)	(600)	(707)	(1,199)	(1,407)
Total stock-based compensation expense	\$ 11,132	\$ 12,001	\$ 22,891	\$ 22,129

Note 8. Debt and Interest Expense

The following table presents the components of the Company's interest expense:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
Contractual interest on Subordinated Convertible Debentures	\$ 10,156	\$ 10,156	\$ 20,312	\$ 20,312
Contractual interest on Senior Notes	15,234	15,234	30,469	24,271
Amortization of debt discount on the Subordinated Convertible Debentures	2,744	2,527	5,433	5,004
Credit facility fees and other interest expense	725	586	1,449	933
Total interest expense	\$ 28,859	\$ 28,503	\$ 57,663	\$ 50,520

Note 9. Non-operating Income (Loss), Net

The following table presents the components of Non-operating income (loss), net:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
Unrealized (loss) gain on contingent interest derivative on Subordinated Convertible Debentures	\$ (94)	\$ 2,708	\$ 971	\$ (4,311)
Interest income	1,522	373	2,564	632
Other, net	281	120	1,295	1,325
Total non-operating income (loss), net	\$ 1,709	\$ 3,201	\$ 4,830	\$ (2,354)

Unrealized gains and losses on the contingent interest derivative on the Subordinated Convertible Debentures reflect the change in value of the derivative that results primarily from changes in the Company's stock price.

Note 10. Income Taxes

The following table presents income tax expense and the effective tax rate:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(Dollars in thousands)			
Income tax expense	\$ 35,907	\$ 30,652	\$ 69,535	\$ 59,079
Effective tax rate	24%	25%	24%	25%

The effective tax rate for the three and six months ended June 30, 2016 and 2015 is lower than the statutory federal rate of 35% primarily due to tax benefits from foreign income taxed at lower rates, partially offset by state income taxes.

Deferred tax liabilities as of June 30, 2016 reflect the use of a portion of U.S. foreign tax credits during the six months ended June 30, 2016, and an increase in the deferred tax liability related to the Subordinated Convertible Debentures.

Note 11. Subsequent Event

Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016.

ITEM 2. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

You should read the following discussion in conjunction with the interim unaudited Condensed Consolidated Financial Statements and related notes.

This Quarterly Report on Form 10-Q contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). These forward-looking statements involve risks and uncertainties, including, among other things, statements regarding our anticipated costs and expenses and revenue mix. Forward-looking statements include, among others, those statements including the words "expects," "anticipates," "intends," "believes" and similar language. Our actual results may differ significantly from those projected in the forward-looking statements. Factors that might cause or contribute to such differences include, but are not limited to, those discussed in the section titled "Risk Factors" in Part II, Item 1A of this Quarterly Report on Form 10-Q. You should also carefully review the risks described in other documents we file from time to time with the Securities and Exchange Commission, including the Quarterly Reports on Form 10-Q or Current Reports on Form 8-K that we file in 2016 and our 2015 Form 10-K, which was filed on February 19, 2016, which discuss our business in greater detail. You are cautioned not to place undue reliance on the forward-looking statements, which speak only as of the date of this Quarterly Report on Form 10-Q. We undertake no obligation to publicly release any revisions to the forward-looking statements or reflect events or circumstances after the date of this document.

Overview

We are a global provider of domain name registry services and internet security, enabling internet navigation for many of the world's most recognized domain names and providing protection for websites and enterprises around the world. Our Registry Services ensure the security, stability and resiliency of key internet infrastructure and services, including the .com and .net domains, two of the internet's root servers, and the operation of the root zone maintainer function for the core of the internet's DNS. Our product suite also includes Security Services, consisting of DDoS Protection Services, iDefense Services, and Managed DNS Services. Revenues from Security Services are not significant in relation to our consolidated revenues.

As of June 30, 2016, we had approximately 143.2 million names in the domain name base for .com and .net, our principal registries. The number of domain names registered is largely driven by continued growth in online advertising, e-commerce, and the number of internet users, which is partially driven by greater availability of internet access, as well as marketing activities carried out by us and third-party registrars. Growth in the number of domain names under our management may be hindered by certain factors, including overall economic conditions, competition from ccTLDs, the introduction of new gTLDs, and ongoing changes in the internet practices and behaviors of consumers and businesses. Factors such as the evolving practices and preferences of internet users, and how they navigate the internet, as well as the motivation of domain name registrants and how they will manage their investment in domain names, can negatively impact our business and the demand for new domain name registrations and renewals.

Business Highlights and Trends

- We recorded revenues of \$286.5 million and \$568.3 million during the three and six months ended June 30, 2016. This represents an increase of 9%, as compared to the same periods in 2015.
- We recorded operating income of \$176.3 million and \$343.0 million during the three and six months ended June 30, 2016. This represents an increase of 18% and 17%, respectively, as compared to the same periods in 2015.
- We added 0.8 million net new names during the second quarter, ending with 143.2 million names in the domain name base for .com and .net, which represents a 7% increase over the base at the end of the second quarter in 2015.
- During the three months ended June 30, 2016, we processed 8.6 million new domain name registrations for .com and .net as compared to 8.7 million for the same period in 2015.
- The final .com and .net renewal rate for the first quarter of 2016 was 74.4% compared with 73.4% for the same quarter in 2015. Renewal rates are not fully measurable until 45 days after the end of the quarter.
- During the three months ended June 30, 2016, we repurchased 1.7 million shares of our common stock under the share repurchase program for \$149.9 million. As of June 30, 2016, \$765.9 million remained available for further repurchases under our share repurchase program.

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- Through July 27, 2016, we repurchased an additional 0.5 million shares for \$42.3 million under our share repurchase program.
- We generated cash flows from operating activities of \$304.3 million during the six months ended June 30, 2016, compared to \$307.6 million in the same period last year.
- On July 28, 2016, we announced an increase in the annual fee for the *.net* domain name registration from \$7.46 to \$8.20, effective February 1, 2017, per our agreement with ICANN.

Pursuant to our agreements with ICANN, we make available on our website (at www.Verisign.com/zone) files containing all active domain names registered in the *.com* and *.net* registries. At the same website address, we make available a summary of the active zone count registered in the *.com* and *.net* registries and the number of *.com* and *.net* domain names in the domain name base. The domain name base is the active zone plus the number of domain names that are registered but not configured for use in the respective top level domain zone file plus the number of domain names that are in a client or server hold status. These files and the related summary data are updated at least once per day. The update times may vary each day. The number of domain names provided in this Form 10-Q are as of midnight of the date reported. Information available on, or accessible through, our website is not incorporated herein by reference.

Results of Operations

The following table presents information regarding our results of operations as a percentage of revenues:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
Revenues	100.0%	100.0%	100.0%	100.0%
Costs and expenses:				
Cost of revenues	17.0	18.4	17.5	18.5
Sales and marketing	6.9	9.3	7.0	9.0
Research and development	5.0	6.2	5.5	6.4
General and administrative	9.6	9.4	9.7	9.8
Total costs and expenses	38.5	43.3	39.7	43.7
Operating income	61.5	56.7	60.3	56.3
Interest expense	(10.1)	(10.9)	(10.1)	(9.7)
Non-operating income (loss), net	0.6	1.2	0.8	(0.5)
Income before income taxes	52.0	47.0	51.0	46.1
Income tax expense	(12.5)	(11.7)	(12.2)	(11.3)
Net income	39.5%	35.3%	38.8%	34.8%

Revenues

Revenues related to our Registry Services are primarily derived from registrations for domain names in the *.com* and *.net* domain name registries. We also derive revenues from operating domain name registries for several other TLDs and from providing back-end registry services to a number of TLD registry operators, all of which are not significant in relation to our consolidated revenues. For domain names registered with the *.com* and *.net* registries we receive a fee from third-party registrars per annual registration that is fixed pursuant to our agreements with ICANN. Individual customers, called registrants, contract directly with third-party registrars or their resellers, and the third-party registrars in turn register the domain names with Verisign. Changes in revenues are driven largely by changes in the number of new domain name registrations and the renewal rate for existing registrations as well as the impact of new and prior price increases, to the extent permitted by ICANN and the DOC. New registrations and the renewal rate for existing registrations are impacted by continued growth in online advertising, e-commerce, and the number of internet users, as well as marketing activities carried out by us and third-party registrars. We increased the annual fee for a *.net* domain name registration from \$6.18 to \$6.79 on February 1, 2015, and from \$6.79 to \$7.46 on February 1, 2016. On July 28, 2016, we announced an increase in the annual fee for the *.net* domain name registration from \$7.46 to \$8.20, effective February 1, 2017. The annual fee for a *.com* domain name registration is fixed at \$7.85 for the duration of the current *.com* Registry Agreement through November 30, 2018, except that prices may be raised by up to 7% each year due to the imposition of any new Consensus Policy or documented extraordinary expense resulting from an attack or threat of attack on the Security and Stability (each as defined in the *.com* Registry Agreement) of the DNS, subject to approval of the DOC. We offer promotional marketing programs for our registrars based upon market conditions and the business environment in which the registrars operate. All fees paid to us for *.com* and *.net* registrations are in U.S. dollars.

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Revenues from Security Services are not significant in relation to our total consolidated revenues.

A comparison of revenues is presented below:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
(Dollars in thousands)						
Revenues	\$ 286,466	9%	\$ 262,539	\$ 568,342	9%	\$ 520,961

The following table compares domain name base for .com and .net managed by our Registry Services business:

	June 30, 2016	% Change	June 30, 2015
Domain name base for .com and .net	143.2 million	7%	133.5 million

Revenues increased by \$23.9 million and \$47.4 million during the three and six months ended June 30, 2016, respectively, as compared to the same periods last year, primarily due to an increase in revenues from the operation of the registries for the .com and .net TLDs. The increase in revenues from the operation of the registries for the .com and .net TLDs was driven by a 7% increase in the domain name base for .com and .net and an increase in the .net domain name registration fees in February 2015 and 2016.

Growth in the domain name base has been primarily driven by continued internet growth and marketing activities carried out by us and third-party registrars. During the second half of 2015 and the first quarter of 2016 we experienced an increased volume of new domain name registrations primarily from our registrars in China. The volume of these new registrations has been inconsistent and periodic compared to prior periods, and by the end of the first quarter of 2016, reverted back to a more normalized registration pace. However, ongoing economic uncertainty, competitive pressure from ccTLDs, the introduction of new gTLDs, ongoing changes in internet practices and behaviors of consumers and business, as well as the motivation of existing domain name registrants and how they will manage their investment in domain names, has limited the rate of growth of the domain name base in recent years and may continue to do so in the remainder of 2016 and beyond.

We expect revenues to remain consistent in the second half of 2016, as compared to the six months ended June 30, 2016.

Geographic revenues

We generate revenues in the U.S.; Europe, the Middle East and Africa (“EMEA”); China; and certain other countries including Canada, Australia and Japan.

The following table presents a comparison of our geographic revenues:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
(Dollars in thousands)						
U.S.	\$ 165,756	4%	\$ 159,208	\$ 329,799	4%	\$ 316,716
EMEA	52,710	9%	48,233	103,665	9%	95,239
China	32,727	71%	19,092	63,926	73%	36,969
Other	35,273	(2)%	36,006	70,952	(2)%	72,037
Total revenues	\$ 286,466		\$ 262,539	\$ 568,342		\$ 520,961

Revenues for our Registry Services business are attributed to the country of domicile and the respective regions in which our registrars are located, however, this may differ from the regions where the registrars operate or where registrants are located. Revenue growth for each region may be impacted by registrars reincorporating, relocating, or from acquisitions or changes in affiliations of resellers. Revenue growth for each region may also be impacted by registrars domiciled in one region, registering domain names in another region. Although revenues continued to grow in the more mature markets of the U.S. and EMEA, China saw the highest growth rate for both the three and six months ended June 30, 2016 due to the increased volume of new registrations during the second half of 2015 and the first quarter of 2016.

Cost of revenues

Cost of revenues consist primarily of salaries and employee benefits expenses for our personnel who manage the operational systems, depreciation expenses, operational costs associated with the delivery of our services, fees paid to ICANN, customer support and training, consulting and development services, costs of facilities and computer equipment used in these activities, telecommunications expense and allocations of indirect costs such as corporate overhead.

A comparison of cost of revenues is presented below:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
(Dollars in thousands)						
Cost of revenues	\$ 48,753	1%	\$ 48,221	\$ 99,335	3%	\$ 96,574

Cost of revenues expenses remained consistent during the three months ended June 30, 2016, as compared to the same period last year.

Cost of revenues increased by \$2.8 million during the six months ended June 30, 2016, as compared to the same period last year, primarily due to a \$3.4 million increase in salary and employee benefits expenses. Salary and employee benefits expenses increased primarily due to an increase in average headcount and an increase in bonus expenses.

We expect cost of revenues as a percentage of revenues to remain consistent during the remainder of 2016 compared to the six months ended June 30, 2016.

Sales and marketing

Sales and marketing expenses consist primarily of salaries, sales commissions, sales operations and other personnel-related expenses, travel and related expenses, trade shows, costs of lead generation, costs of computer and communications equipment and support services, facilities costs, consulting fees, costs of marketing programs, such as online, television, radio, print and direct mail advertising costs, and allocations of indirect costs such as corporate overhead.

A comparison of sales and marketing expenses is presented below:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
(Dollars in thousands)						
Sales and marketing	\$ 19,757	(19)%	\$ 24,329	\$ 39,784	(15)%	\$ 46,711

Sales and marketing expenses decreased by \$4.6 million during the three months ended June 30, 2016, as compared to the same period last year, primarily due to a \$3.3 million decrease in advertising and consulting expenses. Advertising and consulting expenses decreased primarily due to the timing of marketing programs for our Registry Services business and a decrease in expenses related to our Security Services business.

Sales and marketing expenses decreased by \$6.9 million during the six months ended June 30, 2016, as compared to the same period last year, primarily due to a \$5.5 million decrease in advertising and consulting expenses. Advertising and consulting expenses decreased primarily due to the timing of marketing programs for our Registry Services business and a decrease in expenses related to our Security Services business.

We expect sales and marketing expenses as a percentage of revenues to increase during the remainder of 2016 compared to the six months ended June 30, 2016 as the volume of marketing initiatives increases. We expect sales and marketing expenses as a percent of revenues for full year 2016 to be at comparable levels to 2015.

Research and development

Research and development expenses consist primarily of costs related to research and development personnel, including salaries and other personnel-related expenses, consulting fees, facilities costs, computer and communications equipment, support services used in our service and technology development, and allocations of indirect costs such as corporate overhead.

A comparison of research and development expenses is presented below:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
(Dollars in thousands)						
Research and development	\$ 14,288	(13)%	\$ 16,347	\$ 31,031	(7)%	\$ 33,499

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Research and development expenses decreased by \$2.1 million during the three months ended June 30, 2016, as compared to the same period last year, primarily due to a decrease in salary and employee benefits expenses and allocated overhead expenses resulting from a reduction in headcount.

Research and development expenses decreased by \$2.5 million during the six months ended June 30, 2016, as compared to the same period last year, primarily due to a decrease in salary and employee benefits expenses and allocated overhead expenses resulting from a reduction in headcount.

We expect research and development expenses as a percentage of revenues to remain consistent during the remainder of 2016 compared to the six months ended June 30, 2016.

General and administrative

General and administrative expenses consist primarily of salaries and other personnel-related expenses for our executive, administrative, legal, finance, information technology and human resources personnel, costs of facilities, computer and communications equipment, management information systems, support services, professional services fees, certain tax and license fees, and bad debt expense, offset by allocations of indirect costs such as facilities and shared services expenses to other cost types.

A comparison of general and administrative expenses is presented below:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
(Dollars in thousands)						
General and administrative	\$ 27,401	11%	\$ 24,677	\$ 55,158	8%	\$ 50,975

General and administrative expenses increased by \$2.7 million during the three months ended June 30, 2016, as compared to the same period last year, primarily due to a \$1.6 million increase in legal expenses and a \$1.4 million increase in salary and employee benefits expenses. Legal expenses increased primarily due to an increase in services performed by external legal counsel. Salary and employee benefits expenses increased primarily due to increases in bonus expenses and average headcount.

General and administrative expenses increased by \$4.2 million during the six months ended June 30, 2016, as compared to the same period last year, primarily due to a \$3.4 million increase in salary and employee benefits expenses, and a \$2.3 million increase in legal expenses, partially offset by a \$1.4 million decrease in depreciation expenses. Salary and employee benefits expenses increased primarily due to increases in bonus expenses and headcount. Legal expenses increased due to an increase in services performed by external legal counsel. Depreciation expense decreased due to a decrease in capital expenditures in recent years.

We expect general and administrative expenses as a percentage of revenues to remain consistent during the remainder of 2016 compared to the six months ended June 30, 2016.

Interest expense

The following table presents the components of Interest expense:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
(In thousands)				
Contractual interest on Subordinated Convertible Debentures	\$ 10,156	\$ 10,156	\$ 20,312	\$ 20,312
Contractual interest on Senior Notes	15,234	15,234	30,469	24,271
Amortization of debt discount on the Subordinated Convertible Debentures	2,744	2,527	5,433	5,004
Credit facility fees and other interest expense	725	586	1,449	933
Total interest expense	\$ 28,859	\$ 28,503	\$ 57,663	\$ 50,520

Contractual interest on Senior Notes increased during the six months ended June 30, 2016 due to a \$6.2 million increase in interest expense related to the 2025 Senior Notes which were issued in March 2015. We expect interest expense to remain consistent during the remainder of 2016 as compared to the six months ended June 30, 2016.

Non-operating income (loss), net

The following table presents the components of Non-operating income (loss), net:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
Unrealized (loss) gain on contingent interest derivative on Subordinated Convertible Debentures	\$ (94)	\$ 2,708	\$ 971	\$ (4,311)
Interest income	1,522	373	2,564	632
Other, net	281	120	1,295	1,325
Total non-operating income (loss), net	\$ 1,709	\$ 3,201	\$ 4,830	\$ (2,354)

Unrealized gains and losses on the contingent interest derivative on the Subordinated Convertible Debentures reflect the change in value of the derivative that results primarily from changes in our stock price. Interest income increased during both the three and six months ended June 30, 2016 primarily due to an increase in interest rates and a higher average invested balance.

Income tax expense

The following table presents income tax expense and the effective tax rate:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(Dollars in thousands)			
Income tax expense	\$ 35,907	\$ 30,652	\$ 69,535	\$ 59,079
Effective tax rate	24%	25%	24%	25%

The effective tax rate for the three and six months ended June 30, 2016 and 2015 was lower than the statutory federal rate of 35% primarily due to tax benefits from foreign income taxed at lower rates, partially offset by state income taxes.

Liquidity and Capital Resources

	June 30, 2016	December 31, 2015
	(In thousands)	
Cash and cash equivalents	\$ 170,966	\$ 228,659
Marketable securities	1,736,030	1,686,771
Total	<u>\$ 1,906,996</u>	<u>\$ 1,915,430</u>

As of June 30, 2016, our principal source of liquidity was \$171.0 million of cash and cash equivalents and \$1.7 billion of marketable securities. The marketable securities primarily consist of debt securities issued by the U.S. Treasury meeting the criteria of our investment policy, which is focused on the preservation of our capital through investment in investment grade securities. The cash equivalents consist of amounts invested in money market funds and U.S. Treasury bills purchased with original maturities of less than 90 days. As of June 30, 2016, all of our debt securities have contractual maturities of less than one year. Our cash and cash equivalents are readily accessible. For additional information on our investment portfolio, see Note 2, "Cash, Cash Equivalents, and Marketable Securities," of our Notes to Condensed Consolidated Financial Statements in Part I, Item I of this Quarterly Report on Form 10-Q.

As of June 30, 2016, the amount of cash and cash equivalents and marketable securities held by foreign subsidiaries was \$1.3 billion. Our intent remains to indefinitely reinvest these funds outside of the U.S. and accordingly, we have not provided deferred U.S. taxes for these funds. In the event funds from foreign operations are needed to fund operations in the U.S. and if U.S. tax has not already been provided, we would be required to accrue and pay additional U.S. taxes in order to repatriate these funds.

As of June 30, 2016, we had \$500.0 million principal amount outstanding of the 5.25% senior unsecured notes due 2025 and \$750.0 million principal amount outstanding of the 4.625% senior unsecured notes due 2023.

As of June 30, 2016, there were no borrowings outstanding under the \$200.0 million unsecured revolving credit facility that will expire in 2020.

As of June 30, 2016, we had \$1.25 billion principal amount outstanding of 3.25% subordinated convertible debentures due 2037. The price of our common stock exceeded the conversion price threshold trigger during the second quarter of 2016. Accordingly, the Subordinated Convertible Debentures are convertible at the option of each holder through September 30, 2016. We do not expect a material amount of the Subordinated Convertible Debentures to be converted in the near term as the trading price of the debentures exceeds the value that is likely to be received upon conversion. However, we cannot provide any assurance that the trading price of the debentures will continue to exceed the value that would be derived upon conversion or that the holders will not elect to convert the Subordinated Convertible Debentures. If a holder elects to convert its Subordinated Convertible Debentures, we are permitted under the Indenture to pursue an exchange in lieu of conversion or to settle the conversion value (as defined in the Indenture) in cash, stock, or a combination thereof. If we choose not to pursue or cannot complete an exchange in lieu of conversion, we currently have the intent and the ability (based on current facts and circumstances) to settle the principal amount of the Subordinated Convertible Debentures in cash. However, if the principal amount of the Subordinated Convertible Debentures that holders actually elect to convert exceeds our cash on hand and cash from operations, we will need to draw cash from existing financing or pursue additional sources of financing to settle the Subordinated Convertible Debentures in cash. We cannot provide any assurances that we will be able to obtain new sources of financing on terms acceptable to us or at all, nor can we assure that we will be able to obtain such financing in time to settle the Subordinated Convertible Debentures that holders elect to convert.

On February 15, 2016, we paid contingent interest of \$6.5 million in addition to the normal coupon interest on our Subordinated Convertible Debentures. In February 2016, the upside trigger on the Subordinated Convertible Debentures was met for the six month interest period ending in August 2016. On August 15, 2016, we will pay contingent interest of \$6.8 million in addition to the normal coupon interest to holders of record of the Subordinated Convertible Debentures as of August 1, 2016. The upside trigger is met if the Subordinated Convertible Debentures' average trading price is at least 150% of par during the 10 trading days before each semi-annual interest period. The upside trigger is tested semi-annually for the following six months. The semi-annual upside contingent interest payment, for a given period, can be approximated by applying the annual rate of 0.5% to the aggregate market value of all outstanding Subordinated Convertible Debentures and dividing by two for that semi-annual period payment amount.

We derive significant tax savings from the Subordinated Convertible Debentures. During the first half of 2016 and 2015, the interest deduction, for income tax purposes, related to our Subordinated Convertible Debentures, excluding contingent interest, was \$87.7 million and \$82.4 million, respectively, compared to coupon interest expense of \$20.3 million for each of the same periods. For income tax purposes, we deduct interest expense on the Subordinated Convertible Debentures calculated at 8.5% of the adjusted issue price, subject to adjustment for actual versus projected contingent interest. The adjusted issue price, and consequently the interest deduction for income tax purposes, grows over the term due to the difference between the

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interest deduction taken using a comparable yield of 8.5% on the adjusted issue price, and the coupon rate of 3.25% on the principal amount, compounded annually. The interest deduction taken is subject to recapture upon settlement to the extent that the amount paid (in cash or stock) to settle the Subordinated Convertible Debentures is less than the adjusted issue price. Interest recognized in accordance with GAAP, which is calculated at 8.39% of the liability component of the Subordinated Convertible Debentures, will also grow over the term, but at a slower rate. This difference will result in a continuing increase in the deferred tax liability on our Condensed Consolidated Balance Sheet.

Subsequent to June 30, 2016, we incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016.

We believe existing cash, cash equivalents and marketable securities, and funds generated from operations, together with our borrowing capacity under the unsecured revolving credit facility should be sufficient to meet our working capital, capital expenditure requirements, and to service our debt for at least the next 12 months. We regularly assess our cash management approach and activities in view of our current and potential future needs.

In summary, our cash flows for the six months ended June 30, 2016 and 2015 are as follows:

	Six Months Ended June 30,	
	2016	2015
	(In thousands)	
Net cash provided by operating activities	\$ 304,291	\$ 307,625
Net cash used in investing activities	(58,508)	(489,285)
Net cash (used in) provided by financing activities	(303,443)	176,732
Effect of exchange rate changes on cash and cash equivalents	(33)	606
Net decrease in cash and cash equivalents	\$ (57,693)	\$ (4,322)

Cash flows from operating activities

Our largest source of operating cash flows is cash collections from our customers. Our primary uses of cash from operating activities are for personnel related expenditures, and other general operating expenses, as well as payments related to taxes, interest and facilities.

Net cash provided by operating activities decreased during the six months ended June 30, 2016, primarily due to an increase in cash paid for interest and cash paid to employees and vendors, partially offset by an increase in cash collected from customers. Cash paid for interest increased due to the interest paid on the 2025 Senior Notes and higher contingent interest related to the Subordinated Convertible Debentures. Payments to employees and vendors increased primarily due to the timing of payments. Cash received from customers increased primarily due to an increase in the number of new and renewal domain name registrations during the six months ended June 30, 2016, and the increases in the .net domain name registration fees in February 2016.

Cash flows from investing activities

The changes in cash flows from investing activities primarily relate to purchases, maturities and sales of marketable securities, and purchases of property and equipment.

The decrease in cash flows used in investing activities was primarily due to a decrease in purchases of marketable securities, net of proceeds from sales and maturities, during the first half of 2016, compared to the same period in 2015, and a decrease in purchases of property and equipment and other investing activities.

Cash flows from financing activities

The changes in cash flows from financing activities primarily relate to share repurchases, proceeds from and repayments of borrowings, our employee stock purchase plan, and excess tax benefits from stock-based compensation.

The change in cash (used in) provided by financing activities during the six months ended June 30, 2016 was primarily due to a decrease in proceeds from borrowings as we issued the 2025 Senior Notes in March 2015, partially offset by a decrease in share repurchases.

ITEM 3. QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK

There have been no significant changes in our market risk exposures since December 31, 2015.

ITEM 4. CONTROLS AND PROCEDURES

Based on our management's evaluation, with the participation of our Chief Executive Officer (our principal executive officer) and our Chief Financial Officer (our principal financial officer), as of June 30, 2016, our principal executive officer and principal financial officer have concluded that our disclosure controls and procedures (as defined in Rules 13a-15(e) and 15d-15(e) under the Exchange Act) are effective to ensure that information required to be disclosed by us in reports that we file or submit under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in SEC rules and forms and is accumulated and communicated to our management, including our principal executive officer and principal financial officer, as appropriate, to allow timely decisions regarding required disclosure.

Changes in Internal Control over Financial Reporting

There was no change in our internal control over financial reporting (as such term is defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act) during the three months ended June 30, 2016 that has materially affected, or is reasonably likely to materially affect, the Company's internal control over financial reporting.

Inherent Limitations of Disclosure Controls and Internal Control over Financial Reporting

Because of their inherent limitations, our disclosure controls and procedures and our internal control over financial reporting may not prevent material errors or fraud. A control system, no matter how well conceived and operated, can provide only reasonable, not absolute, assurance that the objectives of the control system are met. The effectiveness of our disclosure controls and procedures and our internal control over financial reporting is subject to risks, including that the control may become inadequate because of changes in conditions or that the degree of compliance with our policies or procedures may deteriorate.

PART II-OTHER INFORMATION

ITEM 1. LEGAL PROCEEDINGS

Verisign is involved in various investigations, claims and lawsuits arising in the normal conduct of its business, none of which, in its opinion, will have a material adverse effect on its financial condition, results of operations, or cash flows. The Company cannot assure you that it will prevail in any litigation. Regardless of the outcome, any litigation may require the Company to incur significant litigation expense and may result in significant diversion of management attention.

ITEM 1A. RISK FACTORS

In addition to other information in this Form 10-Q, the following risk factors should be carefully considered in evaluating us and our business because these factors currently have a significant impact or may have a significant impact on our business, operating results or financial condition. Actual results could differ materially from those projected in the forward-looking statements contained in this Form 10-Q as a result of the risk factors discussed below and elsewhere in this Form 10-Q and in other filings we make with the SEC.

Risks arising from our agreements governing our Registry Services business could limit our ability to maintain or grow our business.

We are parties to (i) a Cooperative Agreement (as amended) with the DOC with respect to the .com gTLD and certain other aspects of the DNS and (ii) Registry Agreements with ICANN for .com, .net, .name and other gTLDs including our IDN gTLDs. As substantially all of our revenues are derived from our Registry Services business, limitations in these agreements could have a material impact on our business.

Pricing. Under the terms of the Cooperative Agreement with the DOC and the .com Registry Agreement with ICANN, we are generally restricted from increasing the price of registrations or renewals of .com domain names except that we are entitled to increase the price up to 7%, with the prior approval of the DOC, due to the imposition of any new Consensus Policies or documented extraordinary expense resulting from an attack or threat of attack on the security and stability of the DNS. However, it is uncertain that such circumstances will arise, or if they do, that the DOC will approve our request to increase the price for .com domain name registrations. We also have the right under the Cooperative Agreement to seek the removal of these pricing restrictions if we demonstrate that market conditions no longer warrant such restrictions. However, it is uncertain that such circumstances will arise, or if they do, that the DOC will agree to the removal of these pricing restrictions. In connection with a renewal of the .com Registry Agreement, we can seek an increase of the price for .com domain name registrations. Regardless of whether we seek such an increase, there can be no assurance of the price that DOC will approve in connection with a renewal of the .com Registry Agreement. Under the terms of the .net and .name Registry Agreements with ICANN, we are permitted to increase the price of registrations and renewals in these TLDs up to 10% per year. Additionally, ICANN's registry agreements for the new gTLDs do not contain such pricing restrictions.

Vertical integration. Under the .com, .net and .name Registry Agreements with ICANN, as well as the Cooperative Agreement with the DOC, we are not permitted to acquire, directly or indirectly, control of, or a greater than 15% ownership interest in, any ICANN-accredited registrar. Historically, all gTLD registry operators were subject to this vertical integration prohibition; however, ICANN has established a process whereby registry operators may seek ICANN's approval to remove this restriction, and ICANN has approved such removal in some instances. If we were to seek removal of the vertical integration restrictions contained in our agreements, it is uncertain whether ICANN and/or DOC approval would be obtained. Additionally, ICANN's registry agreement for new gTLDs generally permits such vertical integration, with certain limitations including ICANN's right, but not the obligation, to refer such vertical integration activities to competition authorities. Furthermore, unless prohibited by ICANN as noted above, such vertical integration restrictions do not generally apply to ccTLD registry operators. If registry operators of new or existing gTLDs, or ccTLDs, are able to obtain competitive advantages through such vertical integration, it could materially harm our business.

Termination or non-renewal. Under the Cooperative Agreement (as amended) the DOC must approve any renewal or extension of the .com Registry Agreement. The DOC, under certain circumstances, could refuse to grant its approval to the renewal of the .com Registry Agreement on similar terms, or at all. Any failure of the DOC to approve the renewal of the .com Registry Agreement prior to the expiration of its current term on November 30, 2018 would have a material adverse effect on our business. Under certain circumstances, ICANN could terminate or refuse to renew one or more of our Registry Agreements including those for .com, .net, and our other gTLDs. The Company and ICANN completed the drafting of the Root Zone Maintainer Service Agreement ("RZMA") and the .com Registry Agreement extension amendment (".com Extension"), which extends the expiration date of the .com Registry Agreement to November 30, 2024 and is intended to coincide with the eight year term of the RZMA. In June 2016, ICANN posted on its website the RZMA for public review and the .com Extension for

public comment. We can provide no assurance that the .com Extension or the RZMA will be approved or, if approved, will be in the form described. See the “Industry Regulation” section in Part I, Item 1 of the Company’s Annual Report on Form 10-K for the year ended December 31, 2015, which was filed on February 19, 2016, for further information on the Cooperative Agreement and the RZMA.

Modification or amendment. Our Registry Agreements for new gTLDs, including the Registry Agreements for our IDN gTLDs, include ICANN’s right to amend the agreement without our consent, which could impose unfavorable contract obligations on us that could impact our plans and competitive positions with respect to new gTLDs. At the time of renewal of our .com or .net Registry Agreements, ICANN might also attempt to impose this same unilateral right to amend these registry agreements under certain conditions. ICANN has also included new mandatory obligations on new gTLD registry operators, including us, that may increase the risks and potential liabilities associated with operating new gTLDs. ICANN might seek to impose these new mandatory obligations in our other Registry Agreements under certain conditions.

Legal challenges. Our Registry Agreements have faced, and could continue to face, challenges, including possible legal challenges resulting from our activities or the activities of ICANN, registrars, registrants and others, and any adverse outcome from such challenges could have a material adverse effect on our business.

Consensus Policies. Our Registry Agreements with ICANN require us to implement Consensus Policies. ICANN could adopt Consensus Policies that are unfavorable to us as the registry operator of .com, .net and our other gTLDs, that are inconsistent with our current or future plans, that impose substantial costs on our business, or that affect our competitive position. Such Consensus Policies could have a material adverse effect on our business.

Governmental regulation and the application of new and existing laws in the U.S. and overseas may slow business growth, increase our costs of doing business, create potential liability and have an adverse effect on our business.

Application of new and existing laws and regulations in the U.S. or overseas to the internet and communications industry can be unclear. The costs of complying or failing to comply with these laws and regulations could limit our ability to operate in our current markets, expose us to compliance costs and substantial liability and result in costly and time-consuming litigation. For example, the government of the People’s Republic of China (“PRC”) has indicated that it will issue new regulations, and has begun to enforce existing regulations, that could impose additional costs on our provision of Registry Services in the PRC and could impact the growth or renewal rates of domain name registrations in the PRC. In addition to registry operators, the regulations will require registrars to obtain a government-issued license for each TLD whose domain name registrations they intend to sell directly to registrants. Their failure to obtain the required licenses could also impact the growth of our business in the PRC.

Foreign, federal or state laws could have an adverse impact on our business, financial condition, results of operations and cash flows, and our ability to conduct business in certain foreign countries. For example, laws designed to restrict who can register and who can distribute domain names, the online distribution of certain materials deemed harmful to children, online gambling, counterfeit goods, and cybersquatting; laws designed to require registrants to provide additional documentation or information in connection with domain name registrations; and laws designed to promote cyber security may impose significant additional costs on our business or subject us to additional liabilities. We have contracts pursuant to which we provide services to the U.S. government and they impose compliance costs, including compliance with the Federal Acquisition Regulation, which could be significant to the Company.

Due to the nature of the internet, it is possible that state or foreign governments might attempt to regulate internet transmissions or prosecute us for violations of their laws. We might unintentionally violate such laws, such laws may be modified and new laws may be enacted in the future. In addition, as we launch our IDN gTLDs, we may raise our profile in certain foreign countries thereby increasing the regulatory and other scrutiny of our operations. Any such developments could increase the costs of regulatory compliance for us, affect our reputation, force us to change our business practices or otherwise materially harm our business. In addition, any such new laws could impede growth of or result in a decline in domain name registrations, as well as impact the demand for our services.

Undetected or unknown defects in our service, security breaches, and DDoS attacks could expose us to liability and harm our business and reputation.

Services as complex as those we offer or develop could contain undetected defects or errors. Despite testing, defects or errors may occur in our existing or new services, which could result in compromised customer data, including DNS data, diversion of development resources, injury to our reputation, tort or contract claims, increased insurance costs or increased service costs, any of which could harm our business. Performance of our services could have unforeseen or unknown adverse effects on the networks over which they are delivered as well as, more broadly, on internet users and consumers, and third-party applications and services that utilize our services, which could result in legal claims against us, harming our business. Our failure to identify, remediate and mitigate security breaches or our inability to meet customer expectations in a timely manner

could also result in loss of or delay in revenues, loss of market share, failure to achieve market acceptance, injury to our reputation and increased costs.

In addition to undetected defects or errors, we are also subject to cyber-attacks and attempted security breaches. We retain certain customer and employee information in our data centers and various domain name registration systems. It is critical to our business strategy that our facilities and infrastructure remain secure and are perceived by the marketplace to be secure. The Company, as an operator of critical internet infrastructure, is frequently targeted and experiences a high rate of attacks. These include the most sophisticated forms of attacks, such as advanced persistent threat attacks and zero-hour threats, which means that the threat is not compiled or has been previously unobserved within our observation and threat indicators space until the moment it is launched, and may well target specific unidentified or unresolved vulnerabilities that exist only within the target's operating environment, making these attacks virtually impossible to anticipate and difficult to defend against. The Shared Registration System, the root zone servers, the Root Zone Management System, the TLD name servers and the TLD zone files that we operate are critical to our Registry Services operations. Despite the significant time and money expended on our security measures, we have been subject to a security breach, as disclosed in our Quarterly Report on Form 10-Q for the quarter ended September 30, 2011, and our infrastructure may in the future be vulnerable to physical break-ins, outages resulting from destructive malware, computer viruses, attacks by hackers or nefarious actors or similar disruptive problems, including hacktivism. It is possible that we may have to expend additional financial and other resources to address such problems. Any physical or electronic break-in or other security breach or compromise of the information stored at our data centers or domain name registration systems may cause an outage of or jeopardize the security of information stored on our premises or in the computer systems and networks of our customers. In such an event, we could face significant liability, customers could be reluctant to use our services and we could be at risk for loss of various security and standards-based compliance certifications needed for operation of our businesses, all or any of which could adversely affect our reputation and harm our business. Such an occurrence could also result in adverse publicity and therefore adversely affect the market's perception of the security of e-commerce and communications over the internet as well as of the security or reliability of our services.

Additionally, our networks have been, and likely will continue to be, subject to DDoS attacks. While we have adopted mitigation techniques, procedures and strategies to defend against such attacks, there can be no assurance that we will be able to defend against every attack, especially as the attacks increase in size and sophistication. Any attack, even if only partially successful, could disrupt our networks, increase response time, negatively impact our ability to meet our contracted service level obligations, and generally hamper our ability to provide reliable service to our Registry Services customers and the broader internet community. Further, we sell DDoS protection services to our Security Services customers. Although we increase our knowledge of and develop new techniques in the identification and mitigation of attacks through the protection of our Security Services customers, the DDoS protection services share some of the infrastructure used in our Registry Services business. Therefore the provision of such services might expose our critical Registry Services infrastructure to temporary degradations or outages caused by DDoS attacks against those customers, in addition to any directed specifically against us and our networks.

Changes to the present multi-stakeholder model of internet governance could materially and adversely impact our business.

The internet is governed under a multi-stakeholder model comprising civil society, the private sector including for-profit and not-for-profit organizations such as ICANN, governments including the U.S. government, academia, non-governmental organizations and international organizations. Changes to the present multi-stakeholder model of internet governance could materially and adversely impact our business.

Role of ICANN. ICANN plays a central coordination role in the multi-stakeholder system. ICANN is mandated by the non-binding Affirmation of Commitments ("AOC") between the DOC and ICANN to uphold a private sector-led multi-stakeholder approach to internet governance for the public benefit. If ICANN fails to uphold or significantly redefines the multi-stakeholder model, it could harm our business and our relationship with ICANN. Additionally, the AOC could be terminated or replaced with a different agreement between ICANN and some other authority which may establish new or different procedures for internet governance that may be unfavorable to us. Also, legal, regulatory or other challenges could be brought challenging the legal authority underlying the roles and actions of ICANN.

Role of foreign governments. Some governments and members of the multi-stakeholder community have questioned ICANN's role with respect to internet governance and, as a result, could seek a multilateral oversight body as a replacement. Additionally, the role of ICANN's Governmental Advisory Committee, which is comprised of representatives of national governments, could change, giving governments more control of internet governance. For example, the AOC has established several multi-party review panels and contemplates a greater involvement by foreign governments and governmental authorities in the oversight and review of ICANN. These periodic review panels may take positions that are unfavorable to us. Some governments and governmental authorities outside the U.S. have in the past disagreed, and may in the future disagree, with the actions, policies or programs of ICANN, the U.S. Government and us relating to the DNS.

Role of the U.S. Government. The U.S. Government through the NTIA coordinates the management of important aspects of the DNS including the IANA functions and the root zone. On March 14, 2014, NTIA announced its intent to transition its oversight of the IANA function to the global multi-stakeholder community. NTIA asked ICANN to convene global stakeholders to develop a proposal to transition the current role played by NTIA in the coordination of the DNS. The NTIA is also coordinating a related and parallel transition of related root zone management functions. These related root zone management functions involve our role as Root Zone Maintainer under the Cooperative Agreement. At NTIA's request, we submitted a proposal with ICANN to NTIA as to how best to remove NTIA's administrative role associated with root zone maintenance in a manner that maintains the security, stability and resiliency of the DNS. We have performed the Root Zone Maintainer function as a community service spanning three decades without compensation at the request of the DOC under the Cooperative Agreement. While it is uncertain how the transition of oversight of the IANA functions and related root zone management functions will affect our role as Root Zone Maintainer, it is anticipated that performance of the root zone maintainer function would be conducted by us under a new Root Zone Maintainer Service Agreement with ICANN once our root zone maintainer function obligations under the Cooperative Agreement are completed. Although our Root Zone Maintainer function is separate from our Registry Agreements, there can be no assurance that the transition of the IANA functions, the transition of the related root zone management functions, and associated transition processes will not negatively impact our business.

As a result of these and other risks, internet governance may change in ways that could materially harm our Registry Services business. For example, after the transition, if we perform the root zone maintainer function under a new agreement, we may be subject to claims challenging the agreement and we may not have immunity from or sufficient indemnification for such claims. If another party is designated to perform the Root Zone Maintainer function, there could be new or increased risks in availability, integrity and publication of the root zone file, which is critical to the operation of the DNS and our operation of our TLDs, including *.com*.

In addition to harming our Registry Services business, changes to internet governance may make it more difficult for us to introduce new services in our Registry Services business and we could also be subject to additional restrictions on how our business is conducted, or to fees or taxes applicable to this business, which may not be equally applicable to our competitors.

We operate two root zone servers and are contracted to perform the Root Zone Maintainer function. Under ICANN's New gTLD program, we face increased risk from these operations.

We operate two of the 13 root zone servers. Root zone servers are name servers that contain authoritative data for the very top of the DNS hierarchy. These servers have the software and DNS configuration data necessary to locate name servers that contain authoritative data for the TLDs. These root zone servers are critical to the functioning of the internet. Under the Cooperative Agreement, we play a key operational role in support of the IANA function as the Root Zone Maintainer. In this role, we provision and publish the authoritative data for the root zone itself multiple times daily and distribute it to all root server operators.

Under its New gTLD Program, ICANN has recommended delegations into the root zone of a large number of new gTLDs. In view of our role as the Root Zone Maintainer, and as a root server operator, we face increased risks should ICANN's delegation of these new gTLDs, which represent unprecedented changes to the root zone in volume and frequency, cause security and stability problems within the DNS and/or for parties who rely on the DNS. Such risks include potential instability of the DNS including potential fragmentation of the DNS should ICANN's delegations create sufficient instability, and potential claims based on our role in the root zone provisioning and delegation process. These risks, alone or in the aggregate, have the potential to cause serious harm to our Registry Services business. Further, our business could also be harmed through security, stability and resiliency degradation if the delegation of new gTLDs into the root zone causes problems to certain components of the DNS ecosystem or other aspects of the global DNS, or other relying parties are negatively impacted as a result of domain name collisions or other new gTLD security issues, such as exposure or other leakage of private or sensitive information.

Additionally, DNSSEC enabled in the root zone and at other levels of the DNS requires new preventative maintenance functions and complex operational practices that did not exist prior to the introduction of DNSSEC. Any failure by us or the IANA functions operator to comply with stated practices, such as those outlined in relevant DNSSEC Practice Statements, introduces risk to DNSSEC relying parties and other internet users and consumers of the DNS, which could have a material adverse impact on our business.

The evolution of internet practices and behaviors and the adoption of substitute technologies may impact the demand for domain names.

Domain names and the domain name system have been used by consumers and businesses to access or disseminate information, conduct e-commerce, and develop an online identity for many years. The growth of technologies such as social media, mobile devices, apps and the dominance of search engines has evolved and changed the internet practices and behaviors of consumers and businesses alike. These changes can impact the demand for domain names by those who purchase domain names for personal, commercial and investment reasons. Factors such as the evolving practices and preferences of internet users

and how they navigate the internet as well the motivation of domain name registrants and how they will monetize their investment in domain names can negatively impact our business. Some domain name registrars and registrants seek to purchase and resell domain names following an increase in their value. Adverse changes in the resale value of domain names could result in a decrease in the demand and/or renewal rates for domain names obtained for resale.

Some domain name registrants use a domain name to access or disseminate information, conduct ecommerce, and develop an online identity. Currently, internet users often navigate to a website either by directly typing its domain name into a web browser, the use of an app on their smart phone or mobile device, the use of a voice recognition technology such as Siri, Cortana, or Echo, or through the use of a search engine. If (i) web browser or internet search technologies were to change significantly; (ii) internet users' preferences or practices shift away from recognizing and relying on web addresses for navigation through the use of new and existing technologies; (iii) internet users were to significantly decrease the use of web browsers in favor of applications to locate and access content; or (iv) internet users were to increasingly use third level domains or alternate identifiers, such as social networking and microblogging sites, in each case the demand for domain names registered by us could decrease. This may trigger current or prospective customers and parties in our target markets to reevaluate their need for registration or renewal of domain names.

Some domain name registrars and registrants seek to generate revenue through advertising on their websites; changes in the way these registrars and registrants are compensated (including changes in methodologies and metrics) by advertisers and advertisement placement networks, such as Google, Yahoo!, Baidu and Bing, have, and may continue to, adversely affect the market for those domain names favored by such registrars and registrants which has resulted in, and may continue to result in, a decrease in demand and/or the renewal rate for those domain names. For example, according to published reports, Google has in the past changed (and may change in the future) its search algorithm, which may decrease site traffic to certain websites and provide less pay-per-click compensation for certain types of websites. This has made such websites less profitable which has resulted in, and may continue to result in, fewer domain registrations and renewals. In addition, as a result of the general economic environment, spending on online advertising and marketing may not increase or may be reduced, which in turn, may result in a further decline in the demand for those domain names.

If any of the above factors negatively impact the renewal of domain names or the demand for new domain names, we may experience material adverse impacts on our business, operating results, financial condition and cash flows.

Many of our target markets are evolving, and if these markets fail to develop or if our products and services are not widely accepted in these markets, our business could be harmed.

We target many new, developing and emerging markets to grow our business. These markets are rapidly evolving, and may not grow. Even if these markets grow, our services may not be widely used or accepted. Accordingly, the demand for our services in these markets is very uncertain. The factors that may affect market acceptance or adoption of our services in these markets include the following:

- regional internet infrastructure development, expansion, penetration and adoption;
- market acceptance and adoption of products and services based upon technologies other than those we use, which are substitutes for our products and services;
- public perception of the security of our technologies and of IP and other networks;
- the introduction and consumer acceptance of new generations of mobile devices, and in particular the use of alternative internet navigation mechanisms other than web browsers;
- increasing cyber threats and the associated customer need and demand for our Security Services offerings;
- government regulations affecting internet access and availability, domain name registrations or the provision of registry services, or e-commerce and telecommunications over the internet;
- preference by markets for the use of their own country's ccTLDs as a substitute or alternative to our TLDs; and
- increased acceptance and use of new gTLDs as substitutes for established gTLDs.

If the market for e-commerce and communications over IP and other networks does not grow or these services are not widely accepted in the market, our business could be materially harmed.

We may face operational and other risks from the introduction of new gTLDs by ICANN and our provision of back-end registry services.

Approximately 1,000 new gTLDs have already been delegated in this initial round of new gTLDs. ICANN plans on offering a second round of new gTLDs after the completion of the initial round, the timing of which is uncertain. As set forth in

the Verisign Labs Technical Report #1130007 version 2.2: New gTLD Security and Stability Considerations released on March 28, 2013, and reiterated in our further publications since then, we continue to believe there are issues regarding the deployment of the new gTLDs that should have been addressed before any new gTLDs were delegated, and despite our and others' efforts, some of these issues have not been addressed by ICANN sufficiently, if at all. For example, domain name collisions have been reported to ICANN, which have resulted in various network interruptions for enterprises as well as confusion and usability issues that have led to phishing attacks. It is anticipated that as additional new gTLDs are delegated more domain name collisions and associated security issues will occur.

We have entered into agreements to provide back-end registry services to other registry operators and applicants for new gTLDs. We may face risks regarding ICANN requirements for mitigating name collisions in the new gTLDs which we operate or for which we provide back-end registry services. For example, the possibility exists that "controlled interruption" periods may disrupt network services or that privacy or secure communications may be impacted as a result of insufficient preparedness by ICANN and the community for the launch of new gTLDs.

Our agreements with ICANN to provide registry services in connection with our new gTLDs, including our IDN gTLDs, and our agreements to provide back-end registry services directly to other applicants and indirectly through reseller relationships expose us to operational and other risks. For example, the increase in the number of gTLDs for which we provide registry services on a standalone basis or as a back-end service provider could further increase costs or increase the frequency or scope of targeted attacks from nefarious actors.

The business environment is highly competitive and, if we do not compete effectively, we may suffer lower demand for our products, price reductions, reduced gross margins and loss of market share.

The internet and communications network services industries are characterized by rapid technological change and frequent new product and service announcements which require us continually to improve the performance, features and reliability of our services, particularly in response to competitive offerings or alternatives to our products and services. In order to remain competitive and retain our market position, we must continually improve our access to technology and software, support the latest transmission technologies, and adapt our products and services to changing market conditions and our customers' and internet users' preferences and practices, or launch entirely new products and services such as new gTLDs in anticipation of, or in response to, market trends. We cannot assure that competing technologies developed by others or the emergence of new industry standards will not adversely affect our competitive position or render our services or technologies noncompetitive or obsolete. In addition, our markets are characterized by announcements of collaborative relationships involving our competitors. The existence or announcement of any such relationships could adversely affect our ability to attract and retain customers. As a result of the foregoing and other factors, we may not be able to compete effectively with current or future competitors, and competitive pressures that we face could materially harm our business.

We face competition in the domain name registry space from other gTLD and ccTLD registries that are competing for the business of entities and individuals that are seeking to obtain a domain name registration and/or establish a web presence. We have applied for new gTLDs including certain IDN gTLDs; however, there is no guarantee that such new gTLDs will be as or more successful than the new gTLDs obtained by our competitors. For example, some of the new gTLDs, including our new gTLDs, may face additional universal acceptance and usability challenges in that current desktop and mobile device software does not ubiquitously recognize these new gTLDs and may be slow to adopt standards or support these gTLDs, even if demand for such products is strong. This is particularly true for IDN gTLDs, but applies to conventional gTLDs as well. As a result of these challenges, it is possible that resolution of domain names within some of these new gTLDs may be blocked within certain state or organizational environments, challenging universal resolvability of these strings and their general acceptance and usability on the internet.

See the "Competition" section in Part I, Item 1 of the Company's Annual Report on Form 10-K for the year ended December 31, 2015, which was filed on February 19, 2016, for further information.

We must establish and maintain strong relationships with registrars and their resellers to maintain their focus on marketing our products and services otherwise our Registry Service business could be harmed.

One registrar accounts for approximately 30% of our revenues. All of our domain name registrations occur through registrars. Registrars and their resellers utilize substantial marketing efforts to increase the demand and/or renewal rates for domain names. Consolidation in the registrar or reseller industry or changes in ownership, management, or strategy among individual registrars or resellers could result in significant changes to their business, operating model and cost structure. Such changes could include reduced marketing efforts or other operational changes that could adversely impact the demand and/or the renewal rates for domain names. With the introduction of new gTLDs, many of our registrars have chosen to, and may continue to choose to, focus their short or long-term marketing efforts on these new offerings and/or reduce the prominence or visibility of our products and services on their e-commerce platforms. Our registrars and resellers not only sell domain name registrations of other competing registries but also sell and support their own services for websites such as email, website hosting, as well as

other services. To the extent that registrars and their resellers focus more on selling and supporting other services and less on the registration and renewal of our TLDs, our revenues could be adversely impacted. Our ability to successfully market our services to, and build and maintain strong relationships with, new and existing registrars or resellers is a factor upon which successful operation of our business is dependent. If we are unable to keep a significant portion of their marketing efforts focused on selling our TLDs as opposed to other competing TLDs or their own services, our business could be harmed.

If we encounter system interruptions or failures, we could be exposed to liability and our reputation and business could suffer.

We depend on the uninterrupted operation of our various systems, secure data centers and other computer and communication networks. Our systems and operations are vulnerable to damage or interruption from:

- power loss, transmission cable cuts and other telecommunications failures;
- damage or interruption caused by fire, earthquake, and other natural disasters;
- attacks, including hacktivism, by miscreants or other nefarious actors;
- computer viruses or software defects;
- physical or electronic break-ins, sabotage, intentional acts of vandalism, terrorist attacks and other events beyond our control;
- risks inherent in or arising from the terms and conditions of our agreements with service providers to operate our networks and data centers;
- state suppression of internet operations; and
- any failure to implement effective and timely remedial actions in response to any damage or interruption.

Most of the computing infrastructure for our Shared Registration System is located at, and most of our customer information is stored in, our facilities in New Castle, Delaware; Dulles, Virginia; and Fribourg, Switzerland. To the extent we are unable to partially or completely switch over to our primary alternate or tertiary sites, any damage or failure that causes interruptions in any of these facilities or our other computer and communications systems could materially harm our business. Although we carry insurance for property damage, we do not carry insurance or financial reserves for such interruptions, or for potential losses arising from terrorism.

In addition, our Registry Services business and certain of our other services depend on the efficient operation of the internet connections to and from customers to our Shared Registration System residing in our secure data centers. These connections depend upon the efficient operation of internet service providers and internet backbone service providers, all of which have had periodic operational problems or experienced outages in the past beyond our scope of control. In addition, if these service providers do not protect, maintain, improve, and reinvest in their networks or present inconsistent data regarding the DNS through their networks, our business could be harmed.

A failure in the operation or update of the root zone servers, the root zone file, the root zone management system, the TLD name servers, or the TLD zone files that we operate, or other network functions, could result in a DNS resolution or other service outage or degradation; the deletion of one or more TLDs from the internet; the deletion of one or more second-level domain names from the internet for a period of time; or a misdirection of a domain name to a different server. A failure in the operation or update of the supporting cryptographic and other operational infrastructure that we maintain could result in similar consequences. A failure in the operation of our Shared Registration System could result in the inability of one or more registrars to register or maintain domain names for a period of time. In the event that a registrar has not implemented back-up services in conformance with industry best practices, the failure could result in permanent loss of transactions at the registrar during that period. Any of these problems or outages could create potential liability, including liability arising from a failure to meet our service level agreements in our Registry Agreements, and could decrease customer satisfaction, harming our business or resulting in adverse publicity that could adversely affect the market's perception of the security of e-commerce and communications over the internet as well as of the security or reliability of our services.

Our operating results may be adversely affected as a result of unfavorable market, economic, social and political conditions.

An unstable global economic, social and political environment, including hostilities and conflicts in various regions both inside and outside the U.S., natural disasters, currency fluctuations, and country specific operating regulations may have a negative impact on demand for our services, our business and our foreign operations. The economic, social and political environment has impacted or may negatively impact, among other things:

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- our customers' continued growth and development of their businesses and our customers' ability to continue as going concerns or maintain their businesses, which could affect demand for our products and services;
- current and future demand for our services, including decreases as a result of reduced spending on information technology and communications by our customers;
- price competition for our products and services;
- the price of our common stock;
- our liquidity and our associated ability to execute on any share repurchase plans;
- our ability to service our debt, to obtain financing or assume new debt obligations; and
- our ability to obtain payment for outstanding debts owed to us by our customers or other parties with whom we do business.

In addition, to the extent that the economic, social and political environment impacts specific industry and geographic sectors in which many of our customers are concentrated, that may have a disproportionate negative impact on our business.

Our international operations subject our business to additional economic and political risks that could have an adverse impact on our revenues and business.

A significant portion of our revenues is derived from customers outside the U.S. Doing business in international markets has required and will continue to require significant management attention and resources. We may also need to tailor some of our services for a particular market and to enter into international distribution and operating relationships. We may fail to maintain our ability to conduct business, including potentially material business operations in some international locations, or we may not succeed in expanding our services into new international markets or expand our presence in existing markets. Failure to do so could materially harm our business. Moreover, local laws and customs in many countries differ significantly from those in the U.S. In many foreign countries, particularly in those with developing economies, it is common for others to engage in business practices that are prohibited by our internal policies and procedures or U.S. law or regulations applicable to us. There can be no assurance that our employees, contractors and agents will not take actions in violation of such policies, procedures, laws and/or regulations. Violations of laws, regulations or internal policies and procedures by our employees, contractors or agents could result in financial reporting problems, investigations, fines, penalties, or prohibition on the importation or exportation of our products and services and could have a material adverse effect on our business. In addition, we face risks inherent in doing business on an international basis, including, among others:

- competition with foreign companies or other domestic companies entering the foreign markets in which we operate, as well as foreign governments actively promoting ccTLDs, which we do not operate;
- legal uncertainty regarding liability, enforcing our contracts and compliance with foreign laws;
- tariffs and other trade barriers and restrictions;
- difficulties in staffing and managing foreign operations;
- currency fluctuations;
- potential problems associated with adapting our services to technical conditions existing in different countries;
- difficulty of verifying customer information, including complying with the customer verification requirements of certain countries;
- more stringent privacy policies in some foreign countries;
- additional vulnerability from terrorist groups targeting U.S. interests abroad;
- potentially conflicting or adverse tax consequences;
- reliance on third parties in foreign markets in which we only recently started doing business; and
- potential concerns of international customers and prospects regarding doing business with U.S. technology companies due to alleged U.S. government data collection policies.

We rely on our intellectual property rights to protect our proprietary assets, and any failure by us to protect or enforce, or any misappropriation of, our intellectual property could harm our business.

Our success depends in part on our internally developed technologies and related intellectual property. Despite our precautions, it may be possible for a third party to copy or otherwise obtain and use our intellectual property without authorization. Furthermore, the laws of foreign countries may not protect our proprietary rights in those countries to the same

extent U.S. law protects these rights in the U.S. In addition, it is possible that others may independently develop substantially equivalent intellectual property. If we do not effectively protect our intellectual property, our business could suffer. Additionally, we have filed patent applications with respect to some of our technology in the U.S. Patent and Trademark Office and patent offices outside the U.S. Patents may not be awarded with respect to these applications and even if such patents are awarded, third parties may seek to oppose or otherwise challenge our patents, and such patents' scope may differ significantly from what was requested in the patent applications and may not provide us with sufficient protection of our intellectual property. In the future, we may have to resort to litigation to enforce and protect our intellectual property rights, to protect our trade secrets or to determine the validity and scope of the proprietary rights of others. This type of litigation is inherently unpredictable and, regardless of its outcome, could result in substantial costs and diversion of management attention and technical resources. Some of the software and protocols used in our business are based on standards set by standards setting organizations such as the Internet Engineering Task Force. To the extent any of our patents are considered "standards essential patents," we may be required to license such patents to our competitors on reasonable and non-discriminatory terms.

We also license third-party technology that is used in some of our products and services to perform key functions. These third-party technology licenses may not continue to be available to us on commercially reasonable terms or at all. The loss of or our inability to obtain or maintain any of these technology licenses could hinder or increase the cost of our launching new products and services, entering into new markets and/or otherwise harm our business. Some of the software and protocols used in our Registry Services business are in the public domain or may otherwise become publicly available, which means that such software and protocols are equally available to our competitors.

We rely on the strength of our Verisign brand to help differentiate ourselves in the marketing of our products. Dilution of the strength of our brand could harm our business. We are at risk that we will be unable to fully register, build equity in, or enforce the Verisign logo in all markets where Verisign products and services are sold. In addition, in the U.S. and most other countries' word marks for TLDs have currently not been successfully registered as trademarks. Accordingly, we may not be able to fully realize or maintain the value of these intellectual property assets.

We could become subject to claims of infringement of intellectual property of others, which could be costly to defend and could harm our business.

We cannot be certain that we do not and will not infringe the intellectual property rights of others. Claims relating to infringement of intellectual property of others or other similar claims have been made against us in the past and could be made against us in the future. It is possible that we could become subject to additional claims for infringement of the intellectual property of third parties. The international use of our logo could present additional potential risks for third party claims of infringement. Any claims, with or without merit, could be time consuming, result in costly litigation and diversion of technical and management personnel attention, cause delays in our business activities generally, or require us to develop a non-infringing logo or technology or enter into royalty or licensing agreements. Royalty or licensing agreements, if required, may not be available on acceptable terms or at all. If a successful claim of infringement were made against us, we could be required to pay damages or have portions of our business enjoined. If we could not identify and adopt an alternative non-infringing logo, develop non-infringing technology or license the infringed or similar technology on a timely and cost-effective basis, our business could be harmed.

A third party could claim that the technology we license from other parties infringes a patent or other proprietary right. Litigation between the licensor and a third party or between us and a third party could lead to royalty obligations for which we are not indemnified or for which indemnification is insufficient, or we may not be able to obtain any additional license on commercially reasonable terms or at all.

In addition, legal standards relating to the validity, enforceability, and scope of protection of intellectual property rights in internet-related businesses, including patents related to software and business methods, are uncertain and evolving. Because of the growth of the internet and internet-related businesses, patent applications are continuously being filed in connection with internet-related technology. There are a significant number of U.S. and foreign patents and patent applications in our areas of interest, and we believe that there has been, and is likely to continue to be, significant litigation in the industry regarding patent and other intellectual property rights.

We could become involved in claims, lawsuits or investigations that may result in adverse outcomes.

In addition to possible intellectual property litigation and infringement claims, we are, and may in the future, become involved in other claims, lawsuits and investigations, including with respect to the root zone maintainer agreement now under negotiation with ICANN. Such proceedings may initially be viewed as immaterial but could prove to be material. Litigation is inherently unpredictable, and excessive verdicts do occur. Adverse outcomes in lawsuits and investigations could result in significant monetary damages, including indemnification payments, or injunctive relief that could adversely affect our ability to conduct our business and may have a material adverse effect on our financial condition, results of operations and cash flows. Given the inherent uncertainties in litigation, even when we are able to reasonably estimate the amount of possible loss or range

of loss and therefore record an aggregate litigation accrual for probable and reasonably estimable loss contingencies, the accrual may change in the future due to new developments or changes in approach. In addition, such investigations, claims and lawsuits could involve significant expense and diversion of management's attention and resources from other matters.

We continue to explore new strategic initiatives, the pursuit of any of which may pose significant risks and could have a material adverse effect on our business, financial condition and results of operations.

We are exploring a variety of possible strategic initiatives which may include, among other things, the investment in, and the pursuit of, new revenue streams, services or products, changes to our offerings, initiatives to leverage our patent portfolio, our Security Services business, back-end registry services and IDN gTLDs. In addition, we have evaluated and are pursuing and will continue to evaluate and pursue acquisitions of TLDs that are currently in operation and those that have not yet been awarded as long as they support our growth strategy.

Any such strategic initiative may involve a number of risks, including: the diversion of our management's attention from our existing business to develop the initiative, related operations and any requisite personnel; possible regulatory scrutiny or third-party claims; possible material adverse effects on our results of operations during and after the development process; our possible inability to achieve the intended objectives of the initiative; as well as damage to our reputation if we are unsuccessful in pursuing a strategic initiative. Such initiatives may result in a reduction of cash or increased costs. We may not be able to successfully or profitably develop, integrate, operate, maintain and manage any such initiative and the related operations or employees in a timely manner or at all. Furthermore, under our agreements with ICANN, we are subject to certain restrictions in the operation of *.com*, *.net*, *.name* and other TLDs, including required ICANN approval of new registry services for such TLDs. If any new initiative requires ICANN review or ICANN determines that such a review is required, we cannot predict whether this process will prevent us from implementing the initiative in a timely manner or at all. Any strategic initiative to leverage our patent portfolio will likely increase litigation risks from potential licensees and we may have to resort to litigation to enforce our intellectual property rights.

We depend on key employees to manage our business effectively, and we may face difficulty attracting and retaining qualified leaders.

We operate in a unique competitive and highly regulated environment and we depend on the knowledge, experience, and performance of our senior management team and other key employees in this regard and otherwise. We periodically experience changes in our management team. If we are unable to attract, integrate, retain and motivate these key individuals and additional highly skilled technical, sales and marketing, and other experienced employees, and implement succession plans for these personnel, our business may suffer. For example, our service products are highly technical and require individuals skilled and knowledgeable in unique platforms and software implementation.

Changes in, or interpretations of, tax rules and regulations or our tax positions may adversely affect our effective tax rates.

We are subject to income taxes in both the U.S. and numerous foreign jurisdictions. Significant judgment is required in determining our worldwide provision for income taxes. In the ordinary course of our business, there are many transactions and calculations where the ultimate tax determination is uncertain. We are subject to audit by various tax authorities. In accordance with U.S. GAAP, we recognize income tax benefits, net of required valuation allowances and accrual for uncertain tax positions. For example, we claimed a worthless stock deduction on our 2013 federal income tax return and recorded a net income tax benefit of \$380.1 million. Although we believe our tax estimates are reasonable, the final determination of tax audits and any related litigation could be materially different than that which is reflected in historical income tax provisions and accruals. Should additional taxes be assessed as a result of an audit or litigation, an adverse effect on our results of operations, financial condition and cash flows in the period or periods for which that determination is made could result.

A significant portion of our foreign earnings for the current fiscal year was earned in low tax jurisdictions. Our effective tax rate could fluctuate significantly on a quarterly basis and could be adversely affected to the extent earnings are lower than anticipated in countries where we have lower statutory rates and higher than anticipated in countries where we have higher statutory rates.

Various legislative proposals that would reform U.S. corporate tax laws have been proposed by the Obama administration as well as members of Congress, including proposals that would significantly impact how U.S. multinational corporations are taxed on foreign earnings. We are unable to predict whether these or other proposals will be implemented. Although we cannot predict whether or in what form any proposed legislation may pass, if enacted, such legislation could have a material adverse impact on our tax expense or cash flow.

Our foreign earnings, which are indefinitely reinvested offshore, constitute a majority of our cash, cash equivalents and marketable securities, and there is a high cost associated with a change in our indefinite reinvestment assertion or a repatriation of those funds to the U.S.

A majority of our cash, cash equivalents and marketable securities are held by our foreign subsidiaries. Our foreign earnings are indefinitely reinvested offshore and are not available to be used in the U.S. for working capital needs, debt obligations, acquisitions, share repurchases, dividends or other general corporate purposes. In the event that funds from our foreign operations are needed in the U.S. for any purpose, we would be required to accrue and pay additional U.S. taxes in order to repatriate those funds, which could be significant. Further, if we are unable to indefinitely reinvest our foreign earnings our effective tax rate would increase. These could adversely impact our business valuation and stock price.

Our marketable securities portfolio could experience a decline in market value, which could materially and adversely affect our financial results.

As of June 30, 2016, we had \$1.9 billion in cash, cash equivalents, marketable securities and restricted cash, of which \$1.7 billion was invested in marketable securities. The marketable securities consist primarily of debt securities issued by the U.S. Treasury meeting the criteria of our investment policy, which is focused on the preservation of our capital through the investment in investment grade securities. We currently do not use derivative financial instruments to adjust our investment portfolio risk or income profile.

These investments, as well as any cash deposited in bank accounts, are subject to general credit, liquidity, market and interest rate risks, which may be exacerbated by unusual events, such as the U.S. debt ceiling crisis and the Eurozone crisis, which affected various sectors of the financial markets and led to global credit and liquidity issues. During the 2008 financial crisis, the volatility and disruption in the global credit market reached unprecedented levels. If the global credit market deteriorates again or other events negatively impact the market for U.S. Treasury securities, our investment portfolio may be impacted and we could determine that some of our investments have experienced an other-than-temporary decline in fair value, requiring an impairment charge which could adversely impact our results of operations and cash flows.

We are subject to the risks of owning real property.

We own the land and building in Reston, Virginia, which constitutes our headquarters facility. Ownership of this property, as well as our data centers in Dulles, Virginia and New Castle, Delaware, may subject us to risks, including:

- adverse changes in the value of the properties, due to interest rate changes, changes in the commercial property markets, or other factors;
- ongoing maintenance expenses and costs of improvements;
- the possible need for structural improvements in order to comply with environmental, health and safety, zoning, seismic, disability law, or other requirements;
- the possibility of environmental contamination or notices of violation from federal or state environmental agencies; and
- possible disputes with neighboring owners, tenants, service providers or others.

We have anti-takeover protections that may discourage, delay or prevent a change in control that could benefit our stockholders.

Our amended and restated Certificate of Incorporation and Bylaws contain provisions that could make it more difficult for a third party to acquire us without the consent of our Board of Directors ("Board"). These provisions include:

- our stockholders may take action only at a duly called meeting and not by written consent;
- special meetings of our stockholders may be called only by the chairman of the board of directors, the president, our Board, or the secretary (acting as a representative of the stockholders) whenever a stockholder or group of stockholders owning at least thirty-five percent (35%) in the aggregate of the capital stock issued, outstanding and entitled to vote, and who held that amount in a net long position continuously for at least one year, so request in writing;
- vacancies on our Board can be filled until the next annual meeting of stockholders by a majority of directors then in office; and
- our Board has the ability to designate the terms of and issue new series of preferred stock without stockholder approval.

In addition, Section 203 of the General Corporation Law of Delaware prohibits a publicly held Delaware corporation from engaging in a business combination with an interested stockholder, generally a person which together with its affiliates owns or within the last three years has owned 15% or more of our voting stock, for a period of three years after the date of the transaction in which the person became an interested stockholder, unless in the same transaction the interested stockholder acquired 85% ownership of our voting stock (excluding certain shares) or the business combination is approved in a prescribed manner. Section 203 therefore may impact the ability of an acquirer to complete an acquisition of us after a successful tender offer and accordingly could discourage, delay or prevent an acquirer from making an unsolicited offer without the approval of our Board.

We have a considerable number of common shares subject to future issuance.

As of June 30, 2016, we had one billion authorized common shares, of which 107.2 million shares were outstanding. In addition, of our authorized common shares, 12.7 million common shares were reserved for issuance pursuant to outstanding equity and employee stock purchase plans (“Equity Plans”), and 36.4 million shares were reserved for issuance upon conversion of our 3.25% Junior Subordinated Convertible Debentures due 2037 (“Subordinated Convertible Debentures”). As a result, we keep substantial amounts of our common stock available for issuance upon exercise or settlement of equity awards outstanding under our Equity Plans and/or the conversion of Subordinated Convertible Debentures into our common stock. Issuance of all or a large portion of such shares would be dilutive to existing security holders, could adversely affect the prevailing market price of our common stock and could impair our ability to raise additional capital through the sale of equity securities.

Our financial condition and results of operations could be adversely affected if we do not effectively manage our indebtedness.

We have a significant amount of outstanding debt, and we may incur additional indebtedness in the future. Our substantial indebtedness, including any future indebtedness, requires us to dedicate a significant portion of our cash flow from operations or to arrange alternative liquidity sources to make principal and interest payments, when due, or to repurchase or settle our debt, if triggered, by certain corporate events, certain events of default, or conversion. It could also limit our flexibility in planning for or reacting to changes in our business and our industry, or make required capital expenditures and investments in our business; make it difficult or more expensive to refinance our debt or obtain new debt; trigger an event of default; and increase our vulnerability to adverse changes in general economic and industry conditions. Some of our debt contains covenants which may limit our operating flexibility, including restrictions on share repurchases, dividends, prepayment or repurchase of debt, acquisitions, disposing of assets, if we do not continue to meet certain financial ratios. Any rating assigned to our debt securities could be lowered or withdrawn by a rating agency, which could make it more difficult or more expensive for us to obtain additional debt financing in the future. The settlement amount, contingent interest, and potential recapture of income tax deductions related to our Subordinated Convertible Debentures can be substantial, and can increase significantly based on changes in our stock price. The occurrence of any of the foregoing factors could have a material adverse effect on our business, cash flows, results of operations and financial condition.

ITEM 2. UNREGISTERED SALES OF EQUITY SECURITIES AND USE OF PROCEEDS

The following table presents the share repurchase activity during the three months ended June 30, 2016:

	Total Number of Shares Purchased	Average Price Paid per Share	Total Number of Shares Purchased as Part of Publicly Announced Plans or Programs (1)	Approximate Dollar Value of Shares That May Yet Be Purchased Under the Plans or Programs (1)
	(Shares in thousands)			
April 1 - 30, 2016	550	\$ 89.22	550	\$ 866.7million
May 1 - 31, 2016	576	\$ 85.40	576	\$ 817.5million
June 1 - 30, 2016	608	\$ 84.95	608	\$ 765.9million
	<u>1,734</u>		<u>1,734</u>	

(1) Effective February 11, 2016, our Board of Directors authorized the repurchase of approximately \$611.2 million of our common stock, in addition to the \$388.8 million of our common stock remaining available for repurchase under the previous share repurchase program, for a total repurchase authorization of up to \$1.0 billion of our common stock. The share repurchase program has no expiration date. Purchases made under the program could be effected through open market transactions, block purchases, accelerated share repurchase agreements or other negotiated transactions.

ITEM 5. OTHER INFORMATION

On July 27, 2016, our Board of Directors amended our Bylaws to implement the changes discussed in the Company's proxy statement for the 2016 Annual Meeting of Stockholders. The amended Bylaws were effective upon approval by the Board of Directors.

The Bylaws were amended to provide for "proxy access" by eligible stockholders. Specifically, the Bylaws permit a stockholder, or a group of up to twenty stockholders, that has continuously owned at least 3% of the Company's outstanding stock entitled to vote in the election of directors for at least three years, to nominate and include in the Company's proxy materials for an annual meeting of stockholders up to the greater of two directors or 20% of the number of the directors then in office provided that the nominating stockholder(s) and nominee(s) satisfy the requirements described in the provision. (Article I, Section 14). As a result of these amendments, if any stockholder intends to include a director nominee in the proxy statement for the Company's 2017 Annual Meeting of Stockholders, the stockholder must notify the Secretary of the Company in writing and the notice must be delivered to the Secretary at the principal executive office of the Company not earlier than the close of business on November 30, 2016, nor later than the close of business on December 30, 2016. The nomination must otherwise comply with the applicable requirements of the Bylaws.

In addition, the Bylaws were amended to, among other things:

- Conform the definition of stock ownership used in the provisions on stockholder-requested special meetings to the definition used in the proxy access bylaw. (Article I, Section 2)
- Clarify the methods for giving notice for meetings of stockholders and Board of Directors meetings. (Article I, Section 4 and Article II, Section 11)
- Implement majority voting in uncontested director elections with plurality voting retained for contested elections. (Article I, Section 10 and Article II, Section 3)
- Add provisions requiring all director nominees, regardless of whether nominees are nominated by the Board or a stockholder, to provide certain information and representations. (Article I, Section 12)
- Include an advance notice provision regarding nominating persons for election to the Board and proposing other business to be considered at annual and special stockholder meetings. For annual meetings, this provision requires a stockholder to provide notice and certain information about the stockholder and the nominee or item of business generally not later than the close of business on the 90th day nor earlier than the close of business on the 120th day prior to the first anniversary of the previous year's annual meeting of stockholders. (Article I, Section 13) As a result of the amendments, if any stockholder intends to nominate a director candidate or propose other business for consideration at the Company's 2017 Annual Meeting of Stockholders (not including a proposal intended for inclusion in the Company's proxy statement in accordance with the SEC's Rule 14a-8 under the Securities Exchange Act of 1934), the stockholder must notify the Secretary of the Company in writing and the notice must be delivered to the Secretary at the principal executive office of the Company not earlier than the close of business on February 9, 2017, nor later than the close of business on March 11, 2017. The notice also must comply with the applicable requirements of the Bylaws.
- Clarify the Board's ability to use the methods in Delaware General Corporation Law Section 141(f) when the Board is taking action by unanimous consent in lieu of a meeting, which includes the use of electronic transmission. (Article II, Section 14)
- Conform provisions relating to Board committees and subcommittees to amendments to the Delaware General Corporation Law set to take effect on August 1, 2016. (Article II, Section 17)
- Clarify the Board's ability to delegate authority to officers, employees and agents outside the Bylaws. (Article III, Section 1)
- Remove inoperative language about stockholder action by written consent without a meeting of stockholders.
- Other miscellaneous wording changes throughout the document to make corrections, to clarify language and to conform the language in the Bylaws to that of the Certificate or the Delaware General Corporation Law.

This description of the amendments to the Bylaws is qualified in its entirety by reference to the text of the Bylaws filed as Exhibit 3.02 to this Form 10-Q.

ITEM 6. EXHIBITS

As required under Item 6-Exhibits, the exhibits filed as part of this report are provided in this separate section. The exhibits included in this section are as follows:

Exhibit Number	Exhibit Description
3.02	Bylaws of VeriSign, Inc.
31.01	Certification of Principal Executive Officer pursuant to Exchange Act Rule 13a-14(a).
31.02	Certification of Principal Financial Officer pursuant to Exchange Act Rule 13a-14(a).
32.01	Certification of Principal Executive Officer pursuant to Exchange Act Rule 13a-14(b) and Section 1350 of Chapter 63 of Title 18 of the U.S. Code (18 U.S.C. 1350). *
32.02	Certification of Principal Financial Officer pursuant to Exchange Act Rule 13a-14(b) and Section 1350 of Chapter 63 of Title 18 of the U.S. Code (18 U.S.C. 1350). *
101.INS	XBRL Instance Document
101.SCH	XBRL Taxonomy Extension Schema
101.CAL	XBRL Taxonomy Extension Calculation Linkbase
101.DEF	XBRL Taxonomy Extension Definition Linkbase
101.LAB	XBRL Taxonomy Extension Label Linkbase
101.PRE	XBRL Taxonomy Extension Presentation Linkbase

* As contemplated by SEC Release No. 33-8212, these exhibits are furnished with this Quarterly Report on Form 10-Q and are not deemed filed with the SEC and are not incorporated by reference in any filing of VeriSign, Inc. under the Securities Act of 1933 or the Securities Exchange Act of 1934, whether made before or after the date hereof and irrespective of any general incorporation language in such filings.

BYLAWS

of

VERISIGN, INC.

ARTICLE I

Stockholders

Section 1. Annual Meeting. An annual meeting of the stockholders of the corporation, for the election of the directors to succeed those whose terms expire and for the transaction of such other business as may properly come before the meeting, shall be held at such place, on such date and at such time as the Board of Directors shall each year fix.

Section 2. Special Meetings. (a) Special meetings of the stockholders, for any purpose or purposes prescribed in the notice of the meeting, shall be held at such place, on such date, and at such time as determined by the Board of Directors and may be called only by (i) the Board of Directors pursuant to a resolution adopted by a majority of the total number of directors authorized by resolutions (whether or not there exist any vacancies in previously authorized directorships at the time any such resolution is presented to the Board of Directors for adoption), (ii) the Chairman of the Board of Directors, (iii) the President or (iv) the Secretary whenever a stockholder or group of stockholders Owning (as defined below) at least thirty-five percent (35%) in the aggregate of the capital stock issued, outstanding and entitled to vote, and who held that amount in a net long position continuously for at least one year (the "Eligibility Criteria"), so request in writing. Business transacted at special meetings shall be confined to the purpose or purposes stated in the notice of the meeting.

In the case of clause (iv) of the immediately preceding sentence, each such written request must be signed by each stockholder making the request and delivered to the Secretary at the principal executive office of the corporation and shall set forth (a) a brief description of the business desired to be brought before the special meeting of the stockholders, including the complete text of any resolutions to be presented at the special meeting of the stockholders with respect to such business, and the reasons for conducting such business at the meeting; (b) the date of request; (c)(i) if any stockholder making the request is a registered holder of the corporation's stock, the name, address and ownership information, as they appear on the corporation's books, of each such stockholder and (ii) if any stockholder making the request is not a registered holder of the corporation's stock, proof of satisfaction by each such stockholder of the Eligibility Criteria which shall be substantially similar to the proof specified by Rule 14a-8(b)(2)(i) or (ii) under the Securities Exchange Act of 1934 (the "Exchange Act"), as amended from time to time, in each case, including a written agreement to update and supplement such information upon the occurrence of any changes thereto; (d) a representation that each requesting stockholder intends to appear in person or by proxy at the special meeting of the stockholders to transact the business specified; and (e) a representation that each requesting stockholder intends to hold the shares of the corporation's stock set forth in the written request through the date of the special meeting of the stockholders; provided that, if any such requesting stockholder (x) fails to satisfy the Eligibility Criteria or to follow one of the procedural requirements described in clauses (a) through (e) of this sentence (the "Procedural Requirements"), the corporation shall not be obligated to call a special meeting unless the remaining requesting stockholders continue to satisfy the Eligibility Criteria and the Procedural Requirements or (y) fails to hold the required number of shares through the date of the special meeting (a "Non Performing Holder"), the corporation may cancel the special meeting (if previously called but not yet held) unless the remaining requesting stockholders have not failed to hold such shares through such date and continue to satisfy the Eligibility Criteria; provided, further, that the corporation may disregard future requests to call special meetings from each Non Performing Holder for the following two calendar years. Following receipt by the Secretary of a written request of stockholders that complies with the requirements set forth in this Section 2 (a "Special Meeting Request"), the Secretary shall call a special meeting of the stockholders.

(b) Revocation of Special Meeting Request. A stockholder may revoke a Special Meeting Request at any time by written revocation. Following such revocation, the Board of Directors, in its discretion, may cancel the special meeting unless, in the case of a Special Meeting Request, any remaining requesting stockholders continue to satisfy the Eligibility Criteria and the Procedural Requirements. For purposes of this Section 2, written revocation shall mean delivering a notice of revocation to the Secretary.

(c) Limitations. The Secretary shall not call a special meeting in response to a Special Meeting Request if (i) an identical or substantially similar item (as determined by the Board of Directors, a "Similar Item") is included or will be included in the corporation's notice of meeting as an item of business to be brought before a meeting of stockholders that will be held not later than ninety (90) days after the delivery date of the Special Meeting Request (the "Delivery Date"); (ii) the Delivery Date is during the period commencing ninety (90) days prior to the date of the next annual meeting of stockholders and ending on the date of the next annual meeting of stockholders; (iii) a Similar Item was presented at any meeting of stockholders held within one hundred and eighty (180) days prior to the Delivery Date; (iv) the Special Meeting Request relates to an item of business that is not a proper subject for stockholder action under applicable law; or (v) such Special Meeting Request was made in a manner that involved a violation of Regulation 14A under the Exchange Act or other applicable law. For purposes of this Section 2, the election of directors shall be deemed to be a Similar Item with respect to all items of business involving the election or removal of directors.

For the purposes of this Section 2, a stockholder or beneficial owner is deemed to "Own" only those outstanding shares of capital stock as to which the person possesses both (A) the full voting and investment rights pertaining to the shares and (B) the full economic interest in (including the opportunity for profit and risk of loss on) such shares, except that the number of shares calculated in accordance with clauses (A) and (B) shall not include any shares (1) sold by such person in any transaction that has not been settled or closed, (2) borrowed by the person for any purposes or purchased by the person pursuant to an agreement to resell, or (3) subject to any option, warrant, forward contract, swap, contract of sale, or other derivative or similar agreement entered into by the person, whether the instrument or agreement is to be settled with shares or with cash based on the notional amount or value of outstanding shares of capital stock, if the instrument or agreement has, or is intended to have, or if exercised would have, the purpose or effect of (x) reducing in any manner, to any extent or at any time in the future, the person's full right to vote or direct the voting of the shares, and/or (y) hedging, offsetting, or altering to any degree any gain or loss arising from the full economic ownership of the shares by the person. The terms "Owned," "Owning" and other variations of the word "Own," when used with respect to a stockholder or beneficial owner, have correlative meanings. For purposes of clauses (1) through (3), the term "person" includes its affiliates. A stockholder or beneficial owner "Owns" shares held in the name of a nominee or other intermediary so long as the person retains the right to instruct how the shares are voted with respect to the election of directors and the right to direct the disposition thereof and possesses the full economic interest in the shares. The person's Ownership of shares is deemed to continue during any period in which the person has delegated any voting power by means of a proxy, power of attorney, or other instrument or arrangement that is revocable at any time by the stockholder.

Section 3. Place of Meetings. All meetings of stockholders shall be held at the principal office of the corporation unless a different place is fixed by the person or persons calling the meeting and stated in the notice of the meeting.

Section 4. Notices of Meetings and Adjourned Meetings. A written notice of each annual or special meeting of the stockholders stating the place, date, and hour thereof, shall be given by the Secretary (or the person or persons calling the meeting), not less than 10 nor more than 60 days before the date of the meeting, to each stockholder entitled to such notice, and, if mailed, shall be given by depositing it postage prepaid in the United States mail, directed to each stockholder at his or her address as it appears on the records of the corporation. Notices of all special meetings of stockholders shall state the purpose or purposes for which the meeting is called. An affidavit of the Secretary, Assistant Secretary, or transfer agent of the corporation that the notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. No notice need be given to any person with whom communication is unlawful or to any person who has waived such notice in the manner permitted by Section 229 of the Delaware General Corporation Law (the "DGCL"). When a meeting is adjourned to another time and place, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken except that, if the adjournment is for more than 30 days or if, after the adjournment, a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given as provided in this Section 4.

Section 5. Quorum. At any meeting of the stockholders, a quorum for the transaction of business shall consist of one or more individuals appearing in person or represented by proxy and owning or representing a majority of the shares of the corporation then outstanding and entitled to vote thereat, unless or except to the extent that the presence of a larger number may be required by law (including as required from time to time by the DGCL or the Certificate of Incorporation of the corporation (the "Certificate of Incorporation")). Where a separate vote by a class or classes is required, a majority of the shares of such class or classes then outstanding and entitled to vote present in person or by proxy shall constitute a quorum entitled to take action with respect to that vote on that matter. If a quorum shall fail to attend any meeting, the chairman of the meeting or the holders of a majority of the shares of stock entitled to vote thereat who are present, in person or by proxy, may adjourn the meeting to another place, date, or time.

Section 6. Organization. Such person as the Board of Directors may have designated or, in the absence of such a person, the President of the corporation or, in his or her absence, such person as may be chosen by the holders of a majority of the shares entitled to vote thereat who are present, in person or by proxy, shall call to order any meeting of the stockholders and act as chairman of the meeting. In the absence of the Secretary of the corporation, the secretary of the meeting shall be such person as the chairman appoints.

Section 7. Conduct of Business. The chairman of any meeting of stockholders shall determine the order of business and the procedure at the meeting, including such regulation of the manner of voting and the conduct of discussion as seems to him or her in order.

Section 8. Voting. Unless otherwise provided in the Certificate of Incorporation and subject to the provisions of Section 6 of Article IV hereof, each stockholder shall have one vote for each share of stock entitled to vote held by him or her of record according to the records of the corporation. Persons holding stock in a fiduciary capacity shall be entitled to vote the shares so held. Persons whose stock is pledged shall be entitled to vote unless the pledgor in a transfer on the books of the corporation has expressly empowered the pledgee to vote the pledged shares, in which case only the pledgee or his or her proxy shall be entitled to vote. If shares stand of record in the names of two or more persons or if two or more persons have the same fiduciary relationship respecting the shares then, unless the Secretary is given written notice to the contrary and is furnished with a copy of the instrument or order appointing them or creating the relationship wherein it is so provided to the contrary: (a) if only one votes, his or her act binds all; (b) if more than one votes, the act of the majority so voting binds all; and (c) if more than one votes and the vote is evenly split, the effect shall be as provided by law.

Section 9. Proxies. Each stockholder entitled to vote at a meeting of stockholders may authorize another person or any group of persons to act for him or her by proxy, but no such proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period.

Section 10. Action at Meeting.

(a) Voting - General. When a quorum is present at any meeting, action of the stockholders on any matter properly brought before such meeting, other than the election of directors, shall require, and may be effected by, the affirmative vote of the holders of a majority in interest of the stock present or represented by proxy and entitled to vote on the subject matter, except where a different vote is expressly required by law, the Certificate of Incorporation or these Bylaws, in which case such express provision shall govern and control.

(b) Voting - Directors. Except as provided in Section 7 of Article II of these Bylaws, each director shall be elected by the affirmative vote of the Majority of the Votes Cast (as defined herein) with respect to that director at any meeting for the election of directors at which a quorum is present, provided that if as of a date that is five business days in advance of the date the corporation files its definitive proxy statement (regardless of whether or not thereafter revised or supplemented) with the Securities and Exchange Commission ("SEC") the number of nominees exceeds the number of directors to be elected, the directors shall be elected by the vote of a plurality of the votes cast at such meeting. If the Certificate of Incorporation so provides, no ballot shall be required for the election of directors unless requested by a stockholder present or represented at the meeting and entitled to vote in the election. For purposes of this paragraph (b), the term "Majority of the Votes Cast" means, with respect to a nominee for director, that the number of shares voted "for" the election of that nominee must exceed the number of votes cast "against" that nominee.

Section 11. Stockholder Lists. The officer who has charge of the stock ledger of the corporation shall prepare and make available, at least 10 days before every meeting of stockholders, a complete list of stockholders entitled to vote at the meeting, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder for any purpose germane to the meeting for a period of at least 10 days prior to the meeting during ordinary business hours, at the principal place of business of the corporation. Such list shall also be produced and kept at the time and place of the meeting during the whole time thereof, and may be inspected by any stockholder who is present. The stock ledger shall be the only evidence as to who are the stockholders entitled to examine the stock ledger, the list required by this section or the books of the corporation, or to vote in person or by proxy at any meeting of stockholders.

Section 12. Submission of Information by Director Nominees. (a) To be eligible to be a nominee for election or re-election as a director of the corporation, a person must deliver to the Secretary at the principal executive office of the corporation the following information:

(i) a written representation and agreement, which shall be signed by such person and shall represent and agree that such person: (A) consents to serving as a director if elected and (if applicable) to being named in the corporation's proxy statement and form of proxy as a nominee; (B) is not and will not become a party to any agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person or entity: (1) as to how the person, if elected as a director, will act or vote on any issue or question that has not been disclosed to the corporation, or (2) that could limit or interfere with the person's ability to comply, if elected as a director, with such person's fiduciary duties under applicable law; (C) is not and will not become a party to any agreement, arrangement or understanding with any person or entity other than the corporation with respect to any direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director that has not been disclosed to the corporation; and (D) if elected as a director, will comply with all of the corporation's corporate governance, conflict of interest, confidentiality, and stock ownership and trading policies and guidelines, and any other corporation policies and guidelines applicable to directors (which will be provided to such person promptly following a request therefor); and

(ii) all completed and signed questionnaires required of the corporation's directors (which will be provided to such person promptly following a request therefor).

(b) A nominee for election or re-election as a director of the corporation shall also provide to the corporation such other information as it may reasonably request. The corporation may request such additional information as necessary to permit the corporation to determine the eligibility of such person to serve as a director of the corporation, including information relevant to a determination whether such person can be considered an independent director.

(c) Notwithstanding any other provision of these Bylaws, if a stockholder has submitted notice of an intent to nominate a candidate for election or re-election as a director pursuant to Section 13 of this Article I or Section 14 of this Article I, the questionnaires described in Section 12(a)(ii) above and the additional information described in clause (b) of this Section 12 above shall be considered timely if provided to the corporation promptly upon request by the corporation, but in any event within the time period for delivery of a stockholder's notice pursuant to Section 13 of this Article I or Section 14 of this Article I, respectively, and all information provided pursuant to this Section 12 shall be deemed part of the stockholder's notice submitted pursuant to Section 13 of this Article I or Section 14 of this Article I, respectively.

Section 13. Notice of Stockholder Business; Nominations.

(a) Annual Meeting.

(i) Nominations of persons for election to the Board of Directors and the proposal of business other than nominations to be considered by the stockholders may be made at an annual meeting of stockholders only (A) pursuant to the corporation's notice of meeting (or any supplement thereto), (B) by or at the direction of the Board of Directors (C) by any stockholder of the corporation who is a stockholder of record at the time the notice provided for in this Section 13(a) is delivered to the Secretary of the corporation, who is entitled to vote at the meeting and who complies with the notice procedures set forth in this Section 13(a) or (D) by an Eligible Stockholder (as defined in clause (c) of Section 14 of this Article I) pursuant to the requirements of Section 14 of this Article I. For the avoidance of doubt, the foregoing clauses (C) and (D) shall be the exclusive means for a stockholder to make nominations or propose other business at an annual meeting of stockholders (other than a proposal included in the corporation's proxy statement pursuant to and in compliance with Rule 14a-8 under the Exchange Act).

(ii) For nominations or other business to be properly brought before an annual meeting by a stockholder pursuant to clause (C) of the foregoing paragraph, the stockholder must have given timely notice thereof in writing to the Secretary of the corporation and, in the case of business other than nominations, such business must be a proper subject for stockholder action. To be timely, a stockholder's notice must be delivered to the Secretary at the principal executive office of the corporation not later than the close of business (as defined in clause (c)(ii) of this Section 13) on the 90th day nor earlier than the close of business on the 120th day prior to the first anniversary of the preceding year's annual meeting; provided, however, that in the event that the date of the annual meeting is more than 30 days before or more than 60 days after such anniversary date, or if no annual meeting was held in the preceding year, notice by the stockholder to be timely must be so delivered not earlier than the close of business on the 120th day prior to such annual meeting and not later than the close of business on the later of the 90th day prior to such annual meeting or the 10th day following the date on which public announcement (as defined in clause (c)(ii) of this Section 13) of the date of such meeting is first made by the corporation. In no event shall an adjournment or recess of an annual meeting, or a postponement of an annual meeting for which notice of the meeting has already been given to stockholders or with respect to which there has been a public announcement of the date of the meeting, commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above. Such stockholder's notice shall set forth:

(A) as to each person whom the stockholder proposes to nominate for election or re-election as a director (1) all information relating to such person that is required to be disclosed in solicitations of proxies for election of directors in an election contest, or is otherwise required, in each case pursuant to and in accordance with Regulation 14A under the Exchange Act, and (2) the information required to be submitted by nominees pursuant to clause (a)(i) of Section 12 of this Article I above;

(B) as to any other business that the stockholder proposes to bring before the meeting, a brief description of the business desired to be brought before the meeting, the text of the proposal or business (including the text of any resolutions proposed for consideration and in the event that such business includes a proposal to amend these Bylaws, the language of the proposed amendment), the reasons for conducting such business at the meeting and any substantial interest (within the meaning of Item 5 of Schedule 14A under the Exchange Act) in such business of such stockholder and the beneficial owner (within the meaning of Section 13(d) of the Exchange Act), if any, on whose behalf the proposal is made;

(C) as to the stockholder giving the notice and the beneficial owner, if any, on whose behalf the nomination is made or the other business is proposed:

(1) the name and address of such stockholder, as they appear on the corporation's books, and the name and address of such beneficial owner,

(2) the class or series and number of shares of stock of the corporation which are owned of record by such stockholder and such beneficial owner as of the date of the notice, and a representation that the stockholder will notify the corporation in writing within five business days after the record date for such meeting of the class or series and number of shares of stock of the corporation owned of record by the stockholder and such beneficial owner as of the record date for the meeting, and

(3) a representation that the stockholder (or a qualified representative of the stockholder) intends to appear at the meeting to make such nomination or propose such business;

(D) as to the stockholder giving the notice or, if the notice is given on behalf of a beneficial owner on whose behalf the nomination is made or the other business is proposed, as to such beneficial owner, and if such stockholder or beneficial owner is an entity, as to each director, executive, managing member or control person of such entity (any such individual or control person, a "Control Person"):

(1) the class or series and number of shares of stock of the corporation which are beneficially owned (as defined in clause (c)(ii) of this Section 13) by such stockholder or beneficial owner and by any Control Person as of the date of the notice, and a representation that the stockholder will notify the corporation in writing within five business days after the record date for such meeting of the class or series and number of shares of stock of the corporation beneficially owned by such stockholder or beneficial owner and by any Control Person as of the record date for the meeting,

(2) a description of any agreement, arrangement or understanding with respect to the nomination or other business between or among such stockholder, beneficial owner or Control Person and any other person, including without limitation any agreements that would be required to be disclosed pursuant to Item 5 or Item 6 of Exchange Act Schedule 13D (regardless of whether the requirement to file a Schedule 13D is applicable) and a representation that the stockholder will notify the corporation in writing within five business days after the record date for such meeting of any such agreement, arrangement or understanding in effect as of the record date for the meeting,

(3) a description of any agreement, arrangement or understanding (including without limitation any derivative or short positions, profit interests, options, hedging transactions, and borrowed or loaned shares) that has been entered into as of the date of the stockholder's notice by, or on behalf of, such stockholder, beneficial owner or Control Person, the effect or intent of which is to mitigate loss, manage risk or benefit from changes in the share price of any class or series of the corporation's stock, or maintain, increase or decrease the voting power of the stockholder, beneficial owner or Control Person with respect to securities of the corporation, and a representation that the stockholder will notify the corporation in writing within five business days after the record date for such meeting of any such agreement, arrangement or understanding in effect as of the record date for the meeting,

(4) a representation whether the stockholder or the beneficial owner, if any, will engage in a solicitation, within the meaning of Exchange Act Rule 14a-1(l), with respect to the nomination or other business and, if so, the name of each participant (as defined in Item 4 of Schedule 14A under the Exchange Act) in such solicitation and whether such person intends or is part of a group which intends to deliver a proxy statement and/or form of proxy to holders of at least

fifty percent (50%) of the corporation's stock entitled to vote generally in the election of directors in the case of a nomination and to holders of at least the percentage of the corporation's stock required to approve or adopt the business to be proposed, in the case of a proposal.

(iii) Notwithstanding anything in clause (ii) of this Section 13(a) or clause (b) of this Section 13 to the contrary, if the record date for determining the stockholders entitled to vote at any meeting of stockholders is different from the record date for determining the stockholders entitled to notice of the meeting, a stockholder's notice required by this Section 13 shall set forth a representation that the stockholder will notify the corporation in writing within five business days after the record date for determining the stockholders entitled to vote at the meeting, or by the opening of business on the date of the meeting (whichever is earlier), of the information required under clauses (ii)(C)(2) and (ii)(D)(1)-(3) of this Section 13(a), and such information when provided to the corporation shall be current as of the record date for determining the stockholders entitled to vote at the meeting.

(iv) This Section 13(a) shall not apply to a proposal proposed to be made by a stockholder if the stockholder has notified the corporation of his or her intention to present the proposal at an annual or special meeting only pursuant to and in compliance with Rule 14a-8 under the Exchange Act and such proposal has been included in a proxy statement that has been prepared by the corporation to solicit proxies for such meeting.

(v) Notwithstanding anything in this Section 13(a) to the contrary, in the event that the number of directors to be elected to the Board of Directors at an annual meeting is increased and there is no public announcement by the corporation naming all of the nominees for directors or specifying the size of the increased Board of Directors made by the corporation at least 10 days prior to the last day a stockholder may deliver a notice in accordance with clause (ii) of this Section 13(a), a stockholder's notice required by this Section 13(a) shall also be considered timely, but only with respect to nominees for any new positions created by such increase, if it shall be delivered to the Secretary of the corporation at the principal executive office of the corporation not later than the close of business on the 10th day following the day on which such public announcement is first made by the corporation.

(b) Special Meeting. Only such business shall be conducted at a special meeting of stockholders as shall have been brought before the meeting pursuant to the corporation's notice of meeting. Nominations of persons for election to the Board of Directors may be made at a special meeting of stockholders at which directors are to be elected pursuant to the corporation's notice of meeting (i) by or at the direction of the Board of Directors, (ii) provided that one or more directors are to be elected at such meeting, by any stockholder of the corporation who is a stockholder of record at the time the notice provided for in this Section 13(b) is delivered to the Secretary of the corporation, who is entitled to vote at the meeting and upon such election and who delivers a written notice setting forth the information required by clause (a) of this Section 13 and provides the additional information required by clause (a) of Section 12 of this Article I above, or (iii) in the case of a stockholder-requested special meeting, by any stockholder of the corporation pursuant to clause (a)(iv) of Section 2 of this Article I. In the event the corporation calls a special meeting of stockholders for the purpose of electing one or more directors to the Board of Directors, any stockholder entitled to vote in such election of directors may nominate a person or persons (as the case may be) for election to such position(s) as specified in the corporation's notice of meeting, if the notice required by this Section 13(b) shall be delivered to the Secretary at the principal executive office of the corporation not earlier than the close of business on the 120th day prior to such special meeting and not later than the close of business on the later of the 90th day prior to such special meeting or the 10th day following the date on which public announcement of the date of the special meeting and of the nominees proposed by the Board of Directors to be elected at such meeting is first made by the corporation. In no event shall an adjournment, recess or postponement of a special meeting commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above.

(c) General.

(i) Except as otherwise required by law, only such persons who are nominated in accordance with the procedures set forth in this Section 13 shall be eligible to be elected or re-elected at any meeting of stockholders of the corporation to serve as directors and only such other business shall be conducted at a meeting of stockholders as shall have been brought before the meeting in accordance with the procedures set forth in this Section 13. Except as otherwise required by law, each of the Chairman of the Board of Directors, the Board of Directors or the chairman of the meeting shall have the power to determine whether a nomination or any other business proposed to be brought before the meeting was made or proposed, as the case may be, in accordance with the procedures set forth in this Section 13. If any proposed nomination or other business is not in compliance with this Section 13, then except as otherwise required by law, the chairman of the meeting shall have the power to declare that such nomination shall be disregarded or that such other business shall not be transacted. Notwithstanding the foregoing provisions of this Section 13, unless otherwise required by law, or otherwise determined by the Chairman of the Board of Directors, the Board of Directors or the chairman of the meeting, if the stockholder does not provide

the information required under Section 12 of this Article I above or clauses (a)(ii)(C)(2) and (a)(ii)(D)(1)-(3) of this Section 13 to the corporation within the time frames specified herein, or if the stockholder (or a qualified representative of the stockholder) does not appear at the annual or special meeting of stockholders of the corporation to present a nomination or other business, such nomination shall be disregarded and such other business shall not be transacted, notwithstanding that proxies in respect of such vote may have been received by the corporation. For purposes of these Bylaws, to be considered a qualified representative of a stockholder, a person must be a duly authorized officer, manager or partner of such stockholder or authorized by a writing executed by such stockholder (or a reliable reproduction or electronic transmission of the writing) delivered to the corporation prior to the making of such nomination or proposal at such meeting stating that such person is authorized to act for such stockholder as proxy at the meeting of stockholders.

(ii) For purposes of this Section 13, the “close of business” shall mean 6:00 p.m. local time at the principal executive office of the corporation on any calendar day, whether or not the day is a business day, and a “public announcement” shall mean disclosure in a press release reported by the Dow Jones News Service, Associated Press or a comparable national news service or in a document publicly filed by the corporation with the SEC pursuant to Sections 13, 14 or 15(d) of the Exchange Act. For purposes of clause (a)(ii)(D)(1) of this Section 13, shares shall be treated as “beneficially owned” by a person if the person beneficially owns such shares, directly or indirectly, for purposes of Section 13(d) of the Exchange Act and Regulations 13D and 13G thereunder or has or shares pursuant to any agreement, arrangement or understanding (whether or not in writing): (A) the right to acquire such shares (whether such right is exercisable immediately or only after the passage of time or the fulfillment of a condition or both), (B) the right to vote such shares, alone or in concert with others and/or (C) investment power with respect to such shares, including the power to dispose of, or to direct the disposition of, such shares.

Section 14. Proxy Access for Director Nominations.

(a) Subject to the terms and conditions of these Bylaws, in connection with an annual meeting of stockholders at which directors are to be elected, the corporation (i) shall include in its proxy statement and on its form of proxy the names of, and (ii) shall include in its proxy statement the “Additional Information” (as defined below) relating to, a number of nominees specified pursuant to clause (b) of this Section 14 below (the “Authorized Number”) for election to the Board of Directors submitted pursuant to this Section 14 (each, a “Stockholder Nominee”), if:

(i) the Stockholder Nominee satisfies the eligibility requirements in this Section 14;

(ii) the Stockholder Nominee is identified in a timely notice (the “Stockholder Notice”) that satisfies this Section 14 and is delivered by a stockholder that qualifies as, or is acting on behalf of, an Eligible Stockholder (as defined below);

(iii) the Eligible Stockholder satisfies the requirements in this Section 14 and expressly elects at the time of the delivery of the Stockholder Notice to have the Stockholder Nominee included in the corporation’s proxy materials; and

(iv) the additional requirements of these Bylaws are met.

(b) The maximum number of Stockholder Nominees appearing in the corporation’s proxy materials with respect to an annual meeting of stockholders (the “Authorized Number”) shall not exceed the greater of (i) two or (ii) twenty percent (20%) of the number of directors in office as of the last day on which a Stockholder Notice may be delivered pursuant to this Section 14 with respect to the annual meeting, or if such amount is not a whole number, the closest whole number (rounding down) below twenty percent (20%); provided that the Authorized Number shall be reduced (i) by any Stockholder Nominee whose name was submitted for inclusion in the corporation’s proxy materials pursuant to this Section 14 but whom the Board of Directors decides to nominate as a Board of Directors nominee, and (ii) by any nominees who were previously elected to the Board of Directors as Stockholder Nominees at any of the preceding two annual meetings and who are nominated for election at the annual meeting by the Board of Directors as a Board of Directors nominee. In the event that one or more vacancies for any reason occurs after the date of the Stockholder Notice but before the annual meeting and the Board of Directors resolves to reduce the size of the Board of Directors in connection therewith, the Authorized Number shall be calculated based on the number of directors in office as so reduced.

(c) To qualify as an “Eligible Stockholder,” a stockholder or a group as described in this Section 14(c) must:

(i) Own and have Owned (as defined below), continuously for at least three years as of the date of the Stockholder Notice, a number of shares (as adjusted to account for any stock dividend, stock split, subdivision, combination, reclassification or recapitalization of the shares of capital stock issued, outstanding and entitled to vote generally in the

election of directors (for purposes of this Section 14, "Voting Capital Stock")) that represents at least three percent (3%) of the outstanding shares of Voting Capital Stock as of the date of the Stockholder Notice (the "Required Shares"); and

(ii) thereafter continue to Own the Required Shares through such annual meeting of stockholders.

For purposes of satisfying the ownership requirements of this Section 14(c), a group of not more than twenty (20) stockholders and/or beneficial owners may aggregate the number of shares of Voting Capital Stock that each group member has individually Owned continuously for at least three years as of the date of the Stockholder Notice if all other requirements and obligations for an Eligible Stockholder set forth in this Section 14 are satisfied by and as to each stockholder or beneficial owner comprising the group whose shares are aggregated. No shares may be attributed to more than one Eligible Stockholder, and no stockholder or beneficial owner, alone or together with any of its affiliates, may individually or as a member of a group qualify as or constitute more than one Eligible Stockholder under this Section 14. A group of any two or more funds shall be treated as only one stockholder or beneficial owner for this purpose if they are (A) under common management and investment control or (B) under common management and funded primarily by a single employer. For the purposes of this Section 14, the term "affiliate" or "affiliates" shall have the meanings ascribed thereto under the rules and regulations promulgated under the Exchange Act.

(d) For purposes of this Section 14:

(i) The terms "Own," "Owned," "Owning" and other variations of the word "Own" when used with respect to a stockholder or beneficial owner shall have the same meanings as defined in Section 2 of this Article I.

(ii) A stockholder or beneficial owner's Ownership of shares shall be deemed to continue during any period in which the person has loaned the shares if the person has the power to recall the loaned shares on not more than five business days' notice.

(e) For purposes of this Section 14, the "Additional Information" referred to in clause (a) of this Section 14 that the corporation will include in its proxy statement is:

(i) the information set forth in the Schedule 14N provided with the Stockholder Notice concerning each Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the corporation's proxy statement by the applicable requirements of the Exchange Act and the rules and regulations thereunder; and

(ii) if the Eligible Stockholder so elects, a written statement of the Eligible Stockholder (or, in the case of a group, a written statement of the group), not to exceed 500 words, in support of its Stockholder Nominee(s), which must be provided at the same time as the Stockholder Notice for inclusion in the corporation's proxy statement for the annual meeting (the "Statement").

Notwithstanding anything to the contrary contained in this Section 14, the corporation may omit from its proxy materials any information or Statement that it, in good faith, believes is untrue in any material respect (or omits a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law, rule, regulation or listing standard. Nothing in this Section 14 shall limit the corporation's ability to solicit against and include in its proxy materials its own statements relating to any Eligible Stockholder or Stockholder Nominee.

(f) The Stockholder Notice shall set forth all information, representations and agreements required under clause (a)(ii) of Section 13 of this Article I above, including the information required with respect to (i) any nominee for election as a director, (ii) any stockholder giving notice of an intent to nominate a candidate for election, and (iii) any stockholder, beneficial owner or other person on whose behalf the nomination is made under this Section 14. In addition, such Stockholder Notice shall include:

(i) a copy of the Schedule 14N that has been or concurrently is filed with the SEC under the Exchange Act;

(ii) a written statement of the Eligible Stockholder (and in the case of a group, the written statement of each stockholder or beneficial owner whose shares are aggregated for purposes of constituting an Eligible Stockholder), which statement(s) shall also be included in the Schedule 14N filed with the SEC: (A) setting forth and certifying to the number of shares of Voting Capital Stock the Eligible Stockholder Owns and has Owned (as defined in clause (d) of this Section 14) continuously for at least three years as of the date of the Stockholder Notice, and (B) agreeing to continue to Own such shares through the annual meeting;

(iii) the written agreement of the Eligible Stockholder (and in the case of a group, the written agreement of each stockholder or beneficial owner whose shares are aggregated for purposes of constituting an Eligible Stockholder) addressed to the corporation, setting forth the following additional agreements, representations, and warranties:

(A) it shall provide (1) within five business days after the date of the Stockholder Notice, one or more written statements from the record holder(s) of the Required Shares and from each intermediary through which the Required Shares are or have been held, in each case during the requisite three-year holding period, specifying the number of shares that the Eligible Stockholder Owns, and has Owned continuously in compliance with this Section 14, (2) within five business days after the record date for the annual meeting both the information required under clause (a)(ii)(D)(1) of Section 13 of this Article I and notification in writing verifying the Eligible Stockholder's continuous Ownership of the Required Shares, in each case, as of such date, and (3) immediate notice to the corporation if the Eligible Stockholder ceases to own any of the Required Shares prior to the annual meeting;

(B) it (1) acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control at the corporation, and does not presently have this intent, (2) has not nominated and shall not nominate for election to the Board of Directors at the annual meeting any person other than the Stockholder Nominee(s) being nominated pursuant to this Section 14, (3) has not engaged and shall not engage in, and has not been and shall not be a participant (as defined in Item 4 of Exchange Act Schedule 14A) in, a solicitation within the meaning of Exchange Act Rule 14a-1(l), in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee or a nominee of the Board of Directors, and (4) shall not distribute to any stockholder any form of proxy for the annual meeting other than the form distributed by the corporation; and

(C) it will (1) assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with the stockholders of the corporation or out of the information that the Eligible Stockholder provided to the corporation, (2) indemnify and hold harmless the corporation and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against the corporation or any of its directors, officers or employees arising out of the nomination or solicitation process pursuant to this Section 14, (3) comply with all laws, rules, regulations and listing standards applicable to its nomination or any solicitation in connection with the annual meeting, (4) file with the SEC any solicitation or other communication by or on behalf of the Eligible Stockholder relating to the corporation's annual meeting of stockholders, one or more of the corporation's directors or director nominees or any Stockholder Nominee, regardless of whether the filing is required under Exchange Act Regulation 14A, or whether any exemption from filing is available for such materials under Regulation 14A under the Exchange Act, and (5) at the request of the corporation, promptly, but in any event within five business days after such request, (or by the day prior to the day of the annual meeting, if earlier) provide to the corporation such additional information as reasonably requested by the corporation; and

(iv) in the case of a nomination by a group, the designation by all group members of one group member that is authorized to act on behalf of all members of the group with respect to the nomination and matters related thereto, including withdrawal of the nomination and the written agreement, representation, and warranty of the Eligible Stockholder that it shall provide within five business days after the date of the Stockholder Notice, documentation reasonably satisfactory to the corporation demonstrating that the number of stockholders and/or beneficial owners within such group does not exceed twenty (20), including whether a group of funds qualifies as one stockholder or beneficial owner within the meaning of clause (c) of this Section 14.

All information provided pursuant to this Section 14(f) shall be deemed part of the Stockholder Notice for purposes of this Section 14.

(g) To be timely under this Section 14, the Stockholder Notice must be delivered by a stockholder to the Secretary of the corporation at the principal executive office of the corporation not later than the close of business (as defined in clause (c)(ii) of Section 13 of this Article I) on the 120th day nor earlier than the close of business on the 150th day prior to the first anniversary of the date or approximate date (as stated in the corporation's proxy materials) the definitive proxy statement was first released to stockholders in connection with the preceding year's annual meeting of stockholders; provided, however, that in the event the annual meeting is more than 30 days before or after the anniversary of the previous year's annual meeting, or if no annual meeting was held in the preceding year, to be timely, the Stockholder Notice must be so delivered not earlier than the close of business on the 150th day prior to such annual meeting and not later than the close of business on the later of the 120th day prior to such annual meeting or the 10th day following the day on which public announcement (as defined in clause (c)(ii) of Section 13 of this Article I) of the date of such meeting is first made by the corporation. In no event shall an adjournment or recess of an annual meeting, or a postponement of an annual meeting for which notice has been given or with

respect to which there has been a public announcement of the date of the meeting, commence a new time period (or extend any time period) for the giving of the Stockholder Notice as described above.

(h) Within the time period for delivery of the Stockholder Notice, for each Stockholder Nominee, all written and signed representations and agreements and all completed and signed questionnaires required pursuant to clause (a) of Section 12 of this Article I, including consent to being named in the corporation's proxy statement and form of proxy as a nominee, shall be delivered to the Secretary of the corporation at the principal executive office of the corporation. The Stockholder Nominee must promptly, but in any event within five business days after such request, provide to the corporation such other information as it may reasonably request. The corporation may request such additional information as necessary to permit the Board of Directors to determine if each Stockholder Nominee satisfies the requirements of this Section 14.

(i) In the event that any information or communications provided by the Eligible Stockholder or any Stockholder Nominees to the corporation or its stockholders is not, when provided, or thereafter ceases to be, true, correct and complete in all material respects (including omitting a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading), such Eligible Stockholder or Stockholder Nominee, as the case may be, shall promptly notify the Secretary and provide the information that is required to make such information or communication true, correct, complete and not misleading; it being understood that providing any such notification shall not be deemed to cure any defect or limit the corporation's right to omit a Stockholder Nominee from its proxy materials as provided in this Section 14.

(j) Notwithstanding anything to the contrary contained in this Section 14, the corporation may omit from its proxy materials any Stockholder Nominee, and such nomination shall be disregarded and no vote on such Stockholder Nominee shall occur, notwithstanding that proxies in respect of such vote may have been received by the corporation, if:

(i) the Eligible Stockholder or Stockholder Nominee breaches any of its agreements, representations, or warranties set forth in the Stockholder Notice (or otherwise submitted pursuant to this Section 14), any of the information in the Stockholder Notice (or otherwise submitted pursuant to this Section 14) was not, when provided, true, correct and complete, or the Eligible Stockholder or applicable Stockholder Nominee otherwise fails to comply with its obligations pursuant to these Bylaws, including, but not limited to, its obligations under this Section 14;

(ii) the Stockholder Nominee (A) is not independent under any applicable listing standards, any applicable rules of the SEC, and any publicly disclosed standards used by the Board of Directors in determining and disclosing the independence of the corporation's directors, (B) is or has been, within the past three years, an officer or director of a competitor, as defined in Section 8 of the Clayton Antitrust Act of 1914, as amended, (C) is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in a criminal proceeding (excluding traffic violations and other minor offenses) within the past 10 years or (D) is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended;

(iii) the corporation has received a notice (whether or not subsequently withdrawn) that a stockholder intends to nominate any candidate for election to the Board of Directors pursuant to the advance notice requirements for stockholder nominees for director in clause (a)(i) (C) of Section 13 of this Article I; or

(iv) the election of the Stockholder Nominee to the Board of Directors would cause the corporation to violate the Certificate of Incorporation of the corporation, these Bylaws, any applicable law, rule, regulation or listing standard.

(k) An Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the corporation's proxy materials pursuant to this Section 14 shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the corporation's proxy materials and include such assigned rank in its Stockholder Notice submitted to the corporation. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders pursuant to this Section 14 exceeds the Authorized Number, the Stockholder Nominees to be included in the corporation's proxy materials shall be determined in accordance with the following provisions: one Stockholder Nominee who satisfies the eligibility requirements in this Section 14 shall be selected from each Eligible Stockholder for inclusion in the corporation's proxy materials until the Authorized Number is reached, going in order of the amount (largest to smallest) of shares of the corporation each Eligible Stockholder disclosed as Owned in its Stockholder Notice submitted to the corporation and going in the order of rank (highest to lowest) assigned to each Stockholder Nominee by such Eligible Stockholder. If the Authorized Number is not reached after one Stockholder Nominee who satisfies the eligibility requirements in this Section 14 has been selected from each Eligible Stockholder, this selection process shall continue as many times as necessary, following the same order each time, until the Authorized Number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements in this Section 14 thereafter is

nominated by the Board of Directors, thereafter is not included in the corporation's proxy materials or thereafter is not submitted for director election for any reason (including the Eligible Stockholder's or Stockholder Nominee's failure to comply with this Section 14), no other nominee or nominees shall be included in the corporation's proxy materials or otherwise submitted for election as a director at the applicable annual meeting in substitution for such Stockholder Nominee.

(l) Any Stockholder Nominee who is included in the corporation's proxy materials for a particular annual meeting of stockholders but withdraws from or becomes ineligible or unavailable for election at the annual meeting for any reason, including for the failure to comply with any provision of these Bylaws (provided that in no event shall any such withdrawal, ineligibility or unavailability commence a new time period (or extend any time period) for the giving of a Stockholder Notice), shall be ineligible to be a Stockholder Nominee pursuant to this Section 14 for the next two annual meetings.

(m) Notwithstanding the foregoing provisions of this Section 14, unless otherwise required by law or otherwise determined by the Chairman of the Board of Directors, the Board of Directors or the chairman of the meeting, if the stockholder delivering the Stockholder Notice (or a qualified representative of the stockholder, as defined in clause (c)(i) of Section 13 of this Article I) does not appear at the annual meeting of stockholders of the corporation to present its Stockholder Nominee or Stockholder Nominees, such nomination or nominations shall be disregarded, notwithstanding that proxies in respect of the election of the Stockholder Nominee or Stockholder Nominees may have been received by the corporation. Without limiting the Board of Directors' power and authority to interpret any other provisions of these Bylaws, the Board of Directors (and any other person or body authorized by the Board of Directors) shall have the power and authority to interpret this Section 14 and to make any and all determinations necessary or advisable to apply this Section 14 to any persons, facts or circumstances, in each case, acting in good faith. This Section 14 shall be the exclusive method for stockholders to include nominees for director election in the corporation's proxy materials.

ARTICLE II

Directors

Section 1. Powers. The business and affairs of the corporation shall be managed by or under the direction of the Board of Directors, which may exercise all such powers of the corporation and do all such lawful acts and things as are not by law or these Bylaws directed or required to be exercised or done by the stockholders.

Section 2. Number of Directors. The Board of Directors shall consist of one or more members. The number of directors shall be no less than six (6) and no more than nine (9), the number thereof to be fixed from time to time by resolution of the Board of Directors.

Section 3. Election and Tenure. Each director shall be elected by the vote specified in clause (b) of Section 10 of Article I or as provided in Section 7 of this Article II. Each director shall serve until his or her successor is elected and qualified, or until his or her earlier resignation or removal.

Section 4. Qualification. No director need be a stockholder.

Section 5. Removal. Any director or the entire Board of Directors may be removed with or without cause, by the holders of a majority of the shares then entitled to vote at an election of the directors except as otherwise provided by law.

Section 6. Resignation. Any director of the corporation may resign at any time by giving written notice to the Board of Directors, to the Chairman of the Board of Directors, if any, to the President, or to the Secretary, and any member of a committee may resign therefrom at any time by giving notice as aforesaid or to the chairman or secretary of such committee. Any such resignation shall take effect at the time (or upon the happening of an event) specified therein, or, if the time (or event) be not specified, upon receipt thereof; and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

Section 7. Vacancies and Newly Created Directorships. Vacancies and newly created directorships resulting from any increase in the authorized number of directors may be filled (a) by the stockholders at any meeting, (b) by a majority of the directors then in office, although less than a quorum, or (c) by a sole remaining director. Whenever the holders of any class or classes of stock or series thereof are entitled to elect one or more Directors by the Certificate of Incorporation, vacancies and newly created directorships of such class or classes or series may be filled by a majority of the Directors elected by such class, classes or series then in office or by the sole remaining director so elected. When one or more directors shall resign from the Board of Directors, effective at a future date, a majority of directors who are entitled to act on the filling of

such vacancy or vacancies and who are then in office, including those who have so resigned, shall have power to fill such vacancy or vacancies by vote to take effect when such resignation or resignations shall become effective.

Section 8. Annual Meeting. The first meeting of each newly elected Board of Directors may be held without notice immediately after an annual meeting of stockholders (or a special meeting of stockholders held in lieu of an annual meeting) at the same place as that at which such meeting of stockholders was held; or such first meeting may be held at such place and time as shall be fixed by the consent in writing of all the directors, or may be called in the manner hereinafter provided with respect to the call of special meetings.

Section 9. Regular Meetings. Regular meetings of the directors may be held at such times and places as shall from time to time be fixed by resolution of the Board of Directors, and no notice need be given of regular meetings held at times and places so fixed, provided, however, that any resolution relating to the holding of regular meetings shall remain in force only until the next annual meeting of stockholders and that, if at any meeting of Directors at which a resolution is adopted fixing the times or place or places for any regular meetings any Director is absent, no meeting shall be held pursuant to such resolution without notice to or waiver by such absent Director pursuant to Section 11 of this Article II.

Section 10. Special Meetings. Special meetings of the directors may be called by the Chairman of the Board of Directors, if any, the President, or by at least one- third of the directors then in office (rounded up to the nearest whole number), and shall be held at the place and on the date and hour designated in the call thereof.

Section 11. Notices. Notices of any special meeting of the directors shall be given to each director by the Secretary or an Assistant Secretary (a) by mailing to him or her, postage prepaid, and addressed to him or her at his or her address as registered on the books of the corporation, or if not so registered at his or her last known home or business address, a written notice of such meeting at least 4 days before the meeting, (b) by delivering such notice by hand or by telegram, teletype, telex, facsimile or electronic transmission (including without limitation e-mail) to him or her at least 48 hours before the meeting, or (c) by giving such notice in person or by telephone at least 48 hours in advance of the meeting. Any notice given personally or by telephone, telegram, teletype, telex, facsimile or electronic transmission (including without limitation e-mail) may be communicated either to the director or to a person at the office of the director who the person giving the notice has reason to believe will promptly communicate it to the director. In the absence of the Secretary or an Assistant Secretary, such notice may be given by the officer or one of the directors calling the meeting. Notice need not be given to any director who has waived notice in accordance with Section 229 of the DGCL. A notice or waiver of notice of a meeting of the directors need not specify the business to be transacted at or the purpose of the meeting.

Section 12. Quorum. At any meeting of the directors, a majority of the authorized number of directors shall constitute a quorum for the transaction of business. If a quorum shall not be present at any meeting of the Board of Directors, a majority of those present (or, if not more than two directors are present, any director present) may adjourn the meeting from time to time to another place, date or time, without notice other than announcement at the meeting prior to adjournment, until a quorum shall be present.

Section 13. Participation in Meetings by Conference Telephone. One or more members of the Board of Directors, or any committee thereof, may participate in a meeting of such Board of Directors or committee by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this Section 13 shall constitute presence in person at such meeting.

Section 14. Conduct of Business: Action by Written Consent. At any meeting of the Board of Directors at which a quorum is present, business shall be transacted in such order and manner as the Board of Directors may from time to time determine, and all matters shall be determined by the vote of a majority of the directors present, except as otherwise provided in these Bylaws or required by law. Without limiting the manner by which a consent of directors may be given under Section 141(f) of the DGCL, action may be taken by the Board of Directors, or any committee thereof, without a meeting if all members of the Board of Directors or committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the records of proceedings of the Board of Directors or committee.

Section 15. Place of Meetings. The Board of Directors may hold its meetings, and have an office or offices, within or without the State of Delaware.

Section 16. Compensation. The Board of Directors shall have the authority to fix stated salaries for directors for their service in such capacity and to provide for payment of a fixed sum and expenses of attendance, if any, for attendance at each regular or special meeting of the Board of Directors. The Board of Directors shall also have the authority to provide for payment of a fixed sum and expenses of attendance, if any, payable to members of committees for attending committee

meetings. Nothing herein contained shall preclude any director from serving the corporation in any other capacity and receiving compensation for such services.

Section 17. Committees. (a) The Board of Directors, by resolution passed by a majority of the number of directors required at the time to constitute a full Board of Directors as fixed in or determined pursuant to these Bylaws as then in effect, may from time to time designate one or more committees, each committee to consist of one or more of the directors of the corporation. The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he or she or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it; but no such committee shall have such power or authority in reference to amending the Certificate of Incorporation (except that a committee may, to the extent authorized in the resolution or resolutions providing for the issuance of shares of stock adopted by the Board of Directors as provided in Subsection (a) of Section 151 of the DGCL, fix the designations and any preferences or rights of such shares relating to dividends, redemption, dissolution, any distribution of assets of the corporation or conversion into, or the exchange of such shares for, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation or fix the number of shares in a series of stock or authorize the increase or decrease in the shares of any series), adopting an agreement of merger or consolidation under Sections 251, 252, 254, 255, 256, 257, 258, 263, or 264 of the DGCL, recommending to the stockholders the sale, lease or exchange of all or substantially all of the corporation's property or assets, recommending to the stockholders a dissolution of the corporation or a revocation of a dissolution, or amending the Bylaws of the corporation. Such a committee may, to the extent expressly provided in the resolution of the Board of Directors, have the power or authority to declare a dividend or to authorize the issuance of stock or to adopt a certificate of ownership and merger pursuant to Section 253 of the DGCL.

(b) At any meeting of any committee or subcommittee of a committee, a majority of the directors then serving on such committee of the Board of Directors or subcommittee of a committee shall constitute a quorum for the transaction of business by the committee or subcommittee, unless the Certificate of Incorporation, these Bylaws, a resolution of the Board of Directors or a resolution of a committee that created the subcommittee requires a greater or lesser number, provided that in no case shall a quorum be less than 1/3 of the directors then serving on the committee or subcommittee. The vote of the majority of the members of a committee or subcommittee present at a meeting at which a quorum is present shall be the act of the committee or subcommittee, unless the Certificate of Incorporation, these Bylaws, a resolution of the Board of Directors or a resolution of a committee that created the subcommittee requires a greater number.

(c) Each committee, except as otherwise provided by resolution of the Board of Directors, shall fix the time and place of its meetings within or without the State of Delaware, shall adopt its own rules and procedures, and shall keep a record of its acts and proceedings and report the same from time to time to the Board of Directors.

(d) Unless otherwise provided in the Certificate of Incorporation, these Bylaws or the resolution of the Board of Directors designating the committee, a committee may create one or more subcommittees, each subcommittee to consist of one or more members of the committee, and delegate to a subcommittee any or all of the powers and authority of the committee.

ARTICLE III

Officers

Section 1. Officers and Their Election. The officers of the corporation shall be a Chief Executive Officer, a President, a Secretary, a Chief Financial Officer and such Vice Presidents, Assistant Secretaries, Assistant Chief Financial Officers and other officers as the Board of Directors may from time to time determine and elect or appoint. The Board of Directors may appoint one of its members to the office of Chairman of the Board of Directors and another of its members to the office of Vice-Chairman of the Board of Directors and from time to time define the powers and duties of these and other officers, employees or agents of the corporation notwithstanding any other provisions of these Bylaws. All officers shall be elected by the Board of Directors and shall serve at the will of the Board of Directors. Any officer may, but need not, be a director. Two or more offices may be held by the same person. All officers shall perform such duties and have such powers as the Board of Directors shall designate by resolution, or in the absence of such resolution, as set forth in these Bylaws. The Board of Directors may from time to time delegate the powers or duties of any officer to any other officers or agents, notwithstanding the foregoing provisions of this Article III.

Section 2. Term of Office. The Chief Executive Officer, the President, the Chief Financial Officer and the Secretary shall hold office until his or her successor is elected and qualified or until his or her earlier resignation or removal.

Section 3. Vacancies. Any vacancy at any time existing in any office may be filled by the Board of Directors.

Section 4. Chairman of the Board of Directors. The Board of Directors may, in its discretion, elect a Chairman of the Board of Directors from among its members. He or she may be the Chief Executive Officer of the corporation if so designated by the Board of Directors, and he or she shall preside at all meetings of the Board of Directors at which he or she is present and shall exercise and perform such other powers and duties as may from time to time be assigned to him or her by the Board of Directors or prescribed by the Bylaws.

Section 5. Chief Executive Officer. The Board of Directors may elect a Chief Executive Officer of the corporation who may also be the Chairman of the Board of Directors or President of the corporation or both. It shall be his or her duty and he or she shall have the power to see that all orders and resolutions of the Board of Directors are carried into effect. He or she shall from time to time report to the Board of Directors all matters within his or her knowledge which the interests of the corporation may require to be brought to its notice.

Section 6. President. If there is no Chief Executive Officer, the President shall be the chief executive officer of the corporation except as the Board of Directors may otherwise provide. The President shall perform such duties and have such powers additional to the foregoing as the Board of Directors shall designate.

Section 7. Vice Presidents. In the absence or disability of the President, his or her powers and duties shall be performed by the vice president, if only one, or, if more than one, by the one designated for the purpose by the Board of Directors. Each vice president shall perform such duties and have such powers additional to the foregoing as the Board of Directors shall designate.

Section 8. Chief Financial Officer. The Chief Financial Officer shall be the treasurer of the corporation and shall keep full and accurate accounts of receipts and disbursements in books belonging to the corporation and shall deposit all monies and other valuable effects in the name and to the credit of the corporation in such depositories as shall be designated by the Board of Directors or in the absence of such designation in such depositories as he or she shall from time to time deem proper. The Chief Financial Officer (or any Assistant Chief Financial Officer) shall sign all stock certificates as treasurer of the corporation. He or she shall disburse the funds of the corporation as shall be ordered by the Board of Directors, taking proper vouchers for such disbursements. He or she shall promptly render to the Chief Executive Officer and to the Board of Directors such statements of his or her transactions and accounts as the Chief Executive Officer and Board of Directors respectively may from time to time require. The Chief Financial Officer shall perform such duties and have such powers additional to the foregoing as the Board of Directors may designate.

Section 9. Assistant Chief Financial Officers. In the absence or disability of the Chief Financial Officer, his or her powers and duties shall be performed by the Assistant Chief Financial Officer, if only one, or if more than one, by the one designated for the purpose by the Board of Directors. Each Assistant Chief Financial Officer shall perform such duties and have such powers additional to the foregoing as the Board of Directors shall designate.

Section 10. Secretary. The Secretary shall issue notices of all meetings of stockholders, of the Board of Directors and of committees thereof where notices of such meetings are required by law or these Bylaws. He or she shall record the proceedings of the meetings of the stockholders and of the Board of Directors and shall be responsible for the custody thereof in a book to be kept for that purpose. He or she shall also record the proceedings of the committees of the Board of Directors unless such committees appoint their own respective secretaries. Unless the Board of Directors shall appoint a transfer agent and/or registrar, the Secretary shall be charged with the duty of keeping, or causing to be kept, accurate records of all stock outstanding, stock certificates issued and stock transfers. He or she shall sign such instruments as require his or her signature. The Secretary shall have custody of the corporate seal and shall affix and attest such seal on all documents whose execution under seal is duly authorized. In his or her absence at any meeting, an Assistant Secretary or the Secretary pro tempore shall perform his or her duties thereat. He or she shall perform such duties and have such powers additional to the foregoing as the Board of Directors shall designate.

Section 11. Assistant Secretaries. In the absence or disability of the Secretary, his or her powers and duties shall be performed by the Assistant Secretary, if only one, or, if more than one, by the one designated for the purpose by the Board of Directors. Each Assistant Secretary shall perform such duties and have such powers additional to the foregoing as the Board of Directors shall designate.

Section 12. Salaries. The salaries and other compensation of officers, agents and employees shall be fixed from time to time by or under authority from the Board of Directors. No officer shall be prevented from receiving a salary or other compensation by reason of the fact that he or she is also a director of the corporation.

Section 13. Removal. The Board of Directors may remove any officer, either with or without cause, at any time.

Section 14. Bond. The corporation may secure the fidelity of any or all of its officers or agents by bond or otherwise.

Section 15. Resignations. Any officer of the corporation may resign at any time by giving written notice to the Board of Directors, to the Chairman of the Board of Directors, if any, to the Chief Executive Officer or to the Secretary of the corporation. Any such resignation shall take effect at the time specified therein, or, if the time be not specified, upon receipt thereof; and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

ARTICLE IV

Capital Stock

Section 1. Stock Certificates: Uncertificated Shares. The shares of capital stock of the corporation shall be represented by certificates, provided that the Board of Directors may provide by resolution or resolutions that some or all of any or all classes or series of its stock may be uncertificated shares. Any such resolution shall not apply to shares represented by a certificate until such certificate is surrendered to the corporation (or the transfer agent or registrar, as the case may be). Notwithstanding the adoption of such a resolution, every holder of stock represented by certificates and upon request every holder of uncertificated shares shall be entitled to have a certificate signed by, or in the name of, the corporation by the Chairman or Vice-Chairman of the Board of Directors or the President or a Vice President, and by the Chief Financial Officer (in his or her capacity as treasurer) or an Assistant Chief Financial Officer (in his or her capacity as assistant treasurer), or the Secretary or an Assistant Secretary, certifying the number of shares owned by him or her in the corporation. Any or all of the signatures on the certificate may be a facsimile. In case any officer, transfer agent, or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent or registrar before the certificate is issued, such certificate may nevertheless be issued by the corporation with the same effect as if he or she were such officer, transfer agent or registrar at the date of issue.

Section 2. Classes of Stock. If the corporation shall be authorized to issue more than one class of stock or more than one series of any class, the face or back of each certificate issued by the corporation to represent such class or series shall either (a) set forth in full or summarize the powers, designations, preferences and relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions thereof, or (b) contain a statement that the corporation will furnish a statement of the same without charge to each stockholder who so requests. Within a reasonable time after the issuance or transfer of uncertificated shares, the corporation shall send to the registered holder thereof such written notice as may be required by law as to the information required by law to be set forth or stated on stock certificates.

Section 3. Transfer of Stock. Shares of stock shall be transferable only upon the books of the corporation pursuant to applicable law and such rules and regulations as the Board of Directors shall from time to time prescribe. The Board of Directors may at any time or from time to time appoint a transfer agent or agents or a registrar or registrars for the transfer or registration of shares of stock. Except where a certificate, or uncertificated shares, are issued in accordance with Section 5 of Article IV of these Bylaws, one or more outstanding certificates representing in the aggregate the number of shares involved shall be surrendered for cancellation before a new certificate, or uncertificated shares, are issued representing such shares.

Section 4. Holders of Record. Prior to due presentment for registration of transfer the corporation may treat the holder of record of a share of its stock as the complete owner thereof exclusively entitled to vote, to receive notifications and otherwise entitled to all the rights and powers of a complete owner thereof, notwithstanding notice to the contrary.

Section 5. Stock Certificates. The Board of Directors may direct that a new stock certificate or certificates, or uncertificated shares, be issued in place of any certificate or certificates theretofore issued by the corporation alleged to have been lost, stolen, or destroyed upon the making of an affidavit of that fact by the person claiming the certificate of stock to be lost, stolen or destroyed. When authorizing such issue of a new certificate or certificates, or uncertificated shares, the Board of Directors may, in its discretion and as a condition precedent to the issuance thereof, require the owner of such lost, stolen or destroyed certificate or certificates or his or her legal representative, to give the corporation a bond sufficient to indemnify it

against any claim that may be made against the corporation on account of the alleged loss, theft, or destruction, of such certificates or the issuance of such new certificate or certificates, or uncertificated shares.

Section 6. Record Date. In order that the corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders, or to receive payment of any dividend or other distribution or allotment of any rights or to exercise any rights in respect of any change, conversion or exchange of stock or for the purpose of any other lawful action other than stockholder action by written consent, the Board of Directors may fix a record date, which record date shall not precede the date on which the resolution fixing the record date is adopted and which record date shall not be more than 60 nor less than 10 days before the date of any meeting of stockholders, nor more than 60 days prior to the time for such other action as hereinbefore described; provided, however, that if no record date is fixed by the Board of Directors, the record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the day on which notice is given or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held, and, for determining stockholders entitled to receive payment of any dividend or other distribution or allotment of rights or to exercise any rights of change, conversion or exchange of stock or for any other purpose, the record date shall be at the close of business on the day on which the Board of Directors adopts a resolution relating thereto. A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.

ARTICLE V

Miscellaneous Provisions

Section 1. Interested Directors and Officers. (a) No contract or transaction between the corporation and one or more of its directors or officers, or between the corporation and any other corporation, partnership, association, or other organization in which one or more of its directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the Board of Directors or committee thereof which authorizes the contract or transaction, or solely because his or her or their votes are counted for such purpose, if:

(i) the material facts as to his or her relationship or interest and as to the contract or transaction are disclosed or are known to the Board of Directors or the committee, and the Board of Directors or committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested directors, even though the number of disinterested directors is less than a quorum; or

(ii) the material facts as to his or her relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or

(iii) the contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the Board of Directors, a committee thereof, or the shareholders.

(b) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the Board of Directors or of a committee which authorizes the contract or transaction.

Section 2. Indemnification.

(a) Right to Indemnification. The corporation shall indemnify and hold harmless each person who was or is made a party or is threatened to be made a party to or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (hereinafter a "proceeding"), by reason of the fact that he or she is or was a director or an officer of the corporation or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust or other enterprise, including service with respect to an employee benefit plan (hereinafter an "indemnitee"), whether the basis of such proceeding is alleged action in an official capacity as a director, officer, employee or agent or in any other capacity while serving as a director or officer, to the fullest extent authorized by law, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the corporation to provide broader indemnification rights than such law permitted the corporation to provide prior to such amendment), against all expense, liability and loss (including attorneys' fees, judgments, fines, ERISA excise taxes or penalties and amounts paid in settlement) reasonably incurred or suffered by such indemnitee in connection therewith; provided, however, that except as provided in Subsection (c) of this Section with respect to proceedings

to enforce rights to indemnification, the corporation shall indemnify any such indemnitee in connection with a proceeding (or part thereof) initiated by such indemnitee only if such proceeding (or part thereof) was authorized by the Board of Directors of the corporation; and provided further that as to any matter disposed of by a compromise payment by such person, pursuant to a consent decree or otherwise, no indemnification either for said payment or for any other expenses shall be provided unless such compromise and indemnification therefor shall be appropriated:

(i) by a majority vote of a quorum consisting of disinterested directors;

(ii) if such a quorum cannot be obtained, then by a majority vote of a committee of the Board of Directors consisting of all the disinterested directors;

(iii) if there are not two or more disinterested directors in office, then by a majority of the directors then in office, provided they have obtained a written finding by special independent legal counsel appointed by a majority of the directors to the effect that, based upon a reasonable investigation of the relevant facts as described in such opinion, the person to be indemnified appears to have acted in good faith in the reasonable belief that his or her action was in the best interests of the corporation (or, to the extent that such matter relates to service with respect to an employee benefit plan, in the best interests of the participants or beneficiaries of such employee benefit plan);

(iv) by the holders of a majority of the shares of stock entitled to vote for the election of directors, which majority may include interested directors and officers; or

(v) by a court of competent jurisdiction.

An “interested” director or officer is one against whom in such capacity the proceeding in question or other proceeding on the same or similar grounds is then pending. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

(b) Right to Advancement of Expenses. The right to indemnification conferred in Subsection (a) of this Section shall include the right to be paid by the corporation the expenses incurred in defending any such proceeding in advance of its final disposition (hereinafter an “advancement of expenses”); provided, however, that if the DGCL requires, an advancement of expenses incurred by an indemnitee in his or her capacity as a director or officer (and not in any other capacity in which service was or is rendered by such indemnitee, including, without limitation, service to an employee benefit plan) shall be made only upon delivery to the corporation of an undertaking (hereinafter an “undertaking”), by or on behalf of such indemnitee, to repay all amounts so advanced if it shall ultimately be determined by final judicial decision from which there is no further right to appeal (hereinafter a “final adjudication”) that such indemnitee is not entitled to be indemnified for such expenses under this Section or otherwise, which undertaking may be accepted without reference to the financial ability of such person to make repayment.

(c) Right of Indemnitee to Bring Suit. If a claim under Subsection (a) or (b) of this Section is not paid in full by the corporation within 60 days after a written claim has been received by the corporation, except in the case of a claim for an advancement of expenses, in which case the applicable period shall be 20 days, the indemnitee may at any time thereafter bring suit against the corporation to recover the unpaid amount of the claim. If successful in whole or in part in any such suit, or in a suit brought by the corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the indemnitee shall be entitled to be paid also the expense of prosecuting or defending such suit. In (i) any suit brought by the indemnitee to enforce a right to indemnification hereunder (but not in a suit brought by the indemnitee to enforce a right to an advancement of expenses) it shall be a defense that, and (ii) any suit by the corporation to recover an advancement of expenses pursuant to the terms of an undertaking the corporation shall be entitled to recover such expenses upon a final adjudication that, the indemnitee has not met any applicable standard for indemnification set forth in the DGCL. Neither the failure of the corporation (including its Board of Directors, independent legal counsel, or its stockholders) to have made a determination prior to the commencement of such suit that indemnification of the indemnitee is proper in the circumstances because the indemnitee has met the applicable standard of conduct set forth in the DGCL, nor an actual determination by the corporation (including its Board of Directors, independent legal counsel, or its stockholders) that the indemnitee has not met such applicable standard of conduct, shall create a presumption that the indemnitee has not met the applicable standard of conduct or, in the case of such a suit brought by the indemnitee, be a defense to such suit. In any suit brought by the indemnitee to enforce a right to indemnification or to an advancement of expenses hereunder, or by the corporation to recover an

advancement of expenses pursuant to the terms of an undertaking, the burden of proving that the indemnitee is not entitled to be indemnified, or to such advancement of expenses, under this Section or otherwise shall be on the corporation.

(d) Non-exclusivity of Rights. The rights to indemnification and to the advancement of expenses conferred in this Section shall not be exclusive of any other right which any person may have or hereafter acquire under any statute, certificate of incorporation, bylaw, agreement, vote of disinterested directors or otherwise. The corporation's indemnification under this Section 2 of any person who is or was a director or officer of the corporation, or is or was serving, at the request of the corporation, as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall be reduced by any amounts such person receives as indemnification (i) under any policy of insurance purchased and maintained on his or her behalf by the corporation, (ii) from such other corporation, partnership, joint venture, trust or other enterprise, or (iii) under any other applicable indemnification provision.

(e) Joint Representation. If both the corporation and any person to be indemnified are parties to an action, suit or proceeding (other than an action or suit by or in the right of the corporation to procure a judgment in its favor), counsel representing the corporation therein may also represent such indemnified person (unless such dual representation would involve such counsel in a conflict of interest in violation of applicable principles of professional ethics), and the corporation shall pay all fees and expenses of such counsel incurred during the period of dual representation other than those, if any, as would not have been incurred if counsel were representing only the corporation; and any allocation made in good faith by such counsel of fees and disbursements payable under this paragraph by the corporation versus fees and disbursements payable by any such indemnified person shall be final and binding upon the corporation and such indemnified person.

(f) Indemnification of Employees and Agents of the Corporation. Except to the extent that rights to indemnification and advancement of expenses of employees or agents of the corporation may be required by any statute, the Certificate of Incorporation, this Section or any other bylaw, agreement, vote of disinterested directors or otherwise, the corporation may, to the extent authorized from time to time by the Board of Directors, grant rights to indemnification and to the advancement of expenses to any employee or agent of the corporation to the fullest extent of the provisions of this Section with respect to the indemnification and advancement of expenses of directors and officers of the corporation.

(g) Insurance. The corporation may maintain insurance, at its expense, to protect itself and any director, officer, employee or agent of the corporation or another corporation, partnership, joint venture, trust or other enterprise against any expense, liability or loss, whether or not the corporation would have the power to indemnify such person against such expense, liability or loss under the DGCL (as currently in effect or hereafter amended), the Certificate of Incorporation or these Bylaws.

(h) Nature of Indemnification Right; Modification or Repeal of Indemnification. Each person who is or becomes a director or officer as described in subsection (a) of this Section 2 shall be deemed to have served or to have continued to serve in such capacity in reliance upon the indemnity provided for in this Section 2. All rights to indemnification (and the advancement of expenses) under this Section 2 shall be deemed to be provided by a contract between the corporation and the person who serves as a director or officer of the corporation at any time while these Bylaws and other relevant provisions of the DGCL and other applicable law, if any, are in effect. Such rights shall continue as to an indemnitee who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the indemnitee's heirs, executors and administrators. Any modification or repeal of this Section 2 shall not adversely affect any right or protection existing under this Section 2 at the time of such modification or repeal.

Section 3. Stock in Other Corporations. Subject to any limitations that may be imposed by the Board of Directors, the President or any person or persons authorized by the Board of Directors may, in the name and on behalf of the corporation, (a) call meetings of the holders of stock or other securities of any corporation or other organization, stock or other securities of which are held by this corporation, (b) act, or appoint any other person or persons (with or without powers of substitution) to act in the name and on behalf of the corporation, or (c) express consent or dissent, as a holder of such securities, to corporate or other action by such other corporation or organization.

Section 4. Checks, Notes, Drafts and Other Instruments. Checks, notes drafts and other instruments for the payment of money drawn or endorsed in the name of the corporation may be signed by any officer or officers or person or persons authorized by the Board of Directors to sign the same. No officer or person shall sign any such instrument as aforesaid unless authorized by the Board of Directors to do so.

Section 5. Corporate Seal. The seal of the corporation shall be circular in form, bearing the name of the corporation, the word "Delaware", and the year of incorporation, and the same may be used by causing it or a facsimile thereof to be impressed or affixed or in any other manner reproduced.

Section 6. Books and Records. The books, accounts and records of the corporation, except as may be otherwise required by law, may be kept outside of the State of Delaware, at such place or places as the Board of Directors may from time to time appoint. Except as may otherwise be provided by law, the Board of Directors shall determine whether and to what extent the books, accounts, records and documents of the corporation, or any of them, shall be open to the inspection of the stockholders.

Section 7. Severability. If any term or provision of the Bylaws, or the application thereof to any person or circumstances or period of time, shall to any extent be invalid or unenforceable, the remainder of the Bylaws shall be valid and enforced to the fullest extent permitted by law.

Section 8. Interpretations. Words importing persons include firms, associations and corporations, all words importing the singular number include the plural number and vice versa, and all words importing the masculine gender include the feminine gender.

Section 9. Amendments. The Board of Directors is expressly empowered to adopt, amend or repeal these Bylaws; provided that the Board of Directors shall not have the power to alter, amend or repeal any bylaw adopted by the stockholders that by its terms may be altered, amended or repealed only by the stockholders. The stockholders also have the power to adopt, amend or repeal the Bylaws of the corporation.

**CERTIFICATION OF PRINCIPAL EXECUTIVE OFFICER PURSUANT TO
EXCHANGE ACT RULE 13a-14(a)/15d-14(a)
AS ADOPTED PURSUANT TO SECTION 302
OF THE SARBANES-OXLEY ACT OF 2002**

I, D. James Bidzos, certify that:

1. I have reviewed this quarterly report on Form 10-Q of VeriSign, Inc.;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:

a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: July 28, 2016

By:

/S/ D. JAMES BIDZOS

D. James Bidzos
Chief Executive Officer

**CERTIFICATION OF PRINCIPAL FINANCIAL OFFICER PURSUANT TO
EXCHANGE ACT RULE 13a-14(a)/15d-14(a)
AS ADOPTED PURSUANT TO SECTION 302
OF THE SARBANES-OXLEY ACT OF 2002**

I, George E. Kilguss, III, certify that:

1. I have reviewed this quarterly report on Form 10-Q of VeriSign, Inc.;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:

a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: July 28, 2016

By: _____ /S/ GEORGE E. KILGUSS, III

George E. Kilguss, III
Chief Financial Officer

**CERTIFICATION OF PRINCIPAL EXECUTIVE OFFICER PURSUANT TO
18 U.S.C. SECTION 1350
AS ADOPTED PURSUANT TO SECTION 906
OF THE SARBANES-OXLEY ACT OF 2002**

I, D. James Bidzos, Chief Executive Officer of VeriSign, Inc. (the "Company"), do hereby certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that, to my knowledge:

1. the Quarterly Report on Form 10-Q of the Company for the fiscal quarter ended June 30, 2016, as filed with the Securities and Exchange Commission (the "Report"), fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934; and
2. the information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Date: July 28, 2016

/S/ D. JAMES BIDZOS

D. James Bidzos
Chief Executive Officer

**CERTIFICATION OF PRINCIPAL FINANCIAL OFFICER PURSUANT TO
18 U.S.C. SECTION 1350
AS ADOPTED PURSUANT TO SECTION 906
OF THE SARBANES-OXLEY ACT OF 2002**

I, George E. Kilguss, III, Chief Financial Officer of VeriSign, Inc. (the “Company”), do hereby certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that, to my knowledge:

1. the Quarterly Report on Form 10-Q of the Company for the fiscal quarter ended June 30, 2016, as filed with the Securities and Exchange Commission (the “Report”), fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934; and
2. the information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Date: July 28, 2016

/S/ GEORGE E. KILGUSS, III

George E. Kilguss, III
Chief Financial Officer

EXHIBIT C-34



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IFSC, Dublin 1, D01 K8F1, Ireland
T +353.1.854.1100
F +353.1.791.8569
W Afilias.info

C-34

8 August 2016

Mr. Akram Atallah
President, Global Domains Division
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: .WEB Auction

Dear Akram:

Afilias Domains No. 3 Limited, a wholly-owned subsidiary of Afilias plc, is an applicant for the .WEB top-level domain under the ICANN new gTLD program. On 27-28 August 2016, ICANN conducted an auction (the "Auction") for the .WEB string per the rules and procedures set forth in the New gTLD Applicant Guidebook (the "Guidebook"). As announced by ICANN on 28 August 2016 (<https://www.icann.org/news/announcement-2-2016-07-28-en>), the successful bidder in the Auction was Nu Dot Co LLC ("NDC").

Subsequent to the conclusion of the auction, it has been publically disclosed that VeriSign, Inc. acquired rights in the NDC application for .WEB. VeriSign's press release, dated 1 August 2016, states "*The Company [i.e., VeriSign] entered into an agreement with Nu Dot Co LLC wherein the Company provided funds for Nu Dot Co's bid for the .web TLD. We are pleased that the Nu Dot Co bid was successful. We anticipate that Nu Dot Co will execute the .web Registry Agreement with the Internet Corporation for Assigned Names and Numbers (ICANN) and will then seek to assign the Registry Agreement to Verisign upon consent from ICANN.*" (<https://investor.verisign.com/releasedetail.cfm?ReleaseID=981994>)

Further, in its 10-Q for the quarter ended 30 June 2016, filed with the U.S. Securities and Exchange Commission on 28 July 2016, VeriSign states "*Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016.*"

Paragraph 10 of the Terms and Conditions set forth in the Guidebook includes in part the following language: "Applicant may not resell, assign or transfer any of applicant's rights or obligations in connection with the application." We have not been able to review a copy of the agreement(s) between NDC and VeriSign with respect to this arrangement, but it appears likely, given the public statements of VeriSign, that DNC and VeriSign entered into an agreement in the form of an option or similar arrangement with respect to the rights and obligations of NDC regarding its .WEB application. An option to acquire a string won at auction, together with a promise to fund the auction, is exactly the type of transfer of rights and obligations in connection with an application that ICANN was attempting to stop by including this language in the Terms and Conditions. Otherwise, such language would have no real purpose. The language of paragraph 10 precludes not only a transfer of all rights or obligations in an application, but of any rights or obligations. There is no materiality threshold, and



no procedure to seek consent or waiver of these terms. It is an absolute prohibition of this type of arrangement in clear and unambiguous terms.

The purposes of a prohibition on transferring rights and obligations in an application are obvious. ICANN and the community spent years engaged in a stakeholder driven process to develop the important processes and procedures by which one could submit an application for a new gTLD. These procedures were developed to endure a level playing field for gTLD applicants and to protect the integrity of the process. The application requirements and associated filing deadlines were clear and strictly enforced from the beginning. To allow third parties to circumvent the entire Guidebook process simply by buying rights in an application once filed renders the entire Guidebook and ICANN process mere folly and negatively impacts to a material degree the rights and expectations of applicants that have played by the rules.

There is no cure provided in the Guidebook for violations of paragraph 10 of the Terms and Conditions. The only reasonable and fair solution is to disqualify the NDC application and proceed to the next highest bidder in the auction to contract for the string, at the price at which the third highest bidder exited the auction.

Further, section 1.2.7 of the Guidebook provides:

If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.

ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.

Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.

Clearly, an agreement to provide at least \$135 Million to an applicant constitutes a material change in that applicant's financial condition. Further, the type of option agreement that apparently exists between NDC and VeriSign likely constitutes a change in control of the applicant. A change in control can be effected by contract as well as by changes in equity ownership. It is our understanding that NDC never notified ICANN of these changes per the terms of the Guidebook. In the interest of fairness to the other .WEB auction participants, ICANN should exercise its right under paragraph 1.2.7 and deny NDC's application.

We request that ICANN promptly undertake an investigation of the matters set forth in this letter and take appropriate action against NDC and its .WEB application for violations of the Guidebook as we have requested.

In addition to this letter, we are filing a complaint with the ICANN Ombudsman with regard to this matter. We strongly urge ICANN to stay any further action in this matter with respect to NDC, including entering into a registry agreement for .WEB with NDC, or acting on any request of NDC or VeriSign to



assign such agreement to VeriSign, until the Ombudsman has had an opportunity to investigate and report on this matter.

Regards,

A handwritten signature in blue ink, appearing to read "M. Scott Hemphill". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

M. Scott Hemphill
Vice President & General Counsel

cc: Steve Crocker, Chairman of the Board
Göran Marby, President and CEO

EXHIBIT C-35



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www.Afilias.info

9 September 2016

Via E-Mail

Mr Akram Attallah
President, Global Domains Division
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: .WEB auction

Dear Mr. Atallah:

On behalf of Afilias Domains No. 3 Limited ("Afilias"), a wholly-owned subsidiary of Afilias plc, I write with reference to our letter of 8 August 2016, in which we requested that ICANN disqualify and reject Nu Dot Co LLC's ("NDC") application for .WEB.

Specifically, NDC entered into an agreement to transfer any rights it acquired in connection with its application for .WEB to VeriSign, Inc. ("VeriSign"), which it did not disclose prior to the .WEB auction. The evidence strongly suggests that NDC acted as a front for and participated in the .WEB auction (the "Auction") for and on behalf of VeriSign. Given ICANN's failure to respond to our prior letter, we request that ICANN promptly, and by no later than 16 September, 2016, (1) disclose the steps (if any) that it has taken to disqualify NDC's bid on the basis that NDC violated the rules applicable to its application; and (2) provide an undertaking that it has not, and will not, enter into a registry agreement for .WEB with NDC until (a) the Ombudsman has completed his investigation; (b) ICANN's Board has reviewed NDC's conduct and determined whether or not to disqualify NDC's bid and reject its application; and, (c) to the extent Afilias seeks review of any decision of ICANN relating to .WEB through ICANN's accountability mechanisms, such mechanisms are completed. We nonetheless emphasize that Afilias reserves all of its rights to pursue any and all rights or remedies available to it in any forum against ICANN, NDC or VeriSign in connection with the delegation of the .WEB gTLD.

We take the opportunity of this letter to further explain the reasons why ICANN must disqualify NDC's application for .WEB and proceed to contract for .WEB with Afilias, the next highest bidder in the Auction, in compliance with its obligations under ICANN's Articles of Incorporation and Bylaws (as well as principles of international law and California law), as set forth below.



NDC violated the New gTLD Applicant Guidebook and the Auction Rules for New gTLDs

First, NDC violated Paragraph 10 of the Terms and Conditions in Module 6 of the New gTLD Applicant Guidebook (the "Guidebook"), which expressly prohibits any applicant for a gTLD to "*resell, assign or transfer any of applicant's rights or obligations in connection with the application*". As we explained in our letter of August 8, 2016, Verisign publicly disclosed that it "*provided funds*" for NDC's bid for .WEB and that NDC would "*seek to assign the Registry Agreement to VeriSign.*" Although the specific terms of the agreement between VeriSign and NDC have not been disclosed, it is clear from Verisign's own press release and its disclosure in its Form 10-Q filed with the U.S. Securities and Exchange Commission for the quarter ended June 30, 2016, that both companies entered into an arrangement well in advance of the Auction to transfer NDC's rights and obligations regarding its .WEB application to VeriSign.

Second, NDC violated Section 1.2.7 of the Guidebook, which requires applicants to "*promptly notify ICANN via submission of the appropriate forms*" "*if at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate,*" including "*changes in financial position and changes in ownership or control of the applicant*". In this regard, we find remarkable that the Form 10-Q VeriSign filed with the U.S. Securities and Exchange Commission on 28 July, 2016—the day after the Auction—contained the following statement: "*Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016.*" When rumors surfaced that another company was behind NDC's application for .WEB, NDC sent a note to ICANN's Ombudsman on 8 July 2016, stating merely that "*neither the governance, management nor the ownership in NuDotcoco [sic] has changed.*" Clearly, by then, relevant changes concerning NDC's financial position had, at a minimum, been agreed to and should have been reported to ICANN, namely, that the VeriSign had agreed to fund NDC's bid for .WEB.

Third, NDC violated the Auction Rules for New gTLDs ("Auction Rules"). Rule 12 provides that "*participation in an Auction is limited to Bidders, which is defined by the Auction Rules as a "Qualified Applicant" or a "party designated by a Qualified Applicant to bid on its behalf*". This rule prohibits bids placed on behalf of a third-party that is not a "Qualified Applicant", defined by the Auction Rules as "*an entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction.*" Accordingly, Rule 40(b) provides that "*in order to be valid*" "*a Bid must be placed by a Bidder for its Application in an Open Contention Set.*"



ICANN has the duty to deny NDC's application, disqualify its bid and proceed to contract with the next highest bidder in the Auction

ICANN's governing documents clearly dictate the appropriate response ICANN should take in connection with NDC's improper conduct:

- ICANN is required to *"...operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets."* [Articles of Incorporation, Art.4]
- ICANN is required to *"mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness"* [Bylaws, Art.I § 2 (8)]
- ICANN is required to *"not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."* [Bylaws, Art. II3]
- ICANN is required to *"Act[] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected."* [Bylaws, Art. I§ 2 (9)]
- ICANN is directed to *"operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness"* [Bylaws, Art. III § 1].
- ICANN is required to *"promot[e] competition in the registration of domain names where practicable and beneficial in the public interest"* [Bylaws, Art. I § 2 (6)]
- ICANN is required to *"Remain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."* [Bylaws, Art. I. § 2 (10)]

VeriSign chose not to apply for .WEB, as it could have done. Instead, VeriSign improperly and surreptitiously funded NDC's application. NDC's and VeriSign's attempt to game the system and obtain control over .WEB for VeriSign (which already controls.COM), must be sanctioned by ICANN by disqualifying NDC's bid and rejecting its application.

In these circumstances, we submit that ICANN should disqualify NDC's bid and offer to accept the application of Afilias, which placed the second highest exit bid. Consistent with Auction Rules No. 46 and No. 47, the winning price should be deemed to be the second-highest remaining exit bid after disqualifying NDC and striking its exit bid as invalid.

This course of action is consistent not only with ICANN's Guidebook and Auction Rules, but also with the principles of due process and fairness that ICANN is obligated to observe pursuant to its governing documents. In this regard, we note that NDC's violations must not affect the rights of other applicants that participated in the Auction in full compliance with the applicable rules, and that a new auction would be improper since the bidders have already



seen the outcome of the first Auction. Thus, ICANN must protect the integrity of the gTLD auction and delegation process from being tainted by the actions of one bidder. The only way to do this is to disqualify NDC and proceed as we have outlined above.

Finally, we remind ICANN that "ICANN's Board of Directors has ultimate responsibility for the New gTLD Program" (Bylaws, Art. II, § 1; Guidebook, Section 5.1), and that "material changes in circumstances" require "additional Board review" before "formal approval" of a registry agreement for the delegation of a gTLD. We therefore request that ICANN provide us with an undertaking that it has not, and will not, enter into a registry agreement for .WEB with NDC until ICANN's Board has reviewed NDC's conduct and reached a considered decision on whether or not to disqualify NDC's bid and reject its application; the Ombudsman has completed his investigation and the Board has considered and reached a decision on his report; and, to the extent Afilias seeks review of any decision of ICANN relating to .WEB through ICANN's accountability mechanisms, Afilias has exhausted such mechanisms.

Conclusion

For the reasons set out above, ICANN's Board and officers are obligated under the Articles of Incorporation, Bylaws and the Guidebook (as well as international law and California law) to disqualify NDC's bid immediately and proceed with the contracting of a registry agreement with Afilias, the second highest bidder. We look forward to receiving a response from ICANN by no later than 16 September 2016.

Afilias reserves all of its rights at law and in equity, including, without limitation, relating to the issues raised in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Scott Hemphill".

M. Scott Hemphill
Vice President & General Counsel

cc: Steve Crocker, Chairman of the ICANN Board
Göran Marby, President and Chief Executive Officer
Arif Hyder Ali, Dechert LLP

EXHIBIT C-36

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
INDEPENDENT REVIEW PANEL

AFILIAS DOMAINS NO. 3 LIMITED)	
)	
Claimant,)	
)	
v.)	Case No. 01-18-0004-2702
)	
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS)	
)	
Respondent.)	
)	

**EMERGENCY PANELIST’S DECISION ON AFILIAS’ REQUEST FOR PRODUCTION
OF DOCUMENTS IN SUPPORT OF ITS REQUEST FOR INTERIM MEASURES**

1. Procedural Background

- 1.1. Scheduling Order No. 1, dated 3 December 2018, took note of Affilias Domains No. 3 Limited’s (“Affilias”) request for documentary disclosures in support of its Request for Interim Measures (“Interim Request”). The parties had preliminarily addressed the issue of document discovery during a scheduling conference held on 30 November 2018. It appeared that there had been agreement that limited disclosures would be in order. Affilias agreed to submit a narrowly tailored list of document requests on 3 December 2018. The Internet Corporation for Assigned Names and Numbers (“ICANN”) agreed to produce, by 14 December 2018, documents responsive to a narrowly tailored list of documents if they were necessary for Affilias to present its case in this emergency proceeding. Scheduling Order No. 1 at ¶ 6.2.
- 1.2. On 3 December 2018, Affilias submitted a chart identifying eight (8) specific documents or categories of documents. On 5 December 2018, ICANN submitted Responses and Objections to Affilias’ Request. ICANN raised general objections and several specific objections to each document request. ICANN did not agree to produce any of the documents requested.
- 1.3. On 7 December 2018, Affilias filed a Reply to ICANN’s Responses and Objections. Affilias argued that the documents requested are “highly relevant” to the emergency proceeding. Affilias’ Reply to Document Request at 2.
- 1.4. In this Order, the Emergency Panelist will review ICANN’s general objections and then, its objections to each of the eight document categories identified in Affilias’ Request.

2. ICANN's General Objections

- 2.1. **Jurisdiction.** ICANN contends that ICANN's Bylaws and relevant procedures do not permit discovery during an interim measures phase of an Independent Review Process ("IRP"). ICANN argues that such discovery is "outside the jurisdiction of the Emergency Panelist." ICANN's Responses and Objections at 1. ICANN does not cite to any specific Bylaws, rules or procedures in support of its objection.
- 2.2. Afilias argues that neither the Interim Supplementary Procedures (*e.g.*, Art. 8) nor the ICDR Rules (*e.g.*, Art. 21) prohibit document exchange during an emergency proceeding. Afilias cites to an order of an Emergency Panelist in an IRP emergency proceeding to support its position that emergency panelists have authority to order discovery. Afilias' Reply at 3 (citing *Donuts, Inc. v. ICANN*, ICDR Case No. 01-14-0000-1579, Procedural Order No. 1 (5 Nov. 2014)). In *Donuts, Inc. v. ICANN*, the Emergency Panelist was appointed under the ICDR Rules. He advised the parties in Procedural Order No. 1 that "[t]he Emergency Arbitrator will also consider [during the hearing] whether any oral or written or oral discovery is needed." *Id.* This suggests that the arbitrator believed that discovery would be appropriate during the interim measures phase of an IRP.
- 2.3. Afilias also relies upon U.K. civil litigation standards and U.S. court norms in copyright litigation for the proposition that written discovery is commonly permitted during interim measures proceedings. Afilias' Reply at 3.
- 2.4. The undersigned Emergency Panelist finds no basis in the Bylaws, ICDR Rules or Interim Supplementary Procedures to limit its authority to resolve Claimant's application for interim measures, including by permitting document discovery as necessary to decide the application. Under ICDR Rules, Art. 6(3), an Emergency Panelist is required to provide "a reasonable opportunity to all parties to be heard." Further, ICDR Rules, Art. 20(4), provides that a tribunal shall have power to order the parties to produce documents "[a]t any time during the proceedings." ICDR Rules, Art. 6(3), clarifies that an emergency arbitrator is vested with the same authorities as that of an arbitral tribunal.
- 2.5. The Emergency Panelist concludes it has jurisdiction to rule on Afilias' document request and authority to order production of documents as necessary to resolve Afilias' Interim Request.
- 2.6. **Standards To Be Applied.** Afilias' Request for Production of Documents seeks documents "relevant and material" to its Interim Request. ICANN contends that discovery during an interim proceeding should only be permitted upon a "showing" that it is "required on an urgent basis to prevent serious imminent harm." ICANN's Response at 1. ICANN appears to conflate the standard for deciding whether an interim measure may be ordered with the lower threshold for deciding whether documentary discovery in support of an application for interim measures is justified.
- 2.7. Under Article 8 of the Interim Supplementary Procedures, an IRP Panel may order production of documents that are: (1) "necessary to further the Purposes of the IRP;" (2) "in the other Party's possession, custody or control;" (3) "reasonably likely to be relevant and material to the resolution of the Claims and/or defenses in the Dispute;" and (4) "are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law." Int. Supp. Proc. at Art. 8.

- 2.8. These standards for disclosure are consistent with ICDR Rules, Art. 21, which provides that an arbitral tribunal (and by the extension of Art. 6(3), the emergency arbitrator):

may... require a party to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case.

ICDR Rules at Art. 21(4).

- 2.9. ICANN does not dispute (a) that the documents requested by Claimant are in its possession and (b) are not otherwise available to Claimant. Therefore, after dealing with ICANN's other general objections, I will turn to whether the documents requested are "necessary," "relevant and material" to Claimant's Interim Request.
- 2.10. **Confidentiality.** ICANN objects to Afiliás' Document Requests Nos. 1, 2 and 8 on grounds that they call for production of "confidential information of non-parties." ICANN's Response at 2, 3, 6 and 8. ICANN does not explain this objection nor cite to authority showing that the requested information is "protected from disclosure by applicable law."
- 2.11. In response to this confidentiality concern, Afiliás offered to enter into a protective order under which ICANN would disclose all responsive documents, but ICANN could designate those documents that reveal confidential information of non-parties. Under Afiliás' proposal, appropriately designated documents would be disclosed only to "outside-counsel" and not to Afiliás itself. Afiliás' Reply at 5.
- 2.12. In considering Afiliás' document request and ICANN's objection to production of documents containing confidential information, the Bylaws, Interim Supplementary Procedures and ICDR Rules must be reviewed.
- 2.12.1. **Bylaws.** The ICANN Bylaws emphasize the transparency of IRP proceedings, including that "documents *filed in* connection with IRP Panel Proceedings shall be posted on the Website." Bylaws at Art. 4, Sec. 4.3(u)(emphasis added). This instruction likely does not apply to document exchanges, but even if it did, an IRP Panel is expressly authorized, "in its discretion," to "grant a party's request to keep certain information confidential, such as trade secrets, but only if such confidentiality does not materially interfere with the transparency of the IRP proceeding." *Id.*
- 2.12.2. **Interim Supplementary Procedures.** The Interim Supplementary Procedures address exchanges of information. The panel "shall be guided by considerations of accessibility, fairness and efficiency ... in its consideration of requests for exchange of information." Int. Supp. Proc. at Art. 8. Subject to determinations of necessity, relevance and materiality, a panel "may order" document production of documents that "are not subject to attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law (including,

without limitation, disclosures to competitors of any competition-sensitive information of any kind).” *Id.*¹

- 2.12.3. **ICDR Rules.** Both the Interim Supplementary Procedures and ICDR Rules anticipate that an exchange of commercial or technical confidential information may be requested during an Independent Review Process or an arbitral proceeding. Consistent with conventional arbitration practice, the ICDR Rules do not limit production of relevant and material documents. The ICDR Rules expressly authorize the tribunal, where appropriate, to “condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.” ICDR Rules at Art. 21(5). Commonly, production of business confidential information of one of the parties may be conditioned on adoption and compliance with a protective order.
- 2.13. **Conclusion.** The Interim Supplementary Procedures do not address the availability of protective orders, nor do they preclude their use to protect competition-sensitive information. The use of such protective measures is permitted under the ICDR Rules and would best achieve the twin goals of “accessibility” and “fairness,” while ensuring that trade secrets are not disclosed to competitors.
- 2.14. For these reasons, to the extent that documents ordered to be exchanged below contain trade secrets or commercial confidential information, they are ordered to be produced subject to an appropriate protective order. The parties are requested to consult and submit a joint request for a protective order by Friday, 14 December 2018.
- 2.15. **ICANN’s General Objection As To Burden and Costs.** ICANN summarily alleges that Afilias’ document requests are “unduly burdensome” and would “increase the cost” of the interim proceedings. ICANN’s Response at 1. ICANN does not explain why the production of Afilias’ restated and narrowed document requests would be unduly burdensome, nor does it object to any particular document request as being unreasonable or overly broad.
- 2.16. ICANN appears to claim that all of Afilias’ requests are unduly burdensome because “ICANN has not *yet* disputed any of Afilias’ factual assertions.” *Id.*(emphasis added). But this statement does not bind ICANN, nor does it serve as a stipulation as to the correctness of facts asserted by Afilias. Without such admissions or stipulations on the record, Afilias would have every reason to try to establish support for its factual assertions.
- 2.17. Given the Emergency Panelist’s mandate to provide each party a fair opportunity to present its case, considerations of “accessibility” and “fairness” outweigh any “increased” costs that may result from the limited document exchange ordered herein.
- 2.18. **ICANN’s Objection As To Inequitable, One-Way Discovery.** ICANN objects to Afilias’ document requests because Afilias purportedly “seeks to obtain one-way discovery from ICANN without permitting ICANN to obtain any discovery from Afilias.” ICANN’s Response at 1. ICANN claims this is inequitable and violates Article

¹ ICANN did not argue that “applicable law” prevents the production of documents subject to an appropriate protective order.

20(1) of the ICDR Rules requiring “that the parties are treated with equality.” ICANN’s Response at 1.

- 2.19. ICANN’s objection is hard to reconcile with the procedural record. ICANN has not requested any discovery, nor did it request the right to file document requests during the scheduling conference. It would be unfair to reject Afilias’ request solely because ICANN did not similarly invoke its right to request the production of documents during this emergency proceeding.
- 2.20. Moreover, this case presents an unusual circumstance where Afilias’ contentions relate in part to ICANN’s conduct in respect to third parties. It is undisputed that ICANN has possession of documents concerning these transactions that are not in Afilias’ possession, custody or control.

3. **Determinations as to Claimant’s Document Requests**

- 3.1. **Document Requests No. 1, 2 and 8.** Afilias’ Reply reorders its document requests. In basket 1, Afilias includes its prior Document Requests Nos. 1, 2 and 8. Afilias argues that these three requests are “vital to understanding the precise nature of NDC’s violations of the New gTLD Program Rules,” and in particular, “whether ICANN’s refusal to disqualify NDC’s bids ... is a violation of ICANN’s Bylaws.” Afilias’ Reply at 4. In Afilias’ view, the documents sought are “relevant and material” to meeting its burden of demonstrating that there is a “sufficiently serious question related to the merits.” *See* Int. Supp. Proc. at Art. 10(ii)(B).
- 3.2. ICANN’s objections to each of Requests Nos. 1, 2 and 8 are identical. They essentially repeat ICANN’s general objections which are reviewed and dismissed above.
- 3.3. In addition, ICANN contends that “Afilias fails to specifically identify how the requested documents are relevant to resolution of Afilias’ Emergency Request.” This objection is unsupported. Afilias alleges that its requests seek production of relevant and material information that will help establish its theories of recovery. Without substantiation, Afilias’ claims might be viewed as mere speculation and thus, not raising sufficiently serious questions related to the merits.
- 3.4. ICANN does not contend that these specific requests are overbroad, unreasonable or would impose an undue burden to produce. Accordingly, these requests are granted and must be complied with, subject to an appropriate protective order.
- 3.5. **Document Requests Nos. 3, 4 and 5.** These requests seek documents relating to negotiation of any registry agreement and pre-delegation testing. Afilias argues that these three requests are necessary for it to carry its burden of establishing “urgency” of the requested stay. ICANN disagrees because it has made a written undertaking that effectively stays any further actions by ICANN with respect to delegation of .WEB gTLD.
- 3.6. While “urgency” is not expressly stated in the Interim Supplementary Procedures as a prerequisite for interim relief, the ICDR Rules clarify that an emergency arbitrator has power to order conservancy measures deemed “necessary.” ICDR Rules at Art. 6(4). Urgency is just one of the factors that could establish the necessity of requested interim relief. Urgency could also be evaluated in the balance of hardships contemplated by

Interim Supplementary Procedures at Article 10(iii). Documents establishing urgency, therefore, are likely to be relevant and material to consideration of Afilias' Interim Request.

- 3.7. ICANN's unilateral decision to keep the delegation of .WEB "on hold" pending completion of this emergency proceeding does not eliminate Afilias' burden of establishing harm, necessity and balance of hardships. ICANN's voluntary "stay" shifts the relevant inquiry to whether the status quo existing as of the date of Afilias' Interim Request should be maintained. Afilias argues that ICANN has not been forthcoming as to the status of its activities to delegate the .WEB contention set. Afilias contends that it needs to know what was the "status quo" before the delegation of .WEB was unilaterally placed on hold. Otherwise, it would be foreclosed from addressing the urgency of maintaining the status quo and the harm that it could experience if the voluntary stay were lifted.
- 3.8. The Emergency Panelist is persuaded by Afilias' argument. On the one hand, assuming arguendo that the registry agreement and pre-delegation testing had advanced to the point that final delegation of .WEB were only days away from a decision on the Interim Request, establishment of the urgency of a stay (if other factors were satisfied) would be more likely. But, on the other hand, if delegation activities would take years to complete, then this lack of urgency might weigh in the balance of whether interim measures are necessary and whether the hardships would tip decidedly toward the party seeking relief.
- 3.9. ICANN does not contend that these specific Requests are overbroad or unreasonable or would create an undue burden to produce.
- 3.10. Accordingly, Document Requests Nos. 3, 4 and 5 are granted and must be complied with, subject to an appropriate protective order.
- 3.11. **Document Request No. 6.** In this Request, Afilias seeks production of correspondence between ICANN and VeriSign and/or NDC concerning the Cooperative Engagement Process ("CEP") that was held between Afilias and ICANN. Afilias argues that these documents are relevant to assessing whether ICANN was pressured and would be harmed if its Interim Request were granted.
- 3.12. ICANN responds with the general objections already reviewed. ICANN does not contend that this request is unreasonable or overly broad or explain why it would be create an undue burden to produce documents in response to this request.
- 3.13. Without clarification or detail, ICANN argues generally that Afilias failed to establish the "relevance" of these documents to its Interim Request. In its general objections, ICANN also argues that Afilias' claims to relevance are "unsupported because ICANN has not *yet* disputed any of Afilias' factual assertions." ICANN's Response at 1 (emphasis added). But the prospect that ICANN might challenge Afilias' factual allegations in this interim proceeding – including whether ICANN might suffer hardship if a stay were ordered – is precisely Afilias' rationale for seeking production of documents that are likely relevant to its Interim Request and might be material to the determination of whether interim measures are necessary and the balance of hardships tips decidedly toward the party seeking relief.


- 3.14. For these reasons, Document Request No. 6 is granted and must be complied with, subject to an appropriate protective order.
- 3.15. **Document Request No. 7.** Afilias seeks production of documents by which ICANN placed the .WEB contention set on hold previously. Afilias argues that these documents are “directly relevant” to its request for an award of costs for this emergency proceeding. Afilias’ Reply at 5.
- 3.16. ICANN challenges the relevance of these requested documents, but again, does not argue that the request is unreasonable, overly broad or would create a specific undue burden if the requested documents were ordered to be produced. ICANN’s Response at 7.
- 3.17. Without making any factual finding in this Decision, it would appear for purposes of this preliminary determination that ICANN’s prior decisions to put “on” and “off” “hold” the .WEB contention set might be relevant and material to Afilias’ request for costs. Accordingly, Document Request No. 7 is granted and must be complied with.

4. Conclusion

- 4.1. For the reasons stated above, the Parties are requested to confer and propose a mutually acceptable protective order. The deadline for submission of a joint proposal for a protective order is 14 December 2018.
- 4.2. ICANN is further ordered to produce documents in accordance with this Decision. In order to provide further time for this production to occur, ICANN’s deadline for producing the documents will be extended to 17 December 2018. The Procedural Timetable set forth in Scheduling Order No. 1 will be modified accordingly. All other deadlines set forth in Scheduling Order No. 1 are continuing.

It is so Ordered.

Dated: 12 December 2018



Kenneth B. Reisenfeld
Emergency Panelist

EXHIBIT C-37

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,) ICDR CASE NO. 01-18-0004-2702
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

**ICANN'S REJOINDER MEMORIAL IN RESPONSE TO AMENDED REQUEST BY
AFILIAS DOMAINS NO. 3 LIMITED FOR INDEPENDENT REVIEW**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Rejoinder to the Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited (“Afilias”) for Independent Review (“Reply”) submitted by Afilias on 4 May 2020.

1. What makes this Independent Review Process (“IRP”) different from all the others is that ICANN has not fully addressed the ultimate, underlying dispute that Afilias raises in this IRP – namely, whether Nu Dot Co (“NDC”), by virtue of the Domain Acquisition Agreement (“DAA”) between NDC and Verisign Inc. (“Verisign”), violated the New gTLD Program (“Program”) Applicant Guidebook (“Guidebook”) or the Auction Rules and, if so, whether NDC’s application should be disqualified or its winning bid for .WEB rejected. This is because .WEB has been mired in legal proceedings from before the .WEB auction was even held, including repeated invocations of ICANN’s Accountability Mechanisms and a year-long United States Department of Justice (“DOJ”) investigation.

2. Since the inception of the Program, ICANN has followed a practice of placing applications and contention sets “on hold” when related Accountability Mechanisms are initiated. Once on hold, ICANN generally refrains from taking any action with respect to the application or contention set that could interfere with, or otherwise preempt, a pending Accountability Mechanism. ICANN follows this practice, in part, because ICANN considers its Accountability Mechanisms to be fundamental safeguards in ensuring its bottom-up, multistakeholder model remains effective and that ICANN remains accountable to its community.

3. The ICANN Board followed its processes and its obligations under the Articles of Incorporation (“Articles”) and Bylaws by specifically choosing in November 2016 not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending

(which might also be the subject of other soon-to-be filed Accountability Mechanisms). That decision made perfect sense given the expectation that the results of those proceedings could have an impact on whether ICANN might need to make any decision. And because that Board's decision arises "out of the Board's exercise of its fiduciary duties," and the decision was "within the realm of reasonable business judgment," ICANN's Bylaws state that this decision must be viewed by the Panel with deference.¹

4. Other than certain claims raised for the first time in Afilias' Reply, the Reply is mostly a reread of Afilias' Amended Request for IRP, which itself repackages the misplaced arguments Afilias has been making since 2016. In its Reply, Afilias continues to argue that ICANN's Articles and Bylaws required ICANN to automatically disqualify NDC in 2016 after ICANN received a copy of the DAA. But Afilias overlooks the fact that the violations of the Guidebook and Auction Rules that it alleges do not require the automatic disqualification of NDC's application or rejection of its winning bid for .WEB. Instead, the Guidebook and Auction Rules, together with ICANN's Bylaws, provide ICANN with substantial discretion to determine whether NDC committed a breach of the Guidebook or Auction Rules and, if so, the appropriate remedy or penalty, if any. Afilias' argument also overlooks the fact that, even prior to the Board's determination in 2016 not to make any decision regarding .WEB while an Accountability Mechanism was pending, ICANN would not have disqualified NDC's application upon its receipt of the DAA in August 2016 because the .WEB contention set was on hold at that time due to a pending Accountability Mechanism filed by the parent of another .WEB applicant. Consistent with its well-known practices, ICANN did not take action on .WEB while that Accountability Mechanism was pending.

¹ Bylaws, Art. 4, § 4.3(i)(iii), Claimant's Ex. C-23 ("C-23").

5. Likewise, Afilias continues to argue that ICANN was required to do a regulatory-like review of Verisign's possible operation of .WEB and block it on the ground that, in Afilias' view, this would diminish competition. Put another way, Afilias claims that ICANN should have rejected NDC's winning bid for .WEB in 2016 and declared Afilias the winner because, in Afilias' opinion, the operation of .WEB by Afilias rather than Verisign is more likely to enhance competition. Not only has this presumption never been established – nor could it with any economic certainty – but there is literally nothing in the Guidebook's detailed procedures for selecting qualified generic top-level domain (“gTLD”) applicants that requires ICANN to perform this type of competition analysis. Indeed, ICANN's Bylaws specifically prohibit ICANN from exercising regulatory authority or acting like a regulator. Likewise, ICANN's Core Value regarding competition does not require it to award gTLDs based on a determination of which applicant will most effectively promote competition, as two current ICANN Board members attest in their witness statements.

6. Rather, ICANN complies with its Core Value regarding competition by coordinating and implementing policies that facilitate market-driven competition – which is precisely what ICANN did by introducing over 1,200 new gTLDs into the market under the Program. ICANN also complies with its Core Value regarding competition by deferring to competition regulators' evaluation of potential competition concerns associated with the Internet's domain name system (“DNS”) – which is precisely what ICANN did when it cooperated with, and deferred to, the DOJ's investigation of competition issues associated with Verisign's possible operation of .WEB. The DOJ's decision not to take action to block Verisign's potential operation of .WEB is dispositive, in the same way it would have been had the DOJ determined to take regulatory action to prevent that from happening. Before this IRP, Afilias recognized ICANN's proper role with respect to competition issues by noting that

“[n]either ICANN nor [ICANN’s Generic Names Supporting Organization] have the authority or expertise to act as anti-trust regulators.”² Nothing has changed since Afilias first endorsed this view, other than Afilias assembling arguments for this IRP, of course.

7. In addition, two of the world’s most prominent economists, Dr. Dennis Carlton and Dr. Kevin Murphy, have each submitted expert reports in this IRP – Dr. Carlton on behalf of ICANN and Dr. Murphy on behalf of Verisign – concluding that there is no economic evidence that Verisign’s operation of .WEB (rather than Afilias’) would result in anticompetitive effects. Moreover, ICANN’s Bylaws preclude it from singling out any particular party, including Verisign, for disparate treatment except where justified by substantial and reasonable cause. Afilias has made no showing that Verisign’s operation of .WEB would inhibit competition, much less a substantial showing.

8. Afilias’ contention that ICANN violated its Articles, Bylaws and internal procedures due to the manner in which ICANN investigated Afilias’ allegations against NDC and Verisign is similarly meritless. Afilias’ Amended Request for IRP made no such claim, and Afilias cannot properly assert this new claim in its Reply. Further, the record clearly shows that, after receiving complaints from certain .WEB applicants, including Afilias’ letter dated 8 August 2016, ICANN promptly gathered the information relevant to the issues raised by the applicants. Indeed, Afilias asserts that, by the end of August 2016, ICANN had acquired all of the facts and information necessary to address Afilias’ allegations, which is an admission that is fundamentally inconsistent with Afilias’ argument that ICANN’s investigation was inadequate.

9. In addition, many of Afilias’ claims are time-barred. Specifically, Afilias’ assertions that the ICANN Board and ICANN staff violated the Articles and Bylaws in 2016 are

² 2006 Registry Operators Submission, at 8, R-21.

barred by Rule 4 of the Interim Supplementary Procedures, which states that a dispute may not be filed more than twelve months from the date of the action or inaction sought to be challenged. Afiliás' reliance on the doctrine of equitable estoppel in an attempt to evade that clear bar is without merit.

10. Afiliás is also seeking relief that is not available in these proceedings. While this Panel is certainly empowered to declare whether ICANN complied with its Articles and Bylaws – with the appropriate deference to the Board's reasonable business judgment – the Panel is not empowered to provide the affirmative relief Afiliás seeks. Nothing in ICANN's Articles, Bylaws or the relevant IRP procedures permits the Panel to require ICANN to “disqualify NDC's application and bid and [] offer Afiliás the rights to .WEB.”³ Afiliás' claims to the contrary are an irresponsible attempt to push the Panel beyond the marked boundaries of its authority. As Afiliás well knows, a decision in excess of the Panel's authority would be invalid.

11. Finally, with respect to Afiliás' claim regarding Rule 7 of the Interim Supplementary Procedures, Afiliás relies on its prior submissions.⁴ ICANN does the same.⁵ There is simply no support for the claim that ICANN was either duped by, or conspired with, Verisign to create IRP procedures benefitting Verisign.

I. BACKGROUND.

12. ICANN provided a summary of relevant facts at pages 4 through 16 of its Response to Afiliás' Amended Request for IRP (“IRP Response”), dated 31 May 2019. This section provides additional facts that are relevant to the arguments made by Afiliás in its Reply.⁶

³ Afiliás' Reply Memorial ¶ 155.

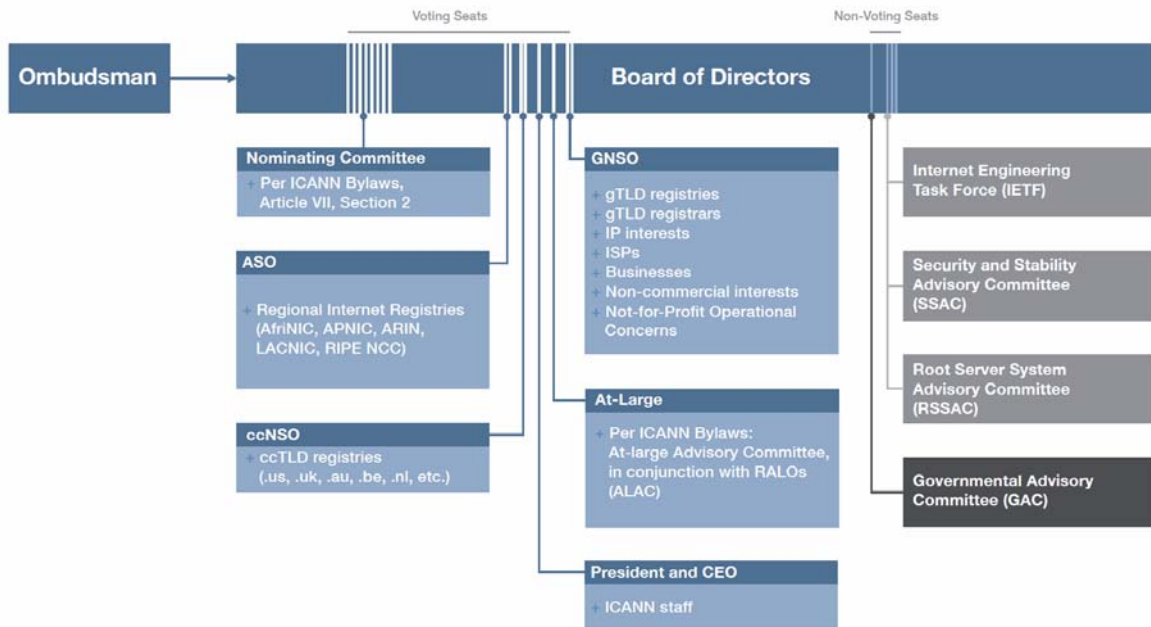
⁴ *Id.*, ¶ 11.

⁵ See ICANN's Response to Amended Request for IRP ¶¶ 77-82.

⁶ Pursuant to Paragraph 201 of the Panel's Decision on Phase I dated 12 February 2020, ICANN submits herewith the witness statements of *Amici* NDC and Verisign in order to help ensure that the factual record in this IRP is complete. ICANN does so without endorsing those statements or agreeing with them in full.

A. ICANN And Its Board.

13. ICANN is a complex organization with the critical Mission of ensuring “the stable and secure operation of the Internet’s unique identifier systems[.]”⁷ ICANN accomplishes its Mission through a multistakeholder model in which individuals, non-commercial stakeholder groups, industry, and governments play important roles in its community-based, consensus-driven, policy-making approach. In fact, ICANN in many ways operates more as a community of participants than a traditional corporation, as shown by the following organization chart:



14. In addition to its international Board of Directors and nearly 400 staff members, the ICANN community includes three Supporting Organizations that develop and recommend policies, within their distinct areas of expertise, concerning the Internet’s technical management. They are the Address Supporting Organization,⁸ the Country Code Names Supporting

⁷ Bylaws, Art. 1, § 1.1(a), C-23.

⁸ *Id.*, Art. 9.

Organization⁹ and the Generic Names Supporting Organization (“GNSO”).¹⁰

15. The community also includes four Advisory Committees that serve as formal advisory bodies to the ICANN Board. They are made up of representatives from the Internet community to advise on particular issues or policy areas and include the Governmental Advisory Committee,¹¹ the Security and Stability Advisory Committee,¹² the Root Server System Advisory Committee¹³ and the At-Large Advisory Committee.¹⁴

16. In addition, there is an ICANN Nominating Committee (“NomCom”). The NomCom is a committee made up of ICANN community members tasked with selecting, among other positions, some of ICANN’s Board members, as well as leaders of certain Supporting Organizations and Advisory Committees.¹⁵

17. The Ombudsman is another important part of the ICANN community.¹⁶ “The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly.”¹⁷

18. The final component of the ICANN community is the large, globally diverse group of Internet stakeholders – national governments, international organizations, the business sector, civil society, the technical community, and individual Internet users. These entities and individuals participate in ICANN processes by, among other things, attending ICANN’s public meetings, responding to calls for public comment, and initiating ICANN’s Accountability

⁹ Bylaws, Art. 10, C-23.

¹⁰ *Id.*, Art. 11.

¹¹ *Id.*, Art. 12, § 12.2(a).

¹² *Id.*, Art. 12, § 12.2(b).

¹³ *Id.*, Art. 12, § 12.2(c).

¹⁴ *Id.*, Art. 12, § 12.2(d).

¹⁵ *Id.*, Art. 8.

¹⁶ *Id.*, Art. 5, § 5.1.

¹⁷ *Id.*, Art. 5, § 5.2.

Mechanisms.

19. While the international community broadly participates in ICANN’s policy making process, ICANN’s Board of Directors has the sole responsibility and discretion for overseeing and enacting ICANN policies consistent with ICANN’s Mission, Articles and Bylaws.¹⁸ The Board is composed of sixteen voting Directors and four non-voting Liaisons.¹⁹ The ICANN Board is internationally represented, as required by ICANN’s Bylaws, which specify that at least one Director represent each of ICANN’s designated five geographic regions, and no region have more than five Directors on the Board.²⁰ Over time, the ICANN Board has included, among others, engineers, business executives, researchers, NGO leaders, consultants, directors of non-profit organizations, regulatory experts, technology experts, academics, and attorneys.²¹ The Board thus has a wide array of expertise that allows it to consider, assess and balance the diverse interests and perspectives of the global Internet community on the many issues that come before it.

20. ICANN’s Board members have a unique understanding of ICANN’s Mission “and the potential impact of ICANN decisions on the global Internet community.”²² They also have “personal familiarity” with the operation of gTLD registries and registrars, with Internet technical standards and protocols, with policy-development procedures, and with the broad range of business, individual, academic, and non-commercial users of the Internet.²³ And, significantly, Board members “have the duty to act in what they reasonably believe are the best interests of ICANN”²⁴ through its “bottom-up, consensus-driven, multistakeholder model.”

¹⁸ Bylaws, Art. 2, § 2.1, C-23.

¹⁹ *Id.*, Art. 7, § 7.1.

²⁰ *Id.*, Art. 7, § 7.2(b), (c), § 7.5.

²¹ See ICANN Board of Directors, R-23.

²² Bylaws, Art. 7, § 7.3(b), C-23.

²³ *Id.*, Art. 7, § 7.3(d).

²⁴ *Id.*, Art. 7, § 7.7.

ICANN defines its unique model as follows:

- ***Bottom-up.*** Rather than the ICANN Board solely declaring what topics ICANN will address, members of sub-groups in ICANN can raise issues at the grassroots level. If the issue is worth addressing and falls within ICANN’s remit, it rises through various Advisory Committees and Supporting Organizations until eventually policy recommendations are passed to the Board for resolution.²⁵
- ***Consensus-driven.*** Through its Bylaws, processes, and international meetings, ICANN provides the arena where all advocates and interested parties can discuss Internet policy issues. Almost anyone can join most of ICANN’s volunteer working groups, assuring broad representation with a diverse array of perspectives. Hearing all points of view, searching for mutual interests, and working toward consensus takes time, but the process resists capture by any single interest – an important consideration when administering a resource vital to the global Internet.²⁶
- ***Multistakeholder model.*** ICANN’s inclusive approach treats the public sector, the private sector, and technical experts as peers.²⁷ The ICANN community includes registry operators, registrars, Internet service providers, intellectual property advocates, commercial and business interests, non-commercial and non-profit interests, representation from almost 180 governments,²⁸ and individual Internet users from around the world. All points of view receive consideration on their own merits. ICANN’s fundamental philosophy is that all users of the Internet deserve a say in how it is run.²⁹

²⁵ Welcome to ICANN!, R-24.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Governmental Advisory Committee, R-25.

²⁹ R-24.

B. The New gTLD Program.

21. Nowhere was the ICANN Board's unique expertise and decision-making process more on display than in the creation of the Program. In 2005, ICANN's GNSO began a policy development process to consider the introduction of new gTLDs, based on the results of trial rounds conducted in 2000 and 2003. The GNSO's two-year long policy development process included detailed and lengthy consultations with the many constituencies of ICANN's global Internet community, including governments, civil society, business and intellectual property holders, and resulted in 19 specific policy recommendations for the Program.³⁰ In June 2008, the ICANN Board adopted the GNSO's policy recommendations for introducing more gTLDs and directed ICANN staff to develop an implementation plan for the Program, with significant input from community members, to be provided to the Board for evaluation and approval.³¹

22. Accordingly, after approval of the GNSO policy recommendations, ICANN undertook an open, inclusive, and transparent implementation process to address a variety of stakeholder issues, including things such as the protection of intellectual property and community interests, consumer protection, and DNS stability. This work involved numerous public consultations, review, and input to and public comment on draft versions of the Guidebook, with the first draft being published in October 2008.³² This process continued and resulted in multiple versions of the Guidebook, until the ICANN Board adopted the operative, 338-page Guidebook four years later, in June 2012.³³

23. The Guidebook provides a step-by-step procedure for new gTLD applicants.

³⁰ GNSO Final Report on Introduction of New Generic Top-Level Domains (8 August 2007), C-20.

³¹ ICANN Adopted Board Resolutions (26 June 2008), C-21.

³² Guidebook (24 October 2008), *available at* <https://archive.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>.

³³ Guidebook, Preamble, C-3; Witness Statement of Christine Willett (31 May 2019) (“Willett Stmt.”) ¶ 4.

Applicants that pass initial evaluations and successfully resolve any objections and/or contention set proceedings are presumed to proceed to contracting with ICANN, assuming no Accountability Mechanisms regarding the gTLD are pending.³⁴ The Guidebook, however, explicitly vests ICANN with significant discretion over the Program. For instance, because the Board has the “ultimate responsibility” for the Program, the Guidebook reserves to the Board “the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.”³⁵ Likewise, the Guidebook states that ICANN’s “decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion.”³⁶ The Guidebook also makes clear that material misrepresentations by applicants “may cause” ICANN to disqualify an application.³⁷ And other materials related to the Guidebook, such as the Auction Rules and New gTLD Auction Bidders Agreement (“Bidders Agreement”), state that ICANN’s interpretation of the rules “shall be final and binding”³⁸ and that ICANN has the discretion to select an appropriate remedy, if any, for violation of the rules.³⁹

24. In 2012, ICANN received 1,930 new gTLD applications.⁴⁰ To date, approximately 1,235 new gTLDs have been introduced into the Internet.⁴¹ While many applications sailed through the process with little or no dispute, hundreds of applications were the subject of objection proceedings and over 200 contention sets were created, in which multiple, qualified applicants sought the same or similar gTLDs.⁴² In addition, more than 20

³⁴ Guidebook, § 5.1, C-3; New Generic Top-Level Domains – Contracting & The Registry Agreement, R-26.

³⁵ Guidebook, § 5.1, C-3.

³⁶ *Id.*, § 6, Terms and Conditions 3.

³⁷ *Id.*, § 6, Terms and Conditions 1, *see also id.* § 1.2.7.

³⁸ Auction Rules for New gTLDs ¶ 72, C-4.

³⁹ ICANN gTLD Bidders Agreement § 2.10, C-5.

⁴⁰ ICANN New Generic Top-Level Domains – Program Statistics, C-212.

⁴¹ *Id.*

⁴² *Id.*

new gTLDs have been the subject of an IRP and some have been the subject of litigation in federal and state courts.⁴³

25. Not surprisingly, with so many disputes among applicants, ICANN has been bombarded with fierce lobbying from applicants and others throughout the life of the Program.⁴⁴ These efforts – many times requesting that an application be approved or denied, or claiming that certain applications are deficient – have included public comments, informal letters and emails sent to the ICANN Board and Staff, and ICANN Board members and Staff being cornered by interested parties at ICANN meetings.⁴⁵ Given the number and frequent stridency of these types of requests – as well as the Guidebook provisions that call for disputes and complaints to be resolved through ICANN’s Accountability Mechanisms – requests for ICANN to take action or not take action in response to a complaint regarding a particular application must be made through ICANN’s Accountability Mechanisms, rather than through private lobbying or letter-writing campaigns.⁴⁶

26. In addition, from the outset of the Program, ICANN has followed a practice of placing applications and contention sets on hold when Accountability Mechanisms regarding them have been filed, although with respect to IRPs, claimants typically are required to submit a request for interim measures in order for the hold to be instituted.⁴⁷ Once on hold, ICANN generally refrains from taking any material action with respect to the application or contention

⁴³ Independent Review Process Documents, R-27.

⁴⁴ Disspain Stmt. ¶ 7.

⁴⁵ *Id.*

⁴⁶ *Id.* ¶¶ 6-7; Guidebook §§ 5.1, 6.6, C-3.

⁴⁷ Disspain Stmt. ¶ 11; Determination of the Board Governance Committee (BGC) on Reconsideration Request 14-11 (29 April 2014), at p. 8, R-22 (ICANN staff’s decision to place an application on hold in light of the pending CEP and Reconsideration Requests was “in accordance [with] ICANN transparency and with stated procedures for application status updates and of placing applications on hold pending the final outcome of accountability mechanisms.”).

set while the Accountability Mechanism is pending.⁴⁸ ICANN does this, in part, because ICANN considers its Accountability Mechanisms – which include Reconsideration Requests, Ombudsman complaints, the Cooperative Engagement Process (“CEP”) (a pre-IRP proceeding that allows the parties to attempt to resolve or narrow the issues to be brought in an IRP), and the IRP – to be fundamental safeguards in ensuring its bottom-up, multistakeholder model remains effective.⁴⁹

C. Disputes Over .WEB And ICANN’s Responses.

27. As detailed in ICANN’s IRP Response, and discussed further herein, .WEB was one of the new gTLDs that has been engulfed in fierce battles amongst its applicants, resulting in litigation, Accountability Mechanisms, and even a DOJ investigation,⁵⁰ and ICANN has complied with its Articles and Bylaws in dealing with these disputes.⁵¹

28. There have been sustained disputes over .WEB – both before and after the .WEB auction – which have caused the .WEB applications to be “on hold” for long periods of time. In 2013, one of the .WEB applicants filed a “string confusion” objection against a .WEBS application arguing that .WEB and .WEBS were confusingly similar (and thus should be placed into the same contention set). This caused ICANN to place the .WEB applications on hold for the first time. The objection was ultimately upheld by an independent ICDR panelist, resulting in the .WEBS and .WEB applications being placed in the same contention set, which thereby became the “.WEB Contention Set.”⁵²

29. Shortly thereafter, in June 2014, a .WEBS applicant filed an IRP against ICANN

⁴⁸ Disspain Stmt. ¶ 11.

⁴⁹ *Id.* With respect to certain IRPs, however, claimants have been required to submit a request for interim measures in order for the hold to be instituted formally.

⁵⁰ ICANN’s Response to Amended Request for IRP ¶¶ 34-54.

⁵¹ *Id.* ¶¶ 56-72.

⁵² *Id.* ¶ 31.

challenging ICANN’s acceptance of the ICDR’s determination on the string confusion objection. This led to the .WEB Contention Set being placed back on hold. In October 2015, ICANN prevailed in that IRP, and the ICANN Board resolved that ICANN staff should “move forward with the processing of the [.WEB Contention Set].”⁵³

30. ICANN staff followed the Board’s directive by removing the hold on the .WEB Contention Set and scheduling the .WEB auction for 27 July 2016.⁵⁴ Pursuant to the Guidebook, an ICANN auction is a “mechanism of last resort” that takes place only if all members of the contention set do not agree to a private resolution, such as through a private auction in which the losing applicants would often split the proceeds from the auction.⁵⁵ As far as ICANN is aware, the members of the .WEB Contention Set discussed a possible private resolution, but NDC ultimately would not agree to private resolution,⁵⁶ meaning an ICANN auction was required by the Guidebook.⁵⁷ It now appears that during the “Blackout Period,” which is a seven-day period during which applicants are forbidden from communicating with one another immediately prior to an ICANN auction,⁵⁸ Afiliat again contacted NDC to pressure NDC into agreeing to a private resolution of the .WEB Contention Set.⁵⁹ But NDC did not respond and continued to insist on an ICANN auction.

31. Then, as detailed in ICANN’s IRP Response, shortly before the auction was set to commence, another .WEB applicant, Ruby Glen, LLC (“Ruby Glen”), took a number of actions in an attempt to halt the auction, including litigation in federal court in which it sought a

⁵³ ICANN’s Response to Amended Request for IRP ¶ 32.

⁵⁴ Willett Stmt. ¶ 13.

⁵⁵ Guidebook, § 4.3, C-3.

⁵⁶ Witness Statement of Jose Ignacio Rasco III (“Rasco Stmt.”) ¶¶ 63-66.

⁵⁷ Guidebook, § 4.3, C-3.

⁵⁸ C-4, § 68; C-5, § 2.6; Supplement to New gTLD Auctions Bidder Agreement, § 2, C-6.

⁵⁹ Letter from R. Johnston to E. Enson (23 Aug. 2016), Attachment E, R-18; Rasco Stmt. ¶¶ 67-74.

temporary restraining order to block the auction.⁶⁰ Ruby Glen’s claims were rejected by the court, and the auction went forward.

32. NDC prevailed at the auction, which was held on 27-28 July 2016.⁶¹ On 1 August 2016, Verisign announced that it had “entered into an agreement with [NDC] wherein [Verisign] provided funds for [NDC’s] bid” and that, if NDC entered into a Registry Agreement with ICANN to operate .WEB, NDC “will then seek to assign[] the Registry Agreement to VeriSign upon consent from ICANN.”⁶² Despite Afilias’ insinuations to the contrary, this was the first time that ICANN learned that Verisign had an agreement with NDC regarding .WEB.⁶³

33. A day later, on 2 August 2016, Ruby Glen’s parent organization, Donuts, Inc. (“Donuts”), invoked ICANN’s CEP regarding the .WEB auction and Verisign’s announcement.⁶⁴ Donuts’ invocation of the CEP caused ICANN staff to again place the .WEB Contention Set on hold.

34. On 8 August 2016, Afilias’ General Counsel wrote ICANN a letter demanding that ICANN “deny NDC’s application” based on three specific claims.⁶⁵ First, Afilias stated that the NDC/Verisign agreement constituted a transfer of NDC’s rights and obligations in connection with its application in violation of the Guidebook. Second, Afilias stated that NDC violated various disclosure requirements of the Guidebook by failing to inform ICANN of the

⁶⁰ Ruby Glen complained to ICANN that NDC had a change in ownership or control, and that NDC had failed to notify ICANN of this change, as required by the Guidebook. Ruby Glen made the same complaints to the ICANN Ombudsman. Both ICANN and the Ombudsman investigated and concluded that there had been no change in ownership or control that had to be reported to ICANN. Nonetheless, shortly before the auction, Ruby Glen filed a Reconsideration Request seeking to halt the auction. It also filed a complaint in federal court and an application for a temporary restraining order (TRO). The federal court denied the TRO, its decision was upheld on appeal, and the action was subsequently dismissed. ICANN’s Response to Amended Request for IRP ¶¶ 35-39.

⁶¹ ICANN New gTLD Contention Set Resolution Auction: Final Results for WEB / WEBS, RE-10.

⁶² Verisign Statement Regarding .Web Auction Results (1 August 2016), C-46.

⁶³ Disspain Stmt. ¶ 8; ICANN-WEB_000844, R-19; Witness Statement of Paul Livesay (“Livesay Stmt.”) ¶ 38.

⁶⁴ Cooperative Engagement and Independent Review Processes Status Update – 26 September 2016, R-42.

⁶⁵ Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN’s Global Domains Division) (8 August 2016), at p. 2, C-49.

agreement. Third, Afilias contended that the agreement “likely constitutes a change of control of the applicant.”⁶⁶ Nevertheless, Afilias did not initiate a Reconsideration Request, a CEP or an IRP at that time. Rather, Afilias waited more than two years to assert these same alleged Guidebook violations in this IRP, initiated in November 2018. And it was not because Afilias was unaware of the Accountability Mechanisms available. To the contrary, Afilias’ August 2016 letter stated that it planned on “filing a complaint with the ICANN Ombudsman with regard to this matter,”⁶⁷ demonstrating that Afilias was certainly aware of the redress it could seek through ICANN’s Accountability Mechanisms.⁶⁸ Indeed, Afilias’ parent organization, Afilias Limited, filed a Reconsideration Request in 2014⁶⁹ and initiated CEP and IRP proceedings in 2015 regarding one of its affiliates’ application for .RADIO.⁷⁰

35. After the filing of Donuts’ CEP and ICANN’s receipt of Afilias’ August 2016 letter, ICANN, through its counsel, contacted Verisign to request a copy of the DAA and other information relevant to the issues surrounding .WEB.⁷¹ In response, Verisign sent ICANN a letter on 23 August 2016 responding to the allegations and asserting that Afilias should be disqualified from the .WEB Contention Set for violating the auction Blackout Period.⁷² As attachments to its letter, Verisign provided a copy of the DAA, a related 26 July 2016 letter agreement between Verisign and NDC, documents supporting its contention that Afilias violated the auction Blackout Period, and documents relating to a private .WEB auction proposed by one

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ ICANN is uncertain of when Afilias initiated this Ombudsman complaint, but, on 19 September 2016, the Ombudsman informed Afilias that he declined to initiate an investigation because ICANN Accountability Mechanisms over the same topics had already been filed. C-101.

⁶⁹ <https://www.icann.org/en/system/files/files/request-afili-as-et-al-25sep14-en.pdf>.

⁷⁰ Afilias Limited, BRS Media, Inc. & Tin Dale, LLC v. ICANN (.RADIO), R-28.

⁷¹ Transcript of 11 May 2020 Hearing at 20:9-15, R-29.

⁷² R-18.

of the .WEB applicants.⁷³

36. Still refusing to initiate its own CEP or IRP, Afilias sent ICANN another letter, dated 9 September 2016, again stating that “ICANN must disqualify NDC’s application for .WEB and proceed to contract for .WEB with Afilias” for the same reasons it raised in Afilias’ August 2016 letter.⁷⁴ In the September 2016 letter, on which Afilias’ outside counsel was copied, Afilias also “reserve[d] all of its rights to pursue any and all rights or remedies available to it in any forum against ICANN, NDC or VeriSign in connection with the delegation of the .WEB gTLD.”⁷⁵

37. On 16 September 2016, ICANN issued a set of questions to Afilias, Ruby Glen, NDC, and Verisign, seeking input regarding the .WEB auction, the NDC/Verisign agreement, and the alleged violations of the Guidebook.⁷⁶ This questionnaire was designed to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted regarding .WEB.

38. On 30 September 2016, ICANN’s President of the Global Domains Division, Akram Atallah, responded to Afilias’ letters. Mr. Atallah explained that the .WEB Contention Set was placed on hold “to reflect a pending ICANN Accountability Mechanism initiated by another member in the contention set.”⁷⁷ Mr. Atallah thereby informed Afilias that its letters – the first of which had preceded Donuts’ CEP – did *not* have the effect of causing the .WEB Contention Set to be placed on hold. Mr. Atallah also informed Afilias that it would be notified if changes were made to the status of the .WEB Contention Set.⁷⁸

⁷³ R-18.

⁷⁴ Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN’s Global Domains Division) (9 September 2016), C-103.

⁷⁵ *Id.*

⁷⁶ Letter from C. Willett (Vice President, ICANN’s gTLD Operations) to J. Kane (Vice President, Afilias’ Corporate Services) (16 September 2016), C-50.

⁷⁷ Letter from A. Atallah to S. Hemphill (30 September 2016), C-61.

⁷⁸ *Id.*

39. Afilias responded to ICANN’s questionnaire on 7 October 2016, reiterating its core objections to the purported NDC/Verisign agreement and describing it as a “failure to disclose material information relating to [NDC’s] bid for the .WEB rights” and as “clearly designed to preserve Verisign’s existing monopoly in gTLD services that results from its control of .COM and .NET.”⁷⁹ These are, again, the same claims Afilias is now belatedly pressing in this IRP. Importantly, Afilias’ response to the questionnaire also noted Mr. Atallah’s statement in his letter to Afilias that .WEB was placed on hold because of Donuts’ CEP.⁸⁰ Afilias thus recognized that its letters did not have the effect of causing a hold on the .WEB Contention Set.

40. In a November 2016 Board workshop session, ICANN Board members and ICANN’s in-house counsel discussed the issue of .WEB. Prior to this discussion, non-conflicted Board members received Board briefing materials directly from ICANN’s counsel that set forth relevant information about complaints received and formal disputes regarding .WEB, the legal and factual contentions asserted by those complaining, and a set of options the Board could consider. This session was attended by, among others, ICANN’s General Counsel (John Jeffrey) and Deputy General Counsel (Amy Stathos), who provided additional advice and answered questions posed by the Board.⁸¹

41. At this Board session, the Board chose to not take any action at that time regarding .WEB because an Accountability Mechanism was pending regarding .WEB.⁸² Given Donuts’ pending CEP (along with knowledge of the pending Ruby Glen lawsuit), the Board chose to see if the results of such proceedings might require the Board to take any action related

⁷⁹ Letter from J. Kane (Vice President, Afilias’ Corporate Services) to C. Willett (Vice President, ICANN’s gTLD Operations) (7 October 2016), C-51. NDC and Verisign also responded to ICANN’s questions in confidential responses.

⁸⁰ *Id.*

⁸¹ Disspain Stmt. ¶ 10.

⁸² *Id.* ¶ 11.

to the .WEB Contention Set.⁸³ ICANN’s Accountability Mechanisms are fundamental safeguards in ensuring that ICANN’s model remains effective, and it did not seem prudent for the Board to interfere with or preempt the issues that were the subject of an Accountability Mechanism regarding .WEB that was pending at that time (which might also be the subject of other soon-to-be filed Accountability Mechanisms).⁸⁴

42. Then, in January 2017, while the Donuts CEP was still pending, the Antitrust Division of the United States Department of Justice (“DOJ”) issued a civil investigative demand (“CID”) to ICANN and Verisign (and likely others involved in the .WEB auction), seeking documents and information “in connection with DOJ’s investigation of Verisign’s proposed acquisition of NDC’s contractual rights to operate the .WEB gTLD.”⁸⁵ The DOJ requested that ICANN take no action on .WEB during the pendency of the investigation, which ICANN agreed was appropriate given DOJ’s expertise in evaluating potential competition issues implicated by Verisign’s possible operation of .WEB.⁸⁶ Between February and June 2017, ICANN made document productions and provided information to the DOJ in connection with its investigation, and ICANN is informed and believes that Verisign produced documents to, and met with representatives of, the DOJ.⁸⁷

43. A year later, in January 2018, the DOJ formally closed its investigation without taking any action to block Verisign’s pursuit of .WEB.⁸⁸

44. On 30 January 2018, the Donuts CEP ended with no resolution, and ICANN gave Donuts an extension of time to file an IRP. After Donuts failed to pursue an IRP within the

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Response to Afilias’ DIDP Request (24 March 2018), at p. 11, R-30.

⁸⁶ Disspain Stmt. ¶ 11.

⁸⁷ R-30, at p. 11.

⁸⁸ Excerpts from Verisign 10-K (for the fiscal year ended 31 December 2017), RE-13.

allotted time, NDC's Jose Rasco contacted ICANN demanding that ICANN send NDC a Registry Agreement for .WEB because the DOJ investigation had closed and no Accountability Mechanisms were pending at that time.⁸⁹

45. Despite NDC's demands, the .WEB Contention Set and NDC's application remained on hold. Afilias had submitted a request for documents regarding the .WEB Contention Set to ICANN under ICANN's Documentary Information Disclosure Policy ("DIDP"), and the expectation was that Afilias would file a Reconsideration Request after ICANN responded to the DIDP request.⁹⁰

46. While Afilias' DIDP request was pending, NDC's counsel wrote ICANN on 28 February 2018, complaining that its prevailing application for .WEB remained on hold due to the "pendency of baseless proceedings initiated by third parties."⁹¹ NDC's counsel also demanded that ICANN deliver a Registry Agreement to NDC by 7 March 2018 and reserved "[a]ll rights and remedies."⁹²

47. On 16 April 2018, Afilias sent ICANN's Board a letter warning that Afilias "intends to initiate a CEP and a subsequent IRP against ICANN" if ICANN takes the .WEB Contention Set off hold or otherwise "proceeds toward delegation of .WEB to NDC."⁹³

48. Consistent with its long-standing procedure, ICANN continued its work by responding to properly invoked Accountability Mechanisms, rather than the threats and demands in informal letters. Then, on 23 April 2018, after ICANN had responded to Afilias' DIDP request, Afilias filed a Reconsideration Request regarding ICANN's DIDP response, as

⁸⁹ Letter from S. Marenberg to ICANN (28 February 2018), R-20.

⁹⁰ Letter from A. Ali to ICANN (23 February 2018), C-78.

⁹¹ R-20, at 1.

⁹² *Id.* at 1, 2.

⁹³ Letter from A. Ali to ICANN (16 April 2018), at 5, C-113. Afilias' intentions were no secret. On April 24, 2018, the online magazine Domain Name Wire ran a story entitled "Afilias plans to file IRP to halt .Web." C-124.

expected.⁹⁴ On the same day, Afilias filed another DIDP request with ICANN.⁹⁵ Consistent with the DIDP and ICANN’s Bylaws, respectively, ICANN responded to Afilias’ second DIDP request and the Board considered and evaluated Afilias’ Request for Reconsideration.⁹⁶ On 5 June 2018, the Board denied Afilias’ Reconsideration Request.⁹⁷

49. With the Afilias’ Reconsideration Request resolved, and no other Accountability Mechanisms pending, ICANN staff followed the procedures called for in the Guidebook and took the .WEB Contention Set off hold.⁹⁸ At the same time, consistent with ICANN established practice and Mr. Atallah’s letter to Afilias, ICANN staff provided all of the members of the .WEB Contention Set, including Afilias, notice of the change of status.⁹⁹ ICANN took these steps with the understanding that Afilias was likely to make good on its threats to “initiate a CEP and a subsequent IRP against ICANN.”¹⁰⁰ On 13 June 2018, ICANN staff sent NDC a form Registry Agreement, in accordance with the Guidebook.¹⁰¹

50. As expected, on 18 June 2018, Afilias initiated a CEP as it had threatened to do, asserting the very same claims it had raised in its 2016 letters to ICANN.¹⁰² As a result of Afilias’ CEP, ICANN staff once again placed the .WEB Contention Set on hold.

⁹⁴ Afilias’ Reconsideration Request (23 April 2018), R-31.

⁹⁵ Letter from A. Ali to ICANN (23 April 2018), C-79.

⁹⁶ Determination of the BAMC – Reconsideration Request 18-7 (5 June 2018), R-32.

⁹⁷ *Id.*

⁹⁸ Disspain Stmt. ¶ 13.; Guidebook, § 4.1.4 (“An applicant that prevails in a contention resolution procedure, either community priority evaluation or auction, may proceed to the next stage.”); *see also id.* at §§ 1.1.2.10, 4.4, 5.1, C-3; New Generic Top-Level Domains – Update on Application Status and Contention Sets, R-33 (once on-hold status is cleared, application can proceed to contracting).

⁹⁹ C-61; Disspain Stmt. ¶ 13; R-22, at p. 7 (“Application status updates are part of the New gTLD Program process ‘to provide a more complete picture of the current status of applications...[a]s applications complete evaluation and proceed to the next phases of the New gTLD Program.’”). This notice also is posted on ICANN’s new gTLD Program web page, which is available to the general public.

¹⁰⁰ C-113 at 5.

¹⁰¹ Guidebook, § 1.1.2.11 (“Applicants successfully completing all the relevant stages outlined in this subsection 1.1.2 are required to carry out a series of concluding steps” that “include execution of the registry agreement with ICANN.”), § 4.4 (“An applicant that has been declared the winner of a contention resolution process will proceed by entering into the contract execution step.”); *see also* §§ 1.1.2.10, 4.1.4, 5.1, C-3.

¹⁰² R-42.

D. ICANN’s Arms-Length Relationship With Verisign And Afilias.

51. In its Reply, Afilias claims that ICANN is somehow beholden to Verisign and, thus, was colluding with Verisign to ensure that Verisign obtains the rights to operate .WEB. In reality, however, as the administrator of the DNS, ICANN has an arms-length relationship with Verisign that is no different from ICANN’s relationship with other registry operators, including Afilias.

52. In fact, ICANN and Verisign have, at times, been at odds with, and formally adverse to, one another. For example, in the late-1990s, Verisign (as its corporate predecessor, Network Solutions, Inc.) was the exclusive provider of domain name registration services and ICANN’s very creation led to an erosion of its market power.¹⁰³ In 2002, ICANN implemented the government requirement that Verisign relinquish control of .ORG.¹⁰⁴ In 2004, Verisign sued ICANN alleging that ICANN had overstepped its contractual authority in blocking Verisign from offering certain registry services.¹⁰⁵ Eventually, ICANN countersued Verisign and the litigation persisted for years.¹⁰⁶ In 2013, Verisign and ICANN had a dispute over ICANN’s right to audit Verisign’s operations of the .NET gTLD.¹⁰⁷

53. While Verisign is certainly an important registry operator, all registry operators are important to ICANN, including Afilias. For example, in a separate IRP that is currently pending, ICANN is defending the process that lead to the awarding of .HOTEL to an Afilias-related company.¹⁰⁸ ICANN’s position in that IRP is the same as in this one – ICANN does not have an agenda by which it attempts to determine which gTLD applicants should win or lose.

¹⁰³ Witness Statement of J. Beckwith Burr (“Burr Stmt.”), at Ex. A.

¹⁰⁴ ICANN Board Selects New .org Registry Operator, R-34.

¹⁰⁵ *Verisign, Inc. v. ICANN*, Complaint, R-35.

¹⁰⁶ *Verisign, Inc. v. ICANN*, Cross-Complaint, R-36.

¹⁰⁷ Letter from P. Kane to ICANN (8 January 2013), R-37.

¹⁰⁸ *See generally, Fegistry, LLC, et al. v. ICANN*, ICDR Case No. 01-19-0004-0808, ICANN’s Response to Request for Independent Review Process, R-38.

Instead, ICANN follows the policies and procedures set forth in the Guidebook and its Articles and Bylaws in administering the application process and awarding the rights to operate new gTLDs as required by that process.

II. THE CORRECT STANDARD OF REVIEW

54. The standard of review governing this IRP should not be controversial. It is set forth expressly in Article 4, section 4.3(i) of the Bylaws and Rule 11 of the Interim Supplementary Procedures, which are substantially identical. Section 4.3(i) states:

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

- (i) With respect to Covered Actions the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.
- (ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- (iii) For Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

...¹⁰⁹

55. Article 4, section 4.3(i) and Rule 11 establish a general *de novo* standard of review and require the Panel to make findings of fact to determine whether any Covered Action violated the Articles or Bylaws. Article 4, section 4.3(i)(iii) also creates a carve-out from that general standard for a particular subset of Covered Actions. “Covered Actions’ are defined as any actions or failure to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”¹¹⁰ Article 4, section 4.3(i)(iii) states that

¹⁰⁹ Subsections (iv) and (v) of Section 4.3(i) concern IRP’s involving claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, and therefore are not relevant here.

¹¹⁰ Bylaws, Art. 4, § 4.3(b)(ii), C-23.

for claims arising from the Board’s exercise of its fiduciary duties, the IRP Panel reviews the Board’s conduct only to determine whether it was “within the realm of reasonable business judgment.”¹¹¹ Thus, the Panel applies a *de novo* standard in making findings of fact and reviewing the actions or inactions of individual Directors, Officers or Staff members. However, the Panel reviews actions or inactions of the Board only to determine whether they were within the realm of reasonable business judgment.

56. Afilias seeks to discount or ignore the deference to the Board’s business judgment mandated by Article 4, section 4.3(i)(iii) on two grounds. First, Afilias asserts that prior IRP decisions have rejected any such deference.¹¹² Afilias relies primarily on the IRP Panel’s decision in *ICM v. ICANN* dated 19 February 2010, which declined to apply the business judgment rule after finding that the “Articles and Bylaws . . . do not specify or imply that the International Review Process [*sic*] provided for shall (or shall not) accord deference to the decisions of the ICANN Board.”¹¹³ That finding has absolutely no relevance here because it was made under a previous version of ICANN’s Bylaws, which have been amended more than a dozen times in the interim. The version of ICANN’s Bylaws that was operative at the time of the *ICM* decision did not have any provision analogous to the current Article 4.3(i)(iii), which expressly mandates that the Panel defer to the Board’s reasonable business judgment.

57. Afilias also relies on the decision in *Dot Sport Ltd. v. ICANN*¹¹⁴ and *Booking.com v. ICANN*.¹¹⁵ Neither decision assists Afilias. Both decisions quote the *ICM* Panel’s finding under the earlier, superseded Bylaws; and neither case purports to examine whether that finding

¹¹¹ Bylaws, Art. 4, § 4.3(i)(iii).

¹¹² Afilias’ Reply Memorial ¶ 6 & n.16.

¹¹³ *ICM Registry, LLC v. ICANN*, ICDR Case No. 50-177-T 000224 08, Final Declaration (19 February 2010) ¶ 136, CA-001.

¹¹⁴ *Dot Sport Ltd. v. ICANN*, ICDR Case No. 01-15-0002-9483, Final Declaration (31 January 2017), CA-018.

¹¹⁵ *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 March 2015), CA-011.

remains valid under the current Bylaws (as both were decided before the more recent amendments). Moreover, the *Booking.com* Panel went on to state that “we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an ‘IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.’ In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws and Guidebook.”¹¹⁶ Similarly, the *Dot Sport* Panel ultimately recognized that it was required to apply a deferential standard of review to the Board’s actions or inactions: “The IRP Panel must apply a defined standard of review to the IRP request, focusing on: a. did the Board act without conflict of interest in taking its decision? b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the community?”¹¹⁷

58. Afilias’ second argument for discounting the deference owed to the Board’s business judgment is that, according to Afilias, its claim does not involve the Board’s exercise of its fiduciary duties.¹¹⁸ Afilias is wrong. As explained in ICANN’s IRP Response and set forth in more detail in the witness statement of Board member Chris Disspain, the ICANN Board was aware of Afilias’ complaints and decided not to make any decision regarding .WEB until analyzing whether the issues and results of the then-pending Accountability Mechanism about .WEB required the Board to do so.¹¹⁹ It cannot reasonably be disputed that the Board’s decision

¹¹⁶ *Booking.com*, Final Declaration ¶ 115, CA-011.

¹¹⁷ *Dot Sport Ltd.*, Final Declaration ¶ 7.17, CA-018.

¹¹⁸ Afilias’ Reply Memorial ¶ 16.

¹¹⁹ See, e.g., ICANN’s Response to Amended IRP Request ¶ 66 (“It was entirely reasonable for the ICANN Board to wait to analyze the issues surrounding .WEB until the DOJ investigation concluded and each of the related Accountability mechanisms was resolved, including this IRP, and then to undertake that analysis on the basis of the results of those proceedings.”).

not to address Afiliias' complaints asserted through letters was an exercise of its fiduciary duties. The Board has a fiduciary duty with respect to all actions that it takes as a Board on behalf of ICANN. "It is without dispute that in California, corporate directors owe a fiduciary duty to the corporation and its shareholders and now as set out by statute, must serve 'in good faith, in a manner such director believes to be in the interests of the corporation and its shareholders.'" *Berg & Berg Enters., LLC v. Boyle*, 178 Cal. App. 4th 1020, 1037 (2009) (citation omitted).¹²⁰

59. Although the Bylaws and Interim Supplementary Procedures do not define "reasonable business judgment," that term has a well-established legal meaning. Every United States jurisdiction, including California, recognizes the "business judgment rule," which provides a "judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions." *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 711 (1996) (quoting *Barnes v. State Farm Mut. Auto. Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)).¹²¹ Article 4.3(i)(iii) is expressed in terms strikingly similar to those used by the California Supreme Court to describe the business judgment rule.¹²²

60. The drafting history of the Bylaws confirms that they were intended to enshrine the common law business judgment rule. After the *ICM* Panel determined that the business judgment rule did not apply because the Bylaws did not specify a policy of deference to the Board, ICANN's Bylaws were amended to address this exact issue.¹²³ On 11 April 2013,

¹²⁰ RLA-5, *See also e.g.*, Cal. Corp. Code § 5231 ("A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."), RLA-22.

¹²¹ RLA-15, The California Supreme Court has noted "that rule of judicial deference to corporate decision making 'exists in one form or another in every American jurisdiction.'" *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 257 (1999) (quoting *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 507 n.14 (1986)), RLA-13.

¹²² *Compare* Bylaws, Art. 4, § 4.3(i)(iii), C-23 (stating that the Panel "shall not replace the Board's reasonable judgment with its own") *with, e.g., Lamden*, 21 Cal. 4th at 257 ("a court will not substitute its judgment for that of the corporation's board of directors."), RLA-13.

¹²³ *ICM Registry, LLC*, Final Declaration, ¶ 136, CA-001.

ICANN adopted new Bylaws, following community input and a public comment phase, to mandate a limited standard of review of Board decisions:

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

- a. did the Board act without conflict of interest in taking its decision?
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?¹²⁴

61. The standard of review set out in the April 2013 Bylaws is an unmistakable restatement of the common law business judgment rule. *See, e.g. Everest Inv'rs & v. McNeil Partners*, 114 Cal. App. 4th 411, 430 (2003) (quoting *Lee*, 50 Cal. App. 4th at 715) (stating that deference to a Board's business judgment does not apply "in circumstances which inherently raise an inference of conflict of interest."¹²⁵ The business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest."). The standard of review added in the April 2013 amendment persisted through several subsequent amendments to the Bylaws until it was abbreviated in the current iteration by simply using the term of art—"reasonable business judgment"—rather than setting forth the legal meaning of that term.

62. In sum, the Panel must apply the standard of review set out in Article 4, section 4.3(i) of the Bylaws and Rule 11 of the Interim Supplementary Procedures. Under those provisions, the Panel applies a *de novo* standard in making findings of fact and determining

¹²⁴ *See* ICANN's Bylaws (as amended 11 April 2013), Art. 4, § 3(4), R-39.

¹²⁵ RLA-9.

whether actions or inactions by ICANN’s officers or staff violated the Bylaws or Articles. The Panel must, however, apply a more limited review to actions or inactions of ICANN’s Board, which can be disturbed only if they are outside the realm of reasonable business judgment.

ARGUMENT

I. AFILIAS’ CLAIMS REGARDING ACTION OR INACTION IN LATE 2016 ARE TIME-BARRED.

63. In its Reply, Afilias asserts claims that ICANN’s staff violated the Bylaws and Articles in the course of its investigation of Afilias’ allegations *in August through October of 2016*, and that ICANN’s Board violated the Bylaws by failing to disqualify NDC *in August 2016* and instead opting in November 2016 to await the conclusion of Accountability Mechanisms before making a determination, if any was needed, on the merits of Afilias’ allegations.¹²⁶ Further, in its Amended IRP Request, Afilias asserts that ICANN violated its Bylaws by not investigating pre-auction rumors that were purportedly circulating *in July 2016* about Verisign’s relationship with NDC, although it is unclear whether Afilias continues to pursue this claim because it is not referenced anywhere in Afilias’ Reply.

64. Rule 4 of the Interim Supplementary Procedures states:

*The INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.*¹²⁷

¹²⁶ Afilias’ Reply Memorial ¶ 82 (“ICANN knew that NDC had committed these material breaches of the New gTLD Program Rules by (at the latest) August 2016, when Verisign provided ICANN with the DAA (and also the 26 July 2016 letter from Mr. Livesay to Mr. Rasco). Yet ICANN failed to act in accordance with the New gTLD Program Rules and its Articles and Bylaws.”); *id.* ¶ 86 (“ICANN violated its Articles and Bylaws when it failed to disqualify NDC’s bid and application upon receiving the DAA in August 2016.”); *id.* ¶¶ 102-118 (asserting complaints regarding ICANN’s investigation in August and September 2016).

¹²⁷ Interim Supplementary Procedures, Rule 4. The Bylaws that were in effect until October 2016 allowed IRPs challenging only actions of the Board—not ICANN’s staff, officers or individual directors—and provided that an

65. Afilias does not dispute that its IRP filing came more than two years after it sent letters complaining about the auction and NDC's relationship with Verisign. Instead, Afilias asserts that the time-bar does not expire until 120 days after Afilias became aware of the material effect of the action or inaction giving rise to the dispute. As shown below, Afilias unquestionably was aware of the actions and inactions in 2016 that it now seeks to challenge, along with the material effect of those actions. In any event, Afilias ignores the final clause of Rule 4, which states that a dispute may not be filed more than 12 months from the date of the challenged action or inaction, regardless of when the Claimant became aware of the material effect of that action or inaction. Afilias filed this IRP in November 2018, more than 24 months after the actions or inactions that it contends violated the Bylaws in July through November of 2016.

66. Even if it mattered (and it does not), Afilias undoubtedly was aware of the actions or inactions in 2016 that it now seeks to challenge and the material effect of those actions or inactions. Indeed, Afilias wrote letters to ICANN in August and September 2016 stating claims substantially identical to claims it asserts in this proceeding.¹²⁸ For example, in its 9 September 2016 letter, Afilias argued that ICANN was required to disqualify NDC immediately and execute a Registry Agreement with Afilias, and that ICANN would be in violation of its Bylaws by not doing so:

ICANN's Board and officers are obligated under the Articles of Incorporation, Bylaws and the Guidebook (as well as international law and California law) to disqualify

IRP must be filed within 30 days of the posting of the Board minutes relating to the challenged ICANN decision or action. Under those earlier provisions, Afilias' claims against the staff would be disallowed and its claims against the Board would be time-barred. Afilias knew from the publicly posted Board minutes and many other sources that ICANN did not disqualify NDC in late 2016.

¹²⁸ C-49; Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (9 September 2016), C-103.

NDC's bid immediately and proceed with the contracting of a registry agreement with Afiliias.¹²⁹

67. Afiliias' 9 September 2016 letter went on to set out the rationale for its claim that ICANN must disqualify NDC, employing the same rationale that Afiliias relies on here. In September 2016, Afiliias asserted that "NDC violated Paragraph 10 of the Terms and Conditions in Module 6 of the New gTLD Guidebook (the "Guidebook"), which expressly prohibits any applicant for a gTLD to 'resell, assign or transfer any of applicant's rights or obligations in connection with the application.'"¹³⁰ Afiliias makes this same argument in Section III.A.1 of its Reply.

68. Afiliias also asserted in its September 2016 letter that NDC violated the Guidebook provisions that require it to notify ICANN of material changes to its application or financial position: "NDC violated Section 1.2.7 of the Guidebook, which requires applicants to promptly notify ICANN via submission of the appropriate forms if at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, including changes in financial position and changes in ownership or control of the applicant."¹³¹ Afiliias makes this same argument in Section III.A.2 of its Reply.

69. Lastly, Afiliias asserted in its September 2016 letter that:

NDC violated the Auction Rules for New gTLDs ('Auction Rules'). Rule 12 provides that 'participation in an Auction is limited to Bidders,[?]' which is defined by the Auction Rules as a 'Qualified Applicant' or a 'party designated by a Qualified Applicant to bid on its behalf.' This rule prohibits bids placed on behalf of a third party that is not a 'Qualified Applicant,' defined by the Auction Rules as 'an entity that has submitted an Application for a new gTLD, has received all necessary approvals

¹²⁹ *Id.*, at p. 4.

¹³⁰ *Id.*, at p. 2.

¹³¹ *Id.* (internal quotation marks omitted).

from ICANN, and which is included within a Contention Set to be resolved by an Auction.’¹³²

This argument re-appears in Section III.A.3 of Afilius’ Reply.

70. In its Reply, Afilius makes much of the fact that it did not obtain a copy of the DAA until December 2018 (one month after it initiated this IRP). But Afilius did not have a copy of the DAA when it filed this IRP. Thus, it cannot credibly argue that it was unable to reasonably pursue an IRP until it obtained the DAA. Moreover, Afilius stated in September 2016 that its arguments were *not* dependent on knowing the precise terms of the DAA:

Although the specific terms of the agreement between VeriSign and NDC had not been disclosed, it is clear from Verisign’s own press release and its disclosure in its Form 10-Q filed with the US Securities and Exchange Commission for the quarter ended June 30, 2016, that both companies entered into an arrangement well in advance of the Auction to transfer NDC’s rights and obligations regarding its .WEB application to VeriSign.¹³³

71. Afilius also argues that the limitations period was tolled from 18 June 2018 to 13 November 2018, while its CEP was pending.¹³⁴ But the statute of limitations expired no later than August/September 2017 for Afilius’ claims arising from actions or inactions in August/September 2016. Any tolling incident to Afilius’ CEP is therefore irrelevant because the limitations period had already expired.

72. Finally, Afilius seeks to avoid the time-bar by asserting an equitable estoppel theory. Afilius bases this theory on two statements by ICANN. First, Afilius cites Ms. Willett’s statement in her 16 September 2016 letter that receiving Afilius’ response to ICANN’s questionnaire would “help facilitate informed resolution of these questions[.]”¹³⁵ Second, Afilius

¹³² C-103, at p.2.

¹³³ *Id.*

¹³⁴ Afilius’ Reply Memorial ¶¶ 143-44.

¹³⁵ *Id.* ¶ 147 (citing Ex. C-50).

cites Mr. Atallah’s statement in his 30 September 2016 letter that ICANN “will continue to take Afiliás’s comments, and other inputs that we have sought, into consideration as we consider this matter.”¹³⁶ Neither statement supports an equitable estoppel claim.

73. A party seeking to invoke equitable estoppel must establish four elements: “(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.” *Krolkowski v. San Diego City Employees' Ret. Sys.*, 24 Cal. App. 5th 537, 564-65 (2018), *review denied* (Sept. 19, 2018).¹³⁷

74. Afiliás fails to satisfy these elements. Ms. Willett’s and Mr. Atallah’s letters did not discuss or refer to any potential IRP by Afiliás. There is nothing in those letters to suggest that they were intended to encourage Afiliás to delay in filing an IRP, nor is there any evidence that Ms. Willett or Mr. Atallah understood or intended them to have such effect. Moreover, Afiliás has not alleged—or submitted any evidence to prove—that it construed Ms. Willett’s or Mr. Atallah’s letters in such a manner or that it actually relied on those letters in deciding not to file an IRP. Yet “reliance is an essential element of equitable estoppel.” *Atkins, Kroll (Guam), Limited v. Cabrera*, 295 F.2d 21, 23 (9th Cir. 1961);¹³⁸ *Elmore v. Cone Mills Corp.*, 187 F.3d 442, 446 (1999) (“The Supreme Court has held that [‘a]n essential element of any estoppel is detrimental reliance on the adverse party’s misrepresentations.”) (Citation omitted).¹³⁹ Where, as here, a party submits no evidence of actual reliance, any claim of equitable estoppel must be

¹³⁶ *Id.* ¶ 147 (citing Ex. C-61).

¹³⁷ RLA-12.

¹³⁸ RLA-4.

¹³⁹ RLA-7.

rejected.¹⁴⁰

75. Afilias' equitable estoppel argument also suffers from two additional defects. First, Afilias' argument is based primarily on Ms. Willett's statement in her 16 September 2016 letter that the parties' responses to ICANN's questionnaire would assist it in reaching an informed determination. However, Afilias also relies on Ms. Willett's letter to support its substantive claim that ICANN's investigation was inadequate and biased.¹⁴¹ Under California law, a party cannot predicate an equitable estoppel argument on the same conduct on which it bases its cause of action. *Lukovsky v. City and Cty. of San Francisco*, 535 F.3d 1044, 1052 (9th Cir. 2008) ("The primary problem with plaintiffs' argument is that their alleged basis for equitable estoppel is the same as their cause of action. As we have previously explained, the plaintiff must point to some fraudulent concealment, some active conduct by the defendant 'above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time.'") (Citation omitted).¹⁴²

76. Second, Afilias was represented by experienced counsel throughout the entire period at issue. Its letters were signed by its General Counsel, Mr. Hemphill, and its 9 September 2016 letter copies Afilias' outside counsel, Mr. Arif Ali (who has been counsel for

¹⁴⁰ *In re Katz Interactive Call Processing Patent Litig.*, Nos. 07-NL-1816, 01-2196, RGK (FFMx) 2009 WL 1351043, at *15 (C.D. Cal. May 1, 2009) ("Essentially, FedEx is attempting to argue that reliance can be inferred from evidence of misleading conduct. That analysis impermissibly eliminates an essential element of estoppel."), RLA-10; *Sood v. Grief*, No. H033875, 2010 WL 2595128, at *4-5 (Cal. Ct. App. June 29, 2010) (unpublished) (rejecting equitable estoppel where the evidentiary record was "devoid of any indication that [counsel's] conduct actually and reasonably induced [plaintiff] to forbear suing" within the statutory period) (citation omitted), RLA-19; *Yeager v. Bowlin*, No. CIV. 2:08-102 WBS JM, 2010 WL 95242, at *16 (E.D. Cal. Jan. 6, 2010) ("Plaintiffs have presented no evidence that indicates they reasonably relied on any representations by defendants that induced them to delay from filing this action until the statute of limitations had run . . . Accordingly, equitable tolling and estoppel are inappropriate."), RLA-20; *Estate of Amaro v. City of Oakland*, No. C09-01019 WHA, 2010 WL 669240, at *10 (N.D. Cal. Feb. 23, 2010) (finding that plaintiff "ignores equitable estoppel's requirement of reasonable reliance, since there is no evidence in the record that plaintiffs relied, or could have relied, on any actions taken by Poulson."), RLA-8.

¹⁴¹ Afilias' Reply Memorial ¶¶ 111-118.

¹⁴² RLA-16.

other claimants in previous IRPs, including the *ICM* IRP).¹⁴³ Under California law, “[w]here one has been represented by an attorney in connection with a claim the necessary elements of estoppel are not established as a matter of law.” *Romero v. Cty. of Santa Clara*, 3 Cal. App. 3d 700, 705 (1970); *Republic Ins. Co. v. Great Pac. Ins. Co.*, 261 Cal. Rptr. 863, 867 (Cal. Ct. App. Aug. 31, 1989) (unpublished);¹⁴⁴ *Lara v. Willows Joint Venture*, No. B145113, 2002 WL 705962, at *5 (Cal. Ct. App. Apr. 24, 2002) (unpublished).¹⁴⁵

77. Afilias knew how to utilize ICANN’s Accountability Mechanisms. It did so in August 2016 when it filed a complaint with ICANN’s Ombudsman regarding the matters that it raised in its August and September 2016 letters, and which it now raises in this IRP.¹⁴⁶ Moreover, Afilias’ parent company had experience initiating a Reconsideration Request, in 2014,¹⁴⁷ and a CEP and IRP, in 2015, regarding another gTLD application.¹⁴⁸ Further, Afilias’ counsel—Mr. Ali—has represented numerous claimants in prior IRP proceedings. Indeed, any time after 1 October 2016, when ICANN’s Bylaws were significantly amended to allow for CEPs and IRPs regarding ICANN staff actions and inactions, Afilias could have formally challenged the staff actions it is challenging in this IRP, but it was required to do so in a timely manner. Afilias chose not to. And if Afilias wished to toll the limitations period, it was required to seek an express agreement to that effect. As a matter of law, and particularly having been

¹⁴³ Dechert LLP – Arif H. Ali, R-40.

¹⁴⁴ RLA-18.

¹⁴⁵ RLA-14, California Rules of Court, rule 8.1105 states that opinions of the Courts of Appeal will be published only if certain criteria are met, such as that the opinion establishes a new rule of law, applies an existing rule to facts significantly different than prior published opinions, or advances a new interpretation, clarification, criticism or construction of the law, RLA-23. Unpublished opinions may not be cited in California state court. *See* Cal. Rules of Court, rule 8.1115, RLA-24. However, they may be cited in federal courts or fora other than California state court. *See, e.g., Inland Concrete Enters., Inc. v. Kraft*, 318 F.R.D. 383, 405-406 (C.D. Cal. 2016), RLA-11. Here, *Romero* (which is published) establishes the applicable rule of law. *Republic Ins. Co.* and *Lara* show that that rule has been consistently applied by the Courts of Appeal, RLA-17.

¹⁴⁶ C-49 (stating “[i]n addition to this letter, we are filing a complaint with the ICANN Ombudsman”).

¹⁴⁷ Afilias Limited, BRS Media Inc. and Tin Dale LLC, Reconsideration Request 14-41, R-43.

¹⁴⁸ Afilias Limited, BRS Media, Inc. & Tin Dale, LLC v. ICANN (.RADIO), R-28.

represented by experienced counsel, Afilias cannot now be heard to claim that it thought that the limitations period would not be enforced.

78. In sum, Afilias' equitable estoppel claim must be rejected. Afilias' claims are time-barred to the extent they are based on actions or inactions that occurred in 2016 or at any other time more than 12 months before Afilias filed its CEP in June 2018.

II. ICANN'S ARTICLES AND BYLAWS DID NOT REQUIRE ICANN TO AUTOMATICALLY DISQUALIFY NDC; ICANN ACTED CONSISTENTLY WITH ITS ARTICLES AND BYLAWS BY NOT MAKING ANY MATERIAL DECISIONS UNTIL ACCOUNTABILITY MECHANISMS WERE RESOLVED.

79. Afilias argues in its Reply that "ICANN was required to disqualify NDC's application and bid in August 2016 when ICANN first learned of NDC's violations, whether as a matter of automatic disqualification pursuant to the applicable standards, or as a matter of the reasonable exercise of ICANN's discretion pursuant to those same standards."¹⁴⁹ Afilias is wrong. None of NDC's alleged breaches of the Guidebook or the Auction Rules, even if true, requires automatic disqualification. Instead, the Guidebook and Auction Rules provide ICANN with significant discretion to determine what the penalty or remedy should be, if any, for a potential breach of their terms. Moreover, ICANN reasonably chose to not take any action in 2016 regarding .WEB because an Accountability Mechanism was pending regarding .WEB. ICANN's Accountability Mechanisms are fundamental safeguards in ensuring that ICANN's model remains effective, and it did not seem prudent for the Board or staff to interfere with or preempt the issues that were the subject of an Accountability Mechanism regarding .WEB that was pending at that time.

A. The Guidebook And Auction Rules Violations Alleged by Afilias Do Not Require the Automatic Disqualification of NDC.

80. As it has since 2016, Afilias continues to argue that NDC violated the Guidebook

¹⁴⁹ Afilias' Reply Memorial ¶ 20.

by failing to amend its application to reflect its new plans for .WEB and by allegedly transferring rights and obligations in connection with its .WEB application to Verisign.¹⁵⁰ Afilias also continues to argue that NDC violated the Auction Rules by submitting bids on Verisign’s behalf, rather than its own.¹⁵¹ Finally, Afilias continues to claim that ICANN violated its Articles and Bylaws by failing to automatically disqualify NDC in 2016 for these alleged breaches.¹⁵² Afilias is incorrect on several levels.

81. As an initial matter, ICANN has taken no position on whether NDC violated the Guidebook, but even if ICANN agreed with Afilias’ interpretation of the Guidebook and the effect of the DAA, ICANN still would not be under an obligation to automatically disqualify NDC. Instead, the Guidebook provides ICANN with substantial discretion in addressing and remedying breaches of its terms. For example, Section 1.2.7 of the Guidebook, which Afilias claims was violated by NDC failing to disclose its arrangement with Verisign, explicitly states that “[f]ailure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading *may result* in denial of the application.”¹⁵³ The Guidebook provides elsewhere that each applicant “acknowledges that any material misstatement or misrepresentation (or omission of material information) *may cause* ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant.”¹⁵⁴ The Terms and Conditions of the Guidebook, which Afilias claims were violated by an alleged transfer of NDC’s rights and obligations, state that ICANN’s “decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs

¹⁵⁰ *Id.* ¶ 28.

¹⁵¹ *Id.*

¹⁵² *Id.* ¶ 20.

¹⁵³ Guidebook, § 1.2.7, C-3 (emphasis added).

¹⁵⁴ *Id.*, § 6, Terms and Conditions 1 (emphasis added).

after such approval is entirely *at ICANN's discretion*.”¹⁵⁵

82. In what appears to be a concession that the Guidebook vests ICANN with this type of discretion, Afilias argues that ICANN's discretion can only be exercised consistent with ICANN's Articles and Bylaws by disqualifying NDC's application. This is not the case for a number of reasons. First, determining that NDC violated the Guidebook is not a simple analysis that is answered on the face of the Guidebook. There is no Guidebook provision that squarely addresses an arrangement like the DAA. A true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA. This analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN.

83. Likewise, ICANN has to approach any such analysis with an eye towards the potential impact a decision of these issues will have on the global Internet community.¹⁵⁶ And, as set forth in ICANN's IRP Response,¹⁵⁷ as well as the witness statements of Paul Livesay and Jose Rasco, there have been a number of arrangements that appear to be similar to the DAA in the secondary market for new gTLDs, including transactions involving Afilias, Donuts and other registry operators.¹⁵⁸ Indeed, the Auction Rules seem to foresee the possibility of such transactions. Rule 68(a) of the Auction Rules explicitly precludes discussion during the Blackout Period “of any post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction.”¹⁵⁹ And Rule 68(b) confirms that the “prohibition against

¹⁵⁵ *Id.*, § 6, Terms and Conditions 3 (emphasis added).

¹⁵⁶ Bylaws, Art. 7, § 7.3(b), C-23.

¹⁵⁷ ICANN's Response to Afilias' Amended Request for IRP, at ¶¶ 25-29.

¹⁵⁸ *Id.* ¶¶ 25-29; Livesay Stmt. ¶¶ 8-10, 26; Rasco Stmt. ¶¶ 42-45.

¹⁵⁹ C-4, at Rule 68(a).

these activities applies only with respect to Contention Strings that are within Blackout Periods . . .”¹⁶⁰ Thus, the Auction Rules appear to contemplate the possibility of a “post-Auction ownership transfer arrangement” being in place prior to an auction. This only reinforces why the outcome here is not preordained, as Afilias tries to portray it.

84. Afilias’ additional argument that “nothing in the [Auction Rules] suggests that ICANN has any discretion in enforcing” the Auction Rules¹⁶¹ is simply incorrect. The Auction Rules grant ICANN significant discretion to interpret and enforce the rules and to determine the appropriate remedy for violation of the rules. Specifically, the Auction Rules make clear that “[i]f any dispute or disagreement arises in connection with these Auction Rules, including the interpretation or application of these Auction Rules, or the form, content, validity or time of receipt of any Bid, *ICANN’s decision shall be final and binding.*”¹⁶² And the New gTLD Auction Bidders Agreement (“Bidders Agreement”) expressly states that an applicant “acknowledges that it *may be subject to a penalty* of up to the full amount of the Deposit and forfeiture of its Applications or termination of its registry agreements for a serious violation of the Auction Rules or Bidder Agreement.”¹⁶³ Thus, there is no question that ICANN has the discretion of determining whether a “serious violation” has taken place and, if so, what the appropriate penalty or remedy should be, if any.

85. Moreover, the Auction Rules violations alleged by Afilias appear to be based on a strained interpretation of the text of the rules. For example, the propriety of an agreement like the DAA is not precisely addressed by the Auction Rules because the Auction Rules are concerned only with the mechanics of the Auction and each applicant’s participation in the

¹⁶⁰ *Id.*, at Rule 68(b).

¹⁶¹ Afilias’ Reply Memorial ¶ 101.

¹⁶² C-4, ¶ 72.

¹⁶³ C-5 § 2.10.

Auction, such as deposits that must be paid, notices that ICANN must release, the process for submitting bids, and the currency that must be used.¹⁶⁴ The Auction Rules do not appear to be designed to address the extent to which a non-applicant—including a financier, affiliated entity, or contractual counter-party—may be permitted to have an interest in a gTLD. The provisions of those rules that Afilias cites cannot bear the weight Afilias puts on them. For example, Afilias repeatedly cites the statement in Section 12 of the Auction Rules that a “Qualified Applicant may designate a party to bid on its behalf (‘Designated Bidder’).”¹⁶⁵ Afilias construes this section as barring an applicant from bidding on its own application where a third party has some type of interest in the gTLD. But Section 12 does not seem concerned with that issue and does not address it.

86. Likewise, Afilias’ argument that NDC’s bids were invalid because NDC did not fit within the Auction Rules’ definition of a “Bidder” or a “Qualified Applicant” are unpersuasive.¹⁶⁶ ICANN could certainly determine that, despite Afilias’ technical reading of the definitions in the Auction Rules, NDC was, in fact, bidding on *its* application, was submitting bids on *its* behalf, and was submitting bids *it* was willing and able to pay, despite the DAA.¹⁶⁷ And as set forth above, the Auction Rules, as well as the Bidders Agreement, both seem to suggest the possibility of a “post-Auction ownership transfer arrangement” being in place prior to an auction.¹⁶⁸

87. Finally, because it has the “ultimate responsibility” for the Program, the ICANN

¹⁶⁴ C-4, ¶ 23 (“All Deposits to the Auction Bank Account must be made by bank wire.”); *id.*, ¶ 8 (“Prior to the scheduling of an Auction, an Intent to Auction notice will be provided to all members of an eligible Contention Set via the ICANN Customer Portal.”) *id.*, ¶ 16 (“Bidding will take place online at the Auction Site.”); *id.*, ¶ 5 (“All prices in the Auction are expressed in whole numbers of United States dollars (\$US).”).

¹⁶⁵ Afilias’ Reply Memorial ¶¶ 49, 92-95.

¹⁶⁶ *Id.* ¶¶ 87-96.

¹⁶⁷ *Id.* ¶ 94; C-5.

¹⁶⁸ C-4 ¶ 68(a), (b); C-5 § 2.6.

Board has reserved the right to “individually consider” any application to “*determine whether* approval would be in the best interest of the Internet community.”¹⁶⁹ In other words, even if ICANN were to conclude that NDC violated the Guidebook or the Auction Rules, ICANN’s Board would still have the discretion to decide whether approval of NDC’s (or any other applicant’s) application is appropriate or not.

88. Thus, ICANN was never under an obligation to automatically disqualify NDC, as Afilias claims. If ICANN were to determine that NDC violated the Guidebook or the Auction Rules, it is for ICANN to decide whether any such violation warrants disqualification. There are a range of remedies or penalties – not involving an award of .WEB to Afilias – that ICANN could employ if it were to find that NDC did violate the Guidebook or the Auction Rules. As just one example, ICANN could order an unwinding of the .WEB auction and either bar NDC from participating, bar NDC from participating in accordance with the DAA, or permit NDC to participate in accordance with the DAA. It is not, as Afilias suggests, simply a choice between disqualification of NDC or condoning the DAA. Selecting the appropriate remedy involves the balancing of competing interests and policies as well as ICANN’s Core Values. Under the Bylaws, that balancing must be done by ICANN’s Board in the exercise of its reasonable business judgment.

B. The ICANN Board Appropriately Chose Not To Make Any Material Decisions Regarding .WEB in November 2016.

89. Since the inception of the Program, ICANN has followed a practice of placing applications and contention sets on hold when Accountability Mechanisms are pending, whether it be a Reconsideration Request, an Ombudsman complaint, a CEP or an IRP.¹⁷⁰ Once on hold,

¹⁶⁹ Guidebook, § 5.1, C-3.

¹⁷⁰ Disspain Stmt. ¶ 11. With respect to IRPs, however, claimants typically are required to submit a request for interim measures in order for the hold to be instituted.

ICANN generally refrains from taking action with respect to the application or contention set that could interfere with, or otherwise preempt, the pending Accountability Mechanism.¹⁷¹ ICANN follows this practice, in part, because ICANN considers its Accountability Mechanisms to be fundamental safeguards in ensuring its bottom-up, multistakeholder model remains effective and in ensuring that ICANN remains accountable to its community.¹⁷² Indeed, accountability is built into every level of ICANN’s organization and Mission, as well as its Articles and Bylaws.¹⁷³ Moreover, ICANN has a policy of referring potential competition issues to relevant government regulators, as set forth in detail below.

90. Thus, when the Board was faced with Donuts’ 2016 CEP (and subsequently the DOJ’s antitrust investigation) that raised issues about .WEB, the Board appropriately, and fully consistent with ICANN’s Articles and Bylaws, chose not to address any concerns about .WEB while these proceedings were pending as the results might have an impact on the Board’s need to make any such decisions.

91. Moreover, because the Board’s determination not to make any decisions regarding .WEB in November 2016 arises “out of the Board’s exercise of its fiduciary duties,” and the decision was “within the realm of reasonable business judgment,” the Panel must defer to the Board’s reasonable business judgment and cannot replace it with the Panel’s own judgment.¹⁷⁴ It was eminently reasonable for the Board to make this choice because the results of the Accountability Mechanism, and the subsequent DOJ investigation, could have had an impact on any eventual analysis ICANN might be called on to make. For example, the DOJ investigation alone, although not expected when the Board made its choice, had the potential to

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ ICANN Articles of Incorporation, § 2(iii), C-2; Bylaws, Art. 4, §§ 4.2, 4.3, C-23.

¹⁷⁴ Bylaws, Art. 4, § 4.3(i)(iii), C-23.

moot or fundamentally alter the issues raised regarding the DAA. The Board made its reasonable business judgment after receiving materials setting forth the relevant information about the disputes over .WEB, the parties' legal and factual contentions, and a set of options the Board could consider. The Board also made this decision after a robust discussion among Board members and receiving information and advice from counsel.

92. Nor is there any plausible argument that the Board's decision violated ICANN's Bylaws. Afilias draws the conclusion that the Board violated its commitment to "apply[] documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment."¹⁷⁵ But Afilias does not attempt to explain how the Board's determination not to make a decision regarding .WEB during the pendency of an Accountability Mechanism or other legal proceedings on the same issues could represent an inconsistent application of "documented policies"; indeed, Afilias does not even identify the documented policies purportedly at issue. Afilias also has not explained how that decision was biased, non-objective or unfair, or how it singled anyone out for discriminatory treatment. It clearly was not and did not.

93. In short, the Board has acted reasonably and prudently. Although this has involved some delay in the final resolution of .WEB, the delay results, in part, from Afilias' decision to sit on its claims for more than two years, rather than promptly initiating another Accountability Mechanism when its complaint to the Ombudsman was denied or even earlier when it first developed and began asserting its claims in August 2016. In any event, under the governing standard of review, the Panel cannot overturn or supplant the Board's reasonable business judgment to decide not to act during the pendency of Accountability Mechanisms that

¹⁷⁵ Afilias' Reply Memorial ¶¶ 16, 23, 86.

might impact whether it even needs act with regard to .WEB and, if so, the nature of the issues that it must address.

III. ICANN HAS COMPLIED WITH ITS CORE VALUE REGARDING COMPETITION.

94. In its Reply, Afilias continues to claim that ICANN has a “competition promotion mandate,”¹⁷⁶ that this mandate is broader than the DOJ’s regulatory powers and review,¹⁷⁷ and that “ICANN’s decision to exercise its discretion to benefit Verisign is a complete perversion of ICANN’s Bylaws.”¹⁷⁸ Afilias is wrong on all fronts and is now taking a litigation-driven position inconsistent with its previous view that “[n]either ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.”¹⁷⁹

95. As an initial matter, ICANN has not exercised its discretion to benefit Verisign. As set forth above, ICANN has not fully evaluated the DAA and NDC’s related conduct because the .WEB Contention Set has been on hold due to the invocation of ICANN’s Accountability Mechanisms and the DOJ investigation. And ICANN certainly has not evaluated whether a transfer of .WEB from NDC to Verisign is appropriate because NDC has not requested such a transfer (and could not unless and until ICANN signs a .WEB registry agreement with NDC). Accordingly, Afilias’ assertion that ICANN has violated its so-called “competition promotion mandate” is not even ripe for consideration.

96. In any event, ICANN does not “decide which companies obtain the exclusive gTLD registry rights” in the way that Afilias asserts.¹⁸⁰ ICANN does not evaluate, for each new gTLD application, whether competition might be enhanced if ICANN selects one registry

¹⁷⁶ *Id.*, ¶¶ 122-124.

¹⁷⁷ *Id.*, ¶¶ 131-136.

¹⁷⁸ *Id.*, ¶¶ 130.

¹⁷⁹ R-21, at 8 (emphasis added).

¹⁸⁰ Afilias’ Reply Memorial ¶ 3.

operator as opposed to another. Rather, ICANN administers the objective, non-discriminatory processes set forth in the Guidebook under which gTLDs are awarded to qualified entities. ICANN is not required or equipped to make judgments about which applicant for a particular gTLD would most effectively promote competition, or to award gTLDs on that basis. As Afilias notes, the Guidebook sets out comprehensive procedures for the gTLD application and review process.¹⁸¹ Nowhere in the Guidebook does it state that ICANN will choose among otherwise qualified applicants based on ICANN’s view of which applicant would most effectively contribute to competition.

97. Afilias also incorrectly asserts that “specifically restraining the market power of .COM” was the primary motivating policy underlying the New gTLD Program.¹⁸² While the community-driven policy underlying the Program was aimed at increasing competition, diversity and consumer choice in the DNS, the Program was not specifically designed to take market share from .COM, as Board members J. Beckwith Burr and Christopher Disspain confirm in their witness statements.¹⁸³ Had the ICANN community wished to prevent Verisign from being the registry operator for any particular new gTLD, the community (through the GNSO) could have included that prohibition as part of the policy recommendations, or the community could have mandated that such a prohibition be included in the Guidebook to which the community provided extensive input on multiple versions over a multi-year period. The community could even have requested that Verisign not be permitted to operate any gTLD registry other than the ones that it was already operating at the start of the Program. But the community did not take such action, nor was such action ever proposed.¹⁸⁴ Afilias’ claim that the Program specifically targeted

¹⁸¹ Afilias’ Reply Memorial ¶ 25.

¹⁸² *Id.*, ¶ 128.

¹⁸³ Burr Stmt. ¶ 27; Disspain Stmt. ¶ 14.

¹⁸⁴ Disspain Stmt. ¶ 14.

Verisign is a fabrication, which Afilias then uses to misrepresent ICANN’s Core Values.

98. Ms. Burr and Mr. Disspain provide a clear explanation of how ICANN complies with its Core Values and Bylaws as to competition. One of ICANN’s Core Values, as set forth in ICANN’s Bylaws, requires ICANN to promote 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.”¹⁸⁵ The Bylaws further require ICANN, “[w]here feasible and appropriate,” to “depend[] on market mechanisms to promote and sustain a competitive environment in the DNS market.”¹⁸⁶ As Ms. Burr explains, taken together, “these provisions obligate ICANN to coordinate the community’s development of, and implement, policy that facilitates market-driven competition.”¹⁸⁷ This is precisely what ICANN did in implementing the Program on behalf of the Internet community.

99. As Ms. Burr and Mr. Disspain further explain, ICANN is not a regulator responsible for taking affirmative actions to block potentially anticompetitive transactions or conduct the way a government regulator would.¹⁸⁸ In fact, ICANN’s Bylaws make clear that ICANN is prohibited from acting like a government regulator. Article 1, section 1.1(c) of the Bylaws states that “[f]or the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”¹⁸⁹ Moreover, ICANN does not have the resources or expertise necessary to serve as a competition regulator for the DNS.¹⁹⁰ Rather, as Ms. Burr and Mr. Disspain confirm in their witness statements, ICANN complies with the Core Value and Bylaws provisions regarding competition by deferring to an appropriate government regulator – such as

¹⁸⁵ Bylaws, Art. 1, § 1.2(b)(iv), C-23.

¹⁸⁶ *Id.*, Art. 1, § 1.2(b)(iii).

¹⁸⁷ Burr Stmt. ¶ 19.

¹⁸⁸ Burr Stmt. ¶¶ 28-30; Disspain Stmt. ¶ 14.

¹⁸⁹ Bylaws, Art. 1, § 1.1(c), C-23.

¹⁹⁰ Burr Stmt. ¶ 30.

DOJ – for investigation of potential competition issues. Indeed, the Guidebook specifically states that “ICANN retains the right to refer an application to a competition authority prior to entry into the registry agreement” if ICANN determines that an application or applicant raises potential competition issues.¹⁹¹ ICANN’s deference to competition authorities in such cases is no different than its deference to the DOJ’s decision here, after a year-long investigation, not to take action to block Verisign’s possible operation of .WEB. If anything, denying NDC’s application on competition grounds in these circumstances would directly violate the Board’s commitment to “apply[] documented policies consistently, neutrally, objectively and fairly without singling out any particular party for discriminatory treatment.”¹⁹²

100. Thus, Afilias’ assertion that ICANN has a competition mandate that is broader than the DOJ’s regulatory powers and review, and which requires ICANN to award .WEB to Afilias, rather than NDC, because that action would most effectively promote competition, is simply wrong. ICANN is not a regulator and has no regulatory authority, and it lacks the institutional capability to make the competition determination that Afilias so blithely and self-servingly demands. ICANN has complied with its Core Value regarding competition by introducing more than a *thousand* new gTLDs into the market and allowing the ultimate competition regulator in the United States – the DOJ – to evaluate the competition issues associated with Verisign’s operation of .WEB.

101. The position that Afilias is espousing in this IRP is a lawyer-generated argument that is inconsistent with ICANN’s Mission, Articles, Bylaws, resources, and expertise. And it is directly contrary to Afilias’ view in 2006 (which, it should be noted, is the same view expressed by Ms. Burr and Mr. Disspain in this IRP), when Afilias commented on ICANN’s appropriate

¹⁹¹ Guidebook, § 5.1.4, C-3.

¹⁹² Bylaws, Art. 1, § 1.2(a)(v), C-23.

role as an administrator of the DNS:

“While ICANN’s mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. *Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.* Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.¹⁹³

102. Also unsupported is Afiliat’s argument that no inference should be drawn from DOJ’s refusal to take action to block Verisign from operating .WEB. To the contrary, Dr. Dennis Carlton, who was the DOJ’s Deputy Assistant Attorney General for Economics, has concluded that, based on his experience, the closure of such an investigation suggests that Verisign’s operation of .WEB is not likely to harm competition.¹⁹⁴

103. Finally, Dr. Carlton and Dr. Kevin Murphy have concluded in their expert reports that there is no evidence that .WEB will be a unique competitive check on .COM. In other words, there is no economic evidence that .WEB will be a successful rival to .COM such that Verisign’s operation of .WEB is likely to restrain competition. Rather, the expert economists do not believe that .WEB will be more successful in taking market share from .COM than other new gTLDs, which is likely what the DOJ concluded as well. Thus, Afiliat’s competition claim is unsupported as an economic matter.

IV. ICANN COMPLIED WITH ITS ARTICLES, BYLAWS AND INTERNAL PROCEDURES IN INVESTIGATING ISSUES REGARDING THE .WEB AUCTION AND AFILIAT’S CLAIMS.

104. Afiliat’s contention in its Reply that the manner in which ICANN investigated Afiliat’s allegations against NDC and Verisign violated the Articles and Bylaws is procedurally

¹⁹³ R-21, 8 (emphasis added).

¹⁹⁴ Expert Report of Dennis W. Carlton ¶¶ 58-61.

improper, internally contradictory, and meritless.¹⁹⁵

105. First, Afilias' Amended IRP Request asserted no such claim. The Amended IRP Request asserts that ICANN did not adequately investigate *pre-auction* rumors that NDC had reached an agreement with Verisign, but makes no contention regarding the adequacy of ICANN's *post-auction* investigation of Afilias' specific allegations in its August and September 2016 letters.¹⁹⁶ Rule 6 of the Interim Supplementary Procedures states that "[a] CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE."¹⁹⁷ Afilias' current claim that ICANN violated its Bylaws in its post-auction investigation of Afilias' complaints differs fundamentally from the claim in its Amended IRP Request that ICANN did not sufficiently investigate pre-auction rumors: it concerns a different investigation of different complaints that occurred at a different time in response to different information received by ICANN. Afilias cannot assert a new claim for the first time in its Reply.

106. Second, Afilias' contention that ICANN did not adequately investigate its allegations contradicts Afilias' assertion that "[b]y August 2016, ICANN had all the information it needed to determine that NDC's application and bid had to be disqualified."¹⁹⁸ Afilias cannot have it both ways: it cannot plausibly contend that ICANN did not gather sufficient facts to make a determination on the propriety of the DAA, while simultaneously arguing that ICANN had all the facts that it needed to make that determination.

107. Third, ICANN's investigation was prompt, thorough and fully consistent with its

¹⁹⁵ See Afilias' Reply Memorial ¶¶ 8, 102-118.

¹⁹⁶ Afilias Amended IRP Request ¶ 78, sub-bullet 4 ("ICANN failed to apply these policies 'neutrally, objectively, and fairly' here: . . . ICANN failed to fully investigate rumors that NDC had reached an agreement with VeriSign prior to the .WEB Auction. Although ICANN specifically asked NDC to confirm that 'there have not been changes to your application . . . that need to be reported to ICANN,' NDC declined to do so and ICANN failed to pursue a response.").

¹⁹⁷ Interim Supp. Proc., Rule 6.

¹⁹⁸ Afilias' Reply Memorial ¶ 16.

Bylaws and Articles. Donuts initiated its CEP on 2 August 2016, and Afilias first raised its allegations with ICANN in a letter dated 8 August 2016.¹⁹⁹ Through its counsel, ICANN promptly reached out to Verisign to request a copy of the DAA and other information relevant to .WEB.²⁰⁰ In response, Verisign sent ICANN counsel a letter on 23 August 2016 responding to Donuts' and Afilias' allegations and providing a copy of the DAA, the 26 July 2016 letter agreement between Verisign and NDC, and documents supporting Verisign's contention that Afilias violated the auction Blackout Period.²⁰¹ Three weeks later, and based on all of the concerns that had been expressed at that time, ICANN wrote to Afilias, Ruby Glen, NDC and Verisign inviting them each to answer questions designed to probe more deeply into their respective allegations and responses and to give them each an opportunity to fully set out their positions.²⁰² Afilias, NDC and Verisign each accepted ICANN's invitation (Ruby Glen did not), providing a total of 59 single-spaced pages of analysis.²⁰³ Although Afilias asserts that ICANN's investigation was "biased and inadequate,"²⁰⁴ it does not identify any additional information that ICANN purportedly should have gathered.

108. Afilias complains that ICANN did not act in accordance with its commitment to transparency because it did not keep Afilias informed on the status of its investigation and the Board's deliberations. However, ICANN's commitment to transparency does not require ICANN to conduct its inner workings or Board discussions publicly, or to give access to that information to a particular applicant upon request. ICANN acted in accordance with its policies and the Bylaws by providing all contention set members, including Afilias, prompt notice when

¹⁹⁹ Ex. C-49.

²⁰⁰ R-29, at 20:9-15.

²⁰¹ R-18.

²⁰² C-50.

²⁰³ C-51 (Afilias response); C-109 (Verisign response); C-110 (NDC response).

²⁰⁴ Afilias' Reply Memorial ¶ 8.

the status of the contention set changed.

109. Afilias baldly asserts that ICANN’s investigation was not neutral, objective, fair, non-discriminatory or in good faith. But Afilias never explains how *any* part of ICANN’s investigation was non-objective, unfair, discriminatory or in bad faith.²⁰⁵ Afilias quibbles with the phrasing of some of the questions in ICANN’s September 2016 questionnaire.²⁰⁶ But Afilias cannot seriously dispute that these questions were premised on the very allegations Afilias and Donuts were asserting and successfully accomplished their purpose of providing the parties an opportunity to state their positions in detail on the issues in dispute between them.

110. Afilias also contends that, when ICANN sent the September 2016 questionnaire, ICANN should have disclosed to Afilias that ICANN had received a copy of the DAA from Verisign.²⁰⁷ Afilias argues that ICANN’s failure to do so meant that “the deck was stacked” because Verisign and NDC purportedly knew “the substantive motivations behind the questions” and Afilias did not.²⁰⁸ Afilias further contends that this somehow amounted to “an attempted cover-up by ICANN of its own failings and of Verisign’s and NDC’s subterfuge.”²⁰⁹

111. These contentions make no sense and Afilias does not (and cannot) explain them. Afilias does not identify the purported “substantive motivations” to which it refers or cite any evidence of any such motivations. Afilias does not explain how NDC or Verisign would have known Ms. Willett’s alleged “substantive motivations.” Afilias does not explain why the fact that ICANN did not inform Afilias that it had obtained the DAA “stacked” the deck. And Afilias does not explain how sending the questions amounted to a “cover-up.” Afilias’ contentions are

²⁰⁵ *Id.*, ¶ 102.

²⁰⁶ *Id.*, ¶¶ 115-116.

²⁰⁷ *Id.*, ¶ 113.

²⁰⁸ *Id.*

²⁰⁹ *Id.*, ¶¶ 16, 102, 118.

simply a series of catch-phrases devoid of any meaning.

112. Moreover, Afilias fails to grapple with the fact that Verisign provided the DAA on the express proviso that it was confidential business information that could *not* be disclosed by ICANN.²¹⁰ When information is provided to ICANN on a confidential basis, ICANN respects and maintains the information's confidentiality.²¹¹ Any other approach would discourage individuals and companies from communicating freely and openly with ICANN.

113. Finally, Afilias' complaints about the adequacy of ICANN staff's investigation of Afilias' allegations against Verisign and NDC are ultimately irrelevant because Afilias requests no relief in relation to that conduct. Afilias does not contend that any further investigation is necessary or should be conducted. On the contrary, as noted, Afilias contends that ICANN has all the information necessary to resolve Afilias' complaints and that ICANN has had that information since August 2016.

V. AFILIAS REQUESTS RELIEF THAT IS BEYOND THE PANEL'S JURISDICTION.

114. Article 4, section 4.3(o) of the Bylaws expressly establishes and circumscribes the authority of an IRP Panel. It is remarkable that, although it devotes more than four pages of its Reply to addressing the Panel's authority,²¹² Afilias never once cites or references Article 4, section 4.3(o). Afilias' studied avoidance of this definitive provision is tantamount to an admission that it seeks to lead the Panel into error by asking it to grant remedies in excess of the Panel's authority.

115. Article 4, section 4.3(o) states:

Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

²¹⁰ C-102 (“**CONFIDENTIAL BUSINESS INFORMATION: DO NOT DISCLOSE**”).

²¹¹ ICANN Documentary Information Disclosure Policy, R-41.

²¹² Afilias' Reply Memorial pp. 57-60.

- (i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;
- (ii) Request additional written submissions from the Claimant or from other parties;
- (iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;
- (iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;
- (v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes; and
- (vi) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).²¹³

116. The only provision of Article 4, section 4.3(o) relevant to this IRP is subsection (iii), which gives the Panel authority to declare whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws.

117. Afilias seeks two types of relief.²¹⁴ First, it asks the Panel to declare that ICANN violated its Articles and Bylaws by: (a) failing to disqualify NDC's Application in August 2016; (b) failing to offer the rights to .WEB to Afilias after disqualifying NDC; and (c) proceeding to contract with NDC for a Registry Agreement.²¹⁵ While ICANN acknowledges that declarations finding that ICANN violated the Articles or Bylaws would be within the Panel's authority, each declaration requested by Afilias should be denied on the merits. As shown above, requests (a) and (b) are time-barred (*supra* Argument, Sec. I). And even if they were not time-barred,

²¹³ Bylaws, Art. 4, § 4.3(o).

²¹⁴ Afilias' Reply Memorial ¶ 155.

²¹⁵ *Id.*

ICANN and the Board acted within the realm of reasonable business judgment in deciding not to address the merits of claims made by Afilias and others while an Accountability Mechanism was pending (*supra* Argument Sec. II(b)); and, even if Afilias’ allegations against NDC were found by ICANN to have merit, nothing mandates automatic disqualification of NDC’s application or rejection of its auction bids (*supra* Argument Sec. II(a)). With respect to the request (c), ICANN did not violate its Articles or Bylaws by merely sending a draft Registry Agreement to NDC in furtherance of the processes set out in the Guidebook when no Accountability Mechanisms were pending challenging the .WEB application that prevailed in the Auction.

118. The second form of relief sought by Afilias is beyond the authority of the Panel to grant. Specifically, Afilias requests that the Panel “**require** ICANN to disqualify NDC’s application and bid and [] offer Afilias the rights to .WEB[.]”²¹⁶ Afilias euphemistically refers to this as a request for “affirmative declaratory relief,”²¹⁷ but it is a request for mandatory injunctive relief in substance and effect. Whether styled as a declaration that ICANN must “affirmatively” take certain actions or (more straightforwardly) as a mandatory injunction to take such actions, the relief that Afilias requests clearly exceeds the powers granted to the Panel by Article 4, section 4.3(o).

119. Article 4, section 4.3(o)(iii) allows the Panel to “[d]eclare whether a Covered Action **constituted** an action or inaction that violated the Articles of Incorporation or Bylaws[.]”²¹⁸ It is thus explicitly concerned only with past actions or inactions. The retrospective nature of this authority is also implicit in that it applies only to a “Covered Action,” which is defined as “actions or failures to act by or within ICANN **committed** by the Board,

²¹⁶ *Id.* ¶ 155.

²¹⁷ *Id.*

²¹⁸ Bylaws, Art. 4, § 4.3(o)(iii) (emphasis added), C-23.

individual Directors, Officers, or Staff members that give rise to a Dispute.”²¹⁹ Similarly, “Disputes” are defined as “Claims that Covered Actions *constituted* an action or inaction that *violated* the Articles of Incorporation or Bylaws[.]”²²⁰ The Panel has authority to issue a binding declaration regarding only whether past actions or inactions violated ICANN’s Articles or Bylaws. It does not have authority to “declare” that ICANN must take some specific action in the future.

120. Afilias misrepresents ICANN’s case—and then attacks a strawman—by asserting that ICANN’s position is that the Panel’s final declaration is “merely advisory.”²²¹ That is not ICANN’s position. A proper declaration from this Panel as to whether ICANN violated its Articles or Bylaws is a final decision that is binding on ICANN as well as Afilias.²²² The Panel, however, can properly decide matters and exercise its authority only insofar as they are within its jurisdiction as defined by the Bylaws. The Panel may declare whether a Covered Action constituted an action or inaction that violated ICANN’s Articles and Bylaws, and ICANN will be bound by that declaration. The Panel does not have authority to order or “declare” that ICANN must engage in particular future actions or inactions.

121. Afilias cites Article 4, section 4.3(a) of the Bylaws, which sets out the general purposes of an IRP, including to ensure that ICANN complies with its Bylaws and Articles, to empower the global Internet community to enforce compliance and to reduce disputes by creating precedent.²²³ Afilias also cites Article 4, section 4.3(x), which states that an IRP is “intended as a final, binding arbitration process.” However, Afilias does not explain how these provisions can plausibly be construed to expand the Panel’s authority beyond the limits set by

²¹⁹ *Id.*, Art. 4, § 4.3(b)(ii) (emphasis added).

²²⁰ *Id.*, Art. 4, § 4.3(b)(iii) (emphasis added).

²²¹ Afilias’ Reply Memorial ¶¶ 1, 5, 153.

²²² Bylaws, Art. 4, § 4.3(x)(i) & (iii), C-23.

²²³ Afilias’ Reply Memorial ¶ 151.

Article 4, section 4.3(o) and to authorize the Panel to issue a mandatory injunction.

122. There is no conflict between the purposes of IRPs set out in Article 4, sections 4.3(a) and (x) and the limits on the Panel’s authority imposed by Article 4, section 4.3(o). But if any conflict existed, the specific limits imposed by Article 4, section 4.3(o) would prevail over the general purposes set out in sections 4.3(a) and (x). *See, e.g., CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 466 (2006) (“when general and specific provisions are inconsistent, the latter control”);²²⁴ Cal. Civ. Proc. Code § 1859 (“when a general and particular provision are inconsistent, the latter is paramount to the former.”).²²⁵

123. Afiliás is also wrong in asserting that prior IRP Panels have found that they have power to issue injunctive relief (or, as Afiliás characterizes it, “affirmative declaratory relief”). The cases that Afiliás cites make no such findings. *DotConnectAfrica Trust* stated that “the Panel is of the view that it does have the power *to recommend* a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN’s Articles of Incorporation, Bylaws or the Applicant Guidebook.”²²⁶ Similarly, *GCC* found that “the Panel may and should *recommend* affirmative steps to be taken by the Board[.]”²²⁷

124. Thus, neither the Bylaws nor any dictum in *DotConnectAfrica Trust* or *GCC* supports Afiliás’ contention that the Panel has authority to “*require* ICANN to disqualify NDC’s application and bid and to offer Afiliás the rights to .WEB,” which is what Afiliás seeks.²²⁸ Such

²²⁴ RLA-6

²²⁵ RLA-21

²²⁶ *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50 2013 001083, Final Declaration (9 July 2015) ¶ 126 (emphasis added), CA-0015.

²²⁷ *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Partial Final Declaration (19 October 2016) ¶ 147 (emphasis added), CA-0017.

²²⁸ Afiliás’ Reply Memorial ¶ 155 (bold added).

an order would exceed the Panel's authority as defined by the Bylaws and render the Panel's declaration invalid and subject to challenge under Article V(1)(c) of the New York Convention, which states that recognition and enforcement of an arbitral award may be refused where it "contains decisions on matters beyond the scope of the submission to arbitration."²²⁹ The Panel should decline Afilias' invitation to commit that clear error.

CONCLUSION

125. Afilias' claims lack merit and should be rejected. Afilias' contentions that ICANN violated its Articles and Bylaws in connection with its investigation in August and September 2016, and by not disqualifying NDC in late-2016, are time-barred and meritless. ICANN's investigation promptly and effectively gathered the information relevant to Donuts' and Afilias' claims regarding .WEB, and the Board exercised its reasonable business judgment in not making any decision while an Accountability Mechanism was pending regarding .WEB (which could have been the subject of other soon-to-be filed mechanisms) that could have had an impact on ICANN's need to make any such decision. Moreover, neither the Guidebook nor the Auction Rules mandate disqualification even if ICANN does ultimately determine that NDC violated either or both; each instead leaves the remedy to the discretion of ICANN to determine in the exercise of its business judgment. Furthermore, ICANN is not equipped or required to award .WEB or any other gTLD based on an evaluation of which applicant might most effectively contribute to competition. No party has sought ICANN's approval to assign .WEB to Verisign and, therefore, ICANN has made no decision with respect to such a request.

²²⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), R-17.

Respectfully submitted,
JONES DAY

Dated: June 1, 2020

By: /s/ Jeffrey A. LeVee
Jeffrey A. LeVee

Counsel for Respondent ICANN

NAI-1513290441

EXHIBIT C-38

ARIF HYDER ALI

Contact Information Redacted

February 23, 2018

VIA E-MAIL

ICANN Board
c/o Cherine Chalaby, Chairman
Göran Marby, President and CEO
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Request for Update on ICANN's Investigation of .WEB Contention Set and Request for Documents under ICANN's Documentary Information Disclosure Policy

Dear ICANN:

We write on behalf of our client, Afilias Domains No. 3 Ltd. ("Afilias"), regarding the .WEB contention set. As stated in past correspondence, Afilias has several concerns with the 27-28 July 2016 auction for .WEB, including (1) Nu Dot Co LLC's ("NDC") apparent change in financial position, ownership, or control after submitting its application to ICANN but prior to the auction for .WEB; (2) NDC's assignment of rights in its application for .WEB to Verisign, Inc. ("Verisign") prior to the auction in breach of the gTLD Applicant Guidebook ("AGB"); and (3) the serious competition issues raised by Verisign's acquisition of .WEB in violation of ICANN's Bylaws and the AGB.¹ As discussed below, we are writing to: (1) request an update on ICANN's investigation of the .WEB contention set; and (2) request documents under ICANN's Documentary Information Disclosure Policy ("DIDP").

¹ See Letter from M. Scott Hemphill to Akram Atallah (8 Aug. 2016), <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-08aug16-en.pdf>; Letter from M. Scott Hemphill to Akram Atallah (9 Sep. 2016), <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-09sep16-en.pdf>; Letter from John Kane to Christine A. Willett (7 Oct. 2016).

I. Request for Update on ICANN's Investigation of .WEB Contention Set

Pursuant to Afilias' concerns in late 2016, ICANN requested "additional information"² regarding the .WEB auction from Afilias, Ruby Glen LLC ("Ruby Glen"), NDC, and Verisign on 16 September 2016.³ Afilias promptly responded to ICANN's request on 7 October 2016.⁴ Since Afilias submitted its response to ICANN over sixteen months ago, it has received no further communications from ICANN in regards to the .WEB contention set. ICANN has failed to update Afilias regarding its investigations relating to .WEB.

ICANN is obligated by its Bylaws to maintain "open and transparent processes."⁵ The principle of "[t]ransparency is one of the essential principles in ICANN's creation documents, and its name reverberates through its Articles [of Incorporation] and Bylaws."⁶ Pursuant to its Bylaws, ICANN is required to (1) "[e]mploy open, transparent and bottom-up, multistakeholder transparent public development processes"⁷ and (2) to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."⁸

Therefore, pursuant to ICANN's transparency obligations,⁹ we respectfully request that ICANN provide an update on the status of ICANN's investigation of the .WEB contention set, including: (1) the steps (if any) taken by ICANN to disqualify NDC's bid on the basis that NDC violated the rules applicable to its application; and (2) the steps (if any) taken by ICANN to assess competition issues arising out of delegation of .WEB to Verisign.

We further request that ICANN take no action in regards to .WEB until Afilias can review and respond to the documents provided as a result of the below DIDP request; and that ICANN confirm that it has not, and will not, enter into a registry agreement for .WEB with

² Letter from Christine A. Willett to John Kane (16 Sep. 2016), p.1.

³ See Letter from Christine A. Willett to John Kane (16 Sep. 2016).

⁴ See Letter from John Kane to Christine A. Willett (7 Oct. 2016).

⁵ ICANN Bylaws, Article 1, Section 1.2(a).

⁶ *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 Jul. 2016), ¶ 101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

⁷ ICANN Bylaws, Article 1, Section 1.2(a)(iv).

⁸ ICANN Bylaws, Article 3, Section 3.1.

⁹ See ICANN Articles of Incorporation, Art. 2(III); ICANN Bylaws (22 Jul. 2017), Art. 1(1.2)(a), Art. 3(3.1), Art. 4(4.1).

NDC until, to the extent Afilias seeks review of any decisions relating to .WEB through ICANN's accountability mechanisms, such mechanisms are completed. We nonetheless emphasize that Afilias reserves all of its rights to pursue any and all rights or remedies available to it in any forum against ICANN, NDC, or Verisign in connection with the delegation of the .WEB gTLD.

II. Request for Documents Pursuant to the DIDP

Afilias further submits this letter to request documents from ICANN, pursuant to ICANN's DIDP, related to (1) ICANN's 30 September 2016 request for additional information sent to Ruby Glen, Afilias, NDC, and Verisign; and (2) any investigation by ICANN of NDC and Verisign in relation to .WEB.¹⁰ The DIDP is "intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."¹¹ Pursuant to the DIDP, Afilias requests that ICANN provide the following documents:

1. All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information;¹²
2. Ruby Glen's Notice of Independent Review, filed on 22 July 2016;¹³
3. All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;¹⁴
4. All applications, and all documents submitted with the applications, for the rights to .WEB;

¹⁰ See Letter from Christine A. Willett to John Kane (16 Sep. 2016).

¹¹ See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>. In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*.

¹² Letter from Christine A. Willett to John Kane (16 Sep. 2016), p.1.

¹³ Complaint, *Ruby Glen, LLC v. ICANN*, 2:16-cv-05505, ¶ 53 (C.D. Ca. July 22, 2016).

¹⁴ Complaint, *Ruby Glen, LLC v. ICANN*, 2:16-cv-05505, ¶ 53 (C.D. Ca. July 22, 2016).

5. All documents discussing the importance of .WEB to bringing competition to the provision of registry services;
6. All documents concerning any investigation or discussion related to
 - a. the .WEB contention set,
 - b. NDC's application for the .WEB gTLD,
 - c. Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and
 - d. Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign;
7. Documents sufficient to show the current status of NDC's request to assign .WEB to Verisign;
8. Documents sufficient to show the current status of the delegation of .WEB;
9. All documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including:
 - a. document productions to the DOJ;
 - b. communications with the DOJ;
 - c. submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions;
 - d. communications with Verisign or NDC relating to the investigation; and
 - e. internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board; and

10. All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ Investigation.

We reserve the right to request additional documents based on the provision of the above documents. Please promptly disclose the requested documents pursuant to the DIDP.

Sincerely,



Arif Hyder Ali

Partner

EXHIBIT C-39

ARIF HYDER ALI
Contact Information Redacted

April 16, 2018

VIA E-MAIL

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Request for Updates on the .WEB Contention Set

Dear Members of the ICANN Board:

We write on behalf of our clients, Afilias Plc and Afilias Domains No. 3 Limited (together, “**Afilias**”), regarding the .WEB contention set. As we have explained in our prior correspondence, Afilias is deeply concerned by (1) the stated intention of Nu Dot Co LLC (“**NDC**”) to assign the .WEB gTLD to Verisign, Inc. (“**Verisign**”); (2) ICANN’s lack of transparency regarding its investigation of NDC, Verisign, and their agreement; (3) NDC and Verisign’s subterfuge in the context of the .WEB auction; and (4) the present status of the .WEB contention set.¹ We therefore write to request that ICANN update Afilias on the status of the issues that we have raised in prior correspondence.

We understand that the .WEB contention set is currently “On Hold.”² To the extent that this is not the case, we request that you inform us immediately and advise us of the actual status. In either case, we ask that ICANN provide Afilias with at least 60 days’ notice before taking any further steps to change the “On Hold” status that is currently stated on the ICANN website, so that, if necessary, Afilias can take appropriate legal action to protect its rights and preserve the status quo while those rights are decided.

¹ See DIDP Request 20180223-1 (23 Feb. 2018), <https://www.icann.org/resources/pages/didp-20180223-1-ali-request-2018-03-26-en>; see also Letter from S. Hemphill to A. Atallah (8 Aug. 2016), <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-08aug16-en.pdf>; Letter from S. Hemphill to A. Atallah (9 Sep. 2016), <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-09sep16-en.pdf>; Letter from J. Kane to C. Willett (7 Oct. 2016).

² See “Application Details,” ICANN (last visited 5 Apr. 2018), <https://gtdresult.icann.org/applicationstatus/applicationdetails/1053>.

01. Request for Update on the Current Status of the .WEB Contention Set

ICANN is not acting with transparency regarding the .WEB contention set. The principle of “[t]ransparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles [of Incorporation] and Bylaws.”³ Pursuant to its Bylaws, ICANN must “operate to the maximum extent feasible in an open and transparent manner.”⁴ Despite this obligation, Afilias believes that ICANN has failed to update Afilias on changes to the .WEB contention set and the related accountability mechanisms.

ICANN pledged to notify Afilias of any changes to the .WEB contention set and the related accountability mechanisms. On 19 August 2016, Afilias was told that ICANN had “placed the .WEB contention set on-hold.”⁵ ICANN later explained that this status “was to reflect a pending ICANN Accountability Mechanism initiated by another member in the contention set”⁶—the cooperative engagement process (“CEP”) initiated by Donuts Inc. (“Donuts”) and Ruby Glen, LLC (“Ruby Glen”).⁷ ICANN also assured Afilias that its primary contact “*will be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms.*”⁸ Afilias has received no such notification from ICANN since ICANN made that assurance on 30 September 2016.

However, recent information from ICANN indicates that there may have been a change in the status of the accountability mechanisms relevant to the .WEB contention set. ICANN specifically changed the status of Donuts and Ruby Glen’s CEP to “recently closed” on 31 January 2018, and further indicated that their deadline to file an IRP was 14 February

³ *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 Jul. 2016), ¶ 101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>. <https://www.icann.org/resources/pages/governance/bylaws-en>.

⁴ ICANN Bylaws (22 July 2017), Art. 3, Sec. 3.1, <https://www.icann.org/resources/pages/governance/bylaws-en>.

⁵ Letter from A. Atallah to S. Hemphill (30 Sep. 2016), <https://www.icann.org/en/system/files/correspondence/atallah-to-hemphill-30sep16-en.pdf>.

⁶ *Id.*

⁷ The 30 September 2016 letter cites to the 22 August 2016 Cooperative Engagement and Independent Review Processes Status Update when describing the “pending ICANN Accountability Mechanism.” Letter from A. Atallah to S. Hemphill (30 Sep. 2016), <https://www.icann.org/en/system/files/correspondence/atallah-to-hemphill-30sep16-en.pdf>. The 22 August 2016 update states that Donuts and Ruby Glen initiated a CEP regarding .WEB on 2 August 2016. Cooperative Engagement and Independent Review Processes Status Update – 22 August 2016 (22 Aug. 2016), p. 1, <https://www.icann.org/en/system/files/files/irp-cep-status-22aug16-en.pdf>.

⁸ Letter from A. Atallah to S. Hemphill (30 Sep. 2016), <https://www.icann.org/en/system/files/correspondence/atallah-to-hemphill-30sep16-en.pdf> (emphasis added).

2018.⁹ Clearly, the status of the “relevant Accountability Mechanisms”¹⁰ changed, but Afilias still has not received any information from ICANN regarding these changes. Afilias therefore remains uncertain about the status of the accountability mechanisms related to .WEB.

These developments raise the possibility of changes to the status of the .WEB contention set as well as to the status of the accountability mechanisms. ICANN told Afilias that the .WEB contention set was placed “On Hold” because of Donuts and Ruby Glen’s CEP. However, ICANN recently published documents stating that Donuts and Ruby Glen’s CEP concluded and that there are no active Independent Review Processes.¹¹ As a result, Afilias has reason to believe that the status of the .WEB contention set has or will soon be changed.

Afilias’ belief is further supported by the recent response it received to DIDP Request No. 201802223-1.¹² In the response, ICANN informed Afilias that the “current status” for the .WEB gTLD is “in contracting.”¹³ While both the “Application Status” and the “Application Details” pages for NDC’s .WEB application state that the “Application Status” is “In Contracting,”¹⁴ the “Application Details” page still states that the “Contention Resolution Status” is “On Hold.”¹⁵ This inherent conflict remains unexplained. Furthermore, Afilias has received no communication from ICANN regarding any change to the contention set.

⁹ Cooperative Engagement and Independent Review Processes Status Update – 18 January 2018 (18 Jan. 2018), p. 2, <https://www.icann.org/en/system/files/files/irp-cep-status-31jan18-en.pdf>. The 29 March 2018 Cooperative Engagement and Independent Review Processes Status Update contains the same information, even though the 14 February 2018 deadline expired. *See* Cooperative Engagement and Independent Review Processes Status Update – 29 March 2018 (29 Mar. 2018), p. 2, <https://www.icann.org/en/system/files/files/irp-cep-status-29mar18-en.pdf>.

¹⁰ Letter from A. Atallah to S. Hemphill (30 Sep. 2016), <https://www.icann.org/en/system/files/correspondence/atallah-to-hemphill-30sep16-en.pdf>.

¹¹ Cooperative Engagement and Independent Review Processes Status Update – 29 March 2018 (29 Mar. 2018), pp. 2-3, <https://www.icann.org/en/system/files/files/irp-cep-status-29mar18-en.pdf> (stating that Donuts and Ruby Glen’s CEP concluded and that there are no active Independent Review Processes).

¹² *See* Response to DIDP Request 20180223-1 (24 Mar. 2018), <https://www.icann.org/resources/pages/didp-20180223-1-ali-request-2018-03-26-en>.

¹³ *Id.* at p. 11.

¹⁴ *See* “New gTLD Application Status” (last visited 6 Apr. 2018), <https://gtdresult.icann.org/applicationstatus/viewstatus> (stating that NDC’s application for .WEB is “In Contracting”); *see also* “Application Details,” ICANN (last visited 5 Apr. 2018), <https://gtdresult.icann.org/applicationstatus/applicationdetails/1053> (same).

¹⁵ *See* “Application Details,” ICANN (last visited 5 Apr. 2018), <https://gtdresult.icann.org/applicationstatus/applicationdetails/1053>. The “Application Status” page does not contain a field for the “Contention Resolution Status.” *See* “New gTLD Application Status” (last visited 6 Apr. 2018), <https://gtdresult.icann.org/applicationstatus/viewstatus>.

Given the above-described situation, Afilias requests that ICANN immediately inform Afilias of (1) the current status of the .WEB contention set, and, specifically, whether it remains “On Hold,” and (2) details regarding its current discussions or negotiations with NDC and/or Verisign related to the .WEB gTLD. And again, Afilias requests that ICANN provide Afilias with at least 60 days’ notice before taking any further steps to change the “On Hold” status that is currently stated on the ICANN website. Afilias further requests that ICANN take no steps regarding the delegation of the .WEB gTLD to NDC or Verisign unless and until Afilias’ rights to the domain are fully and finally determined by an independent decision-maker.

02. Request for Update on the Current Status of ICANN’s Investigation

In addition, Afilias further requests information on the current status of ICANN’s investigation of the .WEB contention set. In response to Afilias’ letters of 8 August 2016 and 9 September 2016, ICANN requested “additional information” regarding the .WEB auction from Afilias, Ruby Glen, NDC, and Verisign on 16 September 2016.¹⁶ Afilias promptly responded to ICANN’s request on 7 October 2016.¹⁷ Yet Afilias has received no information from ICANN regarding the investigation.

Indeed, ICANN has since refused to disclose information regarding its investigation. On 23 February 2018, Afilias asked ICANN to provide an “update on ICANN’s investigation of the .WEB contention set.”¹⁸ As indicated in the letter, Afilias made this request independent of the Documentary Information Disclosure Policy (“**DIDP**”) requests contained in the same correspondence.¹⁹ ICANN, however, mistakenly interpreted Afilias’ request as part of its DIDP request and refused to provide a status update.²⁰

Thus, Afilias renews its request for a status update on ICANN’s investigation of the .WEB contention set, and NDC’s agreement with Verisign, independent of ICANN’s DIDP.

¹⁶ See Letter from C. Willett to J. Kane (16 Sep. 2016), p.1.

¹⁷ See Letter from J. Kane to C. Willett (7 Oct. 2016).

¹⁸ DIDP Request 20180223-1 (23 Feb. 2018), p. 1, <https://www.icann.org/resources/pages/didp-20180223-1-ali-request-2018-03-26-en>

¹⁹ See *id.*

²⁰ Response to DIDP Request 20180223-1 (24 Mar. 2018), p. 1, <https://www.icann.org/resources/pages/didp-20180223-1-ali-request-2018-03-26-en> (“As such, your request for ‘an update on ICANN’s investigation of the .WEB contention set’ is beyond the scope of the DIDP and will not be addressed in this Response.”).

03. Afilias' Request for Prior Notification

Afilias requests the aforementioned updates because it intends to initiate a CEP and a subsequent IRP against ICANN, if ICANN proceeds toward delegation of .WEB to NDC. Afilias also reserves the right to pursue claims against ICANN in a court of law. As Afilias has previously informed ICANN, it has numerous objections to ICANN's conduct with respect to NDC's actions during the .WEB auction and its agreement to assign Verisign the .WEB gTLD, including but not limited to the antitrust and competition issues raised by Verisign's acquisition of the .WEB gTLD.²¹

Therefore, in the interests of transparency and to prevent unnecessary procedural disputes regarding a potential future IRP to be commenced by Afilias, Afilias reiterates its request that ICANN provide it with at least 60 days' notice of any change to the .WEB contention set's status.

Afilias reserves all of its rights and remedies in all available fora whether within or outside of the United States of America.

Sincerely,



Arif Hyder Ali
Partner

²¹ See Letter from S. Hemphill to A. Atallah (8 Aug. 2016), <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-08aug16-en.pdf>; Letter from S. Hemphill to A. Atallah (9 Sep. 2016), <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-09sep16-en.pdf>; Letter from J. Kane to C. Willett (7 Oct. 2016).

EXHIBIT C-40

ARIF HYDER ALI

Contact Information Redacted

May 1, 2018

VIA E-MAIL

Jeffrey A. LeVee
Jones Day
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071

Re: .WEB

Dear Jeff:

Thank you for your letter dated 28 April 2018 on behalf of ICANN. However, we do not understand the basis for your assertion that “in this particular matter, ICANN has been quite transparent” about its conduct. To date, ICANN has provided *no* information about the investigation (if any) it has undertaken regarding the concerns raised by Afilias – viz., that the bid for .WEB that NDC supposedly made on its own behalf was in fact secretly funded by and made for the benefit of Verisign.

As you know, Afilias first raised its concerns that the conduct of NDC and Verisign had violated the rules set forth in the 2012 gTLD Applicant Guidebook in August 2016. In September 2016, ICANN sent Afilias a lengthy set of questions regarding Afilias’ concerns, which Afilias fully answered in October 2016. More than 18 months later, Afilias has received no further information from ICANN regarding this matter.

You refer in your letter to “papers publicly filed in the federal court action that Ruby Glen initiated,” but do not identify the particular submissions to which you are referring. We are of course aware of the questions that Ruby Glen raised in June and July 2016, concerning whether NDC had undergone a change in its ownership or control that caused its withdrawal from the private auction. You are perhaps referring to the exhibits reflecting the brief correspondence from July 2016, in which ICANN asked NDC if it had undergone any change in ownership or control, and NDC responded that it had not. But that correspondence pre-dates Verisign’s public acknowledgement in August 2016 that it had been the real party in interest behind NDC’s bid. We do not see anything in the public

record (whether in the *Ruby Glen* submissions or elsewhere) to indicate that ICANN has taken any steps to address the concerns that Afilias raised about the secret involvement of Verisign in NDC's bid, apart from issuing the written questions sent to Afilias and other members of the .WEB contention set in September 2016.

You also assert in your letter that "ICANN will continue to follow its processes." But ICANN has provided no information about what those "processes" are or when they will be completed. Indeed, the public information available to Afilias regarding the status of .WEB is contradictory. ICANN reports that the .WEB contention set is still "on hold" but that NDC's application status is "in contracting."¹ We do not understand how the contention set can be "on hold" if ICANN is currently "contracting" with NDC.

In the meantime, you assert that ICANN is rejecting Afilias' request for 60 days' notice of a change to the "on-hold" status of the .WEB contention set. Afilias' request is entirely reasonable. As we explained, Afilias has asked for this notice because – in the event that ICANN decides to delegate .WEB to NDC and/or Verisign – Afilias wishes to have adequate time to challenge that delegation *before* the delegation is made and a Registry Agreement is executed, which would otherwise result in irreparable injury to Afilias. It will not be to anyone's benefit if Afilias were to challenge the delegation successfully after ICANN has already entered into a Registry Agreement for .WEB with NDC and/or Verisign.

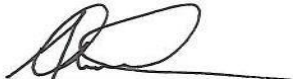
You also assert that providing Afilias with 60 days' notice to a change to the "on-hold" status would constitute a "special notice that is not available to others" But we are unable to find any provision in ICANN's "documented policies" stating the notice period to be given to applicants who plan to challenge a proposed delegation of contested TLD licensing rights. Afilias has no objection to ICANN's providing the same 60-day notice to any other member of the .WEB contention set or other parties who are similarly situated to Afilias. If ICANN believes that some other notice period is applicable, we would ask ICANN to state what the notice period is and to identify where in its policies such notice period is set forth.

¹ See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1053>.

Finally, you assert that ICANN “vehemently disputes” our “characterizations.” At this point, we have no idea which of our “characterizations” ICANN is disputing, other than our assertion that ICANN has not acted transparently in this matter. (E.g., does ICANN dispute that Verisign secretly funded NDC’s bid or that Verisign was secretly the true party in interest behind NDC’s bid? If not, does ICANN actually believe that such conduct complied with the Guidebook, or that ICANN’s failure (so far) to address such conduct is consistent with its Core Values?) We can assure you that ICANN is not helping itself on the issue of transparency when it refuses to provide us with the basic information we have requested – including what (if anything) ICANN is doing to address Afilias’ concerns and how much notice Afilias might receive before ICANN makes a decision on the .WEB contention set and proceeds to enter a Registry Agreement.

We look forward to your prompt response on these matters.

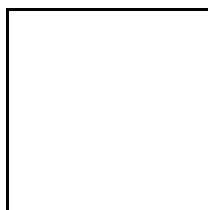
Sincerely,



Arif Hyder Ali
Counsel for Afilias

EXHIBIT C-41

From: Global Support Center <newgtld@icann.org>
Date: June 7, 2018 at 6:58:11 AM GMT+10
To: Contact Information Redacted
Subject: Case 00892769 Has Been Closed



Dear John,

Thank you for contacting the ICANN Team. Case 00892769 has been closed.

Case Information

Subject: Update Regarding Contention Set Status for Application ID 1-1013-6638

Date Closed: 6/6/2018

Please contact us if you have any additional questions.

Kind regards,

ICANN Global Support Center

globalsupport@icann.org

DISCLAIMER: This email is for information only. This email also does not represent a waiver of any ICANN policy, procedure or agreement. In the event that any information provided in this email appears to be inconsistent with any information published elsewhere by ICANN, please do not rely on this email without confirmation or clarification from ICANN.

***** Please Do Not Delete *****

Thread ID: ref:_00D616tJk._50061MZt36:ref

Include the text above in replies to this email. Thank you.

***** Please Do Not Delete *****

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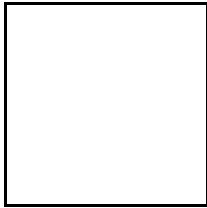


EXHIBIT C-42

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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

---o0o---

AFILIAS DOMAINS NO. 3 LTD.,)	
)	
Claimant,)	
)	
vs.)	ICDR Case No.
)	01-18-0004-
INTERNET CORPORATION FOR)	2702
ASSIGNED NAMES AND NUMBERS,)	
)	
Respondent.)	
)	

VOLUME IV
ARBITRATION
AUGUST 6, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
465535



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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)
)
 Claimant,)
)
 vs.)
)
 INTERNET CORPORATION FOR)
 ASSIGNED NAMES AND NUMBERS,)
)
 Respondent.)
)

ICDR Case No.
01-18-0004-
2702

---o0o---

THURSDAY, AUGUST 6, 2020
ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME IV
(Pages 589-785)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR

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A-P-P-E-A-R-A-N-C-E-S

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A-P-P-E-A-R-A-N-C-E-S
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INDEX OF EXAMINATION

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1 CALIFORNIA, CALIFORNIA, AUGUST 6, 2020

2 ---o0o---

3 ARBITRATOR BIENVENU: Welcome, everyone,
4 to Day 4 of our hearing.

5 Before I ask our colleague JD to bring the
6 witness back into the hearing room, I would like to
7 convey to the parties the Panel's decision on the
8 request by the claimant to add three documents to
9 the record.

10 I begin by recalling that in Mr. De
11 Gramont's email dated 21st July 2020, counsel for
12 Afiliias wrote, and I quote, "Both parties have
13 agreed that only materials in the record may be
14 used to examine witnesses," end of quote.

15 This followed up on a letter dated 20 July
16 from Jones Day proposing 23rd July as a cut-off
17 date to supplement the record for the purpose of
18 the cross-examination of witnesses.

19 The document proposed to be added as
20 Exhibit C-186 is a letter authored by Meredith
21 Baker dating back to 2008, described as the cover
22 letter through which the NTIA transmitted to ICANN
23 the so-called Garza letter marked as Exhibit C-125.

24 The claimant avers in support of its
25 request to add this document to the record, and I

1 quote, "The Baker letter provides crucial
2 clarification regarding how the Garza letter came
3 to the attention of ICANN," close quote.

4 The claimant spent considerable time
5 cross-examining Ms. Burr about the Garza letter.
6 The claimant, therefore, knew of the use it
7 intended to make of the Garza letter. Had the
8 claimant felt it relevant to rely on the Baker
9 letter to provide context for the Garza letter, it
10 ought to have added this document to the record
11 before the agreed cut-off date of 23rd July.

12 The same reasoning applies in the opinion
13 of the Panel to proposed Exhibit C-185, which
14 consists of ICANN's answering brief in the Ruby
15 Glen litigation before the U.S. Federal Courts,
16 litigation to which reference is made in the
17 parties' pleadings.

18 The Panel takes a different view in regard
19 to proposed Exhibit C-184, which consists of Board
20 resolution relating to the CCWG-Accountability Work
21 Stream 1 report. These documents are directly
22 responsive to questions from the Panel and, indeed,
23 the Panel expected that ICANN would offer to
24 provide its position on the issue so raised by the
25 Panel by reference to documents even if those

1 documents were not already part of the record.

2 Accordingly, Afiliias's request is granted
3 in part. The addition of proposed Exhibits C-185
4 and C-186 is denied, but the addition of proposed
5 Exhibit C-184 to the record is allowed.

6 So thank you, all.

7 MR. ALI: Mr. Chairman, if I may.

8 ARBITRATOR CHERNICK: Oh, come on.

9 MR. ALI: Sorry, was that -- I think
10 somebody just said, "Oh, come on" to me. Should I
11 proceed?

12 ARBITRATOR BIENVENU: I don't know who
13 said that, but it wasn't a member of the Panel.

14 MR. ALI: Right. So, Mr. Bienvenu, just a
15 couple of points. We wish to thank the Panel for
16 accepting into the record the Board minutes
17 relating to the CCWG-Accountability. And with
18 respect to the two other documents which you have
19 denied, we will note our objection to the ruling on
20 the following. Just to make two points in
21 connection with that.

22 Number one is I thought that the Panel was
23 going to give us an opportunity to address ICANN's
24 submission in writing yesterday. I believe that
25 was something that had been indicated, which is why

1 we didn't simply go ahead and respond to what ICANN
2 had submitted.

3 And secondly, I accept that there was a
4 cut-off, but we are within the context of an
5 international arbitration, and within international
6 arbitration it is frequently the case that during
7 the course of hearings, as when issues are raised
8 by the questioning of witnesses by counsel and in
9 particular by questioning of a -- of a member of
10 the Tribunal or the Panel, that documents will be
11 admitted.

12 Now, a balancing act can be achieved by
13 instructing that a document not be put to a witness
14 because the issue here is of fairness.

15 We are not -- it would be entirely
16 appropriate for the Panel to say that such a
17 document cannot be put to a witness.

18 But insofar as the Ninth Circuit brief is
19 concerned, there is no surprise here to ICANN, I
20 mean, Mr. LeVee and Mr. Enson, counsel to ICANN in
21 the Ninth Circuit. They know exactly what they
22 said.

23 These are representations to a United
24 States Court that are inconsistent with
25 representations that they are making before you, or

1 potentially not, but we are happy to let them put
2 into the record anything else that they want to
3 give that document context.

4 But a very important issue here -- and you
5 could even admit this document as a legal
6 authority -- is the fact that it is in your
7 jurisdiction, and that jurisdiction is based on
8 what it is -- what the scope of the litigation
9 waiver is.

10 In fact, Mr. Chairman, you, yourself,
11 raised a question with Ms. Burr, and I note in your
12 rationales that you just gave us for denying the --
13 sorry, accepting the CCWG report was the fact that
14 questions had been raised by the Panel.

15 You, yourself, raised the question
16 regarding the issue of gap-filling role or the
17 gap-filling effect of the litigation waiver and the
18 IRP's jurisdiction, specifically you asked
19 Ms. Burr.

20 So if a claimant -- if an IRP doesn't have
21 jurisdiction to decide a claim, then you have to be
22 able to bring it to court, right, because it is not
23 arbitrable. If it is not arbitrable, you have to
24 be able to bring it to court.

25 You also went on, and you asked Ms. Burr,

1 "Ms. Burr, was there, so far as you can recollect,
2 a discussion of the effect of a gap between the
3 litigation waiver, the scope of the accountability
4 mechanisms, including any possible limitation on
5 the remedies that an IRP Panel could award?"

6 So a careful balancing here. In the
7 context of international arbitration, I would
8 instruct you cannot put these documents to any
9 witness because that would be unfair.

10 It is certainly a document that could be
11 added to the record together with any documents
12 from the litigation proceedings that we see fit so
13 that we can refer to these documents in our
14 discussions with you.

15 We can refer to these documents in
16 post-hearing briefing and potentially then oral
17 argument because it goes to the critical issue of
18 your jurisdiction in what is ultimately a
19 precedent-setting proceeding.

20 So with that, I will rest. Thank you.

21 ARBITRATOR CHERNICK: Mr. Chairman, I was
22 the person who made the comment, "Oh, come on." I
23 apologize to Mr. Ali, but my impression was that
24 the matter had been submitted and fully argued and
25 that we were going to proceed with the witness.

1 So my comment was simply directed to my
2 expectation that we were done with this issue and
3 that there would not be effectively a request to
4 reconsider.

5 MR. ALI: I don't think I was making a
6 request to reconsider. I was simply raising a
7 point based on our understanding of what the
8 Chairman had said yesterday. But I will say no
9 more, as it seems to be irritating you.

10 ARBITRATOR CHERNICK: So be it.

11 ARBITRATOR BIENVENU: Mr. Ali, thank you
12 for your comments. They are reflected in the
13 transcript.

14 And I will now ask you if either party has
15 any preliminary matter to raise before we bring the
16 witness back for the continuation of her
17 cross-examination?

18 MR. LeVEE: I do not, Mr. Chairman.

19 ARBITRATOR BIENVENU: Mr. Ali?

20 MR. ALI: Nothing other than to just
21 confirm that everything that we just discussed has
22 been on record.

23 Is that correct, Balinda?

24 THE REPORTER: Yes.

25 ARBITRATOR BIENVENU: Yes, of course.

1 MR. ALI: Yes. Thank you.

2 ARBITRATOR BIENVENU: Of course.

3 Very well. Can we then ask that
4 Ms. Willett be brought back into the hearing room,
5 please?

6 Good morning, Ms. Willett. This is Pierre
7 Bienvenu, Chair of the Panel.

8 THE WITNESS: Good morning, Mr. Chairman.

9 ARBITRATOR BIENVENU: So, Ms. Willett,
10 under the same solemn affirmation, we will continue
11 your cross-examination.

12 Mr. De Gramont, your witness.

13 MR. De GRAMONT: Thank you, Mr. Chairman.

14 CROSS-EXAMINATION (Cont'd)

15 BY MR. De GRAMONT

16 Q. And good morning, Ms. Willett. Thank you
17 again for being with us, particularly so early in
18 the morning. I have a few follow-up questions from
19 yesterday.

20 First of all, have you discussed your
21 testimony from yesterday with anyone?

22 A. No.

23 Q. Okay. Yesterday you testified that you
24 studied the guidebook upon assuming your position
25 at ICANN; is that correct?

1 A. That's correct.

2 Q. And did anyone tell you that you should
3 also study the bylaws and articles?

4 A. Not that I recall, no.

5 Q. Did anyone tell you that the guidebook had
6 to be applied consistently with the articles and
7 bylaws?

8 A. So in terms of any conversation with
9 counsel?

10 Q. No, just anyone. Did anyone at ICANN say
11 to you the articles and bylaws need to govern the
12 application of the guidebook?

13 MR. LeVEE: At what time?

14 Q. BY MR. De GRAMONT: Why don't we start
15 when you first arrived at ICANN.

16 MR. LeVEE: I am trying to interpose an
17 objection. I am concerned that the witness has now
18 identified that she may have had conversations with
19 counsel. So if it's okay, I'd like to warn her not
20 to disclose the contents of conversations with
21 counsel. Beyond that, I have no further objection.

22 MR. De GRAMONT: Thank you, Mr. LeVee.

23 Q. So let me ask it this way, and this is
24 just yes or no: Did anyone advise you when you
25 started at ICANN that the articles and bylaws

1 inform the application of the guidebook?

2 A. Not that I recall.

3 Q. Did anyone tell you at any point during
4 your time at ICANN that the articles and bylaws
5 should inform the interpretation and application of
6 the guidebook?

7 A. I don't recall anyone telling me that the
8 bylaws would inform the application of the
9 guidebook.

10 Q. Okay. Thank you. And if you don't
11 remember something when I ask you, just -- it is
12 perfectly fine to say you don't remember.

13 Okay. So let's pick up where we left off
14 yesterday. And -- I'm sorry, one more question
15 before we do that.

16 You said yesterday that there was no
17 separation agreement providing for you to give
18 testimony in this IRP.

19 Do I remember that correctly?

20 A. So the terms of that agreement are
21 confidential. So -- but it did not -- I will go so
22 far to say that it did not mention providing
23 testimony, no.

24 Q. So there was a separation agreement, but
25 it's confidential?

1 A. Correct.

2 Q. Okay. And do you have any other sort of
3 consulting agreement with ICANN that covers your
4 provision of testimony or assistance in this IRP?

5 A. No, nothing.

6 Q. Okay. So, again, going back to where we
7 left off yesterday, and we were looking at Exhibit
8 C-35, which is behind Tab 12 of your binder.

9 A. I am there.

10 Q. You are there?

11 A. Yes.

12 Q. And, again, this is the exchange of emails
13 between Mr. Nevett and Mr. Rasco in early June
14 2016. And, again, just to put this in context,
15 Mr. Nevett was an executive at Donuts, and Donuts
16 owned Ruby Glen and Ruby Glen was a member of the
17 .WEB contention set; is that correct?

18 A. That's correct.

19 Q. All right. So let me read Mr. Nevett's
20 email again. June 6, 2016. "Hi, guys. Jose and I
21 corresponded last week, but I wanted to take
22 another run at the three of you. Not sure if you
23 three are still the Board members of your
24 applicant, but I wanted to reach out to discuss a
25 couple of ideas. Until Monday, I believe that we

1 have a right to ask for a two-month delay of the
2 ICANN auction with the agreement of all applicants.
3 Would you be okay with an extension while we try to
4 work this out cooperatively?" End of quote.

5 Again, do you recall seeing Mr. Nevett's
6 email?

7 A. I may have seen it. I don't specifically
8 recall seeing this email until we discussed it
9 yesterday.

10 Q. Mr. Nevett is asking for a two-month delay
11 of the ICANN auction to see if the members of the
12 contention set could reach an agreement among
13 themselves to resolve the contention set; is that
14 your understanding?

15 A. Yes.

16 Q. And, again, the guidebook encourages
17 members of the contention set to resolve contention
18 among themselves, right?

19 A. Yes, it does.

20 Q. Okay. So there's nothing about
21 Mr. Nevett's request in that respect?

22 A. Correct. As long as it is prior to the
23 deadline of the request or prior to the blackout
24 period, the contention set members aren't supposed
25 to be discussing then, I would see nothing wrong

1 with that email.

2 Q. Okay. And you explain in your witness
3 statement that under the auction rules, applicants
4 can request a delay of the ICANN auction, but they
5 are all supposed to do that within 45 days of the
6 ICANN auction; do I have that right?

7 A. That's correct.

8 Q. So his reference to, quote, until Monday,
9 is probably a reference to that cut-off; is that
10 your understanding?

11 A. I would believe so.

12 Q. So on 7 June Mr. Rasco writes back to
13 Mr. Nevett, and this is what he says, quote, "John,
14 thanks for the message. Sorry for the delay. The
15 three of us are still technically the managers of
16 the LLC, but this decision goes beyond just us.
17 Nicolai is at NSR full-time and no longer involved
18 with our TLD applications. I'm still running our
19 program, and Juan sits on the Board with me and
20 several others. Based on your request, I went back
21 to check with all of the powers that be and there
22 was no change in the response, and we will not be
23 seeking an extension. It pains me personally to
24 stroke a check to ICANN like this, but that's what
25 we're going to have to do, just like others did on

1 .APP and .SHOP," end of quote?

2 Just to put this in context at the outset,
3 Nicolai is a reference to Mr. Bezsonoff; is that
4 your understanding?

5 A. I forget the names of the three
6 individuals on .WEB or NDC.

7 Q. Okay. You don't recall that it's -- you
8 recall that Mr. Rasco was one of them?

9 A. Yes.

10 Q. And that -- do you recall that Mr. Calle
11 was one of them?

12 A. I -- yeah, I recall that we looked at that
13 yesterday.

14 Q. Yes. And Mr. Bezsonoff was the third, we
15 looked at that yesterday?

16 A. I trust you, yeah.

17 Q. Okay. We can go back and take a look at
18 the document, but I'll represent to you that that's
19 what it says.

20 A. Very good.

21 Q. And do you know what NSR is a reference
22 to? It says, "Nicolai is at NSR full time."

23 A. I do not.

24 Q. And do you understand Juan to be a
25 reference to Juan Diego Calle?

1 A. I would believe so.

2 Q. Okay. Now, based on this email -- you saw
3 this email at the time in June, July 2016, I think
4 that's what you testified to yesterday?

5 A. At some point, it was four years ago, so
6 June, July, August, I would have to refer to my
7 testimony to determine the date when I --

8 Q. Sometime during that summer?

9 A. Yes.

10 Q. All right. And based on this email,
11 Mr. Nevett raised a concern that there might have
12 been a change of ownership or control over NDC.

13 Do you recall that?

14 A. Could you say that again?

15 Q. Yes. Based on the email, Mr. Nevett
16 raised a concern that there might have been a
17 change in ownership or control over NDC?

18 A. I don't see that in this email. Are you
19 referring to a different email?

20 Q. No. I am asking if you recall that based
21 on this email, after this email, Mr. Nevett raised
22 that concern?

23 A. Yes. I recall Mr. Nevett raising that
24 concern with me in June of 2016. I believe -- I
25 came to understand it was based on this email

1 exchange.

2 Q. And reading Mr. Rasco's email, you can see
3 why Mr. Nevett had that concern, would you agree?

4 MR. MARENBERG: Objection; calls for
5 speculation, no foundation.

6 MR. De GRAMONT: I am asking for the
7 witness' understanding, and I don't think it is
8 appropriate for Amici to object in any extent.

9 ARBITRATOR BIENVENU: I will allow --

10 MR. MARENBERG: May I briefly respond?
11 He's asking her to speculate on what Mr. Nevett was
12 thinking and what Mr. Rasco was thinking.

13 MR. De GRAMONT: I am asking -- first of
14 all, it is totally inappropriate for Amici to
15 object. This is not an Amici witness, and I will
16 ask the Chairman to instruct the Amici counsel not
17 to interject objections to witnesses that are not
18 being presented by the Amici. That's beyond the
19 scope of what the Panel ordered and what we agreed
20 to. So that's number one.

21 Number two, I am not asking the witness to
22 speculate. I'd also ask for objections to be made
23 in a form that doesn't suggest the answer to the
24 witness.

25 Number three, I am simply asking for the

1 witness' understanding of the text of the document
2 that we are showing to her.

3 ARBITRATOR BIENVENU: So as to Mr. De
4 Gramont's first point, we recalled yesterday the
5 parties' agreement on a one-counsel rule subject to
6 the possibility for the counsel cross-examining a
7 witness to consult with his team.

8 So the rule applies to all, and the
9 witness is -- has been introduced by Mr. LeVee. If
10 there are objections to be raised, he should raise
11 them himself. And my ruling stands, I will allow
12 the question.

13 Q. BY MR. De GRAMONT: So, Ms. Willett, just
14 reading Mr. Rasco's email, you can understand why
15 Mr. Nevett had raised a concern about the change of
16 ownership or control in NDC, can't you?

17 A. Well, I really -- I don't know what
18 Mr. Nevett was thinking, but this would not have
19 raised concerns to me about the ownership interest.
20 He says that the three of them are still
21 technically the managers of the LLC. That was what
22 was on their application. ICANN was concerned
23 about what was technically the case.

24 Q. Well, he says the decision as to whether
25 to participate in an ICANN auction or a private

1 auction, quote, "goes beyond just us," unquote. He
2 says that there are now additional Board members
3 beyond those identified in the application. He
4 says that in order to be able to answer whether he
5 can participate in a private auction or in an ICANN
6 auction, he has to check with all of the powers
7 that be.

8 In your view, that doesn't indicate that
9 someone else is -- now has an ownership or control
10 interest in NDC?

11 MR. LeVEE: Mr. Chairman, I do think that
12 this is starting to be very argumentative. The
13 witness has provided an answer.

14 MR. De GRAMONT: Again, I am asking for
15 the witness' understanding of the document and how
16 ICANN reacted to it at the time.

17 MR. LeVEE: She gave you an answer to the
18 question, and then what you did was you read more
19 of the paragraph and asked the same question.

20 MR. De GRAMONT: I am asking whether these
21 particular issues raised a concern that there had
22 been a change of ownership in the company. I am
23 simply pointing her to particular statements to
24 follow up on my earlier question.

25 ARBITRATOR BIENVENU: The question is

1 allowed.

2 THE WITNESS: So I can speak to my -- does
3 this raise an issue for me. Since it says that
4 Mr. Rasco was still managing, running the program,
5 managing the application, the fact that he had to
6 check with other individuals, that was sort of
7 common practice amongst applicants.

8 They often had dozens of people on a Board
9 of Directors, maybe a governing Board, an advisory
10 Board. They had all sorts of other executives they
11 would have to check with. So it wouldn't surprise
12 me that an individual like Mr. Rasco would have to
13 check with others.

14 Q. BY MR. De GRAMONT: So this communication
15 did not raise any concerns for you that there was a
16 change of ownership or control in NDC's ownership
17 or, for that matter, in NDC's application?

18 A. So, again, I didn't get this email until
19 some late date, but it did not drive me -- this
20 email alone would not have -- I guess I am sort of
21 talking about a hypothetical, but since I did
22 receive it, it didn't drive action in it. I am
23 just saying hypothetically it wouldn't have beyond,
24 you know, the action my team did take in June of
25 2016.

1 Q. Okay. Well, let's move on to that.

2 In Paragraph 19 of your witness statement,
3 again, that's behind Tab 1, the first sentence
4 reads, quote, "ICANN was first notified that Ruby
5 Glen had concerns that NDC had undergone a change
6 of control or ownership on 23 June 2016 by way of
7 an email from then Donuts Inc.'s cofounder and
8 executive vice president of corporate affairs, John
9 Nevett, sent to ICANN's customer portal."

10 And then you cite to Exhibit A of your
11 witness statement. So let's take a look at that
12 email, which is behind Tab 13 of your binder. It
13 is Willett Witness Statement Exhibit A, Page 2.

14 A. Yes.

15 Q. And it's the longer email in the middle of
16 the page, and it's very small. But Mr. Nevett
17 writes, "It has come to our attention that one of
18 the applicants for .WEB has failed to properly
19 update its application. Upon information and
20 belief, there have been changes to the Board of
21 Directors and potential control of NU DOT CO LLC
22 (NDC) that has materially changed its application.
23 To our knowledge, however, NDC has not filed the
24 required application change request," unquote.

25 He goes on to say, "We" -- this is the

1 second-to-last paragraph, quote, "We request that
2 ICANN investigate the change in NDC's Board and
3 potential control and that the ICANN auction
4 scheduled for July 27th be immediately postponed.
5 The auction should be scheduled after the final
6 investigation is complete and NDC's requisite
7 change request is resolved. We do not make this
8 request lightly and haven't done so in well over
9 100 other scheduled ICANN auctions," unquote.

10 In light of the email from Mr. Rasco that
11 we just looked at, this was a reasonable request,
12 don't you agree?

13 A. Based on subsequent conversations I had
14 with Mr. Nevett, I believe that this was a sincere
15 concern of his. I would be presuming what was the
16 basis of this email.

17 Q. And Mr. Nevett is correct when he writes
18 that if the ownership or control of NDC had
19 changed, NDC was required to report that and ICANN
20 needed to evaluate that change, he's citing to
21 Section 1.2.7 of the guidebook; is he correct in
22 that assertion?

23 A. Section 1.2.7 of the guidebook does govern
24 the changes that ICANN needs to be informed of,
25 yes.

1 Q. Going back to your witness statement,
2 Paragraph 20, Page 7. Tell me when you're there.

3 A. Yes.

4 Q. In reference to Exhibit A that we just
5 looked at, you write in Paragraph 20, quote, "The
6 only issue Mr. Nevett raised was his concern that
7 NDC may have undergone a change in ownership or
8 control. He did not mention that he thought
9 VeriSign might be involved with NDC's application
10 and, in fact, did not mention VeriSign at all."

11 Do you see that?

12 A. I do.

13 Q. My first question is: Do you have any
14 reason to believe that Mr. Nevett knew that
15 VeriSign might be involved in NDC's application?

16 A. I don't have any information on that.

17 Q. Are you suggesting that he was somehow at
18 fault for somehow not mentioning VeriSign in that
19 communication?

20 A. No, not at all.

21 Q. And you seem to draw a distinction between
22 the concern that NDC may have undergone a change of
23 ownership or control on the one hand and the
24 possibility that VeriSign might be involved with
25 NDC's application on the other.

1 Do I understand that correctly?

2 A. I'm sorry, I am not sure I understand the
3 question. Could you repeat that?

4 Q. Sure. So you say, "The only issue
5 Mr. Nevett raised was his concern that NDC may have
6 undergone a change in ownership or control. He did
7 not mention that he thought VeriSign might be
8 involved with NDC's application," end of quote.

9 So is there a distinction between the
10 concern that NDC may have gone -- undergone a
11 change in ownership or control from a concern that
12 VeriSign might be involved with NDC's application?

13 A. I wouldn't say that there was a concern or
14 a distinction. It was more -- it would have
15 been -- if VeriSign or any other entity had been
16 shared with me, it would have given my team another
17 direction to pursue and additional questions to ask
18 about, but insomuch it was about control and
19 ownership, we just followed up with NDC about those
20 matters.

21 Q. But if VeriSign had been involved with
22 NDC's application, that would suggest a resale or
23 transfer or assignment of NDC's rights and
24 obligations in the application.

25 Do you disagree?

1 A. Not necessarily.

2 Q. Okay. In paragraph -- let me back up.

3 So if -- you're saying that if Mr. Nevett
4 had mentioned VeriSign, it would have given you
5 another avenue to pursue and investigate?

6 A. We would have asked a question about that,
7 yes.

8 Q. Okay. In Paragraph 21, you write, quote,
9 "In view of Ruby Glen's concerns, ICANN immediately
10 investigated. Upon receipt of Mr. Nevett's 23 June
11 2016 email, I instructed my staff to investigate
12 the claims raised therein," unquote.

13 And you refer to an email dated 27 June
14 2016, which is Exhibit B. So let's take a look at
15 that, and that's at Tab 14 of your binder. Tell me
16 when you're there, Ms. Willett.

17 A. I am there.

18 Q. So the bottom -- the email at the bottom
19 is from Mr. Jared Erwin to Mr. Rasco. Who is
20 Mr. Erwin?

21 A. He was a member of the new gTLD Program
22 team.

23 Q. Do you recall what his title was?

24 A. I don't. I know that he was involved in
25 administering the auctions and contention set at

1 that time.

2 Q. How many investigations of this type had
3 he done before, do you know?

4 A. I don't know.

5 Q. How big was your staff at this time, do
6 you recall that?

7 A. June of 2016, approximately 35, perhaps
8 40.

9 Q. Okay. Were they all direct reports to
10 you?

11 A. They were not.

12 Q. Was Mr. Erwin a direct report to you?

13 A. He was not.

14 Q. Do you recall to whom he directly
15 reported?

16 A. As of that date, I was uncertain.

17 Q. So the first two sentences of Mr. Erwin's
18 email to Mr. Rasco read, quote, "We would like to
19 confirm that there have not been changes to your
20 application or the NU DOT CO LLC organization that
21 need to be reported to ICANN. This may include any
22 information that is no longer true and accurate in
23 the application, including changes that occur as
24 part of regular business operations (e.g., changes
25 to officers and directors, application contacts),"

1 period.

2 Do you recall that?

3 A. Yes.

4 Q. And did you see that email at the time
5 that Mr. Erwin sent it out?

6 A. It was four years ago. I don't recall.

7 Q. Now, Mr. Rasco appears to respond very
8 quickly, within about 48 minutes, but there are
9 different time zones. Do you know if all these
10 times are Pacific time?

11 A. I believe them to be Pacific time.

12 Q. In any event, Mr. Rasco responds, quote,
13 "I can confirm that there have been no changes to
14 the NU DOT CO LLC organization that would need to
15 be reported to ICANN."

16 Do you see that?

17 A. Yes.

18 Q. So he answers Mr. Erwin's questions about
19 whether any changes had been made to the NDC
20 organization, but he doesn't answer whether there
21 had been any changes to the application, correct?

22 A. Correct.

23 Q. And then Mr. Erwin responds very soon
24 thereafter, quote, "Thank you for confirming. No
25 further action is required of you at this time,"

1 unquote.

2 Just so I'm clear, when you write in your
3 witness statement that you asked your staff to
4 investigate the claims raised by Mr. Nevett, you're
5 referring to this exchange of emails here on
6 Willett Exhibit B; do I understand that correctly?

7 A. Yes, that was one of the steps. That was
8 the investigation as of June.

9 Q. Okay. Let's go back to this witness
10 statement. And at Paragraph 23 you state that on
11 29 June 2016, the next day, you met with
12 Mr. Nevett -- sorry. It is two days later. You
13 met with Mr. Nevett at the ICANN meeting in
14 Helsinki.

15 Do you recall that meeting?

16 A. I do.

17 Q. And Mr. Nevett again asked that the
18 auction be postponed based on his concerns about
19 NDC's ownership or management.

20 Do you recall that?

21 A. I do recall that.

22 Q. Okay. And according to your witness
23 statement -- I am looking at the middle sentence,
24 four lines down. It says, quote, "During this
25 meeting, I informed Mr. Nevett that my team had

1 already investigated the alleged management changes
2 with NDC's representative and that NDC asserted
3 that no such changes had occurred. I further
4 informed Mr. Nevett that, based on the fact that
5 ICANN had found no evidence of such a management
6 change, ICANN was continuing to proceed with the
7 auction as scheduled," unquote.

8 And, again, just so I'm clear, when you
9 told Mr. Nevett that the team had already
10 investigated and found no evidence of a management
11 change, you're referring to the exchange of emails
12 that we just looked at between Mr. Erwin and
13 Mr. Rasco; is that correct?

14 A. That's correct.

15 Q. And you again say, "At no time did
16 Mr. Nevett mention VeriSign."

17 Again, this is only a few days later, but
18 at this point you had no reason to believe that
19 Mr. Nevett should have been aware of VeriSign's
20 involvement in the application; is that correct?

21 A. I don't know what Mr. Nevett was aware of.

22 Q. But you have no reason to believe he
23 should have been aware of any involvement by
24 VeriSign?

25 A. That he should have been, no.

1 Q. Okay. Now, you go on to say in Paragraph
2 24 that you told Mr. Nevett in Helsinki that if he
3 was not satisfied with ICANN's course of action, he
4 had the option to invoke one of ICANN's
5 accountability mechanisms, and that's what
6 Mr. Nevett proceeded to do.

7 Do you recall that?

8 A. Yes. He contacted the ombudsman.

9 Q. And the ombudsman at that time was
10 Mr. Chris LaHatte. How do you pronounce that,
11 LaHatte?

12 A. I believe he says LaHatte.

13 Q. LaHatte. And you go on to say in
14 Paragraph 24, quote, "On 6 July 2016, the ombudsman
15 sent an email to NDC on which I was blind-copied
16 inquiring as to whether any changes in
17 ownership/control had taken place and noting that
18 he had," quote, "opened an ombudsman complaint file
19 about this matter," unquote. And that's at Exhibit
20 C of your witness statement.

21 So let's take a look at that. It is Tab
22 15 of your binder. Again, this is Willett Exhibit
23 C, Page 2, an email from Chris LaHatte dated July
24 6, 2016. Quote, "Dear, Mr. Rasco. I have received
25 a complaint from one of the applicants for .WEB as

1 follows: One or more applicants for .WEB made a
2 complaint to the ombudsman about changes to the
3 .WEB application by one of the applicants, being NU
4 DOT CO LLC. There is evidence from them (which I
5 have seen) which reveals that there have been
6 changes to the composition of NU DOT CO LLC's Board
7 that require it to go through an ICANN change
8 process," unquote.

9 Was the evidence that Mr. LaHatte was
10 referring to the exchange of emails between
11 Mr. Rasco and Mr. Nevett that we looked at earlier?

12 A. Mr. LaHatte didn't tell me specifically
13 what evidence he was basing that on.

14 Q. Were you aware of any evidence beyond that
15 exchange of emails?

16 A. No, I was not.

17 Q. Okay. Even though Mr. LaHatte decided to
18 open an ombudsman complaint, you decided that you
19 would speak to Mr. Rasco yourself; is that correct?

20 A. So I had a variety of conversations of
21 exchanges with Mr. LaHatte over the course of the
22 program, and all of which I believe were with
23 counsel and would have been privileged, but I could
24 speak to generally the nature of why I would have
25 sent an email -- contacted Mr. Rasco.

1 Q. In any event, two days after Mr. LaHatte's
2 letter to Mr. Rasco, you did send an email to
3 Mr. Rasco asking him to call you.

4 Do you remember that?

5 A. Yes. In essence, I was endeavoring to
6 gather additional information to inform
7 Mr. LaHatte's investigation that I could share with
8 him.

9 Q. And did you tell Mr. LaHatte that you were
10 reaching out to Mr. Rasco?

11 A. I may have. I don't recall specifically.

12 Q. Let's take a look at Tab 16, which is
13 Exhibit F to your witness statement. Tell me when
14 you're there.

15 A. Yes, I am.

16 Q. At the bottom we can see that you sent an
17 email to Mr. Rasco on 8 July 2020 asking him to
18 call you at his earliest convenience, right?

19 A. Yes.

20 Q. And you don't recall if you told the
21 ombudsman that you were going to send Mr. Rasco
22 this email?

23 A. I don't recall specifically telling him
24 one way or another.

25 Q. Do you recall telling anyone else at ICANN

1 that you were going to send this email to
2 Mr. Rasco?

3 A. In terms of conversations with counsel?

4 Q. For now let's leave it at yes or no. Did
5 you tell anyone at ICANN that you were going to
6 send this email to Mr. Rasco, that you recall?

7 A. Yeah, it's been four years. I don't
8 recollect.

9 Q. Do you recall if anyone at ICANN asked you
10 to send this email?

11 A. Not that I recall.

12 Q. In any event, Mr. Rasco called you later
13 that day; is that correct?

14 A. That's correct.

15 Q. And do you remember how long the
16 telephone -- he called you by telephone, I assume?

17 A. Yes.

18 Q. And do you remember how long the
19 conversation lasted?

20 A. I don't.

21 Q. Was anyone on the call besides you and
22 Mr. Rasco?

23 A. I believe I had one or two other staff
24 members from our team with me.

25 Q. Do you recall who they were?

1 A. I believe that it was Christopher Bare,
2 and I believe at the time it may have been
3 Ms. Christina Flores.

4 Q. Was anyone from ICANN listening to the
5 call?

6 A. Not that I recall, no.

7 Q. Okay. Did anyone take notes of the
8 conversation?

9 A. Ms. Flores did.

10 Q. Do you recall if she took them by hand or
11 were they typed?

12 A. Her practice was by hand. That's what I
13 recall.

14 Q. And what did she do with the notes, do you
15 recall?

16 A. I don't know.

17 Q. Do you know -- do you know if they still
18 exist?

19 A. I don't.

20 Q. Do you know if they were sent to the legal
21 department?

22 A. They may. I don't know.

23 Q. Okay. Your conversation with Mr. Rasco
24 took place on 8 July.

25 Do you remember that that was a Friday?

1 A. I don't recall what day of the week it
2 was, no.

3 Q. Well, the next day, Saturday, 9 July, you
4 wrote to the ombudsman to report on your
5 conversation with Mr. Rasco.

6 Do you remember that?

7 A. Yes.

8 Q. Okay. The email you sent to the ombudsman
9 is Exhibit D to your witness statement. It is
10 behind Tab 17 of your binder. So let's take a look
11 at it.

12 Again, it is Willett Witness Statement
13 Exhibit D, Saturday, July 9, 2016, and you copied
14 Amy Stathos and Herb Waye.

15 Can you tell us who Ms. Stathos is or what
16 her position was at the time?

17 A. She's deputy general counsel at ICANN.

18 Q. And when did Ms. Stathos get involved in
19 this process?

20 A. So Ms. Stathos is -- I believe she was
21 involved with the communications between the --
22 with the ombudsman from the beginning. That was
23 the standard practice, but I suppose maybe that's
24 privileged.

25 Q. I don't think it is.

1 A. Okay.

2 Q. Who was Herb Waye?

3 A. Mr. Waye was the -- don't know what his
4 formal title was. He was the assistant ombudsman,
5 secondary ombudsman.

6 Q. And when did he get involved?

7 A. I would have to review the emails, but I
8 believe it would have been part of the email
9 thread.

10 Q. Okay. So you write in the first paragraph
11 to Mr. LaHatte, quote, "I hope that this email
12 finds you well. I know that you have been in
13 communication with NU DOT CO LLC to inquire about
14 the recent complaint filed by Donuts regarding its
15 ownership and potential impact on the .WEB/.WEBS
16 auction," unquote.

17 Does this reflect your recollection as to
18 whether you had communicated with Mr. LaHatte
19 before contacting Mr. Rasco on Friday, July 8?

20 A. If I may review this.

21 Q. Yes.

22 A. Yes, I believe through this entire
23 exhibit, it goes back July 6, yes, I had been in
24 communication with Mr. LaHatte about this matter.

25 Q. Now, is it your understanding that the

1 ombudsman is supposed to be independent?

2 A. Yes.

3 Q. And so why are you gathering information
4 under the ombudsman under the oversight of the
5 deputy general counsel?

6 THE WITNESS: Should I be disclosing
7 conversations and direction?

8 MR. LeVEE: I will caution you not to
9 disclose communications with counsel, and I am
10 going to object to the statement in the question
11 that anything you were doing was under the
12 direction of the deputy general counsel.

13 Q. BY MR. De GRAMONT: Had someone asked you
14 to write this email to Mr. LaHatte?

15 A. Mr. LaHatte had -- in this matter, as in
16 many other matters, had asked me to provide
17 information -- the program team that I might have
18 to help inform his investigation so he could pursue
19 that independent investigation.

20 So he gathered information -- it is a
21 common practice. My understanding is he gathered
22 information from a variety of sources, including
23 asking me to provide information on certain
24 matters.

25 Q. Had you ever read the ombudsman charter

1 stated in ICANN's bylaws?

2 A. I don't specifically recall reading a
3 charter.

4 Q. Well, maybe we can put it up on the
5 screen. This is from the current bylaws, but it is
6 identical -- virtually identical to the bylaws in
7 place at the time. It is Exhibit C-1, Section 5.2.

8 MR. LeVEE: Is this in the binder?

9 MR. De GRAMONT: It is not in the binder.

10 Chuck, could you put that up and enlarge
11 Section 5.2?

12 It says, "The charter of the Ombudsman
13 shall be to act as a neutral dispute resolution
14 practitioner for those matters for which the
15 provisions of the Independent Review Process set
16 forth in Section 4.3 have not been invoked. The
17 principal function of the Ombudsman shall be to
18 provide an independent internal evaluation of
19 complaints by members of the ICANN community who
20 believe that the ICANN staff, Board or an ICANN
21 constituent body has treated them unfairly. The
22 Ombudsman shall serve as an objective advocate for
23 fairness, and shall seek to evaluate, and where
24 possible, resolve complaints about unfair or
25 inappropriate treatment by ICANN staff, the Board,

1 or ICANN constituent bodies, clarifying the issues
2 and using conflict resolution tools such as
3 negotiation, facilitation, and 'shuttle diplomacy'
4 to achieve those results," unquote.

5 Have you ever seen that before?

6 A. I may have. I don't specifically recall
7 an occasion.

8 Q. And here Mr. Nevett was asking the
9 ombudsman to look at a question which your staff
10 had already investigated and where Mr. Nevett was
11 unsatisfied with the results.

12 Do I understand that correctly?

13 A. Correct.

14 Q. Okay. So in the second sentence you
15 write, quote, "As you know, my team had reached out
16 to NU DOT CO LLC previously, and we received
17 confirmation that NU DOT's application materials
18 were still true and accurate."

19 Again, you're referring to that exchange
20 of emails between Mr. Erwin and Mr. Rasco that we
21 looked at earlier, right?

22 A. That's correct.

23 Q. You continue, quote, "In an effort to be
24 extremely cautious, I reached out to Mr. Jose
25 Ignacio Rasco (the application's primary contact

1 for NU DOT's .WEB application) again today to
2 ensure our understanding of his previous response
3 was accurate. During the call, he explained the
4 following:"

5 And then he goes through five different
6 points.

7 Do you see that?

8 A. Yeah, those were my points, yes.

9 Q. These were five points that Mr. Rasco had
10 conveyed to you and were summarized and notes taken
11 by your staff member?

12 A. Yes.

13 Q. Okay. And I think everyone can read the
14 first four points on his or her own.

15 I want to focus on Point 5, quote, "He,"
16 meaning Mr. Rasco, "was contacted by a competitor
17 who took some of his words out of context and is
18 using them as evidence regarding the alleged change
19 in ownership," period. "In communicating with that
20 competitor, he used language to give the impression
21 that the decision to not resolve contention
22 privately was not entirely his. However, this
23 decision was, in fact, his. He does not believe
24 that it is appropriate that this email conversation
25 is being used as evidence."

1 He goes on to say, quote, "Mr. Rasco
2 indicated that he provided you with similar
3 information, but I wanted to share the details of
4 our conversation in case they can provide you with
5 a more complete picture."

6 Do you recall that?

7 A. Yes.

8 Q. Now, did Mr. Rasco tell you during the
9 conversation that the decision to enter the ICANN
10 auction was, in fact, his decision; is that what he
11 told you?

12 A. Yes.

13 Q. And by this time, you had seen Mr. Rasco's
14 email to Mr. Nevett. Do I understand that
15 correctly?

16 A. I may have. Again, I don't -- I don't
17 recall when I specifically saw that email exchange.

18 Q. How could you possibly interview Mr. Rasco
19 without having that email in front of you,
20 Ms. Willett? Let's go back to Tab 12, which is
21 Exhibit C-35.

22 And Mr. Rasco has told you that the
23 decision to skip the private auction and go to the
24 ICANN auction was, in fact, his. But here in
25 Exhibit C-35, he is saying that the decision "goes

1 beyond just us."

2 Did you or anyone else at ICANN ask him
3 what he meant when he said the decision to go to
4 the ICANN auction, quote, "goes beyond just us,"
5 unquote?

6 A. Again, I don't recall having this email at
7 that time. You asked me the question how could I
8 have had the conversation with Mr. Rasco. But I
9 was having a conversation with Mr. Rasco based on
10 my conversation with Mr. Nevett in Helsinki and
11 based on Mr. LaHatte's general practice and request
12 that I provide him with information that I had.
13 That was the basis of my, again, reaching out to
14 Mr. Rasco.

15 Q. Ms. Willett, do you know if you or anyone
16 else at ICANN ever asked Mr. Rasco what he said --
17 what he meant when he said the decision to go to
18 the ICANN auction, quote, "goes beyond just us,"
19 unquote? Do you know if anyone ever asked that
20 question?

21 A. Again, I don't believe -- I don't recall
22 asking that question because I don't recall having
23 this email. The nature of the conversation with
24 Mr. Rasco, the way he described it, was like when
25 someone asks me if I'm available to go out to

1 dinner and I don't really want to go to dinner, but
2 I say, "Let me check with my husband. I need
3 my" --

4 Q. Ms. Willett, you are straying far from my
5 question, and I only have limited time.

6 MR. MARENBERG: Mr. Chairman, this is
7 Steve Marenberg. I believe that the witness is
8 entitled to finish her answer to the question.

9 MR. De GRAMONT: Mr. Chairman, we have had
10 an instruction that the Amici counsel not
11 intervene. The Amici counsel is only participating
12 in this hearing at the discretion of the Tribunal.
13 Are we going to have to ask for the Amici counsel
14 to be removed or will Amici counsel be able to
15 follow the Chairman's instructions?

16 ARBITRATOR BIENVENU: Mr. LeVee and
17 Mr. Marenberg, could you, one after the other,
18 respond to the objection that's just been made,
19 starting with you, Mr. LeVee?

20 MR. LeVEE: I did understand that there's
21 only one lawyer who is supposed to be raising
22 objections in this context, and that lawyer would
23 be me.

24 ARBITRATOR BIENVENU: Mr. Marenberg?

25 MR. MARENBERG: Mr. Chairman, I do believe

1 that we are different parties than Mr. LeVee
2 represents. In other words, he and I represent
3 different parties. So I don't believe that there
4 are two lawyers for one party objecting here.

5 Now, this is a matter in which Mr. De
6 Gramont is interrogating the witness about her
7 conversation with my client, and she is giving an
8 explanation of that conversation, and Mr. De
9 Gramont interrupted her in the middle of that
10 answer.

11 This answer bears on my client's rights,
12 and I believe that I appropriately have the right
13 to at least ask that her answer be heard in its
14 entirety before she's cut off, as is proper in
15 these types of proceedings.

16 Now, if you're going to tell me to be
17 quiet and I cannot represent my client even though
18 its interests are implicated in this question and
19 this line of inquiry, I will be quiet and not raise
20 any other objections, but that is why I interrupted
21 and interjected myself here.

22 I don't believe that I am representing the
23 same interest as Mr. LeVee and, therefore, we are
24 not subject to the one-counsel rule.

25 ARBITRATOR BIENVENU: Mr. Marenberg, you

1 are aware of the status granted to the Amici in
2 this proceeding under the Panel's decision in Phase
3 I. The status is that of an amicus curiae whose
4 contribution to the work of the Panel takes the
5 form of written submissions.

6 So I would indeed ask you to refrain from
7 making objections in the course of the
8 cross-examination of witnesses presented by the
9 respondent.

10 MR. MARENBERG: So noted, Mr. Chair, and I
11 will not make any more objections.

12 ARBITRATOR BIENVENU: Thank you,
13 Mr. Marenberg.

14 Q. BY MR. De GRAMONT: Now, Ms. Willett,
15 since Mr. Marenberg did intervene, you were going
16 to say that this was like being asked to a dinner
17 party and you wanted to make an excuse not to go to
18 have dinner with the person; is that what you were
19 going to say?

20 A. Yes, sort of using my husband as an excuse
21 as to being the decision maker about whether we go
22 to a dinner party or not when ultimately it's my
23 decision.

24 Q. And you know that's exactly the example
25 that Mr. Marenberg gave during his opening argument

1 to the Panel, did you know that?

2 A. No. No, I'm sorry, I didn't.

3 Q. Okay. So going back to Exhibit C-35 -- so
4 to your recollection, no one asked Mr. Rasco what
5 he meant when he said that the decision to go to
6 the ICANN auction, quote, "goes beyond just us,"
7 unquote?

8 A. I only know what I asked Mr. Rasco.

9 Q. Do you know if you or anyone else at ICANN
10 asked him who the several new Board members were?

11 A. Again, I don't recall having this email in
12 this time frame, so I don't believe that I would
13 have asked him about that.

14 Q. Okay. Did you or anyone else at ICANN ask
15 him whom he meant by, quote, "all the powers that
16 be," unquote?

17 MR. LeVEE: Can I just object? I don't
18 know how she has any way of knowing if anyone else
19 at ICANN --

20 Q. BY MR. De GRAMONT: To your knowledge. To
21 your knowledge, Ms. Willett.

22 A. Again, I can't speak to any other
23 conversations. I believe that in terms of program
24 interactions, it was my team and I that were the
25 channel for communicating with applicants, but I

1 don't know what anyone else might have conveyed.

2 Q. Even after an applicant had raised a
3 complaint to the ombudsman about your team's
4 investigation of the matter, you believe it was
5 your team's responsibility to continue
6 communicating with applicants about such matters?

7 A. Well, insomuch as the ombudsman, I don't
8 specifically recall in this situation, but my
9 general recollection is that the ombudsman asked me
10 to provide whatever information we had about the
11 matters he was investigating pertaining to new gTLD
12 applicant disputes.

13 So it was a matter of gathering that
14 information, fact-finding where we could to support
15 to provide that information in support of his
16 investigation.

17 Q. Did you coordinate your phone call to
18 Mr. Rasco with the ombudsman?

19 A. No.

20 Q. Let's go back to your witness statement.
21 And at Paragraph 29 on Page 9 you write, quote --
22 tell me when you're there.

23 A. I am there. Thank you.

24 Q. So you write, again, Paragraph 29, quote,
25 "On 12 July 2016, the ombudsman informed me that he

1 had determined that there was no reason to postpone
2 the auction because he found no evidence of a
3 change to the ownership or control of NU DOT CO,"
4 unquote.

5 Did you write this witness statement, by
6 the way?

7 A. I worked with ICANN's legal counsel to
8 draft this.

9 Q. Okay. And was "determined" your choice of
10 words, do you recall?

11 MR. LeVEE: Object; invades the privilege.

12 Q. BY MR. De GRAMONT: Let me ask it this
13 way: Do you recollect that the ombudsman informed
14 you that he had determined that there was no reason
15 to postpone the auction because he found no
16 evidence of a change to the ownership or control?

17 A. May I look at his email?

18 Q. Yeah, let's take a look at it. That's a
19 good idea.

20 Exhibit G is behind Tab 18 of your binder.
21 Tell me when you're there. Are you there,
22 Ms. Willett?

23 A. Yes. Thank you.

24 Q. So this is Mr. LaHatte's email to you,
25 Ms. Stathos is in copy. It's dated July 12th,

1 2016. He writes, quote, "I have not seen any
2 evidence which would satisfy me that there has been
3 a material change to the application, so my
4 tentative recommendation is that there is nothing
5 which would justify a postponement of the auction
6 based on unfairness to the other applicants,"
7 unquote.

8 So do you see a difference between the
9 terms "determination" and the term "tentative
10 recommendation"?

11 A. Certainly.

12 Q. He goes on to write, quote, "Is there any
13 particular reason why a postponement could not be
14 made anyway, or is the preparation for the auction
15 too far advanced? I make that suggestion not
16 because I agree with the complaint made by Donuts,
17 but because it would prevent them from perhaps
18 taking further accountability action based upon a
19 refusal to postpone, as, of course, this company
20 has demonstrated that they will be aggressive about
21 use of such accountability functions."

22 Do you recall that?

23 A. Yes.

24 Q. Did you sense any discomfort on the part
25 of Mr. LaHatte in having the public auction going

1 forward as scheduled based on this email?

2 A. I took this email to mean that he was
3 trying to help ICANN avoid having to deal with
4 further accountability mechanisms.

5 Q. And did you take this email to mean that
6 he had made a determination that resulted in
7 closing the ombudsman complaint on this matter?

8 A. I did. That's my recollection.

9 Q. Yeah, notwithstanding the words "tentative
10 recommendation"?

11 A. Well, I took that as being sort of
12 mitigated, suggesting that we delay the auction
13 anyway, which would have just been completely
14 inconsistent with program practices and all of the
15 rules of the auction that had been in place for
16 three years by that point.

17 Q. Did you speak to him in person or by
18 telephone or were all your communications in
19 writing?

20 A. Do you mean about this matter
21 specifically?

22 Q. Yes, about this matter specifically.

23 A. So at this juncture, I believe -- because
24 I was in LA, and I am not sure where he was, my
25 recollection is that any communication at this

1 juncture, July 12, 2016, would have been via email,
2 but given that we were at the public ICANN meeting
3 in Helsinki in late June, I don't recall
4 specifically meeting with him, but I expect I may
5 have had a conversation with Mr. LaHatte in
6 Helsinki about the .WEB matter in general.

7 Q. And that would have preceded this 12 July
8 email; is that correct?

9 A. Correct.

10 Q. Okay. So you don't recall any
11 conversation with Mr. LaHatte specifically about
12 this July 12 email?

13 A. I do not.

14 Q. Do you know if anyone responded to his
15 question, quote, "Is there any particular reason
16 why a postponement could not be made anyway, or is
17 the preparation for the auction too far advanced?"

18 A. I hope that respectfully I would have
19 responded, but I don't recall.

20 Q. And you don't recall whether anyone else
21 did either?

22 A. No, I don't know.

23 Q. In any event, the next day, 13 July, you
24 wrote to the contention set to advise them that the
25 ICANN auction would proceed as scheduled.

1 Do you recall that?

2 A. Is there another document I can look at?

3 Q. There is. It is not in your binder, but
4 VeriSign Exhibit 10. It is also Exhibit P to the
5 Rasco witness statement.

6 Chuck, could you put up VeriSign Exhibit
7 10. If you could go to the bottom, I think it is
8 the second-to-last paragraph on Page 1 -- on the
9 first page, sorry. If you could blow up the
10 second-to-last paragraph.

11 Quote, "The date to submit the
12 postponement form passed on 12 June 2016, and we
13 did not receive consensus from the contention set.
14 As such, no postponement was granted."

15 And then the next paragraph, "Secondly, in
16 regards to potential changes of control of NU DOT
17 CO LLC, we have investigated the matter, and to
18 date we have found no basis to initiate the
19 application change request process or postpone the
20 auction."

21 You can see at the top -- I think you can
22 see at the top it is dated July 13.

23 Do you recall writing that?

24 A. Let's see. I am just going to --

25 Q. Yeah, take your time. You can ask Chuck

1 to blow up any portions of the document that you
2 need to read.

3 A. It would be helpful if nothing was blown
4 up and I could just read through it.

5 Q. You can read that?

6 A. Yeah, thank you.

7 Could I ask to see the second page? Thank
8 you.

9 I have forgotten the question, sorry.

10 Q. It was simply do you recall that on July
11 13th -- is that the date of the letter -- July 13th
12 you wrote to the contention set to advise them that
13 the ICANN auction would go forward as scheduled?
14 That was simply my question.

15 A. Yes. Thank you.

16 Q. And that was the day after you had had
17 that exchange with the ombudsman where he wrote
18 about his tentative recommendation?

19 A. Correct.

20 Q. I take it you were under a lot of pressure
21 to make sure that the ICANN auction for .WEB went
22 forward on 27 July; is that true?

23 A. Oh, no, no, I wouldn't say we were under
24 pressure to conduct auctions at all. In fact,
25 ICANN would have preferred that we not have to

1 conduct any auctions of last resort.

2 Q. So you would have been -- ICANN would have
3 been pleased to postpone the auction, the ICANN
4 auction?

5 A. ICANN would have been pleased if the
6 applicants had found some way to resolve the
7 contention in the three-plus years until this
8 point, or we would have hoped that the applicants
9 could have agreed to submit a request for
10 postponement with -- in a timely manner.

11 But at the writing of this letter, I --
12 this letter saying we were proceeding could have
13 been a basis for any of the applicants to initiate
14 an accountability mechanism, to initiate a
15 reconsideration request saying that ICANN should
16 postpone the auction, and that would have put the
17 contention set on hold as of that date.

18 Q. So your testimony was once the ICANN
19 auction was scheduled for July 27, you were not
20 under any new pressure to make sure that it went
21 forward on that date?

22 A. Correct. I wouldn't say there was
23 pressure.

24 Q. Okay. Let's go back to your witness
25 statement and take a look at Paragraph 14, and it

1 says, quote, "The auction rules governing indirect
2 contention sets. Auction rules set forth a
3 prescribed and limited period of time within which
4 members of a contention set may request a
5 postponement of an auction," quote -- and you're
6 quoting from the rules -- "an applicant may request
7 an advancement/postponement request via submission
8 of the auction date advancement/postponement
9 request form. The form must be submitted at least
10 45 days prior to the scheduled auction date, and
11 ICANN must receive a request from each member of
12 the contention set," close quote.

13 And that's from Rule 10 of the auction
14 rules; is that correct?

15 A. I'd have to review the auction rules.

16 Q. Okay. Let's take a look at them. They
17 are behind Tab 20, which is Exhibit C-4.

18 ARBITRATOR BIENVENU: While the document
19 is being pulled up, Mr. De Gramont, at a convenient
20 time in the flow of your cross-examination, we
21 could take our first break.

22 MR. De GRAMONT: Mr. Chairman, may I
23 suggest I finish my questioning on this document
24 and then we can take our break then?

25 ARBITRATOR BIENVENU: Absolutely. If it

1 is convenient for you, we will take it then.

2 MR. De GRAMONT: Thank you, sir.

3 Q. Ms. Willett, we are at Tab 20 of your
4 binder, C-4, is this the auction rules that were in
5 effect in the summer of 2016?

6 A. I believe so.

7 Q. Now, if you turn to Page 4, bracketed Page
8 4, you'll see Rule 10 in about the upper half of
9 the page.

10 And maybe we can highlight the language
11 that starts, "The form must be submitted."

12 "The form must be submitted at least 45
13 days prior to the scheduled auction date and ICANN
14 must receive a request from each member of the
15 contention set," unquote.

16 So that's the language that you quoted in
17 your witness statement, right?

18 A. Correct.

19 Q. But then the sentence that you didn't
20 include in your witness statement says, quote,
21 "Without limiting the foregoing, ICANN reserves the
22 right at its sole discretion to postpone the
23 auction for any contention set due to a future date
24 regardless of whether each and every member of the
25 contention set has submitted a postponement

1 request," unquote.

2 Do you see that?

3 A. I do.

4 Q. So ICANN had within its discretion the
5 possibility of postponing the auction even though
6 not each and every member had submitted a
7 postponement request; is that correct?

8 A. That's correct.

9 Q. Was there any discussion of postponing the
10 auction beyond the discussion by the ombudsman that
11 we looked at in his email?

12 A. Again, I don't recollect a specific
13 conversation, but there may have been.

14 Q. But you don't recall?

15 A. Correct.

16 MR. De GRAMONT: Okay. This would be a
17 good time to take a break, Mr. Chairman.

18 MR. LeVEE: Mr. Chairman, very briefly,
19 could I ask that the witness be excused but that
20 the Panel and Mr. De Gramont remain for 30 seconds?

21 ARBITRATOR BIENVENU: Yes, of course.
22 This is Mr. LeVee speaking?

23 MR. LeVEE: Yes.

24 ARBITRATOR BIENVENU: Yes, very well.

25 So, Ms. Willett, under the same

1 restrictions as yesterday, that is, not to discuss
2 your testimony with anyone during the break. Thank
3 you very much, indeed.

4 Yes, Mr. LeVee -- sorry -- let's wait to
5 get confirmation from JD that the witness has been
6 removed.

7 MR. ENGLISH: Yes, the witness has been
8 removed.

9 ARBITRATOR BIENVENU: Thank you very much.
10 Please proceed.

11 MR. LeVEE: Yes. Yesterday, Mr. Chairman,
12 you said that we had a hard stop yesterday at a
13 particular time, and I wanted to let the Panel know
14 that the witness following Ms. Willett,
15 Mr. Disspain, is in the United Kingdom. And so he
16 said to me that he would not be terribly
17 comfortable -- if the Panel chose to stay late, he
18 would ask that he not be asked to testify.

19 He works during the day. So he will be
20 testifying later today, presumably, and it would be
21 until roughly 9:00 o'clock his time, and he would
22 not be comfortable testifying beyond that.

23 I raise it not because the Panel made any
24 decision whether it was going to extend this
25 particular day, but just to advise everyone. I am

1 not trying to influence the extent of the Willett
2 cross, not trying to have any other impact. I am
3 just alerting the Panel that today we would make a
4 request that we would not go late.

5 ARBITRATOR BIENVENU: Very well. It is a
6 comment that is made at an opportune time because
7 we had -- we had decided as a Panel that we would
8 offer the parties today to sit longer hours
9 precisely to -- well, to try to catch up on our
10 schedule.

11 So you're saying that if Mr. Disspain is
12 the witness being examined at this point, that
13 would be a problem for him?

14 MR. LeVEE: Yes. He is under the original
15 schedule. He was to be finished today, but it
16 looks quite unlikely because we are running a
17 little late. And I know that the estimate on
18 Ms. Willett is four hours, but we have already gone
19 two and a half and the binder is pretty thick. I
20 have no idea if we are stopping at four hours or
21 not.

22 Be that as it may, I have been looking at
23 the schedule and thinking that we would be in the
24 middle of Mr. Disspain's cross-examination if, in
25 fact, that's how it occurs.

1 ARBITRATOR BIENVENU: All right. Well,
2 thank you for advising us of this.

3 MR. MARENBERG: Mr. Chairman, this is
4 Steve Marenberg. I would suggest that all counsel
5 need to talk about scheduling. Because we had
6 mentioned a while ago last week that Mr. Rasco is
7 scheduled to testify on Friday, and he is not
8 available the following week because he's on
9 vacation.

10 I think before we dump this problem in the
11 laps of the Panel, maybe counsel ought to talk
12 about what we suggest the Panel does and we do that
13 either on this break or the next break.

14 ARBITRATOR BIENVENU: Well, that would
15 seem to me to be a sensible proposal. I know that
16 counsel have important things to do during our
17 short breaks, but perhaps they could find five
18 minutes to, as you suggest, have a chat about
19 scheduling and report back to the Panel.

20 MR. MARENBERG: Thank you, Mr. Chairman.

21 MR. De GRAMONT: I would suggest we do
22 that at the next break, if that's -- oh, there
23 isn't another break, is there?

24 MR. LeVEE: No, no, there's another break.

25 ARBITRATOR BIENVENU: There's another

1 break.

2 MR. De GRAMONT: Let's do that at the next
3 break.

4 ARBITRATOR BIENVENU: For our guidance,
5 Mr. De Gramont, and if you prefer to answer this
6 after the break, that's fine, but do you have a
7 sense of where you are in your game plan?

8 MR. De GRAMONT: Mr. Chairman, I would
9 prefer to answer that after the break so I can
10 confer with my colleagues.

11 ARBITRATOR BIENVENU: Perfect. So we will
12 take our first 15-minute break. Thank you all.

13 MR. De GRAMONT: Thank you.

14 (Whereupon a recess was taken.)

15 ARBITRATOR BIENVENU: So, Mr. De Gramont,
16 you are ready to continue your cross-examination?

17 MR. De GRAMONT: I am, Mr. Chairman.

18 ARBITRATOR BIENVENU: Is the witness back
19 with us?

20 MR. ENGLISH: Not yet. Should I call her
21 now?

22 ARBITRATOR BIENVENU: Please call her,
23 yes.

24 Mr. LeVee, you are there?

25 MR. LeVEE: I am here. I'm sorry if I'm

1 late. We didn't even get a signal to rejoin.

2 ARBITRATOR BIENVENU: Okay. Well, you're
3 forgiven.

4 MR. LeVEE: Thank you.

5 MR. De GRAMONT: I forgive you too,
6 Mr. LeVee.

7 MR. ENGLISH: The witness is in the room
8 with us now.

9 ARBITRATOR BIENVENU: Ms. Willett, we will
10 continue your cross-examination.

11 Mr. De Gramont.

12 MR. De GRAMONT: Thank you, Mr. Chairman.

13 And welcome back, Ms. Willett.

14 Q. I'd like to direct your attention back to
15 Tab 16 in your binder, which is Exhibit F to your
16 witness statement, and I believe we had looked at
17 the bottom portion of this document before, which
18 is the July 8, 2016, email where you asked
19 Mr. Rasco to call you.

20 Now I'd like to take a look at the upper
21 portion of that document, which is an email that
22 Mr. Rasco wrote to you. I can't tell -- there
23 doesn't seem to be a date. Am I missing it or do
24 you know what the date of this email is?

25 A. I don't see a date either. I don't

1 recall. It references last Friday. So I suppose
2 it was the week after -- 9, 10 -- week of the 11th.

3 Q. Okay. So in the first paragraph he
4 writes, quote, "Thank you for taking the time to
5 speak with me last Friday, July 8, concerning the
6 complaint that another applicant for the .WEB TLD
7 made to the ICANN ombudsman, Chris LaHatte,
8 relating to an alleged change in the composition of
9 NU DOT CO LLC's," quote, "Board," unquote. "I am
10 writing to reiterate the information I provided you
11 on our call so that the facts are clear," unquote.

12 The third paragraph, he writes, "My
13 understanding from our discussion is that ICANN is
14 satisfied with the information I provided and has
15 concluded there's no basis for any complaint,
16 reevaluation or other process relating to our
17 application, nor for any delay in the ICANN
18 auction. Please let me know if that is not the
19 case," unquote.

20 Did you tell Mr. Rasco during your
21 conversation on Friday, July 8th, that ICANN was
22 satisfied with the information that he had
23 provided?

24 A. I honestly don't recall all of the
25 specifics of the conversation.

1 Q. Okay. In the next paragraph he goes on to
2 cite Rule 10 of the auction rules, which we
3 discussed, and in the next sentence he writes,
4 quote, "As we discussed, I share your understanding
5 that the complaint was raised in order to get more
6 time to convince us to resolve the contention set
7 via a private auction even though we have made it
8 very clear to them (and all other applicants) that
9 we will not participate in a private auction and
10 that we are committed to participating in ICANN's
11 auction as scheduled," period, unquote.

12 Did you tell Mr. Rasco that you believed
13 the complaint had been raised simply to convince
14 NDC to resolve the contention set via a private
15 auction rather than going to the ICANN auction?

16 A. Again, I don't recall all of the specifics
17 of that phone conversation with Mr. Rasco.

18 Q. Do you recall if you told Mr. Rasco that
19 you thought the complaint had no merit?

20 A. I don't recall saying that.

21 Q. Had you concluded at that point that the
22 complaint had no merit?

23 A. Again, I am not certain of the date of
24 this communication and I know, as we just looked
25 at, I was still awaiting response from Mr. LaHatte.

1 My general recollection is that it was --
2 this understanding of mine that I seem to have
3 shared with Mr. Rasco, this understanding that the
4 other applicants wanted more time to resolve
5 contention, I took that based on the conversation
6 and communications from other applicants, including
7 Mr. Nevett.

8 Q. Ms. Willett, we have limited time. So I
9 am going to restate my question, which was: Do you
10 recall telling Mr. Rasco during that conversation
11 on Friday, July 8th, that your understanding was
12 that the complaint was raised to get more time to
13 convince NDC to resolve the contention set via
14 private auction rather than ICANN auction?

15 A. Again, I don't recall the specifics of the
16 conversation from over four years ago.

17 Q. Do you recall telling anyone else that
18 you -- at that time, Friday, July 8th, that you
19 believed that the complaint had been raised simply
20 as a ploy to get NDC to proceed with the private
21 auction rather than the ICANN auction?

22 A. I have that as a general recollection, but
23 I don't recall a specific conversation from four
24 years ago.

25 Q. Okay. You have a general recollection

1 that you told others at ICANN that you thought the
2 complaint was simply a ploy to get others to --
3 rather, to get NDC to participate in the ICANN
4 auction?

5 A. I apologize. I have a general
6 recollection that it was my understanding that
7 applicants were seeking a postponement to
8 independently resolve and avoid an ICANN auction.
9 That is my general recollection and understanding.

10 I don't recall having a specific
11 conversation with anyone about that from four years
12 ago.

13 Q. Do you have any reason to believe that you
14 did not tell Mr. Rasco that you thought the
15 complaint was raised in order to convince NDC to
16 resolve the contention set via private auction
17 rather than an ICANN auction?

18 A. No.

19 Q. Have you reviewed the Domain Acquisition
20 Agreement, Ms. Willett, that was entered into
21 between NDC and VeriSign?

22 A. I have not.

23 Q. You have never seen it?

24 A. I have seen -- in preparation for this I
25 may have seen portions of it, but I have never

1 reviewed it.

2 ARBITRATOR BIENVENU: Mr. De Gramont, can
3 you clarify whether you are asking the question by
4 referring to the time period just prior to
5 Ms. Willett's testimony or back when these events
6 were occurring?

7 MR. De GRAMONT: That's helpful,
8 Mr. Chairman. Thank you.

9 Q. Prior to your preparation for this
10 testimony, had you seen the Domain Acquisition
11 Agreement?

12 A. I had not.

13 Q. You never saw the Domain Acquisition
14 Agreement in 2016?

15 A. That's correct.

16 Q. Okay.

17 Redacted - Third-Party Designated Confidential Information

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20 MR. LeVEE: Let me remind you of the
21 issues relating to privilege, Ms. Willett, and ask
22 you not to disclose information that you acquired
23 from counsel.

24 Q. BY MR. De GRAMONT: It is a yes-or-no
25 question.

1 MR. LeVEE: No, I don't think that's an
2 appropriate question, if anything that she knows
3 comes from counsel.

4 MR. De GRAMONT: Well, let's do this.

5 Q. Let's take a look at the DAA, which is Tab
6 19, Exhibit C-69 in your binder.

7 A. I am there.

8 Q. And I would direct you, please, to Page
9 17, Paragraph (i), and I am just going to read some
10 of the language to you, and you can tell me if it
11 rings any bells.

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1 Do you have any recollection about hearing
2 about that provision in the DAA in 2016?

3 A. No.

4 Q. Looking at that provision, isn't it
5 obvious that Mr. Rasco was telling Mr. Nevett the
6 truth when he said that the decision went beyond
7 simply us and that he had to check with the powers
8 that be in order to answer the question?

9 MR. LeVEE: I object to the question.
10 Ms. Willett is not a lawyer. The question asks an
11 ultimate conclusion. And she's testified that she
12 did not see the documents during 2016, so I don't
13 see how her views today could possibly be relevant.

14 MR. De GRAMONT: I am not asking for a
15 legal opinion. I am just simply asking whether,
16 based on the plain language of this agreement,
17 isn't it obvious that Mr. Rasco was telling
18 Mr. Nevett the truth when he said that the decision
19 whether to participate in a private auction or an
20 ICANN auction went beyond the three individuals
21 identified in the NDC application.

22 MR. LeVEE: It's the same question.
23 "Isn't it obvious" asks her for a legal conclusion.
24 You're asking her to --

25 ARBITRATOR BIENVENU: Mr. LeVee.

1 yes-or-no question.

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MR. LeVEE: That is an objectionable
7 question. There's another way of asking it. But
8 if what she knows comes from a lawyer, then you're
9 asking to invade the privilege by the fact that a
10 lawyer may have said something to her.

11

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MR. De GRAMONT: For now I just want a
yes-or-no question. If I ask a follow-up, I think
Mr. LeVee can object then.

14

15

16

17

MR. LeVEE: No. Because you have asked,
"Yes or no, did somebody tell you that the
agreements mean something?" If someone told her
that, that's a privileged communication.

18

19

MR. De GRAMONT: Not if it came from a
nonlawyer.

20

MR. LeVEE: You didn't ask that question.

21

22

MR. De GRAMONT: I said "did anyone," "did
anyone."

23

MR. LeVEE: Ask a nonlawyer question.

24

25

ARBITRATOR BIENVENU: Gentlemen, could I
ask you both, rather than engage in a conversation,

1 to address the Panel?

2 MR. LeVEE: My apologies.

3 ARBITRATOR BIENVENU: Mr. De Gramont,
4 perhaps you could ask the witness if aside from
5 conversations that she may have had with counsel,
6 rather than, you know, the rest of the question.

7 MR. De GRAMONT: Okay. Thank you,
8 Mr. Chairman.

9 Q. Redacted - Third-Party Designated Confidential Information
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14 A. No.

15 Q. Okay. Let's take a look at Paragraph 18
16 in your witness statement.

17 A. Yes.

18 Q. And you write, quote, "Even if NDC had
19 submitted a change request indicating that it had
20 undergone a change of control and/or ownership, NDC
21 would not have been disqualified from the auction
22 set to take place on 27 July 2016."

23 Do you recall that?

24 A. Yes.

25 Q. And we now know that VeriSign did not

1 acquire ownership control -- let me ask you this:
2 Is it your understanding -- do you have an
3 understanding as to whether VeriSign acquired
4 ownership or control over NDC the entity?

5 A. Well, that's not my understanding.

6 Q. Okay. Your understanding is that VeriSign
7 did not acquire ownership or control over NDC the
8 entity, correct?

9 A. Correct.

10 Q. So Paragraph 18 in your statement, that
11 even if NDC had submitted a change request
12 indicating that it had undergone a change of
13 control and/or ownership is simply a hypothetical,
14 right?

15 A. Yes, that's a -- yes.

16 Q. Under your understanding of the change
17 request process, could applicants submit a change
18 request that they were reselling, assigning or
19 transferring the rights and obligations in their
20 application?

21 A. So they couldn't transfer their
22 application to another entity, no. But applicants
23 all the time had engaged third parties to act on
24 their behalf.

25 Q. Right.

1 A. As part of the application processing.

2 Q. And have you formed a view -- well, you
3 haven't formed a view of whether that's what
4 happened here because you never reviewed the DAA;
5 is that right?

6 A. That's correct.

7 Q. Okay. Let's move on to another subject.

8 So the ICANN auction went forward as
9 scheduled on 27 July 2016; is that correct?

10 A. Yes.

11 Q. And did the auction continue into the next
12 day, 28 July; do I understand that correctly?

13 A. That's my recollection, yes.

14 Q. And NDC was declared the winning bidder
15 with a bid of 142 million.

16 Do you recall that?

17 A. I don't know what NDC's ultimate bid was.
18 I understand what the second bid was.

19 Q. And that's because under the auction
20 rules, the winning bidder paid the bid that the
21 second highest bidder had made?

22 A. Correct.

23 Q. And Afilias submitted the second highest
24 bid, which was 135 million, right?

25 A. That's come to be my understanding, yes.

1 Q. So NDC's bid was effectively 135 million;
2 is that right?

3 A. Correct.

4 Q. Okay. On 28 July 2016 VeriSign published
5 a 10-Q statement with the U.S. Securities and
6 Exchange Commission, or the SEC, and in the
7 footnote stated that, quote, "The company incurred
8 a commitment to pay approximately \$130 million for
9 the future assignment of contractual rights, which
10 are subject to third-party consent," unquote.

11 Do you recall that?

12 A. I recall seeing that at some point.

13 Q. And the media immediately picked up on
14 that footnote and speculated that VeriSign was
15 behind NDC's application for .WEB.

16 Do you recall that?

17 A. Not specifically.

18 Q. Look at what's behind Tab 21 of your
19 binder. It is Exhibit C-98, and it is an email
20 dated July 28, 2016, from Domain Name Wire to
21 ombudsman@ICANN.org, "Subject: It looks like
22 VeriSign bought .WEB domain for 135 million (SEC
23 filing)."

24 Do you recall if you ever saw this
25 particular report?

1 A. I don't ever recall seeing this.

2 Q. The fourth paragraph says, "VeriSign was
3 rumored to be backing NU DOT CO's bid for the
4 domain name."

5 Have you ever heard such rumors?

6 A. Prior to or during the auction, no.

7 Q. Prior to and during the auction you had
8 never heard rumors that VeriSign was financially
9 backing the NDC bid?

10 A. I had not, correct.

11 Q. Would you turn to Tab 22, which is Exhibit
12 C-99, and this is an email from Google Alerts sent
13 to you on Thursday, July 28, 2016. And if you turn
14 to Page 2, you will see at the bottom of the page a
15 title that reads, quote, "Someone (cough, cough
16 VeriSign) just gave ICANN 135 million for the
17 rights to .WEB."

18 It goes on to say, "Under the auction
19 rules, all 135 million will now go into ICANN's
20 coffers, to be added to the 105 million it has made
21 from the auction of 15 other top-level domains."

22 Did you ever see that article?

23 A. Not that I recall.

24 Q. Is it correct that the 15 prior auctions
25 had generated 105 million? And I should say -- let

1 me start over.

2 Is it your recollection that the 15 prior
3 ICANN auctions had yielded \$105 million in bids?

4 A. That sounds about right. I don't have a
5 specific recollection without looking at the web
6 page that reports that, but it sounds generally
7 correct.

8 Q. Do you recall that .WEB generated a bid
9 that was more than the bids in all of the 15 prior
10 auctions put together?

11 A. That sounds about right.

12 Q. And these moneys that are generated in the
13 ICANN auctions don't include the \$185,000
14 application fees that each applicant paid; is that
15 correct?

16 A. That's correct. The ICANN auction
17 proceeds are kept in a separate fund, separate
18 account, segregated from the new gTLD Program funds
19 as well as segregated from ICANN's operating funds.

20 Q. How many applications did you say were
21 filed during the new gTLD Program?

22 A. 1,930 applications.

23 Q. And we multiply that by 185 -- my math
24 isn't good enough to do that, but it is a lot of
25 money?

1 A. It is over \$360 million.

2 Q. Do you recall -- let's do this. Let's
3 take a look at Paragraph 33 of your witness
4 statement.

5 A. Okay.

6 Q. It says, quote, "I am informed and believe
7 that on 1 August 2016, VeriSign made a public
8 announcement that it had entered into an agreement
9 with NDC regarding .WEB," unquote.

10 Who informed you of that?

11 A. I don't specifically recall.

12 Q. Did you see the 1 August 2016 press
13 release on the day that it was issued?

14 A. I believe I did review that.

15 Q. Now, Paragraph 34 you write, quote, "At no
16 time before VeriSign's public announcement did any
17 applicant ever raise a concern to me that VeriSign
18 was involved with NDC's application, nor was I
19 aware of VeriSign's involvement until it publicly
20 announced its agreement with NDC," period, close
21 quote.

22 When you are speaking of the public
23 announcement, you mean the 1 August 2016 press
24 release issued by VeriSign?

25 A. That's correct.

1 Q. Now, do you recall that Mr. Rasco sent an
2 email to you the night before the 1 August 2016
3 press release Redacted - Third-Party Designated Confidential Information
4

5 A. Yes. I recall receiving an email from
6 Mr. Rasco.

7 ARBITRATOR KESSEDJIAN: Mr. De Gramont,
8 are you sure you are speaking of a press release of
9 August 16? I think it was August 1st.

10 MR. De GRAMONT: I had meant to say 1
11 August 2016. I may have misspoken.

12 ARBITRATOR KESSEDJIAN: No, no, it may be
13 my -- as you know, in France we speak of dates in a
14 very different way. I may have been mistaken.
15 Okay.

16 Q. BY MR. De GRAMONT: So let's take a look
17 at that email, which is behind Tab 23. It is
18 Exhibit C-100. And let's -- are you there,
19 Ms. Willett?

20 A. I am. Thank you.

21 Q. And looking at the very bottom of the
22 page, Mr. Rasco writes you on July 31st, 2016,
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Q. Were you at all curious why someone from VeriSign would be contacting Mr. Atallah -- I'm sorry. Let me break it down.

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3 A. I don't recall, but likely, yes, probably
4 piqued my curiosity.

5 Q. And similarly you were curious as to why
6 someone from VeriSign would be contacting
7 Mr. Atallah about the .WEB application?

8 A. Not that I recall.

9 Q. Okay. Did you forward Mr. Rasco's email
10 to anyone at ICANN?

11 A. Not that I recall.

12 Q. Did you discuss it with anyone at ICANN?

13 A. No, I'm sorry, I don't recall.

14 Q. Redacted - Third-Party Designated Confidential Information

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17 A. I don't know.

18 Q. Are you aware that NDC's lawyers stated in
19 opening arguments that ICANN and specifically you,
20 Ms. Willett, knew that VeriSign was financially
21 backing NDC's bid prior to VeriSign's public
22 announcement?

23 A. I am not aware of anything in the opening
24 statements.

25 Q. I will read you what NDC's counsel said

1 and ask you to respond to it. Quote, "At this
2 point, there was a lot of speculation in this
3 close-knit community that VeriSign has been behind
4 NDC's bids. This is an open secret out there, so
5 this is not something that she's guessing about or
6 that is it."

7 And by "she," NDC's lawyer is referring
8 specifically to you.

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18 ICANN has
19 not received the DAA and doesn't get it until later
20 in the month, but they do know that the financial
21 impetus for our winning the bid is from VeriSign.
22 That is something -- that is not something that's
23 hidden from her at all."

23

24

25

So let me ask you again, did you know
prior to 1 August 2016 that VeriSign was funding
NDC's bid or was financially behind NDC's bid.

1 A. No, I don't recall ever having that
2 information prior to 1 August.

3 Q. And as you sit here today, to your
4 knowledge, did anyone else at ICANN know that
5 VeriSign was funding NDC's bid prior to 1 August
6 2016?

7 A. No. I don't know what everyone at ICANN
8 knew, but to my knowledge --

9 Q. To your knowledge --

10 A. To my knowledge, no.

11 Q. Okay. Let's go back to your witness
12 statement, to Paragraph 9. And Paragraph 9 reads,
13 quote, "Prior to the filing of an IRP, potential
14 claimants are encouraged to enter into a
15 Cooperative Engagement Process, CEP, with ICANN in
16 order to allow the parties to discuss resolving or
17 narrowing the issues to be brought in an IRP
18 proceeding. In connection with the new gTLD
19 Program, ICANN employs a practice, depending on the
20 circumstances, of placing a contention set, as
21 described below, or a gTLD application on hold if
22 it is the subject of certain accountability
23 mechanisms, including the initiation of a CEP,"
24 unquote.

25 Do you see that?

1 A. Yes, I do.

2 Q. Is that practice set forth in writing
3 anywhere?

4 A. I am not sure.

5 Q. Do you recall ever seeing that practice
6 set forth in writing?

7 A. I recall explaining it. It might have
8 been written about in terms of the program. I
9 might have spoken about it. Honestly, I don't
10 recall the specifics.

11 Q. You say you recall explaining it --
12 explaining it to whom?

13 A. So as the head of the new gTLD Program, I
14 spoke on behalf of the program and provided public
15 updates on a regular basis through monthly
16 webinars. In 2012, 2013, I typically gave one or
17 more updates on the program at every public ICANN
18 meeting.

19 So I spoke about how the program
20 endeavored to respect the applicants, the
21 community's opportunity to invoke those
22 accountability mechanisms and to respect those by
23 putting contention sets on hold -- or putting
24 applications on hold or contention sets on hold to
25 allow those accountability mechanisms to transpire,

1 to allow that dispute to be handled through one of
2 those accountability mechanisms.

3 Q. And if the practice wasn't set forth in
4 writing anywhere, what was the basis for your
5 providing the information to certain applicants?

6 A. So when I took over the program, there
7 were a number of all -- all of the applications,
8 nearly all of the applications were still active
9 and the program processing was still in its early
10 days and there were many, many disputes about
11 applications.

12 And although the applicant guidebook had
13 described actually multiple objection mechanisms,
14 types of objections, whereby community members or
15 governments or interested parties could object to
16 an application, the guidebook didn't specify an
17 appeals process or any other mechanism by which
18 applications could complain or dispute how ICANN
19 was handling their applications.

20 So after internal discussions, it became
21 clear that we needed to -- these are described --
22 these mechanisms are described in the bylaws, that
23 we need to encourage applicants and the community
24 to utilize those mechanisms. So it became a very
25 familiar refrain of mine in public presentations to

1 guide those complaints using one of the
2 accountability mechanisms, as there was no other
3 mechanism described in the applicant guidebook.

4 Q. You say in your witness statement that the
5 practice applies to certain accountability
6 mechanisms. Which accountability mechanisms does
7 the practice apply to?

8 A. So as a general practice, we evaluate each
9 accountability mechanism on a case-by-case basis.
10 But in general, when a reconsideration request was
11 triggered about an application pertaining to an
12 application or contention set, that application was
13 put on hold.

14 Ombudsman inquiries, when the ombudsman
15 informed us of such, that drove us to put something
16 on hold. CEP being initiated put something on
17 hold. And the actual filing of an IRP, we had a
18 few different practices over time about that, but
19 the IRP, I believe, has another mechanism to --
20 component to request relief, which could be putting
21 the contention set on hold.

22 Q. You said that each accountability is
23 evaluated on a case-by-case basis to determine
24 whether to put it on hold. Are the criteria that
25 ICANN uses for that determination set forth

1 anywhere in writing?

2 A. Not that I am aware of.

3 Q. And you said that you made presentations
4 in which you referred to advising applicants that
5 accountability mechanisms would sometimes lead to
6 contention sets being put on hold. Are you aware
7 if any of those presentations are exhibits in this
8 IRP?

9 A. Oh, I am not -- I am not sure.

10 Q. Okay. Do you know whether those
11 presentations are posted anywhere on the ICANN
12 website?

13 A. I believe a number of my presentations are
14 available by video recordings. I am not sure how
15 far back that goes. But at one point, they were
16 available on the ICANN website.

17 Q. Specifically the presentations where you
18 said that accountability mechanisms would sometimes
19 lead to contention sets being put on hold?

20 A. Yes. I believe -- as a general practice,
21 ICANN records sessions from its public meetings and
22 posts those recordings, but I don't know how long
23 they retain them and where they might be available
24 at this juncture.

25 Q. Are you familiar with the provision in the

1 bylaws that requires ICANN to, quote, "Make
2 decisions by applying documented policies
3 consistently, neutrally, objectively and fairly,"
4 unquote?

5 A. Sorry, can you repeat that?

6 Q. Yeah. Are you familiar with the provision
7 in the bylaws that requires ICANN to, quote, "Make
8 decisions by applying documented policies
9 consistently, neutrally, objectively and fairly,"
10 unquote.

11 A. I think you may have showed that to me
12 yesterday.

13 MR. LeVEE: Alex, since you're quoting,
14 would you mind showing it to her?

15 MR. De GRAMONT: Sure, sure.

16 Q. This is Tab 39 in your bylaws. It's
17 Exhibit C-1, and I am going to point you to a
18 provision at bracketed Page 6. Now, these are not
19 the bylaws that were in effect as of 2016, but the
20 language that I am going to point you to is
21 identical to the language that was in the bylaws
22 that were in effect in 2016.

23 Let's actually start at Page 5 under
24 Section 1.2, "Commitments and Core Values." It
25 says, quote, "In performing its Mission, ICANN will

1 act in a manner that complies with and reflects
2 ICANN's Commitments and respects ICANN's Core
3 Values, each as described below," unquote.

4 And then if you turn the page,
5 Subparagraph Roman Numeral v, and this is the
6 language that's also in the bylaws that were in
7 effect in 2016, "Make decisions by applying
8 documented policies consistently, neutrally,
9 objectively, and fairly."

10 Were you familiar with that principle
11 contained in the bylaws?

12 A. I don't recall reading it from the bylaws.

13 Q. Were you familiar with the principle
14 otherwise?

15 A. Yes, I -- yes.

16 Q. And are you familiar with the requirement
17 of transparency in the bylaws?

18 A. Generally familiar, yes.

19 Q. So if you'll turn to Page 8, and this is
20 language that was also in the bylaws in effect in
21 2018, it says, quote, "ICANN and its constituent
22 bodies shall operate to the maximum extent feasible
23 in an open and transparent manner and consistent
24 with procedures designed to ensure fairness,"
25 unquote.

1 Were you familiar with those provisions of
2 the bylaws?

3 A. Generally familiar.

4 Q. And the purpose of those rules is to
5 ensure that everyone knows what the rules and
6 practices are so that everyone is treated as being
7 on the same playing field, do you agree?

8 A. Well, I believe that both of those
9 provisions are really -- you know, this is my
10 interpretation of bylaws, and I am not a lawyer,
11 but I believe that those are intended to describe
12 ICANN's approach to policy implementation and
13 applying Internet policy and in policy development,
14 as, you know, Section 3.1(a), (b) and (c) are all
15 talking about policy development work, but it was
16 my general understanding that operationally we
17 tried to be as transparent as possible.

18 Q. Let's assume for the sake of argument that
19 there was this practice. If it was not stated
20 anywhere in documentation, some applicants would
21 know about it and others would not, right?

22 MR. LeVEE: Calls for speculation.

23 Q. BY MR. De GRAMONT: Isn't the idea that
24 the policies and practices be documented to ensure
25 that everyone knows what the policies and practices

1 are so that insiders won't have benefit that
2 newcomers will not have; was that your
3 understanding?

4 A. We endeavor to document a whole lot about
5 our practices. The entire new gTLD website is
6 largely our effort to be transparent and to share
7 as much information publicly as possible.

8 Q. But as far as you know, the practice you
9 describe in your witness statement of sometimes
10 putting contention sets on hold depending on the
11 circumstances wasn't documented anywhere for the
12 public?

13 A. I am not certain.

14 Q. You don't recall any such documentation?

15 A. I don't.

16 Q. Okay. Are you aware that Donuts and Ruby
17 Glen filed for CEP on 2 August 2016?

18 A. I am aware they filed and initiated CEP.
19 The date sounds about right.

20 Q. Okay. And if you -- just to be sure, if
21 you look at Tab 25 in your binder, this is a
22 hyperlink in Mr. Atallah's 30 September 2016 letter
23 to Mr. Hemphill, which is Exhibit C-61.

24 For the record, the parties agreed that we
25 could use hyperlinked documents that we identified

1 to one another, and this is one of them.

2 Are you familiar with this Cooperative
3 Engagement and Independent Review Processes Status
4 Update?

5 A. Yes.

6 Q. You have seen these before?

7 A. Yes.

8 Q. You can see that Donuts and Ruby Glen
9 filed for CEP regarding .WEB in 2 August 2016?

10 A. I can see that, yes.

11 Q. On August 5th you wrote to Mr. Rasco to
12 say that NDC would receive an invitation to
13 contract being later that day.

14 Do you recall that?

15 A. What date?

16 Q. 5 August.

17 A. Is there a --

18 Q. It is Tab 23, C-100. Tell me when you're
19 there.

20 A. I am. Thank you.

21 Q. Okay. This is a continuation of the email
22 string in which Mr. Rasco advised you about the
23 press release that was coming from VeriSign, and in
24 the middle of the page first Mr. Rasco writes to
25 you on August 6th, and he writes, quote, "Hi,

1 Christine. I understand Power Auctions confirmed
2 to ICANN that it received the full winning bid
3 proceeds from us for the .WEB auction. With that
4 step complete, I was hoping to find out when ICANN
5 might provide us with the CIR," unquote.

6 Do you see that?

7 A. Yes.

8 Q. First of all, tell us what "CIR" means?

9 A. It stands for Contracting Information
10 Request.

11 Q. So that's what you send out to start the
12 process of delegating a string; do I understand
13 that correctly?

14 A. Not quite. May I explain?

15 Q. Please.

16 A. So a Contracting Information Request is
17 essentially a set of questions that the new gTLD
18 Program team extends to an applicant who is -- once
19 contention has been resolved -- who is moving
20 forward and is proceeding into contracting. So
21 once -- it is essentially sort of like an
22 invitation to begin contracting discussions. It is
23 one of the very first steps in a multiweek,
24 multimonh process.

25 Q. Okay. So the next day, August 5th, we can

1 see from the email above, you write to Mr. Rasco,
2 quote, "Hi, Jose. Yes, we have confirmed that the
3 full auction payment was received by Power
4 Auctions. Based on ICANN's standard registry
5 contracting process, NU DOT CO should expect to
6 receive an invitation to contracting (CIR) today.
7 In addition to engaging with the new gTLD Program
8 team via the GDD portal, feel free to contact me if
9 you have any other questions," close quote.

10 Do you recall sending that email?

11 A. Well, reading it here, yes, I recall that.

12 Q. And do you recall if ICANN sent the
13 invitation to contracting to NDC later that day?

14 A. I believe we did. Is there another
15 document I might look at?

16 Q. I don't have another document.

17 A. Okay.

18 Q. I'm sorry.

19 Now, if -- sorry, if Donuts and Ruby Glen
20 had filed for CEP on 2 August, why did that not put
21 the contention set on hold?

22 A. So there were a lot of things happening in
23 that week. So the CEPs are -- that notice goes to
24 someone in ICANN's legal department, not my team.
25 So it is a matter of when that -- the notice might

1 have come in for the CEP on the 2nd, and that
2 reflects the date that's published on that previous
3 document. But I didn't become aware of it until, I
4 believe, later on August 5th, or shortly
5 thereafter.

6 Q. Do you recall that on August 8, 2016, the
7 general counsel of Afiliias, Mr. Scott Hemphill,
8 wrote to Mr. Atallah about the .WEB application and
9 auction process?

10 A. I recall Mr. Hemphill wrote a couple of
11 letters. Is it possible to look at the --

12 Q. Yes, absolutely. So that's Tab 26. It is
13 Exhibit C-49.

14 Did you see that letter at the time it was
15 sent by Mr. Hemphill to Mr. Atallah?

16 A. I expect I would have seen it shortly
17 after Mr. Atallah received it.

18 Q. And did you read it?

19 A. I expect I did. I believe I did, yes.

20 Q. And do you remember that in the fourth
21 paragraph, second sentence, Mr. Hemphill wrote,
22 quote, "We have not been able to review a copy of
23 the agreement(s) between NDC and VeriSign with
24 respect to this arrangement, but it appears likely,
25 given the public statements of VeriSign, that NDC

1 and VeriSign entered into an agreement in the form
2 of an option or similar arrangement with respect to
3 the rights and obligations of NDC regarding its
4 .WEB application," unquote.

5 Do you remember that Mr. Hemphill made
6 that statement?

7 A. I recall that, yes.

8 Q. And if you look at Page 2, the second
9 paragraph from the bottom, quote, "We request that
10 ICANN promptly undertake an investigation of the
11 matters set forth in this letter and take
12 appropriate action against NDC and its .WEB
13 application for violations of the guidebook, as we
14 had requested," unquote.

15 Do you remember that Afiliias had asked for
16 an investigation?

17 A. Yes, in this letter.

18 Q. And did ICANN undertake an investigation
19 in response to this letter?

20 A. Not that I'm aware.

21 Q. Are you aware that at some point in August
22 2016, ICANN's outside counsel, Mr. Eric Enson at
23 Jones Day, called VeriSign's outside counsel,
24 Mr. Ronald Johnston at Arnold & Porter, about this
25 matter?

1 MR. LeVEE: Please do not answer if the
2 information you know is privileged. I will object
3 that the question invades privilege.

4 THE WITNESS: I have no knowledge about
5 that.

6 Q. BY MR. De GRAMONT: Okay. I am just going
7 to show you the letter and ask you if you've ever
8 seen it.

9 A. I apologize, I thought you said "called."

10 Q. Oh, I did. Okay. You're right.

11 Tell you what, let's take a look at the
12 letter, Tab 27, Exhibit C-102.

13 Have you seen this letter before?

14 A. No, I have not.

15 Q. Okay. And in this letter Mr. Johnston
16 forwarded the DAA and several other documents to
17 ICANN's outside counsel. Were you aware that that
18 had happened?

19 A. I'm sorry, who is Mr. Johnston? Oh,
20 counsel for VeriSign.

21 Q. Yes.

22 A. Okay.

23 Q. Were you aware that VeriSign's outside
24 counsel had written to ICANN's outside counsel
25 forwarding the DAA and other materials attached

1 hereto?

2 MR. LeVEE: Can you ask her if she's aware
3 from anyone other than a lawyer?

4 Q. BY MR. De GRAMONT: Are you aware from
5 anyone other than a lawyer?

6 A. No.

7 Q. Okay. And you never saw these materials?

8 A. No.

9 Q. Okay. Let me ask you a question about the
10 "Confidential Business Information. Do Not
11 Disclose" heading. Have you seen that before on
12 communications to ICANN?

13 A. On occasion parties would write to ICANN
14 and ask their communications to ICANN to be held
15 confidentially, meaning ICANN has a practice of
16 publishing correspondence. So in order to indicate
17 to ICANN that a party didn't want their
18 correspondence published, they would indicate that
19 it was confidential.

20 Q. And do you know if ICANN evaluates those
21 requests, or does it simply keep it confidential if
22 the sender has asked ICANN to do so?

23 A. Insofar as I administered and oversaw the
24 handling of correspondence for several years during
25 my tenure at ICANN, our practice was that we

1 respected those requests for confidentiality and we
2 did not post those -- such correspondences, with
3 one exception.

4 At some point if some other party asked
5 for something to be published or it became
6 desirable and relevant to something else, I recall,
7 again, it's been years, so I don't recall a
8 specific example, but as a general practice, I
9 recall that ICANN might ask the sender if it would
10 be possible to publish a letter, but we respected
11 their requests for confidential correspondence.

12 Q. So you didn't ask anyone to undertake an
13 analysis whether it was, in fact, sensitive
14 business information or anything like that?

15 A. No. Any further discussions of that would
16 have been with counsel.

17 Q. Are you aware that Mr. Atallah did not
18 respond to Mr. Hemphill's 8 August 2016 letter?
19 Let me withdraw the question.

20 Are you aware that he didn't respond to
21 Mr. Hemphill's 8 August 2016 letter prior to late
22 September?

23 MR. LeVEE: Alex, could you put that
24 letter on the screen?

25 MR. De GRAMONT: Yeah, yeah, let's start

1 with this.

2 Q. Do you recall that Mr. Hemphill sent a
3 second letter on 9 September 2016 to Mr. Atallah?

4 A. Yes, I do.

5 Q. Okay. And that's behind Tab 28, Exhibit
6 C-103. Did you read this letter?

7 A. Yes, I believe I did.

8 Q. And did you discuss it with Mr. Atallah?

9 A. I may have. I don't recall a specific
10 conversation.

11 Q. Do you recall discussing it with anyone
12 outside of ICANN's legal department?

13 A. I don't recall a specific conversation.

14 Q. Do you recall that both this letter and
15 Mr. Hemphill's 8 August 2016 letter were posted on
16 the ICANN website?

17 A. I believe so, yes.

18 Q. And do you recall that Mr. Hemphill on
19 Page 2 again said that Afiliias hadn't seen the
20 specific terms of the agreement because they had
21 not been disclosed? Do you recall that?

22 ARBITRATOR BIENVENU: Do you want to draw
23 the witness' attention?

24 MR. De GRAMONT: Yes, sure.

25 Q. First paragraph on the second page, first

1 full paragraph, he says, quote, "Although the
2 specific terms of the agreement between VeriSign
3 and NDC have not been disclosed, it is clear from
4 VeriSign's own press release and its disclosure in
5 its Form 10-Q filed with the U.S. Securities and
6 Exchange Commission for the quarter ended June 30,
7 2016, that both companies entered into an
8 arrangement well in advance of the auction to
9 transfer NDC's rights and obligations regarding its
10 .WEB application to VeriSign," unquote.

11 Do you remember that Mr. Hemphill said
12 that?

13 A. This has refreshed my memory, yes.

14 Q. But not having the terms of the agreement,
15 he was left to speculate as to which rights and
16 obligations may have been transferred; is that a
17 fair assessment, a fair interpretation?

18 A. I mean, I guess that's what the rest of
19 the letter is about.

20 Q. And then do you recall that on Page 4, and
21 this is the last paragraph before the conclusion,
22 Mr. Hemphill requested that ICANN provide Afilias
23 with an undertaking that it has not and will not
24 enter into a Registry Agreement for .WEB with NDC
25 until ICANN's Board has reviewed NDC's contact --

1 conduct and reached a considered decision on
2 whether or not to disqualify NDC's bid and reject
3 its application?

4 Did you recall that?

5 A. Yes.

6 Q. And do you recall that Afilias had
7 submitted an ombudsman complaint?

8 A. I don't recall that. In September I don't
9 recall.

10 Q. Do you recall if -- strike that.

11 Do you recall that Mr. Hemphill asked to
12 receive a response from ICANN by no later than 16
13 September 2016?

14 A. Yeah, I see that.

15 Q. Okay. Do you recall that that request was
16 made?

17 A. Yeah, I recall that was part of the
18 letter, yes.

19 Q. And did ICANN undertake an investigation
20 in response to Mr. Hemphill's 9 September 2016
21 letter?

22 A. Well, ICANN initiated -- sent a set of
23 questions to four of the parties in mid -- in
24 September or October, I forget the exact date, not
25 just about what Afilias was claiming, but also

1 because there was a CEP. So there was a set of
2 questions distributed to collect information.

3 Q. And if you turn to Tab 29 of your bundle,
4 this is Exhibit C-50, it is your letter dated 16
5 September 2016 to Mr. John Kane at Afilias. You
6 sent an identical letter to Ruby Glen, NDC and
7 VeriSign, albeit obviously personally addressed.

8 Do you recall that?

9 A. That's correct, yes.

10 Q. You say, "Dear, Mr. John Kane. In various
11 fora Ruby Glen LLC (Ruby Glen) and Afilias Domains
12 No. 3 Limited (Afilias) have raised questions
13 regarding, among other things, whether NU DOT CO
14 LLC (NDC) should have participated in the 27-28
15 July 2016 auction for the .WEB contention set and
16 whether NDC's application for the .WEB gTLD should
17 be rejected. To help facilitate informed
18 resolution of these questions, ICANN would find it
19 useful to have additional information."

20 Did you write this letter?

21 A. I worked with counsel to draft this
22 letter.

23 Q. And to be clear, the only forum,
24 quote/unquote, in which Afilias had raised the
25 questions were in the two letters sent by

1 Mr. Hemphill; is that correct?

2 A. Well, I suppose there was also the
3 ombudsman complaint.

4 Q. Oh, that's a good point. You're right.
5 That's a good point. Right. Good point.

6 By the way, do you recall how the
7 ombudsman complaint was resolved?

8 A. I'm sorry, I don't.

9 Q. Okay. You don't recall -- do you recall
10 that the ombudsman declined to consider it because
11 of the pending litigation and CEP that had been
12 brought by NDC -- sorry, Ruby Glen?

13 A. That rings a bell, yes, thank you.

14 Q. What did you mean by the words, quote,
15 "informed resolution," unquote?

16 A. So asking questions to gather information,
17 to resolve the questions raised. So there was the
18 Ruby Glen CEP. There was the Afilias request to
19 the ombudsman. So we were endeavoring to gather
20 information.

21 Q. Okay. This sounds like an investigation
22 at the end of which ICANN would resolve the
23 questions that had been raised, do you agree?

24 A. So I was not undertaking an investigation.
25 ICANN counsel handled and administered the CEP

1 process. So the responses which I received to
2 these letters I passed along to counsel.

3 Q. When you wrote to the recipients of this
4 letter that ICANN was seeking to facilitate
5 informed resolution of these questions, you were
6 being truthful, right?

7 A. Of course.

8 Q. And there's nothing in the letter to
9 indicate that ICANN was not going to seek, quote,
10 "informed resolution," unquote, of these questions;
11 is there?

12 A. No. I mean, ICANN resolves -- takes very
13 seriously its bylaws responsibilities for all of
14 its accountability mechanisms.

15 Q. Now, if ICANN's practice was to defer
16 decisions on contention sets while accountability
17 mechanisms are pending, why did ICANN undertake
18 this effort to facilitate informed resolution of
19 the questions?

20 A. Oh, okay. So there's the -- when we put
21 an application on hold or a contention set on hold,
22 it doesn't mean that all work ceases. In fact,
23 what it means is that it prevents that applicant or
24 that contention set -- we are committing that it
25 won't move to the next phase of work, meaning we --

1 while on hold, we wouldn't, for instance, send a
2 Registry Agreement to NU DOT CO for execution. We
3 wouldn't -- it was on hold and the contract had
4 been signed, we wouldn't delegate the top-level
5 domain until the issue of the matter was resolved
6 and the hold was taken off.

7 But, you know, in order to resolve a
8 variety of matters and to get information to assist
9 in the CEP, that's -- we were trying to gather
10 information. So communications continued.

11 Q. Let's turn to the questions themselves.
12 Who drafted the questions?

13 A. In terms of -- I am not sure I should be
14 commenting or responding because of counsel.

15 Q. Let me ask it this way: Did you draft the
16 questions?

17 A. I created an early draft of questions.

18 Q. And who assisted you in -- well, strike
19 that.

20 Who else was involved in the drafting of
21 the questions?

22 MR. LeVEE: Ms. Willett, you can say
23 counsel if that's the answer, or if it is not
24 counsel, whoever is the noncounsel.

25 THE WITNESS: I worked with counsel on

1 drafting the questions.

2 Q. BY MR. De GRAMONT: Did you work with
3 anyone besides counsel in drafting the questions?

4 A. Not that I recall.

5 Q. Now, at this point in time, ICANN,
6 VeriSign and NDC had the following materials in
7 their hands: They had the DAA and the other
8 materials forwarded by Mr. Johnston in his 23rd
9 August letter to Mr. Enson, right?

10 A. I -- yes. That was the letter you just
11 showed me.

12 Q. Yes.

13 A. From Mr. Johnston, and I didn't get a
14 chance to read all of that, but did that include --

15 Q. It did forward the DAA, yeah.

16 A. Okay. Okay.

17 Q. And ICANN and VeriSign and NDC had the two
18 letters that Mr. Hemphill had sent to Mr. Atallah
19 since they were publicly posted, right?

20 A. Yes.

21 Q. And VeriSign and NDC knew the whole
22 history underlying the DAA and how VeriSign and NDC
23 interacted after the DAA was signed, right?

24 MR. LeVEE: I'm sorry, I didn't understand
25 that question. Can you read it back?

1 MR. De GRAMONT: Yes.

2 THE WITNESS: I'm sorry.

3 MR. De GRAMONT: I'll just read it. I'll
4 restate it.

5 Q. So VeriSign and NDC, of course, knew the
6 whole history of the DAA and how they had acted
7 under its terms, right?

8 A. Well, since it's an agreement between
9 them, I would guess they are the only two who would
10 see it.

11 Q. And all Afiliias had was VeriSign's press
12 release and footnotes in VeriSign's SEC filings,
13 right?

14 A. I don't know what Afiliias had.

15 Q. When you created the early draft of the
16 questions, had you reviewed the -- you never
17 reviewed the DAA; is that correct?

18 A. Correct.

19 Q. And you never reviewed Mr. Johnston's
20 letter, correct?

21 A. Correct.

22 Q. And let me ask you this: Did you do the
23 very first draft of the questions?

24 A. I created a draft of questions, yes.

25 Q. And what did you use to create the

1 questions?

2 A. The information that had been made
3 available to me from the Donuts/Ruby Glen
4 complaints prior to the auction. I may have looked
5 at Mr. Hemphill's letters. I don't recall
6 specifically. It was more my personal knowledge.

7 Q. And were -- do you recall how many drafts
8 after your first draft were created?

9 A. I don't recall.

10 Q. Okay. And were you involved in any of the
11 subsequent drafts, or did you turn the first draft
12 over to counsel and they did the rest?

13 A. I worked with counsel on multiple drafts.

14 Q. And were you working both with in-house
15 counsel and outside counsel?

16 MR. LeVEE: Mr. Chairman, I don't think
17 that's an appropriate question. I object on the
18 basis of privilege.

19 MR. De GRAMONT: I don't see why it
20 matters which counsel she's interacting with. It
21 is just a yes-or-no question or one or the other,
22 and/or both question.

23 MR. LeVEE: I don't --

24 ARBITRATOR BIENVENU: Mr. LeVee.

25 MR. LeVEE: I don't see how identifying

1 who the lawyers are is appropriate under the
2 privilege. She has stated that she worked with
3 counsel, and -- well, yeah, that's my objection.

4 MR. De GRAMONT: The privilege log
5 identifies both inside counsel and outside counsel
6 corresponding with ICANN personnel at this time.
7 So, again, the question is simply did you work with
8 solely in-house counsel, or were outside counsel
9 also interacting with you in the preparation of
10 these questions?

11 MR. LeVEE: I'll let that -- I will
12 withdraw my objections. Ms. Willett can answer if
13 she recollects.

14 THE WITNESS: My recollection is I worked
15 exclusively with inside counsel, but it's been a
16 long time. That's my recollection.

17 Q. BY MR. De GRAMONT: And do you recall how
18 the questions you drafted differed from those that
19 went out finally?

20 A. I don't recall.

21 Q. Were they very different, only slightly
22 different?

23 A. I believe I drafted a handful, maybe six
24 questions, a handful of questions, and they were
25 less formal.

1 Q. Let's look at a few of the questions.

2 MR. LeVEE: Mr. Chairman, this is a good
3 time to break. I want to raise a matter that I
4 doubt you want Ms. Willett on the screen for.

5 MR. De GRAMONT: May I just get through
6 this document and then we can take a break?

7 MR. BIENVENU: Unless the matter relates
8 to this document. Does it?

9 MR. LeVEE: No, it does not.

10 ARBITRATOR BIENVENU: Okay. So yes,
11 proceed with your questions on this document,
12 Mr. De Gramont, and then choose when would be a
13 good time without breaking the flow of your cross
14 for our second break.

15 MR. De GRAMONT: Thank you, Mr. Chairman.

16 Q. So if we look at the first question, the
17 last sentence, it says, quote, "Please provide or
18 describe any evidence of which you are aware
19 regarding whether ownership or control of NDC
20 changed after NDC applied for the .WEB gTLD,"
21 period, close quote.

22 Do you see that?

23 A. Yes.

24 Q. Now, at this point ICANN, VeriSign and NDC
25 all knew that there had been no change of ownership

1 or control of NDC the company, right?

2 A. Yes, that was my understanding.

3 Q. But Afiliias, not having seen the DAA, had
4 no idea what had happened, right?

5 A. Again, I don't know what Afiliias knew or
6 didn't know.

7 Q. So if you knew that -- if you knew that
8 there had been no change of ownership or control of
9 NDC the company, why were you asking Afiliias to
10 present evidence of that?

11 MR. LeVEE: I do think that invades the
12 privilege. I object on that basis.

13 ARBITRATOR BIENVENU: Mr. De Gramont, do
14 you want to respond to the objection?

15 MR. De GRAMONT: I am not sure I
16 understand it well enough to respond to it.

17 MR. LeVEE: I am happy to say I am trying
18 to keep my objections short.

19 MR. De GRAMONT: Let me try to rephrase
20 it.

21 Q. Did you draft this particular question?

22 A. I did not.

23 Q. Okay. Question 2 states -- well, in
24 Question 2 ICANN asks for evidence that Mr. Rasco
25 and Mr. Bezsonoff gave false testimony when they

1 said there was no change of ownership or control of
2 NDC the entity, right?

3 A. I see that.

4 Q. And, again, at this point, NDC and
5 VeriSign and ICANN all knew that there had been no
6 change of ownership or control of NDC the company,
7 right?

8 A. So you asked me that earlier. Let me
9 clarify. I still had that informed perception. I
10 can't speak to all of ICANN. My belief is that
11 NDC -- and still is -- that there was no change of
12 control of NDC based on what Mr. Rasco had told me
13 in his responses because I had never seen the DAA.
14 So that is what informed my perspective.

15 Q. The questions are filled with references
16 to Mr. Hemphill's letters; is that right?

17 A. There are several, yes.

18 Q. Yeah. So, for example, Question 4 says,
19 "In his 8 August 2016 letter Scott Hemphill
20 stated," quote, "a change in control can be
21 effected by contract as well as by changes in
22 equity ownership. Do you think that an applicant's
23 making a contractual promise to conduct particular
24 activities in which it is engaged in a particular
25 manner constitutes a 'change in control' of the

1 applicant," unquote.

2 How could Afiliias possibly answer that
3 question without having the DAA?

4 A. Again, these questions as they stand were
5 work product from counsel, and the rationale about
6 responses was something that I discussed with
7 counsel.

8 Q. And while there are references to
9 Mr. Hemphill's letter, there are, of course, no
10 references to arguments attributed to
11 Mr. Johnston's letter, right, because that was
12 still confidential?

13 A. I hadn't seen it, and yes, it was
14 confidential. I don't know the rationale as to why
15 anything -- I just glanced at it here. I don't
16 know what was or wasn't included based on that
17 letter.

18 Q. Did you at any -- why didn't you ask to
19 see a copy of the DAA in preparing these questions?

20 A. Honestly, I don't even -- I don't recall
21 exactly when I became aware of a DAA or a side
22 agreement between NU DOT CO and VeriSign. It is
23 somewhere in August, September I generally became
24 aware of that based on the information from
25 counsel, but I hadn't read the agreement, and

1 personally, I viewed any agreement between those
2 parties would have been confidential amongst
3 themselves.

4 Q. You didn't think the agreement had any
5 relevance to ICANN or ICANN's determination of
6 whether the agreement violated the gTLD rules?

7 A. I don't -- I don't recall -- since I
8 hadn't read the agreement, I don't think I had an
9 opinion on its relevance.

10 Q. Well, isn't that a little bit circular,
11 Ms. Willett? How could you possibly determine
12 whether the agreement was relevant to whether NDC
13 had violated its rules without reviewing the
14 agreement?

15 A. So, okay, generally we talked about the
16 auction rules, and my general understanding based
17 on VeriSign's press release is that they had some
18 future intention, hopes, aspirations to operate the
19 TLD if ICANN approved of a TLD assignment. I also
20 understood from the press release that they had
21 committed funds that were put forward towards the
22 auction.

23 So to me that was akin to and consistent
24 with the auction rules and an applicant being able
25 to designate a bidder to apply -- to act on their

1 behalf in an action and to submit bids and to
2 submit the funds and do the bidding during an ICANN
3 auction.

4 Q. But, Ms. Willett, not having read the DAA,
5 you have no idea whether the press release and NDC
6 statements accurately reflected what the DAA
7 required?

8 MR. LeVEE: Chairman, this is becoming
9 very argumentative, and it is --

10 ARBITRATOR BIENVENU: Overruled. I'll
11 allow the question.

12 THE WITNESS: So applicants had agreements
13 with a variety of vendors and third parties
14 regarding all sorts of aspects of their application
15 and future gTLD operations.

16 There were applicants -- more than a
17 handful of applicants who signed a Registry
18 Agreement and then immediately transferred a TLD to
19 another registry operator, requested such an
20 assignment from ICANN.

21 So just having some sort of agreement, I
22 didn't -- you know, again, I wasn't a lawyer, but
23 they -- I was looking at the applicant's statements
24 that the applicant had made, the information they
25 had provided in the application and the subsequent

1 questions, and that's how I was reviewing and
2 considering the matter.

3 Q. BY MR. De GRAMONT: But not knowing the
4 DAA's terms, you had no way of knowing whether the
5 DAA was comparable to the other arrangements that
6 you just described; isn't that fair?

7 A. I had no way of knowing what was in the
8 DAA or any of those other third-party agreements.

9 Q. You could have asked for the DAA, right?

10 A. Perhaps.

11 Q. Did you ever ask for the DAA?

12 A. I did not.

13 Q. And since you never reviewed the DAA, you
14 don't know whether the questions and the
15 questionnaire reflected any of the terms of the
16 DAA; is that correct?

17 A. That's accurate.

18 Q. And who asked you to draft the
19 questionnaire in the first place?

20 A. It was based on a discussion with counsel.

21 Q. It wasn't Mr. Atallah or any other
22 nonlawyer at ICANN?

23 A. No.

24 Q. And was it your idea to send out the
25 questionnaire?

1 A. Not that I recall.

2 MR. De GRAMONT: Okay. This would be a
3 good time to break, Mr. Chairman.

4 ARBITRATOR BIENVENU: Very well, Mr. De
5 Gramont. Thank you very much.

6 So could we ask our friends to remove the
7 witness from the hearing room.

8 And then, Mr. LeVee, you wanted to raise a
9 point of order?

10 MR. LeVEE: Yes, and I'll wait for
11 Ms. Willett to be temporarily excused.

12 (Discussion off the record.)

13 MR. ENGLISH: She has left the room.

14 ARBITRATOR BIENVENU: Mr. LeVee.

15 MR. LeVEE: Thank you, Mr. Chairman. By
16 my watch, Mr. De Gramont has now cross-examined
17 Ms. Willett for over four hours. The Afiliias
18 estimate was four hours.

19 Again, I am not necessarily saying that
20 people have to stick within the estimate, but I do
21 believe Afiliias has gone over with respect to all
22 of the witnesses, and so we find ourselves faced
23 with a situation where Mr. Ali is emailing me and
24 my team -- it is very difficult for me to respond
25 to email when I am trying to defend a witness --

1 asking about Mr. Disspain's availability next week
2 when I told the Panel yesterday that he wasn't
3 available next week.

4 Candidly I didn't ask him originally if he
5 was available next week because the schedule made
6 it clear ICANN's witnesses were going first and
7 Mr. Disspain was going to be finished today.

8 At this point, it is not even clear we are
9 going to get to Mr. Disspain today, so we will do
10 it tomorrow, but that creates a problem for
11 Mr. Rasco.

12 My concern is you had asked for a
13 cross-examination estimate at the end -- at the
14 beginning of the next session, and you were not
15 provided that. I did not interrupt. But we still
16 don't have an estimate, and we are now past the
17 number of hours originally estimated for this
18 witness.

19 I am not saying we have to establish, but
20 I think you understand my point. We find ourselves
21 in a difficult position, and it is utterly unfair
22 that I am being asked about the availability of a
23 witness next week when I said yesterday that he was
24 not available.

25 MR. ALI: Mr. Chairman.

1 ARBITRATOR BIENVENU: Mr. Ali, just before
2 you respond, if I may.

3 Mr. LeVee, we hear you, and we are
4 conscious of the problem that you allude to, but
5 have you had a chance, you and your colleagues, to
6 speak with counsel for the claimant and counsel for
7 the Amici to try to, as Mr. Marenberg helpfully
8 suggested, to try to find a path forward, has that
9 taken place or not?

10 MR. LeVEE: We have not spoken, but I have
11 received email subsequent to the last time we had
12 this conversation asking me if Mr. Disspain could
13 go next week, and the answer was no. That seems to
14 be their proposed resolution.

15 ARBITRATOR BIENVENU: My suggestion at
16 this point in time, and I know that our breaks are
17 short, but I think counsel should have a
18 conversation and try to find a constructive
19 solution to the problem that we are facing.

20 MR. LeVEE: May I -- sorry.

21 ARBITRATOR BIENVENU: Yes.

22 MR. LeVEE: It is not me. I thought you
23 were done.

24 May I ask the members of the Panel if they
25 were -- if they had flexibility to go a little

1 later tomorrow?

2 ARBITRATOR BIENVENU: I haven't discussed
3 that with my colleagues, but we have discussed
4 possible solutions to the problem that we face, and
5 without in any way encouraging parties to revise
6 their estimates, we are able to offer the parties
7 an additional day on the 14th of August. We are
8 not available on the 13th, but we can make
9 ourselves available on the 14th.

10 ARBITRATOR KESSEDJIAN: In addition,
11 Pierre, are we flexible for tomorrow night?

12 ARBITRATOR BIENVENU: I wasn't going to
13 answer that question before I had consulted with my
14 co-panelists.

15 ARBITRATOR KESSEDJIAN: Because I am.

16 ARBITRATOR CHERNICK: I would be available
17 to start earlier but not to go later.

18 ARBITRATOR KESSEDJIAN: That's fine with
19 me.

20 ARBITRATOR BIENVENU: I am available at
21 both ends.

22 ARBITRATOR KESSEDJIAN: And by the way, I
23 am available on Saturday. I don't know if anybody
24 is working on Saturdays, but that could be also an
25 option. Mr. Rasco is not available next week, so

1 perhaps he's available Saturday.

2 ARBITRATOR CHERNICK: I am not.

3 ARBITRATOR KESSEDJIAN: You are not.

4 ARBITRATOR BIENVENU: So I hope that the
5 parties, with the additional availability of the
6 Panel, can work this out, but I am very reluctant
7 to direct these discussions before they have taken
8 place.

9 The parties are fortunately represented by
10 counsel who have experience, know each other and
11 are solution-oriented. So I would just invite them
12 to have a first crack at finding a path forward and
13 to report back to the Panel.

14 MR. LeVEE: We will do that, Mr. Chairman.
15 Is it possible for Mr. De Gramont to give us a time
16 estimate of his remaining time?

17 ARBITRATOR BIENVENU: He will do that in
18 the course of your discussions with him.

19 MR. LeVEE: Thank you.

20 ARBITRATOR BIENVENU: Thank you. So we
21 break for 15 minutes, and maybe our friend JD can
22 tell Ms. Willett that it will be 15 minutes more.

23 MR. De GRAMONT: Thank you, Mr. Chairman.

24 MR. ENGLISH: Will do.

25 (Whereupon a recess was taken.)

1 MR. LeVEE: Chairman, members of the
2 Panel --

3 ARBITRATOR BIENVENU: Please, Mr. LeVee, a
4 little bit louder.

5 MR. LeVEE: Sorry. The parties have
6 spoken, and I think we have an agreement. We will
7 accept the Panel's offer, generous offer to start
8 one hour earlier tomorrow. So we will start 8:00
9 a.m. -- sorry, 7:00 a.m. Pacific, 10:00 o'clock
10 Eastern and must be 4:00 o'clock or so in Paris.

11 And then Mr. Rasco will go first and
12 Mr. Disspain will go second.

13 But the agreement of counsel is that
14 Afilias will finish both witnesses tomorrow. So
15 they will agree they are going to try to cut their
16 examinations a little shorter and get an extra hour
17 tomorrow. I know that we need to finish tomorrow
18 at the normal time to accommodate the panelists.

19 Afilias has agreed that they will finish
20 both examinations tomorrow, giving a reasonable
21 amount of time for redirect examination of the
22 witnesses.

23 MR. ALI: If I may just add on that
24 particular point that I believe the agreement
25 necessarily contemplates that Mr. Marenberg will

1 also observe the commitment I made that ICANN will
2 have sufficient time for redirect of Mr. Disspain.

3 We can finish our crosses, but the
4 agreement could get busted if Mr. Marenberg's
5 redirect goes too long. So it necessarily means
6 that we are all working towards the goal that we
7 have -- that you just laid out, Jeff, correct?

8 MR. LeVEE: Yes. Our understanding is we
9 are starting early because we understand that
10 Mr. Chernick needs to leave at the normal 1:00
11 o'clock time, and that's good. He has a
12 commitment.

13 So our agreement is that we are going to
14 get those two witnesses done between -- I am going
15 to do it on Pacific time, which will be 7:00 a.m.
16 Pacific and 1:00 p.m. Pacific.

17 MR. ALI: My understanding is we would
18 have an extra hour tomorrow, right?

19 ARBITRATOR CHERNICK: Yes.

20 MR. LeVEE: 7:00 a.m. start time.

21 ARBITRATOR BIENVENU: Okay. All right.

22 We commend the parties for their cooperative
23 approach to solving this problem. That probably
24 will require Panel members to be restrained in
25 their own questions, but so be it.

1 So then do we bring any other points that
2 the parties wish to discuss? No, so we'll bring
3 Ms. Willett back.

4 ARBITRATOR CHERNICK: Could I ask if we
5 are to hold August 14th or not?

6 MR. LeVEE: I don't think that will be
7 necessary at all.

8 ARBITRATOR CHERNICK: Okay.

9 MR. ALI: I think that's right.

10 ARBITRATOR BIENVENU: Okay. I will
11 exercise my prerogative to say that we should all
12 pencil it in in case. Because I think on Monday no
13 one would have predicted where we find ourselves on
14 Thursday afternoon. So let's pencil it in in case.

15 Okay. Let's bring Ms. Willett back in.

16 Mr. De Gramont, are you ready to continue
17 your cross-examination? We cannot hear you, sir.

18 MR. De GRAMONT: I'm sorry, can you hear
19 me now?

20 ARBITRATOR BIENVENU: We can.

21 MR. De GRAMONT: Thank you, Mr. Chairman.

22 Q. Welcome back, Ms. Willett. I have a
23 couple more questions about the questionnaire. As
24 you saw counsel changing your questions, were you
25 curious about the basis on which they were changing

1 them?

2 MR. LeVEE: That invades the privilege
3 clearly.

4 Q. BY MR. De GRAMONT: Let me ask it this
5 way: Did you wonder why counsel was changing the
6 questions in the manner that they changed them?

7 MR. LeVEE: I don't understand how that
8 changes things. The witness sees something that
9 counsel gives her, and then you're asking for her
10 mental impressions following receipt of information
11 from counsel.

12 MR. De GRAMONT: Yes. It is not her
13 mental impressions that are privileged.

14 MR. LeVEE: That's exactly what it is.
15 Were you surprised?

16 MR. De GRAMONT: Well, the communications
17 are privileged and the work product is privileged,
18 but Ms. Willett's frame of mind is not privileged.

19 MR. LeVEE: Mr. Chairman, I object to the
20 question.

21 ARBITRATOR BIENVENU: Mr. De Gramont, can
22 you comment on the relevance of that question?

23 MR. De GRAMONT: In the interest of moving
24 forward, I will move forward and withdraw the
25 question.

1 ARBITRATOR BIENVENU: Thank you.

2 Q. BY MR. De GRAMONT: Ms. Willett, what did
3 you do with the -- well, let me ask you this: Did
4 you receive responses from all of the recipients of
5 the questionnaire?

6 A. I recall there was someone who did not
7 respond.

8 Q. It was Ruby Glen that did not respond,
9 right?

10 A. Donuts, that sounds right.

11 Q. So you received responses from Afilias and
12 VeriSign and NDC; is that correct?

13 A. That's my recollection.

14 Q. And what did you do with them upon
15 receiving them?

16 A. I passed those responses on to ICANN's
17 legal team.

18 Q. Did you read the responses?

19 A. I believe I did.

20 Q. And did you undertake any analysis of the
21 responses yourself?

22 A. I did not.

23 Q. Do you know if ICANN counsel did?

24 A. So any knowledge I have of what counsel
25 did is based on communication I had with counsel.

1 Q. So let me just ask, do you know if they
2 did any analysis, without telling me the substance
3 of that?

4 Did I just check out --

5 (Discussion off the record.)

6 THE WITNESS: I said I provided the
7 responses to counsel. I am not exactly sure what
8 counsel did with them.

9 Q. BY MR. De GRAMONT: Were you aware -- are
10 you aware that ICANN has asserted in these
11 proceedings that its Board held a workshop in early
12 November 2016 at which .WEB was discussed?

13 A. In preparation for this hearing, I had
14 discussions with counsel.

15 Q. Were you aware in 2016 that there was a
16 Board workshop at which .WEB was discussed?

17 A. I was not.

18 Q. Were you asked in 2016 to help prepare
19 materials for the Board to consider the .WEB issue?

20 A. Not that I recall, no.

21 Q. To your knowledge, did ICANN ever reach a
22 decision on what to do with the concerns that
23 Afiliias made regarding .WEB, either before or after
24 November 2016?

25 A. Could you repeat the question? I want to

1 make sure I am answering correctly.

2 Q. Yeah. Do you know if ICANN ever reached a
3 decision regarding the concerns that Afilias had
4 made regarding .WEB?

5 A. Well, I mean, ICANN's a whole bunch of
6 people, but I am not aware of a specific decision
7 regarding Afilias' letters.

8 Q. Were you ever told that once the
9 contention set comes off hold, you should proceed
10 to delegate to NDC?

11 A. No.

12 Q. Were you ever told that the contention set
13 should stay on hold until any pending and
14 anticipated accountability mechanisms were
15 completed?

16 A. That isn't something I would have been
17 told. That would have been our practice. If there
18 were any discussions, it would have been with
19 counsel about that, but I can speak to our general
20 practice within the GDD, Global Domains Division,
21 and the new gTLD Program, our practice was to keep
22 contention sets or applications on hold until
23 accountability mechanisms had been resolved.

24 Q. But you testified that that practice was
25 made on a case-by-case basis depending on the

1 particular circumstances. Do you know if, based on
2 the particular circumstances here, ICANN decided to
3 implement that practice?

4 A. So when I was discussing a case-by-case
5 basis, it was about looking at that particular
6 accountability mechanism, and it was about making
7 the decision to put the application on hold.

8 But once it was on hold, to my
9 recollection, we kept things on hold, and it was a
10 matter of program operations, operational practice
11 to keep them on hold until we became aware and
12 informed that those accountability mechanisms were
13 resolved.

14 Q. In late 2016 or early 2017 the U.S.
15 Department of Justice commenced an antitrust
16 investigation of the VeriSign-NDC arrangements.

17 Do you recall that?

18 A. I became aware of it, yes.

19 Q. And were you told that you should take no
20 action regarding .WEB pending that investigation?

21 A. The conversations I recall were with
22 counsel.

23 Q. Do you recall that there was a long hiatus
24 until the DOJ investigation concluded in January
25 2018?

1 A. Well, the program wasn't on hiatus. My
2 recollection -- if you mean the application and
3 contention set remained on hold in that whole
4 period, it did until 2018 June.

5 Q. Okay. Did you know that in January 2018
6 VeriSign contacted ICANN staff to inquire about the
7 process for NDC to assign its .WEB Registry
8 Agreement to VeriSign?

9 A. I was unaware of that prior to preparing
10 for this hearing.

11 Q. Let me just quickly show you -- let's
12 quickly take a look at what is behind Tab 31,
13 Exhibit C-115. It is an exchange of emails between
14 Jessica Hooper of VeriSign and ICANN staff members
15 and then several internal emails.

16 If you look at Page 2, this is the email
17 from Jessica Hooper at VeriSign. Do you know
18 Ms. Hooper or do you know who she is?

19 A. I do not.

20 Q. And it is to Karla Hakansson at ICANN. Do
21 you know Ms. Hakansson?

22 A. Yes, I do.

23 Q. Is she a member -- was she a member of
24 your team?

25 A. She did not report up to me. She was part

1 of the Global Domains Division under another
2 executive.

3 Q. And if you look at the second page, she
4 writes, "I am beginning to take a high-level look
5 at the documents we would need to fill out to
6 assist NU DOT CO with the assignment process for
7 .WEB when the time comes."

8 Then if you turn to Page 1, Ms. Hakansson
9 says, "Great timing on Jessica's part! VeriSign's
10 ears must have been burning," and there's a little
11 smiley face emoji. You were not aware of these
12 emails at the time?

13 A. No, I was not.

14 Q. You didn't hear anything about them?

15 A. Not that I recall.

16 Q. Were you aware that Mr. Rasco had had a
17 phone call with Mr. Atallah and Mr. John Jeffrey in
18 around this time frame?

19 A. Not that I recall.

20 Q. Can you turn to Tab 2 in your binder,
21 which is Exhibit C-182? And you'll see on December
22 12th, 2017, there's a reference to Peg Rettino.
23 Who was Ms. Rettino?

24 A. She's Mr. Jeffrey's executive assistant.

25 Q. And John Jeffrey is the general counsel of

1 ICANN; is that correct?

2 A. That's correct.

3 Q. And then there's an email from Mr. Rasco
4 dated December 12, 2017, "Thank you. I look
5 forward to speaking on Thursday."

6 Do you know anything about that telephone
7 conference?

8 A. I don't.

9 Q. Then Mr. Rasco writes again on February
10 15th, 2018, quote, "Dear John and Akram, I hope
11 this messages finds you well. In line with our
12 previous conversation, I am contacting you
13 regarding NU DOT CO signing the Registry Agreement
14 for .WEB. Now that the DOJ CID has concluded and
15 that there are no pending accountability mechanisms
16 associated with our successful bid at the auction
17 for this string in 2016, the next step in the
18 process is for us to execute the Registry
19 Agreement. Please let me know if you'll have
20 sufficient time to get that to me this week.
21 Thanks so much for all your help throughout this
22 process, and I look forward to wrapping this up,"
23 unquote.

24 You were unaware of that communication in
25 February 2018?

1 A. Yes, I was unaware of that.

2 Q. Did you have any communications with
3 anyone from NDC after NDC submitted the
4 questionnaire?

5 A. And by "questionnaire," you mean that
6 September 2016 twenty questions?

7 Q. Yes, ma'am.

8 A. I don't recall any conversation.

9 Q. Okay.

10 A. Sorry.

11 Q. Did you know that the Ruby Glen CEP
12 terminated on 30 January 2018?

13 A. That sounds about right. I would have
14 been informed of that.

15 Q. And Ruby Glen had until 14 February 2018
16 to file an IRP but failed to do so.

17 Do you remember that?

18 A. I do recall that.

19 Q. Okay. And were you aware that Afiliias had
20 filed a DIDP request on 23 February 2018?

21 For the court reporter, it is D-I-D-P. It
22 stands for Document Information Disclosure Policy.

23 A. Yes, I do recall that request.

24 Q. And did you see the DIDP request?

25 A. I don't believe I did.

1 Q. Okay. Were you involved in responding to
2 the DIDP request in any way?

3 A. I don't recall. My only involvement would
4 have been with counsel, but I don't recall
5 supporting that request.

6 Q. Does a DIDP request put a contention set
7 on hold under the practice you described?

8 A. Generally no. We considered a DIDP to
9 be -- it was not one of those other three
10 accountability mechanisms.

11 Q. And are you aware that ICANN denied most
12 or all of the DIDP requests?

13 A. Of that specific DIDP request?

14 Q. Yes, yes.

15 A. I don't recall the specifics of that
16 request or the response.

17 Q. Do you recall that Afilias submitted a
18 request for reconsideration of the Board's denial
19 of the DIDP request?

20 A. I do.

21 Q. And you're aware that in early June 2018
22 the Board denied the request for reconsideration?

23 A. Yes. I believe they dismissed that
24 reconsideration request.

25 Q. And that apparently caused the contention

1 set to come off hold; is that correct?

2 A. Yes. That was -- on that basis, after the
3 Board's consideration there, we did take the
4 contention set off hold.

5 Q. When you say we took the contention set
6 off hold, whom do you mean by "we," who is "we"?

7 A. The program team is responsible for
8 managing, administering the applications and the
9 contention sets.

10 Q. So someone notified you that the request
11 for reconsideration was denied, and your team took
12 the contention set off hold?

13 A. That's accurate.

14 Q. All right. So take a look at Tab 33,
15 which is Exhibit C-166.

16 ARBITRATOR KESSEDJIAN: Mr. De Gramont, I
17 am terribly sorry, but I don't see Pierre Bienvenu
18 on the screen.

19 ARBITRATOR BIENVENU: I am still here, and
20 you will see me in a second.

21 ARBITRATOR KESSEDJIAN: Okay. Good.
22 Sorry.

23 MR. De GRAMONT: Thank you, Professor, for
24 that. We don't want to lose the Chairman or any
25 other members of the Panel. Thank you.

1 ARBITRATOR BIENVENU: I was there.

2 Q. BY MR. De GRAMONT: So, Ms. Willett, we
3 are looking at Tab 33, Exhibit C-166. Do you have
4 that?

5 A. Yes, I see that.

6 Q. And it is an email from Russ Weinstein
7 dated June 6, 2018, to Lisa Carter, Linett Nardone
8 and Karla Hakansson. What department were they in?

9 A. They reported to Russ Weinstein in the
10 Global Domains Division. I believe it was
11 contracted party -- they were on the engagement
12 side of the division.

13 Q. When you say "the engagement side," that's
14 the side of ICANN that engages with parties to
15 enter into registry agreements?

16 A. Well, they engage with contracted parties
17 for the most part. They did have some applicant
18 engagement function, but they weren't involved in
19 administering the new gTLD Program functions.

20 Q. Okay. Then you are copied, as are Amy
21 Stathos, Christopher Bare and Cyrus Namazi. I
22 think we have identified the others. Who is Cyrus
23 Namazi?

24 A. In this period of 2018 he was a peer of
25 mine. He was overseeing that portion of the gTLD

1 division.

2 Q. Okay. So Mr. Weinstein writes, "Lisa,
3 Linett and Karla, wanted to give you an update re:
4 .WEB/.WEBS. The question for reconsideration from
5 Afiliias has been denied and the contention set has
6 been taken off hold."

7 It goes on to say, quote, "Please let me
8 know if any questions come from your accounts
9 regarding next steps. Those should continue to be
10 managed by the program team," unquote.

11 And the program team is your team?

12 A. That's correct.

13 Q. Now, the email below is from you, and it
14 refers to an updated scorecard for .WEBS.

15 Just very briefly, what is a scorecard?

16 A. In this context, I believe the scorecard
17 was a summarized chart of the current state, some
18 background information. We prepared those to
19 inform executives about various matters.

20 Q. Did the scorecard contain information
21 about the status of whether contention sets were on
22 hold or not?

23 A. Yes. It would provide an update as to the
24 current status of that application or contention
25 set.

1 Q. So Mr. Atallah and these other executives
2 would have seen that the .WEB contention set was
3 taken off hold in the scorecard?

4 A. Well, Ms. Stathos is copied on here. My
5 understanding is that that scorecard and the
6 communications around it were privileged, but I
7 don't know if that's been -- no longer the case.

8 MR. De GRAMONT: Mr. LeVee, are you
9 raising an objection to my question?

10 MR. LeVEE: Now that I understand what
11 your question is, I do raise a privilege objection
12 because the scorecards are maintained by the legal
13 department.

14 Q. BY MR. De GRAMONT: But your understanding
15 is that the scorecard reflects the on-hold status
16 of the contention sets and that it is sent to
17 executives, including Mr. Atallah?

18 A. Yes. It is shared with executives to make
19 sure that they are informed of the current state of
20 certain matters.

21 Q. Would you turn to Tab 34, which is Exhibit
22 C-167, and it's an email from Jared Erwin, and
23 Mr. Erwin, again, is the gentleman who corresponded
24 with Mr. Rasco in June of 2016; is that correct?

25 A. That's correct.

1 Q. So he's still part of your team in June
2 2018?

3 A. Yes.

4 Q. And he's writing to you and Mr. Bare and
5 he copies Grant Nakata. Who is Mr. Nakata?

6 A. He was another member of the program team.
7 Mr. Erwin and Mr. Nakata reported to Mr. Bare, who
8 reported to me.

9 Q. Mr. Erwin writes, "Hi, Christine and
10 Chris. We have made the contention set updates
11 (on-hold arrow resolved) and notified the
12 applicants. By the end of the day, Grant will be
13 conducting outreach to the prevailing applicants
14 (NU DO and Vistaprint) to confirm/provide updated
15 signatory contact information," unquote.

16 Now, Vistaprint is the winner of the .WEBS
17 contention set, right?

18 A. .WEB and .WEBS were put in one contention
19 set, but Vistaprint was the prevailing party for
20 the string .WEBS, W-E-B-S.

21 Q. So Mr. Erwin is informing you that the
22 delegation process is -- of .WEB to NU DOT CO is
23 proceeding?

24 A. So this -- no, this didn't pertain to
25 delegation. This was essentially saying that --

1 indicating that since the -- informing us that
2 since the status change had been made, which
3 Mr. Erwin was responsible for, that Mr. Nakata
4 would be proceeding to reengage with the applicants
5 to restart the contracting process from where it
6 left off when these applications were put on hold
7 back in 2016.

8 Q. I see. So NDC had been sent the CIS, is
9 that what it's called?

10 A. The Contracting Information Request, CIR.

11 Q. That's right. This was the next step for
12 providing signatory contract information; is that
13 right?

14 A. The next step -- since almost two years
15 had gone by, my team was confirming signatory
16 information at that time.

17 Q. And Mr. Erwin states that ICANN has
18 notified the other applicants?

19 A. Notified, yes.

20 Q. Okay. And if we look at Tab 35, Exhibit
21 C-62, it's from Global Support Center, dated June
22 7th, 2018. It is to Mr. Kane at Afilias. I
23 believe he was in Australia at the time, which is
24 why it is dated June 7. And it says, "Dear John,
25 thank you for contacting the ICANN team. Case

1 00892769 has been closed," and then there's case
2 information. And then it says, "Please contact us
3 if you have any additional questions."

4 Do you see that?

5 A. I do.

6 Q. So this was the notification to Afilias
7 that the contention set had been taken off hold, do
8 I understand that correctly?

9 A. I am not sure exactly what this case is
10 without looking at the whole case. I couldn't
11 speak to this.

12 Q. Is this the form of notice that ICANN
13 typically gives to members of the contention set
14 when the contention set is closed?

15 A. It is not what I would expect to see, but
16 I did not typically look at those communications
17 going out from this portal system.

18 Q. Are you aware of any other notification
19 that was sent to Afilias about the -- taking the
20 contention set off hold?

21 A. I am not aware.

22 Q. Are you aware that Afilias' counsel had
23 asked ICANN for advanced notice if the contention
24 set was going to be taken off hold?

25 A. I recall that.

1 Q. And you recall that ICANN declined to give
2 any advanced notice, right?

3 A. It was not our practice to have outside
4 exceptional communications with applicants. We
5 were treating Afilias like we would any other
6 applicant in the contention set and informing them
7 at the same time we informed everyone else.

8 Q. Well, that's interesting because in August
9 2016, after VeriSign had issued its press release,
10 VeriSign's outside counsel got a call from ICANN's
11 outside counsel asking them for information about
12 .WEB.

13 Do you recall that?

14 A. I have no idea what counsel did, outside
15 counsel.

16 Q. No one from Jones Day called Afilias'
17 counsel when the contention set was taken off hold,
18 right?

19 A. I have no idea.

20 Q. Let's take a look at Tab 36 of your
21 binder, which is Exhibit C-169, and we are going to
22 start at the end. And it is an email dated June
23 12th from Grant Nakata to you and various others,
24 and it says, quote, "Hello, everyone. We have the
25 following contracting request for your review and

1 approval. Attached please find the RA sending
2 list."

3 I think "RA" stands for "Registry
4 Agreement"?

5 A. It does.

6 Q. It goes on to say, quote, "If you recall,
7 the .WEB/.WEBS contention set had resolved via
8 indirect contention auction in July 2016. The
9 contention set was later placed on hold due to a
10 pending accountability mechanism. The
11 accountability mechanisms closed and the contention
12 set was reverted back to resolved. NU DOT CO LLC,
13 the prevailing applicant for .WEB, has completed
14 the CIR form, and we are now prepared to issue a
15 Registry Agreement," unquote.

16 Do you see that?

17 A. I do.

18 Q. I take it that various approvals for that
19 to happen were required?

20 A. That's correct.

21 Q. So we see an approval from Mr. Bare, from
22 you, from Mr. Weinstein, and then at the top
23 Mr. Nakata writes on June 14th, quote, "We have the
24 following contracting request for your review and
25 approval. Attached please find the RA execution

1 list. NU DOT CO has signed the Registry Agreement
2 for .WEB, and we are now able to proceed to
3 countersign."

4 So if I understand correctly, the Registry
5 Agreement has been sent to NU DOT CO., they have
6 returned it and Mr. Nakata says, quote, "We are now
7 able to proceed to countersign," unquote.

8 Am I understanding that correctly?

9 A. So essentially it is two separate requests
10 for approvals in this email chain.

11 Q. And so after the June 14th email there's a
12 request for additional approvals to proceed to
13 countersign?

14 A. So the first request for approval from
15 Mr. Nakata, initiated on 12 June, was for approval
16 to send the Registry Agreement. Then he evidently
17 received that. And then the email from Mr. Nakata
18 on 14 June indicates that NU DOT CO had signed the
19 Registry Agreement. So he was then seeking a
20 second approval from those individuals to -- prior
21 to ICANN's execution, countersigning of the
22 Registry Agreement.

23 Q. And so if we take a look at what's behind
24 Tab 37, Exhibit C-170 and looking at the bottom of
25 Page 2, we see the same -- I think this is the same

1 email that we just looked at from Mr. Nakata asking
2 for approvals -- maybe that's -- yes, asking for
3 approval to countersign, and above it we see
4 various approvals.

5 And then on June 20th, 2018, Mr. Nakata
6 writes to various recipients, "Hello," quote, "I
7 want to provide an update on the .WEB Registry
8 Agreement. Prior to the execution of the .WEB
9 Registry Agreement, we received notice that a
10 cooperative engagement process was initiated on
11 .WEB. The .WEB/.WEBS contention set has been
12 placed on hold. We will void the current Registry
13 Agreement via DocuSign. If or when we are able to
14 proceed, we will reinitiate this approval process,"
15 unquote.

16 Were you instructed that once there were
17 no accountability mechanisms pending, you should go
18 ahead to proceed to delegate or contract with NDC
19 for .WEB?

20 A. Well, as I said before, I wasn't
21 instructed. It would have been our common
22 practice. And if I had -- if there were questions,
23 it would have been a conversation with counsel.

24 Q. Was the ICANN Board informed that staff
25 was moving forward with contracting with NDC for

1 .WEB?

2 A. So there were communications with the
3 Board in which ICANN's legal team was copied.

4 THE WITNESS: Is that something I can
5 disclose in regards to ICANN -- the Board's
6 oversight of this process?

7 MR. LeVEE: Probably no, but I don't know
8 what the document is that you're referring to.

9 I am trying not to object, but the
10 question, Ms. Willett, is: Do you know of any
11 communications that don't involve counsel?

12 MR. De GRAMONT: Let me just start with a
13 yes-or-no question.

14 Q. Did anyone on your staff inform the Board
15 that the contention set had been taken off hold and
16 that you were proceeding to contract with NDC?

17 A. It wasn't a common practice for us to
18 inform the Board of contention set status changes,
19 no.

20 Q. But in this instance -- let me ask it this
21 way: Are you aware of any nonlawyer at ICANN
22 informing the ICANN Board in June 2018 that the
23 contention set was being taken off hold and you
24 were proceeding to contract with NDC for .WEB?

25 A. Communications between my team and the

1 Board typically copied one or more attorneys.

2 Q. Mr. LeVee will object if he thinks that's
3 appropriate.

4 Right now I just want to know if any
5 nonlawyer wrote to the Board to inform the Board
6 that ICANN was proceeding to contract with NDC for
7 .WEB?

8 A. Yes.

9 MR. LeVEE: Yes-or-no question. Okay.
10 Thank you.

11 Q. BY MR. De GRAMONT: Do you know who sent
12 that communication to the ICANN Board?

13 A. Without looking at an email, I can't be
14 certain in this specific instance.

15 Q. Is there someone who it typically would
16 have been?

17 A. It would have been someone on my team,
18 either Mr. Nakata or there was also a David Saxa,
19 who would have sent an email to the Board, and our
20 legal team would have been copied on those
21 communications.

22 Q. And do you recall if anyone on the Board
23 responded to the nonlawyer who had made the
24 communication advising the Board that you were
25 proceeding to contract with NDC for .WEB?

1 A. To my knowledge, no Board member
2 responded.

3 Q. So what had happened to the, quote,
4 "informed resolution," unquote, that ICANN said it
5 was seeking back in September 2016?

6 A. So I believe that was in relationship to
7 those previous accountability mechanisms, the CEP,
8 the ombudsman matter, and those had been resolved.

9 Q. So once Ruby Glen's CEP was resolved and
10 once the ombudsman said he wasn't going to consider
11 ICANN's -- sorry, Afilias' complaint, the
12 questionnaires were -- or the informed resolution
13 was rendered moot?

14 A. I don't know what the legal department was
15 undertaking.

16 Q. If Afilias had not filed for CEP, ICANN
17 would have proceeded to contract with NDC; is that
18 your understanding?

19 A. I don't really know what would have
20 happened.

21 Q. Is it ICANN's position that it only has to
22 consider whether the gTLD rules have been violated
23 if someone forces them to do so by filing an
24 accountability mechanism?

25 MR. LeVEE: Can I get that question back?

1 MR. De GRAMONT: Yes, yes.

2 (Reporter read back as requested.)

3 MR. LeVEE: I object on the grounds of
4 privilege. If you know on other grounds, then you
5 should answer.

6 THE WITNESS: So I -- well, first I'd like
7 to say I don't think -- because I am no longer an
8 employee for ICANN, I don't think I can represent
9 ICANN's position in this hearing.

10 I can only share with you my understanding
11 as to how we operated, how we functioned and what
12 we told applicants about this matter. So I would
13 have to say at ICANN -- I fully expected from 2016
14 August, I expected Afilias to file a -- a
15 reconsideration request at any day, and I fully
16 expected that as soon as we changed the status of
17 the contention set, taking the contention set off
18 hold, that was staff action, and Afilias would have
19 voiced their objection to that and made a formal --
20 the way to formally complain is not by writing a
21 letter. It is by initiating a reconsideration
22 request. That's what I had been telling applicants
23 publicly. That was commonly understood since 2013.

24 Q. BY MR. De GRAMONT: Ms. Willett, Afilias
25 had asked for an investigation. ICANN had

1 responded that it was going to seek informed
2 resolution of the concerns that Afiliias had raised.
3 You don't think that ICANN was required to actually
4 do what it had said it was going to do?

5 MR. LeVEE: I object the question's very
6 argumentative. Put it in a brief.

7 Q. BY MR. De GRAMONT: Having sent a letter
8 to Afiliias stating that ICANN was going to seek
9 informed resolution of ICANN's -- of Afiliias'
10 concerns, didn't you think it was incumbent on
11 ICANN to actually provide an informed resolution of
12 those concerns?

13 A. As we discussed before, I thought I told
14 you the informed resolution pertained to the
15 accountability mechanisms. It was not our practice
16 to respond and initiate investigations and take
17 action in the program based on letters.

18 We had hundreds, if not thousands of
19 letters written to us asking ICANN to eliminate one
20 applicant or give the TLD to another applicant in
21 correspondence, and ICANN did not take questions in
22 letters.

23 Q. Can I ask you to take a look at Tab 30 in
24 your binder, which is Exhibit C-61? It is a letter
25 dated 30 September 2016 from Mr. Atallah to

1 Mr. Hemphill, and at this point ICANN's ombudsman
2 had dismissed Afilias' complaint.

3 Do you recall that?

4 A. I am not sure when I became aware of
5 Afilias' ombudsman complaint.

6 Q. Okay. Just to save time, I will represent
7 that the ombudsman had rejected the complaint by
8 this time and the letter is on record.

9 Mr. Atallah acknowledges Mr. Hemphill's
10 letters of 8/2016 and 9 September 2016. He says,
11 quote, "We note your comments regarding the NU DOT
12 CO LLC application for .WEB and the ICANN auction
13 of 27 July 2016."

14 At the bottom, second-to-last paragraph,
15 he writes, quote, "As an applicant in the
16 contention set, the primary contact for Afilias'
17 application will be notified of future changes to
18 the contention set status or updates regarding the
19 status of relevant accountability mechanisms. We
20 will continue to take Afilias' comments and other
21 inputs that we have sought into consideration as we
22 consider this matter," unquote.

23 Do you see that?

24 A. I do.

25 Q. Had you seen this letter at the time?

1 A. I believe so.

2 Q. And at this point Afiliias doesn't have any
3 accountability mechanism pending, right?

4 A. That's my understanding.

5 Q. And Mr. Atallah is committing to continue
6 to take Afiliias' comments and other inputs that we
7 have sought into consideration as we consider this
8 matter, right?

9 A. I see that.

10 Q. In fact, if Afiliias had not filed for CEP,
11 ICANN would simply have proceeded to contract with
12 NDC without ever considering the issues that
13 Afiliias had raised, right?

14 A. I can't speak to what Mr. Atallah would
15 have done. He would have been the executive to
16 sign the agreement on ICANN's behalf.

17 Q. In fact, the Registry Agreement was sent
18 to NDC, NDC signed it, returned it to ICANN and
19 ICANN personnel approved ICANN's signature and only
20 stopped the process when Afiliias filed its CEP; is
21 that right?

22 A. Once they initiated, yes, that
23 accountability mechanism.

24 Q. So the only way that ICANN will
25 consider -- strike that.

1 Did you consider the concerns that Afilias
2 had raised to be serious concerns?

3 A. I considered them to be sour grapes.

4 Q. And did you express that view to anyone
5 else at ICANN?

6 A. I may have.

7 Q. You don't recall specifically?

8 A. I don't recall specifically.

9 Q. Did anyone at ICANN express that view to
10 you, that Afilias' concerns were simply, quote,
11 "sour grapes," unquote?

12 A. Not that I recall.

13 Q. And you reached that view that Afilias was
14 simply acting out of, quote, "sour grapes,"
15 unquote, without ever having seen the DAA; is that
16 right?

17 A. Correct.

18 MR. De GRAMONT: May I take a two-minute
19 break, Mr. Chairman, to consult with my counsel,
20 with my colleagues?

21 ARBITRATOR BIENVENU: Yes, you may, Mr. De
22 Gramont.

23 (Whereupon a recess was taken.)

24 MR. De GRAMONT: Mr. Chairman, I have no
25 further questions.

1 Ms. Willett, thank you very much for your
2 time. It is nice to meet you.

3 ARBITRATOR BIENVENU: Thank you, Mr. De
4 Gramont.

5 The Panel has a few questions for
6 Ms. Willett, and we agreed that I would begin. If
7 there are supplemental questions, my colleagues
8 would follow me.

9 Ms. Willett, just to clarify an answer
10 that you have just given to counsel for Afiliias, he
11 asked you, you said -- stated in an answer to one
12 of his questions that you consider Afiliias'
13 concerns to be sour grapes.

14 Do you remember saying that?

15 THE WITNESS: I do.

16 ARBITRATOR BIENVENU: Now, does that mean
17 in your opinion, Ms. Willett -- and I am asking
18 only for your opinion, not other people's opinion,
19 not your counsel's opinion.

20 But in your opinion, does that answer mean
21 in your opinion NDC's contract with VeriSign did
22 not violate the guidebook and the auction rules?

23 THE WITNESS: I haven't evaluated that
24 agreement, and I am not a lawyer or in a position
25 to do a legal assessment of it, but the mere fact

1 of an agreement to me and the fact that VeriSign
2 essentially acted as a bidder in the auction on
3 behalf of NDC would not disqualify them. That's
4 my --

5 ARBITRATOR BIENVENU: Sorry to cut you
6 off, but if you haven't seen the agreement, you
7 don't know if the agreement --

8 THE WITNESS: Correct. I haven't reviewed
9 the agreement. I don't know what it says. I am
10 simply saying the fact that an agreement exists to
11 me is not disqualifying.

12 ARBITRATOR BIENVENU: Are you aware,
13 Ms. Willett, as you sit here today, that the
14 position taken by the Respondent in this IRP, and I
15 am reading here from Paragraph 81 of ICANN's
16 rejoinder, is, and I quote, "ICANN has taken no
17 position on whether NDC violated the guidebook."
18 Are you aware that that is the position taken by
19 the respondent in this IRP?

20 THE WITNESS: Yes.

21 ARBITRATOR BIENVENU: And was that the
22 position throughout the period from the moment
23 concerns were first raised about NDC's bid -- NDC's
24 application and the moment of your departure? At
25 no point during that period did ICANN take a

1 position on whether NDC had violated the guidebook?

2 THE WITNESS: As far as I am aware, that's
3 correct, yes.

4 ARBITRATOR BIENVENU: And to pick up on
5 another question that was asked of you by counsel
6 for Afilias, the fact that ICANN sent a draft
7 Registry Agreement to VeriSign -- forgive me, to
8 NDC for execution, that does not imply compliance
9 of NDC's application with the guidebook?

10 THE WITNESS: Well, I suppose, in terms of
11 the fact that -- sorry. I am trying to replay the
12 question.

13 ARBITRATOR BIENVENU: Let me rephrase it
14 if it is helpful to you.

15 If you and your team had taken the view
16 that applicant -- let's move away from the facts in
17 this case, but that an applicant had failed to
18 respect the guidebook, but there had been no
19 accountability mechanism to complain about that
20 noncompliance, would you, by reason of the absence
21 of an accountability mechanism, have sent a draft
22 Registry Agreement for execution?

23 THE WITNESS: No, I don't believe we would
24 have. If we determined that an applicant had
25 violated the terms of the guidebook, I don't

1 believe that my team and I would have given our
2 approvals to proceed with contracting.

3 ARBITRATOR BIENVENU: So why is it, then,
4 that no one in your team raised a red flag before
5 the Registry Agreement was sent to VeriSign to say,
6 "Hey, we have not yet taken a position on whether
7 NDC violated the guidebook, and we have to take a
8 position on this before we send that Registry
9 Agreement out for signature"?

10 THE WITNESS: So my team was operating
11 within the rules of the applicant guidebook, and we
12 were administering the processes and functions
13 described in that applicant guidebook.

14 For us to have been reviewing something
15 else, there was no mechanism beyond those
16 evaluation criteria for the program team to
17 determine that an applicant had violated the
18 guidebook unless we were informed by an outcome of
19 an accountability mechanism, an ombudsman
20 determination, a reconsideration request that was
21 taken up by the Board, and we were informed somehow
22 by the Board to take something new into
23 consideration. We were evaluating their
24 application and the information that the applicant
25 provided us according to those processes.

1 ARBITRATOR BIENVENU: Can I ask you to
2 turn to your letter of 16 September 2016?

3 THE WITNESS: Yes, right there.

4 ARBITRATOR BIENVENU: And if we go to the
5 next page, we see at the top of --

6 ARBITRATOR CHERNICK: What tab is that?

7 ARBITRATOR BIENVENU: It is Tab 30.

8 Sorry, I had a separate copy apart from the witness
9 binder, but it is Tab 30.

10 ARBITRATOR CHERNICK: Thank you.

11 ARBITRATOR BIENVENU: Sorry. I am
12 mistaken. It is not Tab 30.

13 MR. De GRAMONT: I believe it is Tab 29,
14 Mr. Chairman.

15 ARBITRATOR BIENVENU: 29. That's right,
16 29.

17 By the way, your letter is dated 16
18 September 2010.

19 Do you see that?

20 THE WITNESS: My copy says 16 September
21 2016.

22 ARBITRATOR BIENVENU: Sorry, 16 September
23 2016, yeah, forgive me.

24 16 September 2016, that is the deadline
25 that had been -- I will say "set," but maybe it

1 would be more appropriate to say "proposed" -- in
2 Afiliast's letter of 9 September. Was that
3 coincidental?

4 THE WITNESS: Yes, I believe it was.

5 ARBITRATOR BIENVENU: Now, turning to Page
6 2, we see the title of the questionnaire, "Topics
7 on Which Ruby Glen, NU DOT CO, Afiliast and VeriSign
8 are Invited to Comment."

9 Do you see that?

10 THE WITNESS: Yes.

11 ARBITRATOR BIENVENU: Can you tell us why
12 the questionnaire was addressed only to those four
13 parties and not to all members of the contention
14 set?

15 THE WITNESS: Any information I have on
16 that would have been based on conversation with
17 counsel.

18 ARBITRATOR BIENVENU: You were aware when
19 you sent that questionnaire that, among its
20 addressees, two of them were obviously aware of the
21 DAA because they were signatories to it, and you
22 knew that at least one of the four was not aware of
23 the DAA, namely Afiliast; is that correct?

24 THE WITNESS: So I'm sorry, I don't recall
25 when I became aware of the DAA, if it was in -- if

1 it was prior to 16 September or not, and I don't
2 know what other parties were aware of the DAA or
3 had seen copies.

4 ARBITRATOR BIENVENU: Bear with me,
5 Ms. Willett.

6 THE WITNESS: Of course.

7 ARBITRATOR BIENVENU: Just looking through
8 my notes here.

9 You mentioned yesterday that you had not
10 reviewed Mr. Rasco's statement; is that correct?

11 THE WITNESS: Which statement is that?

12 ARBITRATOR BIENVENU: Excuse me?

13 THE WITNESS: Oh, his witness statement?

14 ARBITRATOR BIENVENU: Yes.

15 THE WITNESS: No, I have not.

16 ARBITRATOR BIENVENU: You have not seen
17 it?

18 THE WITNESS: Unless it's in this binder,
19 I have not.

20 ARBITRATOR BIENVENU: Okay. There are
21 statements in Mr. Rasco's statement about what
22 ICANN knew or might have known, and I'd like to
23 explore that with you, if I may.

24 THE WITNESS: Of course.

25 ARBITRATOR BIENVENU: If you go to

1 Paragraph 27, and can someone -- we are going to
2 have someone display it for you.

3 THE WITNESS: Okay.

4 MR. De GRAMONT: Chuck, are you able to
5 get Mr. Rasco's -- okay.

6 MR. BIENVENU: If we go to the bottom of
7 Page 9 and top of Page 10. So I'll read it for
8 you.

9 "It was not until April 2016, however,
10 that ICANN" -- sorry, I can't read on my screen
11 because we have the -- I'll follow here.

12 "It was not until April 2016, however,
13 that ICANN sent notice to the contention set that
14 ICANN would issue the .WEB gTLD and, therefore,
15 that ICANN had scheduled a public auction for .WEB
16 to take place on July 27, 2016. Until ICANN sent
17 that formal notice, there was no guarantee that
18 ICANN would hold an auction for .WEB. Rather, as
19 had occurred with other domain strings (such as
20 .CORP), ICANN had the right to decline to issue the
21 .WEB gTLD and thus not hold an auction."

22 Could you help us situate those cases? In
23 what circumstances might ICANN decide not to hold
24 an auction?

25 THE WITNESS: So it is true that ICANN and

1 the Board had ultimate discretion as to whether to
2 issue any TLD or not.

3 With .CORP, as I recall -- I am going to
4 forget the term for this. There was a technical
5 risk to the root, a root collision. There was a
6 risk of essentially resolution of domain names to
7 IP addresses and queries to the DNS being routed to
8 the incorrect location, essentially, pertaining to
9 the .CORP, C-O-R-P, top-level domain.

10 So I do believe that that was a Board
11 decision which directed that we would not be
12 delegating the top-level domain .CORP at all.

13 ARBITRATOR BIENVENU: Thank you.

14 Can you go to Paragraph 33, and I'll just
15 let you read it, Ms. Willett. Let me know when
16 you're done.

17 THE WITNESS: I am. Thank you.

18 ARBITRATOR BIENVENU: So there's reference
19 in the second sentence to means of resolving
20 contention sets, and I would like to focus on the
21 third one mentioned by Mr. Rasco, which is, "buying
22 various applicants out of their applications before
23 any auction was held."

24 Do you know whether that has happened in
25 practice?

1 THE WITNESS: I would have to think about
2 a specific example, but I do recall more than a few
3 applicants who the applying entity was acquired by
4 a different organization.

5 ARBITRATOR BIENVENU: I don't believe that
6 that's what he's referring to. He's not referring
7 to an acquisition of the applicant. He is
8 referring to an applicant being bought out of its
9 application, at least that's how I read it.

10 THE WITNESS: I don't know what that would
11 mean. Because it would be contrary and against the
12 rules and the AGB to buy or sell an application,
13 but the entity -- the applying entities changed
14 hands on multiple occasions.

15 ARBITRATOR BIENVENU: Right. So you have
16 anticipated my question.

17 If what he's referring to, and no doubt he
18 can clarify when he appears before us, but if what
19 he were referring to was the buyout of the
20 application from the applicant, your view is that
21 this would not be permissible under the guidebook;
22 is that right?

23 THE WITNESS: To me it is -- what ICANN
24 was looking at was that the applying entity
25 continued to retain responsibility for the

1 application. So as long as that was still the
2 case, I -- I am not a lawyer. I know there's all
3 sorts of creative arrangements that could be made,
4 but as long as the applying entity still was
5 managing the application, that would have been
6 consistent with the rules.

7 But if that -- if that changed and then
8 that applicant wasn't managing the application,
9 that might be an issue. But we would have
10 evaluated that on a case-by-case basis.

11 ARBITRATOR BIENVENU: Can you think of
12 examples where that happened?

13 THE WITNESS: I'd have to do a little
14 harder thinking about the specific strings, but I
15 recall that we had at least one applying entity
16 that ceased to exist, so some other, I don't know,
17 parent corporation or sister corporation acquired
18 the assets of that entity. I think there were --
19 over many years, you know, not just these four
20 years in the program and beyond, it was a lot of
21 time for all sorts of changes to corporate
22 structures to occur.

23 As the program progressed, we had to
24 continue to adapt our procedures to handle
25 situations we hadn't contemplated and beyond what

1 was expressly stated in the AGB.

2 ARBITRATOR BIENVENU: Thank you. Could we
3 go to Paragraph 37, and I'll let you read it, but
4 my question will concern the penultimate sentence
5 of the paragraph.

6 THE WITNESS: Yes.

7 ARBITRATOR BIENVENU: Based on your
8 experience, Ms. Willett, were you aware of these
9 practices?

10 THE WITNESS: I don't recall ever being
11 informed explicitly by applicants of these
12 practices, but I became aware through general
13 discussions in the community that various practices
14 of choosing which contention sets or which strings
15 to pursue versus others did occur.

16 ARBITRATOR BIENVENU: Can you go to
17 Paragraph 83 of the witness statement?

18 THE WITNESS: I'm sorry, before we go
19 there, Mr. Chairman, I want to make sure I'm clear.
20 If you're referring to the penultimate statement
21 that ICANN did not object to them -- is that what
22 you were asking me about specifically?

23 ARBITRATOR BIENVENU: I was mostly,
24 whether it did or not is something -- is easily
25 traceable, or more easily traceable. But what I

1 just wanted to know is whether a person in your
2 position, an important position in relation to that
3 program, whether you were aware of these practices?

4 THE WITNESS: So I was aware that a
5 variety of resolutions was taking place, and the
6 way we became aware of that is because applicants
7 would withdraw their applications from ICANN,
8 essentially leaving one remaining applicant, and it
9 would resolve contention.

10 That is how we in the program team came to
11 understand that a private resolution had occurred,
12 but I don't recall anyone specifically telling me
13 of their strategy about an arbitrage strategy.

14 But over many years observing it, I think
15 it is easy to form conclusions how certain
16 applicants were treating certain applications and
17 what was being resolved.

18 ARBITRATOR BIENVENU: Thank you.

19 I was going to ask you about the account
20 in Paragraphs 83 to 86 of your conversation with
21 Mr. Rasco, but I believe we have your evidence on
22 this. So I don't need to go there.

23 My last question concerns the litigation
24 waiver that is contained in Module 6. It is under
25 Tab 8 of your binder.

1 THE WITNESS: Yes.

2 ARBITRATOR BIENVENU: And it is at Page 4.
3 Do you have it in front of you?

4 THE WITNESS: Yes.

5 ARBITRATOR BIENVENU: So I'll let you read
6 the beginning of the paragraph. I don't want to
7 burden the transcript, but when the text becomes
8 capitalized, we read, quote, "Applicant agrees not
9 to challenge, in court or in any other judicial
10 fora, any final decision made by ICANN with respect
11 to the application," and you can read what follows.

12 And then at the bottom of the paragraph,
13 the last -- in the penultimate sentence we see,
14 "Provided, that applicant may utilize any
15 accountability mechanism set forth in ICANN's
16 bylaws for purposes of challenging any final
17 decision made by ICANN with respect to the
18 application."

19 Do you have a view, Ms. Willett, as to
20 what is meant by "final decision made by ICANN with
21 respect to the application"?

22 THE WITNESS: I have a personal opinion.

23 ARBITRATOR BIENVENU: Excuse me?

24 THE WITNESS: I have a personal opinion as
25 to that.

1 ARBITRATOR BIENVENU: Yes. Could you give
2 us your understanding of what is meant by this
3 language?

4 THE WITNESS: So the guidebook describes
5 multiple evaluations that an evaluation goes --
6 that an application goes through, and if an
7 applicant failed any of those evaluations, that
8 would be a final decision made by ICANN.

9 So evaluation -- I guess in general, there
10 are a number of actions that ICANN could take in
11 the processing of an -- sorry -- in the processing
12 of an application, which could be a final decision
13 by ICANN, which would be an evaluation outcome, an
14 objection determination to either perbado
15 [phonetic] or fail an objection process, resolving
16 contention, string similarity, all of those -- it
17 wasn't just contracting. It wasn't just delegation
18 which we deemed as a final decision.

19 This was the part of the guidebook that we
20 were relying on when we looked and guided
21 applicants to utilize those accountability
22 mechanisms to channel action by ICANN.

23 We were talking about .CORP and not
24 choosing to delegate .CORP. That would have been a
25 final decision. This would have been a variety of

1 actions by ICANN in the processing of the program.

2 ARBITRATOR BIENVENU: Thank you very much.

3 So I don't know if my colleagues have
4 questions, additional questions for Ms. Willett.

5 ARBITRATOR CHERNICK: I do not.

6 ARBITRATOR KESSEDJIAN: Well, I think I
7 do, and I want to apologize to both Ms. Willett and
8 Jeff LeVee because he's waiting for the redirect.
9 I was looking at the schedule, and you have
10 evaluated 40 minutes. So it is going to take us
11 pretty long, but I will try to cut short -- I have
12 four questions. We will see whether I go through
13 four questions or whether I cut them.

14 Ms. Willett, I am speaking to you in your
15 capacity as general manager of this new gTLD
16 Program. So I want you to answer my questions to
17 the best of your professional capacities at -- and
18 not really trying to imagine what a lawyer would
19 do, what another person would do. So I am really
20 talking to you in the capacity you occupied for so
21 many years, which I consider to be an essential
22 capacity in the managing of the program.

23 On Monday -- of course you don't know
24 about that, but I am going to tell you what
25 happened on Monday. On Monday we had the opening

1 statements by the parties and the Amici.

2 NDC, who is an Amici -- Amicus in this IRP
3 said, and I quote, "ICANN" -- and it's -- by the
4 way, anyone who is concerned about where I quote,
5 this is one of the slides of NDC's opening
6 statement, and it is in the second version that we
7 received. It is Slide 8. I don't know whether
8 anybody would want to -- it is very short, so I
9 don't think you need to see the document.

10 I quote, "ICANN" -- and it is a title of
11 the slide. "ICANN Never Inquired about the
12 Agreement," and I am adding for you, Ms. Willett,
13 that the agreement that he is concerned about is
14 the DAA. It is the agreement between NDC and
15 VeriSign. "ICANN Never Inquired About the
16 Agreement With VeriSign Prior to the .WEB Auction,"
17 unquote.

18 Now, when I read in my capacity as a Panel
19 member this very sentence, what I read is the
20 reverse position, which is basically what NDC's
21 telling us, is that ICANN should have asked -- if
22 they were interested, if ICANN was interested in
23 the DAA, they should have asked, ICANN should have
24 asked.

25 Now I am asking your opinion. Do you

1 think it was ICANN's duty to inquire about
2 something that would have happened, could have
3 happened? You said to us many times that you had
4 no idea, but if that were true, if something like
5 this was going on, do you think that was your duty
6 as ICANN to ask for it?

7 MR. LeVEE: Professor Kessedjian, can I
8 just clarify that you're asking about prior to the
9 .WEB auction?

10 ARBITRATOR KESSEDJIAN: Yes, prior to the
11 .WEB auction. Thank you, Mr. Levee.

12 THE WITNESS: So I don't believe we could
13 have had a duty to inquire about an agreement we
14 didn't know about. So I think we inquired the
15 questions in June and July that my team and I posed
16 to Mr. Rasco about who the directors or managers
17 were of NDC, who the ownership interests were. We
18 asked those same types of questions of many, many
19 applicants. We sincerely did not -- I had no
20 clue -- sorry, American --

21 ARBITRATOR KESSEDJIAN: That's okay. I
22 understand.

23 THE WITNESS: I had no suspicion, no hint
24 that there was this separate agreement. So I don't
25 think we had a duty beyond all of the inquiries

1 that we did make.

2 ARBITRATOR KESSEDJIAN: Okay. Thank you.

3 Now, you said yesterday, and I quote from
4 the transcript of your witness deposition
5 yesterday, and that's for everybody in the room, it
6 is Page 140, Lines 12 and 13 of the transcript.
7 You said that the applicants are prohibited, and
8 you were very strong on that statement, from
9 signing, reassigning, transferring their
10 application, and you made a difference between that
11 prohibition, which seemed to be very strong in the
12 way you expressed it, and the rights.

13 Now, when I read that -- and in your
14 witness statement you said many, many times, and
15 you were asked today about that, but I noted at
16 least three paragraphs, if not more, 20, 23, 34,
17 where you said, "At no time did NDC tell us that
18 they were doing anything with VeriSign."

19 Now, for the sake of argument and for the
20 sake of discussion, if you had known -- and it is
21 just supposition, if you had known that there was
22 something going on with VeriSign, that was my word,
23 behind the scenes. Now, in your capacity as
24 general manager, what would you have done?

25 You didn't know, so it is a completely

1 hypothetical question.

2 THE WITNESS: So hypothetically, if we had
3 been made aware that NDC had an agreement with any
4 other party, and as we now know about the auction
5 and perhaps a hopeful assignment, we might have
6 asked some questions about it, but not knowing
7 about that, we didn't.

8 So hypothetically, it might have -- it
9 might have driven us to ask some additional
10 questions about the nature of that.

11 ARBITRATOR KESSEDJIAN: Thank you.
12 Pierre, I had two other questions, but I think it
13 is very late in the day, so thank you very much.

14 ARBITRATOR BIENVENU: Thank you.

15 Mr. LeVee, any redirect for Ms. Willett?

16 MR. LeVEE: I do have some.

17 Are you good to keep going?

18 (Discussion off the record.)

19 REDIRECT EXAMINATION

20 BY MR. LeVEE

21 Q. Ms. Willett.

22 A. Mr. LeVee.

23 Q. Would you turn to Exhibit C-61, but in
24 your binder it is Tab 30.

25 I am going to ask Ms. Ozurovich to

1 highlight the second paragraph.

2 You see where it says -- this is the
3 letter that you said you recognize sent by
4 Mr. Atallah and Mr. Hemphill in September 2016,
5 correct?

6 A. Correct.

7 Q. Okay. And do you see where it says in the
8 second paragraph, "You were notified via the
9 Customer Portal we placed the .WEB/.WEBS contention
10 set on hold. This was to reflect a pending
11 accountability mechanism initiated by another
12 member of the contention set." And then there's a
13 citation to the cooperative engagement.

14 Do you know what that was referring to,
15 the other member of the contention set?

16 A. Yes. I believe that was Donuts/Ruby
17 Glen's CEP from 2016.

18 Q. And does this letter anywhere say that
19 ICANN was putting the contention set on hold
20 because of the letters that Afilias had sent?

21 A. No, it does not.

22 Q. Okay. Now, would you --
23 Ms. Ozurovich, would you pull up Exhibit
24 C-51.

25 I am going to -- you don't have this,

1 Ms. Willett. It is not in your binder.

2 Do you see that this is a letter from
3 Afiliias to you dated October 7, 2016?

4 A. I do.

5 Q. And I am going to ask Ms. Ozurovich -- so
6 this is a letter from Afiliias to you, and it says,
7 "We appreciate the opportunity to provide comments
8 on behalf of Afiliias to the question posed by ICANN
9 in its September 16 letter." I am going to skip
10 because we're short on time.

11 Last sentence. "We are concerned" -- go
12 up one sentence. It says, "Mr. Atallah states that
13 while the .WEB contention set was placed on hold by
14 ICANN on August 19," that's the letter we looked
15 at, "such action was taken because of the
16 initiation of an ICANN accountability mechanism by
17 another applicant."

18 Do you see that?

19 A. These are long sentences. Yes.

20 Q. The last sentence says, "We are concerned
21 that this statement appears to imply that ICANN is
22 not placing the contention set on hold in order to
23 address the issues raised by Afiliias."

24 Do you see that?

25 A. I do.

1 Q. Did ICANN place the contention set on hold
2 because of the letter sent by Afilias?

3 A. We did not.

4 Q. So the concern expressed by Afilias was
5 accurate, that ICANN was not placing the contention
6 set on hold because of the letters that it had
7 sent?

8 A. Correct.

9 Q. Now, you said before that you expected
10 Afilias to file a reconsideration request.

11 Tell the Panel, what does it mean to file
12 a reconsideration request and what could they have
13 reconsidered back in 2016?

14 A. So a reconsideration request is one of
15 those accountability mechanisms defined in ICANN
16 bylaws, both prior to 2016 and the most current
17 ones, and a reconsideration request asks the Board
18 to examine any action or inaction taken by staff,
19 Board, et cetera.

20 Q. And who decides a reconsideration request?

21 A. The Board does, or one of the -- either
22 the Board governance committee or the Board itself
23 depending on practice.

24 Q. So could Afilias have initiated a
25 reconsideration request after the .WEB auction when

1 it started complaining that it thought NDC and
2 VeriSign had done something wrong?

3 A. Absolutely, yes. That's what we expected.

4 Q. And by doing that, would the Board have
5 acted on the reconsideration request? That's a bad
6 question.

7 Would it have been the Board that had
8 acted on the -- would have acted on the
9 reconsideration request that Afilias would have
10 filed?

11 A. Yes, it would have been the Board.

12 Q. Okay. And so had that happened, the Board
13 would have taken up at that time whatever Afilias'
14 reconsideration requests addressed?

15 A. Correct.

16 Q. Okay.

17 ARBITRATOR BIENVENU: Mr. LeVee, I am
18 sorry, this is the Chair here. If you'll permit,
19 can I ask the witness what decision would the
20 reconsideration request have targeted?

21 MR. LeVEE: That's a good question. That
22 was my next one.

23 THE WITNESS: So hypothetically --

24 ARBITRATOR BIENVENU: Then maybe you
25 should wait for the question from Mr. LeVee.

1 MR. LeVEE: No, no, no, Mr. Chairman, you
2 asked a question. I couldn't help myself. I'm
3 getting tired. I'm sorry.

4 ARBITRATOR BIENVENU: Please proceed.

5 THE WITNESS: So Afilias made a number of
6 assertions in those two letters of August and
7 September 2016. I would have expected they would
8 have raised those same issues as part of the
9 reconsideration request and hypothetically would
10 have asked the Board to disqualify NDC or
11 invalidate the auction or any of the actions
12 Afilias was asking in letters. It would have been
13 a formal request through that proper channel to the
14 Board to drive them to look at it.

15 Q. BY MR. LeVEE: Was a reconsideration
16 request available to be filed with respect to the
17 action of ICANN staff as opposed to the ICANN Board
18 at that time?

19 A. Yes, it was.

20 Q. So in 2016, Afilias could have filed a
21 reconsideration request with respect to an action
22 of both the Board and the staff, whether it was
23 action or inaction; is that correct?

24 A. That's correct.

25 Q. I am going to jump ahead to 2018 just to

1 connect the points.

2 In June of 2018, when ICANN took the
3 contention set off hold, did you know that Afilias
4 had promised to file an accountability mechanism,
5 namely invoking the CEP?

6 A. I believe they sent a letter to that
7 effect.

8 Q. Yes. So when they did initiate a CEP,
9 that put the contention set back on hold before
10 ICANN could sign, if it was going to sign, a
11 Registry Agreement?

12 A. That's correct.

13 Q. Okay. You were asked a question this
14 morning about -- well, I have the copy of the daily
15 transcript. This is something that we receive.

16 And for the members of the Panel, I am
17 going to read from the transcript today at 8:00
18 a.m. -- 8:43, that would be Pacific time. There's
19 an answer I don't understand.

20 The question is: "But if VeriSign had
21 been involved with NDC's application, that would
22 suggest a resell, transfer or assignment of NDC's
23 rights and obligations in the application." And
24 then you were asked, "Do you disagree?"

25 And you said, "Not necessarily."

1 I did not understand what you meant by
2 "Not necessarily," because I was concerned that you
3 actually might not have heard the whole question.

4 A. Yeah. I think it was a long question, and
5 I might have misunderstood. So could you reread?

6 Q. Let me read the question.

7 A. Perfect.

8 Q. "But if VeriSign had been involved with
9 NDC's application, that would suggest a resell,
10 transfer or assignment of NDC's rights and
11 obligations in the application."

12 Let me ask you to comment on that without
13 asking you to either agree or disagree.

14 A. So, again, if VeriSign had been involved
15 with NDC's application, I don't know what that
16 meant. VeriSign -- VeriSign was acting as the back
17 end. They had been designated as the back-end
18 registry operator for several dozen applicants to
19 operate TLDs.

20 So that could have been an involvement,
21 and that wouldn't have indicated a resell of the
22 application. They could have been acting as a
23 consultant to the applicant.

24 Again, if I may, I have the experience of
25 having managed 1,930 applications and many

1 different scenarios between applicants and third
2 parties and consultants. So my answers are
3 informed not just based on these applicants for
4 .WEB, but I am informed by -- in regards to how
5 many applicants behaved and how ICANN interacted
6 with them and conducted the program as a result.

7 Q. Thank you.

8 ARBITRATOR KESSEDJIAN: Mr. Levee, can I
9 interject a follow-up question on this one?

10 MR. LeVEE: Please do.

11 ARBITRATOR KESSEDJIAN: Thank you.

12 Ms. Willett, would you say that because
13 you were asked "involved," if VeriSign had been
14 involved and then you explained to us that there
15 are many kinds of different involvements, are you
16 saying to us that basically each case is to be
17 looked at, evaluated?

18 I am not sure I know exactly the word
19 because I have not worked in this kind of position,
20 but would that be a case-by-case depending on what
21 are the facts, who is doing what and so on?

22 THE WITNESS: Thank you, Professor.
23 ICANN, through information provided by applicants,
24 both in their applications, subsequent conversation
25 and dialogue, we became aware of a variety of

1 plans, future plans for their operation, what they
2 wanted to do with the TLD. If it wasn't pertaining
3 to selling the application and taking it from, you
4 know, application -- Applying Entity A to Applying
5 Entity B, ICANN was simply -- we were trying to
6 administer the evaluations described in the
7 guidebook.

8 We couldn't and didn't undertake to
9 evaluate all of those other third-party
10 relationships, whether it was for marketing or
11 back-end registry operation or in some cases we
12 became aware of intention to assign a TLD to a
13 third party.

14 Applicants asked us to do that before
15 contracting with some frequency, and we reminded
16 them of the rule that that wasn't possible, that
17 they could request such an assignment after
18 contracting.

19 So to your question, Professor, I suppose
20 it would have required an evaluation of that, but
21 there were so many hundreds or thousands of those
22 potential relationships, we didn't deem it to fall
23 within the scope. It wasn't part of the evaluation
24 criteria that we applied within the guidebook.

25 ARBITRATOR KESSEDJIAN: You have been

1 repeating many times that you had so many
2 applications and, therefore, couldn't spend a lot
3 of time on each of them or whatever, you had a lot
4 of each of them, and it was a fairly difficult job.

5 Now, isn't there some kind of
6 contradiction with the fact that you have been in
7 contact very regularly -- and I could quote you the
8 number of emails and telephone conversations and
9 whatever with the representatives of NDC.

10 So, you know, if, indeed, you had so much
11 work with all those applications, how come this
12 particular application was concerning you
13 particularly?

14 In your witness statement at some stage
15 you say that there was an email to Mr. Rasco, and
16 then a few hours later he's calling you. So he had
17 apparently direct communication with you.

18 THE WITNESS: So I --

19 ARBITRATOR KESSEDJIAN: These are
20 questions in my mind. So if you could clarify
21 that, that would be helpful.

22 THE WITNESS: I would be happy to. You're
23 right, there were many applications, and I didn't
24 regularly email -- have email contact or phone
25 contact with the primary contacts, with the

1 applicants on a regular basis.

2 However, there were more than a handful of
3 several dozen applications that became highly
4 contentious, not just string contention, but I'm
5 thinking of the string for .AMAZON, the string for
6 .AFRICA, the string for .GAY. I could go on,
7 several dozen. Those issues, because we were
8 getting the string for dot -- it doesn't matter.

9 There were several of those situations
10 where there were many communications, there were
11 many accountability mechanisms triggered, and those
12 parties, it wasn't always satisfactory to them or
13 suitable simply to engage on somewhat sensitive and
14 very charged topics simply through emails from
15 low-level staff via that applicant portal.

16 It wasn't very friendly, if you will. So
17 on these handful of occasions, I would become
18 involved, my staff would bring it to my attention
19 or parties would contact me directly. So it was
20 those few dozen applications, contention sets that
21 I had direct conversation with applicants about.

22 ARBITRATOR KESSEDJIAN: And yet in the
23 case for which we are sitting here, that did not
24 trigger your curiosity about trying to find out
25 what was going on, really?

1 THE WITNESS: Well, it wasn't really a
2 matter of my curiosity. It was a matter of what
3 ICANN had a right to and trying to treat this
4 applicant and this contention set the same way we
5 had treated the other 1,900 applications before it.
6 So that's why we ask the same questions.

7 ARBITRATOR KESSEDJIAN: But you just said
8 it was not true for those two handful -- so there
9 was a differentiation?

10 THE WITNESS: So I was speaking of the
11 distinction in terms of the level of concern and
12 disagreement. The .AMAZON TLD had numerous
13 accountability mechanisms and perhaps even hundreds
14 of letters written about it.

15 So depending on sort of the nature,
16 certain issues get escalated to me. But that
17 didn't mean that we were treating the applications
18 and we were applying different standards to
19 different applicants, you know, based on whether I
20 knew them or -- no one got -- there was no
21 favoritism, whether I knew someone or didn't know
22 someone.

23 I believe when I first emailed Mr. Rasco
24 in June 2016, July 2016, I said, "Do you even
25 remember me?" Because I don't know that he and I

1 have ever met face to face, and I don't think I
2 recall talking to him prior -- except maybe on one
3 occasion prior to June 2016.

4 So it was more about --

5 ARBITRATOR KESSEDJIAN: I got the message.
6 I think we probably need to defer to Mr. LeVee. I
7 am sorry, Mr. LeVee, took more time than I thought.
8 Thank you.

9 MR. LeVEE: You are entitled to ask
10 whatever you want, you know that. Let me follow up
11 on those questions.

12 Q. When there was a top-level domain
13 application or there was kinds of disputes such as
14 .AMAZON, was .WEB one where there was a lot of
15 activity over the course of a few years?

16 A. Yes. A couple of accountability
17 mechanisms. Not as much as some, but it wasn't a
18 straightforward contention set.

19 Q. Was there a point on these -- I don't know
20 the right word, I don't want to put words in your
21 mouth, but a point where strings that had a lot of
22 attention where the law department would inevitably
23 become involved?

24 A. Absolutely.

25 Q. And would that affect the amount of

1 attention that you personally would give once the
2 law department became involved?

3 A. Yes.

4 Q. Let me ask you -- I just have two other
5 things.

6 You were asked about the ombudsman and
7 what kind of investigation an ombudsman can do.

8 I am going to ask to have the bylaws put
9 up. I think it is Exhibit C-1, and in particular,
10 let's start with Page 41. Actually go to the
11 previous page, Kelly.

12 Just to orient you, as you see, Article 5
13 is the ombudsman article, yes?

14 A. Yes.

15 Q. Okay. So, Kelly, if you would turn to
16 Page 42, I am going to ask you to look at Section
17 5.3, which is entitled "Operations." It says, "The
18 Ombudsman shall" -- and look at (d). We'll blow
19 that up.

20 It says, "The ombudsman shall have the
21 right to have access to (but not to publish if
22 otherwise confidential) all necessary information
23 and records from ICANN staff and constituent bodies
24 to enable an informed evaluation of the complaint
25 and to assist in dispute resolution where feasible

1 (subject only to such confidentiality obligations
2 as are imposed by the complainant or any generally
3 applicable confidentiality policies adopted by
4 ICANN)."

5 You see that?

6 A. I do.

7 Q. You understand that was part of the
8 bylaws?

9 A. Yes.

10 Q. Did you understand that the ombudsman
11 would ask ICANN's staff to assist him from time to
12 time in gathering information relating to his
13 investigations?

14 A. Yes. Based on his having done so with me
15 in regards to matters pertaining to the new gTLD
16 Program.

17 Q. Okay. Change of subject.

18 You were asked about some emails that you
19 could not recall, in particular, some media
20 reports.

21 Do you remember that?

22 A. Yes.

23 Q. Can you give some estimate of how many
24 emails you received in a given day and the priority
25 that you put on media reports?

1 A. So in 2016, I was probably down to
2 receiving 200 to 300 emails per day, and media
3 reports were definitely not my priority. I might
4 look at them when my calendar permitted, but I will
5 say I typically had in 2016 many hours of meetings
6 scheduled on my calendar.

7 I looked at those news feeds maybe once or
8 twice a week.

9 MR. LeVEE: Mr. Chairman, if I could have
10 one minute, and I'll just check with my colleagues.

11 ARBITRATOR BIENVENU: Yes, Mr. LeVee,
12 please do.

13 MR. LeVEE: I am just going to put this on
14 mute.

15 (Whereupon a recess was taken.)

16 MR. LeVEE: Ms. Willett, I would like to
17 thank you. You sat much longer than I told you you
18 would, and for that I apologize.

19 I very much appreciate that the Panel
20 stayed extra late this evening, in particular the
21 Panel in France, and I have no additional
22 questions. Thank you.

23 THE WITNESS: Thank you.

24 ARBITRATOR BIENVENU: Thank you very much,
25 Mr. LeVee.

1 Ms. Willett, I am sure that counsel for
2 the claimant join Mr. LeVee in thanking you for
3 your availability and for your evidence, and
4 certainly the members of the Panel appreciated the
5 time that you devoted to assisting us in our task,
6 and we are very grateful.

7 I must instruct you that the sequestration
8 of fact witness order requires me to instruct you
9 not to communicate with other witnesses whose
10 testimony has not yet been heard in the case. So
11 if you could avoid doing that, please.

12 So thanks again. It's been a long day for
13 all of us, but I am sure particularly for you, and
14 we are grateful for your availability.

15 THE WITNESS: I hope it's been helpful.
16 Thank you.

17 MR. De GRAMONT: Thank you again.

18 ARBITRATOR BIENVENU: So I don't think I
19 am going to ask if there are any other matters.
20 It's very late for at least one of us, but I do
21 thank everybody for remaining available until such
22 a late hour, particularly our court reporter.
23 Thank you very much.

24 So we resume tomorrow morning at 7:00 a.m.
25 Pacific, and until then, keep well. See you

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tomorrow.

MR. De GRAMONT: Thank you, Mr. Chairman.

MR. LeVEE: Thank you very much.

MR. De GRAMONT: Thank you, everyone.

ARBITRATOR KESSEDJIAN: Good-bye.

(Whereupon the proceedings were
concluded at 2:22 p.m.)

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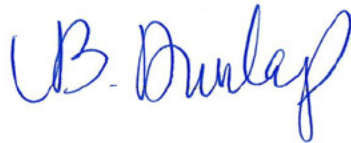
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I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full, true, and correct record of said proceedings:

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 17th day of August, 2020.



BALINDA DUNLAP, CSR NO. 10710, RPR, CRR, RMR

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EXHIBIT C-43

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

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

DECISION ON PHASE I

12 February 2020

Members of the IRP Panel

Catherine Kessedjian
Richard Chernick
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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I. INTRODUCTION

A. Overview

1. The Claimant is one of seven entities that submitted an application to the Respondent for the right to operate the registry of the .WEB generic Top-Level Domain (**gTLD**), pursuant to the rules and procedures set out in the Respondent's New gTLD Applicant Guidebook (**AGB**) and the Auction Rules for New gTLDs (**Auction Rules**). Under the AGB and Auction Rules, in the event of multiple applicants for the same gTLD, the applicants are placed in a "contention set" for resolution privately or, if this first option fails, through an auction administered by the Respondent.
2. On 27 and 28 July 2016, the Respondent conducted an auction among the seven applicants for the .WEB gTLD. Nu Dotco, LLC (**NDC**) won the auction while the Claimant was the second-highest bidder.
3. Shortly after the .WEB auction, it was revealed that NDC and VeriSign, Inc. (**VeriSign**) had entered into an agreement under which VeriSign undertook to provide funds for NDC's bid for the .WEB gTLD, while NDC undertook, if its application proved to be successful, to transfer and assign its registry operating rights in respect of the .WEB gTLD to VeriSign upon receipt from the Respondent of its actual or deemed consent to this assignment¹ (**Domain Acquisition Agreement**).
4. The Claimant initiated the present Independent Review Process (**IRP**) on 14 November 2018. On the merits, the Claimant is seeking, among others, binding declarations that the Respondent must disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel, proceed with contracting the Registry

¹ Third Party Designated Confidential Information Redacted

Agreement for .WEB with the Claimant. As a result of the agreement described in paragraphs 61-64 below, it has been agreed that the merits of the dispute would be the subject of Phase II of the IRP.

5. This decision of the Independent Review Panel (**Panel**) concludes Phase I of the IRP, and determines the requests respectively submitted by VeriSign and NDC (collectively, the **Applicant Amici**) to participate as *amici* in the present IRP. Those requests are based on Rule 7 of the *Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process*, adopted by the Respondent's board (**Board**) on 25 October 2018 (**Interim Procedures**).
6. The Claimant opposes the Applicant *Amici*'s requests. The Claimant contends that the manner in which the *amicus* provisions were added to Rule 7 of the Interim Procedures violated the Respondent's *Bylaws For Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**). On that basis, the Claimant asks that the *amicus* provisions of Rule 7 be declared unenforceable and, consequently, that the Applicant *Amici* not be allowed to participate in this IRP. Alternatively, the Claimant asks that its Rule 7 claim be joined to the other claims to be decided in Phase II and that the Applicant *Amici* be allowed to participate in the IRP provisionally, within the limited terms of Rule 7.
7. After careful consideration of the facts, the applicable law and the submissions made by the Parties and Applicant *Amici*, the Panel unanimously decides to grant the Applicant *Amici*'s applications to participate in Phase II of this IRP, on the terms and upon the conditions set out in this decision. The Panel does so on the basis of the Claimant's alternative request for relief. Accordingly, and to the extent that the Claimant wishes to

maintain its Rule 7 claim, the Panel joins those aspects of this claim over which it has jurisdiction to the claims to be decided in Phase II.

B. The Parties

8. The Claimant in the IRP is Afilias Domains No. 3 Limited (**Afilias** or **Claimant**), a legal entity organized under the laws of the Republic of Ireland with its principal place of business in Dublin, Ireland. Afilias provides technical and management support to registry operators and operates several generic gTLD registries. gTLDs represent the portion of an Internet domain name to the right of the final dot, such as “.COM” or “.ORG”. The Claimant’s parent company, Afilias, Inc., is a United States corporation that is the world’s second-largest Internet domain name registry.
9. Afilias is represented in the IRP by Arif Hyder Ali, Alexandre de Gramont and Rose Marie Wong, of Dechert LLP, and by Ethan Litwin of Constantine Cannon LLP.
10. The Respondent is the Internet Corporation for Assigned Names and Numbers (**ICANN** or **Respondent**), a not-for-profit corporation organized under the laws of the State of California. ICANN oversees the technical coordination of the Internet’s domain name system (**DNS**) on behalf of the Internet community. The essential function of the DNS is to convert easily remembered Internet domain names such as “icann.org” into numeric IP addresses understood by computers.
11. ICANN’s core mission, as described in its Bylaws, is to ensure the stable and secure operation of the Internet’s unique identifier system. To that end, ICANN contracts with entities that operate gTLDs.
12. ICANN is represented in the IRP by Jeffrey A. LeVee, Steven L. Smith, David L. Wallach, Eric P. Enson and Kelly M. Ozurovich, of Jones Day LLP.

C. The IRP Panel

13. On 26 November 2018, Afiliat nominated Professor Catherine Kessedjian as a panelist for the IRP. On 13 December 2018, the International Centre for Dispute Resolution (**ICDR**) appointed Prof. Kessedjian on this IRP Panel and her appointment was reaffirmed by the ICDR on 4 January 2019.
14. On 18 January 2019, ICANN nominated Mr. Richard Chernick as a panelist for the IRP and he was appointed to that position by the ICDR on 19 February 2019.
15. On 17 July 2019, the Parties nominated Mr. Pierre Bienvenu, Ad. E., to serve as the IRP Panel Chair. Mr. Bienvenu accepted the nomination on 23 July 2019 and he was appointed by the ICDR on 9 August 2019.
16. In September 2019, with the consent of the Parties, Ms. Virginie Blanchette-Séguin was appointed as Administrative Secretary to the IRP Panel.

D. The Applicant *Amici*

17. VeriSign is a publicly traded company organized under the laws of the State of Delaware. VeriSign operates, among others, the registries for the .COM, .NET and .NAME gTLDs.
18. VeriSign is represented in this IRP by Ronald L. Johnston, James S. Blackburn and Maria Chedid, of Arnold & Porter Kaye Scholer LLP.
19. NDC is a limited liability company organised under the laws of the State of Delaware. The Claimant avers that NDC was established as a special purpose vehicle to acquire gTLDs in the new gTLD Program.
20. NDC is represented in this IRP by Charles Elder and Steven Marenberg, of Irell & Manella LLP.

E. Place (Legal Seat) of the IRP

21. The Claimant has proposed that the seat of the IRP be London, England, without prejudice to the location of where hearings are held. In its letter dated 30 August 2019, the Respondent has confirmed its agreement with this proposal.

F. Language of the Proceedings

22. In accordance with Section 4.3(l) of the Bylaws, the language of the proceedings of this IRP is English.

G. Jurisdiction of the Panel

23. The Claimant's Request for IRP is submitted pursuant to Article 4, Section 4.3 of the Bylaws, the International Arbitration Rules of the ICDR, and the Interim Procedures. Section 4.3 provides for an independent review process to hear and resolve, among others, claims that actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers or Staff members constituted an action or inaction that violated the *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers* as approved by the ICANN Board on 9 August 2016, and filed on 3 October 2016 (**Articles of Incorporation**) or the Bylaws.
24. In the course of the preparatory hearing of 5 September 2019, each of the Parties and Applicant *Amici* confirmed its consent to the Applicant *Amici's* requests being determined by the Panel in Phase I of the IRP.

H. Applicable Law

25. The rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures (subject to the Claimant's challenge of Rule 7 of the Interim Procedures).

26. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles of Incorporation is to the same effect as Section 1.2(a) of the Bylaws.
27. At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles of Incorporation and other “quasi-contractual” documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN’s position in this respect.
28. As will be seen, the Panel’s conclusions in regard to Phase I issues give effect to the relevant provisions of Rule 7 of the Interim Procedures, properly interpreted, and do not engage any divergence of views between the Parties and the Applicant *Amici* as to the applicable law.

I. Burden and Standard of Proof

29. It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.
30. As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, “more likely than not”. That said, it is also generally accepted that allegations of

dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, “[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established.”²

31. The authors of the same textbook observe that modern international arbitral tribunals tend to “accord greater weight to the contents of contemporary documents than to oral testimony given, possibly years after the event, by witnesses who have obviously been ‘prepared’ by lawyers representing the parties.” In the opinion of these authors, “[i]n international arbitrations, the best evidence that can be presented in relation to any issue of fact is almost invariably contained in the documents that came into existence at the time of the events giving rise to the dispute.”³

32. These principles were applied by the Panel in considering the issues in dispute in Phase I of this IRP.

II. HISTORY OF THE PROCEEDINGS

33. The Parties have provided the Panel with a history of the proceedings as of 23 August 2019, from which the Panel draws in this section of its decision to provide context for its decision on Phase I.

34. The IRP is comprised of the following three interrelated aspects:

² See, generally, Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, 6th ed., Oxford, Oxford University Press, 2015, para. 6.87.

³ *Ibid*, para. 6.90.

- **First**, the overall IRP, in which Afilias argues that ICANN violated its Articles of Incorporation, Bylaws and other governance documents in its administration of the policies and processes to award the .WEB gTLD.
- **Second**, the Request for Emergency Panelist and Interim Measures of Protection (**Emergency Interim Relief Request**) before Mr. Kenneth B. Reisenfeld, the Emergency Panelist, concerning Afilias' emergency request for a stay of all ICANN actions that further the delegation of the .WEB gTLD during the pendency of the IRP.
- And, **third**, NDC's and VeriSign's requests to participate in the IRP, including the request for Emergency Interim Relief, as *amici*, which first proceeded before Mr. Scott Donahey, the Procedures Officer.

35. The Panel further describes each of the three aspects of the IRP in the paragraphs below.

A. The Overall IRP

36. On 18 June 2018, Afilias invoked ICANN's Cooperative Engagement Process (**CEP**) after learning that ICANN had removed the .WEB gTLD contention set's "on-hold" status. A CEP is intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in an IRP. The Parties participated in the CEP process until 13 November 2018. It is of relevance to the issues in dispute in Phase I to note that the fact that Afilias had invoked a CEP in relation to the status of the .WEB gTLD was disclosed on ICANN's website on 20 June 2018.

37. As already mentioned, Afilias filed its request for IRP with the ICDR on 14 November 2018. From November 2018 to March 2019, the Parties principally focused on the requests for Emergency Interim Relief and the possible participation of

the Applicant *Amici* in the proceedings, both of which are described below. Following a request by ICANN and the Parties' failure to reach agreement, the ICDR extended ICANN's deadline for submitting its Answer to Afilias' Request for IRP to 25 January 2019.

38. Pursuant to an order from the Emergency Panelist dated 3 December 2018, ICANN produced documents to Afilias on 18 December 2018, subject to confidentiality restrictions ordered by the Emergency Panelist. Afilias then took the position that the documents produced to it by ICANN warranted the amendment of its Request for IRP. Accordingly, on 29 January 2019, the Parties agreed again to postpone the deadline for the submission of ICANN's Answer until after Afilias filed its Amended Request for IRP.
39. On 21 March 2019, Afilias filed its Amended Request for IRP with the ICDR. On 31 May 2019, ICANN submitted its Answer to the Amended Request for IRP to the ICDR. Since ICANN's Answer, the Parties have submitted no other significant filings to the ICDR in the IRP main proceeding.

B. The Emergency Interim Relief Request

40. On the same day that Afilias filed its Request for IRP, ICANN informed Afilias that it would only keep the .WEB gTLD contention set "on-hold" until 27 November 2018, so as to allow Afilias time to file a request for emergency interim relief, barring which ICANN would take the .WEB gTLD contention set off of its "on hold" status. Afilias filed its Emergency Interim Relief Request with the ICDR on 27 November 2018. The Emergency Interim Relief Request seeks to stay all ICANN actions that would further the delegation of the .WEB gTLD.
41. On 28 November 2018, the ICDR appointed Mr. Reisenfeld as the Emergency Panelist for the Emergency Interim Relief Request. Following a scheduling conference with the

Parties on 30 November 2018, Mr. Reisenfeld issued the Emergency Panelist's Scheduling Order No. 1 (**Order No. 1**) on 3 December 2018. The order, among other procedural issues: (1) acknowledged ICANN's commitment to "keep the .WEB registration process 'on hold' pending a decision on the Interim Request for Emergency Relief"; (2) sought guidance regarding the potential participation of *amicus curiae* and (3) stated that ICANN had agreed to produce documents responsive to a narrow list of requests for documents necessary for Afilias' Emergency Interim Relief Request.

42. On 3 December 2018, in response to Order No. 1, Afilias submitted a narrowed Request for the Production of Documents to which ICANN submitted objections. Mr. Reisenfeld granted Afilias' requests – subject to a protective order – in his 12 December 2018 Decision on Afilias' Request for the Production of Documents.
43. On 14 December 2018, following Mr. Reisenfeld's decision, ICANN submitted its own Request for Production of Documents in order to seek information regarding the merits of the dispute. Afilias objected to ICANN's requests on 18 December 2018. On the same day Afilias objected to ICANN's document requests, ICANN filed its Response to the Emergency Interim Relief Request and produced documents in response to Afilias' document requests. ICANN's production is covered by a protective order finalized by the Parties on the same day. As part of this document production process, ICANN produced the Domain Acquisition Agreement entered into between VeriSign and NDC in connection with the .WEB gTLD.
44. On 26 December 2018, Mr. Reisenfeld issued a decision on ICANN's Request for Production of Documents, denying some of ICANN's requests. Afilias later informed both ICANN and Mr. Reisenfeld that it possessed no documents responsive to ICANN's document requests, as modified by Mr. Reisenfeld's decision.

45. On 3 January 2019, Afilias challenged the Domain Acquisition Agreement's confidentiality designation under the Parties' protective order on the ground that it needed to discuss the document with its general counsel. On 8 January 2019, ICANN informed Mr. Reisenfeld that it objected to Afilias' confidentiality challenge. The Parties resolved the confidentiality designation issue on 15 January 2019, when ICANN informed Afilias and Mr. Reisenfeld that VeriSign and NDC agreed to let Afilias disclose the Domain Acquisition Agreement to its general counsel.
46. While the requests for participation of *amicus curiae* remained pending, Afilias' Emergency Interim Relief Request also remained pending before Mr. Reisenfeld. However, on 23 January 2019, the Parties requested that Mr. Reisenfeld postpone further activity until the requests for participation as *amici* are resolved. On 21 March 2019, ICANN confirmed that it would keep the .WEB contention set "on hold" until there is a decision on the Emergency Interim Relief Request.
47. This Panel having since been appointed to determine the IRP, the Parties have expressed their understanding that, absent party agreement, it will be for this Panel to resolve the Emergency Interim Relief Request. In the meantime, the .WEB gTLD contention set remains on hold.

C. Requests for Participation as *Amicus Curiae*

48. On 5 December 2018, VeriSign and NDC informed the ICDR that they intended to submit requests to participate as *amici* in the IRP, including the Emergency Interim Relief Request. On 8 December 2018, Afilias objected to their participation in the IRP as *amici*. On 11 December 2018, VeriSign and NDC each filed with the ICDR a Request to Participate as *amicus* in the IRP. ICANN indicated that it supported those applications.

49. Pursuant to Rule 7 of the Interim Procedures, a Procedures Officer must be appointed to consider any requests to participate in an IRP as *amicus curiae*. ICANN argued that Mr. Reisenfeld should serve as the Procedures Officer, but Afilias objected to his appointment to serve in this capacity. On 13 December 2018, the ICDR decided to appoint a separate Procedures Officer and, on 21 December 2018, Mr. Scott Donahey was appointed in this role. The Parties and the Applicant *Amici* did not object to Mr. Donahey's appointment.
50. On 5 January 2019, after participating in a conference call with the Parties and the Applicant *Amici*, Mr. Donahey issued a Memorandum of Conference Call No. 1 (**Memorandum No. 1**). That memorandum requested that the Parties and the Applicant *Amici* brief the legislative history of the *amicus* language in the Interim Procedures.
51. In response, Mr. Donahey received several submissions from the Parties and the Applicant *Amici*. ICANN filed its response to Memorandum No. 1 and to the Requests to Participate as *Amicus Curiae* on 17 January 2019. Afilias responded to the Requests to Participate as *Amicus Curiae* on 28 January 2019. ICANN, VeriSign, and NDC filed Replies on 5 February 2019, and Afilias filed a Sur-Reply on 12 February 2019.
52. Meanwhile, Mr. Donahey addressed procedural issues for the *amicus curiae* hearing to be held before him in late February 2019. On 31 January 2019, Mr. Donahey declared that VeriSign and NDC could participate in the hearing on their applications for *amicus curiae* status.
53. On 15 February 2019, Mr. Donahey declared that he had no power to grant Afilias' request to cross-examine two of the witnesses that had filed statements in support of ICANN's and VeriSign's submissions to Mr. Donahey, namely Ms. Samantha Eisner,

Deputy General Counsel of ICANN, and Mr. David McAuley, Senior International Policy & Business Development Manager at VeriSign.

54. On 21 February 2019, Mr. Donahey held a telephonic hearing, during which counsel for the Parties and Applicant *Amici* made oral presentations on the latter's applications for *amicus curiae* status. A transcript of that hearing was prepared.
55. Mr. Donahey issued a Declaration of the Procedures Officer (**PO Declaration**) one week later, on 28 February 2019. The PO Declaration found that "the issues raised in the present matter are of such importance to the global Internet community and Claimants (*sic*) that they should not be decided by a 'Procedures Officer,' and therefore the issues raised are hereby referred to [...] the IRP Panel for determination."⁴
56. On 8 March 2019, ICANN requested that the ICDR appoint a new Procedures Officer on the ground that Mr. Donahey had not resolved the *amicus curiae* issue. Afilias objected to ICANN's request on 14 March 2019. On 9 April 2019, after the Parties exchanged several letters on this issue, the ICDR denied ICANN's request for the appointment of a new procedures officer. Meanwhile, the Procedures Officer issued on 31 March 2019 an Order denying ICANN's request that the Procedures Officer make three corrections to his Declaration.
57. Mr. Donahey having taken the position that he had completed his service as Procedures Officer on the basis of his Declaration, when this Panel was finally constituted in August 2019, the Applicant *Amici*'s requests to participate in the IRP (including in the Emergency Interim Relief Request) were still pending, and the scope of their possible participation in the IRP remained to be decided.

⁴ PO Declaration, p. 38.

58. On 20 August 2019, the Panel issued its first communication to the Parties, confirming that a preparatory conference would be held on 5 September 2019. In this letter, the Panel listed a number of procedural issues to be discussed and determined at the preparatory conference. The Panel invited the Parties to consult each other and report any agreement reached in respect of these issues in advance of the preparatory conference, failing which the Parties were asked to provide the Panel with their respective proposals together with an explanation of any difference between them.
59. On 26 August 2019, the Applicant *Amici* wrote to the Panel to request the opportunity to participate in the preparatory conference of 5 September 2019, noting that one of the first issues needing to be resolved by the Panel was their requests to participate in the IRP as *amici*. By letter dated 30 August 2019, the Claimant informed the Panel that it opposed VeriSign's and NDC's requests to participate in the IRP, including the scheduled preparatory conference. In the submission of the Claimant, "[n]on-party should not be allowed to participate in the first procedural conference with the Panel absent agreement from both Parties". In this same letter, the Claimant recalled its opposition to the participation of NDC and VeriSign as *amici* in the IRP. The Claimant added, without prejudice to that position, that it had advised ICANN that it would be willing to negotiate an agreement by which VeriSign and NDC would be allowed to participate in the IRP with all the rights, obligations, and responsibilities of a Party, including their agreement to be bound by the Panel's determinations in the IRP. To the extent the proposed *amici* need to be consulted on any procedural issues that may affect them, such consultation can and should be held separately. The Claimant, in its 30 August 2019 letter, also informed the Panel of the Claimant's position on the various procedural issues listed in the Panel's 20 August letter.

60. Later on 30 August 2019, the Respondent responded to the Panel's letter of 20 August 2019 as well as to the Claimant's letter submitted earlier that day. With respect to the participation of the Applicants in the 5 September 2019 preparatory conference, ICANN advised that it believed the involvement of the Applicant *Amici* would be helpful in light of their pending requests to participate in the IRP. ICANN also set out its position in respect of the issues listed in the Panel's 20 August letter.
61. One of the points on which the Parties expressed agreement on 30 August 2019 was that there should be a bifurcated Phase I in these proceedings to address (1) the Claimant's claim that ICANN violated its Bylaws in adopting the *amicus curiae* provisions of the Interim Procedures, and that VeriSign and NDC should be prohibited from participating in the IRP on that basis; and (2) should that claim fail, the extent to which NDC and/or VeriSign should be permitted to participate in the IRP as *amici*.
62. On 4 September 2019, the Panel informed the Parties of its decision to allow counsel for the Applicant *Amici* to attend the preparatory conference for the limited purpose of giving them an opportunity to state their position on the procedural framework for Phase I of the proceedings. As proposed by the Parties in their respective letters of 30 August 2019, the Panel further advised that it would defer consideration of the procedural rules and timetable applicable to Phase II of the IRP until after the resolution of the Applicant *Amici's* requests to participate in the IRP.
63. A further point agreed between the Parties on 30 August 2019 was that the record for the determination of Phase I issues would be the record that was before the Procedures Officer, including the latter's Declaration (even though the Parties differ as to the relevance of the Declaration for the determination of Phase I issues). At the request of

the Panel, on 17 September 2019, the Parties provided the Panel with an agreed list of the constituent elements of the record for Phase I.⁵

64. The preparatory conference was held, as scheduled, on 5 September 2019. It was attended by counsel for the Parties and the Applicant *Amici*. By letter dated 9 September 2019, the Panel provided a summary of the procedure applicable to Phase I of the IRP, confirming that it would be devoted exclusively to the Panel's consideration of the Applicant *Amici*'s respective requests to participate as *amici* in the IRP, and of the Claimant's objections thereto.
65. Additional written submissions on Phase I issues were made by each of the Parties and Applicant *Amici* on 27 September 2019. On 2 October 2019, a telephonic hearing was held during which counsel for each of the Parties and the Applicant *Amici* presented additional oral submissions in relation to Phase I issues. At the request of the Panel, an agreed transcript of the hearing was subsequently prepared and provided to the Panel on 20 November 2019.
66. By letter dated 9 October 2019, the Panel invited the Parties and Applicant *Amici* to submit post-hearing submissions on the following three subject matters: 1) the status of the IRP Implementation Oversight Team (**IOT**) and its relationship with ICANN and its Board, including the recourses available to a party wishing to challenge the IOT's conduct or decisions; 2) the timeliness of Afilias' Rule 7 claim, in light of the arguments set out in paragraphs 31 and 32 of ICANN's Supplemental Brief; and 3) the relevance (if any) to the resolution of Phase I issues, of the authority given to IRP Panels under

⁵ The Claimant sought leave, on 30 September 2019, to add to the Phase I record an email dated 12 October 2018 from Ms. Eisner to Mr. McAuley. The Respondent objected to that request. The Panel was not convinced that the addition of a single document to the record would prejudice ICANN or the Applicant *Amici* and therefore allowed the Claimant's request in spite of the Respondent's objection. Accordingly, the email in question was added to the record for Phase I.

Section 4.3(o)(v) of the Bylaws, to "take such other actions as are necessary for the efficient resolution of Disputes". The Parties and Applicant *Amici* submitted post-hearing briefs on these issues on 15 November 2019.

67. On 18 November 2019, ICANN requested the permission to file additional submissions in reply to the arguments made by Afilias in its post-hearing brief in opposition to ICANN's request that the Panel dismiss as time-barred Afilias' Rule 7 claim. The Panel granted that request and ICANN submitted its additional submissions on 27 November 2019. As allowed by the Panel, Afilias filed a rebuttal to ICANN's additional submission on the issue of the alleged untimeliness of the Rule 7 claim on 3 December 2019. On 13 December 2019, the Panel declared that the filing of Afilias' rebuttal completed the round of post-hearing submissions in relation to Phase I, whereupon the Panel took Phase I under advisement.

III. SUMMARY OF SUBMISSIONS AND RELIEF SOUGHT

68. In connection with the IRP, the Parties and the Applicant *Amici* have each submitted to the Panel one supplemental brief and one post-hearing brief. As just mentioned, ICANN and Afilias also filed additional submissions on the issue of the alleged untimeliness of the Rule 7 claim.
69. The record before the Panel on Phase I issues also include the submissions made and the evidence adduced by the Parties and Applicant *Amici* before the Procedures Officer. The submissions are listed in the Parties' agreed list dated 17 September 2019 of the elements of the record for Phase I. As for the evidence, it consists of the documentary and witness evidence that was before the Procedures Officer, as set out in the 17 September 2019 agreed list. In addition to the declarations of Ms. Eisner and Mr. McAuley, already referred to above, a declaration of Mr. Rasco, Chief Financial

Officer and manager for NDC, was submitted to the Procedures Office in support of NDC's Request to Participate as *Amicus Curiae* in Independent Review Process, dated 5 February 2019.

70. The submissions made in relation to Phase I are voluminous. The Panel summarizes these submissions below, beginning with the Applicant *Amici*, followed first by ICANN (which supports the proposed *Amici*'s requests for participation) and then by Afilias. Where appropriate, the Panel refers in its analysis to those parts of the submissions and evidence found by the Panel to be most pertinent to its analysis of the Phase I issues. In reaching its conclusions, however, the Panel has considered all of the Parties' submissions and evidence in relation to Phase I.
71. In order to provide context for the submissions summarized below, the Panel reproduces the provisions of Rule 7 of the Interim Procedures, which are central to the Phase I issues (emphasis in the original):

7. Consolidation, Intervention and Participation as an *Amicus*

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, requests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for

consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an *Amicus Curiae*

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an *amicus* before the IRP PANEL:

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and
- iii. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.⁴ The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

4 During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in then considering the scope of participation from *amicus curiae*, the IRP PANEL shall lean in favor of allowing broad participation of an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

72. The Procedures Officer questioned the Parties about the portions of the text of Rule 7 that are underlined. ICANN explained in response⁶:

ICANN's investigation of this issue, including its review of the IRP-IOT's meeting transcripts, meeting minutes, and email correspondence, does not indicate that any special meaning should be taken from the underlining beyond the fact that those words were added over the weeks leading up to the 21 October 2018 deadline for final IRP-IOT comment and approval. Indeed, the underlined text tracks directly to the edits that Ms. Eisner drafted between 16 and 19 October 2018, and, as such, it likely is nothing more than a remnant of the drafting process. These edits were not posted for public comment, so no public comments address them.⁷

A. VeriSign

⁶ Response to Procedures Officer's Questions Concerning the Drafting History of the Supplementary Procedures, dated 16 January 2019,

⁷ Afilias agrees that the underlining was not intended to convey any emphasis to the underscored language. See Dechert's letter of 28 January 2019, at p. 6, attached to Afilias' Response to VeriSign and NDC's Requests to participate as *amici*.

73. In its submissions in support of its request to participate as *amicus curiae* in the IRP, VeriSign first underscores that it is not contested that the two Applicant *Amici* meet the criteria to qualify as *amici* under Rule 7 of the Interim Procedures. Rather, Afilias' contention is that Rule 7 had been adopted in violation of the Bylaws.
74. VeriSign stresses that the relief sought by Afilias in the IRP would impact the Applicant *Amici*'s own rights and economic interests. Accordingly, they are "indispensable parties" to the IRP that are entitled to participate fully in the proceedings. VeriSign submits that Rule 7 gives the Panel the flexibility to permit the Applicant *Amici* to participate to the extent that the dispute places their conduct in issue or may affect their interests. VeriSign argues in this regard that the relief sought by Afilias in this IRP would impact VeriSign's interests far more than those of ICANN.
75. VeriSign submits that the only question for the Panel is the scope of the Applicant *Amici*'s participation in the IRP. According to VeriSign, nothing less than "full participation" – including the right to present arguments and evidence – is required to ensure fundamental fairness and due process. VeriSign rejects the position advanced in the alternative by Afilias that the Applicant *Amici*'s participation should be restricted to the traditional *amicus* role of submitting written briefs. VeriSign contends that the Bylaws and Rule 7 favour broad participation and do not limit the scope of *amicus* participation in such manner. VeriSign therefore invites the Panel to exercise its discretion to allow broad participation, taking into account that the Applicant *Amici* have a material interest in the dispute.
76. According to VeriSign, the drafting history of Rule 7 confirms that it is designed to accommodate broader third party involvement than the expression "*amicus curiae*" is traditionally understood to include. VeriSign argues that norms of international arbitration

do not dictate the scope of *amicus* participation, and that such norms do not restrict *amicus* participation to the filing of written submissions. In that respect, it states that an IRP – as ICANN’s accountability mechanism – is distinct from international arbitration, which generally is a confidential process.

77. VeriSign states that the PO Declaration inaccurately describes the positions of the Parties and of the Applicant *Amici*, does not decide the issue, and is therefore not relevant to the matters presently before the Panel.
78. In its post-hearing brief, VeriSign argues that, while the IOT was formed pursuant to a directive in the Bylaws, the IOT is part of the ICANN *community* rather than an arm of ICANN itself. VeriSign adds that the IOT is neither the Board nor a Board committee or Staff as defined in the Bylaws. VeriSign stresses that the IOT lacks authority to implement process changes without ICANN’s approval. On that basis, VeriSign submits that an IRP could not be brought directly based on the conduct of members of the IOT. According to VeriSign, the proper means to challenge IOT’s actions would have been the filing of a complaint to ICANN’s Office of Ombudsman or to its Complaints Office, or simply raising concerns with the IOT itself.
79. VeriSign contends that Afilias’ claim was time-barred under Rule 4 of the Interim Procedures as it is based on conduct that occurred “more than three years ago”. VeriSign argues that even if the limitation period started on the date of the adoption of the Interim Procedures by the Board, Afilias’ claim would still be time-barred.
80. Lastly, VeriSign submits that Section 4.3(o)(v) of the Bylaws gives broad discretion to the Panel to grant *amicus* status to the Applicant *Amici* and to tailor the scope of their participation. According to VeriSign, the Panel is not constrained by Rule 7 of the Interim Procedures and could accept *amici* submissions even if Rule 7 did not exist.

81. VeriSign also argues that Section 4.3(o)(v) undermines any claim that Afilias has standing as a “Claimant” to challenge the adoption of Rule 7. In that respect, VeriSign contends that the increased costs that Afilias claims it will incur as a result of the Applicant *Amici*’s participation is not an injury or harm directly or causally connected to the alleged violations.

82. For those reasons, VeriSign requests that the Applicant *Amici* be allowed to “participate fully” in the proceedings as *amici*.

B. NDC

83. NDC generally echoes the arguments put forward by VeriSign. NDC notes that Afilias does not dispute that Rule 7 allows NDC to participate in the IRP as *amicus*. The key question for the Panel is therefore the scope of its participation. Like VeriSign, NDC contends that due process requires that it be allowed to participate in the IRP in order to protect its interests. NDC adds that the Panel would benefit from its active participation in the IRP as NDC can offer first-hand evidence rebutting Afilias’ argument that NDC experienced a change of control. NDC also avers that it has knowledge of misconduct on the part of Afilias during the blackout period that preceded the auction that would disqualify Afilias from the right to operate the .WEB gTLD.

84. NDC also argues that if it is not entitled to fully participate as the real party in interest, any decision rendered by this Panel would be unenforceable, rendering the IRP a waste of time. NDC further argues that the IRP context calls for broader participation than is typically contemplated for an *amicus* in litigation or arbitration, as an *amicus* brief is traditionally filed by a non-party that does not have a direct legal or financial interest in the outcome of a proceeding. NDC disputes Afilias’ assertion that NDC’s interests are aligned to those of ICANN.

85. NDC avers that in view of the fact that one of Afiliias' officers seconded the resolution to adopt the Interim Procedures, Afiliias cannot now contend that the Board acted improperly in adopting them. According to NDC, the Interim Procedures have been properly adopted, are fair, and protect due process. In any event, NDC claims that it should not be prejudiced by any possible impropriety in the adoption of Rule 7. NDC notes that it is not itself accused of any wrongdoing in the adoption of the Interim Procedures, and it rejects as ill-founded the contention that NDC should be "vicariously estopped" from participating in the IRP as an *amicus*.
86. NDC submits that the scope of its participation must be sufficiently broad to protect the Applicant *Amici*'s rights and give the Panel the benefit of their perspective and evidence. In that respect, NDC relies on the call for "broad participation" in Rule 7. NDC submits that the Panel has discretion to give the Applicant *Amici* broader participation rights than are typically seen in international arbitration, all the while noting that the trend in international arbitration is to allow increased participation by non-parties.
87. NDC also contends that its participation in the IRP as an *amicus* should include the right to oppose Afiliias' petition for emergency relief since Rule 7 permits *amici* to participate in proceedings "before the IRP Panel", without any carve-out.
88. In lieu of filing a post-hearing brief of its own, NDC adopted the arguments put forward in VeriSign's post-hearing brief.
89. In sum, NDC asks, in respect of all phases of the IRP, to be permitted to participate in all briefing and argument in the IRP, including in connection with Afiliias' request for interim relief, and to submit evidence defending NDC's own conduct and proving Afiliias' disqualifying misconduct.

C. ICANN

90. ICANN submits that Afiliias' challenge to Rule 7 has no merit. ICANN observes that the arguments that Afiliias presents to the Panel in support of that challenge are based on technical defects in the rule-making process and, as such, are fundamentally different from the arguments grounded on equity that it presented to the Procedures Officer. ICANN asserts that Afiliias made that change to bring its claim within the Panel's jurisdiction.
91. ICANN submits that it did not violate its Bylaws by approving the Interim Procedures. First, ICANN notes that the Bylaws do not require a particular quorum for meetings of the IOT. Second, it argues that the Bylaws did not mandate that every provision of the rules of procedures be based on international arbitration norms and, in any event, that *amicus* participation is not foreign to international arbitration. Third, ICANN contends that its Bylaws do not mandate a second public comment period for Rule 7. Fourth, it argues that the Bylaws also did not impose a positive obligation on the Board to withhold approval of the Interim Procedures, even in the face of alleged defects in the rule-making process.
92. ICANN further argues that the Panel does not have jurisdiction to invalidate Rule 7 or to declare it unenforceable. According to ICANN, if the Panel finds that there is merit to Afiliias' claim that ICANN violated its Bylaws, the proper remedy is to issue a declaration to that effect. It would then be to the Board to decide what action to take.
93. On the timeliness issue, ICANN argues that Afiliias did not bring its Rule 7 claim within 120 days of it becoming aware of the material effect of the action giving rise to the dispute, as required by Rule 4 of the Interim Procedures. In ICANN's view, the material

effect of the Board's challenged action – *i.e.* that Rule 7 would apply to IRPs – was immediately within Afilias' knowledge.

94. ICANN also argues that Afilias' request for costs in relation to the requests for participation of the Applicant *Amici* is baseless as it does not contend that ICANN's defences are frivolous or abusive.
95. ICANN submits that the PO Declaration includes inaccuracies and should have no import because the Procedures Officer made no conclusions, other than the one to the effect that the matters raised by Afilias' challenge to Rule 7 were too important for him to decide.
96. In the submission of ICANN, the participation of the Applicant *Amici* in the IRP should be broad in scope and in nature. ICANN argues that, in addition to falling within categories of mandatory *amici* under Rule 7, the Applicant *Amici* have a material interest relevant to the dispute, especially in light of Afilias' contentions regarding their alleged wrongdoings. ICANN argues that the Applicant *Amici*'s rights of participation should reflect the fact that the relief sought by Afilias would deprive NDC of its right as the winning bidder in the .WEB contention set.
97. More specifically, ICANN urges that the Applicant *Amici* be given the right to (1) submit written briefs addressing the merits of Afilias' Amended Request; (2) submit evidence and written witness statements; (3) cross-examine Afilias' witnesses; (4) participate in the IRP hearing; and (5) participate in post-hearing briefs. In response to a question from the Panel at the hearing, counsel for ICANN reserved the latter's position as to whether it would be permissible for the Applicant *Amici* to assert a claim in the IRP, as they

propose to do by requesting that Afiliis be disqualified from the right to operate the .WEB gTLD.⁸

98. In ICANN's view, international arbitration practice provides little helpful guidance in the context of an IRP, as *amicus* participation is a relatively new and still evolving development in international arbitration. ICANN argues that an IRP is a unique accountability mechanism customized in light of ICANN's "quasi-public role" in the global Internet community.
99. ICANN contends that there are three reasons why the Panel does not have authority to nullify, invalidate or disregard Rule 7 of the Interim Procedures: (1) the conduct of the IOT is not a "Covered Action", (2) the Panel's only authority is to declare whether a Covered Action violated the Articles of Incorporation or the Bylaws, and (3) the Panel is not authorized to replace the Board's reasonable judgment if its action or inaction is within the realm of reasonable business judgment.
100. According to ICANN, the Panel's authority under section 4.3(o)(v) cannot be read to conflict with, or to supplant the specific provisions of Rule 7 governing *amicus* participation.
101. ICANN submits that the means available to a person wishing to challenge the IOT's decisions include active participation or the filing either of a complaint to ICANN's Ombudsman or a request to the Board to reconsider its approval of the recommendation made by the IOT.

⁸ See transcript of the hearing on Phase I, p. 22

102. For those reasons, ICANN states that the Panel should reject Afilias' challenge to Rule 7 and issue an order allowing participation by the Applicant *Amici* to the extent noted above.

D. Afilias

103. Afilias argues that the Procedures Officer's findings of fact demonstrate multiple violations of ICANN's Bylaws and rulemaking practices. First, there was no consultation between the IOT and a Standing Panel – none existed – to develop rules that conform to international arbitration norms in respect of Rule 7. Second, the IOT violated its own quorum rules. Third, the IOT violated its own protocols by adopting significant changes to Rule 7 without a second round of public comments. Fourth, the IOT violated its working rules by sending a draft set of rules to the Board for approval even though that draft contained new language that was never discussed within the IOT. According to Afilias, these violations were designed to provide disparate and preferable treatment to the Applicant *Amici*.

104. If the Panel is not prepared to rule on its Rule 7 claim, Afilias invites the Panel in the alternative to join that claim to the other claims to be decided in Phase II, and to allow the Applicant *Amici* to participate on a provisional and limited basis.

105. Afilias emphasizes the fact that, while the Applicant *Amici* demand rights of participation equivalent to those of a party, they refuse to accept the consequences of party participation, including to be bound by the Panel's determination. Afilias argues that the Applicant *Amici*'s demands are inconsistent with the scope of *amicus* participation as contemplated by the IOT or as reflected in norms of international arbitration. In that regard, Afilias first states that IOT members uniformly understood that *amicus* participation would be limited to the submission of "friend of the court" briefs. Second,

Afilias contends that no form of international arbitration endorses the scope of *amicus* participation sought by the Applicant *Amici*. Third, responding to a statement made by Mr. McAuley, Afilias states that, even in litigation before the United States federal courts, *amicus* participation does not rise to the level of a named party or real party in interest.

106. Regarding the status of the IOT, Afilias notes in its post-hearing brief that its claim is not limited to the conduct of the IOT. Afilias contends that Mr. McAuley instigated the “eleventh-hour” changes to Rule 7 with the knowledge and assistance of ICANN’s personnel, namely Ms. Eisner. Second, Afilias contends that the IOT is part of ICANN as it is a creation of its Bylaws. Third, Afilias submits that ICANN cannot avoid its accountability to the Internet community simply by outsourcing critical projects. In Afilias’ view, ICANN’s position that the IOT’s conduct is not subject to challenge through an IRP would leave a party wishing to challenge the IOT’s decisions with no recourse.
107. Turning to the timeliness issue, Afilias contends that the 120-day limitation period provided for in Rule 4 starts when a claimant becomes aware of the material effect of the action giving rise to the dispute. Afilias submits that when ICANN approved the *amicus* provisions, Afilias had no reason to know that its adoption process violated the Bylaws. Afilias further stresses that the documentation that ICANN made available was incomplete until April-May 2019, after the Procedures Officer issued his Declaration. In any event, Afilias’ claim would not be time-barred even if the starting point of the limitation period were held to be 5 December 2018, when the Applicant *Amici* announced their intention to the ICDR to submit applications to participate as *amici*. Finally, Afilias asserts that its claim includes the Board’s failure to address violations of its Bylaws, the material impact of which failure continues to this day. In any event, Afilias submits that ICANN consented to Afilias submitting its claim after 28 February 2018, and therefore that it is equitably estopped from contesting the timeliness of Afilias’ claims.

108. With respect to the Panel's authority, under Section 4.3(o)(v) of the Bylaws, to take such actions as are necessary for the efficient resolution of disputes, Afilias argues that these provisions must be read in the context of the entire document, including the provisions on the final resolution of disputes. In Afilias' submission, the Applicant *Amici's* position that they can participate fully in the IRP without being bound by the IRP's decision cannot be reconciled with those provisions. According to Afilias, footnote 4 that accompanies Rule 7 cannot be read to broaden *amicus* participation beyond the filing of written briefings. Finally, Afilias reiterates that it would not object to the full participation of the Applicant *Amici* on the condition that they agree to be bound by the Panel's conclusions.

109. All in all, Afilias requests that the Panel find that the *amicus* provisions of Rule 7 were adopted in violation of the Bylaws and are therefore unenforceable on that basis. Afilias submits that the Applicant *Amici's* applications must therefore be denied. In the alternative, Afilias asks that the Applicant *Amici's* participation be limited to "written briefing(s)", as specifically provided for in Rule 7, or that the Panel condition their fuller participation on their commitment to be bound by the Panel's resolution of this IRP.

IV. ANALYSIS

110. It is common ground between the Parties that, assuming Rule 7 to be valid, the Applicant *Amici* are entitled to participate in this IRP under the *amicus curiae* provisions of Rule 7, more particularly under Rule 7, para. (ii) insofar as NDC is concerned, and Rule 7, para. (iii) insofar as VeriSign is concerned. The dispute arises from Afilias' Rule 7 claim and the divergence between the Claimant and the other Phase I participants as to the extent of the participation rights sought by the Applicant *Amici*. The Panel therefore begins its analysis by addressing Afilias' Rule 7 claim.

A. Afilias' Rule 7 Claim

111. Before the Procedures Officer, Afilias submitted that the Applicant *Amici's* requests should be denied as an exercise of the Procedures Officer's inherent equitable authority by reason of VeriSign's misconduct in the rule-making process of Rule 7. Before this Panel, Afilias' Rule 7 claim is put forward on a different legal basis. Afilias contends that ICANN violated its Bylaws by approving Rule 7, and requests a declaration that Rule 7 is unenforceable, and, consequently, that the Applicant *Amici* cannot participate as *amicus* in this IRP.
112. In support of its claim that ICANN violated its Bylaws, Afilias invokes VeriSign's alleged interference, through Mr. McAuley, in the contents of Rule 7.⁹ In addition, Afilias relies on alleged defects in the rule-making process of Rule 7. The defects in question concern the lack of quorum at IOT meetings; the contention that the type of *amicus* participation provided for in Rule 7 departs from international arbitration norms; the failure to have put Rule 7 out for a second public comment round; and the (allegedly inaccurate) recital, in the IOT's representations to the Board, of the drafting principles that guided the IOT in the preparation of the draft Supplementary Procedures, the implication being that, had the position been described accurately, the Board would have withheld approval of the draft Interim Procedures.¹⁰
113. The nature of Afilias' contentions in support of its Rule 7 claim raises the question of whether the actions being challenged by this claim fall within the definition of "Covered Actions". ICANN and VeriSign submit that they do not and, on that basis, challenge the jurisdiction of the Panel to hear Afilias' Rule 7 claim. ICANN also submits that the Rule 7

⁹ Amended Request for IRP, para. 84; see also Afilias Phase I Post-Hearing Brief [PHB], paras. 3-4.

¹⁰ *Id.*, para. 86.

claim is time-barred and, in any event, that the Panel does not have the authority to declare Rule 7 “unenforceable”. The Panel begins by addressing the jurisdictional issue.

1. Jurisdiction of the Panel

114. The IRP is “intended to hear and resolve Disputes”, for a number of stated “Purposes of the IRP”. These purposes are listed in Section 4.3(a) and include “ensur[ing] that ICANN [...] complies with its Articles of Incorporation and Bylaws”.¹¹

115. The term Disputes is defined as including three types of claims. The only one relevant for present purposes is the following: “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws [...]”.¹²

116. The expression Covered Actions is defined as “any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute”.¹³

117. Since many of Afiliias’ submissions in support of its Rule 7 claim are directed at the actions of the IOT, the Panel considers first whether the IOT falls within the enumeration “Board, individual Directors, Officers or Staff members.” The Panel then turns to the alleged involvement of Ms. Eisner in the drafting of Rule 7 as a potential jurisdictional basis for Afiliias’ Rule 7 claim.

(a) Composition and Status of the IOT

118. In December 2014, a working group of ICANN members was formed to develop a set of proposed enhancements to ICANN’s accountability to the Internet community. The

¹¹ Bylaws, Section 4.3(a)(i).

¹² *Id.*, Section 4.3(b)(iii)(A).

¹³ *Id.*, Section 4.3(b)(ii).

working group was called the Cross Community Working Group on ICANN Accountability, or CCWG-Accountability. By the month of August 2015, the CCWG Accountability had already foreshadowed, in draft proposed recommendations, that detailed rules for the implementation of the IRP would need to be created by ICANN through a cross-community working group. Accordingly, in November 2015, the co-chairs of the CCWG-Accountability sought volunteers from the Internet community to serve on the IOT for that purpose. All volunteers who came forward were accepted as members of the IOT, and the team held its first meeting on 14 January 2016.¹⁴

119. The IOT consisted of approximately 25 members recruited, in the manner just described, from the Internet community. It also included Ms. Eisner, who served as ICANN staff liaison to the IOT, as well as representatives from ICANN's outside counsel, Jones Day. The firm Sidley Austin was hired as independent counsel to assist the IOT in drafting the Interim Supplementary Procedures.
120. The first chairperson of the IOT was J. Beckwith ("**Becky**") Burr. Upon her appointment to the ICANN Board in November 2016, Ms. Burr resigned as chairperson of the IOT and she was eventually succeeded in that position by Mr. McAuley, of VeriSign.
121. In February 2016, the CCWG-Accountability issued a set of recommendations, referred to as WorkStream 1, to enhance ICANN's existing IRP process. As did its draft recommendations of August 2015, these recommendations included the creation of updated rules of procedure governing IRPs.
122. Shortly thereafter, on 27 May 2016, ICANN's Board adopted new bylaws. These reflected the recommendations of the CCWG-Accountability in that they included, as part

¹⁴ ICANN PHB, paras. 3-6.

of Section 4.3 dealing with the Independent Review Process for Covered Actions, provisions for the creation of a Standing Panel¹⁵ and the establishment of an IRP Implementation Oversight Team.¹⁶

123. ICANN avers in its post-hearing brief that the Bylaws' reference to the establishment of an IOT "is a reference to the IRP-IOT that already existed [...]. There was never any intention to reconstitute the IRP-IOT following adoption of the Bylaws".¹⁷ Be that as it may, as explained later in this decision, the IOT as composed at the time proceeded with the drafting of Interim Procedures, and a first draft was circulated to IOT members in July 2016.
124. Turning to the ICANN Board, its general function is to exercise the powers, control the property and conduct the business and affairs of ICANN.¹⁸ The Board consists of sixteen voting directors – the Directors referred to in the definition of "Covered Actions" – and four non-voting liaisons.¹⁹
125. As can be seen, the IOT and the ICANN Board are separate and distinct entities. Under the Bylaws, the IOT exists in order to develop rules of procedure to be submitted for approval by the Board.²⁰

¹⁵ Bylaws, Section 4.3(j).

¹⁶ See *id.*, Section 4.3(n).

¹⁷ ICANN PHB, para. 6.

¹⁸ Bylaws, Section 2.1.

¹⁹ *Id.*, Section 7.1.

²⁰ *Id.*, Section 4.3(n)(i)-(ii).

126. Nor can the IOT be equated with ICANN's Staff. Staff is a defined term under the Bylaws, said to "include employees and individual long-term paid contractors".²¹ As just seen, the IOT is, for the most part, composed not of employees of ICANN but of Internet community volunteers. While Ms. Eisner serves on the IOT as ICANN staff liaison, this does not, in the opinion of the Panel, make the IOT a part of ICANN's Staff.
127. Since the IOT is not an individual Director or Officer either, the conclusion must be that actions of the IOT – as distinct from actions of the Board – are not Covered Actions. Accordingly, to the extent Afilias' Rule 7 claim challenges actions of the IOT, it does not fall within the jurisdiction of the Panel.
128. Afilias contends that the IOT can only be viewed "as part of ICANN".²² That may be so in a loose sense, and indeed there is no denying that the IOT is a creation of the Bylaws, which require it to draft rules of procedure for the IRP. However, the question that falls to be determined is whether the IRP is the appropriate accountability mechanism, under the Bylaws, to control the actions of the IOT. The Panel decides that it is not.
129. The Panel questioned the Parties and the Applicant *Amici* as to the recourse available to a party wishing to challenge the IOT's conduct or decisions. ICANN's submission in response was that the principal means to do so is through active participation and, as appropriate, the filing of a complaint with the ICANN Ombudsman, whose remit includes alleged unfair treatment by an "ICANN constituent body",²³ including the IOT. ICANN also says that the IOT can be challenged indirectly, by the filing of a Reconsideration

²¹ *Id.*, Section 4.2(a).

²² Afilias PHB, paras. 5-8. In its PHB, VeriSign submits that the IOT is part of the ICANN *community* rather than an arm of ICANN itself. VeriSign PHB, para. 5.

²³ Bylaws, Section 5.2.

Request under Section 4.2 of the Bylaws asking that the Board reconsider its approval of an IOT recommendation.²⁴

130. Having regard to the definition of Covered Actions, the Panel concludes that actions of the IOT do not fall within the definition of “Covered Actions” and, as such, cannot be challenged through an IRP.

(b) Alleged Involvement of ICANN Staff

131. Afilias argues that, contrary to ICANN’s submissions, its Rule 7 claim is not limited to the conduct of the IOT. Afilias avers that, while Mr. McAuley instigated the changes to Rule 7, he did so with the knowledge and assistance of ICANN’s personnel – namely Ms. Eisner – and that both she and Mr. Bernard Turcotte – an ICANN contractor supporting the IOT – were involved in crafting the procedure that allowed Mr. McAuley to deem the draft Rules approved by the IOT by 23:59 UTC on 21 October 2018.²⁵ Afilias thus contends: “Given that Ms. Eisner is an ICANN Deputy General Counsel and staff liaison to the IOT, Afilias’ claims expressly encompass the actions of ICANN staff.”²⁶
132. The Panel accepts this submission. Afilias made clear, in its Amended Request, that its Rule 7 claim included the contention that VeriSign, “with the knowledge and assistance of ICANN personnel”,²⁷ exploited its leadership position on the IOT to secure an absolute right to participate in this IRP. “Personnel” clearly encompasses employees of ICANN, such as Ms. Eisner. To the extent that Afilias’ Rule 7 claim impugns the actions of ICANN’s Staff and asserts that these actions violated the Articles of Incorporation or

²⁴ ICANN PHB, paras. 11-14.

²⁵ See below, para. 165.

²⁶ Afilias PHB, paras. 2-4.

²⁷ Amended Request for IRP, para. 84 [emphasis added].

Bylaws, it falls within both the definition of Covered Actions and the jurisdiction of the Panel in this IRP.

(c) Conclusions on Jurisdiction

133. In respect of Afiliás' Rule 7 claim, the Panel therefore concludes that it has jurisdiction over any actions or failures to act alleged to violate the Articles of Incorporation or Bylaws:

- (a) committed by the Board; or
- (b) committed by Staff members of ICANN;

but not over actions or failures to act committed by the IOT as such.

2. Timeliness of the Rule 7 Claim

134. Rule 4 of the Interim Procedures provides that a "CLAIMANT shall file a written statement of a DISPUTE [...] no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE [...]".

135. ICANN takes the position that "the 'material effect' of the asserted violation must be the Board's allegedly wrongful adoption of Rule 7 [...] on October 25, 2018."²⁸ According to ICANN, the "material effect of the Board's adoption of Rule 7 was that Rule 7 would apply to future IRPs, including this IRP."²⁹

136. Afiliás contends for its part that it had no reason to know about the drafting history of Rule 7 when ICANN approved the Interim Procedures on 25 October 2018. Nor did it

²⁸ ICANN's Supplemental Brief, para. 32.

²⁹ ICANN's Response to Afiliás' Post-Hearing Arguments Regarding Time-Bar Issues, dated 27 November 2019, para. 5.

have reason to know that that process violated the Bylaws, let alone have any awareness of the material effect of these violations.³⁰

137. In the opinion of the Panel, the earliest date on which Afiliias could have become aware of the material effect of the impugned actions of the Board or ICANN's Staff insofar as the *amicus* provisions of Rule 7 are concerned is 5 December 2018, when its counsel received copy of counsel's letter advising the ICDR that VeriSign and NDC intended to submit applications to participate in the IRP as *amici*, relying on the impugned provisions of Rule 7.³¹ Afiliias' Rule 7 claim having been filed on 21 March 2019, it was filed within the delay provided for in Rule 4 of the Interim Procedures. ICANN's contention that Afiliias' Rule 7 claim is time-barred is therefore rejected.

3. Merits of the Rule 7 Claim

138. The Panel turns to consider the merits of those aspects of the Rule 7 claim over which the Panel has determined it has jurisdiction. The first aspect concerns VeriSign's alleged interference – through Mr. McAuley and allegedly with the knowledge and assistance of ICANN's personnel – in the rule-making process of Rule 7, in order to secure an absolute right in favour of the Applicant *Amici* to participate in this IRP. Consideration of this aspect of the Rule 7 claim requires the Panel to review the drafting history of Rule 7, to which the Panel now turns.

³⁰ Afiliias PHB, para. 11.

³¹ Letter on behalf of NDC and VeriSign to ICDR, 5 December 2018, Ex. C-85.

(a) Drafting History of Rule 7

139. The first draft of the proposed Updated Supplementary Procedures was circulated to the IOT by Becky Burr on 19 July 2016.³² These had apparently been drafted by Sidley Austin.³³ Rule 7 in this initial draft did not contemplate *amicus curiae* participation in an IRP, although that possibility had been alluded to in the IOT meeting of 1 June 2016.³⁴ Rule 7, in this initial draft, read as follows:³⁵

7. Consolidation, Intervention, and Joinder

[At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. A CLAIMANT may join in a single written statement of a DISPUTE, as independent or alternative claims, as many claims as it has that give rise to a DISPUTE.]

³² ICANN's Response to Procedures Officer's Questions dated 16 January 2019, para. 8.

³³ Draft as of 19 July 2016 – Updates to ICDR Supplementary Procedures, Ex. 226. See Declaration of David McAuley of 5 February 2019, para. 10 [**McAuley Declaration**].

³⁴ IOT Meeting #3 of 1 June 2016, Transcript, Ex. 225, p. 26.

³⁵ Draft as of 19 July 2016 – Updates to ICDR Supplementary Procedures, Ex. 226, pp. 6-7 [brackets in the original].

140. Between 20 July 2016 and early November 2016, while several drafts of the Supplementary Procedures were prepared and circulated, the text of Rule 7 remained largely unchanged save for the addition of a third paragraph setting page limits to the written briefings contemplated by its provisions.
141. On 2 November 2016, draft Updated Supplementary Procedures dated 31 October 2016 were reviewed and approved for publication by the CCWG-Accountability and, on 28 November 2016, these were published for public comment pursuant to Section 4.3(n)(ii) of the Bylaws. The version of Rule 7 published for public comment, reproduced below, was very similar to the version of the first draft.³⁶

7. Consolidation, Intervention, and Joinder

At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements

³⁶ Draft as of 31 October 2016 – Updates to ICDR Supplementary Procedures, Ex. 235, p. 8 [reference omitted].

set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.

142. In the notice published with the public comment version of the draft Updated Supplementary Procedures, it was stated that the IOT would consider making amendments to the draft in light of the comments received.
143. During the consultation period, which closed on 1 February 2017,³⁷ the IOT received a number of comments pertaining to Rule 7. Three of these urged that participation rights be granted to other entities than those contemplated in the public comment draft of Rule 7.³⁸
144. The public comments gave rise to further discussions at the IOT and consideration was given to allowing certain interested parties to participate in IRPs as *amici*. More specifically, between the months of May and October 2017, the IOT considered different iterations of Rule 7 designed to provide participation rights to entities involved in the underlying action that is the subject of the IRP.
145. On 8 May 2018, Ms. Eisner circulated to the IOT a new version of the draft Interim Supplementary Rules dated 1 May 2018 which redlined the modifications made to the version posted for public comments in November 2016.³⁹ Reproduced below is the text of the revised Intervention and Joinder section in the 1 May 2018 draft of Rule 7:

³⁷ ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 November 2016), Ex. 221.

³⁸ See Affiliations' Supplemental Brief, paras. 10-11.

³⁹ Ms. Eisner's email to the IOT dated 8 May 2018, Ex. 248; Draft set of interim procedures of 1 May 2018, Ex. 1.

7. Consolidation, Intervention and Joinder

[...]

Intervention and Joinder

If a person, group, or entity participated in an underlying proceeding (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)) (s)he/it/they shall receive notice that the INDEPENDENT REVIEW has commenced. Such a person, group, or entity shall have a right to intervene in the IRP as a CLAIMANT or as an *amicus*, as per the following:

i. (S)he/it/they may only intervene as a party if they satisfy the standing requirement to be a CLAIMANT as set forth in the Bylaws.

ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an *amicus*.

Any person, group, or entity that did not participate in the underlying proceeding may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, such persons may intervene as an *amicus* if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed *amicus* has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly or causally connected to the alleged violation at issue in the DISPUTE.

[...]

146. In regard to this 1 May 2018 draft, Afiliias emphasizes that it only concerned participation rights in IRPs where the underlying proceeding is a “process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)”, not an underlying proceeding like the one that gave rise to this IRP.⁴⁰

147. Between May 2018 and September 2018, the IOT continued to discuss the Interim Supplementary Procedures and draft revisions were prepared by both Sidley Austin and

⁴⁰ Afiliias’ Supplemental Brief, para. 14.

ICANN.⁴¹ In the course of the IOT meeting of 7 June 2018, a person who identified herself as “Liz from ICANN”⁴² addressed Rule 7 and said that, while “there [was] still some work that need[ed] development”, they “seem[ed] to have agreed upon” the version that had been circulated on 8 May 2018.⁴³

148. On 20 June 2018, ICANN disclosed on its website that Afilias had initiated a CEP with ICANN over .WEB. On 30 August 2018, counsel for the Applicant *Amici* wrote to Afilias noting that they had been advised that Afilias had invoked the CEP and, should the CEP prove unsuccessful, planned to initiate an IRP. Counsel added that VeriSign and NDC intended to take legal action against Afilias to protect their business interests.⁴⁴
149. On 5 October 2018, Mr. Turcotte wrote to IOT members on behalf of Mr. McAuley to circulate a revised draft dated 25 September 2018⁴⁵. The revised language of Rule 7 in that draft provided for *amicus* participation in an IRP by “[a]ny person, group, or entity that has a material interest relevant to the DISPUTE”.⁴⁶

⁴¹ Declaration of Samantha Eisner of 16 January 2019, para. 4 [**Eisner Declaration**]

⁴² This is most likely a reference to Elizabeth Le, copied on some of the email exchanges concerning Rule 7, including on Ms. Eisner’s email to Mr. McAuley dated 16 October 2018, Ex. 2 to the Eisner Declaration.

⁴³ IOT Meeting #41 of 7 June 2018, Transcript, Ex. 255, p. 12.

⁴⁴ Afilias’ Supplemental Brief, para. 16.

⁴⁵ Afilias’ Supplemental Brief, para. 17; Afilias’ Response dated 28 January 2019, para. 51; ICANN’s Response to Procedures Officer’s Questions, para. 34.

⁴⁶ Draft of ICDR Interim Procedures dated 25 September 2018, Ex. 256, p. 10 (redline of changes from the version of 1 May 2018).

Participation as an *Amicus Curiae*

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

150. During the IOT meeting held four days later, on 9 October 2018, Mr. McAuley – speaking not as chair but as a participant - expressed the view that it was “essential that a person or entity have a right to join an IRP if they feel that a significant – if they claim that a significant interest they have relates to the subject of the IRP. And that adjudicating the IRP in their absence would impair their ability to protect that.” He added that he “would be happy to provide specific language with respect to this concept.”⁴⁷

⁴⁷ IOT Meeting #42 of 9 October 2018, Transcript, Ex. 202, p. 15.

151. On 10 October 2018, in conjunction with its CEP, Afilias provided to ICANN's in-house counsel a draft of its IRP Request.⁴⁸ Afilias avers that, much like the IRP Request it ultimately filed on 14 November 2018, this draft contained multiple references to VeriSign.
152. On 11 October 2018, Mr. McAuley proposed modifications to the Intervention portion of Rule 7 to broaden opportunities to intervene in an IRP as a party, rather than as an *amicus*. Mr. McAuley also suggested language removing the Procedures Officer's discretion to grant (or not) requests for intervention by entities claiming a significant interest relating to the subject matter of the IRP. The modifications suggested by Mr. McAuley on 11 October 2018 are redlined in the excerpt below.⁴⁹

Rule (7): Consolidation, Intervention and Participation as an *Amicus*

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, requests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.
[...]

Intervention

[...]

⁴⁸ Letter dated 8 December 2018 from Arif Hyder Ali (Counsel for Claimant) to the ICDR, pp. 2-3; Eisner Declaration, para. 6.

⁴⁹ Mr. McAuley's email to the IOT dated 11 October 2018, Ex. 258; Draft for Rule 7 attached to Mr. McAuley's email to the IOT dated 11 October 2018, Ex. 258 [Mr. McAuley's modifications are redlined].

In addition, any person, group or entity shall have a right to intervene as a CLAIMANT where (1) that person, group or entity claims a significant interest relating to the subject(s) of the INDEPENDENT REVIEW PROCESS and adjudicating the INDEPENDENT REVIEW PROCESS in that person, group or entity's absence might impair or impede that person, group or entity's ability to protect such interest, and/or (2) where any question of law or fact that is common to all who are similarly situated as that person, group or entity is likely to arise in the INDEPENDENT REVIEW PROCESS.

[...]

153. During the IOT meeting held later on the same day, Mr. McAuley explained that, in his view, persons who have contracts with ICANN have to be able to protect their interest in competitive situations. In response, Ms. Eisner expressed concern about granting intervener status to persons claiming significant interest if they do not qualify as claimants under the Bylaws. She suggested granting them *amicus* status instead.⁵⁰ Mr. McAuley then indicated that he was willing to consider alternative language to be drafted by Ms. Eisner.
154. The following day, on 12 October 2018, Ms. Eisner sent an email to Mr. McAuley expressing concern about the removal of the Procedures Officer's discretion and the expansion of participation rights beyond the outcome of the public comments and of what was discussed by the IOT. This email is the one document that, upon application by the Claimant, the Panel agreed to add to the record even though it was not before the Procedures Officer.⁵¹ Since much reliance was placed on it by Afilias, the Panel reproduces it in full:

⁵⁰ IOT Meeting #43 of 11 October 2018, Transcript, Ex. 205, pp. 12-14.

⁵¹ Ms. Eisner's email to Mr. McAuley dated 12 October 2018. See above, para. 65, footnote 6.

Hi David -

I sat down with this and tried to develop some language, but realized that this is a really tricky definitional issue. Without being extremely careful, we'd be granting anyone that says that they have an interest in the case the right to participate, which then takes away the discretion from the panel on a much broader basis than is currently allowed, so we'd need to flag that change through ICDR.

As I was thinking through all of this, I realized that giving this participation as of right based on "significant interest" is also broader than what the IOT discussed in outcomes of the public comment. As I understand, we agreed as an IOT, and we have reflected in the rules, that those who participate in underlying panels should have the ability to participate as of right (either as claimant, where we've identified that they meet the material harm threshold) or as an amicus (also reflected in there). We did not have comments on, nor agree as an IOT (from what I can tell) that having an interest that might be impaired by, or is similar to that which is under discussion should give a right to participation.

I don't have an objection to continuing this conversation for the final set of rules, but I think that from the principles laid out for the interim set, this inclusion goes far beyond. Working on it to a short time frame also increases the possibility that we make it too broad, and make it very difficult to tailor in a final rule set. Finally, depending on the scope of the final rule we'd propose, we'd then have to see how significant a change it is from what was posted for comment previously.

In the interim, my thought is that the rules are broad enough that they give a very good opportunity for people to preserve their rights through the IRP. If a party could be a claimant, they can initiate an IRP and seek consolidation, even if joinder is denied under discretion of the panelist. The amicus rules are quite broad as well.

Please let me know your thoughts on this,

Thanks,

Sam

155. On 16 October 2018, Ms. Eisner sent an email to Mr. McAuley with further suggested changes to Rule 7. More specifically, Ms. Eisner introduced in this 16 October 2018 draft two categories of entities deemed to have a material interest in the Disputes. These are: (a) in an IRP arising out of an application for a new gTLD, persons who were part of a contention set for the new gTLD; and (b) persons whose actions are significantly referred to in the briefings before the IRP panel. The language underlined in the excerpt

quoted below of the 16 October 2018 draft indicates a modification from the *amicus curiae* provisions of the draft dated 25 September 2018:⁵²

Here is a proposed addition (in underline), including a footnote, for the *amicus* section:

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. Similarly, if the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.^[1] The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

[1] During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in considering the scope of briefing available from *amicus curiae*, the IRP PANEL shall also consider how the purposes of the IRP set forth at Section 4.3(a) of the ICANN Bylaws are furthered, including the need for coherent, consistent and just resolution of DISPUTES.

156. Neither Ms. Eisner nor Mr. McAuley describe in their respective declarations the discussions that took place between them between 12 and 16 October 2018, as

⁵² Ms. Eisner's email to Mr. McAuley dated 16 October 2018, Ex. 2 to the Eisner Declaration.

Ms. Eisner, to quote from her declaration, was seeking to “provide additional definition to the “material interest” requirement” through revisions to the *amicus* provisions of Rule 7.⁵³ However, the fact that such discussions took place is established by a draft email to the IOT that Mr. McAuley sent to Ms. Eisner and Mr. Turcotte on 17 October 2018, which included the following paragraphs:

I would like to note one particular area – that of Joinder etc. (Rule 7). You may recall that I, wearing my **participant** (not leader) hat, had suggested certain text and with Malcom’s help we seemed to have achieved compromise.

As Sam attempted to draft the compromise in this respect she encountered difficulty in capturing appropriate language that she felt would be consistent with bylaws. Sam reached out to me in my participant capacity and we discussed over the ensuing days and so the language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity. I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list – a way to try to take advantage of board action at next week’s meeting.

157. Afilias characterizes as “bespoke” the language added to Rule 7 by Ms. Eisner on 16 October 2018 to describe the two categories of parties deemed to have a material interest relevant to the Dispute. In this regard, the Claimant avers: “Unsurprisingly, these two 11th hour additions to Rule 7 provide the textual basis for VeriSign’s and NDC’s applications before this Panel.”⁵⁴
158. In her declaration, Ms. Eisner denies Afilias’ contention that these revisions to Rule 7 had been added by Mr. McAuley following Afilias’ CEP and threatened IRP. She states: “Those Rule 7 provisions were drafted by me; and I was not aware of Afilias’ draft IRP Request when I drafted them and proposed them to the IRP-IOT.”⁵⁵

⁵³ See Eisner Declaration, para. 5

⁵⁴ Afilias’ Supplemental Brief, para. 20

⁵⁵ Eisner Declaration, para. 6.

159. As for Mr. McAuley, he says of Ms. Eisner's revisions of 16 October 2018:⁵⁶

This language was developed by Ms. Eisner alone. I never suggested to Ms. Eisner that she should add these two categories of persons who would be deemed to have a material interest for purposes of *amicus* participation.

160. In the same declaration, Mr. McAuley states:⁵⁷

...to the best of my knowledge and belief, I was not aware that Afilias had filed a [CEP] [...] while any of the proceedings described in this declaration were ongoing. [...] None of my proposed edits or comments to the Interim Supplementary Procedures were made because of a CEP or IRP by Afilias with respect to .web.

161. Ms. Eisner and Mr. McAuley exchanged further emails in the course of the three days following her sending her 16 October 2018 draft, during which her proposed revisions were "refin[ed]".⁵⁸ Thus, on 17 October 2018, Mr. McAuley sent an email to Ms. Eisner with suggested language for Rule 7 reinforcing the Procedures Officer's lack of discretion to allow *amicus* participation by the two categories of persons, groups or entities deemed to have a material interest in the Dispute. Mr. McAuley's proposed modifications to the draft of 16 October 2018 appear in red in the excerpt below:⁵⁹

⁵⁶ McAuley Declaration, para. 26

⁵⁷ *Id.*, para. 32.

⁵⁸ Eisner Declaration, para. 5.

⁵⁹ Attachment to Mr. McAuley's email to Ms. Eisner and Mr. Turcotte dated 17 October 2018, Ex. 3 to the Eisner Declaration.

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. Similarly, if the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP shall be deemed to have a material interest relevant to the DISPUTE and shall be permitted to ~~may~~ participate as an *amicus* before the IRP PANEL. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity shall be deemed to have a material interest relevant to the DISPUTE and ~~may~~ shall be permitted to participate as an *amicus* before the IRP PANEL.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.^[1] The *amicus curiae* shall be informed of the proceedings in the same manner as the parties thereto. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

[1] During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in considering the scope of briefing available from *amicus curiae*, the IRP PANEL shall ~~also~~ consider how the purposes of the IRP set forth at Section 4.3(a) of the ICANN Bylaws are furthered, including the need for coherent, consistent and just resolution of DISPUTES. In addition, the IRP PANEL shall allow persons, groups or entities with a material interest relevant to the DISPUTE to participate broadly as an *amicus curiae* consistent with ICANN's pertinent bylaws, including, without limitation, Bylaw Sections 4.3(a) and 4.3(n)(iv)(B).

162. On 18 October 2018, Ms. Eisner replied to Mr. McAuley with a further redline. She explained that her modifications adopted his language removing discretion regarding *amicus* participation, restructured the provision and shortened the footnote.⁶⁰

Hi David -

Thanks for your language. Attached is a further redline. The first paragraph appears to have a lot of changes, but what it does is:

- 1) adopt your language of "shall participate";
- 2) makes that language applicable to all three types of situations; and
- 3) is reframed in a bulleted list so as to avoid repeating the same participation right 3 times.

You'll see my comment that I do not recommend accepting the line regarding how *amicus* are informed. It creates a lot of vagueness in the document, and the procedures don't have other discussion about how parties are "informed". Again, this is something that we can continue discussing for the final set.

Finally, I reorganized the footnote to return to one sentence, as there was some duplication and reference to Bylaws sections that do not appear to apply to *amicus*. In this reorganization, I incorporate that concept of "broad participation" that was not in my previous sentence.

Please let us know your thoughts. It would be good if we could get this out either later today or by tomorrow .

Thanks,

Sam

163. Attached to that email was a redline, where Ms. Eisner's modifications are in blue and Mr. McAuley's in red. This draft also shows how the language of the footnote to Rule 7 evolved.⁶¹

⁶⁰ Ms. Eisner's email to Mr. McAuley dated 18 October 2018, Ex. 4 to the Eisner Declaration.

⁶¹ Attachment to Ms. Eisner's email to Mr. McAuley dated 18 October 2018, Ex. 4 to the Eisner Declaration.

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. The following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, if requested, shall be permitted to participate as an *amicus* before the IRP PANEL.:

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. ~~shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. Similarly, if the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and~~
- iii. ~~shall be deemed to have a material interest relevant to the DISPUTE and shall be permitted to~~ may participate as an *amicus* before the IRP PANEL. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity, ~~shall be deemed to have a material interest relevant to the DISPUTE and may shall be permitted to~~ participate as an *amicus* before the IRP PANEL.

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All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its

discretion. [1] The *amicus curiae* shall be informed of the proceedings in the same manner as the parties thereto. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

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Commented [SE1]: The procedures do not discuss what it means to be "informed" of proceedings, so I recommend removal, as this could lead to vagueness. I'm also not sure what this means. ICANN will always maintain the online docket of filings and orders. If this is anticipating different notification requirements on ICDR, we'd have to obtain that authorization before we could put this into effect.

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[1] During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in then considering the scope of briefing available participation from *amicus curiae*, the IRP PANEL shall also lean in favor of allowing broad participation of an *amicus curiae* as needed to further consider how the purposes of the IRP set forth at Section 4.3(a) of the ICANN Bylaws are furthered, including the need for coherent, consistent and just resolution of DISPUTES. In addition, the IRP PANEL shall allow persons, groups or entities with a material interest relevant to the DISPUTE to participate broadly as an *amicus curiae* consistent with ICANN's pertinent bylaws, including, without limitation, Bylaw Sections 4.3(a) and 4.3(m)(iv)(B).

Commented [SE2]: They have to have a material interest to be an *amicus*, so nothing is added by this phrase.

Commented [SE3]: Reference to 4.3(a) is captured above.

Commented [SE4]: This refers to setting of rules for joinder and consolidation, which is handled separately in these procedures and reference thereto would likely lead to confusion.

164. Mr. McAuley and Ms. Eisner continued to exchange emails with further minor suggestions on 18 October 2018.⁶² The following day, that exchange ended with Mr. McAuley's suggestion to add a phrase in order to avoid excluding non-listed persons from the *amicus* provision. His addition appears in red in the excerpt below:⁶³

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, if requested, shall be permitted to participate as an *amicus* before the IRP PANEL:

165. Later on 19 October 2018, Mr. Turcotte, on behalf of Mr. McAuley, sent the last version of the draft Interim Supplementary Procedures to the IOT members, and asked them to revert back to him by 23:59 UTC on 21 October 2018.⁶⁴ The revised language was deemed approved by the lack of comments from members of the IOT within the time allowed. Afilias points to the fact that 19 October 2018 being a Friday, IOT members were only given two days over a week-end to react to Mr. Turcotte's email.

166. On 22 October 2018, the draft Interim Supplementary Procedures as circulated by Mr. Turcotte were sent to the Board for consideration. The preamble to the Interim

⁶² Mr. McAuley's email to Ms. Eisner dated 18 October 2018, Ex. 5 to the Eisner Declaration; Ms. Eisner's email to Mr. McAuley dated 18 October 2018, Ex. 6 to the Eisner Declaration.

⁶³ Mr. McAuley's email to Ms. Eisner dated 19 October 2018, Ex. 7 to the Eisner Declaration.

⁶⁴ Mr. Turcotte email to the IOT dated 19 October 2018, Ex. 262.

Supplementary Procedures as presented to the Board for adoption contains the following representations of the IOT:⁶⁵

In drafting these Interim Supplementary Procedures, the IRP IOT applied the following principles: (1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016;; (2) to the extent public comments received in response to the Updated Supplementary Procedures reflected clear movement away from either the current Supplementary Procedures or the Updated Supplementary Procedures, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the IRP IOT has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

167. Afiliias contends that, insofar as Rule 7 was concerned, each one of the three representations made in this communication to the Board was false.⁶⁶
168. Before completing this description of the evolution of Rule 7, it bears mentioning, as the Procedures Officer found and as admitted by ICANN, that the meetings of the IOT were sparsely attended and, on occasion, that the IOT was unable to muster a quorum.⁶⁷
169. By way of example, the Procedures Officer noted that at the IOT meeting of 11 October 2018, “[i]n addition to an ICANN consultant, an ICANN counsel, a partner of the Jones Day law firm [counsel to ICANN], an ICANN Research Analyst, and an ICANN

⁶⁵ ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 October 2018), Ex. 314, p. 62.

⁶⁶ Afiliias’ Supplemental Brief, para. 28.

⁶⁷ PO Declaration, paras. 83-85. See also ICANN PHB, para. 9.

Projects and Operations Assistant, only two other people spoke at the meeting: David McAuley and Malcolm Hutto.”⁶⁸

170. Mr. McAuley acknowledged in his declaration that IOT members did not regularly attend telephonic meetings. Nevertheless, he sought to situate this state of affairs in a broader context.⁶⁹

All IRP-IOT meetings are open to all members of the IRP-IOT committee, although it is not uncommon for members to skip some of the telephonic meetings. However, all committee members are included on all IRP-IOT correspondence, including any drafts of the Update Supplementary Procedures, and are able to and are encouraged by me to comment on the telephone and by email on issues being considered by the committee. The meetings themselves are transcribed by an automated transcription service and the meeting transcriptions, and correspondence among the IRP-IOT members, along with any documents considered during those meetings, are publicly posted on ICANN’s website at <https://community.icann.org/display/IRPIOT/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home> and <https://mmm.icann.org/pipermail/iot>.

171. The Interim Supplementary Procedures were adopted by a resolution of the Board on 25 October 2018.⁷⁰

(b) Observations as to the Development of the *Amicus* Provisions of Rule 7

172. The parties and the Applicant *Amici* have made detailed submissions concerning virtually every step in the evolution of Rule 7. The Panel does not consider it necessary

⁶⁸ PO Declaration, para. 87.

⁶⁹ McAuley Declaration, para. 9.

⁷⁰ ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 October 2018), Ex. 0314.

to get into the *minutiae* of each of the drafts, as the following observations suffice to ground its reasons for decision.

173. Beginning with Mr. McAuley's draft of 25 September 2018, a series of changes were introduced to Rule 7 that had the effect of both broadening the circumstances in which interested parties could seek to participate in an IRP and narrowing down the discretion of the Procedures Officer presented with a request to participate by an interested party.
174. In the 16 October 2018 draft prepared by Ms. Eisner, it was proposed that two specific categories of entities be deemed to have a material interest relevant to the Dispute that would justify their participation as *amici*. The first – qualifying an entity that was part of a contention set for the string at issue in an IRP relating to an application arising out of ICANN's New gTLD Program – reflected the circumstances in which NDC found itself after Afilias' CEP was made public, and Afilias announced it might initiate an IRP; the second – qualifying a person external to the Dispute if the briefings before the IRP significantly refer to actions taken by that person – reflected the circumstances in which VeriSign would likely find itself after the initiation of Afilias' IRP, based on the text of Afilias' CEP of 18 June 2018 and the draft IRP shared with ICANN on 10 October 2018.
175. The two categories of interested parties added to Rule 7 on 16 October 2018 and deemed to have a material interest in the Dispute are quite specific. In the experience of the Panel, they are couched in language that is not typical of legal texts used to describe parties that may claim intervenor status or request *amicus* participation in legal proceedings. Although it is not inconceivable that it be so, it would be a surprising coincidence, in light of the documentary evidence just reviewed, if the articulation of these two categories of potential *amici*, at the time that it occurred, were wholly unrelated to Afilias' CEP, made public shortly before, and its impending IRP, a draft of

which had been shared with ICANN less than a week before these categories came to being. All the more so given that the documentary evidence establishes that Ms. Eisner and Mr. McAuley were in contact while Ms. Eisner was developing the language by which these new categories of entities were added to Rule 7.

176. The questions raised by the specificity of these two additional grounds for *amici* participation are all the more serious considering the persistence with which Mr. McAuley, in his last exchanges with Ms. Eisner, sought to constrain the discretion of the Procedures Officer when he or she would be presented with an application by entities meeting those conditions.
177. The full picture arising from the record before the Panel, however, is more complex. On the other side of the ledger, there are two witness declarations that directly contradict the inference that the Panel is asked to draw from the documentary evidence. First, there is the declaration of Ms. Eisner, who holds the position of Deputy General Counsel of ICANN and is an attorney in good standing licensed to practice in California; and second, the declaration of Mr. McAuley, Senior International Policy and Business Development Manager at VeriSign.
178. In her declaration, Ms. Eisner responds to Afiliias' contention that the portions of Rule 7 relied upon by the Applicant *Amici* were added by Mr. McAuley in response to Afiliias' CEP and in reaction to the draft IRP Request that Afiliias provided to ICANN's in-house counsel on 10 October 2018. She states, as already noted, that the relevant Rule 7 provisions "were drafted by me; and I was not aware of Afiliias' draft IRP Request when I drafted them and proposed them to the IRP-IOT."⁷¹

⁷¹ Eisner Declaration, para. 6.

179. Mr. McAuley, for his part, states in his declaration:⁷²

While I understand generally that ICANN identifies publicly matter subject to the Cooperative Engagement Process (“CEP”), to the best of my knowledge and belief, I was not aware that Afilias had filed a [CEP] on any subject, including with respect to the .web gTLD while any of the proceedings described in this declaration were ongoing. [...] I first learned that Afilias had filed an IRP regarding .web a couple of weeks after it had been filed. None of my proposed edits or comments to the Interim Supplementary Procedures were made because of a CEP or IRP by Afilias with respect to .web.

180. Afilias sought leave from the Procedures Officer to cross-examine Ms. Eisner and Mr. McAuley. That request was denied. No such request was presented to this Panel, which was asked to decide all Phase I issues on the basis of the record before the Procedures Officer. In the result, the Panel is therefore left with the invitation, based on submissions interpreting a trail of documents, to make findings of fact that are contradicted by two witness declarations, in circumstances where the witnesses in question did not appear before the Panel and were not cross-examined on their evidence.

181. The Panel has referred earlier in these reasons to the pre-eminence of documents as a means of evidence when international arbitral tribunals are called upon to reconstitute past events. However, where, as in the present case, documents raise serious questions without providing definitive answers, the Panel is not prepared to make findings of fact that are inconsistent with declarations affirmed by witnesses whose evidence has not been subject to cross-examination. Before making findings of fact that necessarily imply that the evidence of a witness is untruthful, the Panel considers it the duty of any adjudicator, save in the clearest of cases, to require that the party urging that these

⁷² McAuley Declaration, para. 32 [emphasis added].

findings be made first put its case and the documents on which it is based to the witness in cross-examination. All the more so, if the findings of fact in question relate to alleged misconduct by the witness.

(c) Conclusions as to the Involvement of ICANN Staff in the Drafting of Rule 7

182. For the reasons just given, the Panel declines in this decision to make a finding as to the propriety of the involvement of ICANN's Staff in the development of the *amicus* provisions of Rule 7, and Afilias' contention that its action violated the Articles of Incorporation or Bylaws.
183. In its Supplemental Brief in connection with the Applicant *Amici's* requests, Afilias has requested, as principal relief, that the Panel find that the *amicus* provisions of Rule 7 were adopted by ICANN in violation of its Bylaws and, consequently, that VeriSign's and NDC's applications be denied. Afilias has also presented the following, alternative requested relief:⁷³

Second, and in the alternative, if the Panel is not prepared to decide Afilias' claim that ICANN violated its Bylaws in adopting the *amicus* provisions in this Phase I, it should join that claim to the other claims to be decided in Phase II, and allow the Applicants to participate as *amici* on a provisional basis.

184. As reflected in the next section of this decision, the Panel's opinion as to the nature and breadth of the *amicus* participation that should be afforded to the Applicant *Amici* in this case – whether it be under the provisions of Rule 7, properly interpreted, as an exercise of the Panel's discretion under Section 4.3(o)(v) of the Bylaws, or under relevant principles of international law – broadly accords with the *amici* participation rights that Afilias is prepared to concede as part of its alternative relief. This being the case, the

⁷³ Afilias' Supplemental Brief, para. 3.

Panel has decided to grant Afilias' alternative request for relief, and to join those aspects of the Rule 7 claim over which the Panel has jurisdiction (to the extent Afilias chooses to maintain them) to the other claims to be decided in Phase II.

(d) Other Aspects of Afilias' Rule 7 Claim

185. To the extent that there remain aspects of Afilias' Rule 7 claim that fall within the jurisdiction of the Panel, as determined in this decision, these are also joined to Afilias' other claims to be determined in Phase II of this IRP.

B. Amicus Participation of the Applicant *Amici* in the IRP

186. As noted already, it is common ground, assuming Rule 7 to be valid, that that Applicant *Amici* are entitled to participate in the IRP as *amici*. The Panel turns now to considering the specific participation rights that are being sought by the Applicant *Amici*. As mentioned, these include submitting written briefs with respect to their alleged misconduct; submitting evidence in the form of witness statements and exhibits; responding to the Claimant's arguments and evidence; participating at the hearing; allowing their witnesses to be cross-examined and being entitled to cross-examine the other Parties' witnesses; making arguments at the hearing and submitting post-hearing submissions with respect to their alleged wrongdoing.⁷⁴

187. The Panel has also noted, above, that the Applicant *Amici* propose to adduce evidence of what they claim was unlawful conduct on the part of Afilias that would disqualify it from the right to operate the .WEB gTLD. To that extent, the Applicant *Amici* are seeking the right themselves to advance a claim in the IRP.

⁷⁴ Transcript of the hearing on Phase I, pp. 21-23.

188. ICANN's counsel also suggested, at the hearing, that if the Applicant *Amici* were permitted the type of broad participation they are seeking, then it would be appropriate that both of them be subject to the provisions of the Interim Procedures relating to Exchange of Information. This means that they would be subject to document requests, and that Afilias would in turn be subject to document requests by both ICANN and the Applicant *Amici*.⁷⁵
189. The Panel is unable to reconcile the type of participation rights being sought by the Applicant *Amici* with the terms of the Interim Procedures. Rule 7 contemplates the participation of a person, group or entity as *amicus curiae*. Its provisions make it clear that any person participating as an *amicus* “may submit to the IRP PANEL written briefing(s) on the DISPUTE or such other discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion” (emphasis added).
190. With respect to footnote 4 of Rule 7, relied upon by the Applicant *Amici* and ICANN, the Panel is of the view that the exhortation to “lean in favour of allowing broad participation” must be read in context, in accordance with the well-accepted rule of construction calling for contextual interpretation. The footnote in question comes at the end of the above-quoted sentence, which contains two references to “briefing”, and the footnote itself refers to the participation of (or from) “*amicus curiae*”, an expression normally used to designate a friend of the court having, as a non-disputing party, a status different from that of a party. In reality, the participation rights being sought by the Applicant *Amici* are

⁷⁵ *Id.*, p. 23.

those of a disputing party, and they are not sought by entities claiming to be “friends of the court”.

191. A further obstacle to the broad interpretation of Rule 7 urged by the Applicant *Amici* and ICANN arises from a comparison of the *amicus* provisions with the provisions of Rule 7 dealing with interventions. The Intervention provisions include, as regards to the status of the intervener, the following sentence (emphasis added):

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT.

192. No such provisions exist in relation to an *amicus curiae*, consistent with the usual limited scope of the participation of such a non-disputing party.

193. The Intervention section of Rule 7 also includes provisions dealing with the materials to be made available to interveners and entities whose claims have been consolidated:

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated...

194. In sharp contrast, the *amicus* provisions of Rule 7 provide:

The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

195. The conclusions the Panel draws from its review of the provisions of Rule 7, read as a whole, are the following:

- *Amici* are not treated as parties, unlike interveners or parties whose cases are consolidated.

- *Amici* do not have a *right* to access the full record of the IRP, unlike interveners or parties whose cases are consolidated.
- *Amici* are permitted to submit “written briefings on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing”.
- Unlike an intervener, who becomes a Claimant and is bound by the outcome of the IRP, Rule 7 does not provide that an *amicus* will be bound by the outcome of a case in which it participates, and the Applicant *Amici* have made clear that they did not accept to be bound by the result of this IRP.
- The provisions of the Interim Procedures relating to Exchange of Information (Rule 8) apply to *Parties*, and the Panel can find no basis in Rules 7 or 8 for the submission that *Afilias* may be subject to motions for exchange of documents by the Applicant *Amici*.
- Nowhere in the Interim Procedures can the Panel find support for the proposition that an *amicus* allowed to participate in an IRP may be afforded the right to assert claims of its own in the IRP.

196. Much reliance was placed by the Applicant *Amici* on *Micula v. Romania*, an ICSID arbitration in which the European Community (**EC**) was allowed to participate as a non-disputing party by the filing of written submissions.⁷⁶ The Panel observes that in its letter allowing the participation of the EC, the *Micula* Tribunal noted:

⁷⁶ *Ioan Micula v. Romania, Final Award*, ICSID Case No. ARB-05-20 (11 December 2013), para. 36.

... The European Community shall act as *amicus curiae* not as *amicus actoris vel rei*. In other words, the non-disputing party shall remain a friend of the court and not a friend to either party.⁷⁷

197. The participation rights accorded to the EC as a non-disputing party in *Micula* included the right to file a written submission of 40 pages in length, supported by exhibits, to be focussed on assisting the Tribunal in the determination of the factual and legal issues arising in the case. The EC was given access to the Parties' pleadings and the Tribunal reserved the possibility of requesting the EC to produce "any document or evidentiary material that the Tribunal deem[ed] useful for the resolution of [the] dispute, or which has been requested by either Party."⁷⁸ Provision was also made for any person who participated in the elaboration of the EC's written submission "to be called to provide clarifications on that submission at the hearing, as may be required by the Tribunal of its own initiative or at the request of the Parties."⁷⁹
198. In the opinion of the Panel, this precedent illustrates the distinction existing between cases in which *amicus* participation has been admitted, and the type of participation rights sought by the Applicant *Amici* in this case. At the Phase I hearing, the Panel asked all participating parties whether they had knowledge of any precedent where a person granted the status of *amicus* was afforded the broad participation rights that were being sought by the Applicant *Amici* in this case. None were cited, beyond the Applicant *Amici's* reference to *Micula*.
199. In *Methanex Corp. v. United States of America*, a NAFTA Chapter 11 arbitration governed by the UNICITRAL Arbitration Rules, the Tribunal was presented with petitions

⁷⁷ *Id.*, para. 27.

⁷⁸ *Id.*, para. 36(5).

⁷⁹ *Id.*, para. 36(7).

on behalf of non-governmental organizations requesting permissions to submit *amicus curiae* briefs to the Tribunal, to have observer status, and to make oral submissions at oral hearings. The petitions invoked the immense public importance of the case and the critical impact of the Tribunal's decision on environmental and other public welfare law-making in the NAFTA region. The Tribunal noted that the rules applicable in that case did not empower the Tribunal to add parties, nor to accord to persons who are not parties the substantive status, rights, or privileges of a disputing party. The Tribunal added that it was called upon to decide a substantive dispute between the claimant and the respondent, and that it had no mandate to decide any other substantive dispute or to determine the legal rights of third persons. The Tribunal further reasoned that if it could not, without the consent of the parties, directly add another person as a party, it was equally precluded from achieving this result *indirectly*, by exercising a power over the conduct of the arbitration.⁸⁰

200. In the opinion of the Panel, this reasoning applies to the type of broad participation rights that are being sought by the Applicant *Amici* in this case. To paraphrase the *Methanex* Tribunal, if the Panel cannot add VeriSign and NDC as parties to the IRP, by granting them intervener status or otherwise, the Panel cannot accept the invitation to achieve this result indirectly, by granting them the rights and privileges of parties while they would not, like parties or interveners, be bound by the Panel's decision.
201. It was urged that the Panel needs the assistance of the Applicant *Amici* to pronounce upon the allegations of wrongdoing levelled against them by the Claimant. In the Panel's

⁸⁰ (UNCITRAL NAFTA Ch. 11), Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*" (15 January 2001), para. 29. In the end, the *Methanex* Tribunal decided that it had the power to accept *amicus* written submissions from the petitioners, and deferred to a later stage of the proceedings the decision of whether or not to receive them.

view, this assistance can be provided by granting them the type of *amicus* participation contemplated by Rule 7. Moreover, there is no suggestion that ICANN is unwilling to adduce, in Phase II, evidence relevant to those allegations of wrongdoing from witnesses under the control of the Applicant *Amici*. Nor is it alleged that ICANN is unprepared to accept VeriSign and NDC's offer of support to marshal this evidence. All indications are rather to the contrary, as evidenced by the positions adopted by these three participants before the Procedures Officer and throughout Phase I of this IRP.

202. When all is said and done, it is a striking feature of the Applicant *Amici*'s requests that while they are seeking the broadest participation rights in respect of what would be the core issues of Phase II, they insist that they would not be bound by the Panel's decision. The Panel can find no basis in Rule 7 to accede to such requests.
203. Having considered all relevant circumstances, the Panel has decided that the Applicant *Amici* shall be allowed to participate in this IRP as *amici*. Except for commercially sensitive or privileged material, the *Amici* shall be given access to all briefings and materials related to the IRP and shall be allowed to attend procedural and merits hearings. The Panel will shortly hold an early preparatory conference to identify, in consultation with the Parties, the issues that fall to be determined in Phase II. Once those issues have been identified, the Panel will decide, in consultation with the Parties and the *Amici*, the questions as to which the *Amici* will be permitted to submit briefings to the Panel, as well as the deadlines, page limits and other modalities of the filing of those briefings and supporting exhibits related to the IRP. The extent to which the *Amici* will be allowed to supplement their written submissions with oral submissions at the merits hearing will be decided, in consultation with the Parties and the *Amici*, during the relevant pre-hearing conference(s). The *Amici* shall bear the full costs of their participation in the IRP.

V. COSTS

204. The costs in respect of Phase I of this IRP are deferred to the Panel's Decision in Phase II of the IRP.

VI. DISPOSITIF

205. For the reasons set out in this Decision, the Panel unanimously decides as follows:

(a) Afiliás' alternative request for relief is hereby granted, and those aspects of Afiliás' Rule 7 claim over which the Tribunal has determined it has jurisdiction are hereby joined to Afiliás' other claims in Phase II;

(b) Nu Dotco, LLC's and VeriSign, Inc.'s respective Requests to participate as *amici* in this IRP are granted, in part, as follows:

(i) NU DOTCO, LLC and VeriSign, Inc. (the ***Amici***) are hereby allowed to participate as *amici* in this IRP;

(ii) Except for commercially sensitive or privileged material, the *Amici* shall be given access to all briefings and materials related to the IRP, and shall be allowed to attend procedural and merits hearings;

(iii) The Panel will shortly hold a preparatory conference to identify, in consultation with the Parties, the issues that fall to be determined in Phase II. Once these issues have been identified, the Panel will decide, in consultation with the Parties and the *Amici*, the questions as to which the *Amici* will be permitted to submit briefings to the Panel, as well as the deadlines, page limits and other modalities of the filing of those briefings and supporting exhibits related to the IRP;

(iv) The extent to which the *Amici* will be allowed to supplement their written submissions with oral submissions at the merits hearing will be decided, in consultation with the Parties and the *Amici*, during the relevant pre-hearing conference(s);

(v) The *Amici* shall bear the full costs of their participation in the IRP.

(c) The costs in relation to Phase I of this IRP are deferred to the Panel's Decision in Phase II of the IRP.

206. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England



Catherine Kessedjian



Richard Chernick



Pierre Bienvenu Ad. E., Chair

Dated: _____

(iv) The extent to which the *Amici* will be allowed to supplement their written submissions with oral submissions at the merits hearing will be decided, in consultation with the Parties and the *Amici*, during the relevant pre-hearing conference(s);

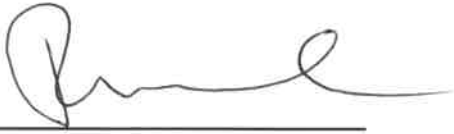
(v) The *Amici* shall bear the full costs of their participation in the IRP.

(c) The costs in relation to Phase I of this IRP are deferred to the Panel's Decision in Phase II of the IRP.

206. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

Catherine Kessedjian



Richard Chernick

Pierre Bienvenu Ad. E., Chair

Dated: _____

(iv) The extent to which the *Amici* will be allowed to supplement their written submissions with oral submissions at the merits hearing will be decided, in consultation with the Parties and the *Amici*, during the relevant pre-hearing conference(s);

(v) The *Amici* shall bear the full costs of their participation in the IRP.

(c) The costs in relation to Phase I of this IRP are deferred to the Panel's Decision in Phase II of the IRP.

206. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

Catherine Kessedjian

Richard Chernick



Pierre Bienvenu Ad. E., Chair

Dated: 12 February 2020

EXHIBIT C-44

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Afilias Domains No. 3 Ltd.,) ICDR CASE NO. 01-18-0004-2702
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

**ICANN'S RESPONSE TO AMENDED REQUEST FOR INDEPENDENT REVIEW
PROCESS**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to the Amended Request for Independent Review Process (“Amended IRP”) submitted by Afilias Domains No. 3 Limited (“Afilias”), on 21 March 2019.

1. ICANN is a California not-for-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the Internet community. The essential function of the DNS is to convert easily remembered Internet domain names such as “icann.org” into numeric IP addresses understood by computers. ICANN’s core Mission is to ensure the stability, security, and interoperability of the DNS.¹ To that end, ICANN contracts with entities that operate generic top-level domains (“gTLDs”), which represent the portion of an Internet domain name to the right of the final dot, such as “.COM” or “.ORG.”

2. This Independent Review Process (“IRP”) proceeding calls for a determination of whether ICANN complied with its Articles of Incorporation (“Articles”), Bylaws and internal policies and procedures relating to disputes over the .WEB gTLD. .WEB is one of the new gTLDs sought in ICANN’s New gTLD Program (the “Program”), through which entities submitted 1,930 applications to ICANN for the opportunity to operate new gTLDs. The Program was designed by ICANN to enhance diversity, creativity, and choice, and to provide the benefits of innovation to consumers via the availability of new gTLDs. The success of the Program is demonstrated by the fact that it has already resulted in the introduction of over 1,200 new gTLDs.

3. Because there were multiple, qualified applicants for .WEB, the .WEB applications were placed in a “contention set,” and ICANN ultimately facilitated an auction to resolve the contention, as is expressly called for in the Applicant Guidebook (“Guidebook”), which contains the procedures for implementation of the Program. The .WEB auction occurred

in July 2016, and Nu Dotco, LLC (“NDC”) was the prevailing bidder. Soon thereafter, Verisign, Inc. (“Verisign”), the operator of .COM and .NET, publicly disclosed that it financially supported NDC’s bid in exchange for NDC’s agreement that, after executing an agreement with ICANN to operate .WEB, NDC would seek ICANN’s permission to transfer that agreement to Verisign, making Verisign the .WEB operator.

4. After Verisign’s disclosure, certain .WEB applicants complained that Verisign’s agreement with NDC violated the Guidebook and raised competition concerns given Verisign’s operation of .COM. Since then, .WEB has been mired in federal court litigation, a Department of Justice Antitrust Division (“DOJ”) investigation and multiple invocations of ICANN’s internal Accountability Mechanisms, which caused ICANN to place .WEB “on hold” pending their resolution. And although ICANN has been caught in the middle of this dispute between powerful and well-funded businesses, ICANN has not taken sides. Rather, ICANN has followed its Articles, Bylaws and internal policies and procedures in overseeing these disputes and in discharging its responsibilities in connection with ICANN’s Accountability Mechanisms.

5. Although content to sit on the sidelines while other .WEB applicants formally pursued their claims in various fora for more than two years, Afilias only recently initiated an IRP. In it, Afilias claims that ICANN failed to apply its policies “neutrally, objectively and fairly” by not fully investigating complaints about NDC prior to the .WEB auction, and because ICANN has not disqualified NDC based on alleged Guidebook violations and competition concerns. Afilias also tacks on a claim that ICANN was either induced by, or colluded with, Verisign to create procedures designed to benefit Verisign in this IRP.

6. The claims that Afilias levels against ICANN are unsupported. ICANN complied with its Articles, Bylaws and internal policies and procedures in facilitating the .WEB auction and in handling the disputes regarding .WEB since the auction. And although Afilias fails to

mention it, Afilias' alleged competition concerns were addressed in DOJ's year-long investigation of the NDC/Verisign agreement. ICANN fully cooperated in that investigation, which the government ultimately closed without taking action to block Verisign from operating .WEB. Finally, there is no support for the incredible claim that ICANN was either duped by, or conspired with, Verisign to create IRP procedures benefitting Verisign.

7. Moreover, Afilias' claims against ICANN are, in one sense, premature and, in another sense, overdue. The claims are premature in that the ICANN Board has not fully evaluated Afilias' allegations that NDC violated the Guidebook – which are fiercely contested by NDC and Verisign and, even if established, would not call for an immediate disqualification of NDC – because .WEB has been on hold since 2016. And since that time, Afilias has not invoked any ICANN Accountability Mechanism that would elevate Afilias' allegations of Guidebook violations to the Board for its consideration and action. Now, with the Afilias IRP pending, the ICANN Board may once again defer any action on .WEB while it awaits this Panel's findings.

8. Conversely, Afilias' claims are overdue in that Afilias has been aware of the NDC/Verisign agreement, the alleged Guidebook violations, and Afilias' purported injury since August 2016, yet Afilias waited *over two years* to assert these claims in an IRP, far outside the applicable limitations period. Whether Afilias is therefore barred from even raising its claims at this late date is a threshold issue the Panel will need to decide.

9. The hypocrisy and inequity of Afilias' claims against ICANN are palpable. Having done nothing to prosecute its claims for over two years while ICANN worked to resolve the host of legal proceedings and Accountability Mechanisms surrounding .WEB, Afilias now shamelessly seeks to use this proceeding to acquire .WEB based on ICANN's supposed failure to take the action that Afilias only now requests. Afilias is in no position to make such claims, but appears tone-deaf to how fundamentally unfair and self-serving its accusations against ICANN

are. This Panel should not indulge such behavior.

10. To be clear, ICANN's interest in this matter is not in picking winners and losers, but in ultimately completing the rollout of .WEB pursuant to the terms of the Guidebook and consistent with ICANN's Articles and Bylaws. As the party that made a significant financial investment in .WEB over two years ago, Verisign is determined to proceed pursuant to its agreement with NDC so that it can operate .WEB. Afilias, on the other hand, is determined to use this proceeding to seize control of .WEB for itself – at a bid price set by this Panel – even though it did not prevail in the auction. NDC and Verisign have responses to Afilias' allegations of Guidebook violations and anticompetitive conduct, but they also have made claims that Afilias breached rules applicable to the .WEB auction and should itself be disqualified by ICANN. Thus, it is important that NDC and Verisign be permitted to participate in this IRP so that the Panel will have the benefit of their evidence and submissions, in addition to the views of Afilias and ICANN, before rendering any final decision. Although this IRP is yet another delay in the rollout of .WEB, ICANN's Board will respect the process and will seriously consider and evaluate this Panel's findings to determine what action, if any, is appropriate in order to make .WEB finally available to consumers.

SUMMARY OF RELEVANT FACTS

I. ICANN AND ITS ACCOUNTABILITY MECHANISMS.

11. To help ensure that ICANN is serving, and remains accountable to, the global Internet community, ICANN has established several Accountability Mechanisms that allow certain interested parties to challenge or seek review of ICANN actions and decisions. Through these mechanisms, aggrieved parties can seek to hold ICANN accountable for alleged violations of its Articles, Bylaws, and certain other internal policies and procedures.²

12. For instance, ICANN's Bylaws provide for a process by which “any person or

entity materially affected by an action or inaction” of ICANN may request review or reconsideration of that action or inaction (“Reconsideration Request”).³ A committee of the ICANN Board hears, considers and recommends to the Board whether it should accept or deny a Reconsideration Request.⁴

13. Similarly, ICANN’s Bylaws provide for an Office of the Ombudsman (“Ombudsman”).⁵ The principal function of the Ombudsman is “to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly.”⁶

14. While not a formal Accountability Mechanism, ICANN also has a Documentary Information Disclosure Policy (“DIDP”), which allows community members to seek public disclosure of documents concerning ICANN’s operational activities unless there is a compelling reason for non-disclosure, such as confidentiality.

15. In addition, the ICANN Bylaws create the IRP under which a party materially and adversely affected by an ICANN action or inaction may submit its claims to an “independent third-party” for review.⁷ IRP claims are submitted to the International Centre for Dispute Resolution (“ICDR”), which is responsible for administering IRP proceedings. IRPs are conducted in accordance with the ICDR’s International Arbitration Rules, as modified by ICANN’s Bylaws and IRP Interim Supplementary Procedures (“Interim Supplementary Procedures”).⁸ In consultation with the Internet community, ICANN’s IRP Implementation Oversight Team (“IRP-IOT”) crafted the Interim Supplementary Procedures in accordance with the Bylaws’ mandate that the IRP-IOT create procedures applicable to IRPs.⁹ On 25 October 2018, after years of discussion, drafting, community consultation and public comment, the Board approved the Interim Supplementary Procedures crafted by the IRP-IOT.

16. Two Interim Supplementary Procedures are particularly important to this IRP.

First, Section 7 provides that any person, group or entity that “has a material interest relevant to” an IRP, such as NDC and Verisign, “shall” be allowed to participate in that IRP as *amicus curiae*.¹⁰ Second, Section 4 dictates¹¹ that an IRP must be commenced within 120 days after a claimant becomes aware of the material effect of the alleged ICANN action or inaction giving rise to the dispute provided, however, that an IRP may not be filed more than twelve months from the date of such action or inaction.¹²

II. ICANN’S NEW GTLD PROGRAM.

A. ICANN’S Policy Development – 2000-2007.

17. In its early years, ICANN focused on increasing the number of companies (known as “registrars”) that could sell domain name registrations to entities and individuals within then existing gTLDs. ICANN also focused on expanding, although more slowly, the number of gTLDs in existence. In 2000, ICANN approved seven new gTLDs as a proof of concept test to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet or the DNS. In 2004 and 2005, ICANN approved a handful of additional gTLDs.

18. The New gTLD Program has produced ICANN’S most ambitious expansion of the Internet’S naming system. Under the Program, any interested party could apply for the opportunity to operate new gTLDs that were not already in use in the DNS, meaning that there was no cap on the number of new gTLDs that could be added to the Internet.¹³ The Program was designed to enhance diversity, creativity and consumer choice in gTLDs, and to provide the benefits of innovation to consumers.¹⁴ The Program arose from policy recommendations by ICANN’S Generic Names Supporting Organization (“GNSO”), which were based on community input during the period 2005-2007.¹⁵ On 26 June 2008, the ICANN Board adopted the GNSO’S policy recommendations and directed the ICANN organization to develop an implementation plan for the Program, to be provided to the Board for approval.¹⁶

B. ICANN's Implementation of the Program – 2008-2012.

19. The Guidebook, which enabled the implementation of the Program, was developed with significant input from the ICANN community over several years. ICANN published a first draft of the Guidebook in October 2008¹⁷ and distributed it for public comment. Numerous revisions were made based on public comment, and additional comments were sought on the revisions. The process repeated many times, resulting in multiple versions of the Guidebook until ICANN adopted the operative, 338-page Guidebook in June 2012.¹⁸

20. The Guidebook provides a step-by-step procedure for new gTLD applicants. It specifies what documents and information are required, the financial and legal commitments of operating a gTLD, what applicants can expect during the application and evaluation periods, and the dispute resolution procedures that could be invoked to object to new gTLD applications.¹⁹

21. The Guidebook requires applicants to provide the names and positions of their “directors,” “officers and partners” and “shareholders holding at least 15% of shares,” as well as information about the applicants’ financial condition so that ICANN can assess the applicants and their technical and financial wherewithal to operate a gTLD.²⁰ The Guidebook also requires applicants to inform ICANN if “information previously submitted by an applicant becomes untrue or inaccurate,” including “applicant specific information such as changes in financial position and changes in ownership or control of the applicant.”²¹ Importantly, an applicant’s failure to inform ICANN that previously submitted information has become untrue or inaccurate does not require denial of an application. The Guidebook gives ICANN discretion to determine whether the changed circumstances are material and what consequences, if any, should follow from a failure to disclose those circumstances, which could include denial of the application.²²

22. Only one applicant can be awarded a particular gTLD. Where there is more than one qualified applicant for the same gTLD, the Guidebook mandates that the applications be

placed in a “contention set.”²³ When this occurs, the Guidebook encourages (but does not require) the applicants to agree among themselves on resolution of the contention set.²⁴ To resolve a contention set privately, all applicants within the contention set must agree to a private resolution.²⁵ If the contention set cannot be resolved through private resolution, the Guidebook requires ICANN to schedule a public auction for those contention set members wishing to proceed with their applications.²⁶ The proceeds of a public auction are provided to ICANN, but are earmarked for purposes consistent with ICANN’s Mission, Core Values and non-profit status, based on Internet community input.²⁷

23. After a successful gTLD applicant passes initial evaluation and resolves any formal objection and/or contention set proceeding, and assuming no ICANN Accountability Mechanisms are pending, the applicant is offered a Registry Agreement with ICANN to become a new gTLD registry operator. A Registry Agreement is a formal, written agreement between a gTLD operator and ICANN that sets forth the rights, duties and obligations of the operator. ICANN offers a model Registry Agreement for most gTLDs, but each Registry Agreement can be negotiated and modified.²⁸ After a Registry Agreement is fully executed, ICANN takes the technical steps necessary to delegate the new gTLD into the DNS. Once a gTLD has been fully delegated into the DNS it becomes accessible on the Internet.²⁹

C. Results of the Program – 2012-Present.

24. In 2012, ICANN received 1,930 applications for new gTLDs. Since then, approximately 1,200 new gTLDs have been delegated and are operational.³⁰ These new gTLDs have increased diversity, consumer choice and competition in the DNS.

25. As one would expect with an expanded marketplace, gTLD operators have chosen to utilize and monetize gTLDs in different ways. Many operators have followed their original business plans for marketing their gTLDs as envisioned in their applications.³¹ Hundreds of

others have assigned or transferred their gTLDs to other entities for financial gain or other reasons.³² Still others have entered the new gTLD marketplace by acquiring new gTLD operators. And some entities have chosen to use the gTLDs for their own benefit, such as for branding purposes.³³

26. Assignments and transfers of Registry Agreements to operate gTLDs must be approved by ICANN, and ICANN follows a known procedure in evaluating such requests.³⁴ ICANN also has published materials explaining how a Registry Agreement can be assigned from one registry operator to another.³⁵ Because ICANN administers, rather than regulates, the DNS,³⁶ ICANN's focus in evaluating a proposed gTLD transfer is whether the transferee organization has the requisite financial and technical ability to operate a gTLD.³⁷

27. Afilias is extremely familiar with the Registry Agreement transfer process due to its involvement in multiple transfers. For instance, Afilias Limited applied for .MEET in 2012, stating that it planned to make it “the most popular, accessible, and innovative destination on the Internet where people seeking online dating and companionship services can learn about dating, companionship services and registrars that offer .MEET domain names.”³⁸ On 16 January 2014, ICANN and Afilias Limited entered into a .MEET Registry Agreement.³⁹ But before launching .MEET – *i.e.*, before serving a single customer – Afilias Limited sought to transfer the .MEET Registry Agreement to Charleston Road Registry Inc. d/b/a Google Registry (“Google”) in October 2014.⁴⁰ Because ICANN determined that Google had the technical and financial ability to operate .MEET, ICANN approved the transfer.⁴¹

28. Likewise, in 2015, the entity that entered into a Registry Agreement with ICANN to operate .PROMO requested that ICANN approve a transfer of the .PROMO Registry Agreement to Afilias plc prior to delegation of .PROMO. Although Afilias did not originally apply to operate .PROMO, ICANN approved the transfer based on a demonstration that Afilias

was qualified to operate the gTLD.⁴²

29. Finally, as described on its own corporate website, “Afilias has an active program for acquiring new Top Level Domains.”⁴³ For instance, in 2016, Afilias plc announced its acquisition of StartingDot, which had become the registry operator for .ARCHI, .BIO and .SKI through the Program. In Afilias plc’s words, “[t]he acquisition agreement is part of Afilias’ ongoing program of acquiring new TLDs to add to its portfolio.”⁴⁴ ICANN approved the transfer of those TLDs to Afilias plc based on its technical and financial ability to operate them.⁴⁵

III. THE .WEB CONTENTION SET.

30. ICANN received seven applications for .WEB from sophisticated companies, including Afilias, NDC, Ruby Glen LLC (“Ruby Glen”), a subsidiary of Donuts Inc, Charleston Road Registry, Inc., a subsidiary of Google, Web.com Group, Inc., DotWeb Inc., and Schlund Technologies GmbH. ICANN also received two applications for .WEBS from another applicant, Vistaprint Limited, which later withdrew one of its applications in April 2016. The seven applications for .WEB passed all applicable evaluations and were placed in a contention set, pursuant to the procedures set forth in the Guidebook.⁴⁶

31. In 2013, one of the .WEB applicants filed a “string confusion” objection against the .WEBS applications with the ICDR, arguing that .WEB and .WEBS were confusingly similar. The objection was ultimately upheld by an independent ICDR panelist, resulting in the .WEBS and .WEB applications being placed in the same contention set, which thereby became the “.WEB Contention Set.”⁴⁷

32. In June 2014, the .WEBS applicant filed an IRP against ICANN challenging ICANN’s acceptance of the ICDR’s determination on the string confusion objection. In October 2015, ICANN prevailed in the .WEBS IRP. The ICANN Board considered the .WEBS IRP Final Declaration in October 2015, December 2015, and March 2016, and resolved that ICANN

should “move forward with the processing of the [.WEB Contention Set].”⁴⁸

33. On 27 April 2016, per the Guidebook, ICANN scheduled an auction for 27 July 2016 to resolve the .WEB Contention Set if it could not be privately resolved by the applicants before then.⁴⁹ As the date of the auction approached, the members of the .WEB Contention Set had not resolved the contention set privately, and the members as a whole did not request a postponement of the auction. Accordingly, ICANN proceeded with plans for the auction.⁵⁰

34. Just before the auction, Ruby Glen (a .WEB applicant) invoked several of ICANN’s Accountability Mechanisms, and eventually commenced litigation, in an attempt to halt the auction from going forward and instead force a private auction for .WEB where the proceeds would be divided and paid to the losing bidders.⁵¹ Ruby Glen complained to ICANN that NDC had a change in ownership or control, and that NDC had failed to notify ICANN of this change, as required by the Guidebook.⁵² According to Ruby Glen, this alleged failure constituted a “potentially disqualifying change[] to NDC’s application.”⁵³ Neither Ruby Glen, nor any other .WEB applicant, suggested to ICANN that NDC had some sort of arrangement with another entity regarding .WEB.

35. ICANN thoroughly investigated these claims. ICANN contacted NDC on 27 June 2016, asking it to confirm whether there were any changes to NDC’s organizational structure that required reporting to ICANN.⁵⁴ NDC’s Chief Financial Officer, Jose Ignacio Rasco III, responded the same day to confirm that NDC had not experienced any changes in its organizational structure.⁵⁵ In an abundance of caution, however, ICANN again contacted NDC to inquire further into potential changes to NDC’s organization.⁵⁶ ICANN staff also interviewed Mr. Rasco via telephone.⁵⁷ During the call, Mr. Rasco stated, and later confirmed via email on 11 July 2016, that: “Neither the ownership nor the control of [NDC] has changed since we filed our application.”⁵⁸ Thereafter, ICANN informed all the contention set members, including Ruby

Glen and Afilius, that ICANN had “investigated the matter, and to date [has] found no basis to initiate the application change request process or postpone the auction.”⁵⁹

36. Ruby Glen then brought the same allegations regarding changes to NDC’s organization or control to the ICANN Ombudsman, who also investigated the claim.⁶⁰ Like ICANN, the Ombudsman did not find “any evidence which would satisfy [him] that there has been a material change to the application.”⁶¹

37. On 17 July 2016, Ruby Glen submitted an emergency Reconsideration Request to ICANN to enjoin the auction, claiming that ICANN staff had failed to sufficiently investigate Ruby Glen’s claims regarding NDC.⁶² ICANN’s Board Governance Committee (“BGC”), which was then tasked with evaluating Reconsideration Requests, expeditiously reviewed the thoroughness of the investigation into the alleged changes in NDC’s management and control.⁶³ After finishing its review, the BGC denied the Reconsideration Request on 21 July 2016, concluding that ICANN staff had sufficiently investigated Ruby Glen’s claims.⁶⁴

38. Then, just days before the .WEB auction was set to begin, Ruby Glen escalated its actions by filing a complaint in Federal District Court in Los Angeles against ICANN and an *ex parte* application for a temporary restraining order (“TRO”) to block the auction.⁶⁵ ICANN opposed the TRO application arguing, among other things, that Ruby Glen was not likely to succeed on the merits of its claims because ICANN appropriately investigated Ruby Glen’s claims and detected no changes to NDC’s ownership or control, a finding corroborated by sworn declarations from NDC’s Chief Operating Officer and Chief Financial Officer.⁶⁶

39. The District Court denied Ruby Glen’s request for a TRO based, in part, on the “strength of ICANN’s evidence.”⁶⁷ Specifically, the District Court held:

ICANN has provided evidence that it has conducted investigations into Plaintiff’s allegations concerning potential changes in NDC’s management and ownership structure at each level of Plaintiff’s appeals to ICANN for an investigation and

postponement of the auction. During those investigations, NDC provided evidence to ICANN that it had made no material changes to its management and ownership structure. Additionally, ICANN's Opposition is supported by the Declarations of Nicolai Bezsonoff and Jose Ignacio Rasco, who declare under penalty of perjury that there have been no changes to NDC's management, membership, or ownership since NDC first filed its application with ICANN.⁶⁸

IV. THE .WEB AUCTION AND ENSUING LITIGATION, ACCOUNTABILITY MECHANISMS, AND GOVERNMENT INVESTIGATION.

40. After denial of the TRO application, the .WEB auction proceeded as scheduled on 27-28 July 2016. NDC prevailed at a bid price of \$135 million.⁶⁹ Days later, Verisign, the entity that operates .COM and .NET, publicly stated that it had "entered into an agreement with [NDC] wherein [Verisign] provided funds for [NDC's] bid" and that, if NDC entered into a Registry Agreement with ICANN to operate .WEB, NDC "will then seek to assign[] the Registry Agreement to VeriSign upon consent from ICANN."⁷⁰

41. On 8 August 2016, Afilias' General Counsel wrote ICANN a letter demanding an immediate disqualification of NDC based on three claims. First, Afilias stated that the NDC/Verisign agreement constituted a transfer of NDC's rights and obligations in its application in violation of the Guidebook. Second, Afilias stated that NDC violated the disclosure requirements of the Guidebook by failing to inform ICANN of the agreement. Third, Afilias contended that the agreement "likely constitutes a change of control of the applicant."⁷¹ These are precisely the same alleged Guidebook violations that Afilias is now pursuing in this IRP, more than two years after this letter.

42. Also on 8 August 2016, Ruby Glen filed its First Amended Complaint against ICANN in Federal District Court, making claims that NDC violated the Guidebook and should have been disqualified on the same grounds asserted in Afilias' letter to ICANN.⁷²

43. At this same time, Ruby Glen's parent organization, Donuts, Inc. ("Donuts"), invoked ICANN's Cooperative Engagement Process ("CEP"), a pre-IRP proceeding that allows

the parties to attempt to resolve or narrow the issues to be brought in an IRP proceeding.⁷³

44. In connection with the New gTLD Program, ICANN employs a practice, depending on the circumstances, of placing a contention set or a gTLD application on hold if it is the subject of certain ICANN Accountability Mechanisms, including the initiation of a CEP.⁷⁴ Thus, on 19 August 2016, ICANN placed the .WEB Contention Set “on hold” due to the pendency of the Donuts CEP.

45. Rather than invoking an ICANN Accountability Mechanism, Afilias sent ICANN another letter, dated 9 September 2016, demanding the immediate disqualification of NDC for the same reasons it had raised in its August 2016 letter. The 9 September 2016 letter also asserted competition concerns that are identical to those alleged in this IRP.⁷⁵

46. As part of ICANN’s due diligence into the issues raised by Afilias and Ruby Glen in 2016, ICANN issued a set of questions to Afilias, Ruby Glen, NDC, and Verisign, seeking input regarding the .WEB auction, the NDC/Verisign agreement, and the alleged violations of the Guidebook.⁷⁶ These questions were designed to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted by Afilias and Ruby Glen.

47. On 7 October 2016, Afilias responded to ICANN’s questions, reiterating its core objections to the purported NDC/Verisign agreement and describing it as a “failure to disclose material information relating to [NDC’s] bid for the .WEB rights” and as “clearly designed to preserve Verisign’s existing monopoly in gTLD services that results from its control of .COM and .NET.”⁷⁷ Again, these are the same claims Afilias is now belatedly pressing in this IRP.

48. Thereafter, on 28 November 2016, the Federal District Court dismissed with prejudice Ruby Glen’s First Amended Complaint regarding the .WEB auction based on the covenant not to sue in the Guidebook, which requires applicants to use ICANN’s Accountability Mechanisms instead of filing lawsuits against ICANN.⁷⁸ Ruby Glen appealed.

49. Then, in early 2017, the Antitrust Division of the United States Department of Justice (“DOJ”) issued a civil investigative demand (“CID”) to ICANN, Verisign and others involved in the .WEB auction, seeking documents and information “in connection with DOJ’s investigation of Verisign’s proposed acquisition of NDC’s contractual rights to operate the .WEB gTLD.”⁷⁹ DOJ requested that ICANN take no action on .WEB during the pendency of the investigation. Between February and June 2017, ICANN made several document productions and provided information to DOJ, and ICANN is informed and believes that Verisign produced documents to, and met with representatives of, DOJ.⁸⁰

50. A year later, in January 2018, DOJ formally closed its investigation without taking any action. Such a decision typically is interpreted as meaning the government did not find a threat to competition that warranted further action.⁸¹ Despite the fact that Afilias’ claims are rooted in the alleged anticompetitive effects of having Verisign operate .WEB, Afilias *does not even mention* DOJ’s investigation – much less DOJ’s decision to close its investigation – in its Amended IRP Request.

51. On 30 January 2018, ICANN closed the Donuts CEP, giving Donuts until 14 February 2018 to file an IRP, which Donuts chose not to do. Thereafter, Afilias submitted two successive DIDP requests to ICANN seeking documents regarding the .WEB Contention Set, but Afilias did not file a formal challenge to ICANN proceeding with contracting for or delegation of .WEB under any of ICANN’s Accountability Mechanisms. Afilias also filed Reconsideration Requests on ICANN’s DIDP responses that were ultimately resolved and denied as of 5 June 2018. With Afilias’ DIDP Reconsideration Requests resolved, and no other Accountability Mechanisms pending, ICANN took the .WEB Contention Set off hold in early June 2018. Then, on 18 June 2018, almost two years after the .WEB auction took place, Afilias initiated its own CEP asserting precisely the same claims it had raised in its 2016 letters to ICANN but did not

formally pursue.⁸² Despite Afilias' delay in bringing its claims, ICANN placed the .WEB Contention Set back on hold.

52. Thereafter, on 15 October 2018, the Ninth Circuit Court of Appeals issued an order affirming the dismissal of Ruby Glen's First Amended Complaint against ICANN.⁸³

53. With the DOJ Antitrust Division investigation closed, the Ruby Glen litigation over and, as of 13 November 2018, the Afilias CEP proceedings closed – ICANN provided Afilias with time to file an IRP and assured Afilias that the .WEB Contention Set would remain on hold until there was a resolution of Afilias' anticipated Request for Interim Measures of Protection seeking to stay action on .WEB.⁸⁴ On 14 November 2018, Afilias filed its IRP. On 27 November 2018, Afilias filed its Request for Interim Measures of Protection.

54. To this day, the .WEB Contention Set remains on hold.

STANDARD OF REVIEW

55. An IRP Panel is asked to evaluate whether an ICANN action or inaction was consistent with ICANN's Articles, Bylaws, and internal policies and procedures.⁸⁵ But with respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, an IRP Panel is not empowered to substitute its judgment for that of ICANN.⁸⁶ Rather, the core task of an IRP panel is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.⁸⁷

ARGUMENT

I. ICANN HAS COMPLIED WITH ITS ARTICLES, BYLAWS AND POLICIES IN OVERSEEING THE .WEB CONTENTION SET DISPUTES AND RESULTING ACCOUNTABILITY MECHANISMS.

56. Afilias argues that ICANN has failed to apply its policies "neutrally, objectively and fairly" because ICANN did not fully investigate NDC prior to the .WEB auction and because ICANN has not disqualified NDC based on Afilias' alleged Guidebook violations.⁸⁸ Afilias is

wrong: ICANN thoroughly investigated claims made about NDC prior to the .WEB auction, none of which included a suggestion that NDC had reached an agreement with Verisign regarding .WEB. Likewise, the ICANN Board has not yet had an opportunity to fully evaluate the alleged Guidebook violations – all of which are vigorously denied by NDC and Verisign, and none of which call for an automatic disqualification of NDC – due to the pendency of government investigations and Accountability Mechanisms, including this IRP.

A. Afilias’ Complaints About ICANN’s Pre-Auction Investigation Of NDC Are Unsupported.

57. In June 2016, ICANN completed an investigation of whether NDC had undergone a change in control prior to the .WEB auction based on complaints raised by Ruby Glen.⁸⁹ Ruby Glen’s accusation was that “[u]pon information and belief, there have been changes to the Board of Directors and potential control of” NDC, and Ruby Glen requested that “ICANN investigate the change in NDC’s Board and potential control.”⁹⁰ Ruby Glen asserted no claims about Verisign and did not suggest that NDC had an agreement with Verisign regarding .WEB.⁹¹

58. Pursuant to its authority to verify information provided by a gTLD applicant,⁹² ICANN investigated whether there had been a change in NDC’s Board or undisclosed owners or managers through several interviews of, and communications with, NDC’s representative. On each occasion, NDC’s representative certified to ICANN that there had been no changes to the NDC “organization that would need to be reported to ICANN.”⁹³ NDC confirmed the same to the Ombudsman in July 2016,⁹⁴ and later in sworn affidavits filed in connection with Ruby Glen’s TRO application seeking to halt the .WEB auction.⁹⁵

59. In its Amended IRP Request, Afilias asserts that “ICANN failed to fully investigate rumors that NDC had reached an agreement with Verisign prior to the .WEB auction.”⁹⁶ ICANN, however, was not asked to – and had no reason to – investigate whether NDC had an arrangement with Verisign regarding .WEB at that time. Rather, ICANN

investigated what it was asked to investigate – namely, if there had been a change in ownership, management or control of NDC, which had not occurred. Thus, ICANN properly exercised its authority in investigating Ruby Glen’s claims, and the Board, in denying Ruby Glen’s Reconsideration Request regarding ICANN’s investigation, properly relied on the due diligence performed by ICANN’s staff and Ombudsman as well as NDC’s representations (later confirmed by the sworn Declarations in the Ruby Glen litigation).

60. If Afilias was aware of rumors regarding an arrangement between NDC and Verisign, Afilias should have raised its concerns with ICANN by invoking an appropriate Accountability Mechanism at the time, just as Ruby Glen had done. The same recourse was available to Afilias if it felt that ICANN’s investigation of NDC prior to the auction was deficient in any meaningful way. But Afilias did not do so. Afilias’ current claim that ICANN’s pre-auction investigation was deficient is, at best, a *post hoc* invention that is time barred, as discussed below.

B. Due To Pending Accountability Mechanisms As Well As The DOJ Investigation, The Board Has Not Fully Evaluated the Guidebook Violations Alleged By Afilias, Which Are Hotly Contested And Do Not Call For Automatic Disqualification.

61. Afilias argues that NDC breached the Guidebook by failing to amend its application,⁹⁷ by transferring rights in connection with its application to Verisign,⁹⁸ and by submitting auction bids that were controlled by and made on behalf of Verisign.⁹⁹ Afilias also argues that ICANN violated its Bylaws by failing to automatically disqualify NDC for these alleged breaches.¹⁰⁰ Afilias is wrong on several levels.

62. First, the ICANN Board has not fully evaluated the Guidebook violations that Afilias alleges because .WEB has been predominantly on hold since 2016 and no other formal Accountability Mechanism has been invoked calling on the Board to take action. Specifically, the .WEB Contention Set has been on hold from August 2016 through today, with the exception

of approximately two weeks in June 2018 after Afiliias' DIDP-related Reconsideration Requests were resolved and before Afiliias initiated its CEP. During the entire period from July 2016 through June 2018, Afiliias took no action that would have placed the .WEB issues before the Board, although Afiliias easily could have. For instance, rather than writing letters, Afiliias could have filed a Reconsideration Request challenging the .WEB auction results or ICANN's decision to take .WEB off hold in June 2018. Afiliias also could have waited for a proposed transfer of .WEB to Verisign and then filed a Reconsideration Request challenging that transfer. These actions – and perhaps others – would have elevated the Guidebook violations that Afiliias alleges to the Board for consideration.

63. Second, the Guidebook breaches that Afiliias alleges are the subject of good faith dispute by NDC and Verisign, both of which are seeking to participate in this IRP pursuant to their *amicus* applications. For instance, Afiliias' overarching theme that the NDC/Verisign agreement is anticompetitive is flatly denied by Verisign, which is prepared to come forward with evidence of its intentions for .WEB, Verisign's competitors, and the fact that Afiliias' competition claims have already been thoroughly investigated by DOJ. Likewise, many of Afiliias' technical arguments regarding the Guidebook and Auction Rules have also been contested by Verisign and NDC in correspondence to ICANN. For their part, NDC and Verisign claim that Afiliias violated the .WEB auction rules and should itself be disqualified by ICANN. While Afiliias' Amended IRP Request is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and Verisign, to which NDC and Verisign have responses. Again, this dispute resolution process and the quality of the Panel's consideration of the issues that Afiliias raises will benefit substantially from NDC's and Verisign's participation in this IRP.

64. Third, the alleged Guidebook violations identified by Afiliias do *not* call for the automatic disqualification of NDC, as Afiliias requests of this Panel. Instead, the Guidebook

grants ICANN discretion to determine whether information not disclosed to ICANN – or any other potential Guidebook violation – warrants disqualification.¹⁰¹ An immediate and less-than-fully-informed disqualification of NDC of the sort sought by Afilias is unprecedented, not mandated by the Guidebook, and could violate ICANN’s obligations to act fairly and transparently as to NDC.

65. Fourth, the demands made by Afilias, in substantial part, require the Panel to usurp the discretion that is more broadly reserved under ICANN’s Bylaws to the ICANN Board and thus exceed the Panel’s jurisdiction. Pursuant to the Bylaws, where, as here, IRP claims arise out of the Board’s exercise of its fiduciary duties, “the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action *or inaction* is within the realm of reasonable business judgment.”¹⁰²

66. Due to the pendency of DOJ’s investigation and a series of Accountability Mechanisms, the Board has not yet had an opportunity to fully address most of the issues that Afilias now pursues in its Amended IRP Request. Deferring such consideration until this Panel renders its final decision is well within the realm of reasonable business judgment. It was entirely reasonable for the ICANN Board to wait to analyze the issues surrounding .WEB until the DOJ investigation concluded and each of the related Accountability Mechanisms was resolved, including this IRP, and then to undertake that analysis on the basis of the results of those proceedings. Should this Panel determine that Afilias’ claims regarding NDC’s conduct have any merit, the Panel should not substitute its own discretion for that of the ICANN Board in deciding what corrective action, if any, is appropriate. Those business judgments must instead be left to the discretion of the Board, after consideration of this Panel’s findings.

67. This conclusion is also mandated by well-settled case law applying a “judicial policy of deference to the business judgment of corporate directors in the exercise of their broad

discretion in making corporate decisions.”¹⁰³ This principle is applicable here, and the result is unequivocal: the demands that Afilias makes – disqualification of NDC and an order that ICANN enter a Registry Agreement for .WEB with Afilias at a bid price to be determined by the Panel – are remedies that the Panel is not empowered to grant.

II. ICANN HAS COMPLIED WITH ITS CORE VALUE REGARDING COMPETITION.

68. One of ICANN’s Core Values, as set forth in its Bylaws, is “[w]here feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market.”¹⁰⁴ Afilias’ argument that failing to disqualify NDC violates this Core Value is baseless for a number of reasons.

69. As an initial matter, Afilias and its witnesses, Mr. Zittrain and Mr. Sadowsky, are wrong to suggest that the sole purpose of the New gTLD Program was to create competition for Verisign. While the community-developed policy underlying the Program was aimed at increasing competition and consumer choice in the DNS, the Program was not specifically designed to take market share from .COM, nor was Verisign prohibited from participating in the Program.¹⁰⁵ Indeed, neither the community-developed policy, the Guidebook nor any other ICANN document or statement underlying the Program says as much or even suggests that Verisign should not be permitted to participate fully in the Program.¹⁰⁶

70. Likewise, Afilias and its witnesses are wrong to suggest that ICANN’s Core Value regarding competition requires ICANN to act like a government regulator responsible for blocking transactions or curbing conduct that may impinge on competition.¹⁰⁷ In fact, ICANN’s Bylaws make clear that “ICANN does not hold any governmentally authorized regulatory authority.”¹⁰⁸ Instead, as ICANN Board member, Ms. Burr, explains in her witness statement, ICANN, as an administrator of the DNS, fulfills its competition mandate by enacting policies that promote competition – such as the New gTLD Program – and by deferring to an appropriate

government regulator – such as DOJ – for investigation of potential competition issues.¹⁰⁹

71. Indeed, an investigation by DOJ of the potential competition issues associated with a Verisign-operated .WEB is precisely what occurred in this matter. DOJ conducted a year-long investigation into the potential competitive effects of the NDC/Verisign agreement and Verisign’s proposed operation of .WEB.¹¹⁰ ICANN fully cooperated with DOJ’s investigation, and DOJ concluded that intervention was not warranted.¹¹¹ The government’s decision not to act answers the question of whether ICANN is required to act to address Afilias’ allegations of anticompetitive conduct. It is not.¹¹²

72. Finally, as expert economist Dennis Carlton concludes in his report, there is no evidence that .WEB will be a unique competitive check on .COM, at least any more than all of the other TLDs that are already in existence.¹¹³ Likewise, the claim that Afilias will promote .WEB more aggressively than Verisign is not supported by any evidence.¹¹⁴

III. ALL OF AFILIAS’ CLAIMS ARE TIME BARRED.

73. According to the Bylaws in place in August 2016, an IRP had to be filed within 30 days of the posting of the Board minutes relating to the challenged ICANN decision or action.¹¹⁵ Under the current Interim Supplementary Procedures, an IRP must be filed within 120 days after the claimant becomes aware “of the material effect of the action or inaction” giving rise to the dispute, provided that an IRP may not be filed 12 months from the date of such action or inaction.¹¹⁶ Under either measure, Afilias’ claims are undoubtedly time barred.

74. For instance, Afilias’ claims regarding deficiencies in ICANN’s pre-auction investigation of NDC accrued on 12 September 2016 when ICANN posted minutes regarding the Board’s denial of Ruby Glen’s Reconsideration Request challenging the investigation, making an IRP on such claims due on 12 October 2016. Afilias missed this deadline by over two years.

75. Likewise, the facts and claims supporting Afilias’ allegations of NDC’s

Guidebook violations were known to Afilias and set forth in its August and September 2016 letters to ICANN. Specifically, Afilias' 9 September 2016 letter to ICANN claimed that: (1) "NDC violated Section 1.2.7 of the Guidebook" for failing to amend its application to reflect its arrangement with Verisign; (2) that "NDC violated Paragraph 10 of the Terms and Conditions of Module 6" of the Guidebook by "transfer[ring] NDC's rights and obligations regarding its .WEB application to Verisign;" (3) that "NDC violated the Auction Rules" by submitting bids that were not on its own behalf; and (4) that ICANN must disqualify NDC for these alleged breaches pursuant to ICANN's competition mandate.¹¹⁷ These are identical to the claims asserted by Afilias in its Amended IRP Request.¹¹⁸ Afilias sat on its hands for *over two years* before asserting these claims in an IRP. There is no doubt that these claims are time barred as well.

76. Afilias' assertion that it was not aware of its claims until it received a copy of the NDC/Verisign agreement in this IRP is belied by the specific claims Afilias made in its September 2016 letter. The argument is also undercut by the requirement in the Interim Supplementary Procedures that an IRP must be brought within 120 days after the claimant becomes aware "of the *material effect* of the action or inaction" giving rise to the dispute,¹¹⁹ which Afilias was certainly aware of in 2016. Moreover, it is settled law that statutes of limitations begin to run even though a plaintiff is not aware of all operative facts.¹²⁰ Even if Afilias were not aware of all the facts regarding the NDC/Verisign agreement, the Interim Supplementary Procedures bar IRPs filed 12 months after the date of alleged ICANN action or inaction.

IV. ICANN COMPLIED WITH ITS ARTICLES AND BYLAWS IN ADOPTING RULE 7 OF THE INTERIM SUPPLEMENTARY PROCEDURES.

77. As set forth fully in ICANN's briefing to the Procedures Officer, ICANN did not violate its Articles or Bylaws in adopting Rule 7 of the Interim Supplementary Procedures, nor

did Verisign exert any pressure on the IRP-IOT to do so. The single Verisign-affiliated member of the IRP-IOT did *not* prepare the October 2018 draft of the Interim Supplementary Procedures and was *not* aware of Afilias' dispute regarding .WEB at that time. Moreover, that draft did not significantly change or expand Rule 7 from the version publicly posted nearly eight months earlier, in February 2018, rebutting Afilias' claim that Rule 7 was surreptitiously amended "just days" before the Board adopted the Interim Supplementary Procedures.

78. Afilias' remaining arguments lack merit. First, Afilias challenges the IRP-IOT's inclusion of ICANN counsel towards a quorum. Yet, nothing in ICANN's Bylaws prohibits ICANN counsel from participating in the IRP-IOT's work or counting towards a quorum.

79. Second, Afilias' argument that Rule 7 violates the Bylaws because it is "foreign" to international arbitration is misleading. ICANN's Bylaws do not require that every rule in the Interim Supplementary Procedures be found explicitly or exactly in international arbitration procedures. Instead, the Bylaws require that the Interim Supplementary Procedures be "informed by international arbitration norms"¹²¹ and, more importantly, that they should be "consistent with the Purposes of the IRP." Rule 7 does not violate either of those provisions.

80. Third, Afilias' argument that the Bylaws required the Interim Supplementary Procedures to be published for public comment a second time is wrong. While the Bylaws require the IRP-IOT to post the Interim Supplementary Procedures for public comment prior to adoption by the ICANN Board, they do not require that every iteration or draft be posted for comment. Here, the IRP-IOT complied with the Bylaws when it posted the Interim Supplementary Procedures for public comment in November 2016. Notably, the IRP-IOT received comments regarding Rule 7 that supported granting broader participation rights to interested parties, which the IRP-IOT incorporated into subsequent drafts of the Interim Supplementary Procedures.

81. Fourth, Afilias' vague allegations that drafting "principles" were violated prior to the Board's adoption of the Interim Supplementary Procedures are unsupported. The committee acted in accordance with its purpose when it sought input from, and coordinated with, all relevant entities in drafting the Interim Supplementary Procedures and presenting them to the ICANN Board.

82. In any event, Afilias challenges conduct by the IRP-IOT only; it has not alleged any inappropriate conduct by ICANN in the adoption of the Interim Supplementary Procedures and thus does not even have standing to pursue these claims in an IRP against ICANN. For each of these reasons, Afilias' claims regarding Rule 7 fail.

CONCLUSION

83. ICANN complied with its Articles, Bylaws, and internal policies and procedures relating to disputes over the .WEB gTLD. Moreover, Afilias' claims were known to Afilias more than two years ago and are therefore time-barred. In addition, Afilias' requested relief from the IRP Panel goes far beyond what is permitted by ICANN's Bylaws and calls for the Panel to decide issues that are reserved to the discretion of the ICANN Board. Accordingly, Afilias' Amended IRP Request should be denied.

Respectfully submitted,
JONES DAY

Dated: May 31, 2019

By: 
Jeffrey A. LeVee

Counsel for Respondent ICANN

-
- ¹ Witness Statement of Christine Willett (“Willett Stmt.”) ¶ 2.
- ² Bylaws, Art. 4 §§ 4.2, 4.3; Art. 5, § 5.2, Ex. C-1.
- ³ *Id.*, Art. 4, § 4.2.
- ⁴ *Id.*
- ⁵ *Id.*, Art. 5.
- ⁶ *Id.*, Art. 5, § 5.2.
- ⁷ *Id.*, Art. 4, § 4.3.
- ⁸ Interim Supplementary Procedures (25 Oct. 2018) (“Supp. Procedures”), Ex. C-59.
- ⁹ Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 1 October 2016), Art. 4, § 4.3(n)(i), R-1.
- ¹⁰ Supp. Procedures, Rule 7, Ex. C-59.
- ¹¹ The deadlines in the Interim Supplementary Procedures are subject to change because, as the procedures recognize, “[i]n the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.” Supp. Procedures, Rule 4, fn3, Ex. C-59.
- ¹² Supp. Procedures, Rule 4, Ex. C-59. Under the previous procedures in effect until October 2016, an IRP had to be filed within thirty days after posting of the Board minutes that contain the action or inaction that allegedly violated the ICANN Articles or Bylaws. Bylaws (as amended 11 February 2016) Art. IV, § 3, Ex. C-23.
- ¹³ Willett Stmt. ¶ 3.
- ¹⁴ Guidebook, Preamble, Ex. C-3.
- ¹⁵ GNSO Final Report on Introduction of New Generic Top-Level Domains (8 Aug. 2007), Ex. C-20.
- ¹⁶ ICANN Adopted Board Resolutions (26 June 2008), Ex. C-21.
- ¹⁷ Guidebook (24 October 2008 version), *available at* <https://archive.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>.
- ¹⁸ Guidebook, Preamble, Ex. C-3; Willett Stmt. ¶ 4.
- ¹⁹ *See generally*, Guidebook, Ex. C-3.
- ²⁰ Willett Stmt. ¶ 16.
- ²¹ Guidebook § 1.2.7, Ex. C-3.
- ²² *Id.*
- ²³ *Id.*, § 4.1.1.
- ²⁴ *Id.*, § 4.1.3.
- ²⁵ *See id.*
- ²⁶ *Id.*, § 4.3.
- ²⁷ *Id.*, § 4.3, n.1.
- ²⁸ Willett Stmt. ¶ 35.
- ²⁹ *Id.*, ¶ 36.
- ³⁰ <https://newgtlds.icann.org/en/program-status/statistics>.
- ³¹ Willett Stmt. ¶ 37.
- ³² *Id.*; *see also* <https://www.icann.org/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en>.
- ³³ Willett Stmt. ¶ 37.

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- ³⁴ *Id.*, ¶ 38; *see also* <https://www.icann.org/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en>.
- ³⁵ <https://www.icann.org/en/system/files/files/gtld-drd-ui-10sep13-en.pdf>.
- ³⁶ Bylaws, Art. 1, § 1.1(c), Ex. C-1 (“ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”).
- ³⁷ Willett Stmt. ¶ 38.
- ³⁸ .MEET Application, 18(b), Ex. R-2.
- ³⁹ <https://www.icann.org/resources/agreement/meet-2014-01-16-en>.
- ⁴⁰ *See* Application for Assignment – Registry Agreement (Material Subcontracting Arrangement) for .MEET, Ex. R-3.
- ⁴¹ <https://www.icann.org/resources/agreement/meet-2014-01-16-en>; *see also* Willett Stmt. ¶ 39.
- ⁴² <https://www.icann.org/resources/agreement/promo-2014-12-18-en>; *see also* Willett Stmt. ¶ 39.
- ⁴³ <https://afiliias.info/news/2016/08/08/afiliias-acquires-premium-tlds-archi-bio-and-ski>.
- ⁴⁴ *Id.*
- ⁴⁵ <https://www.icann.org/resources/agreement/ski-2015-04-09-en>;
<https://www.icann.org/resources/agreement/bio-2014-03-06-en>;
<https://www.icann.org/resources/agreement/archi-2014-02-06-en>.
- ⁴⁶ Willett Stmt. ¶ 10.
- ⁴⁷ *Id.*, ¶ 11.
- ⁴⁸ *Id.*, ¶ 12.
- ⁴⁹ *Id.*, ¶ 13.
- ⁵⁰ *Id.*, ¶ 14.
- ⁵¹ *See generally*, *Ruby Glen v. ICANN*, First Amended Complaint, Ex. R-4.
- ⁵² *Id.*; Willett Stmt. ¶ 19, Ex. A, ¶ 20.
- ⁵³ *Ruby Glen v. ICANN*, First Amended Complaint ¶ 36, Ex. R-4.
- ⁵⁴ Willett Stmt. ¶ 21.
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*, ¶ 26.
- ⁵⁷ *Id.*
- ⁵⁸ *Id.*, ¶ 26, 28, Ex. F.
- ⁵⁹ *Id.*, ¶ 30; *see also* Ex. C-44.
- ⁶⁰ Willett Stmt. ¶¶ 24-25.
- ⁶¹ *Id.*, ¶ 29, Ex. G.
- ⁶² Reconsideration Request by Ruby Glen, LLC and Radix FZC (17 July 2016), Ex. R-5.
- ⁶³ Determination of the Board Governance Committee (BGC), Reconsideration Request 16-9 (21 July 2016), Ex. R-6.
- ⁶⁴ *Id.*
- ⁶⁵ *Ruby Glen v. ICANN*, Docket, Ex. R-7.
- ⁶⁶ *Ruby Glen v. ICANN*, Opp’n to *Ex Parte* Appl. for TRO, Ex. R-8.
- ⁶⁷ *Ruby Glen v. ICANN*, Order on *Ex Parte* Appl. for TRO, Ex. R-9.
- ⁶⁸ *Id.*, at 4.

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- ⁶⁹ ICANN New gTLD Contention Set Resolution Auction: Final Results for WEB / WEBS, Ex. R-10.
- ⁷⁰ Verisign Statement Regarding .Web Auction Results (1 August 2016), Ex. C-46.
- ⁷¹ Letter from S. Hemphill (General Counsel, Afiliias) to A. Atallah (President, ICANN’s Global Domains Division) (8 August 2016), Ex. C-49.
- ⁷² *Ruby Glen v. ICANN*, First Amended Complaint, ¶¶ 68-69, 71, Ex. R-4.
- ⁷³ Cooperative Engagement and Independent Review Processes Status Update – 20 June 2018, Ex. R-11.
- ⁷⁴ Willett Stmt. ¶ 9.
- ⁷⁵ Letter from S. Hemphill (General Counsel, Afiliias) to A. Atallah (President, ICANN’s Global Domains Division) (9 September 2016), Ex. R-12.
- ⁷⁶ Letter from C. Willett (Vice President, ICANN’s gTLD Operations) to J. Kane (Vice President, Afiliias’ Corporate Services) (16 September 2016), Ex. C-50.
- ⁷⁷ Letter from J. Kane (Vice President, Afiliias’ Corporate Services) to C. Willett (Vice President, ICANN’s gTLD Operations) (7 October 2016), Ex. C-51. NDC and Verisign also responded to ICANN’s questions in confidential responses.
- ⁷⁸ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-motion-dismiss-first-amended-complaint-28nov16-en.pdf>.
- ⁷⁹ <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.
- ⁸⁰ *Id.*
- ⁸¹ Excerpts from Verisign 10-K (for the fiscal year ended 31 December 2017), Ex. R-13; Expert Report of Dennis W. Carlton (“Carlton Expert Report”) ¶¶ 58-61.
- ⁸² Cooperative Engagement and Independent Review Processes Status Update – 20 June 2018, Ex. R-11.
- ⁸³ *Ruby Glen v. ICANN*, Memorandum, Ex. R-14.
- ⁸⁴ Letter from J. LeVee to K. Reisenfeld (3 December 2018), Ex. R-15.
- ⁸⁵ Bylaws, Art. 4, § 4.3, Ex. C-1.
- ⁸⁶ *Id.*, § 4.3(h)(i)(iii); *see also* Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 (“Booking.com Final Declaration”) ¶ 115 (3 March 2015), Ex. R-16.
- ⁸⁷ Bylaws, Art. 4, § 4.3(b), Ex. C-1.
- ⁸⁸ Amended IRP at ¶ 78.
- ⁸⁹ Willett Stmt. ¶¶ 19-31.
- ⁹⁰ *Id.*, ¶ 19, Ex. A.
- ⁹¹ *Id.*, ¶ 20.
- ⁹² Guidebook, Terms and Conditions 11(a).
- ⁹³ Willett Stmt. ¶¶ 21, 26, 28.
- ⁹⁴ *Id.*, ¶ 25.
- ⁹⁵ *Ruby Glen v. ICANN*, Order on *Ex Parte* Appl. for TRO, Ex. R-8.
- ⁹⁶ Amended IRP ¶ 78.
- ⁹⁷ *Id.*, ¶¶ 54-62.
- ⁹⁸ *Id.*, ¶¶ 63-68.
- ⁹⁹ *Id.*, ¶¶ 69-74.
- ¹⁰⁰ *Id.*, ¶ 78.
- ¹⁰¹ Guidebook at § 1.2.7 (“Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading *may* result

in denial of the application.”) (emphasis added); Terms and Conditions 1 (“Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) *may* cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant.”) (emphasis added); Terms and Conditions 3 (“The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is *entirely at ICANN’s discretion.*” (emphasis added).

¹⁰² Bylaws, Art. 4. § 4.3(i)(iii), Ex. C-1.

¹⁰³ *Berg & Berg Enterprises, LLC v. Boyle*, 178 Cal. App. 4th 1020, 1045 (2009) (“[A] court will not substitute its judgment for that of the board if the latter’s decision can be attributed to any rational business purpose.”).

¹⁰⁴ Bylaws, Art. 1, § 1.2(b)(iii), Ex. C-1.

¹⁰⁵ Witness Statement of J. Beckwith Burr (“Burr Stmt.”) ¶ 27.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, ¶¶ 28-32.

¹⁰⁸ Bylaws, Art. 1, § 1.1(c), 1.2(b)(iii), Ex. C-1.

¹⁰⁹ Burr Stmt. ¶ 32.

¹¹⁰ Burr Stmt. ¶ 31; Carlton Expert Report ¶ 60.

¹¹¹ Carlton Expert Report ¶¶ 60-61.

¹¹² Burr Stmt. ¶ 32.

¹¹³ Carlton Expert Report ¶¶ 28-54.

¹¹⁴ *Id.*, ¶¶ 55-57.

¹¹⁵ Bylaws (as amended 11 February 2016), Art. IV, § 3.3, Ex. C-23, *available at* <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>.

¹¹⁶ Supp. Procedures, Rule 4, Ex. C-59.

¹¹⁷ Letter from S. Hemphill to A. Atallah (9 Sep. 2016), Ex. R-12.

¹¹⁸ Amended IRP Request at ¶¶ 54-62 (alleging violation of Section 1.2.7); ¶¶ 63-68 (alleging violation of Paragraph 10 of the Terms and Conditions); ¶¶ 69-74 (alleging violation of the Auction Rules); ¶¶ 75-83 (alleging that ICANN must disqualify NDC for these alleged breaches and in accordance with ICANN’s competition mandate).

¹¹⁹ Supp. Procedures, Rule 5, Ex. C-59.

¹²⁰ *See United States v. Kubrick*, 444 U.S. 111, 122 (1979) (cause of action accrues when a plaintiff learns of the critical facts of his claim: that he has been injured and who inflicted the injury); *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1092 (9th Cir. 2006) (“Accrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim. Nor is accrual deferred until the injured party has enough information to calculate its damages. Rather, once a plaintiff has inquiry notice of its claim, it bears the responsibility of making diligent inquiries to uncover the remaining facts needed to support the claim.”) (internal quotation marks and citations omitted); *Wolf v. Travolta*, 167 F. Supp. 3d 1077, 1102-03 (C.D. Cal. 2016) (“The discovery rule does not require absolute certainty for a cause of action to accrue. Rather, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period.... Stated differently, once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights.... A plaintiff need not be aware of the specific ‘facts’ necessary to establish the

claim in order for the claim to accrue; that is a process contemplated by pretrial discovery.”) (internal quotation marks and citations omitted).

¹²¹ Provisions on amicus participation in international arbitration can be found in various arbitral rules, including, most prominently, in Article 37(2) of the ICSID Arbitration Rules, which gives ICSID tribunals discretion to permit amicus briefing.

PROOF OF SERVICE BY E-MAIL

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. On May 31, 2019, I served a copy of the following documents:

1. **ICANN'S RESPONSE TO AMENDED REQUEST FOR INDEPENDENT REVIEW PROCESS AND SUPPORTING EXHIBITS**
2. **EXPERT REPORT OF DENNIS W. CARLTON**
3. **WITNESS STATEMENT OF J. BECKWITH BURR**
4. **WITNESS STATEMENT OF CHRISTINE WILLETT**

by e-mailing a copy thereof to the following individual(s) at the following e-mail addresses:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 31, 2019, at Los Angeles, California.



Kelly Ozurovich

EXHIBIT C-45

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Afilias Domains No. 3 Ltd.,)	ICDR CASE NO. 01-18-0004-2702
)	
Claimant,)	
)	
and)	
)	
INTERNET CORPORATION FOR ASSIGNED)	
NAMES AND NUMBERS,)	
)	
Respondent.)	
_____)	

**ICANN’S OPPOSITION TO
AFILIAS DOMAINS NO. 3 LTD.’S REQUEST FOR EMERGENCY PANELIST AND
INTERIM MEASURES OF PROTECTION**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to and opposes the Request for Emergency Panelist and Interim Measures of Protection (“Emergency Request”) submitted by Afilias Domains No. 3 Limited (“Afilias”).

1. This Independent Review Process (“IRP”) proceeding relates to the .WEB generic top-level domain (“gTLD”). .WEB is one of the new gTLDs that applicants applied for as part of ICANN’s New gTLD Program (the “Program”), under which entities submitted 1,930 applications to ICANN to offer new gTLDs to Internet users. The Program was designed to enhance diversity, creativity, and consumer choice, and to provide the benefits of innovation to consumers via the introduction of new gTLDs. The success of the Program is demonstrated by the fact that it has resulted in the introduction of over 1,200 new gTLDs.

2. Because there were multiple, qualified applicants for .WEB, each of which passed the applicable evaluations, the .WEB applications were placed in a “contention set,” and ICANN ultimately implemented an applicant auction to resolve the contention set, as expressly required in the detailed Applicant Guidebook (“Guidebook”) that ICANN created to administer the Program. The auction occurred in July 2016, and Nu Dotco, LLC (“NDC”) was the prevailing bidder. NDC’s bid was financially supported by Verisign, Inc. (“Verisign”), the current registry operator of .COM and .NET. In exchange for this financial support, NDC agreed that, after executing an agreement with ICANN to operate .WEB, NDC would seek ICANN’s permission to transfer that agreement to Verisign so it would become the registry operator of .WEB.

3. After NDC prevailed in a public auction for .WEB, Afilias and other .WEB applicants cried foul, alleging that Verisign’s agreement with NDC violated the Guidebook and raised competition concerns. ICANN has evaluated these complaints, some of which also have been addressed in other fora, including federal court litigation, a Department of Justice Antitrust

Division investigation of Verisign, and multiple invocations of ICANN's own accountability mechanisms. The federal court litigation was resolved in ICANN's favor, and the Department of Justice investigation concluded without any action being taken by the federal government. The time has therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers.

4. To be clear, ICANN's interest in this matter is not in the picking of winners and losers, but in completing the rollout of .WEB in order to make this new gTLD available to Internet users just like all the other TLDs that have been processed through the Program. The rollout already has been delayed for years based on the very same challenges raised in this IRP and other ICANN accountability mechanisms.

5. In its Emergency Request, Afilias argues that it will suffer irreparable harm if ICANN decides to contract with NDC during these IRP proceedings because an "IRP Panel would be unable to reverse that decision" and the value of .WEB could be destroyed if Verisign is permitted to launch the gTLD. Both contentions are incorrect.

6. As an initial matter, ICANN does in fact have the ability to change gTLD registry operators once the .WEB Registry Agreement has been executed. If the IRP Panel determines that ICANN violated its Bylaws or Articles of Incorporation, and the ICANN Board then determines (based upon the Board's review of the IRP Panel's conclusions and recommendations) that NDC should be disqualified and/or that .WEB should be awarded to Afilias, ICANN will have the power to cancel the registry agreement with NDC and enter into a registry agreement with Afilias. Third Party Designated Confidential Information Redacted

Emergency relief is therefore unnecessary because any harm to Afilias can be adequately remedied.

7. Likewise, Afilias' allegation that Verisign may sabotage .WEB if it is permitted to launch the gTLD is entirely speculative, lacks evidentiary support, and is contrary to public statements that Verisign has made regarding its plans for .WEB if ICANN approves the transfer from NDC to Verisign. Verisign has successfully operated .COM and .NET for twenty years, and there is no reason to believe that Verisign would not do the same with .WEB.

8. The absence of any true need for interim relief is underscored by Afilias' own delay in filing this IRP. Afilias alleges that it has known since June 2016 that Verisign was backing NDC's .WEB bid. Afilias could have initiated an IRP at any time, including prior to the auction, but it chose to wait nearly two years. If Afilias felt truly threatened with irreparable harm, it should have moved to prevent NDC from participating in the auction or, at the very least, sought emergency relief promptly thereafter. That Afilias chose to sit on its hands for two years belies its claim of urgency.

9. Further, Afilias' Emergency Request does not raise the type of "serious questions" that mandate interim relief. Afilias' claims about alleged Guidebook violations are either time-barred or complain of the type of transaction in which Afilias itself has previously engaged. Affiliates of Afilias have been involved in multiple agreements to transfer gTLDs, which Afilias fails to mention, and which Afilias makes no effort to distinguish from the NDC/Verisign agreement. Also, Afilias' claim that allowing Verisign to operate .WEB violates ICANN's goals of enhancing competition fails to recognize that ICANN is an administrator, not a regulator, and that the ultimate competition regulator – the Department of Justice Antitrust Division – did investigate the NDC/Verisign agreement and closed the investigation without

taking any action.

10. Finally, while Afilias notes that it must establish that the balance of hardships tips decidedly in its favor, Afilias fails even to place on the scale the harm that interim relief will cause to ICANN, Internet consumers, NDC, and Verisign. The fact is that interim relief would frustrate ICANN's goals and mission, deprive consumers of a gTLD that appears to be highly valued based on the prevailing bid price, and directly injure the interests of NDC and Verisign.

Third Party Designated Confidential Information Redacted

.¹ Absent the posting of an adequate bond, which Afilias will no doubt refuse to do – indeed, it objects to NDC and Verisign even participating in this emergency proceeding as *amici* – the financial harm to NDC and Verisign is not compensable and is thus irreparable.

11. ICANN urges the Emergency Panelist to deny the request.

SUMMARY OF RELEVANT FACTS

I. ICANN AND ITS ACCOUNTABILITY MECHANISMS.

12. ICANN is a California not-for-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet's domain name system ("DNS") on behalf of the Internet community. The essential function of the DNS is to convert easily remembered Internet domain names, such as "ebay.com" and "icann.org" into numeric IP addresses understood by computers. ICANN's core mission is to ensure the stability, security, and interoperability of the DNS.² To that end, ICANN contracts with entities that operate

¹ Declaration of Todd Strubbe ("Strubbe Decl.") ¶ 8.

² Declaration of Christine Willett ("Willett Decl.") ¶ 2.

generic top-level domains (“gTLDs”), which represent the portion of a domain name to the right of the final dot, such as “.COM” or “.GOV.”

13. To ensure that ICANN is serving and remains accountable to the global Internet community, ICANN has established accountability mechanisms for review of ICANN actions and decisions. Any aggrieved party can seek through these accountability mechanisms to hold ICANN accountable for alleged violations of ICANN’s Bylaws, Articles of Incorporation (“Articles”), or certain other internal policies and procedures.³

14. The ICANN Bylaws also provide for a process by which “any person or entity materially affected by an action or inaction” of ICANN may request review or reconsideration of that action or inaction.⁴ The Board Accountability Mechanisms Committee (“BAMC”), a special committee of the ICANN Board, has been empowered to hear and consider requests for reconsideration.⁵

15. The ICANN Bylaws also create the IRP under which a party materially affected by an action or inaction of the ICANN Board or staff may submit its claims to an “independent third-party.”⁶ IRP claims are submitted to the American Arbitration Association’s International Centre for Dispute Resolution (“ICDR”), which is responsible for administering IRP proceedings in accordance with the ICDR’s International Arbitration Rules, as modified by the ICANN Bylaws and IRP Interim Supplementary Procedures (“Supplementary Procedures”).⁷

16. An IRP Panel is not empowered to substitute its judgment for that of the ICANN

³ Bylaws, Art. 4 §§ 4.2, 4.3; Art. 5, § 5.2, Ex. C-1.

⁴ *Id.*, Art. 4, § 4.2.

⁵ *Id.*

⁶ *Id.*, Art. 4, § 4.3.

⁷ Interim Supplementary Procedures (25 Oct. 2018) (“Interim Supp. Procedures”), Ex. C-59.

Board or staff.⁸ Rather, the core task of an IRP panel is to determine whether ICANN has exceeded the scope of its mission or otherwise failed to comply with its Bylaws, Articles or other internal policies and procedures.⁹

17. Under the current Supplementary Procedures,¹⁰ an IRP must be commenced within 120 days after a claimant becomes aware of the material effect of the alleged ICANN action or inaction giving rise to the dispute, provided, however, that an IRP may not be filed more than twelve months from the date of such action or inaction.¹¹ Under the previous rules in effect until October 2016, an IRP had to be filed within thirty days after notice (as defined below) of the alleged action or inaction, meaning that many of Afiliias' claims in this IRP, despite Afiliias' current claims of urgency, were time-barred nearly two years ago, as ICANN discusses below.¹²

II. ICANN'S NEW GTLD PROGRAM.

A. ICANN's Policy Development – 2000-2007.

18. In its early years, ICANN focused on increasing the number of companies (known as Internet registrars) that could sell domain name registrations to entities and individuals within the existing gTLDs. ICANN also focused on expanding, although more slowly, the number of gTLDs in existence. In 2000, ICANN approved seven new gTLDs as a proof of concept test to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet or the DNS. In 2004 and 2005, ICANN approved a handful of additional gTLDs.

⁸ *Id.*; see also Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 (“Booking.com Final Declaration”) ¶ 115 (3 March 2015), Ex. RE-1.

⁹ Bylaws, Art. 4, § 4.3, Ex. C-1.

¹⁰ The deadlines in the Interim Supplementary Procedures are subject to change because, as the procedures recognize, “[i]n the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.” Interim Supp. Procedures § 4, fn.3, Ex. C-59.

¹¹ Interim Supp. Procedures § 4, Ex. C-59.

¹² Bylaws (as amended 11 February 2016) Art. IV, § 3, Ex. C-23.

19. The New gTLD Program has produced ICANN’s most ambitious expansion of the Internet’s naming system. Under the Program, any interested party could apply for the opportunity to operate new gTLDs that were not already in use in the DNS, meaning that there was no cap on the number of new gTLDs that could be added to the Internet.¹³ The Program was designed to enhance diversity, creativity and consumer choice in gTLDs, and to provide the benefits of innovation to consumers.¹⁴ The Program arose from policy recommendations by ICANN’s Generic Names Supporting Organization (“GNSO”), which were based on community input during the period 2005-2007.¹⁵ On 26 June 2008, the ICANN Board adopted the GNSO’s policy recommendations and directed the ICANN organization to develop an implementation plan for the Program, to be provided to the Board for approval.¹⁶

B. ICANN’s Implementation of the Program – 2008-2012.

20. Implementation of the Program was developed with input from the ICANN community over several years. ICANN published a first draft of the Applicant Guidebook in October 2008¹⁷ and distributed it for public comment. Revisions were made based on public comment, and additional comments were sought on the revisions. The process repeated many times, resulting in numerous versions of the Guidebook until, in June 2012, ICANN adopted the operative, 338-page Guidebook.¹⁸

21. The Guidebook provides a step-by-step procedure for new gTLD applicants. It specifies what documents and information are required to apply, the financial and legal

¹³ Willet Decl. ¶ 3.

¹⁴ Guidebook, Preamble, Ex. C-3.

¹⁵ GNSO Final Report on Introduction of New Generic Top-Level Domains (8 Aug. 2007), Ex. C-20.

¹⁶ ICANN Adopted Board Resolutions (26 June 2008), Ex. C-21.

¹⁷ Guidebook (24 October 2008 version), *available at* <https://archive.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>.

¹⁸ Guidebook, Preamble, Ex. C-3; Willett Decl. ¶ 4.

commitments of operating a new gTLD, what applicants can expect during the application and evaluation periods, and the dispute resolution procedures that people and organizations could invoke to object to new gTLD applications.¹⁹

22. The Guidebook requires applicants, which must be entities and not individuals, to provide the names and positions of their “directors,” “officers and partners” and “shareholders holding at least 15% of shares,” as well as information about applicants’ financial condition so that ICANN could assess the applicants and their technical and financial wherewithal to operate a gTLD.²⁰ The Guidebook also requires applicants to inform ICANN if “information previously submitted by an applicant becomes untrue or inaccurate,” including “applicant specific information such as changes in financial position and changes in ownership or control of the applicant.”²¹ But an applicant’s failure to inform ICANN that previously submitted information has become untrue or inaccurate does not require denial of an application. Instead, the Guidebook gives ICANN the discretion to determine whether the changed circumstances are material and the consequences, if any, that should follow from a failure to disclose them.²²

23. Only one applicant can be awarded a particular gTLD. Where there is more than one qualified applicant for the same gTLD, the Guidebook mandates that the applications be placed in a “contention set” for selection of a single successful applicant.²³ When applicants are placed in a contention set, the Guidebook encourages (but does not require) the applicants to agree among themselves on resolution of the contention set.²⁴ To resolve a contention set privately, all

¹⁹ See generally, Guidebook, Ex. C-3.

²⁰ Willett Decl. ¶ 12.

²¹ Guidebook § 1.2.7, Ex. C-3.

²² *Id.*

²³ *Id.* § 4.1.1.

²⁴ Guidebook § 4.1.3, Ex. C-3.

applicants within the contention set must agree to a private resolution.²⁵ Private resolutions frequently are achieved through a private auction in which the proceeds paid by the prevailing bidder are divided among the losing bidders. If the contention set cannot be resolved through private resolution, the Guidebook requires ICANN to schedule a public auction for those contention set members wishing to proceed with their applications.²⁶ The proceeds of a public auction are provided to ICANN and are to be used to support its Mission and Core Values.²⁷

24. Once a successful gTLD applicant passes initial evaluation and resolves any objections and/or a contention set, it moves to contracting, where it enters a Registry Agreement with ICANN to become a new gTLD registry operator. A Registry Agreement is the formal, written agreement between a gTLD registry operator and ICANN that sets forth the rights, duties and liabilities of the registry operator. ICANN offers a model Registry Agreement for most gTLDs, but each Registry Agreement can be negotiated and modified.²⁸ After a Registry Agreement is fully executed, ICANN takes the technical steps necessary to delegate the new gTLD into the DNS. Only after a gTLD has been fully delegated by ICANN does it become operable and accessible on the Internet.²⁹

C. Results of the Program – 2012-Present.

25. In 2012, ICANN received 1,930 applications for new gTLDs. Since then, approximately 1,200 new gTLDs have been delegated and are operational.³⁰ These new gTLDs have greatly increased diversity, consumer choice and competition in the DNS.

²⁵ *See id.*

²⁶ *Id.* § 4.3.

²⁷ *Id.* § 4.3, n.1.

²⁸ Willet Decl. ¶ 31.

²⁹ *Id.* ¶ 32.

³⁰ <https://newgtlds.icann.org/en/program-status/statistics>.

26. As one would expect with a vastly expanded marketplace, registry operators (entities that have entered into Registry Agreements with ICANN) have chosen to use and monetize gTLDs in different ways. Many registry operators have followed their original business plans of marketing their gTLDs as envisioned in their applications.³¹ Hundreds of others have assigned or transferred their gTLDs to other entities for financial gain or other reasons.³² Other companies have entered the new gTLD marketplace by acquiring new gTLD registry operators. Some have also chosen to use the gTLDs for their own benefit, such as for branding purposes.³³

27. These kinds of assignments and transfers must be approved by ICANN, and ICANN has a procedure in place for evaluating such requests.³⁴ In addition, ICANN has published materials explaining how, as a technical matter, a gTLD can be assigned from one registry operator to another.³⁵ Because ICANN administers, rather than regulates, the DNS,³⁶ ICANN's focus in evaluating a proposed gTLD transfer is whether the transferee organization has the requisite financial and technical ability to operate a gTLD.³⁷

28. Indeed, Afilias is very familiar with the transfer process due to its involvement in multiple gTLD transfers. For instance, Afilias Limited applied for .MEET in 2012, stating that it planned to make it “the most popular, accessible, and innovative destination on the Internet where people seeking online dating and companionship services can learn about dating,

³¹ Willett Decl. ¶ 33.

³² *Id.*; see also <https://www.icann.org/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en>.

³³ Willett Decl. ¶ 33.

³⁴ *Id.* ¶ 34; see also <https://www.icann.org/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en>.

³⁵ <https://www.icann.org/en/system/files/files/gtld-drd-ui-10sep13-en.pdf>.

³⁶ Bylaws, Art. 1, § 1.1(c), Ex. C-1 (“ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”).

³⁷ Willet Decl. ¶ 34.

companionship services and registrars that offer .MEET domain names.”³⁸ On 16 January 2014, ICANN and Afilias Limited entered into a .MEET Registry Agreement.³⁹ But before launching .MEET – *i.e.*, before serving a single customer – Afilias Limited sought to transfer the .MEET Registry Agreement to Charleston Road Registry Inc. d/b/a Google Registry (“Google”) in October 2014.⁴⁰ According to the transfer application, Google planned on converting .MEET from a dating platform to a gTLD that provided “web-based business meetings.”⁴¹ Because ICANN determined that Google had the technical and financial ability to operate .MEET, ICANN approved the transfer even though the new objective for the gTLD was radically different than that expressed in the Afilias application.⁴²

29. Likewise, in 2015, the entity that entered into a Registry Agreement with ICANN to operate .PROMO requested that ICANN approve a transfer of .PROMO to Afilias plc prior to delegation of .PROMO. Although Afilias did not originally apply to operate .PROMO, ICANN approved the transfer based on a demonstration that Afilias was qualified to operate the gTLD.⁴³

30. Finally, as described on its own corporate website, “Afilias has an active program for acquiring new Top Level Domains.”⁴⁴ For instance, in 2016, Afilias plc announced its acquisition of StartingDot, which had become the registry operator for .ARCHI, .BIO and .SKI through the Program. In Afilias plc’s words, “[t]he acquisition agreement is part of Afilias’ ongoing program of acquiring new TLDs to add to its portfolio.”⁴⁵ ICANN approved the transfer

³⁸ .MEET Application, 18(b), Ex. RE-2.

³⁹ <https://www.icann.org/resources/agreement/meet-2014-01-16-en>.

⁴⁰ *See* Application for Assignment – Registry Agreement (Material Subcontracting Arrangement) for .MEET, Ex. RE-3.

⁴¹ *Id.*

⁴² <https://www.icann.org/resources/agreement/meet-2014-01-16-en>; *see also* Willett Decl. ¶ 35.

⁴³ <https://www.icann.org/resources/agreement/promo-2014-12-18-en>; *see also* Willett Decl. ¶ 35.

⁴⁴ <https://afilias.info/news/2016/08/08/afilias-acquires-premium-tlds-archi-bio-and-ski>.

⁴⁵ *Id.*

of those TLDs to Afilias plc based on its technical and financial ability to operate them.⁴⁶

III. THE .WEB CONTENTION SET.

31. ICANN received seven applications for .WEB, including applications from Afilias, NDC and Ruby Glen LLC (“Ruby Glen”). ICANN also received two applications for .WEBS from another applicant, which later withdrew one of its applications in April 2016. The seven applications for .WEB passed all applicable evaluations and were placed in a contention set, pursuant to the procedures set forth in the Guidebook.⁴⁷

32. In 2013, one of the .WEB applicants filed string confusion objections against the .WEBS applications with the ICDR, which is the independent, third-party dispute resolution service provider designated to handle string confusion objections. The objection was ultimately successful and .WEBS was added to the .WEB contention set, thereby creating the .WEB/.WEBS contention set (“Contention Set”).⁴⁸

33. Following the Guidebook’s procedures, on 27 April 2016, ICANN scheduled an auction for 27 July 2016 to resolve the .WEB/.WEBS Contention Set if it could not be privately resolved by the applicants before then.⁴⁹ As the date of the auction approached, it became apparent that the members of the .WEB/.WEBS Contention Set that had applied for .WEB had not resolved the contention set privately, and the members (as a whole) did not request a postponement of the auction. Accordingly, ICANN proceeded with plans for the auction.⁵⁰

⁴⁶ <https://www.icann.org/resources/agreement/ski-2015-04-09-en>; <https://www.icann.org/resources/agreement/bio-2014-03-06-en>; <https://www.icann.org/resources/agreement/archi-2014-02-06-en>.

⁴⁷ Willett Decl. ¶ 6.

⁴⁸ *Id.* ¶ 7. In June 2014, the .WEBS applicant (Vistaprint) filed an IRP against ICANN for accepting the ICDR’s determination following the string confusion objection proceedings. In October 2015, ICANN prevailed in the .WEBS IRP. The ICANN Board considered the .WEBS IRP Final Declaration in October 2015, December 2015, and March 2016, and resolved to “move forward with the processing of the .WEB/.WEBS contention set.” *Id.* ¶ 8.

⁴⁹ Willett Decl. ¶ 9.

⁵⁰ Willett Decl. ¶ 10.

34. Just before the auction, another .WEB applicant (Ruby Glen) invoked several of ICANN’s accountability mechanisms, and eventually commenced litigation, in an attempt to prevent the public auction from going forward and instead force a private auction where the proceeds would be divided and paid to the losing bidders.⁵¹ Ruby Glen complained to ICANN that NDC had a change in ownership or control, and that NDC had failed to notify ICANN of this change, as required by the Guidebook.⁵² According to Ruby Glen, this alleged failure constituted a “potentially disqualifying change[] to NDC’s application.”⁵³

35. ICANN thoroughly investigated these claims. ICANN contacted NDC on 27 June 2016, asking it to confirm whether there were any changes to NDC’s organizational structure that required reporting to ICANN.⁵⁴ NDC’s Chief Financial Officer, Jose Ignacio Rasco III, responded the same day to confirm that NDC had not experienced any changes in its organizational structure.⁵⁵ Nonetheless, in an abundance of caution, ICANN contacted NDC eleven days later to inquire further into potential changes to NDC’s organization.⁵⁶ ICANN staff also interviewed Mr. Rasco via telephone.⁵⁷ During the call, Mr. Rasco stated and later confirmed via email on 11 July 2016: “Neither the ownership nor the control of [NDC] has changed since we filed our application.”⁵⁸ Thereafter, ICANN informed all the contention set members, including Ruby Glen, that ICANN had “investigated the matter, and to date [has] found no basis to initiate the application change request process or postpone the auction.”⁵⁹

⁵¹ See generally, *Ruby Glen v. ICANN*, First Amended Complaint, Ex. RE-4.

⁵² *Id.*; Willett Decl. ¶¶ 11, 15-16.

⁵³ *Ruby Glen v. ICANN*, First Amended Complaint ¶ 36, Ex. RE-4.

⁵⁴ Willett Decl. ¶ 17.

⁵⁵ *Id.*

⁵⁶ *Id.* ¶ 22.

⁵⁷ *Id.*

⁵⁸ Willett Decl. ¶ 22, 24, Ex. F.

⁵⁹ *Id.* ¶ 26; see also Ex. C-44.

36. Ruby Glen then brought its allegations to the ICANN Ombudsman, who also investigated the claim.⁶⁰ Like the ICANN staff, the Ombudsman did not find “any evidence which would satisfy [him] that there has been a material change to the application.”⁶¹

37. On 17 July 2016, Ruby Glen submitted an emergency Reconsideration Request to ICANN to enjoin the auction, claiming that ICANN staff had failed to sufficiently investigate Ruby Glen’s claims regarding NDC.⁶² ICANN’s Board Governance Committee (“BGC”), which was then tasked with evaluating Reconsideration Requests, expeditiously reviewed the thoroughness of the investigation into the alleged changes in NDC’s management and control.⁶³ After finishing its review, the BGC denied the Reconsideration Request on 21 July 2016, concluding that ICANN staff had sufficiently investigated Ruby Glen’s claims.⁶⁴

38. Just days before the .WEB auction was set to begin, Ruby Glen escalated its actions by filing a complaint in Federal District Court against ICANN and an *ex parte* application for a temporary restraining order (“TRO”) to block the auction.⁶⁵ ICANN opposed the TRO application, arguing that Ruby Glen was not likely to succeed on the merits of its claims because ICANN’s Board and staff appropriately investigated Ruby Glen’s claims and detected no changes to NDC’s ownership or control, a finding corroborated by sworn declarations from NDC’s Chief Operating Officer and Chief Financial Officer.⁶⁶

39. The District Court denied Ruby Glen’s request for a TRO based, in part, on the

⁶⁰ *Id.* ¶¶ 20-21.

⁶¹ Willett Decl. ¶ 25, Ex. G.

⁶² Reconsideration Request by Ruby Glen, LLC and Fadix FZC (17 July 2016), Ex. RE-5.

⁶³ Determination of the Board Governance Committee (BGC), Reconsideration Request 16-9 (21 July 2016), Ex. RE-6.

⁶⁴ *Id.*

⁶⁵ *Ruby Glen v. ICANN*, Docket, Ex. RE-7.

⁶⁶ *Ruby Glen v. ICANN*, Opp’n to *Ex Parte* Appl. for TRO, Ex. RE-8.

“strength of ICANN’s evidence.”⁶⁷ Specifically, the District Court held:

ICANN has provided evidence that it has conducted investigations into Plaintiff’s allegations concerning potential changes in NDC’s management and ownership structure at each level of Plaintiff’s appeals to ICANN for an investigation and postponement of the auction. During those investigations, NDC provided evidence to ICANN that it had made no material changes to its management and ownership structure. Additionally, ICANN’s Opposition is supported by the Declarations of Nicolai Bezsonoff and Jose Ignacio Rasco, who declare under penalty of perjury that there have been no changes to NDC’s management, membership, or ownership since NDC first filed its application with ICANN.⁶⁸

40. The District Court also found that “because the results of the auction could be unwound, [Ruby Glen] has not met its burden to establish that it will suffer irreparable harm in the absence of the preliminary injunctive relief it seeks. Significantly, the Court further concluded that the public interest did not favor the postponement of the auction.”⁶⁹

IV. THE .WEB AUCTION AND ENSUING LITIGATION, ACCOUNTABILITY MECHANISMS AND GOVERNMENT INVESTIGATION.

41. After denial of the TRO application, the .WEB/.WEBS auction proceeded as scheduled. NDC prevailed at the auction for .WEB at a bid price of \$135 million on 28 July 2016.⁷⁰ Days later, Verisign, the entity that operates the .COM and .NET gTLDs, among others, publicly stated that it “provided funds for [NDC’s] bid” in exchange for an agreement that, if NDC entered into a Registry Agreement with ICANN to operate .WEB, NDC would then seek to “assign[] the Registry Agreement to VeriSign upon consent from ICANN.”⁷¹

42. On 8 August 2016, Afilias wrote ICANN demanding disqualification of NDC’s .WEB application based on two claims. First, Afilias stated that NDC violated the disclosure requirements of the Guidebook by failing to inform ICANN of its agreement with

⁶⁷ *Ruby Glen v. ICANN*, Order on *Ex Parte* Appl. for TRO, Ex. RE-9.

⁶⁸ *Id.* at 4.

⁶⁹ *Id.*

⁷⁰ ICANN New gTLD Contention Set Resolution Auction: Final Results for WEB / WEBS, Ex. RE-10.

⁷¹ Verisign Statement Regarding .Web Auction Results (1 August 2016), Ex. C-46.

Verisign. Second, Afilias stated that NDC had assigned its application to Verisign in violation of the Guidebook.⁷² These are precisely the same claims that Afilias is now pursuing in this IRP.

43. That same day, Ruby Glen filed its First Amended Complaint against ICANN in Federal District Court, making claims that NDC violated the Guidebook and should have been disqualified on the same grounds asserted in Afilias' letter to ICANN.⁷³

44. On 2 August 2016, Ruby Glen's parent organization, Donuts, Inc. ("Donuts"), invoked ICANN's Cooperative Engagement Process ("CEP"), a pre-IRP proceeding that allows the parties to attempt to resolve or narrow the issues to be brought in an IRP proceeding.⁷⁴ Donuts' claims in the CEP were identical to those asserted in Ruby Glen's First Amended Complaint and Afilias' 8 August 2016 letter.

45. Afilias sent ICANN a subsequent letter, dated 9 September 2016, again asking ICANN to disqualify NDC for the same alleged Guidebook violations. Afilias' 9 September 2016 letter also included claims regarding competition concerns, which are again the same as those alleged in this IRP.⁷⁵

46. As part of ICANN's due diligence into the issues raised by Afilias and Ruby Glen in 2016, ICANN issued a set of questions to Afilias, Ruby Glen, NDC and Verisign, seeking input regarding the .WEB auction, the purported NDC/Verisign agreement, and the alleged violations of the Guidebook.⁷⁶ These questions were designed to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted by Afilias and Ruby Glen.

⁷² Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN's Global Domains Division) (8 August 2016), Ex. C-49.

⁷³ *Ruby Glen v. ICANN*, First Amended Complaint, Ex. RE-4.

⁷⁴ Cooperative Engagement and Independent Review Processes Status Update – 20 June 2018, Ex. RE-11.

⁷⁵ Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN's Global Domains Division) (9 September 2016), Ex. RE-12.

⁷⁶ Letter from C. Willett (Vice President, ICANN's gTLD Operations) to J. Kane (Vice President, Afilias' Corporate Services) (16 September 2016), Ex. C-50.

47. On 7 October 2016, Afilias responded to ICANN’s questions reiterating its core objections to the purported NDC/Verisign agreement, describing it as a “failure to disclose material information relating to [NDC’s] bid for the .WEB rights” and as “clearly designed to preserve Verisign’s existing monopoly in gTLD services that results from its control of .COM and .NET,” which are the claims Afilias is now pressing in this IRP, over two years later.⁷⁷

48. Thereafter, on 28 November 2016, the Federal District Court dismissed with prejudice Ruby Glen’s First Amended Complaint regarding the .WEB auction based on the covenant not to sue in Module 6 of the Guidebook, which requires applicants to use ICANN’s accountability mechanisms instead of filing lawsuits against ICANN.⁷⁸ Ruby Glen appealed.

49. On 1 February 2017, the Antitrust Division of the United States Department of Justice (“DOJ Antitrust Division”) issued a civil investigative demand (“CID”) to ICANN, Verisign and presumably others that participated in the auction for .WEB, seeking documents and information “in connection with DOJ’s investigation of Verisign’s proposed acquisition of NDC’s contractual rights to operate the .WEB gTLD.”⁷⁹ Between February and June 2017, ICANN made several productions of documents and provided information to the DOJ Antitrust Division in connection with its investigation.⁸⁰

50. In January 2018, the DOJ Antitrust Division closed its investigation, presumably meaning the government did not find a threat to competition that warranted further action.⁸¹ Despite the fact that Afilias’ IRP claims focus on the alleged anticompetitive effects of having

⁷⁷ Letter from J. Kane (Vice President, Afilias’ Corporate Services) to C. Willett (Vice President, ICANN’s gTLD Operations) (7 October 2016), Ex. C-51.

⁷⁸ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-motion-dismiss-first-amended-complaint-28nov16-en.pdf>.

⁷⁹ <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.

⁸⁰ *Id.*

⁸¹ Excerpts from Verisign 10-K (for the fiscal year ended 31 December 2017), Ex. RE-13.

Verisign operate .WEB, Afilias does not even mention the Antitrust Division’s investigation – much less the Antitrust Division’s decision to close its investigation – in any of its papers.

51. On 18 June 2018, almost two years after the .WEB auction took place, Afilias initiated its own CEP to assert the exact same claims it had raised in 2016.⁸²

52. Thereafter, on 15 October 2018, the Ninth Circuit Court of Appeals issued an order affirming the dismissal of Ruby Glen’s First Amended Complaint against ICANN.⁸³

53. With the DOJ Antitrust Division investigation closed, the Ruby Glen litigation over, and little progress in the Afilias CEP, ICANN closed the Afilias CEP proceedings but assured Afilias that ICANN would not take further action on .WEB until there was a resolution to Afilias’ Emergency Request in this IRP.⁸⁴ On 14 November 2018, Afilias filed its IRP. On 27 November 2018, Afilias filed its Emergency Request.

STANDARD OF REVIEW

54. ICANN’s Bylaws and Supplementary Procedures allow for interim relief in the form of a stay to maintain the *status quo*.⁸⁵ A claimant must establish the following:

“(i) A harm for which there will be no adequate remedy in the absence of such relief;

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.”⁸⁶

ARGUMENT

I. AFILIAS WILL NOT SUFFER IMMEDIATE, IRREPARABLE HARM IN THE ABSENCE OF INTERIM RELIEF.

⁸² Cooperative Engagement and Independent Review Processes Status Update – 20 June 2018, Ex. RE-11.

⁸³ *Ruby Glen v. ICANN*, Memorandum, Ex. RE-14.

⁸⁴ Letter from J. LeVee to K. Reisenfeld (3 December 2018), Ex. RE-15.

⁸⁵ Bylaws Art. 4, § 4.3(p), Ex. C-1; Interim Supp. Procedures § 10, Ex. C-59.

⁸⁶ Bylaws Art. 4, § 4.3(p), Ex. C-1; Interim Supp. Procedures § 10, Ex. C-59.

55. A critical aspect of an application for interim relief is the applicant’s demonstration that it will suffer immediate, irreparable harm absent a stay.⁸⁷ Afilias argues that it will suffer irreparable harm if ICANN negotiates a Registry Agreement with NDC because an “IRP Panel would be unable to reverse that decision,” and the value of .WEB could be destroyed if Verisign launches the gTLD. Afilias provides no evidence to support either of these claims.

56. Afilias’ first assertion of irreparable injury – that ICANN is unable to transfer a .WEB Registry Agreement after the conclusion of this IRP – is simply wrong. There is no technological, legal, or other barrier preventing the transfer of a Registry Agreement from one registry operator to another after a Registry Agreement is in place or even after a gTLD has been delegated.

Third Party Designated Confidential Information Redacted

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57. Federal and California state courts have found that, where, as here, ICANN can transfer the Registry Agreement, the type of harm alleged by Afilias is not irreparable and does not warrant interim relief. In denying Ruby Glen’s TRO application seeking to halt the .WEB auction, the District Court ruled that “because the results of the auction could be unwound, Plaintiff has not met its burden to establish that it will suffer irreparable harm in the absence of the preliminary injunctive relief it seeks.”⁸⁹ Likewise, in *DotConnectAfrica Trust v. ICANN*, an applicant for .AFRICA (DCA) filed a motion for preliminary injunction to block ICANN from

⁸⁷ See Interim Supp. Procedures § 10, Ex. C-59.

⁸⁸ Strubbe Decl. ¶ 11; Declaration of Jose Ignacio Rasco III, ¶ 3.

⁸⁹ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-denying-plaintiff-ex-parte-application-tro-26jul16-en.pdf>.

entering into a .AFRICA Registry Agreement with a competing applicant. The California Superior Court denied the motion because “there is no potential for irreparable harm to DCA” because the “.Africa gTLD can be [transferred] to DCA in the event DCA prevails in this litigation.” The court further noted that “the evidence reflects that [transfer] is not uncommon and has occurred many times. Indeed, ICANN has an established procedure for re-[transferring] a gTLD, which is set forth in a public manual.”⁹⁰

58. The same is true here. If the IRP Panel ultimately determines that ICANN acted inconsistently with its Bylaws or Articles, and the ICANN Board determines (based upon the Board’s review of the IRP Panel’s conclusions and recommendations, if any) that NDC should be disqualified and/or that .WEB should be awarded to Afilias, ICANN has the power to effect a transfer of .WEB to Afilias.

59. Afilias’ second assertion of irreparable injury – that Verisign will destroy .WEB, either intentionally or through mismanagement – is entirely speculative. Claims of irreparable injury must be buttressed with evidence,⁹¹ yet Afilias offers literally no evidence that Verisign will intentionally or otherwise harm the value of .WEB.

60. Contrary to Afilias’ speculation, Verisign has publicly represented to its shareholders that, if ICANN were to approve a transfer of .WEB from NDC to Verisign, Verisign plans to market .WEB aggressively.⁹² Moreover, in light of Verisign’s successful

⁹⁰ <https://www.icann.org/en/system/files/files/litigation-dca-icann-order-denying-plaintiff-motion-prelim-injunction-03feb17-en.pdf>.

⁹¹ *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (“Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief.”) (emphasis in original) (internal citation omitted), Ex. RELA-3; *iFreedom Direct Corp. v. McCormick*, 662 F. App’x. 550, 551 (9th Cir. 2016) (upholding district court decision denying motion for preliminary injunction in part because plaintiff’s evidence of a likelihood of irreparable harm “was too speculative”), Ex. RELA-5.

⁹² Strubbe Decl. ¶ 7.

stewardship over .COM and .NET for almost two decades, Verisign is clearly qualified to operate a gTLD, making Afiliás' claims that Verisign will irretrievably blunder a .WEB launch implausible at best. In the .AFRICA case, the Superior Court rejected similar claims that an entity would botch the launch of .AFRICA, finding that "[t]his harm is highly speculative and fails to account for the possibility of re-delegation."⁹³

II. INTERIM RELIEF IS NOT WARRANTED BECAUSE AFILIAS UNREASONABLY DELAYED SEEKING SUCH RELIEF.

61. A hallmark of a proper request for interim relief is diligence in seeking that relief. A long delay in seeking interim relief implies that there is no urgency, nor any irreparable harm, and a request for interim relief can be denied on this basis alone.⁹⁴

62. Afiliás did not initiate its CEP until June 2018, almost two years after the .WEB auction and Verisign's announcement on 1 August 2016 that it had entered into an agreement with NDC regarding .WEB. Afiliás concedes that, by August 2016, it was aware of the essential facts and arguments it is now raising in its Emergency Request. Indeed, the Emergency Request includes all of the allegations Afiliás made in its August and September 2016 letters to ICANN.

63. Further, in a letter dated 7 October 2016 from Afiliás' Vice President for Corporate Services, responding to a letter from Mr. Akram Atallah of ICANN, Afiliás stated:

Mr. Atallah states that, while the .WEB/.WEBS contention set was placed on hold by ICANN on 19 August 2016, such action was taken because of the initiation of an ICANN Accountability Mechanism by another applicant. **We are concerned that this statement appears to imply that ICANN is not placing the**

⁹³ <https://www.icann.org/en/system/files/files/litigation-dca-icann-order-denying-plaintiff-motion-prelim-injunction-03feb17-en.pdf>.

⁹⁴ See *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."), Ex. RELA-6; *iFreedom Direct Corp.*, 662 F. App'x. at 550 (upholding district court decision denying motion for preliminary injunction in part because the plaintiff's "ten-month delay in seeking a preliminary injunction undermined its claim of irreparable harm"), Ex. RELA-5.

contention set on hold in order to address the issues raised by Afilias.⁹⁵

Plainly, Afilias knew more than two years ago that ICANN was not placing the contention set on hold in response to Afilias' allegations and arguments, yet it did nothing.

III. AFILIAS' REQUEST FOR IRP DOES NOT RAISE "SUFFICIENTLY SERIOUS QUESTIONS" THAT JUSTIFY INTERIM RELIEF.

64. Afilias must also show either a likelihood of success on the merits or that it has raised "sufficiently serious questions related to the merits" of its IRP. Afilias bases its request on the lesser showing – that its request raises serious questions going to the merits of its claims. But Afilias has not raised the type of serious questions that justify interim relief.

65. For instance, much of the claims Afilias raises in its Emergency Request relate to ICANN's investigation of NDC and the ICANN Board's decision to proceed with the .WEB auction.⁹⁶ But ICANN's investigation of NDC took place in June 2016, and the ICANN Board decided to proceed with the .WEB auction on 21 July 2016.⁹⁷ According to the Bylaws in place at that time, an IRP had to be filed within 30 days of the posting of the minutes of the meeting when the decision was made. Those minutes were posted on 12 September 2016, making an IRP filing on these issues due no later than 12 October 2016.⁹⁸

66. Similarly, Afilias' claim that allowing Verisign to operate .WEB will violate ICANN's "Core Value to introduce and promote competition," is without merit. While ICANN's Bylaws and Core Values call for ICANN to enact policies that promote competition in the DNS, they do not instruct ICANN to act as a government regulator. In fact, ICANN's

⁹⁵ Letter from J. Kane to C. Willett (7 October 2016), Ex. C-51 (emphasis added).

⁹⁶ Emergency Request at 15, Question 1-5.

⁹⁷ <https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-bgc-determination-21jul16-en.pdf>.

⁹⁸ Bylaws (as amended 11 February 2016), Art. IV, § 3.3, Ex. C-23.

Bylaws make clear that “ICANN does not hold any governmentally authorized regulatory authority.”⁹⁹ Instead, the regulator authorized to promote and regulate competition, the U.S. Department of Justice Antitrust Division, already evaluated the potential competitive effects of the NDC/Verisign agreement and concluded that government intervention was not warranted.

67. Afiliás claims to be “the world’s second largest Internet domain name registry, with more than 20 million names under management.”¹⁰⁰ Given its size and technical abilities, Afiliás is more than capable of competing with Verisign, whether in .WEB or elsewhere.

68. Finally, ICANN has never been under a duty to disqualify NDC based on its agreement with Verisign. Rather, the Guidebook gives ICANN discretion to determine whether information not disclosed to ICANN either (a) was required to be disclosed in the first instance and/or (b) whether any such non-disclosure is material enough to warrant disqualification.¹⁰¹

IV. THE BALANCE OF HARDSHIPS DOES NOT TIP IN AFILIAS’ FAVOR.

69. The final requirement for interim relief is that the claimant demonstrate a “balance of the hardships tipping decidedly towards the party seeking the relief.”¹⁰² Where, as here, the party requesting interim relief declines to show a likelihood of success on the merits, the burden to demonstrate that the balance of hardships tips in its favor is higher. The party must

⁹⁹ Bylaws, Art. 1, § 1.1(c), Ex. C-1.

¹⁰⁰ Afiliás, About US, RE-16.

¹⁰¹ Guidebook § 1.2.7, Ex. C-3.

¹⁰² Bylaws Art. 4 § 4.3(p), Ex. C-1; Interim Supp. Procedures § 10, Ex. C-59. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”) (citation and internal quotation marks omitted), Ex. RELA-8; *Burlington Resources Inc. v. Republic of Ecuador & Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures (29 June 2009) ¶ 81 (quoting *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on revocation of provisional measures of 13 May 2008, ¶ 72), Ex. RELA-2; see also UNCITRAL’s Model Law on Commercial Arbitration Art. 17(A)(1)(a) (requiring that a party requesting relief demonstrate that “[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”), Ex. RE-17; *Paushok v. Mongolia*, Order on Interim Measures (2 September 2008) ¶¶ 68-69, Ex. RELA-7.

establish that the balance of hardships “tips sharply” in its favor under the “sliding scale” approach to preliminary injunctions that federal courts employ.¹⁰³ Afilias has not established that the balance of hardships tips in its favor, let alone “sharply tips” in its favor.

70. Separately, Afilias wrongly suggests that the balance of hardships inquiry requires only an analysis of the hardships to Afilias and ICANN, but the standard is not so limited.¹⁰⁴ The Emergency Panelist must not only balance the hardships on the parties, but on all other interested parties, including consumers.

71. As discussed above, Afilias will not “suffer severe and irreparable harm” if its Emergency Request is denied. The harm Afilias claims is fully capable of being remedied in due course through transfer of the .WEB gTLD.

72. On the other hand, significant hardships will be imposed on ICANN, the .WEB auction winner, and consumers if interim relief is granted. There is real harm to ICANN, its processes, and its mission by yet another dispute delaying .WEB, particularly one that could have been resolved by now. In fulfilling ICANN’s mission of ensuring the “stable and secure operation” of the Internet’s DNS, ICANN is committed to respecting the “creativity, innovation, and flow of information made possible by the Internet”; making “decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment”; and “depending on market mechanisms to promote and sustain a competitive environment in the DNS market.”¹⁰⁵ Additional delay in bringing .WEB to fruition would frustrate these ICANN core values and commitments.

73. Likewise, would-be users of .WEB would be harmed by further delays in its

¹⁰³ See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135 (9th Cir. 2011), Ex. RELA-1; see also *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F. 3d 848, 856 (9th Cir. 2017), Ex. RELA-4.

¹⁰⁴ See Interim Supp. Procedures § 10, Ex. C-59.

¹⁰⁵ Bylaws Art. 1, §§ 1.1, 1.2, Ex. C-1.

launch. If .WEB is truly one of the “crown jewels” of the new gTLDs, as Afilias claims, consumers are harmed every day its launch is delayed. Afilias’ Emergency Request places Afilias’ commercial interests ahead of the consumer benefits the New gTLD Program affords.

74. Further, NDC and Verisign would be harmed by additional delays, which is compounded by the delay-related harm they have already suffered. More than two years ago, NDC and Verisign paid \$135 million for .WEB, but have yet to enjoy any of the benefits of that large investment. Third Party Designated Confidential Information Redacted

¹⁰⁷ Realistically, that substantial injury cannot be compensated, unless Afilias were to allow NDC and Verisign to participate in this emergency proceeding and post a bond at Verisign’s request.¹⁰⁸

75. Given the harm to ICANN, consumers, NDC, and Verisign, there is no conceivable way that the balance of the hardships tips decidedly in Afilias’ favor.

CONCLUSION

76. ICANN respectfully requests that Afilias’ Emergency Request be denied.

Respectfully submitted,

JONES DAY

By: 
Jeffrey A. LeVee

Counsel for Respondent ICANN

Dated: December 17, 2018

¹⁰⁶ Strubbe Decl. ¶ 8.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at ¶ 9.

EXHIBIT C-46



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Approved Board Resolutions | Special Meeting of the ICANN Board | 16 January 2022

1. **Consent Agenda:** (</en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#1>)

- a. [IT Outsource Contract Renewal \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#1.a\)](/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#1.a)
Rationale for Resolution 2022.01.16.01 – 2022.01.16.02 (/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#1.a.rationale)
- b. [IT Outsource Contract \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#1.b\)](/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#1.b)
Rationale for Resolutions 2022.01.16.03 – 2022.01.16.04 (/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#1.b.rationale)
- 2. [Main Agenda: \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#2\)](/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#2)
 - a. [Rights Protection Mechanisms Policy Development Process Final Report \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#2.a\)](/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#2.a)
Rationale for Resolutions 2022.01.16.05 – 2022.01.16.11 (/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#2.a.rationale)
 - b. [Consideration of Final Declaration in the Afilias Domains No. 3 Limited \(Afilias\) v. ICANN Independent Review Process \(.WEB\) \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#2.b\)](/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#2.b)
Rationale for Resolutions 2022.01.16.12 – 2022.01.16.15 (/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#2.b.rationale)
 - c. [GAC Advice: ICANN72 Virtual Annual General Meeting Communiqué \(October 2021\) \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#2.c\)](/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#2.c)
Rationale for Resolutions 2022.01.16.16 (/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#2.c.rationale)

1. Consent Agenda:

- a. **IT Outsource Contract Renewal**

Whereas, ICANN organization has a need for continued third-party development, quality assurance and content management support to augment its IT capacity.

Whereas, *[Redacted –Confidential Negotiation Information]* has provided services in software engineering, quality assurance, and content management over the last several years.

Whereas, ICANN org conducted a full request for proposal when renewing the contract in 2017, the results of which lead ICANN org to determine that *[Redacted –Confidential Negotiation Information]* was still the preferred vendor.

Whereas, ICANN org considered the cost and efficiency of either issuing another request for proposal for outsourced IT capacity or further renewing the contract with *[Redacted –Confidential Negotiation Information]* and determined that it was more efficient and cost effective to renew the contract with *[Redacted –Confidential Negotiation Information]*.

Resolved (2022.01.16.01), the Board authorizes the President and CEO, or his designee(s), to enter into, and make disbursement in furtherance of, a further renewed contract with *[Redacted –Confidential Negotiation Information]* for a term of *[Redacted –Confidential Negotiation Information]*.

Resolved (2022.01.16.02), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolution 2022.01.16.01 – 2022.01.16.02

In November 2014, following ICANN Board approval, ICANN organization engaged an expert third-party outsourcing firm, *[Redacted –Confidential Negotiation Information]*, to augment ICANN org's Engineering and IT capacity. That led to a *[Redacted –Confidential Negotiation Information]* with an annual value not to exceed *[Redacted –Confidential Negotiation Information]*. In April 2018, the contract was renewed through March 2020 with Board approval following a request for proposal (RFP) process. The value of the renewed contract was *[Redacted –Confidential Negotiation Information]* for a period of *[Redacted –Confidential Negotiation Information]*. The contract was renewed for a third time in May 2020 through March 2022 with Board approval. The value of the renewal contract was *[Redacted –Confidential Negotiation Information]*. To date, ICANN org has contracted with *[Redacted –Confidential Negotiation Information]* for a total of *[Redacted –Confidential Negotiation Information]*. The relationship with *[Redacted –Confidential Negotiation Information]* has been beneficial to ICANN org and overall has been successful.

Both the initial and first renewed contracts included RFP processes. After consulting with its procurement department, ICANN org determined not to pursue a RFP process for the second and third (current) renewals due to cost of doing a RFP process and limited responses received from the first renewal RFP. The RFP for the first renewed contract concluded that *[Redacted –Confidential Negotiation Information]* is still the preferred vendor and ICANN org determined it was most efficient and cost effective to renew the contract with *[Redacted –Confidential Negotiation Information]*.

Accordingly, both ICANN org and the Board Finance Committee (BFC) recommended that the Board authorize the org to enter into, and make disbursement in furtherance of, a renewed contract with *[Redacted –Confidential Negotiation Information]*, covering the period of *[Redacted –Confidential Negotiation Information]*, with a total cost not to exceed *[Redacted –Confidential Negotiation Information]*.

This decision is in the furtherance of ICANN org's mission and the support of public interest to support the security, stability and resiliency of the domain name system by ensuring that there is a fully resourced engineering and IT team able to support the org in a fiscally responsible and accountable manner.

This decision will have a fiscal impact, but the impact has already been accounted for in the FY23 budget and will be for future budgets as well.

As noted above, this action is intended to have a positive impact on the security, stability and resiliency of the domain name system.

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

b. IT Outsource Contract

Whereas, ICANN organization has a need for continued third-party ad hoc development and quality assurance support to augment its Engineering and IT capacity.

Whereas, *[Redacted –Confidential Negotiation Information]* has provided services in software engineering and quality assurance over the last several years.

Resolved (2022.01.16.03), the Board authorizes the President and CEO, or his designee(s), to enter into, and make disbursement in furtherance of, a further renewed contract with *[Redacted –Confidential Negotiation Information]* for continued third-party ad hoc IT support for a term of *[Redacted –Confidential Negotiation Information]*.

Resolved (2022.01.16.04), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2022.01.16.03 – 2022.01.16.04

In order to provide supplemental support and maintain vendor competition, ICANN organization has previously contracted with *[Redacted –Confidential Negotiation Information]* on a smaller scale to provide ad hoc support for Engineering and IT projects. ICANN org will receive a *[Redacted –Confidential Negotiation Information]* discounted rate on procured engineering resources assuming ICANN signs a *[Redacted –Confidential Negotiation Information]* contract. The value of the contract is *[Redacted –Confidential Negotiation Information]* for a period of *[Redacted –Confidential Negotiation Information]*. The relationship with *[Redacted –Confidential Negotiation Information]* has been beneficial to ICANN org and has been a success overall.

With its procurement department, ICANN org considered the cost and efficiency of either issuing a request for proposal (RFP) for ad hoc outsourced IT capacity or further renewing *[Redacted –Confidential Negotiation Information]* contract and determined that it was more efficient and cost effective to renew *[Redacted –Confidential Negotiation Information]* contract. For example, the cost of switching vendors entails drafting a new RFP, vetting potential candidates, and vendor onboarding – all of which would add cost and extend project durations on an already burdened production line.

Accordingly, both ICANN org and the Board Finance Committee recommended that the Board authorize the org to enter into, and make disbursement in furtherance of, a renewed contract with *[Redacted –Confidential Negotiation Information]* for continued third-party ad hoc IT support covering the period of *[Redacted –Confidential Negotiation Information]*, with a total cost not to exceed *[Redacted –Confidential Negotiation Information]*.

This decision is in the furtherance of ICANN org's Mission and the support of public interest to support the security, stability and resiliency of the domain name system by ensuring that there is a fully resourced engineering and IT team able to support the organization in a fiscally responsible and accountable manner.

As noted above, this action is intended to have a positive impact on the security, stability and resiliency of the domain name system.

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

2. Main Agenda:

a. Rights Protection Mechanisms Policy Development Process Final Report

Whereas, on 18 February 2016, the GNSO Council resolved (<https://gnso.icann.org/en/council/resolutions#20160218-3>) to initiate a two-phased policy development process (PDP) to review all existing trademark-related rights protection mechanisms (RPMs) in all generic top-level domains (gTLDs).

Whereas, on 9 March 2016, the GNSO Council approved (<https://gnso.icann.org/en/council/resolutions#20160309-2>) the PDP Charter (https://gnso.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf), thereby initiating Phase 1 of the PDP that focused on the RPMs developed for the 2012 New gTLD Program.

Whereas, the PDP Working Group has followed all the necessary steps and processes required by the ICANN Bylaws, the GNSO PDP Manual and the GNSO Working Group Guidelines, including the publication of an Initial Report (<https://gnso.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-initial-18mar20-en.pdf>) for public comment ([/public-comments/rpm-initial-report-2020-03-18-en](https://public-comments/rpm-initial-report-2020-03-18-en)) (on 18 March 2020) and consideration of the public comments received thereto.

Whereas, on 24 November 2020, the PDP Working Group submitted its Phase 1 Final Report (<https://gnso.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf>) to the GNSO Council for its review and action.

Whereas, the PDP Working Group has reached Full Consensus for 34 out of the 35 final recommendations documented in the Phase 1 Final Report, and Consensus for the remaining one final recommendation (concerning Final Recommendation #1 for the Trademark Clearinghouse (TMCH)).

Whereas, 16 of the 35 recommendations in the Phase 1 Final Report recommend modifying existing operational practices as well as updating documentation and related materials concerning RPMs and the Board does not anticipate that substantial resources will be needed for implementation (TMCH Final Recommendation 4, Trademark Claims Final Recommendations 2, 5, and 6, URS Final Recommendations

1, 2, 3, 4, 5, 6, 7, 11, 12, 14, and 15, and one Trademark Post Delegation Dispute Resolution Procedure (TM-PDDRP) Final Recommendation).

Whereas, nine of the 35 recommendations in the Phase 1 Final Report recommend that the status quo be maintained for future gTLD expansion rounds (e.g., no change to the current rules as applied to the gTLDs delegated under the 2012 New gTLD Program round) and, as such, the Board anticipates that implementation of these recommendations will be integrated into any implementation work related to the next gTLD expansion round (TMCH Final Recommendation 2, Sunrise Final Recommendations 2, 3, 4, 5, 6, and 7, and Trademark Claims Final Recommendations 3 and 4).

Whereas, six of the 35 recommendations in the Phase 1 Final Report require substantial resources for implementation (including considerations relating to timing and staffing) due to their complexity and the need to involve multiple stakeholders. Successful implementation will also depend on the willingness and availability of stakeholders to participate in the implementation work. Specifically, these recommendations call for:

- collection of data concerning the RPMs,
- developing educational materials to assist users of the RPMs, and
- creating a new complaints mechanism for URS participants.

ICANN org estimates that fully implementing these recommendations will require a minimum of one year once implementation work begins on this set of recommendations and would require substantial internal resources from multiple ICANN org functions in order to identify and work with relevant stakeholders to implement the recommendations, as well as to support and maintain ongoing operations and data collection. ICANN org plans to include these recommendations as part of its ongoing work with the community on prioritization efforts relating to anticipated implementation work arising from community-developed recommendations that require ICANN org resourcing and support (TMCH Final Recommendation 3, URS Final Recommendations 8, 9, 10, and 13, and one Overarching Data Collection Final Recommendation).

Whereas, four of the 35 recommendations in the Phase 1 Final Report call for specific changes to the Applicant Guidebook and/or the Base Registry Agreement for subsequent rounds of new gTLDs (TMCH Final Recommendation 1, Sunrise Final Recommendations 1 and 8, and Trademark Claims Final Recommendation 1).

Whereas, on 21 January 2021, the GNSO Council unanimously approved (<https://gns0.icann.org/en/council/resolutions/2021#202101-3>) all 35 final PDP recommendations as documented in the PDP Working Group's Phase 1 Final Report (<https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf>).

Whereas, on 19 March 2021, the GNSO Council transmitted its Bylaws-mandated Recommendations Report (<https://gns0.icann.org/sites/default/files/file/field-file-attach/council-recommendations-rpm-pdp-phase-1-report-10feb21-en.pdf>) to the ICANN Board of Directors, recommending that the Board adopt all the final Phase 1 recommendations. The GNSO Council also requested that ICANN org convene an Implementation Review Team (IRT) to work on the implementation of these recommendations, as is the regular practice and in accordance with the IRT Principles & Guidelines (<https://gns0.icann.org/sites/default/files/file/field-file-attach/2016-12/irt-principles-guidelines-23aug16-en.pdf>) approved in 2016.

Whereas, on 7 April 2021, the Phase 1 Final Report (<https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf>) was published for public comment ([/public-comments/gns0-rpm-pdp-phase-1-final-recommendations-2021-04-07-en](https://public-comments/gns0-rpm-pdp-phase-1-final-recommendations-2021-04-07-en)) to inform Board action on the report, in accordance with the Bylaws.

Whereas, on 7 April 2021, the ICANN Board also notified ([/en/system/files/correspondence/botterman-to-ismail-2-07apr21-en.pdf](https://en/system/files/correspondence/botterman-to-ismail-2-07apr21-en.pdf)) the Governmental Advisory Committee (GAC) of the GNSO Council's approval of the Phase 1 Final Report, in accordance with the Bylaws.

Whereas, the GAC has not provided advice as to whether it believes there are any public policy issues raised by these recommendations.

Resolved (2022.01.16.05), the Board thanks the members of the PDP Working Group for their dedication and over four years of work on Phase 1 of the PDP, including its development of 35 recommendations to enhance the RPMs that were originally developed for the 2012 New gTLD Program and to facilitate future reviews of all RPMs.

Resolved (2022.01.16.06), the ICANN Board adopts all 35 final Phase 1 PDP recommendations as documented in the PDP Working Group's Phase 1 Final Report.

Resolved (2022.01.16.07), for the 16 recommendations that call for updates to existing operational practices or documentation concerning the RPMs where no substantial resources are required for implementation, the ICANN Board directs ICANN's President and CEO, or his designee(s), to proceed with the implementation of these recommendations as soon as feasible, and to develop an implementation plan, including resources and timelines, for the recommendations that is consistent with Annex A, Section 10 of the ICANN [Bylaws \(/resources/pages/governance/bylaws-en\)](#), and to continue communication with the community on implementation.

Resolved (2022.01.16.08), for the nine recommendations affirming the status quo (i.e. maintaining the Phase 1 RPMs as implemented for the 2012 New gTLD Program), the ICANN Board directs ICANN's President and CEO, or his designee(s), to document and include these recommendations for future expansions of new gTLDs and to inform the community about the ICANN org's plans for how these will be implemented.

Resolved (2022.01.16.09), for the six recommendations that require substantial resourcing, and involvement of multiple stakeholders to implement, the ICANN Board directs ICANN's President and CEO, or his designee(s), to develop and to submit to the ICANN Board a plan for implementation of these recommendations containing information on estimated timing, staffing, and other resources required, and information about how implementation of these recommendations fit into its operational planning and prioritization of the anticipated implementation efforts that will require ICANN org resourcing and support. The Board recognizes that these six recommendations will consequently not be implemented immediately, and that implementation will proceed when resources become available as a result of the ICANN org's prioritization work.

Resolved (2022.01.16.10), for the four recommendations that call for specific changes to the Applicant Guidebook and/or the Base Registry Agreement and coordination with the expected Subsequent Procedures IRT, the ICANN Board directs ICANN's President and CEO, or his designee(s), to incorporate the implementation of these recommendations into the work on updates to the Applicant Guidebook for subsequent new gTLD rounds.

Resolved (2022.01.16.11), the Board directs ICANN org to provide it with an implementation timeline, to be established in agreement with the Implementation Review Team, and to report regularly on the status of work throughout the implementation period. In the event that implementation progress may be impeded or the timeline cannot be met due to unforeseen circumstances or policy questions that cannot

be resolved, or any other cause of impasse, the Board may consider appropriate ways to facilitate next steps with the GNSO and community.

Rationale for Resolutions 2022.01.16.05 – 2022.01.16.11

Why is the Board addressing the issue?

The 2012 New gTLD Program rights protection mechanisms (RPMs) are mechanisms that have now been in use for several years. Community feedback on the RPMs developed for the 2012 New gTLD Program indicated a need to review their application and scope, especially if there is to be further expansion of the gTLD space. As this PDP is the first time that the RPMs have been subject to a policy review by the ICANN community, there were no comprehensive studies or data collected that measured their effectiveness.

As such, on 15 March 2016, the GNSO Council chartered the PDP Working Group to conduct a review of all the RPMs in two phases. Phase 1, which recently concluded, focused on reviewing the effectiveness of all the RPMs and associated structures and procedures applicable to gTLDs that were launched under the 2012 New gTLD Program. Phase 2 will focus on reviewing the Uniform Domain-Name Dispute-Resolution Policy ([UDRP \(/resources/pages/help/dndr/udrp-en\)](https://www.icann.org/resources/pages/help/dndr/udrp-en)), which has been an ICANN Consensus Policy since 1999.

In November 2020, the PDP Working Group completed its review of the RPMs that were developed for the 2012 New gTLD Program and submitted its Phase 1 [Final Report](https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf) (<https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf>) to the GNSO Council for review and approval. The Phase 1 Final Report represents the culmination of over four years of work by the PDP Working Group.

On 21 January 2021, the GNSO Council voted to [approve](https://gns0.icann.org/en/council/resolutions/2021#202101-3) (<https://gns0.icann.org/en/council/resolutions/2021#202101-3>) by a GNSO Supermajority all the 35 recommendations contained in the Phase 1 Final Report. On 19 March 2021, the GNSO Council transmitted its Bylaws-mandated Recommendations [Report](https://gns0.icann.org/sites/default/files/file/field-file-attach/council-recommendations-rpm-pdp-phase-1-report-10feb21-en.pdf) (<https://gns0.icann.org/sites/default/files/file/field-file-attach/council-recommendations-rpm-pdp-phase-1-report-10feb21-en.pdf>) to the ICANN Board of Directors, recommending adoption of all the final recommendations by the ICANN Board.

As required by Article 3, Section 6.(a)(iii) of the ICANN Bylaws, the approved recommendations were posted for [public comment](https://www.icann.org/public-comments/gns0-rpm-pdp-phase-1-final-recommendations-2021-04-07-en) ([/public-comments/gns0-rpm-pdp-phase-1-final-recommendations-2021-04-07-en](https://www.icann.org/public-comments/gns0-rpm-pdp-phase-1-final-recommendations-2021-04-07-en)) to inform Board action on the final recommendations. Furthermore, under Section

11.3(i)(x) of the ICANN Bylaws, the GNSO Council's Supermajority support for these recommendations obligates the Board to adopt the recommendations unless, by a vote of more than two-thirds, the Board determines that the policy is not in the best interests of the ICANN community or ICANN.

What is the proposal being considered?

In 2016, the PDP Working Group was chartered to assess the effectiveness of the existing RPMs, including those established as safeguards in the New gTLD Program, and to study whether or not all the RPMs collectively fulfill the purposes for which they were created. The Board today considers the 35 Phase 1 final recommendations from the PDP Working Group.

The Final Report

(<https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf>) contains 35 recommendations, which were classified into three categories by the PDP Working Group: nine recommendations which recommend that the status quo (e.g., the current rules as applied to the gTLDs delegated under the 2012 New gTLD Program round) be maintained, 15 recommendations for new policies or procedures to improve the RPMs launched under the 2012 New gTLD Program, such as to enable fulfillment of the objectives for their creation and enhance their effectiveness in the next new gTLD expansion round, as well as 10 recommendations to modify existing operational practices to improve the effectiveness of the RPMs. As the Working Group experienced difficulties in obtaining quantitative data concerning the effectiveness of the Phase 1 RPMs, it also put forward an Overarching Data Collection Final Recommendation aimed at addressing this data-related gap.

Among the 35 Phase 1 final recommendations, the PDP Working Group reached full consensus on 34 recommendations and consensus on one recommendation, which was the TMCH Final Recommendation #1. A Minority Statement was jointly filed by seven members of the PDP Working Group with regard to this recommendation, although the Minority Statement did not oppose the primary thrust of the recommendation but instead noted the submitters' concerns over the scope of "word marks" that can be accepted into the TMCH. The Minority Statement was included in the Phase 1 Final Report as "Annex D – Working Group Members' Minority Statement on TMCH Final Recommendation #1".

As required by Article 3, Section 6.(a)(iii) of the ICANN Bylaws, the recommendations were posted for public comment (</public-comments/gns0-rpm-pdp-phase-1-final-recommendations-2021-04-07-en>) to inform Board action on

the final recommendations. In considering the [Final Report](https://gnso.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf) (<https://gnso.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf>), the Board reviewed public comments on the Phase 1 Final Report and briefings by ICANN org on the feasibility and impact of implementation of all the recommendations, including considerations regarding the timing and resourcing needs in the context of the overall prioritization of work on implementation of other community-developed recommendations and other existing activities by the ICANN org and community.

In its review of all the recommendations contained in the Phase 1 Final Report, the Board noted that implementation of the recommendations could be divided into several categories. These implementation categories are:

1) Recommendations where no substantial resources are needed for implementation as they can be integrated into existing work efforts – a total number of 16 recommendations:

- Implementation of 15 of the 16 recommendations in this category involves updating existing documentation and related materials concerning the relevant RPMs, such as the URS [Rules](https://newgtlds.icann.org/en/applicants/urs/rules-04mar13-en.pdf) (<https://newgtlds.icann.org/en/applicants/urs/rules-04mar13-en.pdf>), URS [Procedure](https://newgtlds.icann.org/en/applicants/urs/procedure-01mar13-en.pdf) (<https://newgtlds.icann.org/en/applicants/urs/procedure-01mar13-en.pdf>) and URS High Level [Technical Requirements](https://newgtlds.icann.org/en/applicants/urs/tech-requirements-17oct13-en.pdf) (<https://newgtlds.icann.org/en/applicants/urs/tech-requirements-17oct13-en.pdf>) for Registries and Registrar, as well as the RPM [Requirements](https://newgtlds.icann.org/en/about/trademark-clearinghouse/rpm-requirements-14may14-en.pdf) (<https://newgtlds.icann.org/en/about/trademark-clearinghouse/rpm-requirements-14may14-en.pdf>), [TM-PDDRP](https://newgtlds.icann.org/en/about/trademark-clearinghouse/database-framework-02jul13-en.pdf) ([/resources/pages/tm-pddrp-2013-10-31-en](https://newgtlds.icann.org/en/about/trademark-clearinghouse/database-framework-02jul13-en.pdf)), and the TMCH Database Framework [Agreement](https://newgtlds.icann.org/en/about/trademark-clearinghouse/database-framework-02jul13-en.pdf) (<https://newgtlds.icann.org/en/about/trademark-clearinghouse/database-framework-02jul13-en.pdf>) (TMCH Final Recommendation 4, Trademark Claims Final Recommendations 2, 5, and 6, URS Final Recommendations 1, 2, 3, 4, 5, 6, 7, 11, 14, and 15, and one TM-PDDRP Final Recommendation).
- With regard to modifying existing operational practices, one of the 16 recommendations in this category involves working with registries, registrars, and URS Providers to ensure that one another's contact details are up to date in order to ensure the efficacy of the URS process (URS Final Recommendation 12).

2) Recommendations to maintain the status quo – a total number of nine recommendations:

- The recommendations in this category involve documenting and informing the community as to how the status quo (i.e. the current rules as applied to the gTLDs delegated under the 2012 New gTLD Program application round) will be maintained in the next new gTLD expansion (TMCH Final Recommendation 2, Sunrise Final Recommendations 2, 3, 4, 5, 6, and 7, and Trademark Claims Final Recommendations 3 and 4).

3) Recommendations requiring substantial time and resources to implement – a total number of six recommendations:

- Implementation of four of the six recommendations in this category involves working with RPM-related service providers to develop educational materials to assist users of the RPMs (TMCH Final Recommendation 3 and URS Final Recommendations 9, 10, and 13).
- Implementation of one recommendation in this category involves developing a new and separate complaints mechanism or mechanisms to ensure that URS providers, registries, and registrars operate in accordance with the URS Rules and fulfill their role and obligations in the URS process (URS Final Recommendation 8).
- Implementation of one recommendation in this category involves working with RPM-related service providers and ICANN-accredited registrars to collect data concerning the TMCH (one (1) Overarching Data Collection Final Recommendation).

4) Recommendations affecting subsequent round(s) of new gTLDs – a total number of four (4) recommendations:

- Implementation of these recommendations involves making specific changes to the Applicant Guidebook and/or the Base Registry Agreement for the next expansion round of new gTLDs (TMCH Final Recommendation 1, Sunrise Final Recommendations 1 and 8, and Trademark Claims Final Recommendation 1).

Annex A contains additional details on each recommendation and the scope of effort required for implementation.

Which stakeholders or others were consulted?

In accordance with the requirements of the GNSO PDP Manual, the Working Group solicited early input (<https://community.icann.org/pages/viewpage.action?pageId=59643854>) from ICANN's Supporting Organizations and Advisory Committees as well as the GNSO's Stakeholder Groups and Constituencies. The Working Group also sought input from registry operators, URS providers and

practitioners, and other stakeholders, and conducted a data-gathering exercise to obtain specific data points for the Phase 1 RPMs.

As mandated by the GNSO's PDP Manual, the PDP Working Group published its Phase 1 [Initial Report](https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-initial-18mar20-en.pdf) (<https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-initial-18mar20-en.pdf>) on 18 March 2020 for [public comment](https://public-comments.gns0.icann.org/public-comments/rpm-initial-report-2020-03-18-en) ([/public-comments/rpm-initial-report-2020-03-18-en](https://public-comments.gns0.icann.org/public-comments/rpm-initial-report-2020-03-18-en)), which closed on 4 May 2020. Following a careful review of all public comments received from 55 contributors as well as extensive discussions over a number of additional recommendations developed as a result of the public comment review, the Working Group finalized its recommendations and delivered its Phase 1 [Final Report](https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf) (<https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf>) to the GNSO Council in November 2020. Several Working Group members submitted a Minority Statement pertaining to the TMCH Final Recommendation #1. The Minority Statement was included in the Phase 1 Final Report as Annex D.

As required by the ICANN Bylaws, a [public comment](https://public-comments.gns0.icann.org/public-comments/gns0-rpm-pdp-phase-1-final-recommendations-2021-04-07-en) ([/public-comments/gns0-rpm-pdp-phase-1-final-recommendations-2021-04-07-en](https://public-comments.gns0.icann.org/public-comments/gns0-rpm-pdp-phase-1-final-recommendations-2021-04-07-en)) proceeding for the final recommendations in the Phase 1 Final Report was conducted between 7 April 2021 and 21 May 2021, which allowed stakeholders to comment on the proposed recommendations prior to Board action. As further required by the Bylaws, on 7 April 2021 the ICANN Board [notified](https://www.icann.org/en/system/files/correspondence/botterman-to-ismail-2-07apr21-en.pdf) ([/en/system/files/correspondence/botterman-to-ismail-2-07apr21-en.pdf](https://www.icann.org/en/system/files/correspondence/botterman-to-ismail-2-07apr21-en.pdf)) the GAC of the GNSO Council's approval of the Phase 1 Final Report, to allow the GAC to provide timely advice on any public policy concerns that it may have with the recommendations.

What concerns or issues were raised by the community?

The community provided feedback through Public Comments on the Initial and Final Phase 1 Reports and correspondence. A few Working Group members also submitted a Minority Statement to the Phase 1 [Final Report](https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf) (<https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf>), which raised concerns regarding the continuing confidentiality of the TMCH database and the possibility that the scope of marks accepted by the TMCH is broader than the scope of rights conferred by trademark registration. The Phase 1 Working Group considered all Public Comments filed to its Initial Report in coming to consensus on its final recommendations. The [Report of Public Comments](https://itp.cdn.icann.org/en/files/generic-names-supporting-organization-council-gns0-council/report-comments-gns0) (<https://itp.cdn.icann.org/en/files/generic-names-supporting-organization-council-gns0-council/report-comments-gns0>

[rpm-pdp-phase-1-final-recommendations-04jun21-en.pdf](#)) on the Phase 1 Final Report summarizes the concerns raised by commenters for the Board's consideration.

What significant materials did the Board review?

The Board reviewed the following materials:

- The 18 March 2020 Phase 1 [Initial Report](#) (<https://gnso.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-initial-18mar20-en.pdf>) of the GNSO PDP on the review of all RPMs in All gTLDs.
- The 24 November 2020 Phase 1 [Final Report](#) (<https://gnso.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf>) of the GNSO PDP on the review of all RPMs in All gTLDs.
- The 10 February 2021 GNSO Council [Recommendations Report](#) (<https://gnso.icann.org/sites/default/files/file/field-file-attach/council-recommendations-rpm-pdp-phase-1-report-10feb21-en.pdf>) regarding the adoption of the Phase 1 Final recommendations.
- The 21 January 2021 GNSO Council [resolution](#) (<https://gnso.icann.org/en/council/resolutions/2021#202101-3>) of the RPM PDP Phase 1 [Final Report](#) (<https://gnso.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf>) recommendations.
- The 4 June 2021 Staff [Report](#) (</en/system/files/files/report-comments-gnso-rpm-pdp-phase-1-final-recommendations-04jun21-en.pdf>) of Public Comment Proceeding on the Phase 1 final recommendations from the GNSO Review of all RPMs in all gTLDs PDP.

What factors did the Board find to be significant?

As noted in the GNSO Council [Recommendations Report](#) (<https://gnso.icann.org/sites/default/files/file/field-file-attach/council-recommendations-rpm-pdp-phase-1-report-10feb21-en.pdf>), the PDP Working Group's 15 recommendations for new policies or procedures, 10 recommendations to modify existing operational practice, and one recommendation for overarching data collection are expected to have operational, financial, and/or other impact on registries and registrars who have to implement new requirements and improvements to existing processes; RPM-related service providers, including the TMCH Validation Provider, TMCH Database Provider, URS Providers, and TM-PDDRP Provider; and ICANN org, which will have to, among other things, update its documentation and related materials concerning the TMCH and the Applicant Guidebook for future

expansions of new gTLDs, and collaborate with the RPM-related service providers and Contracted Parties to implement the new policies and procedures.

In addition to the 35 Phase 1 final recommendations, the Phase 1 [Final Report](https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf) (<https://gns0.icann.org/sites/default/files/file/field-file-attach/rpm-phase-1-proposed-24nov20-en.pdf>) included a substantial amount of implementation guidance, which are intended to provide supplemental and/or clarifying information to assist with implementation of the recommendations. The Board understands from the GNSO Council Recommendations [Report](https://gns0.icann.org/sites/default/files/file/field-file-attach/council-recommendations-rpm-pdp-phase-1-report-10feb21-en.pdf) (<https://gns0.icann.org/sites/default/files/file/field-file-attach/council-recommendations-rpm-pdp-phase-1-report-10feb21-en.pdf>) that substantial time and effort will be needed to translate the recommendations into policy language and operational requirements, as well as the complexity of implementing these recommendations with the involvement of various stakeholders.

The Board also understands that some of the PDP Working Group's Phase 1 recommendations will affect future expansion round(s) of new gTLDs. In particular, the PDP Working Group proposed specific changes to the Applicant Guidebook and/or the Base Registry Agreement. As such, the Board's adoption of these recommendations means that they will need to be factored into preparations for future expansion of the gTLD space, including coordination with the SubPro IRT should the Board decide to adopt the recent PDP recommendations from the GNSO's New gTLD SubPro PDP.

The ICANN org has preliminarily estimated that implementing the Phase 1 final recommendations could take a minimum of two years from Board adoption. However, a significant factor that is likely to impact the final implementation timeline is the Board's decision regarding the SubPro PDP recommendations, including implementation considerations based on the outcomes of the Operational Design Phase currently underway for SubPro.

Are there positive or negative community impacts?

Adopting the final recommendations will have a positive impact on ICANN in that it will contribute to ensuring that ICANN addresses policy questions and operational issues identified through experience with the RPMs developed for the 2012 New gTLD Program. Board adoption of the recommendations will facilitate a coherent and uniform mechanism for future reviews of all RPMs and allow for opportunities for continuous improvement of these policies and processes. However, community bandwidth and resources will be required to ensure that implementation of

the recommendations are consistent with what the PDP Working Group intended, in addition to other ongoing work in the community.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

Implementing the Phase 1 recommendations is expected to have operational, financial, and/or other impact on registries and registrars who will implement new requirements and improvements to existing processes; RPM-related service providers, including the TMCH Validation Provider, TMCH Database Provider, URS Providers, and TM-PDDRP Provider; and ICANN org, which will have to, among other things, update its documentation and related materials concerning the TMCH and the Applicant Guidebook for future expansions of new gTLDs, and collaborate with the RPM-related service providers and Contracted Parties to implement the new policies and procedures, update existing documentation and develop or enhance educational materials to assist users of the RPMs.

Are there any security, stability or resiliency issues relating to the DNS?

None at this time.

Is this decision in the public interest and within ICANN's mission?

This action is within ICANN's Mission and mandate and in the public interest as set forth in the ICANN Bylaws. The multistakeholder policy development process of bottom-up, consensus policies and guidelines helps advance the stable and secure operation of the Internet's unique identifier systems.

Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?

As required by the ICANN Bylaws and the GNSO's policy procedures, the recommendations were the subject of [public comment \(/public-comments/gnso-rpm-pdp-phase-1-final-recommendations-2021-04-07-en\)](#) as discussed above.

- b. **Consideration of Final Declaration in the Afilias Domains No. 3 Limited (Afilias) v. ICANN Independent Review Process (.WEB)**

Whereas, the Final Declaration in the *Afilias Domains No. 3 Ltd. (Afilias)*¹[1./en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#foot1](https://www.icann.org/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#foot1). v. ICANN

Independent Review Process regarding .WEB (.WEB IRP) was issued on 20 May 2021, a corrected version was issued on 15 July 2021, and that version was deemed "final" as of 21 December 2021 when the Panel denied Afilias' subsequent challenge.

Whereas, among other things, the IRP Panel designated Afilias as the prevailing party, declared that ICANN violated its Articles of Incorporation and Bylaws in the manner set forth in the Final Declaration, and declared that ICANN shall reimburse Afilias the sum of US\$450,000 for its legal costs relating to the Emergency Interim Relief proceedings and the sum of US\$479,458.27 for its share of the IRP costs. (Final Declaration at ¶¶ 410(6), (10), (12).)

Whereas, the IRP Panel recommended that ICANN "stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the [ICANN] Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the [Domain Acquisition Agreement] complied with the New gTLD Program Rules following [Afilias'] complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified." (Final Declaration at ¶ 410(5).)

Whereas, in accordance with Article 4, Section 4.3(x) of the applicable version of the Bylaws, the Board has considered the Final Declaration.

Resolved (2022.01.16.12), the Board acknowledges that the Panel declared the following: (i) Afilias is the prevailing party in the *Afilias Domains No. 3 Ltd. v. ICANN Independent Review Process*; (ii) ICANN violated its Articles of Incorporation and Bylaws in the manner set forth in the Final Declaration; (iii) ICANN shall reimburse Afilias the sum of US\$450,000 for its legal costs relating to the Emergency Interim Relief proceedings; and (iv) ICANN shall reimburse Afilias the sum of US\$479,458.27 for its share of the IRP costs.²[2./en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#foot2](https://www.icann.org/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#foot2)

Resolved (2022.01.16.13), the Board directs the President and CEO, or his designee(s), to take all steps necessary to reimburse Afilias in the amount of US\$450,000 in legal fees and US\$479,458.27 for its share of the IRP costs in furtherance of the Panel's Final Declaration.

Resolved (2022.01.16.14), further consideration is needed regarding the IRP Panel's non-binding recommendation that ICANN "stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the [ICANN] Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following [Afilias'] complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified."

Resolved (2022.01.16.15), the Board asks the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel's Final Declaration and recommendation, and to provide the Board with its findings to consider and act upon before the organization takes any further action toward the processing of the .WEB application(s).

Rationale for Resolutions 2022.01.16.12 – 2022.01.16.15

Seven applicants submitted applications for the right to operate .WEB, including Afilias Domains No. 3 Ltd. (Afilias),³ (</en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#foot3>) Nu Dotco LLC (NDC), and Ruby Glen LLC, a Donuts subsidiary (Ruby Glen), and, as they did not privately resolve contention, the applicants went to an ICANN auction of last resort. An auction was held on 27-28 July 2016, which concluded with NDC prevailing with a bid of US\$135 million. Shortly thereafter, Verisign Inc. (Verisign) publicly disclosed that, pursuant to an agreement it had entered with NDC, Verisign provided the funds for NDC's bid in exchange for, among other things, NDC's future assignment of the .WEB registry agreement to Verisign, subject to ICANN's consent.

Prior to and since the auction, Ruby Glen and Afilias made numerous allegations regarding NDC and Verisign (including alleging an undisclosed change of ownership or control of NDC and alleging a violation of the Guidebook's prohibition of assignment of an application to a third party), and requested that ICANN disqualify NDC's application, reject its winning bid, and then recognize Afilias as the winning bidder (which had the second highest bid in the auction).⁴ (</en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#foot4>) Further background information is available in the accompanying Reference Materials.

Afilias initiated an Independent Review Process regarding .WEB (.WEB IRP) in November 2018, alleging that NDC had violated the Guidebook as a result of its arrangement with Verisign and that ICANN had violated the Bylaws by failing to disqualify NDC. In particular, Afilias alleged that NDC violated the Guidebook by: (a) "omitting material information from and failing to correct material misleading information in its .WEB application"; (b) "assigning [NDC's] rights and obligations in its .WEB application to VeriSign"; and (c) "agreeing to submit bids on VeriSign's behalf at the .WEB Auction." With regard to ICANN, Afilias alleged that: (a) "ICANN's failure to disqualify [NDC] breaches ICANN's obligation to apply documented ICANN policies neutrally, objectively and fairly"; (b) "ICANN's decision to finalize a registry agreement while knowing of [NDC's] arrangement with VeriSign violates ICANN's mandate to promote competition"; and (c) "ICANN violated its Bylaws in Adopting Rule 7 of the Interim [Supplementary] Procedures," which allows participation in an IRP by a party with a material interest in the proceedings.

NDC and Verisign asked to participate as *amici curiae* in the IRP, which Afilias opposed. The Panel granted *amici* participation allowing them to attend hearings, submit written briefings on the dispute or on questions the Panel might ask, and have access to all materials related to the IRP except for commercially sensitive or privileged material. The merits hearing took place on 3-11 August 2020, and the IRP Panel issued its Final Declaration on 20 May 2021, which the Panel later corrected for certain typographical errors, effective 15 July 2021.

In the Final Declaration, the IRP Panel designated Afilias "as the prevailing party in relation to the above declarations, decisions, findings and recommendations [noted in the Final Declaration]" and dismissed Afilias' "other requests for relief in connection with its core claims." In particular, the Panel denied Afilias' requests for: (a) a binding declaration that ICANN must disqualify NDC's bid for .WEB for violating the Guidebook and Auction Rules; and (b) an order directing ICANN to proceed with contracting for .WEB with Afilias. The Panel noted that: "it is for [ICANN], that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the [Domain Acquisition Agreement] under the New gTLD Program Rules, and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules."

The Panel declared that ICANN had violated its Articles of Incorporation (Articles) and Bylaws by not applying documented policies objectively and fairly in that: (a) ICANN staff failed to decide whether the Domain Acquisition Agreement (DAA) between NDC and Verisign (pursuant to

which Verisign financially supported NDC's bidding in the .WEB auction) violated the Guidebook and Auction Rules, and moved forward toward contracting with NDC in June 2018 without first having made that decision; and (b) the ICANN Board did not prevent staff from moving forward toward contracting in June 2018 or decide whether the DAA violated the Guidebook and Auction Rules, once pending accountability mechanisms had been resolved.

The Panel also declared that ICANN violated its Articles and Bylaws by not operating in an open and transparent manner and consistent with procedures to ensure fairness when it failed to communicate to Afilias in November 2016 that the ICANN Board would not be evaluating Afilias' complaints while accountability mechanisms were pending.

In addition, while finding Afilias' claim that ICANN failed to enable and promote competition in the DNS was premature, the Panel stated that it "accepts the submission that ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct."

The Panel further declared that Afilias' challenge to the validity of IRP Interim Supplementary Procedures Rule 7 about *amici* participation is moot since the Panel previously ruled that NDC and Verisign could participate, and "no useful purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision of Phase I."

The Panel denied the majority of Afilias' request for cost shifting of legal fees, but did grant legal fees in connection with the Request for Emergency Interim Relief (related to whether the contention set would remain on hold during the pendency of the IRP) in a reduced amount of US\$450,000. The Panel further indicated that ICANN "shall reimburse [Afilias] the full amount of its share of [the IRP costs] that Afilias has advanced, in the amount of USD 479,458.27," the vast majority of which ICANN had already agreed to pay.⁵
[\(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#foot5\)](https://www.icann.org/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#foot5)

The Panel recommended that ICANN "stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the [ICANN] Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following [Afilias'] complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified."

Subsequently, on 21 June 2021, Afiliias submitted a request to the Panel for "interpretation and correction" of the Final Declaration under Article 33 of the ICDR Arbitration Rules (Request). On 21 December 2021, the Panel unanimously denied Afiliias' Request in its entirety, finding the Request to be "frivolous" and awarding ICANN the legal fees it incurred in responding to the Request (in the amount of US\$236,884.39). With the Panel's denial of Afiliias' Request, the Final Declaration in the .WEB IRP remains intact and is deemed "final" as of 21 December 2021. In accordance with [Article 4 \(/resources/pages/bylaws-2018-06-22-en#article4\)](#), Section 4.3(x) of the operative Bylaws, [6 \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#foot6\)](#), the Board is now considering the Panel's Final Declaration in the .WEB IRP.

The Board appreciates that both the parties and the *amici* participated in good faith in the IRP, and acknowledges that a neutral third-party Panel designated Afiliias as the prevailing party, declared that ICANN violated its Articles of Incorporation and Bylaws in the manner set forth in the Final Declaration, and declared that ICANN should reimburse Afiliias for its legal costs relating to the Request for Emergency Interim Relief and for its share of the IRP costs as set forth in the Final Declaration. The Board is therefore adopting this resolution so as to not delay the reimbursement of Afiliias for these costs, while the Board continues to consider the Panel's recommendation and/or next steps relating to the .WEB application(s).

The Board recognizes the importance of this decision and wants to make clear that it takes the results of all ICANN accountability mechanisms very seriously, which is why the Panel's recommendation is being referred to the Board Accountability Mechanisms Committee (BAMC) for thorough consideration and formulating a recommendation to the Board on next steps.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially and adversely affected by a Board or organization action or inaction may challenge that action or inaction.

Taking this decision is expected to have a direct financial impact on ICANN in the amount the Panel declared ICANN should reimburse the prevailing party, which can be absorbed under the current budget. Further review and analysis of the Panel's recommendation will not have any direct impact on the security, stability or resiliency of the domain name system.

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

c. **GAC Advice: ICANN72 Virtual Annual General Meeting Communiqué (October 2021)**

Whereas, the Governmental Advisory Committee (GAC) met during the ICANN72 Virtual Annual General Meeting and issued advice to the ICANN Board in a [communiqué \(/en/system/files/correspondence/gac-to-icann-01nov21-en.pdf\)](/en/system/files/correspondence/gac-to-icann-01nov21-en.pdf) on 01 November 2021 ("ICANN72 Virtual Annual General Meeting Communiqué").

Whereas, the ICANN72 Virtual Annual General Meeting Communiqué was the subject of an exchange between the Board and the GAC on 21 December 2021.

Whereas, in a 18 November 2021 [letter \(/en/system/files/correspondence/fouquart-to-botterman-18nov21-en.pdf\)](/en/system/files/correspondence/fouquart-to-botterman-18nov21-en.pdf), the GNSO Council provided its feedback to the Board concerning advice in the ICANN72 Virtual Annual General Meeting Communiqué relevant to the Board Scorecard on SSR2 Review Final Report, Domain Name Registration Directory Service and Data Protection, and EPDP Phase 1 Policy Implementation.

Whereas, the Board developed a scorecard to respond to the GAC's advice in the ICANN72 Virtual Annual General Meeting Communiqué, taking into account the dialogue between the Board and the GAC and the information provided by the GNSO Council.

Resolved (2022.01.16.16), the Board adopts the scorecard titled "[GAC Advice – ICANN72 Virtual Annual General Meeting Communiqué: Actions and Updates \(16 January 2022\) \(/en/system/files/resolutions-icann72-gac-advice-scorecard-16jan22-en.pdf\)](/en/system/files/resolutions-icann72-gac-advice-scorecard-16jan22-en.pdf)" in response to items of GAC advice in the ICANN72 Virtual Annual General Meeting Communiqué.

Rationale for Resolutions 2022.01.16.16

Article 12, Section 12.2(a)(ix) of the ICANN Bylaws permits the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." In [its ICANN72 Virtual Annual General Meeting Communiqué \(01 November 2021\) \(/en/system/files/correspondence/gac-to-icann-01nov21-en.pdf\)](/en/system/files/correspondence/gac-to-icann-01nov21-en.pdf), the GAC issued advice to the Board on the Board Scorecard on SSR2 Review Final Report. The GAC also provided a follow-up to previous advice regarding Domain Name Registration Directory Service and Data Protection and EPDP Phase 1 Policy Implementation. The ICANN Bylaws

require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. Any GAC advice approved by a full consensus of the GAC (as defined in the Bylaws) may only be rejected by a vote of no less than 60% of the Board, and the GAC and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

The Board is taking action today on the GAC Consensus Advice to the ICANN Board in the [ICANN72 Virtual Annual General Meeting Communiqué](#) ([/en/system/files/correspondence/gac-to-icann-01nov21-en.pdf](#)), including the item related to the Board Scorecard on SSR2 Review Final Report. This decision is in the public interest and within ICANN's mission, as it is fully consistent with ICANN's bylaws for considering and acting on advice issued by the GAC.

The Board's actions are described in the scorecard dated 16 January 2022.

In adopting its response to the GAC advice in the [ICANN72 Virtual Annual General Meeting Communiqué](#) ([/en/system/files/correspondence/gac-to-icann-01nov21-en.pdf](#)), the Board reviewed various materials, including, but not limited to, the following materials and documents:

- ICANN72 Virtual Annual General Meeting Communiqué (01 November 2021):
<https://www.icann.org/en/system/files/correspondence/gac-to-icann-01nov21-en.pdf>
([/en/system/files/correspondence/gac-to-icann-01nov21-en.pdf](#)).
- The GNSO Council's review of the advice in the ICANN72 Virtual Annual General Meeting Communiqué as presented in the 18 November 2021 letter to the Board:
<https://www.icann.org/en/system/files/correspondence/fouquart-to-botterman-18nov21-en.pdf>
([/en/system/files/correspondence/fouquart-to-botterman-18nov21-en.pdf](#)).

The adoption of the GAC advice as provided in the scorecard will have a positive impact on the community because it will assist with resolving the advice from the GAC concerning gTLDs and other matters. There are no foreseen fiscal impacts associated with the adoption of this resolution.

Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS. This is an Organizational Administrative function that does not require public comment.

Published on 18 January 2022

[1 \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#note1\)](#) Afilias Domains No. 3 Ltd. is now known as Altanovo Domains Limited. For consistency and ease of reference, we will continue to use "Afilias" to refer to the Claimant in this IRP.

[2 \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#note2\)](#) ICANN already agreed, pursuant to the Bylaws, that it would pay for the administrative costs of maintaining an IRP, including panelist fees. To the extent that this IRP Panel has directed reimbursement for additional fees related to the IRP, such as the initial filing fee, ICANN will abide by the Panel's declaration and reimburse Afilias those amounts as well.

[3 \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#note3\)](#) Afilias Domains No. 3 Ltd. is now known as Altanovo Domains Limited. For consistency and ease of reference, we will continue to use "Afilias" to refer to the Claimant in this IRP.

[4 \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#note4\)](#) In addition, NDC later claimed that Afilias should have been disqualified from the .WEB auction for violating the auction blackout period, which prohibits certain communications just before an ICANN auction.

[5 \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#note5\)](#) ICANN has already agreed to pay for the administrative costs of maintaining an IRP, including panelist fees. To the extent that this IRP Panel has directed reimbursement for additional fees related to the IRP, such as the initial filing fee, ICANN will abide by the Panel's declaration and reimburse Afilias those amounts as well.

[6 \(/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en#note6\)](#) The operative Bylaws are the [ICANN Bylaws \(/resources/pages/bylaws-2018-06-22-en\)](#) as amended 18 June 2018.

Related Documents

[Agenda | Special Meeting of the ICANN Board \(/en/board-activities-and-meetings/materials/agenda-special-meeting-of-the-icann-board-16-01-2022-en\)](#)

[Minutes | Special Meeting of the ICANN Board \(/en/board-activities-and-meetings/materials/minutes-special-meeting-of-the-icann-board-16-01-2022-en\)](#)

[Preliminary Report | Special Meeting of the ICANN Board \(/en/board-activities-and-meetings/materials/preliminary-report-special-meeting-of-the-icann-board-16-01-2022-en\)](#)



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Participate (/en/about/participate)	Report Security Issues (/resources/pages/report-security-issues-2018-05-24-en)	Independent Review Process (/resources/pages/irp-2012-02-25-en)	Reviews (/resources/reviews/organizational-reviews)	Name Collision (/en/help/name-collision)	
Diversity at ICANN (/diversity-en)	Certificate Authority (/contact/certificate-authority)	Request for Reconsideration (/resources/pages/accountability-reconsideration-en)	Specific Reviews (/resources/reviews/specific-reviews)	ICANN Lookup (https://whois.icann.org/en)	
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Board of Directors-2014-03-19-en)	Ombudsman (/ombudsman)	Employee Anonymous Hotline Policy and Procedures (/employee-anonymous-hotline-policy-procedures-whistleblower)	Financials (/en/about/financials)		
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Exhibit C-47

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Exhibit C-48

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EXHIBIT C-49

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,) ICDR CASE NO. 01-18-0004-2702
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

ICANN'S POST-HEARING BRIEF

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GLOSSARY OF DEFINED TERMS

Term	Definition
Afilias	Claimant Afilias Domains No. 3 Limited
Amended IRP Request	Amended Request by Afilias Domains No. 3 Limited for Independent Review, submitted on 21 March 2019
Articles	ICANN's Articles of Incorporation, Ex. C-2
Auction Rules	Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4
Bidders Agreement	New gTLD Auction Bidders Agreement, Ex. C-5
Bylaws	ICANN's Bylaws, as amended 18 June 2018, Ex. C-1
ccTLD	Country code top-level domain
CCWG-Accountability	A cross-community working group created by ICANN's supporting organizations and advisory committees to review and advise on ICANN's accountability mechanisms
CEP	ICANN's Cooperative Engagement Process, as described in Article 4, Section 4.3(e) of ICANN's Bylaws
CIR	Contracting Information Request
Core Values regarding competition	ICANN's Commitment and Core Values regarding competition, as set forth in Article 1, Section 1.2(a) and Section 1.2(b)(iii), (iv) of ICANN's Bylaws
DAA	Domain Acquisition Agreement between Verisign and NDC, executed on 25 August 2015, Ex. C-69
DIDP	ICANN's Documentary Information Disclosure Policy
DNS	Domain Name System
DOJ	United States Department of Justice
Donuts	Donuts, Inc., the parent company of .WEB applicant Ruby Glen
GNSO	Generic Names Supporting Organization
gTLD	Generic top-level domain
Guidebook	ICANN's New gTLD Applicant Guidebook, Ex. C-3.
Hearing	The Phase II Hearing
ICANN	Respondent Internet Corporation for Assigned Names and Numbers
Interim Supplementary Procedures	Interim Supplementary Procedures for ICANN Independent Review Process, Ex. C-59
IOT	Independent Review Process Implementation Oversight Team
IRP	Independent Review Process
NDC	<i>Amicus Curiae</i> Nu DotCo LLC
NPV	Net present value
Program	New gTLD Program
Reply Memorial	Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review, submitted on 4 May 2020 and revised on 6 May 2020
Response to the <i>Amici</i> Briefs	Afilias Domains No. 3 Limited's Response to the <i>Amicus Curiae</i> Briefs, submitted on 24 July 2020
Ruby Glen	Ruby Glen, LLC

Term	Definition
Supplemental Proposal	CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Ex. C-122
Verisign	<i>Amicus Curiae</i> Verisign, Inc.

PANEL QUESTIONS

ICANN thanks the Panel for its preparation of the set of questions it posed to the Parties. ICANN has endeavored to answer each of them where appropriate throughout this brief and has noted where it has done so. For ease of reference, ICANN’s responses to the Panel’s questions can be found as follows:

Question Number	Panel Question	Location
Question 1	The Parties have cited a number of prior IRP decisions. What is the precedential value of these decisions on questions such as time limitation, the applicable standard of review, the remedial powers of IRP Panels, and other questions of principle in light of changes that may have been made to ICANN’s Bylaws after the date of the decisions?	Paragraph 35, footnote 38
Question 2	What is the legal effect of the Board’s adoption of the CCWG Report (C-122) insofar as the later-adopted (amended) Bylaws (C-1) contain provisions contrary to or inconsistent with the Report? Is the CCWG Report relevant to the interpretation of the provisions of the Bylaws relating to the accountability mechanisms of ICANN?	Paragraphs 37-45
Question 3	What is the effect on the claims in issue in this case of the timing of the adoption of Rule 4 of the Interim Supplementary procedures (25 October 2018), as it affects the timing of bringing the claims that have been advanced in this proceeding (4 months and 12 months repose period)?	Paragraphs 81-85
Question 4	What is the scope of the litigation waiver (Terms and Conditions of Module 6 in the Guidebook): “Applicant agrees not to challenge in court . . . any final decision made by ICANN with respect to the Application . . . or any other legal claim . . . with respect to the application”? What link, if any, exists between the litigation waiver and the scope of the jurisdiction of IRP panels under the Bylaws, in light of ICANN accountability obligations? Does the litigation waiver have any relationship to the specific claims advanced in the Claimant’s Amended Request?	Paragraphs 46-48

Question Number	Panel Question	Location
Question 5	Please comment on VeriSign’s stated concern that the private resolution of contention sets may involve collusion, in light of ICANN’s stated preference for the private resolution of contention sets.	Paragraphs 130-135
Question 6	Please comment on the fact that NDC and Verisign deliberately sought to keep the DAA confidential until after the auction, and that VeriSign’s support was essential to NDC winning the auction, in light of ICANN’s commitment to transparency and accountability.	Paragraphs 157-158
Question 7	Is there an inconsistency between the contention that Afilias' claims are time barred and ICANN’s position that it has not yet addressed the fundamental issue that Afilias complains of in this IRP? Please comment on the Respondent’s observation that the Claimant’s claims are in one sense premature and in another sense overdue (Respondent’s Response, para. 7).	Paragraphs 62-72; Paragraphs 163-171
Question 8	The Claimant is invited to comment on article 4.3(o) of the Bylaws as it relates to the remedies it is seeking in this IRP.	This question is addressed to the Claimant. However, ICANN also addresses this question in paragraphs 23-48
Question 9	The Claimant is asked to clarify what is left to be decided in connection with the Claimant’s Rule 7 claim given the disposition of those issues in the Decision on Phase I and the conduct of the IRP in accordance with that ruling. The Claimant is also asked to identify the source of its alleged entitlement to a cost award for the expenditure of effort because of VeriSign and NDC’s participation in the IRP, on account of the alleged “wrongful” adoption of Rule 7.	This question is addressed to Claimant. However, ICANN also addresses this question in paragraphs 218-231.
Question 10	Please comment, in light of the relevant provisions of the Bylaws, on ICANN’s decision not to disclose to Afilias, the Amici and the general public its Board’s November 2016 decision regarding .WEB.	Paragraphs 179, 180, 182-189

Question Number	Panel Question	Location
	The Respondent is asked to explain the reason why this Board decision was disclosed allegedly for the first time in the Respondent's Rejoinder?	

INTRODUCTION

1. Afilias' case has been a moving target throughout this IRP, and it continued to evolve during the Hearing, where Afilias essentially abandoned its competition claim and associated narrative, which, though contrived, were clearly designed to give its case a greater sense of urgency and significance. Afilias' original and Amended IRP Request are both rooted in the contention that ICANN's founding purpose was to affirmatively promote competition and that this "competition mandate" left it no choice but to block Verisign's potential operation of .WEB as "the last, best hope of creating a competitive environment at the wholesale registry level of the DNS and ending VeriSign's market power."¹

2. But in its effort to endow its case with a higher and more pressing purpose, Afilias ignored the following key facts: that ICANN has already authorized the addition of over 1,200 new gTLDs to the Internet, thereby increasing competition and consumer choice; that Afilias is on record as confirming that ICANN is not a competition regulator; that the Guidebook does not authorize ICANN to assess which applicant, among those vying for a particular gTLD, might do a better job "creating competition;" that the community, in developing the Program, could have recommended that Verisign be prohibited from applying for new gTLDs, but did not do so; and that the DOJ rejected the opportunity to block Verisign's plans. In addition, ICANN's and Verisign's multiple fact and expert witnesses issued witness statements and expert reports convincingly nailing the coffin shut on Afilias' competition claim through careful analysis of the factual record, ICANN's Bylaws and founding documents, as well as the available economic evidence.

3. Rather than attempt to rehabilitate its competition claim in response, Afilias ran

¹ Amended IRP Request ¶ 83.

away from that claim at the Hearing, thus reducing its case to a collection of alleged Guidebook and Auction Rules violations. Although ICANN does not minimize the importance of following the Guidebook and Auction Rules, this Panel is charged with determining whether ICANN failed to comply with its Articles and Bylaws, not deciding whether Afilias should be awarded .WEB on the basis of NDC's alleged violations of the Guidebook and Auctions Rules. Having effectively abandoned its competition claim, Afilias is left with no compelling argument that the Articles and Bylaws required ICANN to find NDC in violation of the Guidebook and Auction Rules and disqualify NDC for those alleged violations.

4. Afilias' flight from its competition claim was no oversight. Despite presenting the so-called competition mandate as the original lynchpin of its Amended IRP Request, Afilias chose not to cross-examine John Kneuer, whose expert report explained that ICANN does not have the type of competition mandate Afilias suggests, nor the authority or expertise to select which applicants for any given gTLD are most likely to achieve pro-competitive results. Likewise, Afilias failed to cross-examine Becky Burr on the portions of her witness statement that made clear that ICANN is not permitted to act as a competition regulator and does not have the authority to block potentially anticompetitive transactions like a government regulator. Afilias also failed to address at the Hearing the Bylaws provisions and ICANN foundational documents that explain that ICANN has no authority to act as a competition regulator, and Afilias never addressed (or even acknowledged) its previous, public statement that "***Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.***"² All of this evidence stands un rebutted.

5. With respect to Afilias' assertion that .WEB is "the most promising new gTLD,"

² Amended IRP Request at ¶ 8 & R-21 at 8 (emphasis added).

rather than submitting valid economic evidence to support this theory, Afilias relied upon the subjective opinions of Mr. Zittrain, who is not an economist, and Dr. Sadowsky, who is a technologist, not an expert economist. Moreover, these conclusions were exposed as wholly-unreliable and were contradicted by two of the world’s most renowned competition economists, Dr. Dennis Carlton and Dr. Kevin Murphy. Afilias made no attempt even to address, much less rebut, Dr. Murphy’s or Dr. Carlton’s conclusions, either via cross-examination at the Hearing or via rebuttal expert reports, which Afilias had plenty of opportunity to submit. Afilias has thus effectively abandoned what was previously so central to its case – that ICANN’s Core Values regarding competition “required” ICANN to disqualify NDC due to the potential assignment of the .WEB registry agreement to Verisign.

6. Without Afilias’ narrative that the DAA threatened to vanquish competition in the DNS and subvert the rationale for ICANN’s very existence—which Afilias wrongly describes as being to encourage competition with Verisign³—Afilias’ case boils down to whether ICANN was “required” to disqualify NDC for a series of alleged violations, some highly technical, of the Guidebook and the Auction Rules. Afilias also makes ancillary complaints regarding ICANN’s investigation of NDC’s alleged violations. As discussed herein, these contentions are meritless and should be rejected. Indeed, most of Afilias’ causes of action are not even within the Panel’s jurisdiction, either because they are not properly pled in Afilias’ Amended IRP Request, as required, or they are outside the repose and limitations periods established by Rule 4 of the Interim Supplementary Procedures. To assist the Panel, ICANN has created an index identifying Afilias’ causes of action and requests for relief, together with ICANN’s defenses to each, which is attached as Appendix A.

³ Amended IRP Request ¶ 9.

7. Nearly all of Afilias' requests for relief are also outside the Panel's jurisdiction, which is expressly limited by Section 4.3(o) of the Bylaws. In fact, all of the affirmative relief Afilias seeks – such as an order that ICANN disqualify NDC and proceed to contracting with Afilias at a bid price set by the Panel – is manifestly in excess of the Panel's jurisdiction. Both the express terms of the Bylaws and the testimony given during the Hearing confirm that an IRP Panel's jurisdiction and authority is limited to issuing a binding declaration on whether a properly-alleged ICANN action or inaction violated ICANN's Articles or Bylaws.

8. Afilias will undoubtedly attempt to demonize ICANN for invoking these jurisdictional limits as an effort to evade accountability. But from the outset ICANN has emphasized the boundaries of the Panel's authority to ensure that its decision is compliant with applicable standards and is thus enforceable. All courts and tribunals have limits to their jurisdiction, and it is Afilias' demand that this Panel exceed its jurisdiction that should be firmly rejected.

9. As the testimony at the Hearing confirmed, ICANN has not decided whether the DAA violates the Guidebook or Auction Rules or the appropriate remedy for any violation that may be found. Ms. Burr and Chris Disspain, two current Board members, explained that, in addition to the fact that the Bylaws do not allow the Panel to decide the propriety of the DAA, ICANN would be best suited to decide such issues because of its unique familiarity with the Guidebook and the Program, and its deep appreciation of the various competing interests at play. Ms. Burr testified that the Panel should not evaluate the propriety of the DAA because “there are so many moving parts and parties here, imagine if this Panel said ‘ICANN violated the bylaws, and you must award this to, you know, X, Y or Z.’ There are going to be two or three parties

who then have a cause of action.”⁴ Likewise, Mr. Disspain explained that the propriety of the DAA “is a matter for the Board,” rather than this Panel.⁵ Mr. Disspain also made clear that any thoughts or recommendations the Panel may have for ICANN following its evaluation of the facts will be taken “very seriously by the Board.”⁶

10. The .WEB contention set has been “on hold” for almost the entire period of time since the .WEB auction due to pending Accountability Mechanisms and the DOJ’s antitrust investigation. Every ICANN witness questioned on the topic confirmed that ICANN has a longstanding practice of placing applications and contention sets on hold while related Accountability Mechanisms are pending, and that it does so out of deference to, and so as to not interfere with, those procedures and their outcomes. ICANN publicizes this practice and, in response to Afilias’ letter-writing campaign in 2016, ICANN informed Afilias not only of the existence of the practice (if Afilias did not already know), but the fact that the .WEB contention set was placed on hold because of it.

11. Thus, it should have come as no surprise that, in November 2016, after the ICANN Board was updated by counsel regarding the issues swirling around .WEB – from the pending federal court litigation, to Afilias’ informal complaints and the pending Accountability Mechanism – the Board elected to continue to follow ICANN’s practice by not making any decisions regarding the .WEB contention set during the pendency of related Accountability Mechanisms and, later, the DOJ investigation. The Board’s decision was reasonable, not only because taking precipitous action could have interfered with ongoing and future Accountability Mechanisms, but also because the outcome of such Accountability Mechanisms, and the DOJ

⁴ Hearing Tr. at 334:5-20.

⁵ *Id.* at 984:9-987:24.

⁶ *Id.* at 985:22-988:19.

investigation, could have had an impact on any eventual analysis ICANN might be called upon to make. Because this decision was well within the Board's reasonable business judgment, the Panel should respect it.

12. Likewise, the Hearing testimony explained that ICANN's removal of the hold on the .WEB contention set and transmission of a form registry agreement to NDC did not reflect a decision that the DAA was compliant with the Guidebook and Auction Rules, but was instead a ministerial act taken pursuant to ICANN's normal processes because all Accountability Mechanisms had concluded. As Mr. Disspain explained, "ICANN was taking the next step in its process . . . without wishing to place any weight on either side in this matter, there are two sides . . . both sides need to be treated fairly by ICANN. The best way for ICANN to do that is to follow its process."⁷ At the same time, consistent with ICANN's established practice and its transparency obligations, ICANN staff provided all of the members of the .WEB contention set, including Afilias, with notice of the change of status, which is what finally caused Afilias to make good on its repeated threats to invoke an Accountability Mechanism – a move that ICANN had been expecting from Afilias for nearly two years.

13. For these reasons, and as set forth more fully below, Afilias' claims should each be rejected and its requests for relief denied.

ARGUMENT

I. THE BYLAWS LIMIT THE PANEL'S JURISDICTION.

14. This Panel's jurisdiction is created and defined by ICANN's Bylaws and the Interim Supplementary Procedures applicable to this IRP. The Bylaws and Interim Supplementary Procedures narrowly circumscribe: (a) the types of disputes that may be

⁷*Id.* at 980:17-981:16.

addressed, and the claims that can be raised, in this IRP – *i.e.*, “Disputes” and the “Claim” as defined by the Bylaws; (b) the remedies available, as set forth in Section 4.3(o) of the Bylaws; (c) the time within which a Dispute may be brought – *i.e.*, the limitations and repose periods established by Rule 6 of the Interim Supplementary Procedures; and (d) the standard of review as set forth in Section 4.3(i) of the Bylaws. Despite Afilias’ attempts to argue that the Panel has the discretion to ignore the plain language of the Bylaws, the Bylaws control and they could not be more clear on these subjects.

A. The Panel Has Jurisdiction Only Over the “Disputes” Set Out in Afilias’ Amended IRP Request.

15. An IRP is a narrow, bespoke form of arbitration designed to resolve “Claims” that past actions or inactions by ICANN’s Board, individual directors, officers or staff violated the Articles or Bylaws. This IRP Panel does not have jurisdiction to resolve disputes other than whether ICANN violated its Articles or Bylaws. Nor does it have jurisdiction over disputes other than the Claims asserted in Afilias’ Amended IRP Request.

16. Section 4.3(a) of the Bylaws states that “[t]he IRP is intended to hear and resolve *Disputes*[.]”⁸ Similarly, Section 4.3(g) states that “the IRP Panel shall be charged with hearing and resolving the *Dispute*, considering the *Claim* and ICANN’s written response[.]”⁹

17. “Dispute” and “Claim” are defined terms. As relevant here, “Disputes” are “*Claims* that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws[.]”¹⁰ “Covered Actions” are defined as “any actions or failures to act

⁸ Bylaws, Art. 4, § 4.3(a) (emphasis added), C-1.

⁹ *Id.* Art. 4, § 4.3(g) (“*the IRP Panel shall be charged with hearing and resolving the Dispute*, considering the Claim and ICANN’s written response (“**Response**”) in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.”) (emphasis added).

¹⁰ *Id.*, Art. 4, § 4.3(b)(iii) (emphasis Added). The full definition of “Dispute” is as follows:

(iii) “*Disputes*” are defined as:

by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”¹¹

18. “Claim” is defined as the written statement filed by a Claimant to initiate an IRP: “An IRP shall commence with the Claimant’s filing of a written statement of a Dispute (‘a **Claim**’) with the IRP Provider[.]”¹² The “written statement of a Dispute” that “commence[s]” the IRP is a Request for IRP. Read together, these definitions limit the Panel’s jurisdiction to resolving the allegations set out in a Request for Independent Review Process (here, Afilias’ Amended IRP Request) that actions or inactions of the Board, individual directors, officers or staff members violated the Articles or Bylaws. The Panel does not have jurisdiction to resolve disputes other than whether Covered Actions violated the Articles or Bylaws. These limitations were confirmed on cross-examination by Ms. Burr, a former member of the CCWG-Accountability and current ICANN Board member, who was involved in drafting Section 4.3 of ICANN’s Bylaws:

-
- (A) *Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:*
 - (1) *exceeded the scope of the Mission;*
 - (2) *resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;*
 - (3) *resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;*
 - (4) *resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or*
 - (5) *arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws.*
 - (B) *Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN’s contractual rights with respect to the IANA Naming Function Contract, and*
 - (C) *Claims regarding PTI service complaints by direct customers of the IANA naming functions that are not resolved through mediation.*

¹¹ *Id.*, Art. 4, § 4.3(b)(ii). The Panel recognized the jurisdictional boundaries established by these interlocking definitions in its Decision on Phase I at paragraphs 114-116.

¹² *Id.*, Art. 4, § 4.3(d). Throughout this brief, the capitalized term “Claim” is used as defined by Section 4.3(d) of the Bylaws, while the lower-case “claim” is used, when referring to Afilias’ claims, in its colloquial sense as synonymous with “cause of action.”

The purpose of the IRP is to determine whether or not, in taking some action or inaction or failing to act, ICANN has violated its Bylaws, and that would be including in its application of the rules of the Applicant Guidebook if it's violated the Bylaws somehow.

19. Nor does the Panel have jurisdiction to resolve alleged violations not asserted in the Amended IRP Request. This limitation is consistent with Rule 6 of the Interim Supplementary Procedures, which states that “[t]he Claimant’s written statement of a Dispute shall include all claims that give rise to a particular Dispute, but such claims may be asserted as independent or alternative claims.” As the Panel in the .MERCCK IRP stated, the Bylaws require the Claimant to “identify exactly” the actions it contests, and “also identify exactly how such action is not consistent with the Articles of Incorporation and Bylaws.”¹³ Indeed, a Claimant’s request for IRP may be its *only* pleading in the matter. An IRP Panel “may request additional written submissions,”¹⁴ but a Claimant has no right to make further submissions absent such a request, and such further submissions (if permitted) cannot change the nature of the claims being asserted.

20. It is axiomatic that an arbitral tribunal’s jurisdiction is confined by the submission to arbitration. “An arbitral tribunal has no authority to decide a dispute that the parties have not agreed to arbitrate, and submitted to it, and its awards on such matters are subject to non-recognition.”¹⁵ Under Article V(1)(c) of the New York Convention, recognition and enforcement may be refused for an arbitral award that “deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or [that] contains decisions on

¹³ *Merck KGaA v. ICANN*, ICDR Case No. 01-14-0000-9604, Final Declaration (Reichert, Matz, Dinwoodie) (“Merck, Final Declaration”) (2015), ¶ 22, AA 55.

¹⁴ Interim Supplementary Procedures, Rule 6, C-59.

¹⁵ G. Born, *INTERNATIONAL COMMERCIAL ARBITRATION* §26.05 at 3542 (2nd Ed. 2014), RLA-74

matters beyond the scope of the submission to arbitration.”¹⁶ This principle is memorialized in the UK Arbitration Act of 1996 (the law of the arbitral seat) as well as federal and California law (the law governing the Bylaws).¹⁷

21. Accordingly, the Panel does not have jurisdiction to make determinations regarding NDC’s and Verisign’s alleged conduct except to the extent necessary to resolve whether Covered Actions violated the Articles or Bylaws.¹⁸ Afilias’ claims, however, focus almost exclusively on NDC’s alleged violations of the Guidebook and Auction Rules, and fail to establish a crucial link to the only issue within the Panel’s jurisdiction: whether or not ICANN violated its Articles or Bylaws. Afilias’ attempt to create this linkage by asserting that ICANN had an absolute and unqualified obligation under its Articles and Bylaws to disqualify NDC’s application (and award .WEB to Afilias) as a result of NDC’s alleged violations is overreaching and untenable. Afilias can point to no provision of the Articles or Bylaws that required ICANN to automatically disqualify NDC and award .WEB to Afilias, because there is none.

22. The Panel also does not have jurisdiction to resolve purported violations of the Articles or Bylaws that are not alleged in the Amended IRP Request, such as the belated assertions regarding ICANN’s post-auction investigation and ICANN’s transmittal of a form registry agreement to NDC. This limitation is further discussed in Sections V and VI below.

¹⁶ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(1)(c) (New York, 1958), RLA-77.

¹⁷ UK Arbitration Act of 1996, Art. 67 (allowing an arbitral award to be declared to be of no effect where made in excess of the arbitral tribunal’s substantive jurisdiction), CA-124; *AT&T Techs., Inc. v. Comm’n Workers of Am.*, 475 U.S. 643, 648 (1986) (“arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.”) (citation omitted), RLA-41; *Magness Petroleum Co. v. Warren Resources of Cal., Inc.*, 103 Cal. App. 4th 901, 909 (2002) (“It is well established that arbitration is a matter of contract, and the powers of the arbitrator derive from and cannot exceed the contract to arbitrate and the parties’ submission to arbitration.”), RLA-54.

¹⁸ *Meat Cutters Local No. 439 v. Olson Bros., Inc.*, 186 Cal. App. 2d 200, 207 (1960), RLA-56; *Morris v. Zuckerman*, 69 Cal. 2d 686, 690 (1968), RLA-57; *Homesite Ins., Inc. v. Dhaliwal*, No. A131226, 2012 WL 1354528, at *7 (Cal. App. Apr. 19, 2012) (Unpublished), RLA-51.

B. The Panel’s Remedial Authority Is Limited to Issuing a Declaration as to Whether Covered Actions Violated the Articles or Bylaws.

23. The Panel’s remedial authority is strictly limited by Section 4.3(o) of the Bylaws.

These limitations are extremely important because all but one of Afiliias’ requests for relief exceed the Panel’s jurisdiction.

24. Section 4.3(o) states:

Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

- (i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;
- (ii) Request additional written submissions from the Claimant or from other parties;
- (iii) ***Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws***, declare whether ICANN failed to enforce ICANN’s contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;
- (iv) ***Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;***
- (v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;
- (vi) Determine the timing for each IRP proceeding; and
- (vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).¹⁹

25. The only binding remedy authorized by Section 4.3(o) is a Declaration under Article 4.3(o)(iii). The only affirmative relief authorized under Section 4.3(o) is to

“[r]ecommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered[.]” as set out in subsection (iv).²⁰

¹⁹ Bylaws, Art. 4, § 4.3(o) (emphasis added).

²⁰ *Id.*, Art. 4, § 4.3(o)(iv).

Section 4.3(o) is an exhaustive enumeration of the Panel’s authority. This is self-evident from the terms of Section 4.3(o), and it was confirmed by Ms. Burr, who was involved in the drafting of this provision.²¹

26. Indeed, as Ms. Burr explained, “the IRP’s authority is limited to finding -- making a determination about whether an action or inaction violated the articles of incorporation and bylaws, and that’s what’s binding on ICANN.”²² Ms. Burr also explained during the Hearing that if there is a determination that ICANN breached its Articles or Bylaws, “ICANN must take – then take appropriate action to remedy the breach.”²³

27. Afilias’ requests for relief clearly exceed the Panel’s limited remedial authority. Afilias sets out these requests at paragraph 89 of its Amended IRP Request, and it reiterated them during its opening presentation at the hearing.²⁴ It asks for seven “Declaration[s]”:

- (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;
- (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC’s bid for .WEB for violating the AGB and Auction Rules;
- (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;
- (4) specifying the bid price to be paid by Afilias;

²¹ Hearing Tr. at 394:1-395:1 (“**Q.** BY MR. ENSON: Ms. Burr, were you involved in the drafting of this particular provision? **A.** Yes, I was. **Q.** Sorry, go ahead. **A.** I was involved in Section 4, Article 4. **Q.** Would you describe for us what is set forth here in Section 4.3(o)? **A.** 4.3(o) is a statement of the authority of the IRP Panel, and it includes the three provisions that had been in the bylaws for some time, which is to dismiss -- actually, that may have been a new one, declare whether covered actions constituted an action or inaction that violated the articles. There was also an existing authority to stay actions or decisions, and we then added a few additional provisions relating to, for example, the PTI, determining the shift of IRP costs and expenses was actually moved from a different part of the section. So this was an attempt to gather the authority of the Panel and articulate the full authority of the Panel. **Q.** Is Section 4.3(o) an exhaustive listing of the IRP Panel’s authority? **A.** Of the authority which is binding on ICANN, yes.”).

²² *Id.* at 323:25-324:22 (Burr).

²³ *Id.* at 333:23-334:29.

²⁴ *See* Afilias’ Opening Presentation, at Slide 60, which reproduces paragraph 89 of Afilias’ Amended IRP Request in its entirety, thus confirming Afilias’ quest for remedies the Panel has no authority to grant.

- (5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by VeriSign and/or NDC;
- (6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings;
- (7) and granting such other relief as the Panel may consider appropriate in the circumstances.²⁵

28. The first form of relief requested by Afilias is within the Panel’s jurisdiction insofar as it seeks a declaration regarding whether ICANN acted consistently with its Bylaws and Articles, although it should be denied for the reasons set out in Sections II through VII below. Requests (2) through (7) clearly exceed the Panel’s authority. The Panel does not have authority to order ICANN to disqualify NDC’s bid (Request No. 2), proceed to contracting with Afilias (Request No. 3), specify the price to be paid by Afilias (Request No. 4), invalidate Rule 7 (Request No. 5) or order any other relief that it “may consider appropriate in the circumstances” (Request No. 7). The Panel should reject these requests as outside its jurisdiction, and the disputed factual or legal issues that form the basis for these requests should be disregarded as moot and unnecessary to the resolution of this dispute.

29. With regard to Afilias’ requests for an award of costs (Request No. 5 and 6), the Panel’s authority to shift costs is governed by Section 4.3(r) of the Bylaws, which provides that “each party to an IRP proceeding shall bear its own legal expenses[.]” The IRP Panel is authorized to shift costs only on a finding that “the losing party’s Claim or defense [is] frivolous or abusive.”²⁶ Afilias has not previously argued that this standard is satisfied, and it clearly is not, as discussed in Section VIII.

30. Afilias has not even attempted to explain how its requests for relief possibly could

²⁵ Amended IRP Request ¶ 98.

²⁶ Bylaws, Art. 4, § 4.3(r).

fall within the Panel’s remedial authority as defined by Section 4.3(o). Instead, Afilias has mounted a series of shifting arguments in an attempt to sidestep Section 4.3(o). None has merit.

1. The “Purposes of the IRP” Do Not Expand the Panel’s Remedial Authority.

31. Afilias’ first tactic was to ignore Section 4.3(o) completely and to argue that its sought-for remedies are somehow mandated by the “purposes of the IRP.” ICANN argued in its Response to the Amended IRP Request that “Afilias’ requested relief from the Panel goes far beyond what is permitted by ICANN’s Bylaws[.]”²⁷ Remarkably, Afilias’ Reply Memorial fails even to *mention* Section 4.3(o), the Bylaws provision governing the Panel’s remedial authority. Instead, Afilias argued that the Panel’s purported authority to grant the remedies that Afilias requests somehow derives from statements in Section 4.3(a) that IRP Panels are to:

- “[R]esolve Disputes”²⁸;
- “Ensure that ICANN . . . otherwise complies with its Articles of Incorporation and Bylaws”²⁹;
- “Empower the global Internet community and claimants to enforce compliance with the Articles of Incorporation and Bylaws”³⁰;
- “Ensure that ICANN is accountable to the global Internet community and Claimants”³¹;
- “Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.”³²

32. None of these purposes conflicts with or overrides the limits on the Panel’s

²⁷ ICANN’s Response to Amended IRP Request ¶ 83.

²⁸ Afilias’ Reply Memorial ¶¶ 150, 151 (citing Bylaws, Art. 4, §§ 4.3(a) and (g)); *see also* Afilias’ Response to *Amici* Briefs ¶¶ 226, 231.

²⁹ Afilias’ Reply Memorial ¶ 151 (citing Bylaws, Art. 4, § 4.3(a)(i)); Afilias Response to *Amici* Briefs ¶ 227.

³⁰ Afilias’ Reply Memorial ¶ 151 (citing Bylaws, Art. 4, § 4.3(a)(ii)); Afilias Response to *Amici* Briefs ¶ 228.

³¹ Afilias’ Reply Memorial ¶ 151 (citing Bylaws, Art. 4, § 4.3(a)(iii)); Afilias Response to *Amici* Briefs ¶ 229.

³² Afilias’ Reply Memorial ¶ 151 (citing Bylaws, Art. 4, § 4.3(a)(viii)); Afilias Response to *Amici* Briefs ¶ 230.

remedial authority under Section 4.3(o). Recall that “Dispute” is defined as “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws[.]”³³ Disputes thus concern past actions or inactions. The Panel resolves Disputes by issuing a Declaration as to whether a Covered Action violated the Articles or Bylaws. The purposes of the IRP as set out in Section 4.3(a) are entirely consistent with the Panel’s limited remedial authority as defined by Section 4.3(o). Moreover, even if the general purposes of an IRP as stated in Section 4.3(a) somehow conflicted with the specific remedies available as set out in Section 4.3(o) (and they clearly do not), the latter would control under the rule that “when a general and particular provision are inconsistent, the latter is paramount to the former.”³⁴

2. Prior IRP Decisions Do Not Authorize Afilias’ Requested Relief.

33. Afilias incorrectly asserted in its Reply Memorial that prior IRP decisions establish that the Panel has authority to issue “affirmative declaratory relief,” a euphemism that Afilias uses to describe the mandatory injunctions sought by items (2) through (5) of its requests for relief. Afilias bases this assertion principally on the IRP Panel’s decision in *GCC v. ICANN*.³⁵ But the *GCC* Panel found only that IRP Panels “may and should *recommend* affirmative steps to be taken by the Board.”³⁶ The *GCC* Panel did not order the Board to take any such steps or suggest that it had authority to issue that type of order.³⁷

³³ Bylaws, Art. 4, § 4.3(b)(iii)(A).

³⁴ Cal. Civ. Proc. Code § 1859, RLA-21; *see also CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 466 (2006) (“when general and specific provisions are inconsistent, the latter control), RLA-6.

³⁵ Afilias’ Reply Memorial ¶ 153 & n.279, (citing *GCC v. ICANN*, ICDR Case No. 01-14-0002-1065, Partial Final Declaration ¶ 146 (19 Oct. 2019), CA-17).

³⁶ *GCC v. ICANN*, ¶ 146, CA-17.

³⁷ The *GCC* case arose under the December 8, 2011 Bylaws. Sections 4.3(8)(b) and (c) of the December 8, 2011, Bylaws are substantially similar to Section 4.3(o)(iii) and (iv) of the current Bylaws in the respects relevant to this IRP.

34. Other IRP Panels have similarly found that their remedial authority is limited by the Bylaws. In *Booking.com v. ICANN*, the Panel found that the “authority of an IRP panel is expressly prescribed – and expressly limited – by the ICANN Bylaws[,]” including Sections 4.3(11)(c) and (d) of the then-operative Bylaws, which are substantially similar to Article 4.3(o)(iii) and (iv) of the currently-operative Bylaws.³⁸

3. The Bylaws Need Not Use the Word “Only” to Limit the Panel’s Authority.

35. Apparently realizing that the arguments based on the purposes of the IRP and purported precedent were untenable, Afilias changed tack in its Response to the *Amici* Briefs filed one week before the Hearing and asserted for the first time that Section 4.3(o) should be construed as non-exhaustive because it does not state that the Panel has authority to issue “only” the remedies prescribed.³⁹ Afilias cites no authority to support this argument, which conflicts with fundamental and non-controversial principles of contract construction as well as Ms. Burr’s testimony that Section 4.3(o) *is* an exhaustive list of a Panel’s authority.⁴⁰

³⁸ *Booking.com B.V. v. ICANN*, ICDR Case No.: 50-20-1400-0247, Final Declaration, ¶ 104 (3 March 2015), (Drymer, Matz, Bernstein), CA-11. The Panel’s Question No. 1 asked for the parties’ views on the precedential value of prior IRP decisions. Under Section 4.3(a)(vi) of the Bylaws, the purposes of the IRP include to “[r]educ[e] Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.” Similarly, under Section 4.3(g), the IRP Panel is charged with considering the Claim and ICANN’s Response “in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.” Accordingly, prior IRP decisions are precedential in that they should be considered to the extent relevant, but they are not binding in subsequent Disputes or other ICANN processes. Moreover, prior IRP decisions are relevant only to the extent that the provisions of the Bylaws, Articles, Supplementary Procedures or other instruments that they construe are the same as, or “equivalent” to, the corresponding provisions of the instruments governing this IRP. The *Booking.com* decision was governed by ICANN’s Bylaws dated 11 April 2013. Section 4.3(11)(c) and (d) of those Bylaws are similar to Section 4.3(o)(iii) and (iv) of the Bylaws that govern this IRP. Accordingly, the *Booking.com* Panel’s interpretation of those provisions is relevant precedent.

³⁹ Afilias’ Response to *Amici* Briefs ¶ 223.

⁴⁰ Hearing Tr. at 394:23-395:1 (Burr) (“Q. Is Section 4.3(o) an exhaustive listing of the IRP Panel’s authority? A. Of the authority which is binding on ICANN, yes.”).

36. The rule of *expressio unius est exclusio alterius* “creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions[.]”⁴¹ Under this oft-applied rule, the list of available remedies set out in Section 4.3(o) is clearly exclusive. Indeed, if it were non-exclusive, it would be meaningless. A contract should be construed “to give effect to all of a contract’s terms, and to avoid interpretations that render any portion superfluous, void or inexplicable.”⁴² There would be no reason for the Bylaws to state that an IRP Panel may issue *declaratory relief* determining whether a Covered Action violated the Articles or Bylaws if the Bylaws also intended to allow the Panel to issue *any relief* that a Panel may deem appropriate. Likewise, there would be no reason for the Bylaws to state that a Panel could *recommend* that ICANN take *interim action* during a period before it was able to fully consider the Panel’s opinion if the Bylaws had intended to authorize a Panel to issue injunctive relief *requiring* ICANN to take interim or non-interim action.

4. The CCWG-Accountability’s Supplemental Proposal Prior to the Adoption of the Final Bylaws Does Not Expand the Panel’s Remedial Authority.

37. Another new argument that Afilias raised for the first time in its Response to the *Amici* Briefs and then repeated in its opening presentation at the Hearing is that the CCWG-Accountability’s Supplemental Proposal, dated 23 February 2016, somehow modifies or takes precedence over the limitations on the Panel’s authority imposed by the Bylaws. Because Afilias raised this argument for the first time just a week before the Hearing, the record is devoid of *any* examination of the Supplemental Proposal’s drafting history or the role played by the

⁴¹ *Crawford-Hall v. United States*, 394 F. Supp. 3d 1122, 1143 (C.D. Cal. 2019), AA-46.

⁴² *United Farmers Agents Ass’n., Inc. v. Farmers Grp., Inc.*, 32 Cal. App. 5th 478, 495 (2019) (citation and quotation marks omitted), RLA-69.

Supplemental Proposal in the development of the Bylaws, which were made effective eight months *later* in October 2016.

38. Afilias relies on the Supplemental Proposal’s statement that Claimants should be able to “seek redress,” and IRP Panels should be authorized to “direct[] [ICANN] to take appropriate action to remedy the breach.”⁴³ Based on a definition from Dictionary.com, Afilias argues that “[t]he most common definitions of the word ‘redress’ include: ‘the setting right of what is wrong,’ ‘relief from wrong or injury,’ and ‘compensation or satisfaction for a wrong or injury.’”⁴⁴ Afilias reasons that a declaration permitted by the Bylaws is not a form of “redress” because it purportedly does not “provide[] relief or satisfaction that would eliminate the effects of the breach.”⁴⁵

39. Afilias is wrong. The statement that a Claimant should be able to seek redress cannot plausibly be construed to imply that a Claimant is entitled to any form of remedy that it may request, even where that remedy is not authorized by the Bylaws that create the IRP. A declaration that the challenged Covered Action constitutes an action or inaction in violation of the Articles or Bylaws – as authorized by Section 4.3(o)(iii) of the Bylaws – *is* redress.

40. The CCWG-Accountability’s Supplemental Proposal is thus entirely consistent with the remedial limitations imposed by Section 4.3(o) of the Bylaws. The Supplemental Proposal is clear in stating that the result of an IRP would be “a declaration,” not any other form of relief: “An IRP would result in a declaration that an action/failure to act *complied* or *did not*

⁴³ Afilias’ Response to *Amici* Briefs ¶ 222 (citing CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations ¶ 178 (23 Feb. 2016), C-91, and CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN’s Independent Review Process ¶¶ 54, 57 (23 Feb. 2016), C-122; Hearing Tr. at 83:8-15 (Afilias Opening Statement) and Afilias’ Opening Presentation, at Slides 64-65.

⁴⁴ Afilias’ Response to *Amici* Briefs ¶ 220 n.409.

⁴⁵ *Id.* ¶ 220.

comply with ICANN’s Articles of Incorporation and/or Bylaws.”⁴⁶

41. The Supplemental Proposal explained that “the limitation to the type of decision made is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid an outcome that would force the Board to violate its fiduciary duties.”⁴⁷ This was confirmed by Ms. Burr, who was a member of the CCWG-Accountability and the Rapporteur for Work Stream 1, which produced the Supplemental Proposal.⁴⁸

42. The Panel’s Question No. 2 asked the parties to address “the legal effect of the Board’s adoption of the CCWG Report (C-122) insofar as the later-adopted Amended Bylaws (C-1) contain provisions contrary to or inconsistent with the Report” and whether the CCWG Report is “relevant to the interpretation of the provisions of the Bylaws relating to the accountability mechanisms of ICANN.” As shown above, the CCWG’s Supplemental Proposal is not contrary to or inconsistent with the Amended Bylaws. As part of the Bylaws drafting

⁴⁶ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN’s Independent Review Process (23 Feb. 2016), ¶ 16, C-122.

⁴⁷ *Id.*

⁴⁸ Hearing Tr. at 323:25-324:22 (Burr) (“The bylaws are clear, and this was always the intention. I was the rapporteur for this, and I was the person who wrote the -- was fundamentally charged with a relevant bylaws provision. This means -- and it is very clear in the bylaws, and that is what the CCWG meant – that they had a right to get a decision about whether an action or an inaction violated the bylaws. This does not say to me, it was never the intention of the CCWG, in my hearing, that the Panel could prescribe a remedy. And that totally makes sense in the context of ICANN IRPs, because often there are many, many parties who are affected by this. There are a lot of moving parts. So I do not see that as a statement, and I participated in both the CCWG discussions and the bylaws’ drafting, which was not intended to, you know, damages, recovery, remedy, that kind of stuff, but the -- the IRP’s authority is limited to finding -- making a determination about whether an action or inaction violated the articles of incorporation and bylaws, and that’s what’s binding on ICANN.”); *id.* at 333:25-334:20 (“Well, so, first of all, I can read that construction, which is passive and which was put up as we were working this out. I do not read it to say that the Panel is going to direct ICANN to take a specific action to remedy the breach. The Panel, by making a finding that ICANN has violated its articles, ICANN must take – then take appropriate action to remedy the breach. That is not the same as saying that the Panel has the authority to say what the appropriate action is to remedy the breach. And the reason is there are so many moving parts and parties here, imagine if this Panel said ‘ICANN violated the bylaws, and you must award this to, you know, X, Y or Z.’ There are going to be two or three other parties who then have a cause of action. So ICANN must -- ICANN has an obligation to take appropriate action, but the CCWG did not contemplate that the Panel, the IRP Panel would decide what that appropriate action was.”); *id.* at 303:5-10 (“The CCWG was split up into two work streams. One was the accountability mechanisms and the mission, commitment for value statement of the bylaws, and then there were other issues that another work stream took. I was the rapporteur for the accountability work stream.”).

history, the Supplemental Proposal potentially could be relevant to interpreting aspects of the Bylaws; however, determining whether and the extent to which the Supplemental Proposal is relevant in any given instance would require a thorough examination of the drafting history of the Bylaws provisions at issue to ascertain their relationship to the Supplemental Proposal and the reasons for any differences. No such examination has been done because Afiliias did not assert arguments based on the Supplemental Proposal until the Hearing.

43. If any relevant inconsistency existed between the Bylaws and the Supplemental Proposal, the Bylaws clearly would control. The Bylaws, not the CCWG-Accountability’s Supplemental Proposal, establish the Panel’s jurisdiction, as explained by Ms. Burr: “the language in the bylaws is the final implementation of the CCWG’s recommendations . . . to the extent there’s any discrepancy between [the Supplemental Proposal] and the bylaws, the bylaws is the relevant document.”⁴⁹ The primacy of the Bylaws was also confirmed by the IRP Panel in *Booking.com*: “The jurisdiction and authority of an IRP panel is expressly prescribed – and expressly limited – by the ICANN Bylaws.”⁵⁰

44. This is undeniably correct. The IRP Panel exists solely as a function of the Bylaws. The Panel’s jurisdiction and remedial authority is therefore defined and circumscribed by the Bylaws. The Panel is charged with declaring whether a Covered Action violates the Articles or Bylaws, not whether it violates the CCWG-Accountability’s Supplemental Proposal. The Panel has no jurisdiction to deviate from the Bylaws based on any alleged discrepancy between the Bylaws and the Supplemental Proposal.⁵¹

⁴⁹ Hearing Tr. at 319:5-13 (Burr).

⁵⁰ *Booking.com B.V. v. ICANN*, ICDR, ¶ 104, CA-11.

⁵¹ UK Arbitration Act of 1996, Art. 48(1) (“The parties are free to agree on the powers exercisable by the arbitral tribunal as regard remedies.”), CA 124; *Sutter v. Oxford Health Plans*, 675 F.3d 215, 219-20 (3d Cir. 2012) (“An arbitrator oversteps these limits, and subjects his award to judicial vacatur under §10(a)(4), when he . . . grants relief

45. The Board did not adopt the Supplemental Proposal as a governing ICANN document akin to the Articles or Bylaws, and it certainly did not suggest that the Supplemental Proposal supersedes or takes precedence over the Bylaws, which would not become effective until eight months later. Indeed, the Supplemental Proposal itself explains that “[t]he language proposed in recommendations for the ICANN Bylaw revisions are conceptual at this stage” and that further work was required to develop language that could be incorporated into the Bylaws.⁵² On 10 March 2016, the Board passed three resolutions relating to the CCWG’s work: Resolutions 2016.03.10.16, 2016.03.10.17, and 2016.03.10.18.⁵³ The resolutions formally accept receipt of the Report (2016.03.10.16), approve transmittal of the report to the NTIA (2016.03.10.17) and direct the President and CEO of ICANN to plan for the implementation of the Report (2016.03.10.18).⁵⁴ The Supplemental Proposal was considered in preparing a draft of the revised Bylaws, which was then put out for public comment and further revised accordingly.⁵⁵ To the extent the Bylaws did not adopt a particular suggestion in the Supplemental Proposal, such suggestion was expressly or implicitly rejected.

5. There Is No “Gap” Created by the Litigation Waiver, and ICANN Takes the Same Position Here as It Did in the Ruby Glen Litigation, Where It Sought to Enforce the Litigation Waiver.

46. Afilias raised another new argument at the Hearing by suggesting that there is some type of a “gap” created by the litigation waiver to which applicants must agree as a

in a form that cannot be rationally derived from the parties’ agreement”), *aff’d*, 133 S.Ct. 2064 (U.S. S.Ct. 2013), RLA-68; *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 472 (5th Cir. 2012) (“If the contract creates a plain limitation on the authority of an arbitrator, we will vacate an award that ignores the limitation.”) (quoting *Apache Bohai Corp. v. Texaco China BV*, 480 F.3d 397, 401 (5th Cir. 2007)), RLA-64.

⁵² C-91 at 9 (bullet 2) & 12.

⁵³ C-184 at 43-44.

⁵⁴ C-184.

⁵⁵ Hearing Tr. at 389.22-390:14 (Burr).

condition to participating in the Program.⁵⁶ Afilias has never clearly articulated its argument, but it appears to be that because applicants agree to participate in ICANN Accountability Mechanisms in lieu of litigation, the remedies available in such Accountability Mechanisms must be co-extensive with remedies available in litigation or else there is a gap.⁵⁷

47. This argument defies commercial reality and, not surprisingly, Afilias has cited no authority to support it. Parties frequently waive any entitlement to particular remedies as part of their agreed-upon means of dispute resolution. For example, waivers of consequential and punitive damages are virtually ubiquitous in international commercial contracts. No valid authority holds that such waivers are invalid or somehow undermine the enforceability of the parties' agreement to arbitrate disputes. Likewise, there is no authority holding that an arbitral tribunal can expand its own authority by granting expressly prohibited remedies on the basis that their prohibition creates a gap between the remedies available in arbitration versus those that would have been available had the parties left themselves free, without restriction, to proceed to court. Here, the parties agreed to a carefully circumscribed form of arbitration as one of their means of dispute resolution (along with the other Accountability Mechanisms). The fact that they could have additional claims or remedies available to them in some other contractually-excluded forum is irrelevant.⁵⁸

⁵⁶ *Id.* at 61:20-62:20; 326:10-327:25; 329:15-19.

⁵⁷ *Id.* at 329:24-330:6 (“[MR. LITWIN]: So in light of the litigation waiver, an IRP Panel’s jurisdiction must cover all matters that could not be addressed by a court of competition – competent jurisdiction, otherwise a new gTLD applicant who was required to agree to the waiver would have no effective means of redress; is that fair?”); *id.* at 598:4-9 (Mr. Ali stating that the Panel’s jurisdiction “is based on what is – what the scope of the litigation waiver is.”).

⁵⁸ ICANN’s Accountability Mechanisms are narrower than litigation in some respects, including with regard to the types of remedies potentially available. However, ICANN’s Accountability Mechanisms are also broader in some respects than the rights an applicant might otherwise have in litigation. For example, ICANN’s Accountability Mechanisms entitle applicants to seek a binding declaration with respect to whether ICANN has acted consistently with its Articles and Bylaws, as Afilias does here. Normally, however, a person who does not own an interest in a corporation would have no standing to assert a claim that the entity acted contrary to its Bylaws or Articles of Incorporation. *See* Cal. Corp. Code § 208, RLA-72.

48. ICANN understands that Afiliias intends to argue in its Post-Hearing Brief that ICANN’s position in this IRP somehow conflicts with its position before the Ninth Circuit Court of Appeals in the *Ruby Glen* litigation. This argument—which has never been raised before—is simply wrong. In its brief to the Ninth Circuit, ICANN stated that the Guidebook’s Covenant Not to Sue does not leave applicants “without any form of redress” because they can challenge ICANN’s implementation of the New gTLD Program through various ICANN accountability mechanisms, including an IRP.⁵⁹ ICANN further made clear that the redress available to an applicant through an IRP is a final and binding declaration: “[A]n Independent Review Process panel’s declarations are ‘final and have precedential value.’”⁶⁰ That is entirely consistent with ICANN’s position in this IRP: the Panel properly provides redress by issuing a final and binding decision declaring whether the Covered Actions at issue violated ICANN’s Articles or Bylaws, but the Panel does not have authority to grant other remedies not permitted by the Bylaws.

C. The Panel Is Required to Apply a Prescribed Standard of Review.

49. The Panel’s jurisdiction is also limited by the standard of review prescribed by Section 4.3(i) of the Bylaws and Rule 11 of the Interim Supplementary Procedures, which are substantially identical. Section 4.3(i) states:

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

- (i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.
- (ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

⁵⁹ *Ruby Glen, LLC v. ICANN*, No. 16-56890, Appellee’s Answer Brief at 3, 6 (9th Cir. Oct. 30, 2017), C-187.

⁶⁰ *Id.* at 11(citation omitted).

- (iii) For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.⁶¹

50. The first sentence of Section 4.3(i) establishes a general *de novo* standard of review. Subsection (iii) then creates a carve-out, providing that actions of the Board in the exercise of its fiduciary duty are entitled to deference provided that they are within the realm of “reasonable judgment.” This standard effectively incorporates the “business judgment rule,” which is recognized in California and all other U.S. jurisdictions.⁶²

51. Contrary to the plain language of subsection (iii), Afilias has advanced three different arguments as to why decisions of the Board are not entitled to any deference. First, Afilias asserts that prior IRP decisions have rejected any such deference.⁶³ But Afilias relies primarily on the IRP Panel’s decision in *ICM v. ICANN*, dated 19 February 2010, which declined to apply the business judgment rule under a then-operative version of the Bylaws that had no provision analogous to the current Section 4.3(i)(iii). Indeed, the *ICM* Panel expressly based its decision on the absence of such a provision: “Articles and Bylaws . . . do not specify or imply that the International Review Process [*sic*] provided for shall (or shall not) accord deference to the decisions of the ICANN Board.”⁶⁴ Accordingly, the *ICM* decision provides no guidance as to the proper interpretation and application of Section 4.3(i)(iii).

⁶¹ Bylaws, Art. 4, § 4.3(i).

⁶² *Landen v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 257 (1999) (The California Supreme Court notes “that the rule of judicial deference to corporate decision making ‘exists in one form or another in every American jurisdiction.’”) (quoting *Frances T. v. Vill. Green Owners Ass’n*, 42 Cal. 3d 490, 507 n.14 (1986), RLA-13; see also *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 711 (1996) (quoting *Barnes v. State Farm Mut. Auto. Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993), RLA-15.

⁶³ Afilias’ Reply Memorial ¶ 6 & n.16.

⁶⁴ *ICM Registry, LLC v. ICANN*, ICDR Case. No. 50-177-T 000224 08, Final Declaration ¶ 136 (19 February 2010) (citation omitted), CA-1.

52. In a footnote, Afilias cites the decisions in *Dot Sport Ltd.* and *Booking.com*. Again, both IRPs were decided under earlier versions of the Bylaws that did not include the current Section 4.3(i)(iii).⁶⁵ And while *Dot Sport Ltd.* and *Booking.com* both cited to *ICM*, they also both agreed that an IRP Panel must apply a deferential standard of review to Board action or inaction. The *Booking.com* Panel stated: “[W]e also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an ‘IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.’”⁶⁶ Similarly, the *Dot Sport* Panel found that the Bylaws required the Panel to apply a “defined standard of review” drawn from the Bylaws, which accorded deference to the Board’s reasonable business judgment by “focusing on: a. did the Board act without conflict of interest in taking its decision? b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the community?”⁶⁷

53. Afilias’ second argument for discounting the deference owed to the Board’s business judgment is that, according to Afilias, its claims do not involve the Board’s exercise of its fiduciary duties.⁶⁸ However, under California law, *all* actions by the Board on behalf of ICANN are subject to a fiduciary duty to act in good faith in the interests of ICANN. The California Corporations Code makes clear that, whenever a director is performing duties as a director, he or she does so subject to a fiduciary duty to the corporation:

A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve,

⁶⁵ Afilias’ Reply Memorial ¶ 6 & n.16.

⁶⁶ *Booking.com v. ICANN*, ¶ 115, CA-11.

⁶⁷ *Dot Sport Ltd. v. ICANN*, ICDR Case No. 01-15-0002-9483, Final Declaration ¶ 7.17 (31 Jan. 2017), CA-18.

⁶⁸ Afilias’ Reply Memorial ¶ 16.

in good faith, in a manner that the director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.⁶⁹

54. This was confirmed at the Hearing by Ms. Burr, who testified that she has “an obligation to exercise my fiduciary – respect my fiduciary obligations to ICANN in everything I do related to ICANN,” and that she had trouble imagining any circumstance where the Board could act on behalf of ICANN without exercising its fiduciary duty.⁷⁰

55. Afilias conceded in its opening presentation that “Afilias does not claim that the ICANN Board failed to comply with its fiduciary duties to ICANN.”⁷¹ Accordingly, the Board’s judgment is entitled to deference as long as it is objectively reasonable.

56. Finally, Afilias argues that the business judgment rule in Section 4.3(i)(iii) applies only to official Board action taken by a resolution at a duly held Board meeting. Afilias bases this argument on Sections 2.1 and 7.19 of the Bylaws.⁷² Section 2.1 states that “the Board may act by majority vote of the Directors present at any annual, regular, or special meeting of the Board,”⁷³ and Section 7.19 states that “[a]ny action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action.”⁷⁴ Afilias made this argument for the first time in its Response to the *Amici* Briefs.

57. The argument is simply wrong. Section 4.3(i)(iii) does not, on its face, impose

⁶⁹ Cal. Corp. Code § 5231, RLA-22.

⁷⁰ Hearing Tr. (Burr) at 336:17-25, 392:25-393:3.

⁷¹ Afilias Opening Presentation at Slide 63.

⁷² Afilias’ Response to *Amici* Briefs ¶¶ 170-171. Afilias erroneously cites to Section 2.19. However, the Bylaws contain no Section 2.19. The correct reference is to Article 2, Section 2.1.

⁷³ Bylaws, Art. 2, § 2.1.

⁷⁴ *Id.*, Art. 7, § 7.19.

any such requirement. Nor does the language of that provision permit such an inference. The deference to Board judgment created by Section 4.3(i)(iii) encompasses more than the types of official Board actions governed by Sections 2.1 and 7.19. While Sections 2.1 and 7.19 govern official Board “action,” Section 4.3(i)(iii) expressly applies to both “the Board’s action *or* inaction.”⁷⁵ Section 4.3(i)(iii) therefore is not limited to official actions adopted by resolution at an “annual, regular or special” meeting under Section 2.1 and 7.19; it applies to any exercise of “business judgment” by the Board, including where, as here, it results in the Board taking no action.

II. AFILIAS’ CLAIMS REGARDING ALLEGED ACTIONS AND INACTIONS IN 2016 ARE TIME-BARRED.

A. The Panel Has Jurisdiction Only Over Claims Brought Within the Time Limits Established by the Interim Supplementary Procedures.

58. In addition to the jurisdictional limits imposed by the Bylaws discussed above, the Interim Supplementary Procedures also impose a jurisdictional limit on the time period in which a claim may be brought. Rule 4 of the Interim Supplementary Procedures states:

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

59. Rule 4 thus establishes a limitations period and a repose period. The limitations period provides that an IRP must be filed within 120 days after the Claimant becomes aware of the material effect of the action or inaction giving rise to the Dispute. However, the repose period stipulates that no IRP may be filed more than 12 months after the date of the action or

⁷⁵ *Id.*, Art. 4, § 4.3(i)(iii) (emphasis added).

inaction giving rise to the Dispute, regardless of the Claimant’s state of mind.

60. These time limitations are jurisdictional. A claim that is brought outside the time periods established by Rule 4 is not properly filed and may not be properly decided by an IRP Panel. In *Glamis Gold Ltd. v. United States*, a NAFTA arbitration under the UNCITRAL Rules (1976), the Tribunal held that “an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for the purposes of Article 21(4).”⁷⁶ Similarly, in *Resolute Forest Products Inc. v. Canada*, another NAFTA arbitration, the Tribunal found that “although the time limit specified in Article 1116(2) and 1117(2) [of NAFTA] is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction.”⁷⁷

61. Here, Rule 4 of the Interim Supplementary Procedures *is* a procedure. Article V(1)(c) of the New York Convention provides that an arbitral decision may not be recognized or enforced if “the arbitral procedure was not in accordance with the agreement of the parties.” Relevant national arbitration law is in accord. Article 68(2)(c) of the UK Arbitration Act of 1996 states that an award may be set aside for “failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties.” Likewise, U.S. courts applying the Federal Arbitration Act “may decline enforcement of an arbitral award on the basis that ‘the arbitral procedure was not in accordance with the agreement of the parties.’”⁷⁸ Prior IRP decisions also have recognized time limitations as jurisdictional in nature.⁷⁹

⁷⁶ *Glamis Gold Ltd. v. United States*, Arbitration Under Chapter 11 of NAFTA, Procedural Order No. 2, ¶ 18 (Revised) (May 31, 2005), RLA-75.

⁷⁷ *Resolute Forest Products Inc. v. Canada (NAFTA)*, PCA Case No. 2016-1, Decision on Jurisdiction and Admissibility ¶ 83 (Jan. 30, 2018), RLA-76

⁷⁸ *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 836 (9th Cir. 2010), RLA-63.

⁷⁹ *GCC v. ICANN*, Partial Final Declaration at § VII (Oct. 19, 2016) (“JURISDICTION: TIMELINESS OF THE REQUEST FOR IRP”), CA-17.

B. Afilias' Claim that ICANN Had an Unqualified Obligation to Disqualify NDC Is Time-Barred.

62. Afilias asserts that “ICANN violated its Articles and Bylaws when it failed to disqualify NDC’s bid and application upon receiving the DAA *in August 2016*.”⁸⁰

Fundamentally, Afilias’ position is that ICANN’s Articles and Bylaws created an immediate, absolute and unqualified obligation on ICANN to disqualify NDC’s bid once ICANN became aware of the DAA, and that ICANN had no discretion with regard to the interpretation and application of the Guidebook, the consequences of any potential violation, or the timing of ICANN’s consideration of those issues. This claim is clearly barred by the repose period because it challenges actions or inactions that occurred in 2016, more than two years before Afilias filed this IRP in November 2018.

63. Because the repose period is dispositive, the Panel need not consider whether Afilias’ claim also is barred by the limitations period. If the Panel reaches that issue, however, the Panel should find that the limitations period also bars Afilias’ claims. Afilias unquestionably was aware of the material effect of the alleged actions or inactions of ICANN by August and September 2016, when it was writing letters to ICANN demanding that it disqualify NDC. The claims asserted in those letters are the same as the claims asserted by Afilias in this IRP, which is self-evident from a comparison of Afilias’ August and September 2016 letters and its submissions in this IRP.

64. For example, in its September 2016 letter, Afilias asserted that NDC violated the Guidebook by reselling, assigning or transferring rights or obligations in connection with the

⁸⁰ Afilias’ Reply Memorial ¶ 86 (emphasis added); *see also id.* ¶ 20 (“This IRP, however, claims that ICANN was required to disqualify NDC’s application and bid in August 2016 when ICANN first learned of NDC’s violations[.]”).

.WEB application to Verisign:

NDC violated Paragraph 10 of the Terms and Conditions in Module 6 of the New gTLD Applicant Guidebook (the “Guidebook”), which expressly prohibits any applicant for a gTLD to “*resell, assign or transfer any of the applicant’s rights or obligations in connection with the application.*”⁸¹

That contention is not materially distinguishable from Afilias’ claim in this IRP that:

NDC secretly sold, transferred and assigned its rights and obligations in the application to a non-applicant (*i.e.*, Verisign), in plain violation of the Terms and Conditions of the AGB, including that “Applicant may not resell, assign, or transfer any of the applicant’s rights or obligations in connection with the application.”⁸²

65. Likewise, in its September 2016 letter, Afilias asserted that NDC violated the Guidebook by failing to notify ICANN that information in NDC’s application had allegedly become untrue or inaccurate:

NDC violated Section 1.2.7 of the Guidebook, which requires applicants to “*promptly notify ICANN via submission of the appropriate forms*” “*if at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate,*” including “*changes in financial position and changes in ownership or control of the applicant.*”⁸³

That contention is not materially distinguishable from Afilias’ claim in this IRP:

As soon as NDC entered into the DAA with ICANN [*sic*], almost *none* of the information in NDC’s .WEB Application—and certainly, almost none of the information that had been posted for public comment—was true, accurate, or complete. Nor were the statements made by NDC’s representatives, in phone calls and in writing, to ICANN. There can be little argument that NDC’s failure to update its application constituted an “omission of material information” that rendered its application to be false and certainly misleading.⁸⁴

66. In its September 2016 letter, Afilias asserted that NDC violated the Auction Rules by purportedly placing bids on behalf of Verisign:

⁸¹ C-103 at 2.

⁸² Afilias’ Reply Memorial ¶ 42 (citation omitted).

⁸³ C-103 at 2.

⁸⁴ Afilias’ Reply Memorial ¶ 65.

NDC violated the Auction Rules for New gTLDs (“Auction Rules”). Rule 12 provides that “participation in an Auction is limited to Bidders,” which is defined by the Auction Rules as a “*Qualified Applicant*” or a “*party designated by a Qualified Applicant to bid on its behalf*”. This rule prohibits bids placed on behalf of a third-party that is not a “Qualified Applicant”, defined by the Auction Rules as “*an entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention set to be resolved by an Auction.*”⁸⁵

Again, this contention is not materially distinguishable from the claim Afilias makes in this IRP with regard to the Auction Rules:

[T]he prohibition against bids being made on behalf of any entity other than a Qualified Applicant was stated plainly and repeatedly throughout the Auction Rules. A simple review of the DAA’s terms demonstrate that they *required* NDC to violate and subvert the Auction Rules—which is precisely what NDC did. NDC—the “Qualified Applicant”—was *not* making bids “on its own behalf”.⁸⁶

67. The remedy demanded by Afilias in its August and September 2016 letters is also the same as the one it demands in this IRP, *i.e.*, the immediate disqualification of NDC and awarding of .WEB to Afilias:

ICANN must disqualify NDC’s application for .WEB and proceed to contract for .WEB with Afilias, the next highest bidder in the Auction, in compliance with its obligations under ICANN’s Articles of Incorporation and Bylaws (as well as principles of international law and California law)[.]⁸⁷

68. Afilias has argued that it could not assert its claims in 2016 because it did not have a copy of the DAA at that time.⁸⁸ But that argument directly contradicts the position Afilias took in its 2016 letters to ICANN, in which Afilias stated that *it did not need the DAA to prove its claims*, much less to raise its claims in an IRP:

⁸⁵ C-103 at 2.

⁸⁶ Afilias’ Reply Memorial ¶ 95.

⁸⁷ C-103 at 1.

⁸⁸ Afilias’ Reply Memorial ¶¶ 140-141; Afilias’ Response to *Amici* Briefs ¶ 43.

Although the specific terms of the agreement between VeriSign and NDC have not been disclosed, it is clear from Verisign's own press release and its disclosure in its Form 10-Q filed with the U.S. Securities and Exchange Commission for the quarter ended June 30, 2016, that both companies entered into an arrangement well in advance of the Auction to transfer NDC's rights and obligations regarding its .WEB application to VeriSign.⁸⁹

Indeed, Afilias drafted its IRP Request without a copy of the DAA.

69. In sum, Afilias' claim that ICANN, upon learning in August 2016 of NDC's arrangement with Verisign, had an immediate, absolute and unqualified obligation under its Articles and Bylaws to disqualify NDC and award .WEB to Afilias, is barred by both the repose period and the limitations period. Accordingly, that claim is outside the jurisdiction of this Panel and must be rejected.⁹⁰

C. Afilias' Claim that ICANN Staff Violated the Articles and Bylaws in Their Investigation of Pre-Auction Rumors or Post-Auction Complaints Is Also Time-Barred.

70. Afilias asserted in its Amended IRP Request that ICANN violated the Bylaws in July 2016 when it allegedly "failed to fully investigate *rumors* that NDC had reached an agreement with VeriSign *prior to the .WEB Auction.*"⁹¹ In fact, prior to the auction, ICANN was not aware of any rumors that Verisign was involved in NDC's .WEB application. ICANN's

⁸⁹ C-103 at 2.

⁹⁰ It has been suggested that application of the time bar may be unfair because, until receiving ICANN's Rejoinder, Afilias was not aware of the Board's November 2016 decision to follow its policy of not taking action on applications and contention sets that are the subject of Accountability Mechanisms. But Afilias' claim is not that ICANN's Board violated the Articles and Bylaws in making this decision. Afilias confirmed this in its opening statement. *See* Hearing Tr. at 81:13-22 ("In fact, we couldn't have made a claim that would implicate the business judgment rule because we didn't know about the November 2016 meeting. So when we made – when we filed our amended request for IRP, how could we be making a claim regarding Board conduct when we didn't even know that there had been any Board conduct?"). On the contrary, Afilias asserts that ICANN had violated its Articles and Bylaws three months before the Board's November 2016 meeting when ICANN failed to disqualify NDC immediately upon receipt of Afilias' complaints. Thus, the Board's November 2016 decision is irrelevant to the application of the time-bar. It is also irrelevant that the Board's decision was made during a privileged discussion at a closed workshop and not published on ICANN's website.

⁹¹ Amended IRP Request ¶ 78, bullet 4 (emphasis added).

pre-auction investigation related to Ruby Glen’s contention that there had been a change of ownership or control of NDC, not to any allegations or rumors regarding Verisign. In any event, however, Afilias appears to have abandoned this claim, having failed even to mention it in Afilias’ Reply Memorial or Response to the *Amici* Briefs. Instead, Afilias used those briefs to attempt to introduce a wholly new claim, *i.e.*, that ICANN purportedly violated the Bylaws in its August and September 2016 *post-auction investigation of Afilias’ allegations against NDC*.⁹² ICANN shows below (*infra* at Section VI) that this new claim is not properly pled and is therefore outside the Panel’s jurisdiction and that, in any event, the claim is meritless.

71. But Afilias’ claims concerning ICANN’s 2016 investigations – whether pre- or post-auction – also fail because they are time-barred. These claims are outside the period of repose because they concern alleged actions and inactions in July through September 2016. The claims are also outside the limitations period because Afilias unquestionably was aware, at the time, of the material effect of the alleged violations – *i.e.*, ICANN’s failure to disqualify NDC either before the .WEB auction or immediately thereafter.

72. Accordingly, Afilias’ claims concerning ICANN’s investigations of Ruby’s Glen’s pre-auction allegations regarding a change in control of NDC and Afilias’ post-auction allegations regarding Verisign’s arrangement with NDC are time-barred and therefore outside the jurisdiction of the Panel.

D. Afilias’ Equitable Estoppel Defense Has No Merit.

73. Apart from contending that its current claims are somehow different from those asserted in its August and September 2016 letters (an argument that is flatly refuted by its own letters), and that it was not aware of the status of ICANN’s post-auction investigation (an

⁹² Afilias’ Reply Memorial ¶ 110.

unsupported assertion that is irrelevant to the period of repose, which begins on the date of the challenged ICANN actions or inactions), Afilias' only response to the application of the limitations and repose periods has been to argue that ICANN is equitably estopped from relying on them.

74. Afilias bases its equitable estoppel argument on two statements that ICANN made in 2016. First, Afilias cites Ms. Willett's 16 September 2016 letter to Afilias posing a series of questions regarding the allegations against NDC and Verisign. Afilias relies on Ms. Willett's statement that: "To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information."⁹³ Second, Afilias cites Mr. Atallah's 30 September 2016 response to Afilias' letter demanding to know the status of ICANN's investigation. Afilias relies on Mr. Atallah's statements that: "As an applicant in the contention set, the primary contact for Afilias's application will be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms. We will continue to take Afilias's comments, and other inputs that we have sought, into consideration as we consider this matter."⁹⁴

75. Afilias' positions fail because California law imposes strict requirements for the application of equitable estoppel that Afilias does not meet.

The doctrine of equitable estoppel is founded on notions of equity and fair dealing and provides that a person may not deny the existence of a state of facts if that person has intentionally led others to believe a particular circumstance to be true and to rely upon such belief to their detriment.... Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to

⁹³ Afilias' Reply Memorial ¶ 145 (quoting from C-50).

⁹⁴ *Id.*, C-61.

believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.⁹⁵

76. Afilias satisfies *none* of the doctrine’s four elements. In particular: ICANN’s statements do not misrepresent any facts; Afilias does not contend that any relevant facts existed of which ICANN was aware and about which it misled Afilias; and Afilias was notified of changes to the contention set status and the status of relevant Accountability Mechanisms, as were other .WEB applicants, just as Mr. Atallah said that they would be.

77. Afilias also does not contend—and has not even attempted to prove—that ICANN’s statements were intended to dissuade Afilias from filing an IRP or otherwise pursuing its claims. Afilias subjected Ms. Willett to several hours of cross-examination but decided not to question her on this subject. Afilias cannot properly ask the Panel to make findings based on inference and surmise when it had the opportunity to obtain evidence on this issue and elected not to do so.

78. In addition, Afilias has submitted no evidence that it relied on Ms. Willett’s or Mr. Atallah’s letters in failing to assert its claims in 2016. “[R]eliance is an essential element of equitable estoppel.”⁹⁶ If Afilias actually had decided not to file an IRP based on these statements, it could have submitted witness statements to that effect. Where, as here, a party submits no evidence of reliance, any claim of equitable estoppel must be rejected.⁹⁷

⁹⁵ *Krolkowski v. San Diego City Employees’ Retirement Sys.*, 24 Cal. App. 5th 537, 564-65 (2018) *review denied* (Sept. 19, 2018) (quotations marks and citation omitted), RLA-12.

⁹⁶ *Atkins, Kroll (Guam), Limited v. Cabrera*, 295 F.2d 21, 23 (9th Cir. 1961), RLA-4; *see also Elmore v. Cone Mills Corp.*, 187 F.3d 442, 446 (1999) (“The Supreme Court has held that ‘[an] essential element of any estoppel is detrimental reliance on the adverse party’s misrepresentations.’”) (citation omitted), RLA-7.

⁹⁷ *In re Katz Interactive Call Processing Patent Litig.*, Nos. 07-NL-1816, 01-2196, RGK (FFMx) 2009 WL 1351043, at *15 (C.D. Cal. May 1, 2009) (“Essentially, FedEx is attempting to argue that reliance can be inferred from evidence of misleading conduct. That analysis impermissibly eliminates an essential element of estoppel.”), RLA-10; *Sood v. Grief*, No. H033875, 2010 WL 2595128, at *4-5 (Cal. Ct. App. June 29, 2010) (unpublished) (rejecting equitable estoppel where the evidentiary record was “devoid of any indication that [counsel’s] conduct

79. Further, as a matter of law, equitable estoppel cannot apply where, as here, a party was represented by counsel. Afilias was represented by experienced counsel throughout the entire period at issue. Its letters were signed by its General Counsel, Mr. Hemphill, and its 9 September 2016 letter copies Afilias' outside counsel, Mr. Arif Ali (who has been counsel for other claimants in previous IRPs, including the *ICM* IRP).⁹⁸ Under California law, “[w]here one has been represented by an attorney in connection with a claim the necessary elements of estoppel are not established as a matter of law.”⁹⁹

80. Finally, it is doubtful that equitable estoppel ever can apply to extend a claim beyond the period of repose. California courts have not addressed this issue,¹⁰⁰ but federal courts have held that equitable estoppel has no application to statutes of repose because the purpose of such a period “is to set an outer limit unaffected by what the plaintiff knows.”¹⁰¹

While limitations periods operate to prevent unfairness to a defendant caused by having to

actually and reasonably induced [plaintiff] to forbear suing” within the statutory period) (citation omitted), RLA-19; *Yeager v. Bowlin*, No. CIV. 2:08-102 WBS JFM, 2010 WL 95242, at *16 (E.D. Cal. Jan. 6, 2010) (“Plaintiffs have presented no evidence that indicates they reasonably relied on any representations by defendants that induced them to delay from filing this action until the statute of limitations had run . . . Accordingly, equitable tolling and estoppel are inappropriate.”), RLA-20.

⁹⁸ R-40 (Mr. Ali’s CV); C-49 (8 Aug. 2016 letter from Afilias); C-103 (16 Sept. 2016 letter from Afilias).

⁹⁹ *Romero v. Cty. of Santa Clara*, 3 Cal. App. 3d 700, 705 (1970), RLA-18; *Republic Ins. Co. v. Great Pac. Ins. Co.*, 261 Cal. Rptr. 863, 867 (Cal. Ct. App. Aug. 31, 1989) (unpublished), RLA-17; *Lara v. Willows Joint Venture*, No. B145113, 2002 WL 705962, at *5 (Cal. Ct. App. Apr. 24, 2002) (unpublished), RLA-14.

¹⁰⁰ *McHenry v. Lukasko*, 2018 2112411, at *3 n.9 (Cal. Ct. App. May 8, 2018) (“The parties dispute whether equitable tolling and equitable estoppel apply to statutes of repose. We need not decide the issue because we affirm the trial court’s findings that the 4-year statutes of limitations bar the claims and (as discussed *post*) that Plaintiff has not established an entitlement under either doctrine.”), RLA-55.

¹⁰¹ *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990), RLA-46; *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 865–66 (4th Cir. 1989), RLA-50; Restatement (Second) of Torts § 899, cmt. g (1979) (statutes of repose “set a designated event for the statutory period to start running and then provide that at the expiration of the period any cause of action is barred regardless of usual reasons for ‘tolling’ the statute.”), RLA-73. United States courts applying state law are divided on whether equitable estoppel can ever apply to the statute of repose. Compare *Oldenburg Group Inc. v. Sherwin Williams Co.*, No. 07-C-0596, 2009 WL 10711834, at *2 (E.D. Wis. Aug. 31, 2009) (“equitable estoppel is generally considered inconsistent with periods of repose[.]”), RLA-62; *Rosenberg v. Falling Water, Inc.*, 709 S.E.2d 227, 230 (Ga. 2011) (same), RLA-65; *Beals v. Breeden Bros., Inc.*, 833 P.2d 348, 350 (Or. Ct. App. 1992) (same), RLA-42; with *Wood v. BD&A Construction, L.L.C.*, 601 S.E.2d 311, 314 (N. Car. Ct. App. 2004) (“Equitable estoppel may also defeat a defendant’s statute of repose defense.”), RLA-70.

defend stale claims, periods of repose serve the interests of the public as a whole by providing that rights and liabilities in respect of particular events are certain and cannot be disturbed beyond a given date. Accordingly, “a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason[.]”¹⁰²

E. The Repose and Limitations Periods Apply Retroactively.

81. The Panel’s Question No. 3 asks the parties to state their views on “the effect on the claims in issue in this case of the timing of the adoption of Rule 4 of the Interim Supplementary [P]rocedures (25 October 2018), as it affects the timing of bringing the claims that have been advanced in this proceeding (4 months and 12 months repose period)”.

82. The timing of the adoption of Rule 4 is relevant only in that it occurred before Afilias commenced this IRP. As a consequence, Rule 4 applies to all of Afilias’ claims, regardless of whether they arose before or after 25 October 2018.

83. Once the Interim Supplementary Procedures came into effect, they expressly applied to all subsequently filed IRPs regardless of when the claims at issue arose. Rule 2 states that the Interim Supplementary Procedures “will apply . . . in all cases submitted to the ICDR in connection with Article 4, Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect.”¹⁰³ No exception is made to the compulsory application of Rule 4. Accordingly, the limitations and repose periods established by Rule 4 must be applied in all IRPs initiated after the Interim Supplementary Procedures came into force, without regard to when the claims arose.

84. But even if Afilias’ claims concerning conduct in 2016—*i.e.*, ICANN’s failure to satisfy its alleged obligation to disqualify NDC in August 2016 and its investigations, first in

¹⁰² *First United Methodist Church of Hyattsville*, 882 F.2d at 866, RLA-50.

¹⁰³ Interim Supplementary Procedures at 2, C-59.

July and then in August-September 2016—were evaluated under the limits in force at the time those claims arose, they would still be barred. At that time, an IRP could not be brought to challenge action or inaction of the ICANN staff. The method of challenging such action or inaction was to bring a Reconsideration Request, which would have been considered by the Board Governance Committee.¹⁰⁴ If the Board had denied the Reconsideration Request, then the Board’s denial could have been challenged in an IRP. A Reconsideration Request was required to be brought within 15 days after the Claimant “concluded, or reasonably should have concluded, that the action would not be taken in a timely manner,”¹⁰⁵ and an IRP was required to be filed within 30 days of the publication of the denial of the Reconsideration Request.¹⁰⁶ This is precisely how the applicants in the *Dot Registry* IRP – represented by Mr. Ali – brought an IRP.¹⁰⁷ However, Afilias never filed a Reconsideration Request in September 2016 (or anytime thereafter) asserting that ICANN violated its Articles or Bylaws or any other established policy or process by not disqualifying NDC’s .WEB application.

85. Finally, if Afilias wished to challenge Rule 4 of the Interim Supplementary Procedures, it could have brought such a claim in this IRP, as it has done with Rule 7. Afilias chose not to do so. Indeed, Afilias did not raise any complaint regarding Rule 4 in its Amended IRP Request or at any time prior to the Hearing. Accordingly, Afilias has waived any challenge to the validity and application of Rule 4.¹⁰⁸

¹⁰⁴ Hearing Tr. at 742:10-23; 769:9-770:16 (Willett).

¹⁰⁵ ICANN Bylaws (as amended 11 February 2016), Art. IV, § 2.5(c).

¹⁰⁶ *Id.*, Art. IV, § 3.3 .

¹⁰⁷ *See generally*, CA-4.

¹⁰⁸ Footnote 3 of the Interim Supplementary Procedures states that, if the time for filing adopted in the final Supplementary Procedures is more permissive than the Interim Supplementary Procedures, then ICANN “will include transition language that provides potential claimants the benefit of that additional time[.]” Interim Supplementary Procedures at 5 n.3, C-59. This footnote is not relevant in this IRP because final Supplementary

III. ICANN WAS NOT REQUIRED TO DISQUALIFY NDC BASED ON ICANN'S CORE VALUES REGARDING COMPETITION OR NDC'S ALLEGED VIOLATIONS OF THE GUIDEBOOK AND AUCTION RULES.

86. A central tenet of Afilias' claims leading up to the Hearing was that ICANN's Core Values regarding competition mandated that ICANN block Verisign's potential operation of .WEB, allegedly "the most promising new gTLD."¹⁰⁹ This claim formed the cornerstone of Afilias' narrative, which asserted not just that NDC and Verisign engaged in a series of highly technical violations of the Guidebook and Auction Rules, but that these alleged violations were done for the nefarious purpose of preserving Verisign's alleged monopoly and thus threatened the purported *raison d'etre* of ICANN's existence. Afilias, however, has essentially abandoned its competition claim.

87. Afilias' opening presentation made no mention of its competition claim or the evidence Afilias would present regarding that claim. Likewise, Afilias chose not to cross-examine Mr. Kneuer, whose expert report demonstrated that ICANN does not have the mandate, authority, expertise or resources to act as a competition regulator. While Afilias did cross-examine Ms. Burr, that examination focused on Ms. Burr's experiences as a Board member, ICANN's Accountability Mechanisms, and ICANN's Bylaws; Afilias asked virtually no

Procedures have not been completed or adopted, and no determination has been made as to whether the final Supplementary Procedures will provide potential claimants with additional time.

¹⁰⁹ Afilias' Reply Memorial ¶ 130 ("Worse still, ICANN's decision to ignore NDC's willful process violations would allow .WEB, the most promising new gTLD, to fall under the control of the entity that controls .COM. ICANN's decision to exercise its discretion to benefit Verisign is a complete perversion of ICANN's Bylaws, the Board's stated intention for adopting the New gTLD Program, and the entire purpose of the Program itself."), *id.* ¶ 11 ("ICANN's exercise of any discretion it has to remedy NDC's breaches must be consistent with ICANN's mandate to promote competition."), *id.* ¶ 124 ("Any exercise of ICANN's discretion that would result in Verisign controlling the .WEB registry is wholly inconsistent with ICANN's affirmative mandate to promote competition."); Amended IRP Request ¶ 5 ("Furthermore, by failing to implement faithfully the New gTLD Program Rules and thereby enabling VeriSign eventually to acquire the .WEB gTLD, ICANN has eviscerated one of the central pillars of the New gTLD Program and one of ICANN's founding principles: to introduce and promote competition in the Internet namespace in order to break VeriSign's monopoly."), *id.* ¶ 83 ("By violating its Commitments and Core Values in its Bylaws, thereby enabling VeriSign to gain control over .WEB, ICANN has all but destroyed the last best chance to create a truly competitive environment within the DNS—*i.e.*, one of the principal purposes of the New gTLD Program, and indeed, of ICANN's existence.").

questions about the conclusions in her witness statement that ICANN is not permitted to act as competition regulator and does not have the authority or expertise to block potentially anticompetitive transactions the way a government regulator would. And, finally, Afilias also chose not to cross-examine Dr. Carlton, ICANN's economic expert, or Dr. Murphy, Verisign's economic expert, both of whom issued unrebutted expert reports that included empirical analyses concluding that .WEB is not the competitive juggernaut Afilias made it out to be. In other words, Afilias did not pursue its competition claim at the Hearing and failed to address, much less rebut, the testimony and the evidence establishing that ICANN is not empowered or equipped to act as a competition regulator or that Verisign's potential operation of .WEB is not a competitive threat.

88. The Panel is thus left with the uncontroverted conclusion that ICANN was never under any mandated duty to disqualify NDC because of competitive issues associated with the possibility that Verisign might one day operate .WEB. And to the extent any such competition concern lingered, it was allayed by DOJ's year-long investigation and ultimate decision not to take action to block Verisign from operating .WEB.

89. Also left unrebutted by Afilias at the Hearing is the principle that the unambiguous provisions of the Guidebook and Auction Rules vest in ICANN substantial discretion to determine whether an applicant has violated the terms of either and, if so, what action to take. Indeed, Afilias did not examine a single ICANN witness regarding the Guidebook and Auction Rules provisions that bestow this discretion on ICANN, the scope of ICANN's discretion, the manner in which ICANN exercised this discretion or the policy reasons behind this discretion.

90. Moreover, the testimony at the hearing established that there is a good-faith and

fundamental dispute between *Amici* and Afilias about whether the DAA violates the Guidebook or Auction Rules, meaning that reasonable minds could differ on whether NDC is in breach of either and, if so, whether disqualification is the appropriate remedy. Accordingly, Afilias' additional argument that ICANN can only exercise its discretion reasonably by disqualifying NDC must be rejected.

91. ICANN was never under a duty – let alone an immediate, absolute duty – to disqualify NDC because of NDC's alleged Guidebook and Auction Rules violations.

A. The Unrebutted Evidence Confirms That ICANN's Core Values Regarding Competition Did Not Require ICANN to Disqualify NDC.

92. To succeed on its competition claim, Afilias needed to establish two fundamental elements. First, Afilias had to prove that ICANN's Core Values regarding competition require ICANN to regulate the DNS to halt any anticompetitive conduct or transaction. Second, Afilias had to prove that .WEB is so competitively unique that Verisign's potential operation of .WEB would somehow be anticompetitive and thereby require ICANN to block any transfer of .WEB to Verisign.¹¹⁰ Afilias failed on both fronts.

1. ICANN does not have the mandate, authority, expertise or resources to act as a competition regulator of the DNS.

93. Afilias' assertion that ICANN's Core Values regarding competition require ICANN to block Verisign's possible operation of .WEB has been upended by testimony from witnesses involved in ICANN's creation and operation, ICANN's foundational documents and Bylaws, and Afilias' own statements. As Ms. Burr and Mr. Kneuer both explained, ICANN

¹¹⁰ As ICANN pointed out in its Rejoinder, another fundamental flaw in Afilias' competition claim is that it is not ripe for evaluation by this Panel. To the extent that Afilias is correct and ICANN has a duty to act like a competition regulator, that duty has not yet been triggered because NDC has not yet sought approval from ICANN to transfer .WEB to Verisign.

obtained all of its authority through an express transfer of power from the United States government.¹¹¹ That transfer did not give ICANN the power to act as a competition regulator, for good reason.¹¹² According to Ms. Burr, who was involved in ICANN’s creation when she was with the U.S. government,¹¹³ “[w]hile this express transfer included the powers and authority necessary to oversee the secure and stable operation of the Internet’s DNS, the transfer did not include the power, authority, or expertise to act as a competition regulator by challenging or policing transactions and conduct that could be deemed anticompetitive. That power and authority remains with the relevant government authorities.”¹¹⁴ Mr. Disspain agreed with this explanation in his Witness Statement.¹¹⁵ Ms. Burr confirmed these points in her testimony during the hearing: “ICANN is not a regulator, and ICANN does not have the competition law competence, whether it is the U.S. or otherwise.”¹¹⁶

94. According to Mr. Kneuer, who was responsible for overseeing the agreements between the U.S. government, ICANN and Verisign when he was with the Department of Commerce,¹¹⁷ the U.S. government “did not delegate to ICANN responsibility for policing or regulating competition in the domain name marketplace. That was not ICANN’s mission and it

¹¹¹ Burr Witness Stmt. ¶ 18 (“When it was first created, ICANN obtained its authority through a series of agreements with NTIA, under which NTIA empowered ICANN to exercise certain authority over the DNS.”), *id.* ¶ 25 (“Finally, ICANN was created through an express transfer of powers and authority from the United States government.”); Kneuer Expert Report ¶ 29 (“ICANN is not, and was never intended to be, an economic or competition regulator and has neither the expertise or resources to perform such functions.”), *id.* ¶ 34 (“ICANN was not intended, and has never served, as an economic regulator, as Afilias claims. ICANN lacks the necessary congressional authorization, expertise or resources for such a role.”)

¹¹² *Id.*

¹¹³ Burr Witness Stmt. ¶¶ 4-5.

¹¹⁴ *Id.* ¶ 25.

¹¹⁵ Disspain Witness Stmt. ¶ 14 (“ICANN is not a regulator.”).

¹¹⁶ Hearing Tr. at 350:6-8.

¹¹⁷ Kneuer Expert Report ¶ 2.

lacked the expertise and resources necessary to fulfill such a regulatory function.”¹¹⁸

95. This testimony is fully consistent with the text of ICANN’s Bylaws. For instance, the Bylaws mandate that ICANN “shall not regulate (i.e., impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide. . . . For the avoidance of doubt, **ICANN does not hold any governmentally authorized regulatory authority.**”¹¹⁹ Likewise, ICANN’s Bylaws are clear that ICANN “shall not act outside its Mission,”¹²⁰ which is limited to ensuring “the stable and secure operation of the Internet’s unique identifier systems.”¹²¹ Moreover, the text of the Core Values regarding competition confirms that ICANN’s mandate with respect to competition is narrow in that ICANN should “depend[] on market mechanisms,” “[w]here feasible and appropriate” and “where practicable.”¹²² ICANN’s Commitment regarding competition is similarly narrow: It states that ICANN will carry out its activities “through open and transparent processes that enable competition and open entry into Internet-related markets,”¹²³ not that ICANN will act as a competition regulator.

96. On this point, Ms. Burr explained in her testimony that:

ICANN’s mission is enumerated, not exemplary. So if ICANN doesn’t have the authority, it is not articulated in here, ICANN doesn’t have the authority to do it. And ICANN shall not regulate in certain circumstances, and it specifically says [in the Bylaws] that for the avoidance of doubt, ICANN does not hold any governmentally-authorized regulatory authority. ICANN’s role is policy -- coordination of policy development and implementation.¹²⁴

¹¹⁸ *Id.* ¶ 18.

¹¹⁹ Bylaws, Art 1, §§ 1.1(a), (b), (c); 1.2(b)(iii) (emphasis added); Burr Witness Stmt. ¶ 25.

¹²⁰ *Id.*, Art 1, § 1.1(b).

¹²¹ *Id.*, Art 1, § 1.1(a).

¹²² *Id.*, Art 1, §§ 1.2(b)(iii), (iv).

¹²³ *Id.*, Art 1, § 1.2(a).

¹²⁴ Hearing Tr. at 386:16-25.

97. The Bylaws are fully consistent with ICANN’s foundational documents, such as the White Paper, created in 1997. The White Paper was the U.S. Government’s “policy statement with respect to the process to transition coordination management of the Domain Name System out of the government into the global private sector.”¹²⁵ The White Paper emphasized that, with respect to competition in the DNS, ICANN should rely on market mechanisms and leave regulation to the regulators. The White Paper is the source for the Bylaws’ direction that ICANN should rely on market mechanisms to promote competition, stating “[w]here possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction.”¹²⁶ At the same time, the White Paper emphasized that private management of the DNS would not supplant existing legal regimes applicable to the Internet, including antitrust regulation: “[T]his policy is not intended to displace other legal regimes (international law, *competition law*, tax law and principles of international taxation, intellectual property law, etc.) that may already apply.”¹²⁷ Notably, because the White Paper envisioned ICANN acting in the technical role of coordinating the DNS, rather than a regulatory role, the White Paper affirmatively rejected the suggestion that ICANN should be granted the type of antitrust immunity that governments may enjoy.¹²⁸

98. Prior to this IRP, Afilias took the exact same view that ICANN lacked the authority and expertise to act as a competition regulator. In 2006, Afilias and several other registry operators posted a public statement to an ICANN forum regarding community objections

¹²⁵ *Id.* at 395:24-397:12.

¹²⁶ Burr Witness Stmt., Ex. A, at 18; Burr Witness Stmt. ¶ 29; Kneuer Expert Report ¶ 16.

¹²⁷ Burr Witness Stmt., Ex. A, at 7; Burr Witness Stmt. ¶ 29; Kneuer Expert Report ¶ 16.

¹²⁸ Burr Witness Stmt., Ex. A, at 14; Burr Witness Stmt. ¶ 29; Kneuer Expert Report ¶ 16.

to the amended .COM registry agreement.¹²⁹ On ICANN’s general mission, Afilias stated that:

ICANN was conceived from the beginning as an organization with a limited charter. This understanding is reflected in ICANN’s by-laws, which contemplate policy development only on issues within ICANN’s mission statement. As specifically set forth in the ICANN by-laws, for example, only mission-related issues are properly the subject of a [policy development process].¹³⁰

With respect to ICANN’s role in promoting competition, Afilias asserted the view that:

While ICANN’s mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. ***Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.*** Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.¹³¹

99. At the Hearing and in its briefs, Afilias completely ignored its previous statements regarding ICANN’s limited mandate and its role as an administrator, rather than a regulator, of the DNS. But there is no question that Afilias’ views on these issues – before this IRP – are fully consistent with the testimony of Ms. Burr, Mr. Disspain and Mr. Kneuer, the text of the Bylaws and ICANN’s foundational documents.

100. Afilias may argue that the 2008 letter from the DOJ’s Deborah Garza to NTIA regarding the Program is somehow relevant to whether ICANN has a competition regulation role. It is not, the letter is a red herring. Ms. Garza’s letter was written as she was leaving government service “in 2008, at the very beginning of the new gTLD process, based on the very first applicant guidebook.”¹³² Moreover, as Ms. Burr explained, the letter was “largely about trademark concerns and the implications for consumers and trademark holders through the

¹²⁹ R-21 at 1.

¹³⁰ *Id.* at 2 (emphasis in original).

¹³¹ *Id.* at 8 (emphasis added).

¹³² Hearing Tr. at 376:20-377:25 (Burr), 361:20-362:12 (Burr) (the letter contained “the Justice Department’s observations regarding the very earliest version of the policy.”).

introduction of new top-level domains.”¹³³ And as Ms. Burr testified “before the new gTLD Program launched, there were any number of steps taken to address” the trademark issue, “such as the Trademark Clearinghouse,” and “ICANN went through eight more versions of the Applicant Guidebook, a lot of policy development and practice around protecting consumers and trademark holders.”¹³⁴ Ms. Burr also confirmed that ICANN commissioned a number of economic studies before launching the Program to evaluate some of the issues set forth in Ms. Garza’s 2008 letter.¹³⁵ The letter says nothing about how ICANN complies with its Core Values regarding competition.

101. In fact, ICANN complies with its Core Values regarding competition, as Ms. Burr explained in her witness statement and at the Hearing, not by taking affirmative actions to block potentially anticompetitive conduct and transactions,¹³⁶ but by “carrying out its DNS security mission . . . in a way that creates opportunities for competition and innovation,” a prime example of which is the New gTLD Program.¹³⁷ Or, as further described by Ms. Burr at the Hearing:

¹³³ *Id.* at 366:11-367:14 (Burr), 371:12-372:23 (“To me this letter is really about pressures on trademark owners who will feel compelled to register in new gTLDs and that ICANN should analyze that issue, the trademark issue, and proceed cautiously in authorizing new gTLDs, attempting to assess both the likely costs and benefits of any new gTLD. To me this letter is about is -- it’s possible that new top-level domain operators will be able to impose costs on trademark owners who feel compelled to protect their marks, and you need to do this analysis before you proceed with new gTLDs.”).

¹³⁴ *Id.* at 367:8-11 (Burr), 381:3-25 (Burr).

¹³⁵ *Id.* at 395:10-23 (Burr).

¹³⁶ *Id.* at 397:16-398:9 (“ICANN’s obligation with respect to competition is to create a table in which -- and to coordinate the development of policy under which competition can emerge. But I am not aware of ICANN blocking something . . . There’s a lot we don’t know about these markets, and the view always was that competition law and competition authorities would provide a check on the behavior of the organization and the players that were valuable.”); Burr Witness Stmt. ¶ 30 (“Additionally, ICANN’s Core Value regarding competition does not require, or even suggest, that ICANN take affirmative actions to block potentially anticompetitive transactions or conduct the way a government regulator would.”), *id.* ¶ 32 (“No policy, precedent, or authority permits ICANN, based on competition concerns, to block Verisign from acquiring the rights to operate .WEB or to second-guess the judgment of the DOJ – the ultimate competition regulator in the United States – in determining not to act following its own expert and thorough investigation.”).

¹³⁷ *Id.* at 347:1-12, 374:6-25 (“I would read this also in the context of other provisions of ICANN’s bylaws that require [ICANN] to rely on market mechanisms in the same -- you just can’t take this out of -- I mean, yes, foster competition. Does that mean that ICANN should act like a regulator? No. But it should make a choice to allow

“ICANN’s role is setting a table where competition can take place.”¹³⁸ Mr. Disspain agreed with this explanation.¹³⁹ Ms. Burr also explained that, when faced with potential competition issues in the DNS, ICANN “reserve[s] the right to refer things to appropriate antitrust competition authority.”¹⁴⁰ Mr. Kneuer’s un rebutted testimony on these same points similarly confirms that ICANN is an administrator whose mandate “is to allow an environment in which competition can take place,”¹⁴¹ not a competition regulator.

2. The un rebutted economic evidence establishes that .WEB will not be competitively unique such that Verisign’s operation of .WEB would be anticompetitive.

102. A separate and independent flaw in Afilias’ competition claim is that – even if ICANN had a mandate to block potentially anticompetitive activity – Afilias failed to establish that .WEB is so competitively unique that it would be anticompetitive for Verisign to operate it.

103. The only support Afilias has offered for its claim that .WEB is competitively unique are the reports of Mr. Zittrain and Dr. Sadowsky.¹⁴² The conclusions they reach,

competitive forces to go out and battle it out and introduce innovation.”), *id.* at 375:1-16 (“But basically this is consistent with my view that in all cases, the point is to allow an environment in which competition can take place.”); Burr Witness Stmt. ¶ 31 (“Taken together, the provisions in ICANN’s Bylaws that address competition require ICANN to use the bottom-up, multistakeholder processes to enact policies – such as the community-developed New gTLD Program – that enable market-driven competition “[w]here feasible and appropriate.”).

¹³⁸ Hearing Tr. at 349:6-350:8.

¹³⁹ Disspain Witness Stmt. ¶ 14.

¹⁴⁰ Hearing Tr. at 357:11-359:2; Burr Witness Stmt. ¶ 23 (“A final example of how ICANN has addressed potential competition concerns is ICANN’s occasional referral of competition issues to relevant competition regulators, such as the United States Department of Justice, Antitrust Division (“DOJ”).”), *id.* ¶ 24 (“While these types of referrals to competition regulators have been relatively rare, this is how ICANN has dealt with potentially anticompetitive situations involving the DNS.”), *id.* ¶ 31 (“Furthermore, ICANN appropriately defers to the authority and expertise of relevant government regulators on questions about alleged anticompetitive conduct in the DNS, as I note above.”); Burr Witness Stmt., Ex. B, at 3.

¹⁴¹ Hearing Tr. at 375:1-16.

¹⁴² Amended IRP Request ¶ 26 (“As set out in greater detail in Dr. George Sadowsky’s Expert Report, .WEB is a unique gTLD because of properties inherent in its name, and it is widely viewed as the one potential new gTLD with a sufficiently broad and global appeal to compete with VeriSign’s .COM.”); Response to *Amici Curiae Briefs* ¶ 200 (“the *Amici* (and ICANN) dismiss .WEB as “just another gTLD,” suggesting that adding .WEB to Verisign’s stable would not impact competition. As explained by Drs. George Sadowsky and Jonathan Zittrain, there are compelling

however, are not based on any empirical analysis of competition among TLDs, domain name registrations, domain name pricing or any other scientifically valid method. Instead, their conclusions are based on their own subjective views and cherry-picked anecdotes. For example, Mr. Zittrain – who is not an economist – claims that “.WEB is the strongest potential competitor of all new gTLDs” because “.WEB has a unique association with the Internet.”¹⁴³ Likewise, Dr. Sadowsky – who has an economics degree, but is not a practicing economist – claims that “the only new domain that is likely to compete strongly with .com is .web, due to the properties inherent in its name.”¹⁴⁴ Mr. Zittrain and Dr. Sadowsky also base their conclusions on speculative statements made by various .WEB applicants and others about the success they envisioned for .WEB.¹⁴⁵ And Dr. Sadowsky draws the conclusion that the “magnitude of the winning bid for .web provides strong evidence that Verisign regarded it as a significant competitive threat if [it] were controlled by another registry operator.”¹⁴⁶

104. These conclusions were exposed as wholly unreliable in the unchallenged expert reports of Dr. Carlton and Dr. Murphy, which provided independent and scientifically valid analyses that contradict Messrs. Zittrain’s and Sadowsky’s opinions. Both Dr. Carlton and Dr. Murphy performed their assignments as economists should – by evaluating empirical data to address the question of whether .WEB will be a unique, competitive force against .COM. And both answered this economic question with a resounding “no” – the economic evidence establishes that .WEB, even if successful, will not create meaningful competition for .COM

reasons to believe why this is not true.”). Afiliat’s Reply made no argument and provided no evidence as to why .WEB is competitively unique.

¹⁴³ Zittrain Expert Report ¶ 46.

¹⁴⁴ Sadowsky Expert Report ¶ 39.

¹⁴⁵ Zittrain Expert Report ¶¶ 47, 49; Sadowsky Expert Report ¶¶ 43-44.

¹⁴⁶ Sadowsky Expert Report ¶ 46.

beyond the competition it already faces from more than a thousand existing TLDs, as well as other competitors, such as social media and search-based navigation.¹⁴⁷

(i) The economic evidence establishes that .WEB will not exert a unique competitive constraint on .COM based on its name.

105. As to the claim that .WEB will be successful because of an apparent association with the Internet, both Dr. Carlton and Dr. Murphy explain that “the available economic evidence demonstrates that the word ‘web’ is unlikely to convey any particular competitive advantage.”¹⁴⁸ To reach this conclusion, Dr. Carlton and Dr. Murphy evaluated data on domain name registrations in various TLDs and observed that other new gTLDs that are generic and evocative of the Internet, such as .SITE, .ONLINE and .WEBSITE “have not had a meaningful competitive impact on .COM’s pricing or share of domain registrations.”¹⁴⁹ In fact, according to the data, “[w]hile .ONLINE, .SITE and .WEBSITE are among the new gTLDs with the most registered domain names, they collectively account for just 2.5 million registrations,” which is *less than 2%* of the domain names registered in .COM.¹⁵⁰

106. In addition, Dr. Murphy observed in the registration data that “[m]any of the most successful new gTLDs – including .top, .xyz, .loan, .club, .vip, .shop, .work, and .ltd – have no obvious association with the Internet.”¹⁵¹ In fact, Dr. Murphy observed in the data that “of the largest ten new gTLDs as of the end of 2018, only two – .online and .site – were ‘Internet sounding,’ and they ranked only number five and six in terms of domain base. Thus, eight of the top ten new gTLDs were NOT ‘Internet sounding.’”¹⁵²

¹⁴⁷ Murphy Expert Report ¶¶ 31-34.

¹⁴⁸ Murphy Expert Report ¶ 40; Carlton Expert Report ¶ 36.

¹⁴⁹ Carlton Expert Report ¶¶ 36-37; Murphy Expert Report ¶¶ 40-41.

¹⁵⁰ Carlton Expert Report ¶ 37; Murphy Expert Report ¶ 41.

¹⁵¹ Murphy Expert Report ¶ 41.

¹⁵² *Id.*

Table 4: Domain Base in the Largest New gTLDs (Dec. 31, 2018)¹⁵³

TLD	Domain Base	Launch Date (General Availability)
.top	3,857,410	Nov. 2014
.xyz	2,268,847	June 2014
.loan	2,087,415	Aug. 2015
.club	1,613,435	May 2015
.online	1,114,252	Aug. 2015
.site	944,419	July 2015
.vip	856,302	May 2016
.shop	637,941	Sept. 2016
.ltd	622,587	June 2016
.work	520,229	Feb. 2015

107. Dr. Murphy confirmed that the data bore out the same trends in 2020. “As of April 2020, .site and .online were still only two of the top ten new gTLDs with ‘internet sounding’ names. The other new gTLDs in the top ten are .icu, .xyz, .vip, .wang, .club, .shop, and .live.”¹⁵⁴ If the most-popular new gTLDs are *.ICU*, *.XYZ* and *.VIP*, which have no association with the Internet, there is no basis to conclude that a new gTLD that has an association with the Internet will have some competitive advantage.

108. Accordingly, Drs. Carlton and Murphy have demonstrated, through empirical analysis, that Messrs. Zittrain and Sadowsky’s hunch that .WEB will be the crown jewel of new gTLDs because of its connection to the Internet is unsupported by the data. Thus, “[t]here is no economic basis for the claim that the potential association of the term ‘web’ with the Internet places the .web TLD in a unique position to compete for registrations or that this potential association provides any significant competitive advantage to .web whatsoever.”¹⁵⁵

¹⁵³ *Id.* at Table 4.

¹⁵⁴ *Id.* ¶ 41 n.33.

¹⁵⁵ Murphy Expert Report ¶ 3(c). Dr. Murphy further concludes that the economic evidence demonstrates that “web” is not uniquely associated with the Internet. *Id.* ¶¶ 45-48.

(ii) Speculative statements by .WEB applicants and others regarding .WEB are not reliable and are contradicted by the economic evidence.

109. As to Messrs. Zittrain and Sadowsky's reliance on statements made by .WEB applicants and others regarding .WEB's competitive potential, these statements amount to nothing more than hopeful speculation and are contradicted by existing economic evidence.¹⁵⁶ Dr. Carlton points out in his expert report that a number of applicants for other new gTLDs also made statements in their applications characterizing them as strong competitors to .COM. With respect to .ONLINE, for example, an applicant claimed that ".online is essentially a better alternative to existing generics such as .com or .net."¹⁵⁷ Likewise, an applicant for .SITE asserted that ".SITE is a perfect fit among today's top TLDs and is a viable alternative to current generic TLDs."¹⁵⁸ And an applicant for .WEBSITE claimed that "[t]he .Website registry will be a new direct and formidable competitor to the current group of global generic TLDs." But according to Dr. Carlton's analysis, these new gTLDs "have not had a major competitive impact on .COM."¹⁵⁹ Puffery from applicants for new gTLDs is not valid economic evidence.

110. The stock Mr. Zittrain and Dr. Sadowsky put in news articles and other industry statements about the .WEB's potential is similarly misplaced. Neither Mr. Zittrain nor Dr. Sadowsky even attempt to show that these types of statements come from reliable or competent sources. Nor do they account for the fact that there have been similar, mistaken claims about

¹⁵⁶ Mr. Zittrain also claims that .WEB is unique because "[i]n 2012, .WEB again attracted the most applications ..." (Zittrain Expert Report ¶ 49). This is incorrect. There were seven applications for .WEB, which is tied for the 12th most. The TLDs that attracted the most applications were .APP (with 13 applications), .HOME (with 11 applications), .INC (with 11 applications) and .ART (with 10 applications). Carlton Expert Report ¶ 36.

¹⁵⁷ Carlton Expert Report ¶ 36.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* ¶ 37.

other new gTLDs.¹⁶⁰ They also ignore the fact that subjective views expressed in news articles and industry sources on the likely success of .WEB vary significantly, as many have stated the belief that .WEB will not be competitively significant.¹⁶¹

(iii) Dr. Sadowsky misinterprets the .WEB auction results.

111. Dr. Sadowsky's final assertion is that the .WEB winning bid of \$135 million is indicative of the "competitive significance of .WEB."¹⁶² Dr. Sadowsky, however, did not conduct any economic analysis about what this auction value actually implies about .WEB's likely competitive impact. But Dr. Carlton and Dr. Murphy did this economic analysis, and each independently concluded that the \$135 million auction price actually suggests that .WEB will *not* be a particularly significant competitor.¹⁶³

112. As Dr. Carlton and Dr. Murphy both point out in their expert reports, there have been other transactions in which similar amounts of money were spent to operate TLDs that had not established that they could reduce .COM's share. For example, Neustar acquired the company that operated the .CO ccTLD for \$118.1 million in April 2014. At the time, .CO had roughly 1.6 million domain name registrations, or just a 0.6% share of all domain name registrations.¹⁶⁴ Neustar also acquired the operator of the .AU ccTLD for approximately \$110.6 million in July 2015. At the time, .AU had approximately three million domain name registrations, or only a 1% share of all domain name registrations.¹⁶⁵ And Afilias purchased

¹⁶⁰ *Id.* ¶ 40.

¹⁶¹ Murphy Expert Report ¶ 38 n.32; KM-26 ("Web is a good extension but the future of New gTLDs does not depend on .web and .web is not going to be a game changer.... The New gTLD program is about more options and better left.right combinations. I would prefer credit.cards over creditcards.web any day of the year."); Carlton Expert Report ¶ 41.

¹⁶² Sadowsky Expert Report ¶¶ 42, 45-47.

¹⁶³ Carlton Expert Report ¶¶ 42-45; Murphy Expert Report ¶¶ 39-64.

¹⁶⁴ Murphy Expert Report ¶ 60; Carlton Expert Report ¶ 43.

¹⁶⁵ Murphy Expert Report ¶ 61.

.IO's operator for \$70 million in 2017. At the time, .IO had approximately 270,000 domain name registrations, or less than .2 % of all domain name registrations.¹⁶⁶

113. If acquisition cost is indicative of a TLD's competitive importance – as Dr. Sadowsky claims in his report – then the higher combined value of .CO, .AU and .IO (approximately \$298.7 million) would imply that they are collectively more than twice as important as .WEB despite accounting for less than 1% of all registered domain names.¹⁶⁷ Accordingly, if the .WEB winning bid suggests anything it is that .WEB is likely to garner less than 1% market share when it is launched, hardly a strong competitive presence.

114. The .WEB bid price is also lower than the cumulative purchase price of other new gTLDs. As described by Dr. Carlton, ICANN reported that new gTLD applicants spent a total of \$294.6 million in new gTLD application fees and paid another \$240.6 million for winning public auctions (including the .WEB auction).¹⁶⁸ Many more millions were spent in privately-resolved contention sets with one publicly-traded registry operator alone receiving over \$50 million from losing private auctions.¹⁶⁹ The cumulative purchase price of other new gTLDs is thus much larger than the individual price paid for .WEB. Hence, if auction money and fees paid are indicators of competitive might, as Dr. Sadowsky suggests, then .WEB is much less competitively important than all of the other gTLDs combined, which certainly have increased

¹⁶⁶ Carlton Expert Report ¶ 43; Murphy Expert Report ¶ 63. To the extent that Afilias' \$70 million valuation of .IO was based on the assumption that .IO would grow its share, that further undermines Afilias' claim that .WEB is a uniquely significant competitor to .COM. As Dr. Murphy has explained, .IO is a ccTLD for the British Indian Ocean Territory that Afilias has marketed globally based on "I/O" being an abbreviation in technology circles for "input/output." Murphy Expert Report ¶ 64. "If such an insignificant TLD is worth \$70 million, then that suggests there are many other TLDs likely worth as much or more than \$70 million. That further undermines Afilias's argument that .web being worth \$135 million means .web is a uniquely significant competitor to .com." *Id.*

¹⁶⁷ Carlton Expert Report ¶ 43.

¹⁶⁸ *Id.* ¶ 44.

¹⁶⁹ *Id.*

competition, but in fact have not had a major impact on .COM's share of total registrations.¹⁷⁰

115. Finally, Dr. Murphy performed an NPV analysis to evaluate the implications of the \$135 million winning bid for the likely competitive significance of .WEB. NPV is a standard tool used to discount the value of a series of future profits to a net present value using a discount rate.¹⁷¹ NPV analysis is a form of intrinsic valuation and is used extensively across economics, finance and accounting for determining the value of a business, investment or new venture.

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117. This is yet another indicator – based on data and empirical analysis, rather than subjective speculation – that if the \$135 million winning bid is indicative of competitive significance, it indicates that .WEB is not likely to be a unique competitive presence in the DNS.

¹⁷⁰ *Id.*; Murphy Expert Report ¶ 63; Sadowsky Expert Report ¶ 17 (concluding that the introduction of approximately 1,500 new gTLDs have failed to “[show] the degree of popularity needed to compete with .com or .net in a meaningful way.”).

¹⁷¹ Murphy Expert Report ¶ 52.

¹⁷² *Id.* ¶ 53.

¹⁷³ *Id.* ¶ 54.

¹⁷⁴ *Id.* ¶ 57 n.53 (“[A]s of December 2018, the largest two new gTLDs, .top and .xyz, have domain bases of 3.9 million and 2.3 million respectively, or about 1.1% and 0.6% of the overall market.”).

(iv) The independent economic analyses of Dr. Carlton and Dr. Murphy confirm that .WEB will not be a unique competitive check on .COM.

118. In addition to evaluating the conclusions of Mr. Zittrain and Dr. Sadwosky, Dr. Carlton and Dr. Murphy performed their own, independent economic analyses and both concluded that .WEB's entry into the DNS will not create meaningful competition for .COM. They also each independently concluded that there is evidence that Verisign may be the most efficient operator of .WEB. Neither Afilias nor its experts addressed (much less rebutted) these core conclusions from two of the world's most-renowned economists. Moreover, Afilias chose not to challenge these conclusions when it opted not to submit responsive expert reports or cross examine Dr. Carlton or Dr. Murphy.¹⁷⁵

119. As explained by Dr. Carlton, in order to assess the claim that .WEB is competitively unique, "one needs to determine whether competitive pressure from an Afilias-operated .WEB would cause Verisign to reduce its .COM prices or otherwise improve the quality of the .COM offering."¹⁷⁶ Both Dr. Carlton and Dr. Murphy concluded that Verisign is not likely to reduce its prices in response to an Afilias-operated .WEB because the .COM price is already lower than it otherwise would be due to government-mandated price caps, and because the .COM price is far lower than prices charged for other TLDs, including those run by Afilias.

120. Since 2000, the Department of Commerce has imposed a cap on the price Verisign can charge for .COM domain names.¹⁷⁷ Amendment 35 to the Verisign Cooperative

¹⁷⁵ Afilias' counsel claimed in his opening statement that Afilias would not cross examine Dr. Murphy because his conclusions were duplicative of Dr. Carlton, Hearing Tr. at 28:5-9, but Afilias subsequently decided to not cross examine Dr. Carlton either, despite having plenty of time to do so.

¹⁷⁶ Carlton Expert Report ¶ 28; Murphy Expert Report ¶ 35 ("Afilias's core assertion is that if Verisign had not acquired .web, .com's prices would be lower because of the competitive constraint provided by .web.")

¹⁷⁷ Murphy Expert Report ¶ 37.

Agreement with the Department of Commerce sets a maximum price of \$7.85 through 2020.¹⁷⁸ After 2020, the maximum allowable rate increases by 7% per year until 2024 when the current term of the Cooperative Agreement ends.¹⁷⁹ After 2024, the Cooperative Agreement – with the existing price caps – will automatically renew for another six-year term unless the Department of Commerce chooses not to renew the agreement with Verisign.¹⁸⁰

121. The empirical evidence that Dr. Carlton and Dr. Murphy examined “indicates that Verisign has consistently set .COM prices equal to the maximum level allowed under existing price caps.”¹⁸¹ “The fact that Verisign has consistently charged the maximum-allowable price for .COM domain name registrations indicates that regulation is a binding constraint and that Verisign would set a higher price for .COM absent the regulation.”¹⁸² In addition, Dr. Murphy observed that .COM’s “wholesale prices are generally lower than the wholesale prices of both other legacy TLDs and many new gTLDs, again suggesting .com’s price is artificially constrained below competitive levels.”¹⁸³ Dr. Carlton reached the same conclusion.¹⁸⁴

122. These points – that price caps constrain .COM pricing and that the regulated .COM price is low compared to prices charged in other TLDs – both “indicate that Verisign is not likely to reduce its already low, regulated .COM prices in response to an Afilias-operated .WEB.”¹⁸⁵ On this “key economic question,” neither Afilias nor its experts “offer any contrary

¹⁷⁸ Carlton Expert Report ¶ 29 n.41.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Carlton Expert Report ¶ 30; Murphy Expert Report ¶ 35.

¹⁸² Carlton Expert Report ¶ 30; Murphy Expert Report ¶ 35 (“Verisign has consistently set the wholesale price for .com at the price cap, suggesting that .com’s price is artificially constrained below the competitive levels.”).

¹⁸³ Murphy Expert Report ¶¶ 35-36.

¹⁸⁴ Carlton Expert Report ¶ 31 (“Also of relevance is the fact that the maximum-allowable .COM price is lower than the price typically charged to registrars for domain name registrations in other TLDs.”).

¹⁸⁵ Carlton Expert Report ¶ 32; Murphy Expert Report ¶¶ 35-36.

evidence suggesting that an Afilias-operated .WEB would in fact force .COM's pricing below the regulated rates, even if one accepts their assumption that .WEB is special."¹⁸⁶

123. Likewise, Afilias and its experts ignore the economic evidence identified by Dr. Murphy suggesting that Verisign may be more aggressive and efficient than Afilias in promoting .WEB, an advantage that inures to the benefit of consumers.

124. First, the higher prices Afilias charges in its existing TLDs is evidence of its likely approach with .WEB pricing. "As of April 2020, Afilias charges wholesale prices of \$11.92 for .info, \$12.09 for .pro, \$14.25 for .mobi, and \$10.99 to \$50 for its new gTLDs."¹⁸⁷ If .WEB is as valuable as Afilias has claimed, "it is unlikely that Afilias would charge less for .web than it charges for these other supposedly less valuable TLDs."¹⁸⁸ Second, Verisign has every incentive to aggressively grow .WEB given the name congestion in .COM. "There is a widespread perception that the most attractive names in .com and .net are already taken, and competing TLDs promote their superior name availability," leading to declining growth in .COM and .NET.¹⁸⁹ Thus, Verisign is incentivized to grow .WEB in order "to participate in this new gTLD growth, and to counteract the declining growth that it is experiencing in .com and .net."¹⁹⁰ Indeed, Mr. Livesay confirmed that this was Verisign's intent in entering into the DAA, stating – "And this was an opportunity to grow and sell more domains."¹⁹¹ Third, "Verisign is also an efficient, low-cost operator of TLDs," according to Dr. Murphy.¹⁹² "These advantages will

¹⁸⁶ Carlton Expert Report ¶ 32.

¹⁸⁷ Murphy Expert Report ¶ 69.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* ¶ 74.

¹⁹⁰ *Id.* ¶ 75.

¹⁹¹ Hearing Tr. at 1263:20-1264:11.

¹⁹² Murphy Expert Report ¶ 78.

allow Verisign to procompetitively grow .web more rapidly than another operator could.”¹⁹³

125. In short, the economic evidence analyzed by Dr. Carlton and Dr. Murphy does not show that .WEB is uniquely positioned to become a significant competitor. To the contrary, it shows that .WEB is merely one of many competitors and is highly unlikely to capture a significant portion of domain name registrations or compete meaningfully with .COM.¹⁹⁴

(v) DOJ’s closure of its investigation of Verisign is dispositive of Afilias’ competition claim.

126. To the extent there remains any question about whether Verisign’s possible operation of .WEB may be anticompetitive, and whether ICANN should have taken steps to prevent it, this was answered by the DOJ’s decision not to take any action to block Verisign’s potential operation of .WEB. As explained by Dr. Carlton, who served as Deputy Assistant Attorney General for Economic Analysis for the DOJ’s Antitrust Division, the “Antitrust Division, which has a large staff of Ph.D. economists in addition to attorneys, is one of the world’s leading venues for applying economics to real world questions of competition. The economic issues most often analyzed by the Antitrust Division include the competitive effect of mergers, acquisitions and various alleged restraints of trade.”¹⁹⁵

127. In January 2017, the DOJ launched an investigation of “VeriSign, Inc.’s proposed acquisition of Nu Dot Co LLC’s contractual rights to the .web generic top-level domain.”¹⁹⁶ Verisign, ICANN, and others involved in the DNS, including presumably Afilias, provided the

¹⁹³ *Id.*

¹⁹⁴ Murphy Expert Report ¶ 39; Carlton Expert Report ¶¶ 62-63.

¹⁹⁵ Carlton Expert Report ¶ 59.

¹⁹⁶ AC-31.

DOJ with information and evidence in response to the DOJ's requests.¹⁹⁷ "[T]he focus of the investigation was whether Verisign's operation of .WEB was likely to significantly harm competition through increased prices or reduced quality given Verisign's operation of .COM."¹⁹⁸ The DOJ "has the authority to investigate and challenge mergers, acquisitions and other types of transactions and conduct that significantly harm competition,"¹⁹⁹ and the DOJ "could have taken steps or filed litigation to block Verisign from operating .WEB."²⁰⁰ Yet in January 2018, the DOJ closed its investigation and decided not to take any action to block or otherwise challenge Verisign's possible operation of .WEB.²⁰¹

128. Thus, any competition concerns regarding .WEB were answered by the fact that the preeminent antitrust regulator in the U.S. evaluated the claims, evidence and economics on this issue and determined not to seek to block Verisign from operating .WEB. Not only is this a matter of common sense, but as Dr. Carlton concluded, based on his personal involvement in DOJ investigations, the DOJ's "decision to allow the transaction to proceed indicates to me that the Antitrust Division concluded—likely based on much more information than is available to me, Professor Zittrain or Dr. Sadowsky—that Verisign's operation of .WEB is not likely to harm competition."²⁰²

129. As the evidence at the Hearing confirmed, had ICANN been concerned about competition issues with Verisign operating .WEB, ICANN would have referred the issue to the

¹⁹⁷ Hearing Tr. at 269:22-270:2 (Neustar received a CID); AC-31; Carlton Expert Report ¶ 60 ("I expect that Afilias, and others, would have had the opportunity to raise their competitive concerns about a Verisign-operated .WEB with the Antitrust Division.").

¹⁹⁸ Carlton Expert Report ¶ 60.

¹⁹⁹ *Id.* ¶ 58.

²⁰⁰ *Id.* ¶ 61.

²⁰¹ AC-67.

²⁰² Carlton Expert Report ¶ 61.

DOJ.²⁰³ Inasmuch as the DOJ declined to block Verisign's operation of .WEB, there is nothing further for ICANN to do to prevent Verisign from operating .WEB on competition grounds.

3. ICANN does not share Verisign's stated concern that private resolutions of contention sets involve collusion.

130. The Panel's Question No. 5 asked the parties to "comment on VeriSign's stated concern that private resolution of contention sets may involve collusion, in light of ICANN's stated preference for the private resolution of contention sets." Notwithstanding Verisign's purported concern, ICANN's view is that the type of private resolutions that ICANN envisioned and is aware of (*i.e.*, private auctions) are not collusive.

131. As a general matter, unlawful collusion occurs when competitors agree with one another on the prices they will charge customers, the bids they will submit to customers or the customers they will or will not pursue, all to the detriment of consumers.²⁰⁴ These types of collusive arrangements are unlawful because they always increase prices, reduce output or diminish choice to consumers, who the antitrust laws are primarily aimed at protecting.²⁰⁵

132. While a private resolution of a contention set may be an agreement among competitors, it is not the type of collusive agreement that the antitrust laws prohibit, for several reasons. First, a private resolution does not fit into the type of agreements that courts have said are "inherently anticompetitive" because prices and output to consumers are not contemplated or

²⁰³ Hearing Tr. at 358:1-10.

²⁰⁴ *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, . . . or to divide markets."), RLA-53; *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) ("Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused."), RLA-49; *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) ("price fixing, horizontal output restraints, and market-allocation agreements, are illegal *per se*."), RLA-47.

²⁰⁵ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486, n.10 (1977), RLA-45.

affected by a private resolution.²⁰⁶ Instead, consumers may benefit from private resolution because all disputes among contention set members, which can delay entry of new gTLDs and increase costs to gTLD operators and therefore to consumers, are fully and finally resolved.²⁰⁷

133. Second, given that only one entity can operate a particular gTLD, a contention set must be resolved in order for the gTLD to become available to consumers. As the United States Supreme Court has explained, agreements among competitors do not violate the antitrust laws when they “are essential if the product is to be available at all” or “the integrity of the ‘product’ cannot be preserved except by mutual agreement” among competitors.²⁰⁸ Thus, resolution of a contention set is far different from a scenario in which there is some sort of collusive agreement among entities that are all able to offer a product to consumers in competition with one another.

134. Third, antitrust regulators and private parties have been aware of private resolutions of contention sets since the beginning of the Program, yet they have never moved to block or challenge them under the antitrust, competition or consumer protection laws. Indeed, to the extent DOJ was not previously aware of the concept of private resolutions of contention sets, which is highly unlikely, DOJ was certainly made aware of them in connection with its

²⁰⁶ *Broad. Music, Inc. v. CBS Inc.*, 441 U.S. 1, 19-20 (1979) (only when a “practice facially appears to be one that would always or almost always tend to restrict competition and decrease output” rather than “one designed to ‘increase economic efficiency and render markets more, rather than less, competitive,’” is it considered “per se illegal.”) (Citation omitted), RLA-44; *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (“[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”), RLA-61; *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994) (“To be judged anticompetitive, the agreement must actually or potentially harm consumers.”), RLA-67.

²⁰⁷ Even Mr. Livesay, who claimed to have concerns with private resolutions, noted in his testimony that this is the premise behind ICANN’s preference for private resolutions of contention sets. Hearing Tr. at 1276:14-20 (“I appreciated why ICANN would want the contention set to resolve itself, because at that point in theory all the potential antagonists have agreed, great solution.”).

²⁰⁸ *Nat’l Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85, 101-102 (1984), RLA-59; see also *Nat’l Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 601 (11th Cir. 1986) (interchange fee agreement among competitors was “a necessary element in the creation of efficiency creating integration” and therefore not unlawful), RLA-58.

investigation of the DAA and the .WEB auction.

135. Finally, there is no claim in this IRP that private resolutions of contention sets are collusive, and there is no record evidence about the terms, participants or scope of any particular private resolution. Yet, except for the narrow categories of agreements among direct competitors that are automatically deemed collusive, such as price fixing and output restrictions, any antitrust analysis of whether a particular transaction is collusive requires an in-depth evaluation of “the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.”²⁰⁹ This type of critical analysis cannot be performed on this record or in this IRP, and therefore should not be attempted.

B. ICANN’s Articles And Bylaws Did Not Require ICANN To Automatically Disqualify NDC For The Alleged Guidebook And Auction Rules Violations

136. Afiliás’ remaining claim is that ICANN was required to disqualify NDC based on a series of highly technical alleged violations of the Guidebook and the Auction Rules. In its Amended IRP Request and other pre-hearing briefings, Afiliás contended that Verisign and NDC committed these alleged violations for the purpose of preserving Verisign’s alleged monopoly. Having effectively abandoned its competition claim during the Hearing, Afiliás’ case now boils down to the contention that the letter of the Guidebook and Auction Rules – as Afiliás contends those documents should be read – must be strictly enforced to “require” ICANN to disqualify NDC’s application.

²⁰⁹ *Board of Trade v. United States*, 246 U.S. 231, 238 (1918), RLA-43; *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (“the [fact-finding] weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”), RLA-48; *Nat’l Soc. of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978) (an analysis of whether a restraint is collusive “focuses directly on the challenged restraint’s impact on competitive conditions.”), RLA-60.

137. Specifically, Afilias alleges in its Amended IRP Request that ICANN violated its Bylaws by failing to apply ICANN policies “neutrally, objectively, and fairly” in not automatically disqualifying NDC for its alleged violations of the Guidebook and Auction Rules.²¹⁰ However, other than this conclusory assertion, Afilias has never explained how not disqualifying NDC results in the application of ICANN policies in a way that is non-neutral, non-objective or unfair. In its Reply, Afilias tweaked this claim to argue that “ICANN was required to disqualify NDC’s application and bid in August 2016 when ICANN first learned of NDC’s violations, whether as a matter of automatic disqualification pursuant to the applicable standards or as a matter of the reasonable exercise of ICANN’s discretion pursuant to those same standards.”²¹¹ Once again, however, Afilias does not identify the “applicable standards” or explain how they require ICANN to disqualify NDC, or why ICANN purportedly could reasonably exercise its discretion only by doing so.

138. In any event, Afilias is wrong. The Guidebook and Auction Rules grant ICANN significant discretion to determine whether a breach of their terms has occurred, and if so, the appropriate remedy, and Afilias presented no evidence or argument at the Hearing contesting ICANN’s discretion or the fact that it is limited only by the requirement that it must be exercised “consistently, neutrally, objectively, and fairly[.]”²¹² The testimony at the hearing confirmed that there is a good-faith dispute between the *Amici* and Afilias about whether the DAA violates the Guidebook or Auction Rules. Thus, it is not a foregone conclusion that NDC is or is not in breach. And ICANN’s witnesses confirmed that ICANN has not determined whether the DAA violates the Guidebook or Auction Rules due to the enduring hold on .WEB.

²¹⁰ Amended IRP Request ¶ 78.

²¹¹ Afilias’ Reply Memorial ¶ 20.

²¹² Bylaws, Art. 1, § 1.2(a)(v).

1. ICANN has discretion to determine whether a violation of the Guidebook or Auction Rules has occurred and the appropriate remedy for any such violation.

139. At the Hearing, Afilias made no effort to challenge the fact that the Guidebook and Auction Rules do not require ICANN to automatically disqualify an applicant that breaches their terms. In fact, the very sections of the Guidebook and Auction Rules that Afilias claims to have been breached are explicit in giving ICANN discretion to determine whether their terms have been violated and to determine the appropriate remedy for any violations.

140. For example, Afilias alleges that the Guidebook required ICANN to disqualify NDC for failing to provide ICANN with “identifying information necessary to confirm the identity” of the true applicant – which Afilias contends was Verisign, not NDC – and for failing to notify ICANN of NDC’s “change in circumstances.”²¹³ But the “applicant” for .WEB was NDC—not Verisign—both before and after the DAA, and no testimony suggested otherwise.²¹⁴ And, in any event, Section 1.2 of the Guidebook, which sets forth the information applicants are required to provide ICANN and which Afilias claims NDC violated, states that a “[f]ailure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading *may result* in denial of the application.”²¹⁵

141. Likewise, Afilias alleges that ICANN was required to reject NDC’s application because NDC violated the Guidebook Terms and Conditions by omitting “material information . . . namely that it was obligated to assign .WEB to VeriSign.”²¹⁶ But the term “material information” is not defined anywhere. And, in any event, the Terms and Conditions state that

²¹³ Amended IRP Request ¶ 78 (first and third bullet points).

²¹⁴ Indeed, Afilias’ argument to the contrary is internally inconsistent. Afilias’ contention that NDC violated its obligation to update its application presupposes that NDC remained the applicant for .WEB.

²¹⁵ Guidebook, § 1.2.7 (emphasis added), C-3.

²¹⁶ Amended IRP Request ¶ 78 (second bullet point).

“any material misstatement or misrepresentation (or omission of material information) *may cause* ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant.”²¹⁷ The Terms and Conditions also state elsewhere that ICANN’s “decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely *at ICANN’s discretion*.”²¹⁸

142. Finally, Afiliat alleges that ICANN was required to disqualify NDC because NDC’s bids did not comply with “all aspects of the auction rules.”²¹⁹ The Auction Rules, however, also grant ICANN significant discretion to interpret and enforce the rules and to determine the appropriate remedy in the event of their violation. Specifically, the Auction Rules make clear that “[i]f any dispute or disagreement arises in connection with these Auction Rules, including the interpretation or application of these Auction Rules, or the form, content, validity or time of receipt of any Bid, *ICANN’s decision shall be final and binding*.”²²⁰ And the Bidders Agreement expressly states that an applicant “acknowledges that it *may be subject to a penalty* of up to the full amount of the Deposit and forfeiture of its Applications or termination of its registry agreements for a *serious violation* of the Auction Rules or Bidder Agreement.”²²¹ Thus, there is no question that ICANN has the discretion of determining whether a “serious violation”—or any violation—of the Auction Rules has taken place and, if so, what the appropriate penalty or remedy should be.

143. In sum, the alleged Guidebook and Auction Rules violations that Afiliat levels at NDC do not “require” ICANN to disqualify NDC’s application or reject NDC’s bids, even if

²¹⁷ Guidebook, § 6, Terms and Conditions 1 (emphasis added), C-3.

²¹⁸ *Id.* § 6, Terms and Conditions 3 (emphasis added), C-3.

²¹⁹ Amended IRP Request ¶ 78 (seventh bullet point) (citation omitted).

²²⁰ C-4 ¶ 72.

²²¹ C-5 § 2.10.

ICANN agreed with Afiliás' interpretation of the Guidebook and Auction Rules. Rather, the Guidebook and Auction Rules provide ICANN with the discretion whether to determine if a breach occurred and, if ICANN makes such a determination, to determine the appropriate remedy. There is no basis for the Panel to interfere with this discretion.

2. The reasonable exercise of ICANN's discretion does not require ICANN to disqualify NDC.

144. In what can only be seen as a concession that the Guidebook and Auction Rules vest ICANN with significant discretion to address alleged violations of their terms, Afiliás now argues that ICANN's discretion can only be "reasonably exercised" consistent with ICANN's Articles and Bylaws by disqualifying NDC's application.²²² But Afiliás never explains how any specific provision of the Articles or Bylaws plausibly could compel this result. The Articles and Bylaws do not mandate any particular interpretation or application of the Guidebook and Auction Rules. The Bylaws merely require that ICANN apply its "documented policies" – including the Guidebook and Auction Rules – "consistently, neutrally, objectively and fairly." Yet Afiliás has never even attempted to explain why reading the Auction Rules in the manner advocated for by the *Amici*, or determining that any potential violation may not warrant disqualification, would be inconsistent, non-neutral, non-objective or unfair. Reasonable minds can differ on whether there was a violation of the Guidebook or Auction Rules and, if so, what the penalty should be.

145. The Hearing made clear that Afiliás and the *Amici* have diametrically different interpretations of the Guidebook, Auction Rules and the DAA, and ICANN expects that the closing briefs of the *Amici* and Afiliás will amplify on those differing interpretations. For

²²² Amended IRP Request ¶ 78.

example, Mr. Rasco testified that, despite the DAA, NDC “always maintained the ability to make sure that our application was in compliance with ICANN rules.”²²³ Mr. Livesay agreed with this notion,²²⁴ but Afilias has claimed the opposite.²²⁵ Mr. Rasco testified that “[n]othing in [NDC’s] application changed that would require any kind of disclosure to ICANN” under the Guidebook,²²⁶ and Mr. Livesay expressed the same view,²²⁷ but Afilias disagrees.²²⁸ Mr. Rasco testified to his belief that “NDC remained the bidder and in control” during the .WEB auction in compliance with the Auction Rules,²²⁹ but Afilias has claimed that Verisign was the bidder and was in control.²³⁰ Mr. Rasco testified that the DAA did not transfer NDC’s right in its application to participate in a private auction because NDC had decided unilaterally that it would not,²³¹ but Afilias claims that NDC did give up such a right.²³² In fact, Mr. Rasco testified that NDC “maintained all our rights in the application in .WEB and obviously NDC throughout”²³³ ICANN’s evaluation process, but Afilias takes the opposite position.²³⁴

146. In addition, Mr. Rasco’s witness statement provides specific responses to Afilias’ allegations and describes why he believes the DAA complies with the Guidebook and Auction Rules. For instance, Mr. Rasco claims that the “mission/purpose” portion of NDC’s application merely calls for NDC’s “general vision of new gTLDs in the marketplace and its general strategy

²²³ Hearing Tr. at 813:5-21, 826:6-25.

²²⁴ *Id.* at 1241:5-19, 1244:3-17

²²⁵ Amended IRP Request ¶¶ 63-68

²²⁶ Hearing Tr. at 863:15-864:10, 895:24-898:10

²²⁷ *Id.* at 1148:9-1149:9, 1150:22-1151:8, 1158:16-1159:22.

²²⁸ Amended IRP Request ¶¶ 54-62.

²²⁹ Hearing Tr. at 828:1-829:25, 859:1-8; *see also* Rasco Witness Stmt. ¶ 98.

²³⁰ Amended IRP Request ¶ 73.

²³¹ Hearing Tr. at 833:7-834:22, 855:22-857:10, 868:5-869:24; *see also* Rasco Witness Stmt. ¶ 65.

²³² Amended IRP Request ¶ 65.

²³³ Hearing Tr. at 837:1-15.

²³⁴ Amended IRP Request ¶¶ 63-68.

at the time as to how .WEB might be successfully and productively introduced and used to benefit consumers,”²³⁵ “not binding commitments of future actions.”²³⁶ Mr. Rasco also states that NDC’s mission/purpose statement did not need to be updated in light of the DAA because of the Guidebook’s statement that the mission/purpose statement is not part of the evaluation process,²³⁷ because NDC’s view of how .WEB might benefit consumers did not change “irrespective of who operates .WEB” and because NDC’s stated marketing and other business plans “were not final and were subject to market conditions.”²³⁸ Mr. Rasco further states that the terms of the DAA make clear that “NDC remained the applicant and did not agree to assign anything related to its Application, let alone the Application itself.”²³⁹ Mr. Rasco also contends that the DAA “did not substitute Verisign as the applicant for .WEB and did not change the owners or managers of NDC.”²⁴⁰

147. Mr. Livesay also responds to Afiliat’s allegations in his witness statement. For example, Mr. Livesay states that Redacted - Third Party Designated Confidential Information

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Mr. Livesay concludes that Redacted - Third Party Designated Confidential Information

²⁴² Moreover, Mr. Livesay states that the “Guidebook does not require an applicant to reveal the existence of, sources or amounts of any

²³⁵ Rasco Witness Stmt. ¶ 14.

²³⁶ *Id.* ¶ 15.

²³⁷ *Id.* ¶¶ 16, 18-20.

²³⁸ *Id.* ¶ 16; *see also id.* ¶¶ 58-62

²³⁹ *Id.* ¶¶ 47-50.

²⁴⁰ *Id.* ¶ 52.

²⁴¹ Livesay Witness Stmt. ¶¶ 19, 21-22.

²⁴² *Id.* ¶ 23.

funding for a public or private auction for a new gTLD or other resolution of a contention set.”²⁴³

148. Thus, this is not a situation in which all reasonable minds would agree that the DAA violates the Guidebook and/or the Auction Rules. Accordingly, it is not a foregone conclusion that any reasonable exercise of ICANN’s discretion would lead to the conclusion that the DAA violates the Guidebook and Auction Rules.

149. Nor is it a foregone conclusion that, if NDC is found to be in breach of the Guidebook or Auction Rules, NDC must be disqualified. As set forth above, ICANN has discretion to determine an appropriate remedy for a violation of its rules. There are a range of remedies or penalties – including but not limited to disqualification – that ICANN could employ if it were to find that NDC did violate the Guidebook or the Auction Rules. It is not, as Afilias suggests, simply a choice between disqualifying NDC or condoning the DAA. Selecting the appropriate remedy would involve the balancing of competing interests and policies as well as ICANN’s Commitments and Core Values.²⁴⁴

150. Further, because it has the “ultimate responsibility” for the Program, the ICANN Board has reserved the right to “individually consider” any application to “*determine whether* approval would be in the best interest of the Internet community.”²⁴⁵ In other words, even if ICANN were to conclude that NDC violated the Guidebook or the Auction Rules, ICANN’s Board would still have the discretion to decide whether approval of NDC’s (or any other applicant’s) application is appropriate or not.

²⁴³ *Id.* ¶ 25.

²⁴⁴ See Hearing Tr. at 981:1-7 (Disspain) (“You know, there are two -- without wishing to place any weight on either side in this matter, there are two sides. There are the Afilias side, who are bringing this IRP; and then there are others on the other side who believe that they are entitled to the TLD. So both sides need to be treated fairly by ICANN.”).

²⁴⁵ Guidebook, § 5.1, C-3.

3. ICANN has not determined whether the DAA violated the Guidebook or Auction Rules, but ICANN would be in the best position to do so.

151. Testimony during the Hearing confirmed that ICANN has not taken a position on whether NDC violated the Guidebook or the Auction Rules due to pending Accountability Mechanisms and the DOJ’s investigation.²⁴⁶ Ms. Burr’s and Mr. Disspain’s testimony also explained that ICANN would be best suited to decide this issue because of its far-ranging implications, but also because a unique familiarity with ICANN, the Guidebook and the Program are critically important to making any such decision.

152. For example, Ms. Burr explained: “it was never the intention of the CCWG, in my hearing, that the Panel could prescribe a remedy. And that totally makes sense in the context of ICANN IRPs, because often there are many, many parties who are affected by this. There are a lot of moving parts.”²⁴⁷ Ms. Burr reiterated this point later in her testimony:

[the] Panel, by making a finding that ICANN has violated its articles, ICANN must take -- then take appropriate action to remedy the breach. That is not the same as saying that the Panel has the authority to say what the appropriate action is to remedy the breach. And the reason is there are so many moving parts and parties here, imagine if this Panel said “ICANN violated the bylaws, and you must award this to, you know, X, Y or Z.” There are going to be two or three parties who then have a cause of action. So ICANN must -- ICANN has an obligation to take appropriate action, but the CCWG did not contemplate that the Panel, the IRP Panel would decide what that appropriate action was.²⁴⁸

153. Even if the Panel were to consider the CCWG’s Supplemental Final Proposal in construing the scope of its authority as Afilias has suggested (*see supra* ¶¶ 37-45), the Supplemental Final Proposal is fully consistent with Ms. Burr’s testimony. It states that “the

²⁴⁶ Hearing Tr. 748:12-749:3, 720:21-723:4; *id.* at 938:8-939:11, 950:3-11 (“The Board has, to my recollection, not considered the merits of Afilias’ complaint.”); *id.* at 976:9-977:3, 980:17-981:16; 984:3-8.

²⁴⁷ *Id.* at 324:8-13.

²⁴⁸ *Id.* at 334:5-20.

limitation to the type of decision made [by an IRP Panel] is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid an outcome that would force the Board to violate its fiduciary duties.”²⁴⁹

154. In his testimony, Mr. Disspain explained his view that the propriety of the DAA “is a matter for the Board,” rather than this Panel.²⁵⁰ And although Mr. Disspain could not bind the Board to a particular action, Mr. Disspain testified that “[a]ll I can tell you is that pursuant to the decision of this Panel, the Board will meet and the Board will consider what this Panel has to say.”²⁵¹ Mr. Disspain also made clear that any thoughts or recommendations the Panel may have for ICANN will be taken “very seriously by the Board.”²⁵²

155. ICANN has the unique knowledge, expertise, and experience required to interpret the Guidebook and Auction Rules. Importantly, ICANN would approach this type of analysis with an eye towards the potential impact a decision on these issues might have on the global Internet community, as required by the Bylaws.²⁵³ As set forth in ICANN’s Response as well as the witness statements of Mr. Livesay and Mr. Rasco, there have been other arrangements in the secondary market for new gTLDs that appear to be similar to the DAA, including transactions involving Afilias, Donuts and other registry operators.²⁵⁴ Any analysis of the DAA must take into account these previous arrangements and their impact.²⁵⁵

²⁴⁹ C-122 ¶ 16.

²⁵⁰ Hearing Tr. at 984:9-987:24.

²⁵¹ *Id.* at 991:4-16; *see also id.* at 989:4-990:23 (testifying that the Board will take any recommendations from the Panel very seriously).

²⁵² *Id.* at 985:22-988:19.

²⁵³ Bylaws, Art. 7, § 7.3(b).

²⁵⁴ ICANN’s Response to Amended IRP Request ¶¶ 25-29; Livesay Witness Stmt. ¶¶ 8-10, 26; Rasco Witness Stmt. ¶¶ 42-45.

²⁵⁵ Likewise, the Auction Rules seem to foresee the possibility of “post-Auction ownership transfer arrangements” being in place prior to an auction. (C-4, at Rule 68(a), (b).) ICANN is best suited to interpret this provision of the Auction Rules and determine whether it is relevant to the DAA.

156. In short, any ultimate decision regarding whether the DAA is compliant with the Guidebook and Auction Rules could be properly made only by ICANN.

4. ICANN’s commitment to transparency and accountability is not relevant to Afilias’ contention that NDC violated the Guidebook and Auction Rules.

157. In its Question No. 6, the Panel asked the parties to “comment on the fact that NDC and Verisign deliberately sought to keep the DAA confidential until after the auction, and that Verisign’s support was essential to NDC winning the auction, in light of ICANN’s commitment to transparency and accountability.”

158. Afilias has repeatedly referenced the concepts of transparency and accountability, but these concepts as set forth in ICANN’s Bylaws apply to ICANN, not new gTLD applicants. New gTLD applicants are bound to act in accordance with the terms of the Guidebook and the Auction Rules, which do not have similar transparency and accountability requirements beyond what applicants were required to disclose – and update – in their applications. Thus, the fact that ICANN has undertaken commitments to transparency and accountability is irrelevant to Afilias’ contention that NDC and Verisign violated the Guidebook and Auction Rules.

IV. THE ICANN BOARD COMPLIED WITH ICANN’S ARTICLES AND BYLAWS BY DECIDING NOT TO TAKE ANY ACTION REGARDING THE .WEB CONTENTION SET WHILE ACCOUNTABILITY MECHANISMS WERE PENDING, AND THE PANEL SHOULD DEFER TO THIS REASONABLE BUSINESS JUDGMENT.

159. Afilias’ claim that ICANN violated its Articles and Bylaws by failing to disqualify NDC, in 2016, after ICANN learned of the DAA is without merit. At the time ICANN received Afilias’ 8 August 2016 letter complaining about the .WEB auction, ICANN, pursuant to its longstanding practice, had already placed the .WEB contention set “on hold” as a result of a pending Accountability Mechanism instituted by another .WEB applicant, and all applicants had been so informed. Therefore, in November 2016, when the ICANN Board

received a briefing from ICANN’s counsel as to the status of .WEB, the Board chose to continue to follow its longstanding practice and not take any action regarding the .WEB contention set while an Accountability Mechanism – and, later, the one-year DOJ investigation – was pending. Not only was that decision consistent with ICANN’s Articles and Bylaws, it was also consistent with ICANN’s notice to Afilias that the contention set was on hold due to a pending Accountability Mechanism. Moreover, the Board’s decision to refrain from taking action while Accountability Mechanisms were pending was within the Board’s reasonable business judgment, and the Panel should not supplant that judgment.

A. ICANN Has A Longstanding Practice Of Keeping Contention Sets “On Hold” While Accountability Mechanisms Are Pending.

160. Every ICANN witness questioned on the topic confirmed that ICANN has a longstanding practice of placing applications and contention sets on hold while related Accountability Mechanisms are pending.²⁵⁶ This practice applies to Requests for Reconsideration under Article 4, Section 4.2 of the Bylaws, complaints made to ICANN’s Ombudsman under Article 5 (if ICANN was aware of such complaints), and CEPs under Article 4, Section 4.3.²⁵⁷ This practice does not necessarily apply to IRP Requests because, unlike other Accountability Mechanisms, the IRP rules specifically afford Claimants the ability to seek emergency relief, or interim measures of protection to stay the processing of a gTLD application.²⁵⁸ ICANN urges IRP Claimants to make use of these interim measures and thus

²⁵⁶ Hearing Tr. at 296:4-11 (Burr) (describing ICANN’s “usual practice of not intervening once an accountability mechanism has been invoked so as to respect the accountability mechanisms themselves”); *id.* at 721:12-722:13 (Willett) (the general practice within the New gTLD Program “was to keep contention sets or applications on hold until accountability mechanisms had been resolved”); *id.* at 938:14-18 (Disspain) (ICANN has a longstanding practice of not interfering with an application or contention set “when there is an outstanding Accountability Mechanism”).

²⁵⁷ *Id.* at 678:4-21, 982:10-983:5.

²⁵⁸ *Id.* at 678:4-21, 982:10-983:5; Interim Supp. Proc. Rule 10, C-59; Bylaws, Art. 4, § 4.3(p).

does not automatically place an application or contention set on hold when an IRP is instituted.²⁵⁹

161. ICANN adopted this practice because it considers its Accountability Mechanisms to be fundamental to ensuring that its bottom-up, consensus-driven, multistakeholder model remains effective.²⁶⁰ ICANN's practice of placing applications and contention sets on hold respects the integrity of the Accountability Mechanisms and Claimants' rights under those Accountability Mechanisms.

162. This practice is published on ICANN's website, which explains that an application or a contention set is placed on hold:

if there are pending activities (e.g., *ICANN accountability mechanisms*, ICANN public comment periods on proposed implementation plans for Program-related activities, Board decisions, or other outstanding unresolved issues) that may impact the status of the application. The application is active but cannot complete certain Program processes such as Auction, Contracting, and Transition to Delegation until the On-Hold status is cleared.²⁶¹

ICANN also advised applicants of this practice during the monthly updates regarding the New gTLD Program, as Ms. Willett testified.²⁶² And here, Afilias was informed by ICANN, in September 2016, that the .WEB contention set was placed on hold due to an Accountability Mechanism filed by another .WEB applicant (and not because of Afilias' letters).²⁶³

B. The Board's Decision To Adhere To Its Normal Practice of Not Taking Action While a Related Accountability Mechanism Is Pending Was Well Within The Board's Reasonable Business Judgment And Is Entitled To Deference.

163. The .WEB contention set became mired in legal proceedings as the date for the

²⁵⁹ For this reason, ICANN encouraged Afilias to apply for emergency relief in this IRP to halt the processing of NDC's .WEB application, as provided for in the Bylaws and the Interim Supplementary Procedures. *See* Bylaws, Art. 4, § 4.3(p), C-1; Interim Supp. Proc., Rule 10, C-59.

²⁶⁰ Burr Witness Stmt. ¶ 12; Disspain Witness Stmt. ¶ 5.

²⁶¹ R-33.

²⁶² Hearing Tr. at 676:13-677:2.

²⁶³ C-61.

auction approached. Ruby Glen, a .WEB applicant, submitted a Request for Reconsideration to ICANN, seeking to halt the .WEB auction, which was denied. Ruby Glen then filed a complaint against ICANN in Los Angeles federal court days before the auction and immediately sought a temporary restraining order enjoining the auction, which the court denied. Ruby Glen's lawsuit was ultimately dismissed as a result of the covenant not to sue undertaken by all applicants as a condition of their participation in the Program,²⁶⁴ and that decision was subsequently upheld on appeal to the Ninth Circuit.²⁶⁵

164. Within days of concluding the .WEB auction and before ICANN received Afilias' 8 August 2016 letter complaining about NDC's arrangement with Verisign, Donuts, the parent company of Ruby Glen, initiated a CEP, which was pending at the time of the 3 November 2016 Board workshop.²⁶⁶

165. At the 3 November 2016 Board workshop, the ICANN Board acted consistently with ICANN's practice of not taking action with respect to a matter that was the subject of an ongoing Accountability Mechanism. The Board was briefed by ICANN's in-house counsel regarding the issues being raised by members of the .WEB contention set, including Afilias, and received materials provided by, and asked questions of, ICANN's in-house counsel. The Board, however, made no decision regarding the various challenges to NDC's application and winning bid for .WEB based on its arrangement with Verisign. As Ms. Burr, who attended the workshop, explained at the hearing:

The Board in November . . . continued to follow its usual practice of not intervening once an accountability mechanism has been invoked so as to respect

²⁶⁴ As described above, the covenant not to sue is a provision in the Guidebook that requires new gTLD applicants to forego pursuing any claims related to their applications in court, and instead pursue any such claims through one of the Accountability Mechanisms provided for in ICANN's Bylaws. *See* Guidebook, § 6.6, C-3.

²⁶⁵ C-106; R-14.

²⁶⁶ RE-11.

the accountability mechanisms themselves. That is what the Board typically does. That is what org typically does.²⁶⁷

166. Mr. Disspain testified similarly:

It was a decision to – a choice, if you will, to do what we would usually do, normally do with a longstanding practice of not interfering when there was an outstanding accountability mechanism.²⁶⁸

167. Weeks later, in January 2017, the DOJ’s Antitrust Division initiated an investigation of Verisign’s potential operation of .WEB, during which it asked ICANN not to take any action regarding .WEB. That investigation continued until January 2018, when DOJ closed the investigation without taking further action. The Donuts CEP also closed in January 2018, and Donuts elected not to initiate an IRP. However, in February and April 2018, Afilias submitted two DIDP Requests and a Request for Reconsideration. Throughout the course of these various proceedings, the ICANN Board made no material decisions regarding .WEB.

168. Conceding that this longstanding ICANN practice actually exists, Afilias suggested at the Hearing that ICANN violated its “no action” practice because ICANN took certain actions after Donuts initiated its CEP on 2 August 2016. Specifically, Afilias questioned Ms. Willett as to why ICANN sent NDC a CIR on 5 August 2016.²⁶⁹ As Ms. Willett explained, however, a notice of CEP is not directed to Ms. Willett or her team; it is directed to ICANN’s in-house counsel, and it typically takes a few days for Ms. Willett’s team to receive notice of a

²⁶⁷ Hearing Tr. at 296:4-11.

²⁶⁸ *Id.* at 935:16-20. In its response to Afilias’ request for interim measures of protection, ICANN stated that it had already evaluated Afilias’ complaints. This was inartfully drafted to the extent that it could be construed to suggest that ICANN had made a determination on whether NDC violated the Guidebook and Auction Rules, which ICANN did not do. ICANN’s next submission—and each submission since then—stated unequivocally that ICANN had made no such determination. Further, ICANN ultimately agreed to keep .WEB on hold, which mooted Afilias’ request for interim measures of protection.

²⁶⁹ *Id.* at 683:16-687:5. A CIR is a set of questions that the New gTLD Program team sends to an applicant once the contention set has been resolved. It is essentially an invitation to begin contracting discussions, and is “one of the very first steps in a multi-week, multi-month process.” *Id.*

CEP.²⁷⁰ Ms. Willett recalls that she received notice of Donuts' CEP later on 5 August or shortly thereafter,²⁷¹ and that her team halted the contracting process for .WEB at that time.

169. Afilias has also suggested that ICANN deviated from its practice of not taking action while a contention set was on hold when it sent a letter to NDC, Verisign, Afilias, and Ruby Glen in September 2016, asking them to provide their views on a series of questions relevant to the issues raised by Donuts and by Afilias.²⁷² Afilias is wrong. Putting a contention set on hold does not mean that all work ceases, as Ms. Willett testified; what it means is that a contention set will not “move to the next phase of work,” such as “send[ing] a Registry Agreement to [NDC] for execution,” “[b]ut, you know, in order to resolve a variety of matters and to get information to assist in the CEP, [ICANN was trying] to gather information.”²⁷³ Ms. Willett's explanation is logical: ICANN's decision to gather information does not mean that ICANN deviated from its practice of refraining from deciding matters that were subject to a pending Accountability Mechanism. Moreover, the collected information could assist ICANN if it was called on to address the matters in the future.

170. The Board's decision not to make any material decisions regarding .WEB while an Accountability Mechanism was pending was undoubtedly a reasonable business judgment made in the exercise of the Board's fiduciary duties. Accordingly, that decision is entitled to deference.²⁷⁴ The Bylaws are clear that where, as here, “Claims aris[e] out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable [business]

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *See, e.g.*, Afilias' Response to the *Amici* Briefs ¶¶ 52–55.

²⁷³ Hearing Tr. at 697:15–698:10 (Willett).

²⁷⁴ Bylaws, Art. 4, § 4.3(i)(iii).

judgment with its own.”²⁷⁵ Ms. Burr, who was one of the individuals responsible for drafting the new Bylaws, confirmed as much during the IRP Hearing.²⁷⁶

171. At the 3 November 2016 workshop, the Board committed to follow “its usual practice of not intervening once an Accountability Mechanism had been invoked,” as Ms. Burr and Mr. Disspain testified.²⁷⁷ The Board maintained that position throughout subsequent Accountability Mechanisms regarding .WEB and the related DOJ investigation. The Board’s decision respects the purpose and integrity of the Accountability Mechanisms, which is fundamental to ensuring that ICANN’s unique model remains effective.²⁷⁸

172. Indeed, had the Board taken action, that action could have interfered with ongoing Accountability Mechanisms. Further, the outcome of pending Accountability Mechanisms and the DOJ investigation could have had a material impact on any eventual analysis ICANN might be called to make. For instance, if the DOJ had decided to block Verisign’s potential acquisition of .WEB, the DOJ’s action likely would have rendered Afilias’ concerns moot. Similarly, this IRP could have an impact on the scope of any remaining issues to be resolved (as would an IRP brought by Donuts, had Donuts chosen to file an IRP in early 2018, as ICANN had expected). Therefore, taking action on Afilias’ claims would not have been prudent, as Mr. Disspain testified, because it would have interfered with the pending accountability mechanisms and DOJ investigation, and the Board would have acted without the benefit of input from an IRP Panel or

²⁷⁵ *Id.*, Art. 4, § 4.3(i)(iii).

²⁷⁶ Hearing Tr. at 338:19-340:1 (testifying that the Panel cannot substitute its judgment for the Board’s reasonable judgment, and it does not have the authority to say that the Board should have pursued an alternate course of action, if “failing to do it a different way does not amount to a violation of the Bylaws”).

²⁷⁷ *Id.* at 296:4-11 (Burr); *see also id.* at 388:8-12 (Burr) (The ICANN Board “did not deviate from the standard practice, which was once there is an Accountability Mechanism . . . the process goes on hold, pending resolution.”); *id.* at 935:16-20 (Disspain) (The Board decided to adhere to its “longstanding practice of not interfering when there was an outstanding Accountability Mechanism.”).

²⁷⁸ Burr Witness Stmt. ¶ 12; Disspain Witness Stmt. ¶ 5.

the DOJ, respectively.²⁷⁹

C. Afilias’ Arguments That The Board’s Decision Is Not Protected By The Business Judgment Rule Lack Merit.

173. Afilias made a number of arguments at the Hearing and in its Response to the *Amici* Briefs that the Board’s decision was not a reasonable business judgment entitled to deference under Section 4.3(i)(iii) of the Bylaws. First, Afilias argues that its claims do not relate to the Board’s exercise of its fiduciary duties.²⁸⁰ However, as shown above (*supra* ¶¶ 53-55), the Board has a fiduciary duty with respect to all activities that it conducts on behalf of ICANN, which Ms. Burr confirmed during the Hearing and is a matter of law.²⁸¹

174. Second, Afilias argues that the Board’s decision is not entitled to deference because it was made at a “workshop” rather than a formal meeting or by a formal resolution, and because the decision was not publicly posted. But there was no reason for the Board to call a formal meeting or pass a formal resolution to decide to follow its normal practice of refraining from taking action while an Accountability Mechanism was pending, and the Board certainly had no obligation to publish a decision that it was not taking any action.

175. As shown above (*supra* ¶¶ 56-57) the business judgment rule set forth in Section 4.3(i)(iii) is not limited to resolutions adopted and duly published by the Board after formal meetings. Indeed, under Section 4.3(i)(iii), the business judgment rule applies not only to Board “action” but also to the Board’s decision not to take action.²⁸²

²⁷⁹ Hearing Tr. at 942:13-18; Disspain Witness Stmt. ¶ 11.

²⁸⁰ Afilias’ Response to *Amici* Briefs ¶ 167.

²⁸¹ Hearing Tr. at 336:17-25 (testifying that she cannot imagine a circumstance where the Board acts without respect to its fiduciary duties); *id.* at 392:5-393:3 (The Board’s fiduciary obligations to ICANN extend to everything Board members do related to ICANN).

²⁸² Bylaws, Art. 4, § 4.3(i)(iii) (“[T]he IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s *action or inaction* is within the realm of reasonable business judgment.”) (emphasis added).

176. Additionally, the Bylaws do not require the Board to call a formal meeting to decide to follow its normal practice of not taking action while an Accountability Mechanism is pending. The Board can and regularly does conduct various types of business at informal meetings, including Board workshops, as Ms. Burr testified.²⁸³ Board workshops “are essentially working sessions for the Board.”²⁸⁴ They are a way for the Board “to work together, exchange information, get up to speed on what’s going on in the community, take care of various housekeeping matters and the like.”²⁸⁵ But because these are not formal meetings, and because the Board is not taking or passing formal resolutions, there are no formal meeting requirements, such as quorum requirements.²⁸⁶ Even so, the majority of the Board typically attends Board workshops.²⁸⁷ Ms. Burr explained that, outside of a formal meeting, including at Board workshops, the Board “can decide to follow procedures that it typically follows,”²⁸⁸ which is exactly what occurred at the November 2016 Board workshop. And in doing so, the Board was exercising its fiduciary duties to ICANN, and its resulting “action or inaction” is entitled to deference under the business judgment rule.

177. Nor was the ICANN Board required to conduct a formal written vote under Article 7, Section 7.19 of the Bylaws. This provision reflects the procedure by which the Board can take formal action *outside* of a formal meeting.²⁸⁹ But Ms. Burr and Mr. Disspain both testified that the November 2016 decision was not a formal action, thereby rendering Section

²⁸³ Hearing Tr. at 281:22-285:23.

²⁸⁴ *Id.* at 283:1-2.

²⁸⁵ *Id.* at 284:17-285:12.

²⁸⁶ *Id.* at 282:24-283:6.

²⁸⁷ *Id.* at 282:24-283:6.

²⁸⁸ *Id.* at 285:19-286:10.

²⁸⁹ Bylaws, Art. 7, § 7.19.

7.19 inapplicable. Instead, it was a commitment to adhere to ICANN’s usual practice of not taking action that could interfere with a pending Accountability Mechanism. As Ms. Burr testified, “it is complicated because we are referring to this as a decision, where what I observed was a confirmation to continue to follow the standard practice, which was that the contention set was on hold.”²⁹⁰ Mr. Disspain testified similarly:

The Board made a choice to follow its longstanding practice of not doing anything when there is an outstanding Accountability Mechanism. I cannot say that the Board proactively decided, proactively agreed, proactively chose . . . to not pursue Afilias’ complaints. We just decided that it was our standard practice not to do anything because there were outstanding Accountability Mechanisms.²⁹¹

178. Ms. Burr further explained that it would be impractical to require the Board to take a formal vote in this context: “If you’re suggesting that every time the Board decides to follow a practice that it has always followed, it has to take a formal vote, then we would be voting constantly. . . . [I]t is just not practical to insist that every time the Board makes a decision, including a decision to follow its standard practice, that it has to have a formal vote. I don’t understand that to be typical of any organization of any Board of Directors.”²⁹² This is especially true for ICANN, which has a “very active Board.”²⁹³

179. ICANN was also not required to publicly post its decision after the 3 November 2016 workshop. To be clear, ICANN *did inform Afilias* (and all other contention set members) that .WEB had been placed on hold and that it would be notified when that status changed, as discussed in Section IV.D below. Thus, Afilias knew that .WEB was on hold before and after the November 2016 meeting. No purpose would have been served by announcing on ICANN’s

²⁹⁰ Hearing Tr. at 388:13-389:19; *id.* (The Board simply “agreed to continue to abide by the standard practice.”).

²⁹¹ *Id.* at 938:8-25; *see also id.* at 939:1-11 (the issue was not before the Board “for a formal decision”).

²⁹² *Id.* at 287:1-288:4.

²⁹³ *Id.* at 291:2-19.

website that the Board had decided at its workshop not to lift the hold, nor was the Board required to make such an announcement.²⁹⁴

180. Article 3, Section 3.5(c) of the Bylaws requires actions taken by the Board at a formal meeting to be published in a preliminary report on ICANN’s website.²⁹⁵ Section 3.5(c) applies only to “the formal decisions that the Board makes by resolution during Board meetings,” which Ms. Burr explained is “the way this has always been interpreted from the beginning of time.”²⁹⁶ It does not apply to informal decisions taken at Board workshops.²⁹⁷ Any contrary interpretation would paralyze the Board’s ability to operate, as Ms. Burr explained: “If you read this to say anything the Board thinks about, [or] decides to move on” must be contained on ICANN’s website, or in a “preliminary report seven days later, the Board would spend all of its time approving these preliminary reports.”²⁹⁸

181. Third, Afilias argues that the Panel cannot defer to the Board’s reasonable business judgment because it does not have access to the transcript of the Board’s privileged discussion with counsel, or the written briefings provided to the Board by counsel.²⁹⁹ But Afilias has not offered any authority or logic to support its argument that the Panel must have access to such privileged information in order to conclude that the decision was within the realm of reasonable business judgment. To the contrary, case law confirms: “it is the existence of legal advice that is material to the question of whether the board acted with due care, not the substance

²⁹⁴ In ICANN’s 30 September 2016 letter to Afilias (C-61), Mr. Atallah advised that “the primary contact for Afilias’s application will be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms,” which is exactly what occurred, as explained in more detail below.

²⁹⁵ Bylaws, Art. 3, § 3.5(c).

²⁹⁶ Hearing Tr. at 289:7-291:1.

²⁹⁷ *Id.* at 289:7-291:1, 993:1-4.

²⁹⁸ *Id.* at 291:11-19.

²⁹⁹ Afilias Response to *Amici* Briefs ¶¶ 176–178.

of that advice.”³⁰⁰ In order to apply the deferential standard contemplated by the Bylaws, it is sufficient that the Panel understands that the ICANN Board was briefed by in-house counsel, received materials on the subject, had a discussion that included counsel, and then elected to adhere to ICANN’s usual practice of awaiting the conclusion of a pending Accountability Mechanism.

D. ICANN’s Obligations To Act Transparently Did Not Require The Board To Inform Afilias Of Its 3 November 2016 Decision.

182. ICANN’s commitments in its Articles and Bylaws to operate through “open and transparent processes”³⁰¹ and “to operate to the maximum extent feasible in an open and transparent manner”³⁰² do not require ICANN to publish every decision it makes or every informal meeting it conducts. Ms. Burr confirmed that:

[The] ICANN Board has to have the opportunity to meet in workshops, for example, to get its work done. From time to time we’ll provide information to the community before or after about the general topics that we are looking at during our workshop, but I have never understood the requirement to act in an open and transparent way to mandate that every single interaction of the Board and every Board discussion be public.³⁰³

183. This is yet another point with which Afilias agreed before this IRP. In its 2006 public statement regarding the .COM registry agreement, Afilias took the view that:

The job of the ICANN Board is to serve the community by exercising its informed judgment based on the best available information. Some of that important information may be proprietary, and not on the public record. ***Some of that information may relate to the fiduciary obligations of the ICANN Board and properly not on the public record.***³⁰⁴

³⁰⁰ See *Wynn Resort, Ltd. v. Eighth Judicial Dist. Ct. in & for Cty. of Clark*, 133 Nev. 369, 379 (2017) (citation omitted), RLA-38.

³⁰¹ Articles of Incorporation, § III, C-2.

³⁰² Bylaws, Art. 3, § 3.1.

³⁰³ Hearing Tr. at 275:4-276:23; see also *id.* at 293:22-294:4 (ICANN is required to operate openly and transparently to the maximum extent feasible, which “does not mean it has to do everything in public.”).

³⁰⁴ R-21 at 7 (emphasis added).

184. This is especially true with respect to ICANN’s decision to abide by its practice of placing contention sets on hold, and not acting, pending resolution of Accountability Mechanisms.³⁰⁵ Indeed, that ICANN was adhering to this practice was evident from the fact that .WEB remained on hold throughout the entire time related Accountability Mechanisms were pending, and the fact that the hold was published on ICANN’s website and separately disclosed to Afilias.

185. Specifically, Afilias (and all other contention set members) received notice from ICANN that the .WEB contention set was on hold at least as early as 19 August 2016, a fact that was also published on ICANN’s website.³⁰⁶ ICANN then sent Afilias a letter on 30 September 2016 in which ICANN reiterated that the .WEB contention set was on hold.³⁰⁷ In that letter, ICANN explained that the on hold status “reflect[s] a pending ICANN Accountability Mechanism initiated by another member of the contention set,” referring to the Donuts CEP.³⁰⁸ ICANN assured Afilias that it would “be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms.”³⁰⁹ ICANN also directed Afilias to the link to ICANN’s website that explains ICANN’s practice of placing applications and contention sets on hold while Accountability Mechanisms are pending.³¹⁰ Inconsistent with Afilias’ current contention that ICANN kept it in the dark regarding the status of the contention

³⁰⁵ Afilias’ Amended IRP Request does not contain any claims that ICANN violated its obligations to act transparently by failing to inform Afilias of the Board’s 3 November 2016 decision, and Afilias confirmed in its opening statement that its claims do not relate to ICANN Board conduct. Hearing Tr. at 81:13-22. These claims, therefore, are not properly before the Panel, but ICANN nonetheless addresses them to the extent the Panel decides to consider them.

³⁰⁶ C-61.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

set, Afiliias acknowledged the on-hold status of the .WEB contention set in its 7 October 2016 letter to ICANN, and even recognized that .WEB had been put on hold as a result of the Donuts CEP, and not in response Afiliias' letters.³¹¹

186. The ICANN Board's decision at the 3 November 2016 workshop simply confirmed that the *status quo* would be maintained while the .WEB contention set was on hold in accordance with normal practice. As Ms. Burr testified, the 30 September 2016 letter from ICANN to Afiliias "reflects what ICANN org typically does when an Accountability Mechanism has been invoked, and the practice of the Board is to respect and follow that. And that would be the Board deciding in November that it was going to continue to follow this practice."³¹² The Board's decision was not some "new action" by ICANN that required an additional notice – the contention set was placed on hold when Donuts initiated the CEP, and the contention set remained on hold until June 2018, after which Afiliias was notified of the change in status, as promised in ICANN's 30 September 2016 letter.³¹³

187. Importantly, Afiliias has not put forward a single piece of evidence suggesting that it would have acted any differently had it known that the Board decided in November 2016 to take no action while the contention set remained on hold. To the contrary, Afiliias withdrew all of its witness statements and, thus, there is no evidence whatsoever of what Afiliias was thinking

³¹¹ C-51 at 1 ("Mr. Atallah states that, while the .WEB/.WEBS contention set was placed on hold by ICANN on 19 August 2016, such action was taken because of the initiation of an ICANN Accountability Mechanism by another applicant. We are concerned that this statement appears to imply that ICANN is not placing the contention set on hold in order to address the issues raised by Afiliias.").

³¹² Hearing Tr. at 295:21-297:21.

³¹³ C-61. Afiliias' argument that ICANN should have disclosed the Board's 3 November 2016 decision in response to Afiliias' DIDP Requests is meritless for the same reasons. Additionally, the only document that would have been potentially responsive to Afiliias' DIDP Requests on this topic is the privileged transcript of the 3 November 2016 Board workshop, which ICANN is not obligated to disclose in response to a DIDP Request (or to any request for that matter). Indeed, one of the enumerated "Conditions for Nondisclosure" of documents is "[i]nformation subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation." C-92.

throughout the entire time period (or why it never filed a Reconsideration Request to force Board action in 2016). Instead, the documentary evidence demonstrates that Afilias knew as early as August 2016 that the .WEB contention set was on hold as a result of the Donuts CEP – which Afilias confirmed in its 7 October 2016 letter to ICANN – but that Afilias waited on the sidelines for nearly two years hoping that Donuts (or the DOJ) would take the laboring oar in challenging the results of the .WEB auction. In sum, Afilias’ argument that the Board was required to disclose its decision to adhere to normal practice is a lawyer’s invention designed to distract from Afilias’ decision to sit on its hands.

188. For these reasons, Afilias’ complaint that it did not learn of the Board’s decision in November 2016 to maintain the status quo until ICANN submitted its Rejoinder in 2020 is inapposite.³¹⁴ It is also wrong, as ICANN has repeatedly stated the position throughout this IRP that the Board took no action on .WEB, including in its Response to Afilias’ Amended IRP Request:

- “.WEB has been mired in federal court litigation, a [DOJ] investigation and multiple invocations of ICANN’s internal Accountability Mechanisms, which caused ICANN to place .WEB ‘on hold’ pending their resolution.”³¹⁵
- “In connection with the New gTLD Program, ICANN employs a practice, depending on the circumstances, of placing a contention set or a gTLD application on hold if it is the subject of certain ICANN Accountability Mechanisms, including the initiation of a CEP. Thus, on 19 August 2016, ICANN placed the .WEB Contention Set ‘on hold’ due to the pendency of the Donuts CEP.”³¹⁶
- “After a successful gTLD applicant passes initial evaluation and resolves any formal objection and/or contention set proceeding, **and assuming no ICANN**

³¹⁴ This responds to the Panel’s Question No. 10, “Please comment, in light of the relevant provisions of the Bylaws, on ICANN’s decision not to disclose to Afilias, the *Amici* and the general public its Board’s November 2016 decision regarding .WEB. The Respondent is asked to explain the reason why this Board decision was disclosed allegedly for the first time in the Respondent’s Rejoinder?”

³¹⁵ ICANN’s Response to Amended IRP Request ¶ 4.

³¹⁶ *Id.* ¶ 44.

Accountability Mechanisms are pending, the applicant is offered a Registry Agreement with ICANN to become a new gTLD registry operator.”³¹⁷

189. The only new fact ICANN disclosed in its Rejoinder is the date of the ICANN Board’s workshop and the fact that the Board had a (privileged) discussion regarding the .WEB contention set, but took no further action.

V. AFILIAS HAS NOT PROPERLY CHALLENGED ICANN’S TRANSMITTAL OF A FORM REGISTRY AGREEMENT TO NDC IN JUNE 2018 AND, IN ANY EVENT, ICANN ACTED IN ACCORDANCE WITH GUIDEBOOK PROCEDURES AND THE ARTICLES AND BYLAWS.

190. Afiliias asserts at Heading 5 of its Amended IRP Request that ICANN violated its “mandate to promote competition” by sending a draft Registry Agreement to NDC in June 2018 when .WEB was taken off hold. Afiliias’ Amended IRP Request does not allege that ICANN violated any other Article or Bylaws provision by taking the contention set off hold and sending NDC a form registry agreement in June 2018.³¹⁸ As shown above (*supra* Sec. III.A), Afiliias’ competition claim has been thoroughly refuted, thereby also refuting Afiliias’ entire claim relating to the June 2018 draft Registry Agreement, as alleged in the Amended IRP Request.

191. In its Reply, Afiliias makes a two-sentence reference to transmission of a registry agreement, but Afiliias does not argue that this was a violation of the Articles or Bylaws.³¹⁹ Then, in its Response to the *Amici* Briefs, Afiliias again refers to ICANN sending NDC the form registry agreement, but refers to it as an indication that ICANN “already decided” that the DAA was appropriate.³²⁰ Nowhere in *any* of Afiliias’ briefing has Afiliias asserted a claim that, by sending a draft Registry Agreement to NDC, ICANN violated provisions of its Bylaws or

³¹⁷ *Id.* ¶ 23.

³¹⁸ Amended IRP Request ¶ 78 (listing alleged breaches of ICANN’s Articles and Bylaws).

³¹⁹ Afiliias’ Reply Memorial ¶ 121 (“Instead, on 6 June 2018, ICANN notified Afiliias that it had decided to remove the .WEB contention set from its on-hold status—signaling that it intended to proceed with the delegation of .WEB to NDC, and therefore to Verisign. And on 14 June 2018, ICANN in fact sent NDC the .WEB registry agreement—which NDC signed and returned to ICANN.”).

³²⁰ Afiliias’ Response to *Amici* Briefs ¶ 230.

Articles other than its alleged competition mandate. And Afilias elicited no testimony at the Hearing supporting such a claim.

192. The evidence adduced at the Hearing established that taking the contention set off hold and sending NDC a form registry agreement were not indicative of a decision that the DAA was compliant with the Guidebook and Auction Rules. They were ministerial acts taken as part of ICANN's normal processes under the Guidebook once all Accountability Mechanisms had concluded. Moreover, these actions were done with full notice to Afilias and other contention set members, which finally caused Afilias to invoke an Accountability Mechanism (as Afilias had promised in writing only weeks earlier).

193. Ms. Willett testified that, once the Board denied Afilias' Reconsideration Request regarding its DIDP Requests, and no other Accountability Mechanisms were pending, ICANN followed its established practice and Guidebook procedures by taking the .WEB contention set off hold and sending a draft Registry Agreement to the winning bidder.³²¹ As Mr. Disspain explained, "ICANN was taking the next step in its process . . . without wishing to place any weight on either side in this matter, there are two sides . . . both sides need to be treated fairly by ICANN. The best way for ICANN to do that is to follow its process."³²² At the same time, consistent with its transparency obligations, ICANN staff provided all of the members of the .WEB contention set, including Afilias, with notice of the change of status.³²³

³²¹ Hearing Tr. at 721:8-11, 727:21-728:13, 750:3-25 ("So my team was operating within the rules of the applicant guidebook, and we were administering the processes and functions described in the guidebook."); Disspain Witness Stmt. ¶ 13; Guidebook, § 4.1.4, C-3 ("An applicant that prevails in a contention resolution procedure, either community priority evaluation or auction, may proceed to the next stage."); *see also id.* §§ 1.1.2.10, 4.4, 5.1; New Generic Top-Level Domains – Update on Application Status and Contention Sets, R-33 (once on-hold status is cleared, application can proceed to contracting).

³²² Hearing Tr. at 980:17-981:16.

³²³ Disspain Witness Stmt. ¶ 13; R-22 at 7 ("Application status updates are part of the New gTLD Program process 'to provide a more complete picture of the current status of applications...[a]s applications complete evaluation and

194. ICANN took these steps knowing full well that Afilias was likely to make good on its written threats to “initiate a CEP and a subsequent IRP against ICANN.”³²⁴ As

Mr. Disspain explained:

Prior to the lifting of the hold on the contention set, the matter was discussed in the Board Accountability Mechanisms Committee, I believe as part of its general litigation update, but I am not certain. In that discussion we were told that the next step in the process was for -- should all of the accountability mechanisms be dealt with, was for it to come off hold, but that Afilias had made it abundantly clear that in the event that it did come off hold, that they would file an IRP. And we were also clear as a Board committee that Afilias would be aware that it had come off hold because all of the contention set members would be informed that it had come off hold. So that occurred. And then secondly, a couple of days -- again, I don't know exactly, I can't remember exactly when -- after it had actually come off hold, there was another discussion at which we were told that it had come off hold and that an IRP claim from Afilias was expected -- I am going to paraphrase here -- at any minute, so to speak, because that is what they said they would do . . . We were very clear that our understanding was that Afilias had said categorically that they would launch an IRP in the event that the contention set was taken off hold.”³²⁵

195. According to Ms. Willett:

I fully expected from 2016 August, I expected Afilias to file a -- a reconsideration request at any day, and I fully expected that as soon as we changed the status of the contention set, taking the contention set off hold, that was staff action, and Afilias would have voiced their objection to that and made a formal -- the way to formally complain is not by writing a letter. It is by initiating a reconsideration request. That's what I had been telling applicants publicly. That was commonly understood since 2013.³²⁶

196. But as both Mr. Disspain and Ms. Willett explained, taking the contention set off

proceed to the next phases of the New gTLD Program.”). This notice also is posted on ICANN's new gTLD Program web page, which is available to the general public.

³²⁴ C-113 at 5.

³²⁵ Hearing Tr. at 978:5-980:16, 947:16-948:22 (“And [the BAMC] was also briefed that Afilias had written letters, maybe a letter, I can't remember, one or more than one, to say that if that happened, if it came off hold, Afilias was going to launch an accountability mechanism. I can't remember if it says an IRP or not, but launch an accountability mechanism. The BAMC was aware of that.”); *id.* at 738:24-740:21 (Willett) (testifying that the Board was informed that the contention set was being taken off hold in June 2018).

³²⁶ *Id.* at 741:21-742:23. Ms. Willett also testified that Afilias could have filed a Reconsideration Request in 2016 challenging the results of the .WEB auction and seeking disqualification of NDC. That would have placed the issues Afilias raises in this IRP squarely before the board for decision in 2016. *See id.* at 769:9-771:24.

hold was in no way a determination by ICANN that the DAA was compliant with the Guidebook or Auction Rules.³²⁷ It was, instead, ICANN remaining true to its normal practices and the Guidebook procedures in order to treat all applicants fairly, and it was done by ICANN in full expectation that the next step would be an Afilias Accountability Mechanism,³²⁸ which is precisely what happened. Mr. Disspain was clear in his testimony that, had Afilias not invoked an Accountability Mechanism, the Board would have been made aware of that fact and may have taken action at that point, although he could not speculate on what might have happened.³²⁹

197. Afilias has not explained to the Panel how ICANN’s actions in June 2018 violated ICANN’s Articles or Bylaws. Afilias has also failed to explain how it was harmed in any way by these actions because Afilias was given prompt notice, which resulted in Afilias finally filing the Accountability Mechanism (a CEP) that it had been promising.

VI. AFILIAS’ CLAIMS THAT ICANN’S PRE- AND POST-AUCTION INVESTIGATIONS VIOLATED THE ARTICLES AND BYLAWS HAVE NO MERIT AND ARE NOT PROPERLY BEFORE THE PANEL.

198. Afilias asserts at paragraph 78 of its Amended IRP Request that “ICANN failed to fully investigate rumors that NDC had reached an agreement with VeriSign prior to the .WEB Auction” because “[a]lthough ICANN specifically asked NDC to confirm that ‘there have not been changes to your application . . . that need to be reported to ICANN,’ NDC declined to do so and ICANN failed to pursue a response”³³⁰ (the “Pre-Auction Investigation Claim”). In its later-filed briefs, Afilias shifted focus to a new claim – that ICANN violated its Articles and Bylaws

³²⁷ *Id.* at 980:17-981:16 (Disspain); *id.* at 749:15-750:25 (Willett).

³²⁸ *Id.* at 980:17-981:16 (Disspain).

³²⁹ *Id.* at 981:17-982:9; (Disspain); *see also id.* at 741:16-20 (Willett) (“Q: If Afilias had not filed for CEP, ICANN would have proceeded to contract with NDC; is that your understanding? A: I don’t really know what would have happened.”).

³³⁰ Amended IRP Request ¶ 78.

in its *post-auction* investigation of Afilias’ complaints about NDC’s relationship with Verisign (the “Post-Auction Investigation Claim”).³³¹

199. Afilias’ Pre-Auction and Post-Auction Investigation Claims are both time-barred pursuant to Rule 4 of the Interim Supplementary Procedures, as shown above at Section II.B. Each claim also fails on several additional grounds.

A. Afilias’ Pre-Auction Investigation Claim Lacks Merit.

200. On 27 April 2016, ICANN scheduled an auction of last resort for the .WEB gTLD to be held on 27 July 2016.³³² The Auction Rules allow applicants to request a postponement up to 45 days before an auction.³³³ For the scheduled .WEB auction, that deadline expired on 12 June 2016.³³⁴ After that, on Thursday, 23 June 2016, Jon Nevett, the CEO of Donuts, emailed Ms. Willett of ICANN alleging “[u]pon information and belief, there have been changes to the Board of Directors and potential control of Nu Dot Co LLC (“NDC”) that has materially changed its application,” and that NDC had not updated its Application to reflect these alleged changes.³³⁵ Mr. Nevett requested a postponement to the .WEB auction.³³⁶

201. On Monday, 27 June 2016, Jared Erwin, a member of ICANN’s New gTLD Program team,³³⁷ wrote to Mr. Rasco of NDC to investigate Mr. Nevett’s allegations:

We would like to confirm that there have not been changes to your application or the [NDC] organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including

³³¹ Afilias’ Reply Memorial ¶¶ 8, 102.

³³² Willett Witness Stmt. ¶ 13.

³³³ *Id.* ¶ 14.

³³⁴ *Id.*

³³⁵ Willett Witness Stmt. ¶ 19 & Ex. A, C-36; Hearing Tr. at 608:10-609:1.

³³⁶ Willett Witness Stmt., Ex. A, C-36

³³⁷ Hearing Tr. at 617:18-22.

changes that occur as part of regular business operations (e.g., changes to officers or directors, application contacts).³³⁸

Mr. Rasco promptly replied that “there have been no changes to the NU DOTCO LLC organization that would need to be reported to ICANN.”³³⁹

202. Afilias argues that Mr. Rasco intentionally answered only ICANN’s question regarding changes to NDC’s ownership but did not address whether there were any other changes to NDC’s application, and that ICANN should have pressed him on that issue.³⁴⁰ But because ICANN was investigating claims that NDC had undergone a change in ownership or control (as alleged by Donuts’ Mr. Nevett),³⁴¹ ICANN’s query regarding changes to NDC’s application was necessarily focused on whether it would need to be updated to reflect any changes in NDC’s ownership or control. This makes perfect sense, as no concerns had been raised about any other aspect of NDC’s application, much less the possible involvement of Verisign.³⁴² As Ms. Willett explained: “[I]f Verisign or any other entity had been shared with me, it would have given my team another direction to pursue and additional questions to ask about, but insomuch [as] it was about control and ownership, we just followed up with NDC about those matters.”³⁴³ Thus, after Mr. Rasco indicated that there was no change in the control

³³⁸ Willett Witness Stmt., Ex. B, C-38.

³³⁹ *Id.*

³⁴⁰ Afilias’ Reply Memorial ¶ 73.

³⁴¹ Hearing Tr. at 616:2-616:20.

³⁴² *Id.*; Willett Witness Stmt. ¶ 20 (“The only issue Mr. Nevett raised was his concern that NDC may have undergone a change in ownership or control. He did not mention that he thought Verisign might be involved with NDC’s application and, in fact, did not mention Verisign at all.”).

³⁴³ Hearing Tr. at 616:2-616:20 (The full question and answer are as follows: “Q. Sure. So you say, ‘The only issue Mr. Nevett raised was his concern that NDC may have undergone a change in ownership or control. He did not mention that he thought VeriSign might be involved with NDC’s application,’ end of quote. So is there a distinction between the concern that NDC may have gone - - undergone a change of ownership or control from a concern that VeriSign might be involved with NDC’s Application? A. I wouldn’t say that there was a concern or a distinction. It was more - - it would have been - - if Verisign or any other entity had been shared with me, it would have given my team another direction to pursue and additional questions to ask about, but insomuch it was about control and ownership, we just followed up with NDC about those matters.”).

or ownership of NDC, ICANN staff felt comfortable moving forward.³⁴⁴ Afilias does not argue that Mr. Erwin or Ms. Willett violated the Articles or Bylaws by not pressing Mr. Rasco on matters beyond the scope of the complaints they were investigating. Indeed, Afilias has not even identified any provisions of the Articles or Bylaws that are implicated.

203. Afilias suggested through its questioning at the Hearing that Mr. Rasco's statement in an email to Mr. Nevett that he had "check[ed] with all the powers that be" and confirmed that NDC would not agree to postpone the .WEB auction³⁴⁵ should have been some type of red flag to ICANN that NDC had undergone a change in ownership or control.³⁴⁶ But Ms. Willett was not a recipient of this email and did not "recall having this email at that time."³⁴⁷ Moreover, Ms. Willett explained that, even if she had seen the email during the investigation, she would not have necessarily concluded that it suggested a change in ownership or control of NDC because applicants frequently have advisory boards or other bodies that participate in decisions

³⁴⁴ Willett Witness Stmt. ¶ 23 ("I informed Mr. Nevett that my team had already investigated the alleged management changes with NDC's representative, and that NDC asserted that no such changes had occurred. I further informed Mr. Nevett that, based on the fact that ICANN had found no evidence of such a management change, ICANN was continuing to proceed with the Auction as scheduled. At no time did Mr. Nevett mention Verisign."); ICANN's Opposition to *Ex Parte* Application for Temporary Restraining Order, Declaration of Christine Willett ¶¶ 15, 19, C-40; ICANN's Response to Amended IRP Request ¶ 35.

³⁴⁵ Rasco Witness Stmt., Ex. I.

³⁴⁶ See Hearing Tr. at 610:13-16 ("Mr. De Gramont: So, Ms. Willett, just reading Mr. Rasco's email, you can understand why Mr. Nevett had raised a concern about the change of ownership or control in NDC, can't you?"); see also *id.* at 610:24-611:24 (Mr. De Gramont asked: "Well, [Mr. Rasco] says the decision as to whether to participate in an ICANN auction or a private auction, quote, 'goes beyond just us,' unquote. He says that there are now additional Board members beyond those identified in the application. He says that in order to be able to answer whether he can participate in a private auction or in an ICANN auction, he has to check with all of the powers that be. In your view, that doesn't indicate that someone else is – now has an ownership or control interest in NDC?").

³⁴⁷ *Id.* at 633:18-634:14 ("Again, I don't recall having this email at that time. You asked me the question how could I have had the conversation with Mr. Rasco. But I was having a conversation with Mr. Rasco based on my conversation with Mr. Nevett in Helsinki and based on Mr. LaHatte's general practice and request that I provide him with information that I had. That was the basis of my, again, reaching out to Mr. Rasco."). See also *id.* at 633:13-17 ("Q. And by this time, you had seen Mr. Rasco's email to Mr. Nevett. Do I understand that correctly? A. I may have. Again, I don't - - I don't recall when I specifically saw that email exchange."); *id.* at 638:9-13 (Q. Do you know if you or anyone else at ICANN asked [Mr. Rasco] who the several new Board members were? A. Again, I don't recall having this email in this time frame, so I don't believe that I would have asked him about that.").

without having ownership or control of the entity.³⁴⁸

204. After ICANN staff concluded its investigation, Ms. Willett met with Mr. Nevett at an ICANN meeting in Helsinki and informed him that ICANN’s investigation had found no evidence of a change in ownership or control of NDC and that ICANN therefore would not be postponing the auction.³⁴⁹ She also told him that, if he was not satisfied with this conclusion, he could use one of ICANN’s Accountability Mechanisms to challenge it.³⁵⁰ Mr. Nevett did just that and filed a complaint with ICANN’s Ombudsman.³⁵¹

205. Resort to the Ombudsman is another important means for members of the ICANN community to have their complaints investigated and resolved.³⁵² As part of his investigation of Mr. Nevett’s complaint, the Ombudsman reached out to Mr. Rasco to ask whether there had been any changes to the ownership or control of NDC or to NDC’s Application.³⁵³ Mr. Rasco again confirmed that there had been no changes, writing: “There have been no changes to the [NDC] application. Neither the governance, management nor the ownership in [NDC] has changed.”³⁵⁴ As Ms. Willett testified, the Ombudsman had also reached out to ICANN staff to request any

³⁴⁸ *Id.* at 612:2-13 (“A. So I can speak to my – does this raise an issue for me. Since it says that Mr. Rasco was still managing, running the program, managing the application, the fact that he had to check with other individuals, that was sort of common practice amongst applicants. They often had dozens of people on a Board of Directors, maybe a governing Board, an advisory Board. They had all sorts of other executives they would have to check with. So it wouldn’t surprise me that an individual like Mr. Rasco would have to check with others.”).

³⁴⁹ *Id.* at 620:9-622:8; Willett Witness Stmt. ¶ 23.

³⁵⁰ Hearing Tr. at 620:9-622:8; Willett Witness Stmt. ¶ 24 (“During my meeting with Mr. Nevett at the ICANN56 Public Meeting in Helsinki, I suggested to Mr. Nevett that if he was not satisfied with ICANN’s course of action he had the option to invoke one of ICANN’s accountability mechanisms. Mr. Nevett indicated that he intended to contact ICANN’s then Ombudsman, Mr. Chris LaHatte (“Ombudsman”) while in Helsinki. He did so. . .”).

³⁵¹ *Id.*

³⁵² Bylaws, Art. 5, § 5.2(a) (“The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that ICANN staff, Board or an ICANN constituent body has treated them unfairly.” The Ombudsman is to collect all relevant facts, independently investigate the complaint, and resolve the complaint. To do this, among other things, the Ombudsman considered information from Mr. Nevett, Mr. Rasco, and the ICANN staff.).

³⁵³ Willett Witness Stmt., Ex. E.

³⁵⁴ *Id.*

additional evidence that might inform his investigation.³⁵⁵ To assist the Ombudsman, Ms. Willett spoke to Mr. Rasco by telephone, and he once again confirmed that there had been no change of control and that the decision to proceed with an ICANN-administered auction had been made by him alone.³⁵⁶ Ms. Willett emailed the Ombudsman on 9 July 2016 summarizing her conversation with Mr. Rasco.³⁵⁷

206. As Ms. Willett testified, it is consistent with the Bylaws and ICANN’s common practice for the Ombudsman to gather information from a variety of sources to inform his investigation.³⁵⁸ The Ombudsman followed this practice in response to the Donuts complaint: he independently and objectively considered the evidence and reached the same conclusion as ICANN’s staff, *i.e.*, that there was no credible evidence of a change of ownership or control of NDC and thus no reason to delay the auction.³⁵⁹ Once the Ombudsman concluded his investigation, ICANN informed the members of the .WEB contention set that the auction would proceed as scheduled in accordance with the Guidebook.³⁶⁰

207. Then, prior to the .WEB auction, ICANN’s Board Governance Committee

³⁵⁵ Hearing Tr. at 629:15-631:7 (“A. Mr. LaHatte had - - in this matter, as in many other matters, had asked me to provide information - - the program team that I might have to help inform his investigation so he could pursue that independent investigation. So he gathered information - - it is a common practice. My understanding is he gathered information from a variety of sources, including asking me to provide information on certain matters.”); *id.* at 639:2-19, 780:6-781:16.

³⁵⁶ *Id.* at 876:4-877:16; *see also id.* at 634:6-14 (“... You asked me the question how could I have had the conversation with Mr. Rasco. But I was having a conversation with Mr. Rasco based on my conversation with Mr. Nevelt in Helsinki and based on Mr. LaHatte’s general practice and request that I provide him with information that I had. That was the basis of my, again, reaching out to Mr. Rasco.”).

³⁵⁷ Willett Witness Stmt., Ex. D, C-75; Hearing Tr. at 628:25-631:7.

³⁵⁸ Hearing Tr. at 628:25-631:7, 634:6-14; *see also id.* at 639:7-16 (“... [M]y general recollection is that the ombudsman asked me to provide whatever information we had about the matters he was investigating pertaining to new gTLD applicant disputes. So it was a matter of gathering that information, fact-finding where we could to support to provide that information in support of his investigation.”).

³⁵⁹ ICANN’s Response to Amended IRP Request ¶ 36; Willett Witness Stmt. ¶ 29 (“On 12 July 2016, the Ombudsman informed me that he had determined there was no reason to postpone the Auction because he found to evidence of a change to the ownership or control of Nu Dotco.”).

³⁶⁰ VRSN-10.

evaluated whether ICANN staff conducted a proper investigation of Donuts' claims in connection with the emergency Reconsideration Request filed by Donuts and another .WEB applicant.³⁶¹ The Board Governance Committee found that "ICANN *did* diligently investigate the claims regarding potential changes to [NDC's] leadership and/or ownership."³⁶²

208. In sum, ICANN properly investigated Donuts' pre-auction allegation that there had been a change to the ownership and control of NDC that required an update to NDC's application and postponement of the .WEB auction. ICANN found no evidence of any change to NDC's ownership and control, the Ombudsman reached the same conclusion through his own independent investigation, and the Board Governance Committee came to the same conclusion, as did the Federal District Court, which denied Ruby Glen's application to enjoin the auction.³⁶³ ICANN's investigation was prompt, thorough and complied in every respect with its Articles and Bylaws.

B. Afilias' Post-Auction Investigation Claim Also Lacks Merit.

209. Afilias' separate claim that ICANN violated its Articles and Bylaws in its *post-auction* investigation of Afilias' complaints must also be rejected.³⁶⁴

210. First, in addition to being time barred, Afilias' Post-Auction Investigation Claim was not properly pled and is therefore outside the Panel's jurisdiction. As explained above in

³⁶¹ R-6.

³⁶² *Id.* at 9 (emphasis in original).

³⁶³ In Ruby Glen's lawsuit to enjoin the auction, the court found, based on ICANN's evidence, including primarily Ms. Willett's declaration, that Ruby Glen was not likely to prevail on the merits of its case. Specifically, the court wrote that: "Based on the strength of ICANN's evidence submitted in opposition to the Application for TRO, and the weakness of Plaintiff's efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook, the Court concludes that Plaintiff has failed to establish that it is likely to succeed on the merits, raise serious issues, or show that the balance of hardships tips sharply in its favor on its breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims." *Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers*, No. CV 16-5505 PA (ASX), 2016 WL 10834083, at *3 (C.D. Cal. July 26, 2016), RLA-66.

³⁶⁴ Afilias' Reply Memorial ¶¶ 8, 102.

paragraphs 18-22, the Panel has jurisdiction only over the claims pled in the Amended IRP Request, *i.e.*, the “Claim” as defined by Section 4.3(d) of the Bylaws. The Amended IRP Request asserted a claim that ICANN violated its Bylaws in connection with its pre-auction investigation of allegations concerning changes to NDC’s ownership and control. The contention in Afilias’ later submissions that ICANN violated its Bylaws in its post-auction investigation is a fundamentally different claim arising from a different investigation of different allegations occurring at a different time. That claim is not fairly encompassed by, or presented in, the Amended IRP Request and therefore is outside the Panel’s jurisdiction.

211. Second, Afilias’ belated contention – raised for the first time in its Reply Memorial – that ICANN’s post-auction investigation was “biased and inadequate”³⁶⁵ lacks merit and is internally contradictory. As an initial matter, the Hearing testimony confirmed that ICANN was not aware of Verisign’s involvement in the .WEB auction until Verisign issued a press release, on 1 August 2016.³⁶⁶ Afilias’ suggestion that Ms. Willett knew of Verisign’s involvement a day earlier when Mr. Rasco informed her that Verisign was going to issue a press release regarding .WEB was undermined by Ms. Willett’s testimony that she did not know what the press release was going to say and that she thought the release could have related to a post-delegation transaction.³⁶⁷ And Ms. Willett’s testimony dispelled the unsupported claim made by NDC’s counsel that when Ms. Willett congratulated Mr. Rasco on winning the auction she was somehow indicating that she knew and approved of Verisign’s funding of NDC’s bids.³⁶⁸ Ms. Willett, like all others at ICANN, learned of Verisign’s involvement only when Verisign issued

³⁶⁵ *Id.* ¶ 8.

³⁶⁶ Hearing Tr. at 673:18-675:10 (Willett); *id.* at 873:3-9 (Rasco); *id.* at 1252:8-20 (Livesay).

³⁶⁷ *Id.* at 672:10-21 (Willett).

³⁶⁸ *Id.* at 673:18-675:10 (Willett).

its press release, on 1 August 2016.³⁶⁹

212. Once that happened, Donuts initiated a CEP on 2 August 2016, and Afilias contacted ICANN on 8 August 2016 to allege for the first time that NDC violated the Guidebook through its arrangement with Verisign.³⁷⁰ ICANN, through its counsel, promptly reached out to Verisign to request a copy of the DAA and other information relevant to Ruby Glen's and Afilias' complaints.³⁷¹ In response, Verisign sent ICANN's counsel a letter dated 23 August 2016 responding to Ruby Glen's and Afilias' allegations, as well as providing a copy of the DAA, the 26 July 2016 letter agreement between Verisign and NDC, and documents supporting Verisign's contention that Afilias violated the auction Blackout Period.³⁷² Despite Afilias' arguments to the contrary, nothing about this communication from ICANN's counsel to Verisign's counsel was "sinister."³⁷³ Instead, ICANN was, through its counsel, collecting evidence it knew was in Verisign's control that was relevant to complaints that had been raised.

213. ICANN then wrote to Afilias, Ruby Glen, NDC, and Verisign inviting them to answer a questionnaire designed to give each an opportunity to fully set out their allegations and positions.³⁷⁴ The questionnaire was used as a tool to gather information to assist ICANN in evaluating the parties' respective positions.³⁷⁵ Afilias, NDC, and Verisign each accepted ICANN's invitation (Ruby Glen did not), providing a total of 59 single-spaced pages of

³⁶⁹ *Id.* (Willett).

³⁷⁰ C-49.

³⁷¹ R-29, at 20:9-15.

³⁷² R-18.

³⁷³ Hearing Tr. at 53:10 (Afilias' Opening Statement).

³⁷⁴ C-50.

³⁷⁵ Hearing Tr. at 695:10-696:20 (Willett) (Responding to a question about what it meant that the responses to the questionnaire would facilitate an "informed resolution" of the questions raised, Willett testified: "So asking questions to gather information, to resolve the questions raised. So there was the Ruby Glen CEP. There was the Afilias request to the ombudsman. So we were endeavoring to gather information.").

analysis.³⁷⁶ Although Afilias asserts that ICANN’s investigation was “biased and inadequate,”³⁷⁷ Afilias does not identify any additional information that ICANN should have gathered.

214. Afilias also claims that the questionnaire itself was biased because ICANN had a copy of the DAA and used it to draft questions designed to elicit answers that would not only help Verisign’s cause, but also protect ICANN from the type of concerns raised by Afilias in its letters.³⁷⁸ Afilias alleges that Verisign and NDC purportedly knew “the substantive motivations behind the questions” and, Afilias did not, when they responded to the questionnaire.³⁷⁹ Afilias argues that ICANN should have informed Afilias that it had the DAA and, because it did not, somehow “the deck was stacked” against Afilias.³⁸⁰

215. The problem with Afilias’ rhetoric is that Afilias did not present a shred of evidence to demonstrate that ICANN was “favoring” Verisign or had somehow drafted a set of questions that were designed to “protect” Verisign (in some fashion that is completely unclear). Thus, Afilias does not explain why the fact that ICANN did not advise Afilias that it had obtained the DAA “stacked” the deck or how giving Afilias this information would have changed Afilias’ responses. Nor does Afilias explain how sending the questions – some of which reflected the exact allegations Afilias and Ruby Glen had been making – amounted to a “cover-up.” Significantly, Afilias ignores the fact that Verisign provided the DAA to ICANN on the express condition that it was confidential business information that could *not* be disclosed by

³⁷⁶ C-51 (Afilias response); C-109 (Verisign response); C-110 (NDC response).

³⁷⁷ Afilias’ Reply Memorial ¶ 8.

³⁷⁸ *Id.* at ¶¶ 113-115.

³⁷⁹ *Id.* ¶ 113.

³⁸⁰ *Id.*

ICANN.³⁸¹ ICANN properly respected this condition while considering the substance of the DAA in crafting the questions that it put to Afilias, Ruby Glen, NDC and Verisign.

216. Afilias' contention in its Reply Memorial that the manner in which ICANN investigated Afilias' allegations violated the Articles and Bylaws is also internally contradictory. On the one hand, Afilias claims that ICANN did not adequately investigate its claims.³⁸² On the other hand, Afilias asserts that "[b]y August 2016, ICANN had all the information it needed to determine that NDC's application and bid had to be disqualified."³⁸³ Afilias cannot plausibly contend that ICANN did not gather sufficient facts to make a determination on the DAA, while simultaneously arguing that ICANN had all the facts that it needed to make that determination.

217. Finally, Afilias requests no relief in connection with this issue. No further investigation is possible, and Afilias' own allegations establish that none is warranted. And, as mentioned, Afilias has not identified any Article or Bylaws provision that was allegedly violated by the manner in which ICANN conducted its post-auction investigation.

VII. AFILIAS' RULE 7 CLAIM MUST BE REJECTED.

218. The Panel's Question No. 9 asked Afilias "to clarify what is left to be decided in connection with the Claimant's Rule 7 claim given the disposition of those issues in the Decision on Phase I and the conduct of the IRP in accordance with that ruling." The Panel also asked Afilias "to identify the source of its alleged entitlement to a cost award for the expenditure of effort because of VeriSign and NDC's participation in the IRP, on account of the alleged 'wrongful' adoption of Rule 7."

³⁸¹ C-102 ("CONFIDENTIAL BUSINESS INFORMATION: DO NOT DISCLOSE"). When information is provided to ICANN on a confidential basis, it is crucial that ICANN respect and maintain its confidentiality. ICANN Documentary Information Disclosure Policy, R-41. Any other approach would discourage individuals and companies from communicating openly with ICANN.

³⁸² Afilias' Reply Memorial ¶ 8.

³⁸³ *Id.* ¶ 16

219. With regard to the latter issue, as shown above (*supra* Sec. I.B) and below (*infra* Sec. VIII), the Panel’s remedial authority is defined by Section 4.3(o) of the Bylaws and its authority to shift costs is defined by Section 4.3(r). Under those provisions, the Panel has no power to grant a monetary award, and it can shift costs only on finding that the Claim or defense is frivolous or abusive. Accordingly, there is no valid basis for Afilias’ request for an order shifting costs on the grounds of Rule 7’s alleged wrongful adoption.

220. With regard to the former issue, the only part of Afilias’ Rule 7 claim that survived the Panel’s Decision on Phase I consists of the contention that ICANN staff (specifically ICANN’s Samantha Eisner) knowingly assisted Verisign in “exploit[ing] its leadership position on the IOT to secure an absolute right to participate in this IRP.”³⁸⁴ The Panel concluded in its Phase I Decision that the remainder of Afilias’ claim, which impugned the actions of the IOT, fell outside the Panel’s jurisdiction.³⁸⁵

221. It is not clear whether Afilias continues to press its Rule 7 claim. Afilias stated at the 4 March 2020 Case Management Conference that it was continuing to maintain its Rule 7 claim as “a vehicle for us to present evidence on the relationship between ICANN and VeriSign.”³⁸⁶ The testimony at the Hearing certainly did not provide evidence of any inappropriate relationship between ICANN and Verisign.

222. In any event, Afilias’ Rule 7 claim is meritless. There is no evidence supporting Afilias’ contentions that anyone within ICANN knowingly assisted Verisign in exploiting its leadership position on the IOT to secure a right to participate as *amicus* (or otherwise) in this IRP. On the contrary, the evidence contradicts Afilias’ claim.

³⁸⁴ Decision on Phase I ¶ 132 (citing Amended IRP Request ¶ 84).

³⁸⁵ *Id.* ¶¶ 111-133.

³⁸⁶ Case Management Conference Tr. (4 March 2020) at 11.

223. The fundamental predicate of Afiliias’ claim is that revisions made in October 2018 to the draft Rule 7 were engineered by Verisign to give itself the right to participate in this IRP. However, Verisign already would have had a right to participate as an *amicus* under the draft Interim Supplementary Procedures regardless of any of the changes at issue.

224. The draft Interim Supplementary Procedures circulated at the end of September 2018 stated that “[a]ny person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL[.]”³⁸⁷ The Procedures Officer had discretion to determine whether a proposed *amicus* had a material interest relevant to the dispute.³⁸⁸ If the Procedures Officer found that a proposed *amicus* had such an interest, the Procedures Officer had no discretion to disallow participation.³⁸⁹ Verisign clearly has a material interest relevant to this IRP, and therefore would have had a right to participate as an *amicus* pursuant to the September 2018 version of Rule 7.

225. On 11 October 2018, David McAuley – the Chair of the IOT and a Senior International Policy & Business Development Manager for Verisign – proposed amending the *intervention* section of Rule 7 to allow any person that “claims a significant interest” in the IRP to intervene as a Claimant.³⁹⁰ ICANN *rejected* those proposed changes: at a meeting of the IOT later that day, Ms. Eisner opposed Mr. McAuley’s amendments on the basis that they conflicted with standing requirements imposed by the Bylaws that require a Claimant to have suffered an

³⁸⁷ C-256; *see also* Hearing Tr. at 437:6-16.

³⁸⁸ *Id.* (“If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she *shall* allow participation by the *amicus curiae*.”) (Emphasis added).

³⁸⁹ *Id.*

³⁹⁰ C-258; C-259.

injury as a result of the alleged violation at issue in an IRP.³⁹¹ Ms. Eisner also objected that the standard proposed by Mr. McAuley was unduly vague and would allow a party to confer standing on itself simply by claiming a significant interest, regardless of whether it actually had any such interest.³⁹²

226. At that same IOT meeting, Malcolm Hutty – a member of the IOT not associated with any party or the *Amici* in this IRP – suggested that the Interim Supplementary Procedures should specify categories of persons, groups, or entities entitled as a matter of right to participate as *amicus curiae*.³⁹³ Following that meeting, Ms. Eisner drafted proposed revisions to Rule 7 to implement Mr. Hutty’s proposal. Ms. Eisner circulated her revisions on 16 October 2018. Those revisions added two categories of persons who would be deemed to have a material interest entitling them to participate as *amici*: (a) in an IRP relating to an application arising out of ICANN’s New gTLD Program, a person that was part of the contention set for the string at issue; and (b) a person external to the Dispute whose actions are “significantly refer[red] to in the briefings before the IRP Panel.”³⁹⁴

227. These revisions did not expand the scope of *amicus* participation. Entities that participated in a contention set at issue in an IRP or whose actions were significantly at issue invariably would have a material interest related to the IRP entitling them to participate under the September 2018 version of Rule 7. By deeming such entities to have a material interest, the 16 October 2018 revisions sought merely to eliminate the unnecessary procedural step of requiring

³⁹¹ Transcript of 11 October 2018 IRP-IOT meeting, at 12-13, https://community.icann.org/display/IRPIOT/IOT+Meeting+%2343+%7C+11+October+2018+@+19%3A00+UTC?preview=/95094963/96210667/ICANN-10112018-FINAL-en_IOT.pdf; see also Bylaws, Art. 4, Sec. 4.3(b)(i).

³⁹² E-mail from S. Eisner to D. McAuley, B. Turcotte and L. Le dated 12 October 2018.

³⁹³ Eisner Decl. ¶ 5.

³⁹⁴ *Id.*, Ex. 2.

the Procedures Officer to grant an application for leave to participate in circumstances where a proposed *amici* clearly satisfied the material interest requirement.³⁹⁵ Thus, the October 2018 revisions to Rule 7 did not create a right for Verisign to participate as *amicus curiae* in this IRP.

228. The evidence also shows that neither Ms. Eisner nor Mr. McAuley were aware at the time of the October 2018 revisions that Afilias intended to initiate an IRP, much less that the changes were made for the purpose of securing Verisign's right to participate in such an IRP. Ms. Eisner testified in her witness statement that she was not aware of Afilias' draft IRP Request when she proposed revisions to Rule 7.³⁹⁶ Ms. Eisner confirmed this at the Hearing.³⁹⁷ Ms. Eisner further testified that she does not recall being aware that Afilias had initiated a CEP³⁹⁸ and had no information regarding the progress or status of the CEP.³⁹⁹ Ms. Eisner was working to finalize a set of Interim Supplementary Procedures for approval by the Board so that a coherent process would be in place in case any IRP was filed.⁴⁰⁰ Her sense of urgency had to do with completing her work and had nothing to do with Afilias' planned IRP.⁴⁰¹ The IRP procedures that were in place prior to that time had been developed under a version of the Bylaws that had been significantly revised and superseded two years earlier.⁴⁰² As a result, the operative IRP procedures did not harmonize with the new Bylaws, which could have caused problems if an IRP were to be filed before revised procedures were in place.

³⁹⁵ Hearing Tr. at 460:9-13 (Eisner) (“And we had already started using that tool of identifying if there was anyone who might come in as of right – as a matter of reducing the level of briefing and streamlining the IRP proceedings.”); *id.* at 473:10-14 (“I was thinking about how this could present and what would make sense in terms of allowing an IRP to move forward and not get bogged down in briefing . . .”).

³⁹⁶ Eisner Decl. ¶ 7.

³⁹⁷ Hearing Tr. at 414:24-415:6, 415:24-416:2.

³⁹⁸ *Id.* at 411:13-19.

³⁹⁹ *Id.* at 414:24-415:6, 456:13-19.

⁴⁰⁰ *Id.* at 449:18-450:25, 453:1-25.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

229. Mr. McAuley states in his declaration that in October 2018 he “was not aware that Afilias had filed a Cooperative Engagement Process (“CEP”) on any subject, including with respect to the .web gTLD.”⁴⁰³ Mr. McAuley confirmed this in response to cross-examination at the Hearing.⁴⁰⁴ Mr. McAuley also testified that he was not aware that NDC had applied for .WEB or that Verisign had an interest in NDC’s application through the DAA.⁴⁰⁵ He further testified that “[n]one of my proposed edits or comments in the Interim Supplementary Procedures were made because of a CEP or IRP by Afilias with respect to .web.”⁴⁰⁶

230. Ms. Eisner and Mr. McAuley testified that the two categories of entities deemed to have a material interest that were added in October 2018 were drafted by Ms. Eisner alone, with no input from Mr. McAuley.⁴⁰⁷ Ms. Eisner and Mr. McAuley were both forthcoming and credible witnesses, and Afilias did not attempt to challenge their testimony on this issue. Afilias suggested at the Hearing that Ms. Eisner and Mr. McAuley may have had a telephone conversation on 15 October 2018, before Ms. Eisner circulated her draft revisions to Rule 7 the next day. Neither Ms. Eisner nor Mr. McAuley recalled such a conversation.⁴⁰⁸ But even if

⁴⁰³ McAuley Decl. ¶ 32.

⁴⁰⁴ Hearing Tr. at 1093:17-25 (“Q. Were you aware in October 2018 that Afilias had filed a CEP with ICANN? A. I believe that I was not. I don’t – I don’t pay attention to CEP. I don’t pay attention to IRP, really. Q. And in October of 2018, were you aware that Afilias had threatened to file an IRP against ICANN with respect to .WEB? A. I was not.”).

⁴⁰⁵ *Id.* at 1067:23-1068:13.

⁴⁰⁶ McAuley Decl. ¶ 32.

⁴⁰⁷ Eisner Decl. ¶ 6 (“I understand that Afilias Domains No. 3 Ltd. (“Afilias”) has suggested in letters to the ICDR and the ICANN Board dated 8 December 2018 and 21 December 2018 (respectively) that the provisions of Rule 7 stating that a member of the contention set for a new gTLD that is the subject of an IRP and/or a person, group, or entity whose actions are significantly referred to in the IRP briefing have material interests sufficient to participate as amici were added by David McAuley in response to a draft IRP Request that Afilias provided to ICANN’s in-house counsel on 10 October 2018 in conjunction with the confidential Cooperative Engagement Process. That is incorrect. Those Rule 7 provisions were drafted by me; and I was not aware of Afilias’ draft IRP Request when I drafted them and proposed them to the IRP-IOT.”); McAuley Decl. ¶ 26 (“This language was developed by Ms. Eisner alone. I never suggested to Ms. Eisner that she should add these two categories of persons who would be deemed to have a material interest for purposes of *amicus* participation.”).

⁴⁰⁸ Neither Ms. Eisner nor Mr. McAuley had any recollection of such a conversation. *See* Hearing Tr. at 511:4-512:16 (Eisner), *id.* at 1080:8-19 (McAuley).

some sort of conversation had occurred, that would not belie Ms. Eisner's and Mr. McAuley's testimony that the two categories deemed to have a material interest were drafted by Ms. Eisner alone, without input from Mr. McAuley.

231. In sum, the evidence unequivocally contradicts Afilias' claim that Mr. McAuley exploited his position as chair of the IOT to ensure Verisign's right to participate in this IRP, or that Ms. Eisner somehow knowingly assisted such conduct. Therefore, what little remains of Afilias' Rule 7 claim must be rejected.

VIII. COSTS.

232. The Bylaws and Interim Supplementary Procedures authorize the Panel to shift costs only on a finding that, when viewed in its entirety, a Party's case is frivolous or abusive. While this is an uncommonly high standard for international arbitration, it is more permissive than the "American Rule" under which legal fees ordinarily cannot be shifted to the non-prevailing party. Although ICANN contends that Afilias has deployed certain tactics and arguments that may well be frivolous or abusive, ICANN does not view the whole of Afilias' case as frivolous or abusive. Nor can Afilias plausibly argue that ICANN's case has been frivolous or abusive. Even if Afilias prevails on parts of its Claim (and it should not, for the reasons stated above), many of Afilias' individual causes of action, and nearly all of its requests for relief, must be rejected as clearly beyond the Panel's authority. Accordingly, the Panel's cost shifting power is not triggered.

233. Specifically, Section 4.3(r) of the Bylaws provides that (1) "ICANN shall bear all the administrative costs of maintaining the IRP mechanisms, including compensation of Standing Panel members" and (2) "each party to an IRP proceeding shall bear its own legal expenses;" but (3) the "IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing Party's Claim or defense as

frivolous or abusive.”⁴⁰⁹ Rule 15 of the Interim Supplementary Procedures contains substantially identical provisions.⁴¹⁰

234. Pursuant to Section 4.3(r) of the Bylaws and Rule 15 of the Interim Supplementary Procedures, ICANN agreed to bear all administrative costs of maintaining this IRP, including the fees and expenses of the Panelists and the ICDR (with the exception of the initial filing fee), and the parties have borne their own legal expenses.

235. Section 4.3(r) allows the Panel to re-allocate fees and costs only if it “identifies the losing party’s Claim or defense as frivolous or abusive.” “Claim” is a defined term: it means the “written statement of a Dispute” that initiates the IRP.⁴¹¹ Thus, administrative costs and legal expenses may be shifted onto the Claimant only when the Request for IRP as a whole is frivolous and abusive; they cannot be shifted where only particular aspects of the Request for IRP are frivolous and abusive. It follows that the same standard applies to the Panel’s authority to shift legal expenses onto ICANN, the Respondent. This is reinforced by the fact that Section 4.3(r) requires a finding that “*the* . . . Claim or defense [is] frivolous or abusive.” (Emphasis added.) It is not sufficient to find that a particular cause of action or defense is frivolous or

⁴⁰⁹ Bylaws, Art. 4, § 4.3(r).

⁴¹⁰ Article 34 of the ICDR Rules states that “the Tribunal may allocate costs among the parties if it determines that allocation is reasonable.” This provision of Article 34 directly conflicts with Section 4.3(r) of the Bylaws and Rule 15 of the Interim Supplementary Procedures and is therefore superseded pursuant to Rule 2 of the Interim Supplementary Procedures and Article 1(1) of the ICDR Rules.

⁴¹⁰ Rule 15 states:

“The IRP Panel shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN’s Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN’s Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party’s Claim or defense as frivolous or abusive.”

⁴¹¹ Bylaws, Art. 4, § 4.3(d).

abusive. That the Panel may shift costs only where the Claim or defense as a whole is frivolous or abusive is also consistent with the overall structure of Rule 4.3(r), which establishes a default rule that each party “shall bear” its own legal expenses and then a narrow carve-out permitting fee-shifting in only the most exceptional cases.

236. The Bylaws do not define “frivolous or abusive,” but those terms have a well-established meaning under California law. Section 128.5 of the California Code of Civil Procedure, which deals with fee shifting for improper litigation tactics, defines “frivolous” as “totally and completely without merit or for the sole purpose of harassing an opposing party.”⁴¹² This is an objective standard that is met only when “[a]ny reasonable attorney would agree” that the Claim or defense “is totally and completely without merit.”⁴¹³ Although Section 128.5 does not use the term “abusive,” it imposes the analogous requirement that litigation tactics must be found to have been “in bad faith” before fees can be shifted. This standard requires “a showing of an improper purpose, *i.e.*, subjective bad faith on the part of the attorney or party to be sanctioned.”⁴¹⁴

237. Afiliás has employed abusive tactics in this IRP from time to time and has taken positions that clearly have no merit. For example, Afiliás sought to have Rule 7 invalidated in a baseless and staggeringly inequitable attempt to preclude NDC and Verisign from being heard even though their conduct and rights are directly at issue. That effort led directly to the bifurcation of these proceedings, which substantially increased this IRP’s length and cost. After the Panel rejected the principal basis for Afiliás’ Rule 7 cause of action in Phase I—finding that it improperly sought to challenge conduct of the IOT, which is outside the Panel’s jurisdiction—

⁴¹² Cal. Civ. Proc. Code § 128.5(b)(2), RLA-71.

⁴¹³ *In re Marriage of Reese & Guy*, 73 Cal. App. 4th 1214, 1220-21 (1999), RLA-52.

⁴¹⁴ *Id.* at 1221.

Afilias continued to press the remainder of its Rule 7 cause of action for an abusive and improper purpose. Indeed, Afilias admitted as much at the 4 March 2020 Case Management Conference, stating that it was persisting in litigating the remaining rump of that cause of action for the purpose of digging for prejudicial and otherwise inadmissible evidence to be used to support its other contentions. (*Supra* at ¶ 221). Afilias has also asserted certain allegations and requests for relief that would be understood by any reasonable attorney to be without merit, such as Requests for Relief Nos. 2, 3, 4, 5 and 7, which are unquestionably beyond the authority of the Panel to grant. And Afilias' competition cause of action directly contradicts not only the outcome of a year-long DOJ investigation, but also its own prior statement that "[n]either ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators."⁴¹⁵

238. Nevertheless, ICANN does not view Afilias' Claim as a whole to be frivolous or abusive. Accordingly, in recognition of the standard established by Section 4.3(r) of the Bylaws, ICANN does not contend that Afilias' Claim triggers the Panel's authority to allocate administrative costs and legal expenses in ICANN's favor, and ICANN therefore does not seek an award of such costs.

239. Nor can Afilias plausibly argue that ICANN's defense triggers the Panel's authority to allocate legal expenses in Afilias' favor.⁴¹⁶ ICANN prevailed in Phase I on the lion's share of Afilias' Rule 7 cause of action and, as shown above (Sec. VII), ICANN must prevail in Phase II on the remainder of that cause of action. ICANN also must prevail in its defense to Afilias' Requests for Relief Nos. 2, 3, 4, 5 and 7, which are clearly outside the Panel's jurisdiction; its defense to the competition cause of action, which Afilias has essentially

⁴¹⁵ Amended IRP Request ¶ 8.

⁴¹⁶ As noted above, ICANN has borne all administrative costs of maintaining the IRP mechanisms. Therefore, any possible re-allocation of such costs could only be in ICANN's favor, not Afilias' favor.

abandoned; and its defenses to Afilias' Pre- and Post-Auction Investigation Claims and Afilias' contention that ICANN violated the Bylaws by not disqualifying NDC's .WEB application in August 2016, which are unequivocally barred by the repose and limitations periods established by Rule 4 of the Interim Supplementary Procedure. In short, even if Afilias prevails on some narrow aspect of its case, the great bulk of Afilias' allegations, causes of action and requests for relief can be readily rejected.

240. For these reasons, the Panel's cost-shifting authority under Section 4.3(r) of the Bylaws and Rule 15 of the Interim Supplementary Procedures has not been triggered, and the parties therefore must bear their own legal expenses. Likewise, ICANN will continue to honor its responsibility to bear the administrative costs of maintaining the IRP mechanism, including the Panel's fees.

CONCLUSION

241. In sum, ICANN has acted consistent with its Articles and Bylaws in overseeing and dealing with the numerous disputes over .WEB and the .WEB auction. ICANN, therefore, respectfully requests that the Panel deny each of Afilias' causes of action and all of its requested relief.

Respectfully submitted,
JONES DAY

Dated: October 12, 2020

By: /s/ Jeffrey A. LeVee
Jeffrey A. LeVee

Counsel for Respondent ICANN

APPENDIX A
INDEX OF AFILIAS' CAUSES OF ACTION AND REQUESTS FOR RELIEF
AND ICANN's DEFENSES

CLAIM	PLEADING WHERE FIRST ASSERTED	DEFENSES
<p>ICANN violated its Bylaws' provision stating that it should "[m]ake decisions by applying its documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment," by not immediately disqualifying NDC's application or auction bids in 2016 when ICANN became aware of NDC's arrangement with Verisign regarding .WEB.</p>	<p>Afilias Amended IRP Request ¶¶ 68 & 78 (bullets 1-3, 7))</p>	<ul style="list-style-type: none"> • <u>Time Bar</u>. This claim is time-barred by Rule 4 of the Interim Supplementary Procedures, and it is therefore outside the Panel's jurisdiction. (ICANN's Post-Hearing Brief, Section II.) • <u>No Violation of the Articles or Bylaws</u>. The Guidebook and Auction Rules grant ICANN significant discretion to determine whether a breach of their terms has occurred, and if so, the appropriate remedy. There is a good-faith dispute between the <i>Amici</i> and Afilias about whether the DAA violates the Guidebook or Auction Rules, and it is not a foregone conclusion that NDC is or is not in breach. (ICANN's Post-Hearing Brief, Section III.) • <u>Business Judgment Rule</u>. The Board exercised reasonable business judgment in deciding not to make any material decisions regarding .WEB while a related Accountability Mechanism was pending. (ICANN's Post-Hearing Brief, Section IV.)
<p>ICANN violated its Bylaws' provision stating that ICANN should "[m]ake decisions by applying its documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment," by the manner in</p>	<p>Afilias Amended IRP Request ¶ 78 (bullets 4, 5))</p>	<ul style="list-style-type: none"> • <u>Time Bar</u>. This claim is time-barred by Rule 4 of the Interim Supplementary Procedures, and it is therefore outside the Panel's jurisdiction. (ICANN's Post-Hearing Brief, Section II.)

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AND ICANN'S DEFENSES

CLAIM	PLEADING WHERE FIRST ASSERTED	DEFENSES
which ICANN conducted its pre-auction investigation of allegations by Ruby Glen that there had been a change of ownership or control of NDC.		<ul style="list-style-type: none"> • <u>The Investigation Was Done Properly.</u> ICANN's pre-auction investigation was prompt and thorough and it correctly concluded that NDC had not undergone a change in ownership and control. (ICANN's Post-Hearing Brief, Section VI.) • <u>No Violation of the Articles or Bylaws.</u> Afilias has not identified any provisions of the Articles or Bylaws purportedly violated by ICANN's investigation. (ICANN's Post-Hearing Brief, Section VI.)
Assertion that ICANN violated the Articles and Bylaws in its investigation of post-auction complaints by Afilias regarding NDC's arrangement with Verisign regarding .WEB.	Afilias Reply Memorial ¶¶ 8, 102-118	<ul style="list-style-type: none"> • <u>Not Pled.</u> This "claim" was not asserted in Afilias original or Amended IRP Request. Therefore, it is not part of the "Claim," as defined by Section 4.3(d) of the Bylaws, and is not properly before the Panel. (ICANN's Post-Hearing Brief, Section VI.) • <u>Time Bar.</u> This "claim" is time-barred by Rule 4 of the Interim Supplementary Procedures, and it is therefore outside the Panel's jurisdiction. (ICANN's Post-Hearing Brief, Section II.) • <u>The Investigation Was Done Properly.</u> ICANN's post-auction investigation was prompt and thorough. Indeed, Afilias' assertion that the investigation was insufficient is internally inconsistent with its

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INDEX OF AFILIAS' CAUSES OF ACTION AND REQUESTS FOR RELIEF
AND ICANN'S DEFENSES

CLAIM	PLEADING WHERE FIRST ASSERTED	DEFENSES
		<p>contention that by August 2016 ICANN had gathered all of the information necessary to disqualify NDC's application. (ICANN's Post-Hearing Brief, Section VI.)</p> <ul style="list-style-type: none"> • <u>No Violation of the Articles or Bylaws.</u> Afilias has not identified any provisions of the Articles or Bylaws purportedly violated by ICANN's investigation. (ICANN's Post-Hearing Brief, Section VI.)
<p>ICANN acted inconsistent with the provision in its Bylaws that ICANN's decisions and actions "should [be] guid[ed]" by the Core Values "to promote and sustain a competitive environment in the DNS market" "[w]here feasible and appropriate" and "depending on market mechanisms" as set forth in Bylaws Sections 1.2(b)(iii) and (iv), when ICANN sent a form registry agreement to NDC after NDC had prevailed in the .WEB auction, and the previously pending Accountability Mechanisms and DOJ investigation had all been concluded.</p>	<p>Afilias Amended IRP Request, Sec. 5 (¶¶ 79-83)</p>	<ul style="list-style-type: none"> • <u>No Violation of the Articles or Bylaws.</u> ICANN's Articles and Bylaws do not require or allow it to act as a competition regulator by awarding or withholding gTLDs based on its view of which applicant will most effectively contribute to competition. Nor does ICANN have the mandate, resources or expertise to evaluate and block anticompetitive conduct or transactions the way a government regulator would. (ICANN's Post-Hearing Brief, Section III.A.) • <u>No Anticompetitive Impact.</u> Afilias has not shown that Verisign's potential operation of .WEB would be anticompetitive. (ICANN's Post-Hearing Brief, Section III.B.) • <u>The DOJ's Investigation is Dispositive.</u> The DOJ's decision not to challenge Verisign's potential operation of .WEB establishes that

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AND ICANN’S DEFENSES

CLAIM	PLEADING WHERE FIRST ASSERTED	DEFENSES
		ICANN was not under a duty block Verisign’s possible operation of the TLD. (ICANN’s Post-Hearing Brief, Section III.B.)
ICANN violated its “policy of transparency,” or its Bylaws provision stating that ICANN should “[m]ake decisions by applying its documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,” by allegedly “conceal[ing] the terms of the DAA and its [purported] decision to delegate .WEB to NDC.”	Afilias’ Amended IRP Request for IRP, ¶ 78, (bullet 6)	<ul style="list-style-type: none"> • <u>ICANN Complied With Its Transparency Obligations.</u> ICANN’s obligations to act transparently did not require ICANN to disclose to Afilias the terms of the DAA. (ICANN’s Post-Hearing Brief, Section IV.) • <u>No Decision Was Made.</u> ICANN never made a decision to grant operation of .WEB to NDC. (ICANN’s Post-Hearing Brief, Sections V, IV.)
Verisign “exploited its leadership position on the IOT to ensure that the Interim Supplementary Procedures gave Verisign an absolute right to participate in this IRP,” and ICANN staff violated the Articles and Bylaws by allegedly knowingly assisting Verisign in doing so.	Amended IRP Request ¶ 84	<ul style="list-style-type: none"> • <u>Mr. McAuley Did Not Exploit His Leadership of IOT.</u> Afilias bases its claim on changes to Rule 7 that were made in October 2018. However, before any such changes, the draft Rule 7 already allowed <i>amicus curiae</i> participation by interested parties, such as Verisign and NDC. Further, Mr. McAuley testified that he was not aware of Afilias’ CEP or planned IRP, and his proposed changes were not motivated by those proceedings. (ICANN’s Post-Hearing Brief, Section VII.) • <u>Ms. Eisner Did Not Knowingly Assist Mr. McAuley.</u> Ms. Eisner was not aware of

APPENDIX A
INDEX OF AFILIAS' CAUSES OF ACTION AND REQUESTS FOR RELIEF
AND ICANN's DEFENSES

CLAIM	PLEADING WHERE FIRST ASSERTED	DEFENSES
		Afilias' CEP or planned IRP, and those proceedings had no impact on her work with the IOT. The changes to Rule 7 made in October 2018 were not meant to expand the scope of <i>amicus curiae</i> participation. They were intended to improve efficiency in circumstances where a proposed <i>amicus curiae</i> already had a clear right to participate. (ICANN's Post-Hearing Brief, Section VII.)

REQUESTS FOR RELIEF	PLEADING WHERE FIRST ASSERTED	DEFENSES
A declaration that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law.	Afilias Amended IRP Request ¶ 89(1)	<ul style="list-style-type: none"> • <u>Merits</u>. Afilias' request for a declaration that ICANN acted inconsistently with its Articles and Bylaws should be denied because its claims lack merit.¹ (ICANN's Post-Hearing Brief, Sections III-VII.)
An order requiring ICANN to disqualify NDC's bid for .WEB for violating the AGB and Auction Rules.	Afilias Amended IRP Request ¶ 89(2)	<ul style="list-style-type: none"> • <u>Jurisdiction</u>. The Panel's authority is defined and circumscribed by Section 4.3(o) of the Bylaws, and its authority does not allow the

¹ ICANN understands Afilias' references to the AGB and international law as contending that ICANN violated provisions in its Bylaws stating ICANN should make decisions by applying documented policies consistently, neutrally, objectively and fairly, and to carry out its activities in accordance with international law. ICANN does not understand Afilias to be asserting a claim that ICANN violated the Guidebook and/or international law separate and apart from the alleged Articles/Bylaws violations. However, if Afilias were to assert such a claim it would be outside the Panel's jurisdiction, which is limited to determining if a Covered Action violated the Articles and Bylaws.

APPENDIX A
INDEX OF AFILIAS' CAUSES OF ACTION AND REQUESTS FOR RELIEF
AND ICANN's DEFENSES

REQUESTS FOR RELIEF	PLEADING WHERE FIRST ASSERTED	DEFENSES
		<p>relief that Afilias requests. (ICANN's Post-Hearing Brief, Section I.)</p> <ul style="list-style-type: none"> • <u>Merits</u>. Afilias' claims should be rejected on the merits. (ICANN's Post-Hearing Brief, Sections III-VII.)
An order requiring ICANN to enter a Registry Agreement with Afilias.	Afilias Amended IRP Request ¶ 89(3)	<ul style="list-style-type: none"> • <u>Jurisdiction</u>. The Panel's authority is defined and circumscribed by Section 4.3(o) of the Bylaws, and its authority does not allow the relief that Afilias requests. (ICANN's Post-Hearing Brief, Section I.) • <u>Merits</u>. Afilias' claims should be rejected on the merits. (ICANN's Post-Hearing Brief, Sections III-VII.)
An order specifying the price to be paid by Afilias for the right to operate .WEB.	Afilias Amended IRP Request ¶ 89(4)	<ul style="list-style-type: none"> • <u>Jurisdiction</u>. The Panel's authority is defined and circumscribed by Section 4.3(o) of the Bylaws, and its authority does not allow the relief that Afilias requests. (ICANN's Post-Hearing Brief, Section I.) • <u>Merits</u>. Afilias' claims should be rejected on the merits. (ICANN's Post-Hearing Brief, Sections III-VII.)
An order that Rule 7 is unenforceable.	Afilias Amended IRP Request ¶ 89(5)	<ul style="list-style-type: none"> • <u>Jurisdiction</u>. The Panel's authority is defined and circumscribed by Section 4.3(o) of the Bylaws, and its authority does not allow the

APPENDIX A
INDEX OF AFILIAS' CAUSES OF ACTION AND REQUESTS FOR RELIEF
AND ICANN'S DEFENSES

REQUESTS FOR RELIEF	PLEADING WHERE FIRST ASSERTED	DEFENSES
		<p>relief that Afilias requests. (ICANN's Post-Hearing Brief, Section I.)</p> <ul style="list-style-type: none"> • <u>Merits</u>. Afilias' claims should be rejected on the merits. (ICANN's Post-Hearing Brief, Sections III-VII.)
An order awarding Afilias damages in the amount of all costs associated with work addressing arguments and filings by Verisign and/or NDC.		<ul style="list-style-type: none"> • <u>Jurisdiction</u>. The Panel's authority is defined and circumscribed by Section 4.3(o) of the Bylaws, and its authority does not allow the relief that Afilias requests. (ICANN's Post-Hearing Brief, Section I.) • <u>Merits</u>. Afilias' claims should be rejected on the merits. (ICANN's Post-Hearing Brief, Sections III-VII.)
An order awarding Afilias the costs of these proceedings.	Afilias Amended IRP Request ¶ 89(6)	<ul style="list-style-type: none"> • <u>Merits</u>. Pursuant to Section 4.3(r) of the Bylaws, the Panel may shift costs only on a finding that a Party's Claim or defense as a whole is frivolous or abusive. That standard is not met. ICANN's defense is not frivolous or abusive. (ICANN's Post-Hearing Brief, Section VIII.)
An order providing such other relief as the Panel may consider appropriate.	Afilias Amended IRP Request ¶ 89(7)	<ul style="list-style-type: none"> • <u>Jurisdiction</u>. Insofar as this request seeks relief not authorized by Section 4.3(r) of the Bylaws, it is outside the Panel's jurisdiction. (ICANN's Post-Hearing Brief, Section I.)

EXHIBIT C-50

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

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED'S RESPONSE TO
THE *AMICUS CURIAE* BRIEFS

24 July 2020

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I. INTRODUCTION

1. Throughout this IRP process, the *Amici* have sought to enjoy all the benefits of participation as parties while bearing none of the responsibilities. The *Amici's* recent submissions confirm that this approach is reflective of their general view of due process: as a right to which they alone—and no one else—are entitled. Having refused to join this IRP as parties, the *Amici* now bemoan what they view as the curtailment of their due process rights as *amici curiae*. The *Amici's* position in this regard is curious, as their conception of due process for Affiliates—and any other prospective IRP claimants—apparently entails eliminating any meaningful independent review of conduct by ICANN's Board and Staff, even when such conduct plainly violates the letter and spirit of ICANN's governing documents.

2. It is common ground that in keeping with ICANN's core function to promote competition, the New gTLD Program was designed to challenge Verisign's monopoly over the DNS. As such, Verisign's failure to pursue the most promising strings emerging from the New gTLD Program, including .WEB, was perhaps unsurprising. Years later, however, Verisign sought to eliminate the sole remaining threat to its monopoly—.WEB—circumventing the New gTLD Program Rules. Verisign acted surreptitiously, selecting an ideal puppet in *Amicus* NDC—an entity that had no chance of success in the .WEB contention set—and purchasing the relevant control rights in NDC's application, something that is without precedent. ICANN has been all too happy to enable Verisign's efforts to preserve its monopoly, abdicating its mandate to promote competition on the DNS in the hopes of retaining the \$135 million that Verisign paid for what was supposedly NDC's auction bid. ICANN violated numerous other requirements of its Articles and Bylaws to assist Verisign acquire .WEB—including its decision to take the .WEB contention set “off-hold” in June 2018 and proceed to contract for .WEB with NDC (and hence Verisign).

3. In their attempts to subvert the very purpose of the New gTLD Program by eliminating the one viable competitor to Verisign's monopoly that could emerge therefrom, the *Amici* now attempt to eviscerate the Bylaws' requirement of “meaningful” independent review and to deprive ICANN of any

accountability. The *Amici* submit that the Panel is powerless to redress Afilias' claim; instead, they would require the Panel to remand the matter to the very ICANN Board that sought to rubber-stamp Verisign's acquisition of .WEB, in violation of the New gTLD Program Rules and ICANN's Bylaws and Articles of Incorporation. The *Amici's* dim view of this Panel's powers would cripple the IRP process, rendering panels incapable of providing redress to aggrieved parties and ensuring adequate remedies for ICANN's breach of its constitutive documents. To endorse this view would bring no finality to the dispute over who is entitled to .WEB, and it would undermine the global Internet community's policy and procedural intentions as reflected in the New gTLD Program Rules, Articles, and Bylaws. To the contrary, it would permit ICANN to delegate a string after the applicant sold control rights in its application in a secret agreement, and allegedly addressed by ICANN for secret reasons at an undocumented meeting. Further, it would leave prospective registrars in the dark and at the mercy of ICANN's unfettered discretion.

4. Accordingly, for the reasons described below, this Panel must reject the arguments of ICANN and the *Amici* and order the relief requested in Afilias' Amended Request.

II. THE OMISSIONS AND MISREPRESENTATIONS OF KEY FACTS IN THE *AMICI* SUBMISSIONS

5. In seeking to participate as *Amici* in this case, Verisign and NDC have represented, including in their most recent letter, that they have important information and evidence that is "critical to the proper evaluation of Afilias' claims."¹ Unfortunately, the *Amici* submissions are most notable for their omissions and misrepresentations of key facts, as well as blind endorsement of ICANN's submissions.²

6. As we have explained elsewhere,³ the Panel's task in deciding Afilias' claims is straightforward. By reviewing the terms of the DAA against the New gTLD Program Rules⁴—applied, as they

¹ See, e.g., VeriSign's Supplemental Brief in Support of Its Request to Participate as *Amicus Curiae* in Independent Review Process (27 Sep. 2019), ¶ 31.

² Nor has ICANN made any effort to fill these obvious lacunae in its submissions.

³ See Section IX below.

⁴ The "New gTLD Program Rules" refer to the gTLD Applicant Guidebook, the Auction Rules for New gTLDs: Indirect Contention Edition, the New gTLD Auctions Bidder Agreement, "and other rules related to the New gTLD Program." Amended Request

must be, in accordance with ICANN's Articles and Bylaws—there is no question that ICANN violated its Articles and Bylaws by failing to disqualify NDC's application and bid, and by failing to award .WEB to Afilias as the next highest bidder.⁵ The *Amici* and their two fact witnesses—Mr. Paul Livesay of Verisign and Mr. Jose Ignacio Rasco III of NDC—do not dispute that they adhered to the terms of the DAA. The terms of the DAA are clear—as are the requirements of the ICANN's New gTLD Program Rules, Articles, and Bylaws. Given the terms of the DAA and the requirements of the New gTLD Program Rules, Articles, and Bylaws, no proper exercise of ICANN's discretion could have yielded any other result than the disqualification of NDC's application and/or auction bids and the award of .WEB to the next highest bidder, which was indisputably Afilias.⁶

7. However, to clear up the confusion that the *Amici* have tried to create, we will address the most significant of the *Amici's* omissions and misrepresentations in this section of our Response, proceeding in chronological order from the commencement of the .WEB application process in 2012 through ICANN's decision to take the .WEB contention set off-hold in June 2018 and to proceed to contract with NDC (and hence with Verisign). The *Amici's* omissions and misrepresentations serve only to advance Afilias' claims and undermine ICANN's defenses.

A. Verisign's Failure to Apply for .WEB in 2012

8. ICANN's New gTLD Program, as fully implemented in 2012, promised to expand the Domain Name System ("DNS") in a manner that was unprecedented in size and scope. As ICANN itself has stated in this IRP, the New gTLD Program is by far its "most ambitious expansion of the Internet's naming system."⁷ ICANN's New gTLD Program Rules arose from many years of work, with broad input from across the ICANN

by Afilias for Independent Review Process (21 Mar. 2019) ("**Afilias' Amended IRP Request**"), p. i; Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review (4 May 2020) (Revised, 6 May 2020) ("**Afilias' Reply Memorial**"), ¶ 8, fn. 22.

⁵ See, e.g., Afilias' Amended IRP Request, ¶¶ 76-78.

⁶ See Afilias' Amended IRP Request, ¶¶ 76-78; Afilias' Reply Memorial, ¶ 101; see also Sections III, IX below.

⁷ ICANN's Response to Amended IRP Request, ¶ 18.

community, designed to further the principles set forth in ICANN's Articles and Bylaws.⁸ Put simply, for TLD registry companies, there has been no event more significant in ICANN's history than the launch of the New gTLD Program.

9. As set forth in our prior submissions, .WEB has long been seen as representing the last best hope to provide meaningful competition against .COM, the TLD that has historically dominated the DNS, and that Verisign and its predecessors have controlled (along with .NET, the #2 gTLD) since the 1990s.⁹ Seven applicants—including major players in the Internet space (such as Google, Donuts, and Afilias)—submitted applications for the .WEB gTLD by the 13 June 2012 deadline. Verisign was not among them. Nor did any of the seven applicants have any known affiliation with Verisign.¹⁰

10. Both of the *Amicus* fact witnesses acknowledge the commercial significance of .WEB in their testimony. Mr. Rasco of NDC states that his company applied for .WEB because NDC was “focused on those potential gTLDs that could occupy a corporate space similar to .CO and ***had the greatest potential for commercial success.***”¹¹

11. Mr. Livesay of Verisign testifies that in 2014—*i.e.*, ***two years after the deadline for submitting new gTLD applications had passed***—Verisign put him “in charge of identifying potential business opportunities for Verisign in ICANN's New gTLD Program.”¹² Mr. Livesay does not mention any involvement in Verisign's strategy regarding the New gTLD Program prior to 2014, and Verisign provides no information on that topic. According to Mr. Livesay, out of the thousands of gTLDs that *bona fide* applicants had applied for in 2012, Verisign decided to pursue .WEB and, apparently, ***only .WEB.***

⁸ See ICANN's Response to Amended IRP Request, ¶ 19; Afilias' Reply Memorial, ¶¶ 22, 24.

⁹ See Afilias' Amended IRP Request, ¶¶ 82-83; Afilias' Reply Memorial, ¶¶ 124, 130.

¹⁰ As previously identified, the seven applicants, in alphabetical order, are: (1) Afilias; (2) Donuts, Inc. (through Ruby Glen LLC); (3) Google, Inc. (through Charleston Road Registry Inc.); (4) InterNetX GmbH (through Schlund Technologies GmbH); (5) NDC; (6) Radix FZC (through DotWeb Inc.); and (7) Web.com Group, Inc. See Afilias' Amended IRP Request, ¶ 27; ICANN's Response to Amended IRP Request, ¶ 30.

¹¹ Witness Statement of Jose Ignacio Rasco III (1 June 2020) (“**Rasco Decl.**”), ¶ 4 (emphasis added).

¹² Witness Statement of Paul Livesay (1 June 2020) (“**Livesay WS**”), ¶ 4.

12. *Verisign offers no explanation as to why Verisign chose not to apply for .WEB itself by 13 June 2012*—which, under the New gTLD Program Rules, was a threshold requirement for participating in the .WEB contention set, and which was met by all of the seven actual applicants for .WEB.¹⁴ Mr. Livesay acknowledges that Verisign had timely applied for *other* TLDs “that were variants of its company name (*i.e.*, ‘.Verisign’) or internationalized versions of Verisign’s existing TLDs”¹⁵ Verisign was therefore certainly aware of the deadline and was able to meet it in applying for variants of Verisign’s existing TLDs.

13. However, Mr. Livesay states without further explanation that in 2012, “*Verisign had not sought to acquire the rights to a new gTLD not already associated with Verisign.*”¹⁶

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[t]he period for filing new applications as part of the New gTLD Program had ended.”¹⁷ Verisign provides no explanation of what had changed between 2012 and 2014 that led it to decide pursue .WEB—let alone to pursue it *secretly*.¹⁸ The only hint is found in

¹³ Livesay WS, ¶11. Mr. Livesay is incorrect in this statement. He made no efforts to contact Afilias.

¹⁴ The AGB provides that “[a]n application will not be considered, in the absence of exceptional circumstances, if ... [i]t is received after close of the application submission period.” ICANN, gTLD Applicant Guidebook (4 June 2012) (“AGB”), [Ex. C-3], p. 1-3; *see also* Afilias’ Reply Memorial, ¶ 43.

¹⁵ Livesay WS, ¶ 4.

¹⁶ Livesay WS, ¶ 4 (emphasis added).

¹⁷ Livesay WS, ¶ 4 (emphasis added).

¹⁸ Mr. Livesay asserts in his witness statement that Redacted - Third Party Designated Confidential Information

Verisign provides no evidence of any “decrease” in the inventory for domain names that would justify Verisign’s failure to apply for the .WEB gTLD in 2012 but suddenly decide to seek it in 2014. Nor does this assertion explain why Verisign decided to pursue .WEB *in secret*. Redacted - Third Party Designated Confidential Information

Mr. Livesay's Witness Statement, where he attempts to explain why Verisign did not want anyone to know of Verisign's plan to pursue the rights to .WEB:

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14. Of course, if Verisign had applied for .WEB in 2012, its status as an applicant for .WEB would have been known to the public and governments. Among other things, the public portions of its .WEB application would have been available to the public and governments and would have been posted as part of the same notice and comment process to which all of the actual .WEB applicants were subject. Indeed, as ICANN states in its 18 July 2020 letter to the Panel—setting forth the portions of Livesay and Rasco testimony that it does not endorse (even though it submitted the statements with its Rejoinder)—the public portion of a gTLD application (including the Mission/Purpose Section) is “relevant to the Program” because:

[I]t allows the [Internet] community to comment on the application (during the public comment period) based on the applicant's statement of how the mission and purpose and how the gTLD is intended to be operated.²⁰

The public notice and comment are of course key components of ICANN's governing principles of transparency and accountability.²¹

15. If—as Verisign contends—there is nothing about its efforts to obtain the rights to .WEB that run afoul of the New gTLD Program Rules, or of ICANN's Articles and Bylaws, the Panel should ask why Verisign simply did not submit an application for .WEB in its own name. The Panel might also wonder why—

¹⁹ Livesay WS, ¶ 5 (emphasis added).

²⁰ Letter from ICANN to Panel (18 July 2020) (revised), p. 3. It is possible that Verisign sought to keep ICANN's Government Advisory Committee (“GAC”) in the dark about its intentions regarding .WEB, since the GAC had filed dozens of “early warning notices” regarding competition-related concerns raised by certain applications.

²¹ As stated in the AGB, ICANN's “[p]ublic comment mechanisms are part of ICANN's policy development, implementation, and operational processes.” AGB, [Ex. C-3], p. 1-5. They are critical to ICANN's mission, including in “promoting competition, achieving broad representation of global Internet communities, and developing policy appropriate to its mission through bottom-up, consensus based processes.” *Id.*

after deciding after the application deadline passed to pursue .WEB—Verisign went to such lengths to conceal that Verisign was (in Verisign's own words) **Redacted - Third Party Designated Confidential Information**

"²³ Surely, the mere prospect of "criticism by its competitors" was not what led Verisign to undertake its efforts to acquire the rights to .WEB and to do so in total secrecy.

16. There is, therefore, no explanation for why Verisign did not apply for .WEB itself in 2012—other than that it did not want anyone to know that Verisign was seeking the .WEB registry. Verisign was either worried about the reaction that its pursuit of .WEB would cause throughout the Internet community (and beyond) and/or wanted to act as a stealth bidder—acting under the cloak of a much smaller special purpose TLD acquisition company—so that bidders would not know that the industry behemoth was seeking .WEB and develop their bidding strategy to account for that fact.

B. The Circumstances Surrounding the Negotiation and Execution of the DAA

17. The testimony of Messrs. Livesay and Rasco is also remarkably vague about the circumstances under which Verisign and NDC negotiated and executed the DAA. **Redacted - Third Party Designated Confidential Information**

²⁴ **Redacted - Third Party Designated Confidential Information**

"²⁵

²² Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC (25 Aug. 2015) ("DAA"), [Ex. C-69], Sec. 10(a) (emphasis added).

²³ DAA, [Ex. C-69], Ex. A, Sec. 1 (emphasis added).

²⁴ Livesay WS, ¶ 12.

²⁵ Livesay WS, ¶ 12.

18. We know from Mr. Rasco's testimony that NDC "received confirmation from ICANN that [NDC's] .WEB Application had been accepted—meaning that the Application had satisfied all applicable ICANN criteria and evaluations—in June 2013."²⁶ Thus, by June 2013, the notice and comment period had closed and NDC's application had passed all of the evaluation criteria set forth in the AGB. According to Mr. Rasco, after the identity of other applicants became publicly known, NDC realized that it was competing against larger and better-financed companies. Redacted - Third Party Designated Confidential Information

.²⁷

19. Redacted - Third Party Designated Confidential Information

²⁸ Accordingly, NDC decided to explore other ways to "monetize" its .WEB application, and to make a profit over the \$185,000 application fee and the costs involved in preparing the application.

Mr. Rasco states in his witness statement:

In or around May 2015, I received a phone call from Verisign expressing interest in working with NDC to acquire the rights to .WEB. As noted above, by that date ICANN had formed the Contention Set for .WEB (*meaning no new applicants could join*) and Redacted - Third Party Designated Confidential Information

In addition, as also noted above, by that date ICANN had yet to schedule a public auction for .WEB., and thus the domain was still on hold, so there was no clarity as to a resolution by either a public *or* private auction. Consequently, Redacted - Third Party Designated Confidential Information

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²⁶ Rasco Decl., ¶ 24.

²⁷ Rasco Decl., ¶ 40.

²⁸ Rasco Decl., ¶ 41.

²⁹ Rasco Decl., ¶ 41 (emphasis added). It should be noted that in ICANN's letter to the Panel dated 18 July 2020, ICANN states that Mr. Rasco's use of the term "public auction" is a misnomer; the correct term is an "ICANN auction." Letter from ICANN to Panel (18 July 2020) (revised), pp. 5, 10.

20. From Verisign’s perspective, therefore, NDC was the ideal candidate to serve as cover for Verisign’s efforts to secretly obtain the rights to .WEB for itself. *First*, NDC was not only willing but eager to sell its rights in its .WEB Application, given that^{Redacted - Third Party Designated Confidential Information} *Second*, because NDC was a small company with limited funding, the other .WEB applicants would not base their bidding strategies on the assumption that NDC would be able to make a substantial bid. NDC was thus the perfect vehicle to allow Verisign to fly “under the radar.” NDC not only allowed Verisign to conceal its “indirect” participation in the contention set; it also allowed Verisign to blindside the *bona fide* applicants with a high bid that none of the other applicants could have seen coming—not knowing that Verisign was hiding behind NDC.

21. Neither Mr. Livesay nor Mr. Rasco provide any details of how the DAA was drafted or negotiated. We know from Mr. Rasco’s witness statement that someone at Verisign contacted him “[i]n or around May 2015.”³⁰ We have virtually no information as to what transpired between Verisign and NDC between that time and the execution of the DAA on 25 August 2015. The *Amici* provide no information concerning who drafted the DAA, how many drafts (if any) were exchanged, or if there was any negotiation of its terms. ^{Redacted - Third Party Designated Confidential Information}

which are attached as Exhibits B and C to his witness statement. We address the terms of the DAA—and the various transactions to which the *Amici* try to compare the DAA—in detail in Section IV below. ^{Redacted - Third Party Designated Confidential Information}

³¹ Indeed,

³⁰ Rasco Decl., ¶ 41.

³¹ ^{Redacted - Third Party Designated Confidential Information}

Mr. Livesay does not even claim that the terms of the DAA are based on the templates; nor does he identify any actual model for those terms.

22. Both the *Amici* and their witnesses attempt at length to explain why the provisions of the DAA were consistent with the New gTLD Program Rules and what they call “industry practice” (which, given that ICANN had never undertaken anything like the New gTLD Program, was in fact non-existent).³² As we explain in detail in Section IV.D. below, their legal arguments and factual assertions do not withstand scrutiny. Indeed, many of the arguments are frivolous and many of the assertions are demonstrably false. And again, as discussed further below, if Verisign and NDC believed that their arrangement did not violate the New gTLD Program Rules, one must wonder why they went to such lengths to conceal it—including not only from Verisign’s competitors, but from ICANN itself.

C. Verisign’s Post-DAA Inquiry to ICANN

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. As detailed in Section IV.D. below, the involvement of Donuts in these applications was not only announced to the public prior to the application deadline; Donuts was specifically identified in the applications at issue.³⁴ Again, none of the other transactions identified by the *Amici* are roughly analogous to the DAA. Nor do the *Amici* attempt

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³² As ICANN states in its 18 July 2018 letter to the Panel, ICANN has “not formally endorsed” any of the particular arrangements that Messrs. Livesay and Rasco identify as analogous to the DAA. *See, e.g.*, Letter from ICANN to Panel (18 July 2020) (revised), p. 6.

³³ Livesay WS, ¶ 8.

³⁴ *See* Section IV below.

to explain how other transactions entered into by other entities during the New gTLD Program would constitute any sort of precedent to establish that such transactions did not violate the New gTLD Program Rules, or why they would not have required disclosure to ICANN and the Internet community.³⁵

24. Notably, the *Amici* never approached ICANN about their arrangement prior to executing the DAA on 25 August 2015. Instead, in early September 2015, Verisign contacted ICANN asking about the assignment of a hypothetical gTLD registry agreement *after* a contention set has been resolved, a qualified applicant has been designated to enter into a registry agreement with ICANN, and ICANN and the qualified applicant have executed the registry agreement. Verisign did not pose *any* questions about the DAA or even about the New gTLD Program Rules. Again, Verisign's inquiry asked solely about *post-registry agreement assignments*—which, as ICANN has stated, are governed by an entirely different set of rules that are not at issue in this IRP.³⁶

25. The only information in the record about Verisign's communications with ICANN in September 2015 appears in two emails, which were submitted by Verisign's outside counsel (Mr. Ronald Johnston of Arnold & Porter) in his 23 August 2016 letter to ICANN's outside counsel (which also enclosed the DAA).³⁷ Redacted - Third Party Designated Confidential Information

³⁵ See Section IV below. As stated in its 18 July 2018 letter to the Panel, ICANN has “not formally endorsed” any of the particular arrangements that Messrs. Livesay and Rasco identify as analogous to the DAA. See, e.g., Letter from ICANN to Panel (18 July 2020) (revised), p. 6.

³⁶ See ICANN's Response to Amended IRP Request, ¶ 26 (“Assignments and transfers of Registry Agreements to operate gTLDs must be approved by ICANN, and ICANN follows a known procedure in evaluating such requests.”)

³⁷ Neither Mr. Livesay in his witness statement nor Verisign in its *Amicus* submission mentions this exchange of emails. Although Afilias requested ICANN to produce documents “concerning or discussing” these two emails—and although the Panel ordered ICANN to produce them (see Procedural Order No. 2 (27 Mar. 2020), Attachment A, Request No. 5, p. 20)—ICANN claimed it was unable to locate any responsive documents.

?³⁸

26. This is a remarkable communication. Written barely a week after Verisign executed the DAA, it does not mention .WEB. Nor did Verisign ask any of the numerous other obvious questions that arise from the DAA, such as whether a non-applicant (like Verisign) could enter a confidential agreement with an Applicant (like NDC), under which the non-applicant would pay the Applicant millions of dollars to enable the non-applicant, *inter alia*, to:

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³⁸ Letter and attachments from Ronald Johnston (Counsel for Verisign) and Brian Leventhal (Counsel for NDC) to Eric Enson (Counsel for ICANN) (23 Aug. 2016) [ICANN-WEB_000001 - ICANN-WEB_000073], [Ex. R-18], pp. 44-45 (emphasis added).

³⁹ DAA, [Ex. C-69], Sec. 10(a).

⁴⁰ DAA, [Ex. C-69], Sec. 4(f).

⁴¹ DAA, [Ex. C-69], Secs. 4(i), 4(j), 8; *id.*, Ex. A, Sec. 1(i).

⁴² DAA, [Ex. C-69], Ex. A, Sec. 1.

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27. Nor did Verisign ask ICANN any questions about obviously applicable provisions of the New gTLD Program Rules, such as the rule that an “[a]pplicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application;”⁴⁵ the requirement that an Applicant “warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing with the application) are true and accurate and complete in all material respects;⁴⁶ or the rules that only an Applicant can participate in an ICANN auction and that it can place bids only on its own behalf, unless it designates and specifies an agent to enter bids on its behalf.

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⁴³ DAA, [Ex. C-69], Ex. A, Sec. 3.

⁴⁴ DAA, [Ex. C-69], Ex. A, Sec. 3(c).

⁴⁵ AGB, [Ex. C-3], p. 6-6.

⁴⁶ AGB, [Ex. C-3], p. 6-2.

29. Verisign plainly did not want ICANN to know about the terms of the DAA—which is why Verisign’s September 2015 communications with ICANN contained no reference to them. Verisign sought only to confirm that—if NDC (under the complete control of Verisign and acting only for Verisign’s behalf) prevailed in the .WEB contention set and executed a registry agreement with ICANN—Verisign could then direct NDC to ask ICANN to assign the registry agreement to Verisign, with no obstacles posed and no questions asked.

D. Verisign/NDC’s Pre-Auction Conduct

30. As explained in Afilias’ Amended Request for IRP, most contention sets are resolved through private auctions.⁴⁸ The *Amici* do not dispute that assertion.⁴⁹ The reason is simple. In a private auction, the winning bid is distributed among the losing bidders. To apply for a gTLD is an expensive proposition. It requires an application fee of \$185,000. The preparation of an application can be a labor-intensive, expensive exercise. Private auctions and other private resolutions of contention sets—which ICANN says it favors⁵⁰—provided a means for applicants to recoup their initial investments and sometimes make a significant profit.⁵¹

31. As also explained in Afilias’ Amended Request, by mid-May 2016, it appeared that all of the .WEB contention set members had agreed to participate in a private auction.⁵² As Mr. Rasco acknowledges, NDC was a relatively small company, without any apparent means of funding a significant bid. It therefore

⁴⁷ Letter and attachments from Ronald Johnston (Counsel for Verisign) and Brian Leventhal (Counsel for NDC) to Eric Enson (Counsel for ICANN) (23 Aug. 2016) [ICANN-WEB_000001 - ICANN-WEB_000073], [Ex. R-18], p. 44.

⁴⁸ Afilias’ Amended IRP Request, ¶ 21.

⁴⁹ See Rasco Decl., ¶ 31; Livesay WS, ¶ 16.

⁵⁰ See AGB, [Ex. C-3], p. 4-6 (“Applicants that are identified as being in contention are encouraged to reach as settlement or agreement among themselves that resolves the contention.”).

⁵¹ Afilias’ Reply Memorial, ¶ 48.

⁵² See Afilias’ Amended IRP Request, ¶ 29 (and evidence cited therein).

caught the attention of other applicants when NDC failed to meet the deadline to submit an application to participate in the private auction—and led to speculation that a non-applicant (including, possibly Verisign)—was somehow involved in NDC’s application.⁵³ Of course, as we now know, Redacted - Third Party Designated Confidential Information

32. The *Amici* are evasive at best in describing when, how, and why Verisign determined that NDC would not participate in a private auction. Redacted - Third Party Designated Confidential Information

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33. Redacted - Third Party Designated Confidential Information

⁵⁵ But he fails to provide even an approximate time frame for when he gave Mr. Rasco this instruction. Nor does Mr. Rasco indicate when Verisign provided NDC with such instructions.

34. We have set forth in detail in our Amended IRP Request and Reply the misleading and evasive responses that Mr. Rasco provided to executives from other applicants when they asked him if he

⁵³ See *Afilias’ Amended IRP Request*, ¶¶ 29-32.

⁵⁴ DAA, [Ex. C-69], Ex. A, Sec. 1(i).

⁵⁵ *Livesay WS*, ¶ 16.

and the other listed “managers” of NDC (Messrs. Calle and Bezsonoff) were still “the Board members” of NDC—in other words, whether they still had decision-making authority for NDC’s .WEB application.⁵⁶ In response, Mr. Rasco says only that he “was under no obligation to be completely forthcoming about our internal operations or plans with parties who were competing for the same gTLD.”⁵⁷ Of course, Verisign was not a “party” who was legitimately “competing for the same gTLD.” It was a non-applicant who had taken over complete and secret control of NDC’s Redacted - Third Party Designated Confidential Information

35. Regardless of whether Mr. Rasco had an obligation to be “completely forthcoming” with other applicants, there is no question that he had such obligation with respect to ICANN. As set forth in our Reply, on 27 June 2016, Mr. Jared Erwin wrote to Mr. Rasco:

We would like to confirm that there have not been *changes to your application or the [NDC] organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application*, including changes that occur as part of regular business operations (e.g., changes to officers or directors, application contacts).⁵⁸

Mr. Rasco wrote in response:

I can confirm that there have been no changes to the [NDC] organization that would need to be reported to ICANN.⁵⁹

36. In attempting to explain the partial (and misleading) answer that Mr. Rasco provided to Mr. Erwin, Mr. Rasco testifies in his witness statement that he thought Mr. Erwin’s inquiry—notwithstanding its broad language (*i.e.*, changes to the “application or the [NDC organization]” or “any information that is no longer true and accurate in the application”)—was strictly limited to “whether the identifying information set

⁵⁶ See, e.g., Afiliats’ Reply Memorial, ¶ 71 (and exhibits cited therein).

⁵⁷ Rasco Decl., ¶ 87.

⁵⁸ Emails from Jared Erwin (ICANN) to Jose Ignacio Rasco (NDC) (27 June 2016), [Ex. C-96], p. 1 (emphasis added).

⁵⁹ Emails from Jared Erwin (ICANN) to Jose Ignacio Rasco (NDC) (27 June 2016), [Ex. C-96], p. 1.

forth in NDC's application (*e.g.*, management, ownership, and contacts) had changed."⁶⁰ According to Mr. Rasco, "it never occurred to me that ICANN's routine inquiry might require disclosure of" the terms of the DAA.⁶¹ We leave it to the Panel to assess the credibility of Mr. Rasco's testimony under these circumstances.

37. Similarly, in a conversation with Ms. Christine Willett of ICANN, Mr. Rasco told her that although he had suggested to a competitor (*i.e.*, Mr. Jon Nevett of Donuts Inc.) that the "decision to not resolve contention privately was not entirely his ..., this decision was in fact his."⁶² That representation by Mr. Rasco to Ms. Willett simply cannot be reconciled with the terms of the DAA or with the testimony he has provided in his witness statement, where Mr. Rasco acknowledges that Redacted - Third Party Designated Confidential Information

38. As for Mr. Livesay, he asserts in his witness statement that shortly before the ICANN auction for .WEB took place on July 27-28, 2016, Redacted - Third Party Designated Confidential Information

⁶⁰ Rasco Decl., ¶ 78.

⁶¹ Rasco Decl., ¶ 78.

⁶² *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit D to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 July 2016), [Ex. C-75], p. 4.

⁶³ Rasco Decl., ¶ 27.

⁶⁴ Livesay WS, ¶ 27.

⁶⁵ Livesay WS, ¶ 27.

relevance of this document in Section IV.E. below.

39. Redacted - Third Party Designated Confidential Information

Again, we leave it to the Panel to assess the credibility of Mr. Livesay's testimony.

E. Verisign/NDC's Post-Auction Communications with ICANN

40. ICANN declared NDC to be the winner of the .WEB auction on 28 July 2016, based on the \$142 million bid that Verisign directed NDC to make on Verisign's behalf. Verisign then arranged for NDC to pay to ICANN the USD 135 million "final price" on Verisign's behalf on or around 1 August 2016.⁶⁸ Verisign kept its arrangement with NDC secret, stating in a purposefully vague footnote in its 10-Q statement with the U.S. Securities and Exchange Commission that "[s]ubsequent to June 30, 2016, [Verisign] incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third party consent."⁶⁹ However, after the disclosure in the 10-Q footnote caught the attention of the press—which speculated that Verisign was behind NDC's winning bid⁷⁰—Verisign had no choice but to issue its 1 August 2016 press release (which even then was incomplete and misleading).⁷¹

41. Verisign and NDC are remarkably silent in their *Amici* submissions about their activities in the wake of the 1 August 2016 press release. We know from documents produced by ICANN that on the night prior to the press release, Redacted - Third Party Designated Confidential Information

⁶⁶ Livesay WS, ¶¶ 27-28 (quoting Letter from Paul Livesay (Verisign) to Jose Rasco (NDC) (6 July 2016) (Confirmation of Understandings) [Livesay WS (1 June 2020), Ex. H]).

⁶⁷ Livesay WS, ¶ 27.

⁶⁸ Rasco Decl., ¶ 103.

⁶⁹ VeriSign, Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), [Ex. C-45], p. 13; Afiliias' Amended IRP Request, ¶ 37; Afiliias' Reply Memorial, ¶ 103.

⁷⁰ See Afiliias' Reply Memorial, ¶¶ 103-104.

⁷¹ See Afiliias' Reply Memorial, ¶ 106.

42. Mr. Livesay is similarly evasive about Verisign's communications with ICANN following the auction:

I was responsible for this transaction. I did not have any communications with ICANN before or following the auction process.

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43. Mr. Livesay does not refer to any further communications between representatives of Verisign and ICANN following the auction. On 8 August 2016, Mr. Scott Hemphill (Afilias' Vice President and General Counsel) wrote his first letter to Mr. Atallah to state Afilias' concerns in light of Verisign's press release and public reports concerning Verisign's involvement in NDC's application. Like ICANN, the *Amici* misrepresent Mr. Hemphill's 8 August 2016 and 9 September 2016 letters as asserting the same claims as in this IRP, apparently in an effort to help ICANN invoke its "limitations period" defense.⁷⁴ In fact, Mr. Hemphill specifically stated:

We have not been able to review a copy of the agreement(s) between NDC and VeriSign with respect to [their reported] arrangement, but it appears likely, given the public statements of VeriSign, that [NDC] and VeriSign entered into an agreement in the form of an option or similar arrangement with respect to the rights and obligations of NDC regarding its .WEB application.⁷⁵

⁷² Emails from Jose Ignacio Rasco (NDC) to Christine Willett (ICANN) (*various dates*), [Ex. C-100], pp. 1-2.

⁷³ Livesay WS, ¶ 38.

⁷⁴ See Amicus Curiae Brief of Nu Dotco, LLC (26 June 2020) ("**NDC Br.**"), ¶¶ 58-59, 64. See also ICANN's Response to Amended IRP Request, ¶¶ 75-76; ICANN's Rejoinder Memorial, ¶¶ 63-69.

⁷⁵ Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), [Ex. C-49], p. 1.

Mr. Hemphill requested that ICANN “undertake an investigation of the matters set forth in this letter”⁷⁶— which, as discussed below, ICANN specifically committed to do. Afilias did not request Mr. Hemphill’s letter to be given confidential treatment, and accordingly, ICANN posted it on its website.

44. Like ICANN, the *Amici* fail to disclose any information as to how and why ICANN’s outside litigation counsel at Jones Day, Mr. Eric Enson, subsequently contacted Verisign’s outside litigation counsel, Mr. Johnston, by phone, to request (in Mr. Johnston’s words) **Redacted - Third Party Designated Confidential Information**

On 23 August 2016, Mr. Johnston responded by not just submitting the DAA, but various other documents, along with detailed legal argumentation, specifically responding to Mr. Hemphill’s 8 August 2016 letter. The only explanation as to what prompted Mr. Enson’s request for this submission comes from Mr. Enson himself. At the hearing on Afilias’ application to compel documents, Mr. Enson attempted to explain why ICANN apparently had no documents reflecting Mr. Enson’s request to Mr. Johnston or what had prompted it:

And I want to quickly respond to Mr. de Gramont’s argument regarding the “request for information to Verisign” which is referred to at Slide 11 of his presentation. The request was made by me and it was done over the phone. The lawyers ... – ICANN and Verisign had been adverse to one another on a number of occasions. The lawyers know each other well and there is nothing extraordinary or sinister about me picking up the phone to call Mr. Johnston about an issue like this.⁷⁸

45. To the contrary, the complete lack of information about what led Mr. Enson to make this request orally to Mr. Johnson—and the complete secrecy in which the exchange took place—is indeed extraordinary, even sinister. Afilias had just raised serious concerns with ICANN about the manner in which NDC had just bid \$142 million (by far the largest bid ever made for a TLD) to acquire .WEB—widely viewed as the last best hope to provide meaningful competition against Verisign’s .COM—and had apparently done

⁷⁶ Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), [Ex. C-49], p. 2.

⁷⁷ Letter and attachments from Ronald Johnston (Counsel for Verisign) and Brian Leventhal (Counsel for NDC) to Eric Enson (Counsel for ICANN) (23 Aug. 2016) [ICANN-WEB_000001 - ICANN-WEB_000073], [Ex. R-18], p. 1.

⁷⁸ Hearing on Afilias Application (11 May 2020), Tr., 20:9-15 (Enson).

so surreptitiously on behalf of Verisign, the industry monopolist who had not even applied for any TLDs other than foreign language equivalents of .COM, .NET, and .VERISIGN. We can only assume that as a result of Mr. Hemphill's letter, someone at ICANN contacted Mr. Enson at Jones Day, and in turn asked him to contact Mr. Johnston, and not to put anything in writing. Why was ICANN contacting Verisign rather than NDC for this information? Why was this suddenly being handled by outside litigation counsel? Why was Mr. Enson's request to Mr. Johnston made by phone rather than in writing, given ICANN's obligation to act transparently to the global Internet community? What was said in the call that led to such a detailed and defensive response from Verisign? And why were these communications kept completely secret from Afilias and the global Internet community?

46. Unlike Mr. Hemphill's 8 August 2016 letter (and his subsequent 9 September 2016 letter), Mr. Johnston's letter and its accompanying exhibits were never disclosed until the Emergency Arbitrator ordered them to be produced to Afilias in this IRP.⁷⁹ Even now, the Internet community knows almost nothing about the terms of NDC's and Verisign's deal.

47. Indeed, although Mr. Johnston's letter purports to be submitted Redacted - Third Party
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Information Mr. Rasco appears not to have known that ICANN had requested any information from Verisign (in the form of Mr. Enson's call to Mr. Johnston or otherwise). Mr. Rasco testifies in his witness statement that he was surprised to receive Ms. Willett's 16 September 2016 letter and questionnaire, because he had not heard anything about .WEB since communicating with ICANN in early August 2016:

On September 16, 2016, I received an email from Ms. Willett at ICANN stating that Ruby Glen and Afilias had continued to complain that NDC should not have participated in the .WEB public auction and that NDC's Application should be rejected. *That letter was a surprise to me, as prior*

⁷⁹ While Verisign demanded that the DAA and Mr. Johnston's cover email be treated as "highly confidential," ICANN fails to explain what about either document is so "highly confidential" as to warrant extreme confidentiality or, otherwise, why ICANN did not demand that Verisign redact whatever confidential terms prevented ICANN from publicly disclosing the balance of the DAA to the public.

*to receiving it I had not heard from or communicated with Ms. Willett or anyone else at ICANN about .WEB since confirming our payment for .WEB in August 2016.*⁸⁰

It is inexplicable that Mr. Rasco would not have known about Mr. Enson's request for information to Mr. Johnston, and Mr. Johnston's response on behalf of both NDC and Verisign.

48. Mr. Hemphill's and Mr. Johnston's letters appear to have precipitated ICANN's 16 September 2016 letter and questionnaire to NDC, Verisign, Afilias, and Ruby Glen. Although the *Amici* claim in their submissions not to have coordinated with ICANN in the preparation of the questionnaire, it is evident that Ms. Christine Willett's (ICANN's Vice President of gTLD Operations) questions were based on arguments made in Mr. Johnston's 23 August 2016 letter rather than on ICANN's independent review of the DAA. Moreover, it must be recalled that in responding to the questionnaire, Verisign's and NDC's counsel had in their possession—and knew that ICANN had in its possession—Mr. Hemphill's 8 August and 9 September letters; Mr. Johnston's 23 August 2016 letter (specifically responding to Mr. Hemphill's 8 August letter); and the DAA and other documents that accompanied Mr. Johnston's letter. By comparison, Afilias was only aware of its own letters to ICANN—which were prepared without the benefit of having the DAA or other relevant documentation. No reasonable person could think that this was a remotely fair process given the complete imbalance of information. As Afilias stated in its Reply Memorial: "ICANN already knew in the main what Verisign's and NDC's responses would be. The questionnaire was thus a pure artifice intended to create the impression that ICANN was engaging in a fair and balanced process."⁸¹ Neither of the *Amici* respond to this point in their submissions.

⁸⁰ Rasco Decl., ¶ 104 (emphasis added). On 5 August 2016, Ms. Willett had written to Mr. Rasco that
[Redacted - Third Party Designated Confidential Information]
Ignacio Rasco (NDC) to Christine Willett (ICANN) (*various dates*), [Ex. C-100], p. 1.

⁸¹ Afilias' Reply Memorial, ¶ 114.

. Emails from Jose

F. The *Amici's* Reliance on ICANN's Decision Not To Decide

49. Both of the *Amici* have put heavy reliance on ICANN's alleged "decision not to decide," about which ICANN has always been exceptionally vague—failing to identify even when the alleged decision had been made prior to its Rejoinder. The *Amici*, again following ICANN's lead, have seized upon the "decision not to decide" in an effort to recast Afilias' principal claim as a claim for breach of fiduciary duty—which, they argue, would place the Panel's review of the alleged decision into the realm of the business judgment rule.⁸² As discussed below in Section VI, the *Amici's* (and ICANN's) legal arguments on this point are grossly misplaced. Afilias does not allege any breach of fiduciary duty in this IRP. Moreover, the business judgment rule does not even come into play where, as here, a Board has failed to act within the requirements of its constitutive documents. Nor could the business judgment rule apply where, as here, Afilias' claims are directed at ICANN's staff and officers as well as ICANN's Board.⁸³

50. The arguments are not only misplaced as a matter of law; they are also misplaced as a matter of *fact*. The *Amici's* reliance on the alleged "decision not to decide" rests on ICANN's assertion in its Rejoinder that:

ICANN would not have disqualified NDC's application upon its receipt of the DAA in August 2016 because the .WEB contention set was on hold at that time due to a pending Accountability Mechanism filed by the parent of another .WEB applicant. Consistent with its well-known practices, ICANN did not take action on .WEB while that Accountability Mechanism was pending.⁸⁴

ICANN further asserted in its Rejoinder that at a "November 2016 Board workshop session," the ICANN Board "chose to see if the results of such proceedings [*i.e.*, an Accountability Mechanism commenced by

⁸² See Verisign, Inc.'s Pre-Hearing Brief (Phase II) (26 June 2020) ("**Verisign Br.**"), p. 1 ("the only question properly before the Panel here is whether ICANN violated its Bylaws when it decided to defer a decision on Afilias' objections"); NDC Br., ¶ 2 ("the Panel's jurisdiction is limited to determining whether ICANN violated [its] Bylaws when it decided to defer a decision on Afilias' objections to the .WEB auction award in 2016").

⁸³ See Section VI below.

⁸⁴ ICANN's Rejoinder Memorial, ¶ 4.

Ruby Glen] might require the Board to take any action related to the .WEB Contention Set.”⁸⁵ According to the Witness Statement submitted by ICANN Board Member Christopher Disspain:

At the November 2016 session, the Board chose not to take any action *at that time* regarding the claims arising from the .WEB auction, including the claim that, by virtue of the Agreement between Verisign and NDC, NDC had committed violations of the Applicant Guidebook which merited the disqualification of its application for .WEB and the rejection of its winning bid. Given the Accountability Mechanisms that had already been initiated over .WEB, and given the prospect of further Accountability Mechanisms and legal proceedings, the Board decided to await the results of such proceedings *before considering and determining what action, if any, to take at that time*.⁸⁶

51. None of these assertions is consistent with the factual record in this case. Nor are they consistent with ICANN's and the *Amic's* conduct at the time.

52. First of all, contrary to ICANN's assertion that it has a “well-known practice” of not taking any action on a contention set while an Accountability Mechanism is pending, there is no such practice. Certainly, the practice is not among ICANN's “documented policies.” Nor did ICANN's officers or staff seem to be aware of any such practice in August 2016, when Afilias first raised its concerns about .WEB and ICANN opened an investigation despite the pendency of Donut's triggering of an ICANN Accountability Mechanism.

53. According to ICANN's CEP and IRP Update Status, Ruby Glen and its parent Donuts Inc. had commenced a Cooperative Engagement Proceeding on .WEB on 2 August 2016.⁸⁷ Thus, as of 2 August 2016, there was an Accountability Mechanism with respect to .WEB. Redacted - Third Party Designated Confidential Information

⁸⁵ ICANN's Rejoinder Memorial, ¶¶ 40-41. Ruby Glen eventually never pursued an IRP.

⁸⁶ Witness Statement of Christopher Disspain (1 June 2020) (“*Disspain WS*”), ¶ 11 (emphasis added). Ruby Glen had also commenced U.S. federal court litigation against ICANN in July 2016. ICANN successfully defended this litigation on the basis that Ruby Glen had waived its right to pursue remedies against ICANN in any court of competent jurisdiction and that the only fora available to Ruby Glen were those provided under ICANN's accountability framework.

⁸⁷ ICANN, Cooperative Engagement and Independent Review Processes, Status Update (8 Aug. 2016), [Ex. C-108], p. 1.

54. In her 16 September 2016 letter forwarding the questionnaire, Ms. Willett asserted that “[i]n various fora, [Ruby Glen] and [Afilias] have raised questions regarding, among other things, whether [NDC] should have participated in the 27-28 July 2016 auction for the .WEB contention set and whether NDC’s application for the .WEB gTLD should be rejected.”⁸⁹ Ms. Willett stated further that the “additional information” sought by ICANN would “help facilitate *informed resolution of these questions*”⁹⁰ Thus, Ms. Willett was also apparently unfamiliar with ICANN’s “well-known practice” that required ICANN to take no action on .WEB while the Ruby Glen CEP was pending.

55. Similarly, on 30 September, Mr. Atallah (the President of ICANN’s Global Domains Division), finally responded to the 8 August and 9 September 2016 letters sent by Mr. Hemphill on behalf of Afilias. Mr. Atallah wrote to Mr. Hemphill on behalf of ICANN: “We will continue to take Afilias’s comments, and other inputs that we have sought, into consideration as we consider this matter.”⁹¹ Like Ms. Willett, Mr. Atallah was also unaware of ICANN’s well-known practice” to defer making decisions on contention sets while Accountability Mechanisms were pending.

56. Although the *Amici* are aware of Ms. Willett’s letter (having received and responded to it), and presumably were aware of Mr. Atallah’s letter (since it was posted on the ICANN website), they make no effort to reconcile ICANN’s assertions concerning its “well-known practice” of not taking any action on contention sets while Accountability Mechanisms are pending. Nor is it clear when and how much ICANN told Verisign and NDC about its alleged decision to decide or defer deciding. It is, however, undisputed that

⁸⁸ Letter from Ronald Johnston (Counsel for Verisign) and Brian Leventhal (Counsel for NDC) to Eric Enson (Counsel for ICANN) (23 Aug. 2016), [Ex. C-102], p. 1.

⁸⁹ Letter and attachment from Christine A. Willett (ICANN) to John Kane (Afilias) (16 Sep. 2016), [Ex. C-50], p. 1.

⁹⁰ Letter and attachment from Christine A. Willett (ICANN) to John Kane (Afilias) (16 Sep. 2016), [Ex. C-50], p. 1 (emphasis added).

⁹¹ Letter from Akram Atallah (ICANN) to Scott Hemphill (Afilias) (30 Sep. 2016), [Ex. C-61], p. 1.

ICANN *never* informed Afilias of the alleged decision until during this IRP. Verisign, in its 21 July 2020 letter to the Panel, indicates that it also was unaware of ICANN's "well-known practice"—or even of ICANN's position that it had not considered Afilias' objections *at any level*:

Prior to its receipt of ICANN's Rejoinder, *Amici* were not aware that ICANN had not, *at any level*, considered Afilias' objections. Although ICANN stated in its Response to the Request for IRP that its Board had not made a decision on Afilias' objections, action by the Board itself is not required in all circumstances.⁹²

57. As for NDC, Mr. Rasco in his Witness Statement states:

Since submitting [NDC's] responses [to Ms. Willett's questionnaire] in October 2016, NDC has periodically made inquiries to ICANN through the ICANN customer service portal regarding the status of .WEB. ICANN has never responded beyond a statement that the resolution of .WEB is on hold due to the pendency of accountability mechanisms or similar processes.⁹³

58. Although ICANN's Bylaws provided for broad disclosure of Board activities and decision—including the publication of "[a]ll minutes of meetings of the Board" to be "approved promptly ... for posting on the [ICANN] Website"⁹⁴—there is no indication in any public ICANN document (or for that matter, any document that ICANN has produced in this IRP) concerning ICANN's alleged decision not to decide.⁹⁵ The *Amici* do not address that fact in their submissions.

59. It is undisputed that in late 2016 or early 2017, the U.S. Department of Justice ("DOJ") commenced an antitrust investigation into the DAA and requested that ICANN take no action on .WEB during the pendency of the investigation.⁹⁶ The DOJ's investigation closed in January 2018.⁹⁷ Afilias believed that with the DOJ investigation closed, ICANN would resume the "informed resolution" of Afilias' concerns that it

⁹² Letter from *Amici* to Panel (21 July 2020), p. 2, n.1 (emphasis added).

⁹³ Rasco Decl., ¶ 104.

⁹⁴ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) ("**Bylaws**"), Sec. 3.5(a).

⁹⁵ See Section VI below; see *also* note 314 below.

⁹⁶ See, e.g., ICANN's Response to Amended IRP Request, ¶ 49.

⁹⁷ ICANN's Response to Amended IRP Request, ¶ 50.

had promised in September 2016.⁹⁸ Afilias wrote to ICANN on 23 February 2018 to “request an update on ICANN’s investigation of the .WEB contention set” and also to request documents on the investigation under ICANN’s Documentary Disclosure Policy (“DIDP”).⁹⁹ As detailed in Afilias’ Reply, ICANN never provided Afilias with any substantive response.¹⁰⁰ But it is now clear that ICANN was communicating with NDC and Verisign.

60. While ICANN maintains that Afilias’ DIDP Request and Request for Reconsideration of the Board’s denial constituted Accountability Mechanisms—leading ICANN to take no action on .WEB while these mechanisms were pending (pursuant to the alleged decision not to decide)—the record, and, in particular, the actions of the *Amici*, indicate otherwise. Thus, according to an email included in ICANN’s document production, on 17 January 2018, Ms. Jessica Hooper, the Senior Manager of New gTLD Strategic Accounts at Verisign, wrote to Ms. Karla Hakansson at ICANN: Redacted - Third Party Designated Confidential Information

61. On 8 February 2018, Mr. James Bidzos, Verisign’s President and CEO, announced at an earnings conference that Verisign was “now engaged in ICANN’s process to move the delegation of .web

⁹⁸ In addition, according to ICANN’s Response to Afilias’ Amended Request for IRP, ICANN closed the Donuts/Ruby Glen CEP on 30 January 2018, giving Donuts until 14 February 2018 to file an IRP, which Donuts/Ruby Glen chose not to do. See ICANN’s Response to Amended IRP Request, ¶ 51.

⁹⁹ Letter from Arif H. Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), [Ex. C-78], p. 1.

¹⁰⁰ See Afilias’ Reply Memorial, ¶ 139.

¹⁰¹ Email Jessica Hooper (Verisign) to Karla Hakansson (ICANN) (17 Jan. 2018), [Ex. C-115], p. 2.

¹⁰² Email Jessica Hooper (Verisign) to Karla Hakansson (ICANN) (17 Jan. 2018), [Ex. C-115], p. 1.

forward.”¹⁰³ Roughly one week later, on 15 February 2018, Mr. Rasco wrote to Mr. Atallah and Mr. John Jeffrey (ICANN’s General Counsel), indicating that Redacted - Third Party Designated Confidential Information

62. ICANN apparently did not move forward immediately on Mr. Rasco’s request because Afilias submitted its DIDP request shortly afterwards. However, contrary to ICANN’s suggestion that it would defer making any decision on Afilias’ objections while Accountability Mechanisms were pending, ICANN staff moved toward contracting with NDC as soon as the ICANN Board rejected Afilias’ request to reconsider the denial of its DIDP request. It is not at all clear what was discussed or disclosed to the Board in this regard, or what assessment ICANN staff had undertaken of the compatibility of the DAA with the New gTLD Program Rules to allow ICANN to proceed to contracting with NDC.

63. According to another email produced by ICANN in its document production, Mr. Russ Weinstein of ICANN sent his colleagues an email on 6 June 2018 that stated:

Wanted to give you an update re; WEB/WEBS. The Request for Reconsideration from Afilias has been denied and the contention set has been taken off of “hold.”¹⁰⁵

On 6 June 2018, ICANN staff notified Afilias, without any explanation or in any way addressing Afilias’ concerns, that the contention set had been taken off-hold; and on 14 June 2018, ICANN staff sent NDC the

¹⁰³ VeriSign, Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), [Ex. C-47], p. 4.

¹⁰⁴ Email from Jose Ignacio Rasco (NDC) to Peg Rettino (ICANN) (copy to John Jeffrey and Akram Atallah (ICANN)) (15 Dec. 2018) [ICANN-WEB_001061], [Ex. C-182], p. 1 (emphasis added).

¹⁰⁵ Email from Russ Weinstein (ICANN) to Lisa Carter *et al.* (6 June 2018) [ICANN-WEB_000458], [Ex. C-166], p. 1.

.WEB registry agreement—which NDC signed and returned to ICANN.¹⁰⁶ With Afilias having commenced the CEP process on 18 June 2018, ICANN staff put the contention set back on-hold.¹⁰⁷

64. And yet—as soon as Afilias filed its IRP request on 14 November 2018—ICANN threatened to take the contention set off-hold unless Afilias sought interim emergency relief. Thus, while ICANN now asserts that its “well-known” practice is to take no action regarding a contention while Accountability Mechanisms are pending, in November 2018, ICANN’s lead counsel in this IRP, Mr. Jeffrey LeVee, wrote to Afilias’ lead counsel, Mr. Arif Ali, rejecting Afilias’ request that ICANN keep the contention set on-hold pending the IRP. According to Mr. LeVee:

ICANN does not agree that Afilias’ commencement of the Independent Review Process (“IRP”) regarding the .WEB gTLD automatically requires ICANN to place the .WEB contention set “on hold,” as your letters claim. Rather, as you well know, *it has not been ICANN’s historical practice upon the filing of an IRP to automatically place, or continue, a hold on a contention set or application*, and a number of IRP claimants have sought emergency relief from the ICDR requiring ICANN to place an application or a contention set on hold.¹⁰⁸

65. Accordingly, on 27 November 2018, Afilias had no choice but to file a Request for Emergency Panelist and Interim Measures of Protection (the “Emergency Request”). In opposing Afilias’ Emergency Request, ICANN took *precisely* the opposite position from that asserted in its Rejoinder. Rather than asserting that its Board had made a decision not to decide—pursuant to a “well-known practice” not to take decisions on contention sets that are the subject of Accountability Mechanisms—ICANN argued to the Emergency Arbitrator:

After NDC prevailed in a public auction for .WEB, Afilias and other .WEB applicants cried foul, alleging that Verisign’s agreement with NDC violated the Guidebook and raised competition concerns. *ICANN has evaluated these complaints*, some of which also have been addressed in other fora,

¹⁰⁶ NDC’s Supplemental Brief in Support of Its Request to Participate as *Amicus Curiae* (27 Sep. 2019), ¶ 18.

¹⁰⁷ See Letter from Arif Ali (Counsel for Afilias) to ICANN (18 June 2018), [Ex. C-52]; Email from ICANN to Arif Ali (Counsel for Afilias) (20 June 2018), [Ex. C-53], p. 2.

¹⁰⁸ Letter from Jeffrey LeVee (Counsel for ICANN) to Arif Ali (Counsel for Afilias) (26 Nov. 2018), [Ex. C-66], p. 1 (emphasis added).

including federal court litigation, a Department of Justice Antitrust Division investigation of Verisign, and *multiple invocations of ICANN's own accountability mechanisms*. The federal court litigation was resolved in ICANN's favor, and the Department of Justice investigation concluded without any action being taken by the federal government. The time has therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers.¹⁰⁹

Of course, ICANN's advocacy to the Emergency Arbitrator was every bit as dishonest as it is to this Panel. The federal court litigation and DOJ investigation involved entirely different issues; there were not multiple invocations of ICANN's Accountability Mechanisms (there was only the CEP amicable resolution process involving Donuts/Ruby Glen, which either ICANN or the claimant could terminate at any time); and—at least according to the sworn testimony of ICANN's Board Member, Mr. Disspain—ICANN had not “evaluated” Afilias' complaints. Rather, according to Mr. Disspain, the Board “decided to await the results” of pending and anticipated Accountability Mechanisms “before considering and determining what action, if any, to take at that time.”¹¹⁰ The *Amici* fail to address any of these matters in embracing ICANN's new allegations about its “deferral” decision, and in joining ICANN's argument that the only issue before the Panel is whether ICANN's supposed “decision not to decide” violated its Articles and Bylaws.¹¹¹ The schizophrenia and duplicity of ICANN's positions is truly head-reeling.

66. In sum, as stated at the outset, the Panel's task with respect to Afilias' principal claim is straightforward: by reviewing the terms of the DAA against the New gTLD Program Rules, applied in accordance with ICANN's Articles and Bylaws, the Panel should conclude that ICANN violated its Articles and Bylaws by failing to disqualify NDC's application and bid, and by failing to award .WEB to Afilias as the

¹⁰⁹ ICANN's Opposition to Afilias' Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018), ¶ 3 (emphasis added).

¹¹⁰ Disspain WS, ¶ 11.

¹¹¹ With respect to the resolution of Afilias' Emergency Request, ICANN was unwilling to pursue those proceedings until the Procedures Officer decided the question of whether the *Amici* could participate in them. By the time the Procedures Officer issued his declaration, and the matter of the *Amici*'s participation came before this Panel, ICANN apparently decided simply to leave the contention set on-hold for the duration of the IRP.

next highest bidder. The misleading and contradictory assertions by ICANN and the *Amici* as to whether ICANN “evaluated” Afiliias’ complaints or decided to “defer” any decision on them are irrelevant to that task, though not to assessing the trustworthiness of the factual and legal assertions made by ICANN and the *Amici*. The available evidence raises serious questions regarding the veracity of ICANN’s representations to the Panel about what took place or came out of the Board workshop meetings in November 2016. The available evidence also shows that, in spite of ICANN’s supposed policy, discussions were taking place between ICANN, NDC and Verisign in early 2018 regarding the delegation of .WEB, and that in June 2018, ICANN Staff proceeded with the contracting process for .WEB, even though there is nothing to suggest that any sort of evaluation was conducted as to whether the DAA is compatible with the New gTLD Program Rules, or whether NDC’s failure to disclose the DAA violated the AGB, or whether its bids violated the Auction Rules, or any of the other concerns that Afiliias has raised—that is, other than ICANN’s representation to the Emergency Arbitrator that it had evaluated all complaints.

III. THE *AMICI* MISREPRESENT THE NATURE OF THE DAA

67. The Panel should not allow itself to be misled by the *Amici* regarding the nature and effect of the DAA.

68. *First*, the *Amici* attempt to characterize the DAA as an “executory agreement,” arguing that
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This is a gross misstatement.

The key provisions of the DAA relevant to this IRP are not “executory” at all.¹¹³ This IRP does not concern

¹¹² NDC Br., ¶ 28.

¹¹³ Executory terms are those that are to be performed contingent upon some future event. The question of whether a contract is “executory” or “executed” holds little relevance outside of bankruptcy law, as the act of filing for bankruptcy has obvious consequences where debtors and counterparties have outstanding mutually underperformed contractual obligations to each other. Under U.S. law, remedies for breaches of “executory contracts” are limited to damages, rather than specific performance, *see In re Cho*, 581 B.R. 452, 467 (Bankr. D. Md. 2018), [Ex. CA-45] (noting that, any nonbankruptcy rights that the plaintiffs may retain do not include the right to request specific performance); *In re Spoverlook, LLC*, 560 B.R. 358, 363 (Bankr. D. N.M. 2016), [Ex. CA-46] (noting that the strong majority of courts have held that parties can be forced to accept claims for money damages in bankruptcy); *In re Aslan*, 65 B.R. 826, 830-31 (Bankr. C.D. Cal. 1986), *rev’d in part on other*

NDC's unfulfilled commitment to assign the .WEB registry agreement to Verisign. Rather, it concerns NDC's transfer of rights and obligations it held as an applicant for .WEB to Verisign upon execution of the DAA. We have detailed these transfers in our prior submissions. **Redacted - Third Party Designated Confidential Information**

grounds, 909 F.2d 367 (9th Cir. 1990), [Ex. CA-47]. While NDC and Verisign have mutually unperformed obligations under the DAA, Afiliias' complaints against ICANN do not implicate those sections of the DAA in this IRP.

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69. *Second*, the *Amici* attempt to characterize the DAA as a “loan”¹²³ from Verisign to NDC or otherwise as some form of “financing agreement.”¹²⁴ Again, this is a gross mischaracterization of the DAA. This was no “financing agreement.” Redacted - Third Party Designated Confidential Information

No financing agreement requires the lender to pay for the privilege of loaning money to a borrower. Verisign was not “funding NDC’s bid”—NDC was being paid a flat fee to buy .WEB for Verisign.

70. Indeed, the normal indicia of a creditor-debtor relationship are entirely missing from the DAA altogether. The DAA does not contain the words “lend” or “loan” or anything remotely similar. The DAA does not specify the principal of the loan, does not provide for any accrual of interest, does not set a fixed maturity date, and does not contain any demand for repayment by NDC of any monies expended by Verisign. NDC did not execute a promissory note attesting to a debt owed to Verisign.

71. *Third*, Redacted - Third Party Designated Confidential Information

that is, for example, in the event that ICANN were to reject the assignment

¹²³ The *Amici* repeatedly state that Verisign provided a “loan” to NDC. NDC Br., ¶ 106; Verisign Br., ¶¶ 29, 52, 56, 57, 59, 74.

¹²⁴ The *Amici* also repeatedly characterize the DAA as a financing agreement. Rasco Decl., ¶ 66, 78, 99; Verisign Br., ¶¶ 8, 32, 45, 53, 58.

¹²⁵ DAA, [Ex. C-69], Schedule 1, Preamble.

IV. IT IS SELF-EVIDENT THAT THE DAA VIOLATES THE NEW GTLD PROGRAM RULES

72. Far from being an ordinary financing agreement that provided for Verisign's "loan of funds" to NDC, the DAA is self-evidently an attempt to circumvent the New gTLD Program's application procedures and rules. This should have been patently obvious to ICANN Staff and the Board based upon even a cursory review of the DAA, as demonstrated by the DAA provisions that we have reproduced in **Annex A** hereto. The DAA violates the New gTLD Program Rules in multiple ways, which we have previously discussed.¹²⁸ For present purposes, and in light of the *Amic's* submissions, we focus on three:

- **First**, as we set out in **Section IV.A**, contrary to NDC's commitment not to "resell, assign, or transfer *any of applicant's rights or obligations* in connection with the application," by concluding the DAA, NDC transferred *numerous rights and obligations* to Verisign in exchange for several million dollars.¹²⁹
- **Second**, contrary to NDC's obligation to "notify ICANN in writing of any change in circumstances that would render *any information* provided in the application false or misleading," NDC did not disclose to ICANN the existence or terms of the DAA for over a year and, then, only after Afilias had complained to ICANN about how the .WEB contention set had been resolved.¹³⁰ As discussed in **Section IV.B** below, the DAA rendered significant

¹²⁶ Verisign Br., ¶ 29 Redacted - Third Party Designated Confidential Information

¹²⁷ DAA, [Ex. C-69], Exhibit A, Sec. 9.

¹²⁸ See Afilias' Amended IRP Request, Sec. 3; Afilias' Reply Memorial, Sec. III(A).

¹²⁹ The Guidebook provides: "Applicant *may not resell, assign, or transfer* any of *applicant's rights or obligations in connection with the application.*" AGB, [Ex. C-3], Module 6.10 (Terms and Conditions) (emphasis added).

¹³⁰ The Guidebook provides: "Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are *true and*

parts of NDC's .WEB application misleading at best and outright false at worst, which should have been immediately evident to ICANN upon receipt of the DAA, especially taking in to consideration statements made by NDC to ICANN only several weeks earlier.

- **Third**, contrary to NDC's obligation to submit bids at the .WEB Auction on its own behalf, and in an amount that NDC itself was willing to pay for .WEB, the DAA Redacted - Third Party Designated Confidential Information

As discussed at **Section IV.C**, each of NDC's bids *were clearly invalid under* the plain and unambiguous language of the New gTLD Program Rules.

73. The New gTLD Program Rules are based on a self-evident assumption that the applicant will act on its own behalf; that the decisions it is making regarding its application are being made to advance its own interests; that it is submitting bids in a contention set resolution auction based on its own financial capabilities; in short, that it is seeking to win the registry rights for itself. Instead, the DAA permitted Verisign to secretly pursue the acquisition of .WEB, avoiding scrutiny by governments, the public, and the global internet community. It could have submitted its own .WEB application, but chose not to do so. If NDC's and Verisign's conduct is allowed to stand, it will not only gut the very purposes for which the New gTLD Program was established, it will also eviscerate the multi-year, multi-stakeholder, bottom-up policy-making process that resulted in the New gTLD Program Rules.¹³¹

A. NDC Assigned Multiple Rights and Obligations in its .WEB Application to Verisign

1. The New gTLD Program Rules Prohibiting the Resale, Transfer, or Assignment of Applications

74. The Terms and Conditions agreed to by NDC when it filed its application provide that NDC "may not resell, assign, or transfer any of applicant's *rights or obligations in connection with*" its .WEB

accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that *any material misstatement or misrepresentation (or omission of material information)* may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. *Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.*" AGB, [Ex. C-3], Module 6.1 (Terms and Conditions) (emphasis added).

¹³¹ Afiliias' Amended IRP Request, ¶ 12, Sec. 5; Afiliias' Reply Memorial, Sec. IV; Report of Jonathan Zittrain (26 Sep. 2018) ("**Zittrain Report**"), Secs. 6-7; Report of George Sadowsky (20 Mar. 2019) ("**Sadowsky Report**"), Sec. VII.

application.¹³² While the Guidebook sets forth the various rights and obligations of applicants across its three-hundred plus pages, the Terms and Conditions further provide that NDC would not “acquire *rights in connection with [WEB]* [until] it enters into a registry agreement with ICANN.”¹³³ The obvious and only legitimate interpretation of the anti-assignment provision of Section 10 is that:

- Applicants may not “resell, transfer, or assign” their rights acquired or obligations assumed as applicants.
- This provision is violated when an applicant “resells, transfer, or assigns” *any* such right or obligation; accordingly, the provision is violated even if the applicant does not “resell, transfer, or assign” *all* of its rights or obligations in its application.¹³⁴
- The rights and obligations that are the subject of this anti-assignment clause are separate and distinct from any rights the applicant may eventually acquire in the gTLD that is the subject of the application, since the latter rights do not vest in the applicant until a registry agreement for that gTLD is concluded with ICANN.
- Accordingly, the rights and obligations that are the subject of the anti-assignment clause are those rights and obligations that are set forth elsewhere in the Guidebook, and which vest or are assumed by the applicant upon the submission of its application.

75. The *Amici* attempt to obfuscate this clear and obvious reading of Section 10’s anti-assignment clause by changing the relevant standard, arguing alternatively that Afilias must show that Verisign “hold[s] *all* rights and obligations under the Application,”¹³⁵ that the DAA transferred “ownership, management or *control of NDC* to Verisign,”¹³⁶ or that NDC agreed to “assign or otherwise *transfer its*

¹³² AGB, [Ex. C-3], Module 6.10 (emphasis added); see also note 129 above.

¹³³ AGB, [Ex. C-3], Module 6.10 (emphasis added).

¹³⁴ Contrary to the *Amici*’s arguments, U.S. law clearly recognizes partial assignments of “rights or obligations under [a] contract.” See *Vir2us, Inc. v. Sophos Inc.*, No. 2:19CV18, 2019 WL 8886440, at *9 (E.D. Va. Aug. 14, 2019), [Ex. CA-48]; see also *In re Hat*, 310 B.R. 752, 756, 759 (Bankr. E.D. Cal. 2004), [Ex. CA-49] (finding that debtor’s ex-spouse had improperly transferred her right of first refusal and that, under the agreement, her “sole function was to exercise her [rights] for a fee”). A partial acquisition of rights may constitute the acquisition of beneficial ownership under U.S. law. See *U.S. v. Smithfield Foods, Inc.*, Case 1:10-cv-00120 (D.D.C.), Complaint (21 Jan. 2010), [Ex. CA-50]; U.S. Department of Justice, *Smithfield Foods and Premium Standards Farms Charged with Illegal Premerger Coordination: Company Required to Pay \$900,000 Civil Penalty* (21 Jan. 2010), available at <https://www.justice.gov/opa/pr/smithfield-foods-and-premium-standard-farms-charged-illegal-premerger-coordination> (last accessed 23 July 2020), [Ex. CA-51]. The U.S. Department of Justice found that the partial assignment of the rights to approve hog procurement contracts had improperly granted Smithfield “operational control over a significant segment” of Premium Standard Farm’s business. *Id.*, ¶ 20.

¹³⁵ Verisign Br., ¶ 3 (emphasis added).

¹³⁶ Livesay WS, ¶ 19 (emphasis added).

.WEB Application to Verisign.”¹³⁷ The plain language of the Guidebook is to the contrary: *any* transfer of *any* individual right or obligation that NDC held as an applicant for .WEB violates the Terms and Conditions that govern NDC’s application: “Applicant may not resell, assign or transfer *any* of applicants rights or obligations in connection with the application.”

76. As yet a further alternative, Verisign argues that NDC could not have violated the anti-assignment clause, because the first part of Section 10 provides that NDC will not acquire any rights until such time as it executes a registry agreement. Verisign’s interpretation is wrong because Section 10 clearly discusses *two distinct sets of rights*.

- Specifically, Section 10 provides that an applicant will not “*acquire rights in connection with a gTLD*” until it enters into a registry agreement for that gTLD.
- That language does not have any relevance to the subsequent provision, which sets out an independent obligation that “[a]pplicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application.”

These are, quite plainly, two separate sets of rights and obligations: one in the application (which the applicant possesses but may not assign) and one in the applied-for gTLD (which the applicant will not acquire until it signs a registry agreement).

77. Finally, Verisign argues that the Guidebook does not specify which of the several rights and obligations assumed by applicants upon submission of an application “could possibly be subject to a resale, assignment or transfer, at least prior to the execution of a registry agreement.”¹³⁸ Verisign’s argument is without merit because it simply ignores the plain language of Section 10 or otherwise suggests that it is meaningless.¹³⁹ ICANN’s recent letter to the Panel refused to endorse this argument. In that letter, ICANN

¹³⁷ Rasco Decl., ¶ 47 (emphasis added); Livesay WS, ¶ 20.

¹³⁸ Verisign Br., ¶¶ 12-13. This argument is based on Verisign’s failure to distinguish between “rights in a gTLD” and “rights and obligations in an application.”

¹³⁹ The canons of contractual construction prohibit interpretations that render terms meaningless. *Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1483 (1998), [Ex. CA-52].

categorically states: “it is clear under the Guidebook that *applications* cannot be transferred to any other party.”¹⁴⁰

2. **NDC Violated the New gTLD Program Rules by “Selling, Transferring, or Assigning” Several Right and Obligations to Verisign**

78. By agreeing to the DAA, NDC improperly “resold, transferred, or assigned” several of its rights and obligations it had acquired and assumed when it applied for .WEB, thereby violating the Terms and Conditions of its .WEB application. There is no question that these rights and obligations were resold, transferred and assigned to Verisign: Redacted - Third Party Designated Confidential Information

demonstrate that the DAA was not a financing arrangement. Verisign was not “funding NDC’s bid”—NDC was being *paid to buy .WEB for Verisign*.

79. For an assignment to be effective, it “must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person.”¹⁴¹ Courts look at the “substance and not the form of a transaction” to determine whether an “assignment was intended,”¹⁴² and so also must this Panel. The DAA makes plain that NDC “resold, assigned or transferred” several rights and obligations in its application to Verisign. *Each right or obligation so “resold, assigned or transferred” constitutes an independent violation of the Guidebook*. These rights and obligations include:

¹⁴⁰ Letter from ICANN to Panel (18 July 2020) (revised), p. 6 (emphasis added). While ICANN confirms the distinction between two sets of rights set forth in Section 10, ICANN’s shorthand that “applications cannot be transferred” misstates the actual language of Section 10, which provides that applicants may not resell, transfer or assign “*any*” rights or obligations in the application.

¹⁴¹ *Mountain of Fire & Miracles Ministries v. Oyeyemi*, No. B218591, 2012 WL 2373003, at *6 (Cal. Ct. App. June 25, 2012), [Ex. CA-53].

¹⁴² *Mountain of Fire & Miracles Ministries v. Oyeyemi*, No. B218591, 2012 WL 2373003, at *6 (Cal. Ct. App. June 25, 2012), [Ex. CA-53].

- **Obligation to Timely Amend Application:**

80. Section 1.2.7 of the Guidebook required NDC to “promptly notify ICANN” if any information in its application “becomes untrue or inaccurate.” While this obligation “*includes*” situations where an applicant experiences “changes in financial position and changes in ownership or control” the obligation to amend is *not limited* to only those changes. The broad scope of this obligation to amend is underscored by the Terms and Conditions to which NDC agreed. These Terms and Conditions required NDC to “notify ICANN in writing of *any change in circumstances that would render any information* provided in the application false or misleading.”

81. NDC transferred control over compliance with this obligation to Verisign in the DAA.

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82. Verisign’s total control over NDC’s ability to disclose *the very “change in circumstance”* that “render[ed] any information [NDC] provided in [its .WEB] application false or misleading” transferred NDC’s obligations assumed pursuant to Section 1.2.7 of the Guidebook to promptly notify ICANN of such “untrue or inaccurate” statements now contained in its application. Indeed, Verisign’s control over disclosure of the existence or terms of the DAA were made an *express exception* to the general rule that

¹⁴³ DAA, [Ex. C-69], Sec. 4(f).

¹⁴⁴ DAA, [Ex. C-69], Sec. 10(a).

¹⁴⁵ DAA, [Ex. C-69], Sec. 10(a).

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83. To ensure that NDC kept the existence and terms of the DAA secret from ICANN, the DAA provides that Redacted - Third Party Designated Confidential Information

84. Mr. Rasco's statement that Redacted - Third Party Designated Confidential Information is wrong. Indeed, Mr. Rasco's observation that NDC did not need to obtain Verisign's consent to communicate with ICANN, if necessary to preserve its rights as an applicant, is entirely misleading, as it does not reveal the express exemption to this rule regarding disclosures of the existence or terms of the DAA.

85. Mr. Rasco's misleading declaration is merely the latest effort by the *Amici* to rewrite what they perceive to be troublesome terms in the DAA. In their 2016 Confirmation of Understandings ("**Confirmations**"), which the *Amici* drafted and signed *after* ICANN had initiated its investigation of NDC, Verisign and NDC specifically and misleadingly cite to Section 1(k) of the DAA. They do so in an effort to support the proposition that NDC did not require Verisign's consent to take actions or communicate with ICANN as necessary to preserve its rights in its Application.¹⁴⁹ But, even here, Verisign and NDC misrepresent the truth, by quoting Section 1(k), *except for the prefatory* clause that Redacted - Third Party Designated Confidential Information

This prefatory clause required

¹⁴⁶ DAA, [Ex. C-69], Exhibit A, Sec. 1(k).

¹⁴⁷ DAA, [Ex. C-69], Secs. 14-15.

¹⁴⁸ Rasco Decl., ¶ 48.

¹⁴⁹ Letter from Paul Livesay (Verisign) to Jose Rasco (NDC) (26 July 2016) [ICANN-WEB_000041 - ICANN-WEB_000042] (Confirmation of Understandings), [Ex. C-97], ¶ D.

- **Right to Resolve String Contention.**

86. Contention set members have the right to “reach a settlement or agreement among themselves that resolves the contention.”¹⁵⁰ For example, contention set members have the right to withdraw their application, establish joint ventures among multiple contention set members, or otherwise agree to a private auction to determine which applicant would acquire the contested gTLD. Mr. Livesay’s observation that the Guidebook and Auction Rules encourage and expressly permit contention set members to resolve string contention¹⁵¹ ignores the salient fact that the Guidebook restricts this right to contention set members who are applicants for the gTLD. Verisign, contrary to how it acted, was not a member of the .WEB contention set.

87. NDC transferred control over its right to resolve the contention set to Verisign by transferring to Verisign the right to choose whether to participate in a private auction, as well as its right to withdraw its application. Redacted - Third Party Designated Confidential Information

88. The *Amic’s* argument that Verisign instructed NDC not to participate in the proposed private auction because Verisign had concerns that such auctions may constitute criminal bid rigging are belied by

¹⁵⁰ AGB, [Ex. C-3], Module 4.1.3 (String Contention Procedures).

¹⁵¹ Livesay WS, ¶¶ 6-7.

¹⁵² DAA, [Ex. C-69], Sec. 4(j).

¹⁵³ DAA, [Ex. C-69], Exhibit A, Sec. 1(i) (emphasis added).

the plain and unambiguous language of the DAA. If Verisign truly believed that a private auction was illegal, let alone criminal, the DAA would have included a blanket prohibition on resolving the contention set by private auction under any circumstances. Redacted - Third Party Designated Confidential Information

Accordingly, the plain language of the DAA contradicts Mr. Rasco's statement that the parties agreed that NDC would *only* use Verisign's funds in a public auction administered by ICANN.

89. NDC also gave up its right to decide to withdraw its application, expressly transferring it to Verisign. Redacted - Third Party Designated Confidential Information

Underscoring

NDC's new role as Verisign's agent in the acquisition of .WEB, if NDC were instructed to withdraw its application, NDC would still be entitled to Redacted - Third Party Designated Confidential Information

- **Right to Participate in the ICANN Auction.**

90. If the contention set cannot be resolved voluntarily by its members, ICANN conducts, as it did here, an "auction of last resort." Only applicants belonging to the contention set have a right to participate in that auction. There is no exception allowing for "indirect" third-party participation.

91. NDC transferred several of its rights regarding its participation in the ICANN auction of last resort to Verisign. Redacted - Third Party Designated Confidential Information

¹⁵⁴ DAA, [Ex. C-69], Exhibit A, Sec. 1(i) and Schedule 1, Sec. 2(a)(ii)(b)(3).

¹⁵⁵ DAA, [Ex. C-69], Ex. A, Sec. 8.

¹⁵⁶ DAA, [Ex. C-69], Schedule 1, Sec. 2(a)(iv).

¹⁵⁷ DAA, [Ex. C-69], Exhibit A, Secs. 1(a), 1(e), 1(i), 3(g), 13.

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Again, this is inconsistent with any financing agreement we are aware of, but entirely consistent with agency or vendor agreements. Redacted - Third Party Designated Confidential Information

- **Right and Obligation to Negotiate and Enter Into the .WEB Registry Agreement.**

92. Winning applicants have the right and obligation to negotiate and “enter into the prescribed registry agreement with ICANN” for the applied-for gTLD. NDC transferred several of its rights regarding the registry agreement for .WEB. Redacted - Third Party Designated Confidential Information

¹⁵⁸ DAA, [Ex. C-69], Exhibit A, Sec. 1(b).

¹⁵⁹ DAA, [Ex. C-69], Exhibit A, Sec. 1(c).

¹⁶⁰ DAA, [Ex. C-69], Exhibit A, Sec. 1(h).

¹⁶¹ DAA, [Ex. C-69], Exhibit A, Sec. 2(e).

¹⁶² DAA, [Ex. C-69], Exhibit A, Sec. 3(b).

¹⁶³ DAA, [Ex. C-69], Exhibit A, Sec. 3(b).

¹⁶⁴ DAA, [Ex. C-69], Exhibit A, Sec. 3(b).

- Right to Operate the .WEB Registry.

93. As the applicant, NDC was applying for the right to operate the .WEB Registry. NDC transferred this fundamental right to Verisign. Contrary to the *Amic's* protestations, there is no set of facts under the DAA that would have permitted NDC to operate .WEB, short of the DAA being terminated prior to the .WEB Auction.¹⁶⁵

94. Redacted - Third Party Designated Confidential Information

¹⁶⁵ While NDC argues that it was not required to update its .WEB Application because Redacted - Third Party Designated Confidential Information (NDC Br., ¶¶ 104-107; Rasco Decl., ¶ 59), NDC concedes that the only set of facts under which an amendment to its application would not be required was if the DAA ceased to exist. This is a ludicrous position and Mr. Rasco's argument that "NDC was under no obligation to update its .WEB application upon execution of the DAA" because "ICANN had yet to even conclude whether or how the .WEB Contention Set would be resolved" (Rasco Decl., ¶ 59.), does not explain why NDC did not disclose the DAA to ICANN once ICANN had set the date for the .WEB Auction in April 2016. Mr. Rasco's further admission that "complete transparency with ICANN" was appropriate, Redacted - Third Party Designated Confidential Information is telling. *Id.*

¹⁶⁶ DAA, [Ex. C-69], Exhibit A, Sec. 3(h) (emphasis added).

¹⁶⁷ DAA, [Ex. C-69], Exhibit A, Sec. 9 (emphasis added).

¹⁶⁸ DAA, [Ex. C-69], Exhibit A, Sec. 10 (emphasis added).

95. Contrary to the *Amic's* further misrepresentations of the plain terms of the DAA, NDC did not have a right, under the DAA, to obtain funding and repay "Verisign's loan."¹⁶⁹ This is because *Verisign also acquired, in the DAA, all economic rights in .WEB, which controlled even if ICANN prohibited NDC from transferring .WEB to Verisign.* Redacted - Third Party Designated Confidential Information

96. Ignoring the plain language of the DAA, Mr. Livesay states that Verisign's rights were no different than a lender who takes a "security interest" in the borrower's property.¹⁷¹ But lenders who force a sale of a secured asset are only entitled to recover the outstanding principal on the loan, plus any accrued interest—that is, "security" for the loan itself.¹⁷² To the extent a surplus remains after a lender's security interest is discharged, the excess reverts to the debtor.

¹⁶⁹ NDC Br., ¶ 106 Redacted - Third Party Designated Confidential Information

¹⁷⁰ DAA, [Ex. C-69], Schedule 1, Sec. 3(b).

¹⁷¹ Livesay WS, ¶ 33.

¹⁷² Under Virginia law, which governs the DAA, a lender discharges its security interest in real property when proceeds from a foreclosure sale of the asset exceeds the loan's value. *See, e.g., In re O'Neill Enterprises, Inc.*, 547 F.2d 812, 814 (4th Cir. 1977), [Ex. CA-54] ("The[] security interest in the insurance policies was discharged when the real estate was sold, by virtue of [the parties'] agreement, at foreclosure for a price in excess of the first lien debt.").

97. The DAA, in contrast, provided Verisign with considerably more than just a “security interest” in .WEB. Redacted - Third Party Designated Confidential Information

98. In sum, Verisign’s right to all of the upside from any forced sale of .WEB, combined with the lack of any obligation by NDC to repay Verisign for even the Auction Deposit, puts the lie to the *Amict’s* argument that the DAA represented nothing more than a “financing deal” and the monies expended by Verisign nothing more than a “loan” to NDC.

B. NDC Violated the AGB by Failing to “Promptly Notify” ICANN About the Terms of the DAA.

99. Regardless of whether NDC improperly “resold, transferred or assigned” its obligation to update its application to reflect changed circumstances that rendered any information in its application “untrue or misleading,” NDC, as the applicant, remained under an obligation to do so.

1. The New gTLD Program Rules Regarding Updating Applications

100. The rules regarding the obligation to update an application are clear on their face. *First*, Section 1.2.7 required NDC to “promptly notify ICANN” if “*information previously submitted by [NDC] becomes untrue or inaccurate.*”¹⁷⁴ *Second*, the Terms and Conditions required NDC “to notify ICANN in writing of *any change in circumstances* that would render *any information provided in the application* false or misleading.”¹⁷⁵ There are *no exceptions* to these rules, and a violation of these rules specifically gave ICANN the right to reject an application.¹⁷⁶

¹⁷³ Given that a private equity investor recently offered \$1 billion to acquire .ORG, a \$500 million valuation for .WEB is conservative. See Andrew Allemann, “Ethos paid \$1.135 billion for .Org,” *Domain Name Wire* (29 Nov. 2019), available at <https://domainnamewire.com/2019/11/29/ethos-paid-1-135-billion-for-org/> (last accessed 23 July 2020).

¹⁷⁴ AGB, [Ex. C-3], Sec. 1.2.7 (emphasis added).

¹⁷⁵ AGB, [Ex. C-3], Sec. 6.1 (emphasis added).

¹⁷⁶ As discussed in Afilias’ Reply, ICANN does not have unfettered discretion in exercising this right. Afilias’ Reply Memorial, ¶ 83. ICANN’s right to reject an application must be exercised consistently with its Bylaws. See Section V below.

2. NDC Violated the AGB by Failing to Update its Application to Account for the “Changed Circumstances” Created by the DAA

101. Following its execution of the DAA, several provisions of NDC’s .WEB application were indisputably “inaccurate”¹⁷⁷ or “misleading,”¹⁷⁸ if not outright “untrue”¹⁷⁹ or “false.”¹⁸⁰

102. For example, Section 18, which describes NDC’s business plan for .WEB, contains numerous false and misleading statements. Specifically, NDC wrote that “[p]rospective users benefit from the long-term commitment of a proven executive team that has a track-record of building and successfully marketing affinity TLD’s (e.g., .CO targeting innovative businesses and entrepreneurs).”¹⁸¹ Section 18 contains multiple references to this “proven executive team” and .CO’s track record, including the representation that “[w]e plan to implement a very similar strategy for .WEB in its launch, operation, promotion and growth.”¹⁸² This “proven executive team” would have no role, under any circumstances, for the operation of the .WEB registry. Accordingly, this statement is at best “misleading” if not outright “false.”

¹⁷⁷ A statement is inaccurate if it is “not accurate”; “faulty.” *Merriam-Webster Dictionary* (on-line version): inaccurate, available at <https://www.merriam-webster.com/dictionary/inaccurate> (last accessed 21 July 2020), [Ex. CA-55].

¹⁷⁸ A statement is “misleading” if it is deceptive, or tending to mislead or create a false impression. “Misleading” means “leading or tending to lead into error; causing to err; deceiving.” *Merriam-Webster Dictionary* (on-line version): false & misleading, [Ex. C-95].

¹⁷⁹ A statement is “untrue” if it is not according with the facts. “Untrue” means “not faithful; disloyal; not according with a standard of correctness; not level or exact; not according with the facts; false.” *Merriam-Webster Dictionary* (on-line version): untrue, available at <https://www.merriam-webster.com/dictionary/untrue> (last accessed 21 July 2020), [Ex. CA-56].

¹⁸⁰ A statement is “false” if it is untrue, not factual or factually incorrect. “False” means “not true; not conformable to truth; expressing what is contrary to fact or truth; incorrect; wrong; mistaken; as a false report.” *Merriam-Webster Dictionary* (on-line version): false & misleading, [Ex. C-95].

¹⁸¹ NDC .WEB Application, [Ex. C-24], Sec. 18(2).

¹⁸² NDC .WEB Application, [Ex. C-24], Sec. 18(2). Mr. Rasco states that in completing Section 18, NDC described how it envisioned that “.WEB might be successfully and productively introduced and used to the benefit of consumers.” Rasco Decl., ¶ 14. At Section 18, NDC wrote: “The mission of .WEB is to provide the internet community at-large with *an alternative “home domain”* for their online presence.” NDC .WEB Application, [Ex. C-24], Sec. 18(1) (emphasis added). Further, NDC wrote: “The basic product (a domain) has not changed much, and until now, there have been *few feasible alternatives to the commercial TLDs.*” *Id.*, Sec. 18(2) (emphasis added). The dominant, and only generic commercial TLD, of course, has always been .COM, which was shorthand for “COMMERCIAL”. Zittrain Report, ¶ 18. Mr. Rasco’s further statement—that “NDC’s subjective views as to the ‘mission/purpose’ of gTLDs, including .WEB, and how .WEB might benefit consumers and others have not changed, irrespective of who operates .WEB”—rings hollow if that operator is Verisign. Rasco Decl., ¶ 16. Indeed, Verisign admits that its interest in .WEB was the result of “the inventory of available domain names for new registrations in .COM” decreasing, while demand for domain names has continued to increase. Livesay WS, ¶ 4. This suggests that contrary to Mr. Rasco’s vision of .WEB as a competitor to .COM, Verisign views .WEB as a complement, which is consistent with how Verisign has marketed .NET. Sadowsky Report, n. 23.

103. Moreover, part of .CO's "strategy" had been to compete with Verisign's .COM. .CO's marketing materials state:

.COM is the legacy domain extension with more than 100 million registrations. Stick with .com if you're OK with the status-quo. .CO on the other hand is fresh, shorter, social, and... it's available! With an increasing number of people web browsing on mobile devices, the need for short and memorable web addresses has never been so important. In essence, if you want something innovative and cutting edge, go with .CO.¹⁸³

104. Any reasonable person reviewing Section 18 would necessarily conclude that the team that had been behind the launch and development of .CO would also be behind the launch and development of .WEB, and that .WEB would be positioned to compete with .COM. Following NDC's execution of the DAA, this was no longer true and, by the plain and unambiguous terms of the Guidebook, required NDC to "promptly notify ICANN" of the "changed circumstances" caused by the its agreement with Verisign.

105. In addition to Section 18, NDC represented in Section 23 that it had "partnered" with Neustar "to provide back-end services for the .WEB registry."¹⁸⁴ Indeed, much of the information provided in NDC's application was based on technical information provided by Neustar. Any reasonable person reviewing NDC's .WEB application would necessarily conclude that Neustar was going to provide the back end registry services for .WEB if NDC was awarded the gTLD. Following execution of the DAA, however, this was "untrue." If NDC prevailed at the .WEB auction, it was obligated to assign the registry agreement to Verisign or, in the event that it was unable to do so, sell it to a third party. As demonstrated above,¹⁸⁵ these options were mandatory and no exception was made for the possibility that NDC could simply repay Verisign the amounts expended on acquiring .WEB to keep the registry for itself. Accordingly, there were no circumstances under which Neustar would be providing back end registry services for .WEB and significant

¹⁸³ *.Co is Marketed as a "Fresh, Shorter, Social" and "Available" Alternative to .com, .Co* (Sep. 22, 2013), <http://www.go.co/about/faq/> (last accessed May 6, 2020), [Ex. KM-10], p. 1.

¹⁸⁴ NDC .WEB Application, [Ex. C-24], Secs. 18(3), 23(1), 25(1).

¹⁸⁵ See Section IV(A) above.

portions of Sections 23 through 30, which are all admittedly based on information provided by Neustar, were thus rendered “inaccurate” or “misleading,” if not outright “untrue” or “false.” NDC was therefore obligated to “promptly notify ICANN” of the “changed circumstances” caused by its agreement with Verisign.

106. NDC, however, failed to do that. The DAA was executed on August 25, 2015. But the DAA was first provided to ICANN by Verisign only because ICANN asked for it in light of Afilias’ complaints, *a year later* on August 23, 2016. Consequentially, the global internet community, including Afilias, was left to believe, going into the .WEB auction, that NDC intended to acquire .WEB for itself, to compete with .COM, with Neustar providing back-end registry services, when, in fact, that was no longer true.

107. NDC’s defense of its conduct is premised on three false readings of the Guidebook. *First*, NDC is wrong that the Guidebook required applicants to update their applications only if there are changes to the applicants’ management or ownership.¹⁸⁶ The plain language of the Guidebook imposes an obligation to notify ICANN if “*any information*” contained in the application becomes “false or misleading.”

108. *Second*, NDC is wrong that ICANN does not require applicants to update Section 18 of the application that details the applicant’s business plan for the gTLD.¹⁸⁷ The Guidebook does not exempt Section 18 from the obligations imposed on applicants to “promptly notify ICANN” of any changes needed to correct information in their applications that had become “untrue,” “inaccurate,” “false,” or “misleading.” Nor does the Guidebook restrict that obligation to the updating of only the information that is relevant to the formal evaluation criteria for applicants. Indeed, ICANN admits that the information provided in Section 18 is “relevant to the Program as *it allows the community to comment on the application* (during the public comment period) based on the applicant’s statement of the mission and purpose and how the gTLD is intended to be operated.”¹⁸⁸ For example, ICANN notes that “advice from ICANN’s Government Advisory

¹⁸⁶ NDC Br., ¶ 25.

¹⁸⁷ NDC Br., ¶¶ 17, 107; Rasco Decl., ¶¶ 18-20.

¹⁸⁸ Letter from ICANN to Panel (18 July 2020) (revised), pp. 3-4 (emphasis added).

Committee [GAC] ... may change the eligibility of an application.”¹⁸⁹ The GAC has, in fact, issued several “early warning notices” regarding the New gTLD Program based on competition concerns.¹⁹⁰

109. Despite the clarity of the Guidebook, as confirmed by ICANN, Mr. Rasco improperly reads an exemption into the Guidebook. Mr. Rasco testifies: “Section 18 responses are not a material part of evaluating a particular application and, moreover, are not subject to subsequent enforcement by ICANN in the event those responses differ from how or by whom a domain is ultimately operated.”¹⁹¹ Accordingly, *NDC admits that its response to Section 18 was no longer true or misleading*. But even if NDC were correct, and Section 18 was in fact exempt from the obligations imposed by Section 1.2.7 of the Guidebook and the Terms and Conditions, NDC also failed to update Sections 23-30 of its application, which provided detailed responses regarding the technical aspects of how NDC would operate the .WEB registry. *There is no dispute that the technical disclosures in an application were one of the primary evaluation criteria and NDC offers no explanation for its uncontested failure to update this technical information* once the DAA was signed and Verisign, not Neustar, would be providing the back end registry services for .WEB if NDC prevailed at the auction.

110. *Third*, NDC is wrong that prior applicants have failed to update their applications in analogous situations. As discussed in Section IV.D below, there are no analogous prior applications and each of the examples cited by the *Amici* demonstrate how keeping the DAA secret from ICANN and the public fundamentally undermined the New gTLD Program Rules.

¹⁸⁹ Letter from ICANN to Panel (18 July 2020) (revised), p. 6.

¹⁹⁰ See ICANN/GAC, *Activities: GAC Early Warnings* (last updated 19 Feb. 2019), available at <https://gac.icann.org/activity/gac-early-warnings> (last accessed 23 July 2020). In particular, the Government of Australia submitted several early warning notices based on competition concerns.

¹⁹¹ Rasco Decl., ¶ 20.

3. NDC Intentionally Failed to Disclose the DAA Prior to the Auction.

111. Compounding its failure to voluntarily disclose the terms of the DAA to ICANN as required by the Guidebook, NDC further intentionally misled ICANN as to the existence of any agreement with Verisign prior to the .WEB Auction. Mr. Rasco's attempts to finesse how he responded to ICANN's inquiries is telling.

112. On June 27, 2016, Mr. Erwin of ICANN's New gTLD Operations group emailed Mr. Rasco of NDC regarding complaints received from a member of the contention set,¹⁹² requesting confirmation that there had not been any changed circumstances that needed to be reported to ICANN. Mr. Erwin's request was broadly stated, demanding NDC to confirm whether it needed to report to ICANN *any changes* to its application, expressly paraphrasing the language of Section 1.2.7 when he stated that NDC was obligated to report to ICANN "*any information that is no longer true and accurate*" in its .WEB application.

113. Mr. Erwin's request clearly required NDC to disclose the existence and terms of the DAA. We do not know what communications took place between NDC and Verisign regarding this inquiry from ICANN, but this is something that NDC could not do without Verisign's consent without breaching the DAA and incurring a potential liability of significant liquidated damages. Accordingly, Mr. Rasco chose (or was directed by Verisign) to reply only to the part of Mr. Erwin's request that did not require him to disclose the existence of the DAA:

I can confirm that there have been no changes to the NU DOT CO LLC organization that would need to be reported to ICANN.¹⁹³

¹⁹² NDC states, without evidence, that Afilias joined in or otherwise furthered Donut's efforts to delay the ICANN .WEB Auction. NDC Br., ¶¶ 43, 49. This is untrue. While Donuts solicited Afilias' support in lobbying ICANN to delay the auction, Afilias, relying on the truthfulness of information in NDC's application, refused to do so. Thereafter, while Donuts sought to litigate its dispute with ICANN's handling of the .WEB Auction, Afilias sought to work with ICANN. Only when it became clear that ICANN had refused to even consider the merits of Afilias' complaints—which ICANN now admits is true—that Afilias began the process of commencing this IRP.

¹⁹³ Emails from Jared Erwin (ICANN) to Jose Ignacio Rasco (NDC) (27 June 2016), [Ex. C-96].

114. Notably, Mr. Rasco declined to confirm whether or not there were any other changes to its .WEB application that were required to be notified to ICANN, as Mr. Erwin had requested.¹⁹⁴ Given the extreme lengths to which NDC and Verisign had gone to keep the terms of the DAA secret from ICANN, Afilias, the global internet community, and the public, Mr. Rasco's intentionally evasive answer is hardly surprising. Even after receiving a specific request from ICANN to disclose whether "*any information*" in its .WEB application had become "untrue or inaccurate," NDC intentionally declined to do so.

C. NDC Violated the AGB by Submitting Invalid Bids at the .WEB Auction

115. The Guidebook provides that "[o]nly bids that comply with *all aspects of the auction rules* will be considered valid."¹⁹⁵ Where an applicant fails to submit a valid bid, "the bid is taken to be an exit bid at the start-of-round price for the current auction round."¹⁹⁶ Accordingly, if an applicant submits an invalid bid, the bid is treated like an "exit bid" and the applicant may not proceed to the next round of bidding.¹⁹⁷

116. The bids submitted by NDC at the .WEB auction violated Rules 12, 13 and 32 of the Auction Rules. Rule 12 provides: "Participation in an Auction is limited to Bidders." Rule 12 further provides that Bidders are either the Applicant or an entity designated to bid on behalf of the Applicant (a "Designated Bidder").¹⁹⁸ Rule 13 provides that "each Bidder shall nominate up to two people ... to bid on *its behalf* in the Auction."¹⁹⁹ There are no provisions that allow a Bidder to bid on behalf of a third party, as third parties are not permitted to participate in an auction under Rule 12. Finally, Rule 32 provides that "[a] bid represents a price, which a Bidder is willing to pay to resolve string contention within a Contention Set in favor of its

¹⁹⁴ Mr. Rasco's statement that **Redacted - Third Party Designated Confidential Information** strains credibility, especially in light of Mr. Rasco's statement that he was aware that Dot Tech had submitted a change request and had amended its application immediately upon announcement of its deal to sell .TECH to Radix. Rasco Decl., ¶¶ 44, 78.

¹⁹⁵ AGB, [Ex. C-3], Sec. 4.3.1(5) (emphasis added).

¹⁹⁶ AGB, [Ex. C-3], Sec. 4.3.1(7).

¹⁹⁷ AGB, [Ex. C-3], Sec. 4.3.1(7).

¹⁹⁸ Power Auctions LLC, *Auction Rules for New gTLDs: Indirect Contentions Edition* (24 Feb. 2015) ("**Auction Rules**"), [Ex. C-4], Rule 12.

¹⁹⁹ Auction Rules, [Ex. C-4], Rule 13 (emphasis added).

Application.”²⁰⁰ Since third parties are not permitted to participate in an auction under Rule 12, there are no provisions that permit a Bidder to submit a bid that reflects what a third party is willing to pay to resolve the string contention.

1. Each of NDC’s Bids Were Invalid Because NDC Did Not Comply With “All Aspects of the Auction Rules”

117. The DAA provided for Verisign to exercise total and complete control over NDC’s conduct during the .WEB Auction. Redacted - Third Party Designated Confidential Information

Mr. Livesay thereby

concedes that the bids represented what Verisign, not the Bidder NDC, was willing to pay—a clear violation of the Auction Rules. Mr. Livesay further concedes that Redacted - Third Party Designated Confidential Information

²⁰⁰ Auction Rules, [Ex. C-4], Rule 32.

²⁰¹ DAA, [Ex. C-69], Sec. 10.

²⁰² DAA, [Ex. C-69], Exhibit A, Sec. 2(d).

²⁰³ DAA, [Ex. C-69], Exhibit A, Sec. 2(e).

²⁰⁴ DAA, [Ex. C-69], Exhibit A, Sec. 1(h).

²⁰⁵ Rasco Decl., ¶¶ 98-100; Livesay WS, ¶ 37.

²⁰⁶ Livesay WS, ¶ 37 (emphasis added).

²⁰⁷ Livesay WS, ¶ 37 (emphasis added).

118. The *Amici* claim that these control rights were of the sort that were “reasonably required to protect any lender in such a bidding process.”²⁰⁸ But, as discussed above, Verisign was not a “lender” any more than NDC was a “borrower.”

119. The DAA fundamentally changed the nature of the bids NDC submitted at the .WEB Auction. Had NDC received a true loan, and was therefore obligated to repay it, NDC would still be in control of deciding when to bid and how much to bid, until it reached the limits of what it could afford to do. At the end of the day, NDC would have been obligated to repay the bank or whatever lender it was dealing with the principal and any accrued interest, regardless of whether NDC had prevailed or not at the auction. But at the .WEB Auction, NDC was not making any of those decisions, because it was not obligated to repay any of the amounts it was bidding. Verisign was making all these decisions, because Verisign was spending its money to acquire .WEB and had no recourse against anyone else to force repayment.

120. Redacted - Third Party Designated Confidential Information

²⁰⁸ Verisign Br., ¶ 60.

²⁰⁹ Mr. Rasco’s statement that he did not intend by this statement Redacted - Third Party Designated Confidential Information

Mr. Rasco’s further explanation that he understood that by Redacted - Third Party Designated Confidential Information is not credible. See Rasco Decl., ¶ 62; see also Livesay WS, ¶ 34. Redacted - Third Party Designated Confidential Information

D. *Amici's* Examples of Market Practice Are Inapposite

121. The various “example of market practices” cited by the *Amici* do nothing to excuse the *Amici's* conduct in entering into the DAA and keeping it secret from the global Internet community. To the contrary, the examples they cite confirm that disclosure to ICANN was required. Further, not a single one of the examples reflects the level of control that the DAA gave Verisign over NDC’s application. Notably, ICANN has taken no position on the legitimacy of the examples cited by the *Amici* or whether they support the *Amici's* contention of long-standing market practices that ICANN has found acceptable.

1. Donuts and Demand Media

122. As the *Amici* note, Demand Media entered into a partnership with Donuts with respect to 107 of the 307 gTLDs applied for by Donuts. But the *Amici* are wrong that this fact was not disclosed to ICANN or to the general public.

123. Donuts was founded by two former senior executives of Demand Media, so the relationship between Donuts and Demand Media was clear from the outset. Indeed, questions were raised in major media outlets *in 2012* as to whether Donuts had been established to secure gTLDs for Demand Media, which may have had trouble passing ICANN’s evaluation as a result of its history of enforcing cybersquatting rules.²¹⁰

124. Moreover, Donuts’ various New gTLD applications—unlike NDC’s .WEB application—*expressly disclosed its partnership with Demand Media*. For example, Donuts applied for .CITY through its subsidiary Snow Sky LLC. There was no question that Donuts was behind the application, since the contact persons listed in the application identified themselves as Donuts executives with Donuts email addresses. Moreover, in Section 23 of its .CITY application, Donuts stated:

The following response describes our registry services, as implemented by Donuts and our partners. *Such partners include Demand Media Europe*

²¹⁰ See Craig Timberg and James Ball, “Donuts Inc.’s major play for new Web domain names raises eyebrows,” *Washington Post* (24 Sep. 2012), available at https://www.washingtonpost.com/business/technology/donuts-incs-major-play-for-new-web-domain-names-raises-eyebrows/2012/09/24/c8745362-f782-11e1-8398-0327ab83ab91_story.html (last accessed 21 July 2020).

Limited (DMEL) for back-end registry services ... For simplicity, the term “company” and the use of the possessive pronouns “we”, “us”, “our”, “ours”, etc., all refer collectively to Donuts and our subcontracted service providers.

DMEL is a wholly-owned subsidiary of DMIH Limited, a well-capitalized Irish corporation whose ultimate parent company is Demand Media, Inc., a leading content and social media company listed on the New York Stock Exchange (ticker: DMD).²¹¹

Accordingly, any reasonable person reading Donuts’ .CITY application would have understood that Donuts had a partnership with Demand Media.²¹² This disclosure allowed members of the global internet community to raise timely objections to Donuts’ various applications. For example, one objector wrote to ICANN’s Board, Staff and Government Advisory Committee (“GAC”) in *July 2012* and petitioned ICANN to reject Donuts’ applications because there was, in 2012:

[S]trong evidence that Donuts is merely an alter ego of, and working in concert with, Demand Media; evidence should lead to the conclusion that Donuts should fail ICANN’s Background Screening for the same reason Demand Media should fail.²¹³

125. The Donuts/Demand Media example is therefore instructive. Donuts timely disclosed its partnership with Demand Media, a partnership that raised serious questions regarding whether Donuts’ applications should have been allowed. That timely disclosure allowed interested parties to raise objections to ICANN so that they could be vetted before the gTLDs were awarded to Donuts.

²¹¹ See New gTLD Application Submitted to ICANN by Snow Sky, LLC, Application ID 1-1389-12139 (13 June 2012) (emphasis added), available at <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/842?t:ac=842> (last accessed 22 July 2020). Counsel has confirmed that at least several dozen Donuts New gTLD applications contain the same or substantially the same language as quoted from the .CITY application. The *Amici* therefore misrepresent to the Panel that Donuts did not disclose its partnership with Demand Media. That partnership was disclosed, as it should have been, right in the application itself.

²¹² Mr. Livesay’s representation that he researched the details of the Donuts/Demand Media deal does not square with his belief that Verisign could permissibly conceal its partnership with NDC from ICANN and the public. Livesay WS, ¶ 8. Similarly, Mr. Livesay’s representations notwithstanding, Donuts’ ownership of its special purpose vehicles were expressly disclosed on each of its applications. Mr. Livesay identifies no applications where the acquiring party *concealed* its identity behind a special purpose vehicle, which would have violated the Guidebook by preventing ICANN from conducting an evaluation of the prospective registry operator.

²¹³ See Letter from Jeffrey Stoler to Stephen Crocker *et al.* (ICANN) (28 July 2012), available at <https://www.icann.org/en/system/files/correspondence/stoler-to-crocker-et-al-28jul12-en.pdf> (last accessed 22 July 2020), p. 2.

126. In contrast, very likely at Verisign's behest, NDC kept its partnership with Verisign secret, depriving the public and the other members of the .WEB contention²¹⁴ set of the information necessary to raise timely and detailed objections regarding Verisign's proposed acquisition of .WEB.²¹⁵ NDC kept this information secret for a very good reason—if ICANN invalidated NDC's application prior to the .WEB Auction, **Redacted - Third Party Designated Confidential Information**

127. Verisign also had good reasons to keep the DAA secret until after the registry agreement had been signed. As the *Amici* allude to in their papers, ICANN, at the time the DAA was consummated, had never rejected an assignment of a registry agreement. There is a good reason for that: ICANN's authority to block a proposed assignment is extremely limited.²¹⁶ Verisign rightly believed that it would face greater scrutiny if its agreement with NDC became known prior to the .WEB Auction than at any time afterwards.

2. .BLOG

128. Tellingly, the *Amici* do not provide *any* details regarding the agreement between Primer Nivel and Automattic regarding .BLOG. In particular, we do not know the structure of Automattic's funding arrangement with Primer Nivel, whether Primer Nivel incurred any debt obligations, whether Premier Nivel transferred any of its rights or obligations in its application to Automattic, or whether Premier Nivel retained

²¹⁴ **Redacted - Third Party Designated Confidential Information**

DAA, [Ex. C-69], Schedule 1, Sec. 2(ii)(b)(3). It is very unlikely that this arrangement would not have been highly relevant to the other .WEB contention set members in terms of deciding whether and how to participate in a private auction. When various contention set members sought to press NDC to participate in a private auction, it is likely that none of them knew that NDC no longer had the liberty to make its own decision whether or not to participate. Nor would they have known that some of the money they would have bid would potentially be on-paid to Verisign.

²¹⁵ Two members of the .WEB contention set (not Afilias) complained to ICANN in advance of the .WEB auction, demanding that the auction be postponed to allow ICANN to conduct a thorough investigation: "To do otherwise would be unfair as we do not have transparency into who leads and controls that applicant as the auction approaches." NDC Br., ¶ 46.

²¹⁶ In considering a request for assignment, ICANN focuses simply on "whether the transferee organization has the requisite financial and technical ability to operate a gTLD." Declaration of Christine A. Willett (17 Dec. 2018), ¶ 34; *see also* ICANN, Assignment: Change of Control of Registry Operator (29 Jan. 2016), available at <https://www.icann.org/resources/change-of-control> (last accessed 13 July 2020), [Ex. C-129].

full discretion to resolve the contention set and bid as it chose at the .BLOG auction. Absent those facts, it is impossible to determine whether Premier Nivel similarly violated the Guidebook.²¹⁷

129. Moreover, even assuming, *arguendo*, that the Automattic-Primer Nivel agreement was identical to the DAA, Primer Nivel's conduct does not excuse NDC's violations. ICANN's failure to investigate and reveal the facts regarding .BLOG are further evidence of ICANN's dereliction of duty, not a free pass to violate the Guidebook: one possible example out of 1,200 does not constitute industry practice. Moreover, while Afilias was a member of the .BLOG contention set, Afilias was not the runner-up at the .BLOG auction. It therefore had no incentive to initiate an IRP, and incur substantial legal fees, simply to secure .BLOG for Google, the runner-up.

130. The facts regarding .BLOG demonstrate why Verisign chose to conceal its agreement with NDC until after NDC had secured the right to execute a registry agreement and why Google may not have sought to challenge the result of the .BLOG auction. Like Verisign, Google is a prominent entity in the Internet sector and, for this reason, its pursuit of a large number of gTLDs raised serious concerns about the competitive implications of its various applications, despite the fact that Google was not yet a major player in the registry business. The Australian Government, through the GAC, issued an Early Warning Notice regarding Google's .BLOG application. In relevant part, that notice provided:

Charleston Road Registry Inc. is proposing to exclude any other entities, including potential competitors, from using the TLD. Restricting common generic strings for the exclusive use of a single entity could have unintended consequences, including a *negative impact on competition*.

Like Verisign, Google could have "hidden in the weeds" and disguised its pursuit of .BLOG in any number of ways. But Google, unlike Verisign, was transparent about its intent and, perhaps due to the GAC's input,

²¹⁷ We note that Primer Nivel first sought to assign .BLOG to Automattic nearly a year after the .BLOG auction had concluded. This suggests that the facts regarding .BLOG are substantially different from those concerning .WEB. Kevin Murphy, "WordPress reveals IT bought .blog for \$19 million," *Domain Incite* (13 May 2016), available at <http://domainincite.com/20440-wordpress-reveals-it-bought-blog-for-19-million> (last accessed 22 July 2020); see also MATT MUELLENWEG, UNLUCKY IN CARDS: .BLOG (12 May 2016), <https://ma.tt/2016/05/blog/>.

ultimately abandoned its pursuit of many gTLDs. Verisign, however, avoided confronting any competitive concerns about its pursuit of .WEB by “hiding in the weeds” until such time as it could avoid scrutiny by the GAC.²¹⁸

3. Radix and .TECH

131. The draft Radix/Dot Tech. agreement²¹⁹ reveals that Radix’s deal with Dot Tech differed significantly and materially from the DAA, something that was known to Verisign at the time the DAA was drafted.²²⁰ Radix contracted to acquire the applicant Dot Tech, in the event that the latter was successful at the .TECH auction. Dot Tech, however, was completely unrestrained in its dealings with the other members of the .TECH contention set: Dot Tech was free to enter into a private auction, could determine whether, when and how much to bid during any given round of any auction, could decide to withdraw its application, and could agree to enter into any form of settlement with any other contention set member.²²¹ More importantly, if Dot Tech succeeded in securing .TECH (the gTLD) for less than the sale price of Dot Tech (the company), Dot Tech’s owners kept the balance, not Radix. Accordingly, Radix was not a lender to Dot Tech and did not fund Dot Tech’s bids. Dot Tech’s bids, unlike NDC’s, properly reflected what Dot Tech was willing to bid for .TECH and were submitted solely on Dot Tech’s behalf.

132. Moreover, as soon as the Radix/Dot Tech deal closed, and Radix acquired its interest in Dot Tech, Dot Tech filed a change request form with ICANN, allowing ICANN to conduct a reexamination of Dot

²¹⁸ We note that Automattic’s acquisition of .BLOG did not raise any competitive concerns, since Automattic did not and does not control any other gTLD registries.

²¹⁹ Dot Tech, Sale and Purchase Agreement (*undated*), [Livesay WS (1 June 2020), Ex. C].

²²⁰ Livesay WS, ¶ 14.

²²¹ See Dot Tech, Sale and Purchase Agreement (*undated*), [Livesay WS (1 June 2020), Ex. C]. The Radix/Dot Tech agreement was a true “executory agreement” in all respects. In the event that Dot Tech acquired the rights to .TECH, Radix agreed that it would immediately close on its agreement to purchase Dot Tech. *Id.*, p. 4. Until that time, the parties owed no obligations to each other. And in the event that the deal did close, Dot Tech’s former owners would be paid the purchase price for their company, regardless of how much it had cost to acquire .TECH. As discussed above, NDC sold several rights and obligations in its application to Verisign the moment that the DAA was signed. **Redacted - Third Party Designated Confidential Information** while Dot Tech was not paid any fees under its agreement.

Tech's revised .TECH application, which was amended a second time in November 2014.²²² That change request was approved and Dot Tech's revised application passed ICANN's reexamination in January 2015. Accordingly, Dot Tech afforded ICANN a full opportunity to reconsider its application in full, after it had "promptly notified ICANN" of its sale to Radix, and prior to entry into any registry agreement. As required by the Guidebook, Radix filed a change request with ICANN and submitted two amended applications in October and November 2014.

133. NDC, in contrast, did not follow these rules. In sum, despite Mr. Livesay's admission that he had received and reviewed the .TECH agreement prior to drafting the DAA, Mr. Livesay chose to include terms that were materially different from the .TECH agreement and which clearly violated the Guidebook.²²³

4. Other Examples

134. The *Amici* note that the secondary market for gTLDs is robust, and that registry agreements are frequently assigned to third parties. This is not strictly true. Discounting the back and forth assignments that occurred between Donuts and Demand Media, there have been relatively few other assignments. That said, it is true that there have been other assignments of registry agreements and the *Amici* identify several that involved Afilias.²²⁴ However, in each of these cases, the agreement to assign the registry agreement

²²² The two amendments to Dot Tech's .TECH application suggest that the first had been submitted in some haste, which suggests that the deal between Radix and Dot Tech had been concluded post-auction. This second revised application contained all of the technical information needed for ICANN's reexamination. *See* New gTLD Application Submitted to ICANN by Dot Tech LLC, Application ID 1-1670-76346 (13 June 2012), [Rasco Decl. (1 June 2020), Ex. D]; New gTLD Application Submitted to ICANN by Dot Tech LLC, Application ID 1-1670-76346 (13 June 2012) (revised), [Rasco Decl. (1 June 2020), Ex. E]; *see also* New gTLD Application Submitted to ICANN by Dot Tech LLC, Application ID 1-1670-76346 (revised version 3, posted on 13 Nov. 2014), available at <https://gtldresult.icann.org/applicationstatus/applicationchangehistory/548> (last accessed 23 July 2020).

²²³ Mr. Livesay also attached to his Declaration a draft agreement from Google regarding .WEB. The terms of this agreement are also starkly different from the DAA. Importantly, the Google agreement provided that Google, *in its sole discretion*, could provide ICANN and/or the other contention set members notice of its deal with Verisign. Google, Agreement to Withdraw a .TLD Application (*undated*), [Livesay WS (1 June 2020), Ex. B], Sec. 1. Redacted - Third Party Designated Confidential Information . DAA, [Ex. C-69], Sec. 10. Redacted - Third Party Designated Confidential Information

²²⁴ The *Amici* cite the transactions that concern .MEET, .PROMO, .ARCHI, and .SKI. The *Amici* also cite Afilias' "Buy Any Car" campaign, which specifically targeted existing registries, not applicants for gTLDs. There is no dispute in this IRP that Section 7.5 of ICANN's standard Registry Agreement provides that those agreements may be assigned to third parties.

was negotiated and concluded *after* the registry (with Afiliis or the target) had executed the registry agreement with ICANN.²²⁵

135. Accordingly, in each example cited by the *Amici*, including those that did not include Afiliis, the assignments were negotiated and concluded pursuant to the express authorization provided by Section 7.5 of the Registry Agreement. As the *Amici* themselves note, the Terms and Conditions of the Guidebook provide that applicants do not acquire the assignment rights provided in the Registry Agreement until the applicant “enters into a registry agreement with ICANN.”²²⁶ For this reason, while Afiliis (and the other post-delegation assignors identified by the *Amici*) were exercising rights they enjoyed under the Registry Agreement, the DAA enjoys no such immunity. Indeed, while neither Afiliis nor any of the other post-delegation assignors were not assigning any rights or obligations in connection with their applications (which were now, after signing the registry agreements, moot), NDC, as shown above, did assign several such rights and obligations, thereby violating the Guidebook.

136. Finally, the *Amici* do not explain their argument that bankers and other financiers might also

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in the resolution of a contention set.²²⁷ Bankers and other financiers extend loans

Tellingly, the *Amici* focus exclusively on these permitted transactions, and do not (because they cannot) cite a single example where Afiliis paid an applicant to acquire a gTLD for it, or otherwise was paid a fee in exchange for acquiring a gTLD for a third party.

²²⁵ Mr. Rasco declares that “based on my experience and discussions with others in the industry, it was common industry knowledge” that applicants sought to monetize their applications by “assigning interests in domain strings *after securing the rights from ICANN.*” Rasco Decl., ¶ 42 (emphasis added). While Mr. Rasco declares that he was aware “that Donuts and Rightside Media had entered into an agreement whereby certain gTLD applications were potentially financed by the other party in exchange for an interest in the domains in question,” (*id.*, ¶ 43.) Mr. Rasco does not explain why NDC did not publicly disclose its partnership with Verisign as Donuts did with Demand Media (Rightside’s then-parent company) in its various gTLD applications. Mr. Rasco also fails to note that Dot Tech filed a change request with ICANN, permitting reexamination of its application as soon as its deal with Radix was announced. NDC, of course, has not done so.

It is notable that despite this “common knowledge,” the *Amici* could only cite *one possible example*, .BLOG, where the applicant received financial support from the eventual assignee. And, as demonstrated above, the lengthy delay between the auction and the announcement of the assignment to Automattic suggests that the Primer Nivel/Automattic relationship did not go as far as the DAA and may not have constituted a Guidebook violation. NDC has offered *no evidence* of the terms of the Primer Nivel/Automattic agreement to suggest otherwise.

²²⁶ See Verisign Br., ¶ 12 (*citing* AGB, [Ex. C-3], Module 6.10).

²²⁷ Rasco Decl., ¶ 61.

based on the borrower's credit, subject to the borrower's obligation to repay the loan. Other than setting restrictions on the use of the funds extended under the loan, bankers and other financiers do not

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By comparison, investors instruct their agents in this way. For example, investors instruct their brokers on what stocks to buy, how much to pay for them, and, most importantly, those brokers are required to follow their principal's instructions ^{Redacted - Third Party Designated Confidential I} The DAA, as admitted by the *Amici* and their witnesses, transformed NDC from a principal in the .WEB contention set to Verisign's secret agent.

E. The 2016 Verisign-NDC Confirmation of Understandings is Self-Serving and Untrustworthy

137. In June 2016, several members of the .WEB contention set (but not including Afilias) petitioned ICANN to investigate allegations that there had been a change of control over NDC. ICANN investigated and closed its investigation on July 13, 2016 and ordered the .WEB Auction to proceed, as scheduled, on July 28, 2016. ICANN at the time was unaware of the existence or terms of the DAA, or even of Verisign's "indirect participation" in the .WEB contention set, and certainly had no reason to suspect that this might be the case in light of Mr. Rasco's multiple representations to ICANN.²²⁸ Notwithstanding ICANN's decision to close its investigation (ignorant, as it was, of the DAA's terms or existence), Verisign caused NDC to execute a self-serving set of declarations, called the Confirmation of Understandings (the "Confirmation"), that purport to recast the plain terms of the DAA in a more favorable light. The Confirmation was drafted entirely by Verisign and dutifully countersigned by Mr. Rasco.

²²⁸ See Sections II(D)-(E) above.

138. Disingenuously described by the *Amici* as a “Supplement” to the DAA,²²⁹ the Confirmation was drafted nearly a year after the DAA had been executed and by its plain language does not amend the DAA. Far from being drafted in the “ordinary course of business,” the Confirmation was drafted *specifically in response to complaints* made to ICANN and for the purpose of creating a self-serving document to defend the *Amici’s* conduct in any future legal proceedings.²³⁰ The Confirmation was made, days after Verisign had become aware of the allegations concerning its relationship with NDC, after Verisign had had an opportunity to reflect on these allegations, create a set of so-called understandings, share them with NDC, and arrange for Mr. Rasco to sign his name to them.²³¹ Statements offered to establish a party’s own state of mind are intrinsically self-serving, they also inherently untrustworthy. For this reason, U.S. courts have routinely excluded statements introduced to provide intent based on concerns over the declarant’s candor. This is especially true where, as here, the statements concern intentions regarding past acts, here the *Amici’s* intent when executing the DAA a year earlier.²³²

²²⁹ Verisign Br., ¶ 2, ns. 4 & 6. The Confirmation is not a “supplemental agreement” because it does not, by its express terms, modify or amend the DAA. **Redacted - Third Party Designated Confidential Information**

²³⁰ “Proof that an interpretation of a contract is reasonable must come from *objective facts*, and [e]vidence is not objective when it is the self-serving testimony,” *ex post facto*, statement NDC and Verisign, made in the face of an ICANN investigation, as to what the DAA, “clear on its face, ‘really’ means, contrary to what it seems to mean.” *Boeing Co. v. March*, 656 F. Supp. 2d 837, 863 (N.D. Ill. 2009), [Ex. CA-58] (quoting *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 547 (7th Cir. 2000)) (emphasis added).

²³¹ Indeed, several of the “confirmations” amply demonstrate that they are simply *ex post facto* self-serving declarations, rather than evidence of the parties’ intent. For example, Verisign compelled NDC to confirm that ^{Redacted - Third Party Designated Confidential Information}

Letter from Paul Livesay (Verisign) to Jose Rasco (NDC) (26 July 2016) [ICANN-WEB_000041 - ICANN-WEB_000042], [Ex. C-97], ¶ A. Certainly, Verisign did not require NDC to represent to Verisign that Verisign had not acquired NDC: this representation was obviously created solely for use in future legal proceedings.

²³² See *U.S. v. Cianci*, 378 F.3d 71, 106 (1st Cir. 2004), [Ex. CA-59] (affirming trial court’s decision to exclude defendant’s statements because they were “to a large extent ‘self-serving’ attempts to cover tracks already made”).

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Letter from Paul Livesay (Verisign) to Jose Rasco (NDC) (26 July 2016) [ICANN-WEB_000041 - ICANN-WEB_000042], [Ex. C-97], ¶ D. This language clearly refers to actions taken a year earlier and, as such, is simply rank hearsay.

139. Far from establishing that NDC's agreement to the terms of the DAA did not violate the Guidebook, the Confirmation proves the converse. Betraying their proverbial guilty mind, Verisign sought to create a self-serving document to rebut the obvious violations of the New gTLD Program Rules created by the DAA. As of July 2016, no one had complained to ICANN that NDC had agreed to transfer or assign individual rights or obligations it held as an applicant for .WEB—yet the Confirmation devotes two paragraphs to this point. Moreover, as of July 2016, no one had complained to ICANN that the bidding procedures set forth in the still-secret DAA would cause NDC to submit invalid bids at the .WEB Auction. Nonetheless, the Confirmation reflects the *Amic's* concern about the bidding procedures as well, characterizing them as necessary to aid Verisign's financing, provide security for Verisign funds, and provide for Redacted - Third Party Designated Confidential Information during the auction.

V. ICANN'S DISCRETION IS CIRCUMSCRIBED BY ITS ARTICLES OF INCORPORATION AND BYLAWS AS WELL AS PRINCIPLES OF INTERNATIONAL LAW

140. The *Amic's*²³³ echo ICANN's position²³⁴ that ICANN has "significant discretion" in terms of its administration of the New gTLD Program. This is a "significant" exaggeration. Afilias does not dispute that the ICANN Board and Staff²³⁵ have discretion in administering the New gTLD Program. Rather, our position

²³³ NDC Br., ¶ 15; Verisign Br., ¶ 13, n. 19; *id.*, ¶ 67, n. 125.

²³⁴ ICANN's Response to Amended IRP Request, ¶¶ 21, 64; *id.*, ¶ 64, fn. 101.

²³⁵ ICANN Staff's accountability is the same as that of the organization:

As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms:

- Staff Accountability

Annex 12, which details Recommendation 12, also included the following recommendations with regards to Staff Accountability:

In general, management and staff work for the benefit of the community and in line with [ICANN's] purpose and Mission. While it is obvious that they report to and are held accountable by the Board and the President & CEO, ***the purpose of their accountability is the same as that of the organization.***

- Complying with [ICANN's] rules and processes.
- Complying with applicable Bylaws.
- Achieving certain levels of performance, as well as security.
- Making their decisions for the benefit of the community and not in the interest of a particular stakeholder or set of stakeholders or [ICANN] the organization alone.

ICANN, Recommendations to Improve ICANN Staff Accountability (13 Nov. 2017), [Ex. C-84], pp. 2-3 (emphasis added).

is that their discretion is circumscribed—indeed, significantly circumscribed—by the requirements set out in ICANN's Articles and Bylaws,²³⁶ a matter which the *Amici* fail to address in any manner in their hundred plus pages of briefing. ICANN's Articles and Bylaws are replete with obligations with which ICANN's Board and Staff are required to comply insofar as their activities—including administration of the New gTLD Program²³⁷—are concerned. These are found in the Commitments and the Core Values,²³⁸ in other provisions of the Bylaws, in applicable local law, and in the principles of international law that govern ICANN's conduct per its Articles and Bylaws.

141. The Commitments and Core Values are of particular importance insofar as ICANN's discretion is concerned, requiring that, in administering the New gTLD Program, ICANN's Board and Staff must “act in a manner that complies with” and that “reflects” ICANN's Commitments and respects ICANN's Core Values.²³⁹ The Panel will also recall the clear instruction stated in the Bylaws that the “[t]he Commitments and Core Values are intended to apply in the broadest possible range of circumstances.”²⁴⁰ This is so because the “Commitments reflect ICANN's *fundamental compact* with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities.”²⁴¹ Whenever it is impossible for ICANN to simultaneously satisfy all core values, it must nevertheless balance them to serve “a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's

²³⁶ As this Panel is aware, this is the first IRP brought under the revised Bylaws that concerns the actions of ICANN's staff and officers as well as ICANN's Board. As other IRP Panels have recognized with respect to ICANN's Board, its “discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.” *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015), [Ex. CA-2], ¶ 123.

²³⁷ There is no dispute between the Parties, and nor is it questioned by the *Amici*, that the implementation and administration of the New gTLD Program fall squarely within ICANN's Mission.

²³⁸ Bylaws, [Ex. C-1], Sec. 1.2.

²³⁹ Bylaws, [Ex. C-1], Sec. 1.2 (“In performing its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values....”).

²⁴⁰ Bylaws, [Ex. C-1], Sec. 1.2(c).

²⁴¹ Bylaws, [Ex. C-1], Sec. 1.2(c) (emphasis added).

Mission.”²⁴² In the present context, this fundamental compact reflects ICANN’s formal and “fundamental” agreement with the global Internet community that developed the New gTLD Program Rules that it will consistently, neutrally, objectively, fairly, and in good faith implement the principles, procedures and rules set out therein.

142. ICANN’s Articles of Incorporation also require ICANN to carry out its activities “*in conformity with relevant principles of international law and applicable international conventions and local law.*”²⁴³ ICANN’s Bylaws, as recently revised, restate the requirement that ICANN carry out “*its activities in conformity with relevant principles of international law and international conventions and applicable local law.*...”²⁴⁴

143. The substantive and procedural requirements set forth in ICANN’s Articles and Bylaws and the New gTLD Program Rules cannot be understood and given proper effect without reference to relevant legal standards. The requirement that ICANN comply with relevant principles of international law not only guides the interpretation of these terms, it provides independent (and generally overlapping) substantive and procedural safeguards appropriate for an entity that has oversight authority of a key global resource.²⁴⁵ Despite incorporating this requirement into its Articles of Incorporation and Bylaws, ICANN has long-taken the position that there are essentially no “relevant principles of international law” that regulate its activities.²⁴⁶ This is incorrect. It is contrary to the manifest intention behind its Articles of Incorporation—these would not

²⁴² Bylaws, [Ex. C-1], Sec. 1.2(c).

²⁴³ ICANN, Articles of Incorporation (approved on 9 Aug. 2016, filed on 3 Oct. 2016) (“Articles”), [Ex. C-2], Art. 2(III) (emphasis added).

²⁴⁴ Bylaws, [Ex. C-1], Sec. 1.2(a) (emphasis added).

²⁴⁵ See *ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08, Expert Report of Jack Goldsmith (22 Jan. 2009), [Ex. CA-60], ¶¶ 7-8, 16.

²⁴⁶ *ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08, ICANN’s Response to ICM’s Memorial on the Merits (8 May 2009), [Ex. CA-61], ¶ 167.

have vacuously referenced principles of international law—and to the decision of past IRP panels that ICANN must, at a minimum, “carry out its activities” in good faith.²⁴⁷

144. The guiding substantive and procedural rules in ICANN’s Articles and Bylaws—including the rules involving procedural fairness, transparency, and non-discrimination—are so fundamental that they appear in some form in virtually every legal system in the world, and, as discussed below, are given definition by numerous sources of international law. They arise from the general principle of good faith, which is considered to be “the foundation of all law and all conventions.”²⁴⁸ As the International Court of Justice has stated, the principle of good faith is “[o]ne of the basic principles governing the creation and performance of

²⁴⁷ In *ICM Registry v. ICANN*, a Panel comprised of Judge Stephen Schwebel, Professor Jan Paulsson, and Judge Dickran Tevrizian received expert testimony on the relevant principles of international law from Professor Jack Goldsmith and the late Professor David Caron. The Panel concluded that:

ICANN, *in carrying out its activities “in conformity with the relevant principles of international law,” is charged with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law.* That follows from the terms of Article 4 of its Articles of Incorporation and from the intentions that animated their inclusion in the Articles, an intention that the Panel understands to have been to subject ICANN to relevant international legal principles because of its governance of an intrinsically international resource of immense importance to global communications and economies. Those intentions might not be realized were Article 4 interpreted to exclude the applicability of general principles of law.

[T]he provision of Article 4 of ICANN’s Articles of Incorporation prescribing that ICANN “shall operate for the benefit of the Internet community as a whole, carrying out its activities *in conformity with relevant principles of international law and applicable international conventions and local law,*” *requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions,* and the law of the State of California.

ICM Registry, LLC v. ICANN, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010), [Ex. CA-1], ¶¶ 140, 152 (emphasis added). The obligation for ICANN to operate in good faith—and, indeed, to go beyond mere good faith in adhering to its Articles and Bylaws—is also reflected in the CCWG-Accountability’s recommendations regarding the strengthening of ICANN’s Independent Review Process: “A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN’s existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith.” CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], ¶ 175 (at p. 33).

²⁴⁸ Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), [Ex. CA-3(bis)], p. 105 (quoting *Megalidis Case*, 8 T.A.M. 386, 395 (1928)). Similarly, Schwarzenberger and Brown list good faith as one of the seven fundamental principles of international law. Georg Schwarzenberger and Edward Brown, *A Manual of International Law* (6th ed. 1976), [Ex. CA-62], p. 7.

legal obligations.”²⁴⁹ As the Panel in *ICM v. ICANN* observed, the principle of “good faith ... is found in international law, in the general principles that are a source of international law, and in the corporate law of California.”²⁵⁰ At its most general level, it requires all actors to exercise their rights honestly, fairly, and loyally.²⁵¹ However, the principle of good faith also takes specific forms as recognized in ICANN’s Articles and Bylaws as well as in international law. In other words, ICANN’s exercise of good faith must be exercised in accordance with—and as circumscribed by—the additional principles stated in the Articles and the Bylaws. Given their omission from Amici’s briefs, we lay out below the most relevant provisions of the Bylaws and Articles to the present dispute, as well as the supporting principles of international law, that limit ICANN’s discretion in applying its documented policies—here the New gTLD Program Rules.

A. ICANN Must Provide Procedural Fairness and Due Process

145. ICANN’s Bylaws require that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and *consistent with procedures designed to ensure fairness*.”²⁵² Its “Commitments” accordingly include that ICANN will “[m]ake decisions by applying documented policies *consistently, neutrally, objectively, and fairly*...”²⁵³

146. The principle of procedural fairness and due process reflected in ICANN’s Bylaws is multifaceted. It requires, *inter alia*, that ICANN adhere to established substantive and procedural rules, provide those affected by its decision with the opportunity to be heard, base its decisions and actions on

²⁴⁹ *Nuclear Tests (Australia v. France)*, Judgment (20 Dec.), 1974 I.C.J. 253, [Ex. CA-63], ¶ 46; see also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment (11 June), 1998 I.C.J. 275, [Ex. CA-64], ¶ 38 (good faith is a “well-established principle of international law”).

²⁵⁰ *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010), [Ex. CA-1], ¶ 141.

²⁵¹ *ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08, Expert Report of Jack Goldsmith (22 Jan. 2009), [Ex. CA-60], ¶ 33 (citing Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2002), p. 119); Anthony D’Amato, “Good Faith” in *Encyclopedia of Public International Law* Vol. 2 (1995), [Ex. CA-65], p. 599.

²⁵² Bylaws, [Ex. C-1], Sec. 3.1 (emphasis added).

²⁵³ Bylaws, [Ex. C-1], Sec. 1.2(a)(v) (emphasis added).

adequate information, and make decisions that are neither arbitrary nor unreasonable.²⁵⁴ Accordingly, due process and procedural fairness require, among other procedural protections, that decisions be based on evidence and on appropriate further inquiry into the facts.²⁵⁵ In other words, procedural fairness requires, *inter alia*, performing diligent investigation when making decisions, in accordance with the principle of due diligence.²⁵⁶ Arbitrary or unreasonable decisions are also contrary to procedural fairness.²⁵⁷ Decisions are arbitrary when they lack support from a rational policy, when they are not reasonably related to that policy, or when they are based on “caprice, prejudice or personal preference.”²⁵⁸

147. ICANN repeatedly failed to comply with the principle of procedural fairness and due process in regards to Afiliás’ claims. Afiliás first raised its concerns with ICANN in August 2016.²⁵⁹ Even in this IRP, ICANN has taken diametrically opposed positions as to whether or not it evaluated those concerns. In opposing Afiliás’ Request for Emergency Relief and Interim Measures of Protection, ICANN claims that it “evaluated [Afiliás’] complaints” and that it was therefore “time ... for the auction results to be finalized and for .WEB to be delegated” to NDC (and hence Verisign).²⁶⁰ In ICANN’s Rejoinder, by contrast, ICANN asserts that its Board determined in November 2016 to await the results of pending and anticipated accountability mechanisms “before considering and determining what action, if any, to take at that time” concerning Afiliás’

²⁵⁴ Tribunals for the Court of Arbitration for Sport (“CAS”) consider that private regulatory institutions like ICANN must observe the general principle of procedural fairness and due process. See *The Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*, CAS Case No. 2002/O/410, Award (7 Oct. 2003), [Ex. CA-66], ¶ 4.

²⁵⁵ *A. v. Fédération Internationale de Luttés Associées (FILA)*, CAS Case No. 2001/A/317, Award (9 July 2001), [Ex. CA-67], ¶¶ 5-6; *G. v. Fédération Equestre Internationale (FEI)*, CAS Case No. 1991/A/53, Award (15 Jan. 1992) in 1 *Digest of CAS Awards Series Set 79* (1998), [Ex. CA-68], pp. 85-86.

²⁵⁶ See Section VI below.

²⁵⁷ *AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)*, CAS Case No. 98/200, Award (20 Aug. 1999), [Ex. CA-69], ¶ 156.

²⁵⁸ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 Aug. 2008), [Ex. CA-70], ¶ 184; *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 Sep. 2010), [Ex. CA-71], ¶ 10.3.7; *Ronald S. Lauder v. Czech Republic*, UNCITRAL Arbitration, Final Award (3 Sep. 2001), [Ex. CA-72], ¶ 221 (quoting *Black’s Law Dictionary* (7th ed. 1999), p. 100); *Filippo Volandri v. International Tennis Federation (ITF)*, CAS Case No. 2009/A/1782, Award (12 May 2009), [Ex. CA-73], ¶ 26.

²⁵⁹ See Letter from S. Hemphill (Afiliás) to A. Atallah (ICANN) (8 Aug. 2016), [Ex. C-49].

²⁶⁰ ICANN’s Opposition to Afiliás’ Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018), ¶ 3.

complaints.²⁶¹ And yet, in June 2018, ICANN nonetheless proceeded to take .WEB off-hold and to contract with NDC (and hence Verisign) for .WEB, without providing Afilias any advance notice or explanation for why it was doing so. ICANN had determined that it was going to delegate .WEB to NDC/Verisign as long as there was no accountability mechanism to stop it from doing so. There is simply no way to resolve ICANN's conduct with basic notions of procedural fairness and due process.

B. ICANN Must Afford Impartial and Non-Discriminatory Treatment

148. Article 2.3 of the Bylaws require ICANN to act in a non-discriminatory manner. This provision of its Bylaws, entitled "Non-Discriminatory Treatment," states:

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

The above obligation is underscored by ICANN's "Commitments," which include the principle that ICANN must make decisions "without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties)...."²⁶²

149. The obligation enshrined in ICANN's governing documents is consistent with the principles of impartiality and non-discrimination under international law. The principle has broad application,²⁶³ particularly where, as here, a party has affirmatively assumed duties of impartiality and non-discrimination. Prohibited conduct may take the form of that committed with discriminatory or prejudicial intent (such conduct

²⁶¹ Disspain WS, ¶ 11.

²⁶² Bylaws, [Ex. C-1], Sec. 1.2(a)(v).

²⁶³ The principle of non-discrimination is found in numerous legal systems. For the Court of Justice of the European Union, see *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen and Diamalt AG v. Hauptzollamt Itzenhoe*, Joined Cases 117/76 and 16/77, Judgment (19 Oct. 1977), 1977 E.C.R. 1753, [Ex. CA-74], p. 1762; see also *Peter Überschär v. Bundesversicherungsanstalt für Angestellte*, Case 810/79, Judgment (8 Oct.), 1980 E.C.R. 2747, [Ex. CA-75], ¶ 16; *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, Case 170/84, Judgment (13 May), 1986 E.C.R. 1620, [Ex. CA-76], ¶¶ 31, 37-43. For investment tribunals, see *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, SCC Arbitration, Award (16 Dec. 2003), [Ex. CA-77], p. 34; *Saluka Inves. BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award (17 Mar. 2006), [Ex. CA-78], ¶ 347. For human rights courts, see *Kelly and Others v. United Kingdom*, ECHR, Case No. 30054/96, Final Judgment (4 Aug. 2001), [Ex. CA-79], ¶ 148; Advisory Opinion OC-18/03 of September 17, 2003, Inter-Am. Ct. H.R., *Juridical Condition and Rights of the Undocumented Migrants*, [Ex. CA-80], p. 103.

is also arbitrary and unreasonable);²⁶⁴ international procurement standards require impartiality and equal treatment of all participants.²⁶⁵ Prohibited conduct may also take the form of that which is discriminatory or prejudicial merely in effect, even when superficially neutral treatment.²⁶⁶

150. ICANN accepted the *Amici's* position—as reflected, at a minimum, in their responses to the September 2016 questionnaire—at face value in a clearly biased and discriminatory manner. The ICANN Bylaws require that ICANN act in an objective, neutral, and fair manner.²⁶⁷ ICANN, however, blatantly decided *not* to comply with these standards in regards to .WEB. Upon receipt of the *Amici's* position on the DAA in August and October 2016,²⁶⁸ and without conducting any investigation on the matter,²⁶⁹ ICANN accepted the *Amici's* positions at face value —incorporating their positions into a questionnaire that was designed to elicit answers to advance the *Amici's* arguments. Moreover, ICANN based its questionnaire on information that ICANN and the *Amici* all had in their possession—but which they knew was unavailable to Afilias. It was apparently on the basis of this information that ICANN initially took the position in this IRP that it had “evaluated” and rejected Afilias’ concerns about NDC’s compliance with the New gTLD Program Rules, and, therefore proceeded to delegate the .WEB gTLD to NDC in June 2018. ICANN’s clear bias in favor of the

²⁶⁴ *S.D. Myers, Inc. v. Gov't of Canada*, UNCITRAL Arbitration, Partial Award (13 Nov. 2000), [Ex. CA-81], ¶ 254; *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 Oct. 2011), [Ex. CA-82], ¶ 305; *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006), [Ex. CA-83], ¶ 146; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 Jan. 2010), [Ex. CA-84], ¶ 261.

²⁶⁵ United Nations Procurement Manual (30 June 2020), [Ex. CA-85], Sec. 1.4.2; UNCITRAL Model Law on Public Procurement (2011), [Ex. CA-86], Preamble; World Trade Organization, *Revised Agreement on Government Procurement and WTO related Legal Instruments* (in force 6 Apr. 2014), [Ex. CA-87], Arts. IV(4); World Bank, *Bank Policy: Procurement in IPF and Other Operational Procurement Matters* (Nov. 2017), [Ex. CA-88], p. 3; OECD, *Methodology for Assessing Procurement Systems (MAPS)* (2018), [Ex. CA-89], p. 2.

²⁶⁶ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (17 Jan. 2007), [Ex. CA-90], ¶ 321; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 Sep. 2007), [Ex. CA-91], ¶ 368.

²⁶⁷ Bylaws, [Ex. C-1], Sec. 1.2(a)(v).

²⁶⁸ Letter from Ronald Johnston (Counsel for Verisign) and Brian Leventhal (Counsel for NDC) to Eric Enson (Counsel for ICANN) (23 Aug. 2016), [Ex. C-102]; NDN's Responses to ICANN's Topics for Comment (10 Oct. 2016) in Emails and attachment between Jose Igancio Rasco (NDC) and ICANN (*various dates*), [Rasco Decl. (1 June 2020), Ex. T]; Verisign's Responses to ICANN's Topics for Comments (7 Oct. 2016) in Letter from Ronald Johnston (Counsel for Verisign) to Christine Willett (ICANN), [Ex. C-109].

²⁶⁹ ICANN's Response to Amended IRP Request, ¶ 62.

Amici is further evident throughout its submissions in this IRP. Given ICANN's obvious favoritism of Verisign/NDC dating back to 2016, there can be no serious doubt that if this Panel were merely to issue a declaration that that the Board should now consider Afilias' complaints—as ICANN and the *Amici* urge the Panel to do—ICANN would once again proceed to delegate .WEB to NDC (and hence Verisign), which is why this Panel must exercise the jurisdiction it has been granted to finally resolve the Dispute that is before it. We address the Panel's jurisdiction in Section IX below.

C. ICANN Must Act Openly and Transparently

151. Article 2(III) of the Articles of Incorporation provides in relevant part that ICANN—

[S]hall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities *in conformity with relevant principles of international law and international conventions* and applicable local law and *through open and transparent processes* that enable competition and open entry in Internet-related markets.²⁷⁰

152. These provisions are supplemented by “Commitments and Core Values” set forth in ICANN's Bylaws, which are to “guide the decisions and actions of ICANN” in the performance of its Mission.²⁷¹ The Commitments require that:

ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities *in conformity with relevant principles of international law and international conventions* and applicable local law, *through open and transparent processes* that enable competition and open entry in Internet-related markets.²⁷²

153. The Commitments also require ICANN to:

Employ *open, transparent* and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia,

²⁷⁰ Articles, [Ex. C-2], Art. 2(III) (emphasis added).

²⁷¹ Bylaws, [Ex. C-1], Sec. 1.2(b).

²⁷² Bylaws, [Ex. C-1], Sec. 1.2(a) (emphasis added).

and end users), while duly taking into account the public policy advice of governments and public authorities.²⁷³

154. Similarly, ICANN's Bylaws state that:

ICANN and its constituent bodies *shall operate to the maximum extent feasible* in an *open and transparent manner* and consistent with procedures designed to ensure fairness....²⁷⁴

155. The principle of transparency has “the position of a fundamental principle in the international economic field,” especially in the regulatory and standard-setting space that ICANN occupies.²⁷⁵ The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and providing reasons for actions taken.²⁷⁶ Investor-state arbitral tribunals have, for example, determined that it requires all applicable rules and regulations to be well established and knowable to those regulated by them.²⁷⁷ The principle of transparency also requires active communication regarding the status of a decision and the reasons for the outcome of a decision-making process.²⁷⁸

156. Far from acting transparently, ICANN permitted NDC to enable Verisign to secretly participate in the .WEB Auction in flagrant disregard of the New gTLD Program Rules. ICANN, when faced

²⁷³ Bylaws, [Ex. C-1], Sec. 1.2(a)(iv) (emphasis added).

²⁷⁴ Bylaws, [Ex. C-1], Sec. 3.1 (emphasis added).

²⁷⁵ Akira Kotera, “Regulatory Transparency” in *The Oxford Handbook of International Investment Law* 617 (Peter Muchlinski *et al.* eds., 2008), [Ex. CA-92], p. 619. The obligation of “transparency” exists in virtually every well-developed procurement system. See United Nations Procurement Manual (30 June 2020), [Ex. CA-85], Sec. 1.4.2; UNCITRAL Model Law on Public Procurement (2011), [Ex. CA-86], Preamble; World Trade Organization, *Revised Agreement on Government Procurement and WTO related Legal Instruments* (in force 6 Apr. 2014), [Ex. CA-87], Arts. IV(4), XVI; World Bank, *Bank Policy: Procurement in IPF and Other Operational Procurement Matters* (Nov. 2017), [Ex. CA-88], p. 3; OECD, *Methodology for Assessing Procurement Systems (MAPS)* (2018), [Ex. CA-89], p. 2. The transparency principle has been applied in courts in both Europe and the United States. See Case C-532/06, *Emm G. Lianakis AE et al. v. Dimos Alexandroupolis et al.*, Judgment (24 Jan. 2008), [Ex. CA-93], p. 1.

²⁷⁶ Sacha Prechal and Madeleine de Leeuw, “Dimensions of Transparency: The Building Blocks for a New Legal Principle?”, *Rev. Eur. Admin. L.* Vol. O, No. 1 (2007), [Ex. CA-94], p. 51.

²⁷⁷ See, e.g., *Bosh Int'l, Inc. and B & P Ltd. Foreign Inves. Enter. v. Ukraine*, ICSID Case No. ARB/08/11, Award (25 Oct. 2012), [Ex. CA-95], ¶ 212; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 Dec. 2011), [Ex. CA-96], ¶¶ 314-316.

²⁷⁸ See, e.g., *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award (11 Dec. 2013), [Ex. CA-97], ¶ 870. CAS tribunals have explained that private sports organizations—which share with ICANN private regulatory responsibility—must similarly establish transparent rules for those whom they regulate. *United States Olympic Committee (USOC) v. International Olympic Committee (IOC) and International Association of Athletics Federations (IAAF)*, CAS Case No. 2004/A/725, Award (20 July 2005), [Ex. CA-98], ¶ 20.

with such underhanded tactics, did *nothing*. It did not investigate NDC's conduct; it did not investigate the DAA; and it did not investigate claims related to the *Amic's* secrecy.²⁷⁹ Instead, ICANN simply proceeded to delegate .WEB to NDC in an implicit acceptance of its conduct at the .WEB Auction. A good faith application of the New gTLD Program Rules to NDC's conduct—carried out consistent with ICANN's Articles and Bylaws—required ICANN to disqualify NDC's application and bid.²⁸⁰

157. At the same time, ICANN purposefully left Afilias in the dark about the status of its investigation regarding the .WEB gTLD for nearly two years, despite Afilias' frequent attempts to obtain any information on ICANN's actions regarding .WEB.²⁸¹ When, in June 2018, ICANN proceeded to delegate the .WEB gTLD to NDC, ICANN began this process *without providing Afilias with any update regarding the pending investigation of NDC*—which Afilias requested in 2016²⁸² and which ICANN told Afilias that it would perform.²⁸³ Assuming *arguendo* that ICANN's Board in fact made a decision to defer consideration of Afilias' complaints in November 2016, ICANN not only failed to disclose that decision to Afilias prior to this IRP. ICANN kept the alleged “decision not to decide” in November 2016 secret from Afilias *and this Panel* until its Rejoinder—disclosing the existence of a secret, apparently significant ICANN Board meeting on the .WEB matter in its *Rejoinder Memorial, over 19 months after Afilias initiated this IRP*. Nor has ICANN provided any serious explanation of why—despite its Board's alleged decision not to take any action on .WEB until accountability mechanisms were concluded—ICANN nonetheless took the contention set off-hold and proceeded to delegate .WEB to NDC in June 2018.

158. It is difficult to imagine conduct less transparent than what ICANN has engaged in here.

²⁷⁹ ICANN's Response to Amended IRP Request, ¶¶ 61-62.

²⁸⁰ See Section IV above.

²⁸¹ See Letter from Arif H. Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), [Ex. C-78]; Letter from A. Ali (Counsel for Afilias) to ICANN Board (16 Apr. 2018), [Ex. C-113]; Letter from A. Ali (Counsel for Afilias) to J. LeVee (Counsel for ICANN) (1 May 20018), [Ex. C-114].

²⁸² Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), [Ex. C-49].

²⁸³ Letter from Akram Atallah (ICANN) to Scott Hemphill (Afilias) (30 Sep. 2016), [Ex. C-61], p. 1.

D. ICANN Must Respect Legitimate Expectations

159. ICANN's Bylaws specify that one of its Commitments is to "[m]ake decisions by applying *documented policies* consistently, neutrally, objectively, and fairly...."²⁸⁴ The Bylaws further require that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and *consistent with procedures designed to ensure fairness*,"²⁸⁵ as well as "ICANN's Mission, Commitments, Core Values and/or *established ICANN policy(ies)*...."²⁸⁶

160. The commitment to decision-making consistent with documented policies reflects the need to respect the legitimate expectations those policies create. It is uncontroversial that the conduct of one party in any legal relationship may establish reasonable and justifiable expectations on the part of the other party.²⁸⁷ Legitimate expectation has been recognized as an important general principle—often considered a component of good faith—guiding the interpretation of obligations which may arise in any legal relationship. For example, World Bank administrative tribunals rely on the principle of legitimate expectations to ascertain the World Bank's obligations to individuals,²⁸⁸ while CAS tribunals apply the principle of legitimate expectations to the actions of private regulatory organizations.²⁸⁹ The starting point for determining whether legitimate expectations have been violated is the set of rules and regulations in place.²⁹⁰

²⁸⁴ Bylaws, [Ex. C-1], Sec. 1.2(a)(v) (emphasis added).

²⁸⁵ Bylaws, [Ex. C-1], Sec. 3.1 (emphasis added).

²⁸⁶ Bylaws, [Ex. C-1], Sec. 4.1(c)(i) (emphasis added).

²⁸⁷ For investment tribunals, see *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), [Ex. CA-99], ¶¶ 154, 157, 164, 174. For the GATT/WTO, see *United States - Sections 301-310 of the Trade Act of 1974*, WTO Case No. WT/DS152/R, Report of the Panel (22 Dec. 1999), [Ex. CA-100], ¶ 7.77-7.81.

²⁸⁸ World Bank Administrative Tribunal, *Walter Prescott v. International Bank for Reconstruction and Development*, Decision No. 253 (4 Dec. 2001), [Ex. CA-101], ¶ 25.

²⁸⁹ *The Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*, CAS Case No. 2002/O/410, Award (7 Oct. 2003), [Ex. CA-66], ¶ 11; *Sullivan v. The Judo Federation of Australia Inc.*, CAS Case No. 2000/A/284, Award (14 Aug. 2000), [Ex. CA-102], ¶ 18.

²⁹⁰ *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), [Ex. CA-99], ¶ 154; *Saluka Inves. BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award (17 Mar. 2006), [Ex. CA-78], ¶ 301; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration, Partial Award (13 Sep. 2001), [Ex. CA-103], ¶ 611.

161. Afilias, as a participant in ICANN's New gTLD Program, legitimately expected ICANN to comply with its own rules, policies, and procedures in its Bylaws, the Guidebook and the New gTLD Program Rules. ICANN did not. The plain text of the DAA is in violation of the New gTLD Program Rules when interpreted honestly, fairly, and loyally—*i.e.*, in good faith.²⁹¹ Had ICANN actually followed the New gTLD Program Rules, it would have disqualified NDC from the application and bidding process.²⁹² By allowing Verisign to use NDC as a stalking horse to obtain .WEB for itself, ICANN frustrated Afilias' legitimate expectations.

E. ICANN Must Act to Promote Competition

162. ICANN's Commitments in the Bylaws establish that the organization must enable competition through its actions and decisions:

ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole . . . through open and transparent *processes that enable competition and open entry in Internet-related markets*.²⁹³

163. ICANN's Core Values further reflect its obligation to promote competition through its policy development, in multiple domains:

Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market; ...

Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process....²⁹⁴

164. As discussed in Section VIII below, and in Afilias' prior submissions,²⁹⁵ ICANN has entirely failed to comply with its mandate to promote competition in the domain name system. The .WEB gTLD is

²⁹¹ See Section IV above.

²⁹² Afilias' Reply Memorial, ¶¶ 16, 97-101.

²⁹³ Bylaws, [Ex. C-1], Sec. 1.2(a) (emphasis added).

²⁹⁴ Bylaws, [Ex. C-1], Secs. 1.2(b)(iii), (iv):

²⁹⁵ See Afilias' Amended IRP Request, Sec. 5; Afilias' Reply Memorial, Sec. IV.

widely acknowledged as the only new gTLD capable of competing with .COM.²⁹⁶ ICANN nonetheless is permitting Verisign, the registry operator for .COM and the resident monopolist of the DNS, to acquire the .WEB gTLD in a program specifically designed to challenge .COM's dominance through new gTLDs.²⁹⁷ ICANN's own Bylaws preclude it from exercising its discretion in this way.

VI. THE *AMICI* CANNOT RELY ON THE BUSINESS JUDGMENT RULE TO EXCUSE THE ICANN BOARD'S CONDUCT REGARDING THE .WEB MATTER

165. The *Amici* support ICANN's reliance on the business judgment rule, which does not excuse whatever ICANN did or did not do regarding the .WEB matter in November 2016.²⁹⁸ In their haste to assert that "the only issue properly before this Panel is whether ICANN's determination to defer the ultimate decision on Afilias' claims was within the Board's business judgment,"²⁹⁹ the *Amici* erroneously rely on three assumptions—the same incorrect assumptions made by ICANN.

166. The *Amici* first assume that the ICANN Bylaws require this Panel to apply the business judgment rule in this IRP and therefore defer to the ICANN Board's "determination." They then assume that the ICANN Board's November 2016 conduct constitutes a decision protected by the business judgment rule. And they finally assume that ICANN provided the Panel with sufficient evidence to justify a determination on whether that conduct was a reasonable business judgment. All of these assumptions are incorrect. The business judgment rule, therefore, is wholly inapplicable to whatever it is the ICANN Board did in November 2016. Neither the *Amici* nor ICANN assert that the business judgment rule applies to the decision taken by ICANN in June 2018 to proceed with delegating .WEB to NDC.

²⁹⁶ Afilias' Amended IRP Request, ¶ 82.

²⁹⁷ Afilias' Amended IRP Request, ¶ 80.

²⁹⁸ Verisign Br., p. 1.

²⁹⁹ NDC Br., ¶ 78; Verisign Br., p. 1 ("Thus, the only question properly before the Panel here is whether ICANN violated its Bylaws when it decided to defer a decision on Afilias' objections."). As discussed in Section V above, this IRP concerns far more issues than whether the ICANN Board violated its Bylaws in November 2016.

167. *First*, the ICANN Bylaws require that this IRP Panel perform an objective, *de novo* analysis of the ICANN Board's actions and inactions. Pursuant to Section 4.3(i) of the ICANN Bylaws, "[e]ach IRP Panel *should conduct an objective, de novo examination* of the Dispute."³⁰⁰ The *only* time an IRP Panel should "not replace the Board's reasonable judgment with its own" is "*[f]or Claims arising out of the Board's exercise of its fiduciary duties...*"³⁰¹ Afilias' claims, however, do not concern the ICANN Board's exercise of its fiduciary duties. How could they? When Afilias filed its Request for Independent Review and even when it subsequently filed its Amended Request for Independent Review, ICANN had never claimed that it had made its "decision not to decide"—*i.e.*, the decision that ICANN and the *Amici* now argue fall within the Board's exercise of its fiduciary duties (and should be assessed under the business judgment rule).

168. The *Amici* nonetheless attempt to transform this IRP into an arbitration solely about the ICANN Board's "fiduciary duties." In doing so, the *Amici* deliberately mischaracterize or ignore Afilias' actual claims. This IRP concerns the ICANN Staff's (1) failure to disqualify NDC for breaching the New gTLD Program Rules; (2) failure to offer Afilias the rights to the .WEB gTLD; and (3) decision to proceed with the delegation process for .WEB after a superficial investigation.³⁰² As expressly stated in ICANN's Bylaws, the business judgment rule only applies to the ICANN Board—*not* to ICANN Staff.³⁰³

169. As part of this IRP, Afilias further alleges that the ICANN Board completely abdicated "its responsibility to ensure implementation of the New gTLD Program Rules in accordance with ICANN's Articles and Bylaws."³⁰⁴ Afilias at no point claims that the ICANN Board failed to comply with its fiduciary duties to ICANN, which would require that Afilias allege (1) the existence of a fiduciary duty; (2) the breach of that

³⁰⁰ Bylaws, [Ex. C-1], Sec. 4.3(i) (emphasis added).

³⁰¹ Bylaws, [Ex. C-1], Sec. 4.3(i)(iii) (emphasis added).

³⁰² Afilias' Reply Memorial, ¶¶ 8, 155.

³⁰³ Bylaws, [Ex. C-1], Sec. 4.3(i)(iii) (applying business judgment rule to "Claims arising out of *the Board's* exercise of its fiduciary duties" (emphasis added)).

³⁰⁴ Afilias' Reply Memorial, ¶ 8 (emphasis added).

fiduciary duty; and (3) damages proximately caused by the breach.³⁰⁵ Although neither the *Amici* nor ICANN can point to any instance where Afilias makes such explicit allegations, both persist in attempting to convince this Panel to ignore Afilias' actual claims in order justify the application of the business judgment rule in this IRP. ICANN and the *Amic*'s misrepresentation of Afilias' claims should not be endorsed by the Panel.

170. **Second**, the ICANN Board's November 2016 conduct (even assuming *arguendo* that ICANN has accurately described what the Board purported to do) does not constitute a board decision that is protected by the business judgment rule. As ICANN admits in its Reply Memorial, the business judgment rule "provides a 'judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.'"³⁰⁶ But the ICANN Board did not and could not make any decisions during this alleged November 2016 Board workshop. It is simply not possible for the ICANN Board to take any "decision" during an informal Board workshop session. Pursuant to the ICANN Bylaws,

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 ***[E]xcept as otherwise provided in these Bylaws or by law, the Board may act by majority vote of the Directors present at any annual, regular, or special meeting of the Board.***³⁰⁷

171. The ICANN Board can only act outside of an annual, regular or special meeting "***if all of the Directors entitled to a vote thereat shall individually or collectively consent in writing to such action.***"³⁰⁸ Further, ICANN must publically disclose all resolutions and "any actions" taken by the ICANN

³⁰⁵ *AlterG, Inc. v. Boost Treadmills LLC*, 388 F.Supp.3d 1133, 1148 (N.D. Cal. 2019), [Ex. CA-104]; *Coley v. Eskaton*, 2020 WL 3833018 (Cal. Ct. App. 2020), [Ex. CA-105] (applied to a nonprofit mutual benefit corporation).

³⁰⁶ ICANN's Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review (1 June 2020), ¶ 59 (quoting *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 711 (1996), [Ex. RLA-15] (quoting *Barnes v. State Farm Mut. Auto. Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)).

³⁰⁷ Bylaws, [Ex. C-1], Secs. 2.19 (emphasis added).

³⁰⁸ Bylaws, [Ex. C-1], Sec. 7.19 (emphasis added).

Board.³⁰⁹ ICANN's disclosure must provide "the rationale or any resolution adopted by ICANN"³¹⁰ and the "vote of each Director voting on the resolution...."³¹¹ And, significantly, the agenda and meeting minutes for the ICANN Board meetings that involve such decision-making must be publically posted by ICANN—meaning that the ICANN Board cannot generally make a decision in secret.³¹²

172. ICANN did not comply with any of these Bylaws-mandated requirements in regards to the November 2016 informal ICANN Board workshop.³¹³ There is no mention of any ICANN Board discussion of or any action taken by the Board in regards to the .WEB matter in any of the ICANN Board materials posted for November or December 2016.³¹⁴ ICANN did not even disclose the existence of the ICANN Board

³⁰⁹ Bylaws, [Ex. C-1], Sec. 3.5(b) ("No later than 11:59 p.m. on the second business day after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any resolutions passed by the Board at that meeting shall be made publicly available on the Website[.]"); *id.*, Sec. 3.5(c) ("No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website...."). The exceptions to this requirement do not apply in this case. *Id.* ("[P]rovided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the resolutions made publicly available."). The legal matters at issue in regards to .WEB (*i.e.*, the Accountability Mechanisms and the litigation) were a matter of public record. ICANN has further not alleged that the ICANN Board decided not to publish information about its choice by a 3/4 vote.

³¹⁰ Bylaws, [Ex. C-1], Sec. 3.1 ("ICANN shall also implement procedures for the documentation and *public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies* (including the detailed explanations discussed above).") (emphasis added); *id.*, Sec. 3.6(c) ("After taking action on any policy subject to this Section 3.6, *the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board* (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS, financial impacts or other issues that were considered by the Board in approving such resolutions)[.]") (emphasis added).

³¹¹ Bylaws, [Ex. C-1], Sec. 3.6(c) ("After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes ... the vote of each Director voting on the resolution....").

³¹² Bylaws, [Ex. C-1], Sec. 3.4 (stating that ICANN must provide "[a]t least seven days in advance of the Board meeting ... a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted"); *id.*, Sec. 3.5(a) ("All minutes of meetings of the Board, the Advisory Committees and Supporting Organizations (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN Secretary ('Secretary') for posting on the Website."); *id.*, Sec. 3.5(d) ("No later than the day after the date on which they are formally approved by the Board ... the minutes of the Board shall be made publicly available on the Website[.]"). As stated in note 309 above, the exceptions to ICANN's public disclosure requirements do not apply in regards to the ICANN Board's November 2016 choice.

³¹³ Bylaws, [Ex. C-1], Sec. 3.1.

³¹⁴ See ICANN, Board of Governance Committee, Agenda (2 Nov. 2016), available at <https://www.icann.org/resources/board-material/agenda-bgc-2016-11-02-en> (last accessed 17 July 2020), [Ex. C-133] through ICANN, Board of Governance Committee, Meeting Minutes (16 Dec. 2016), available at <https://www.icann.org/resources/board-material/minutes-bgc-2016-12-16-en> (last accessed 17 July 2020), [Ex. C-162] (as listed in the List of Exhibits accompanying this submission).

workshop that the *Amici* allege serves as “the only issue”³¹⁵ before this Panel until its Rejoinder Memorial on 1 June 2020—nearly 19 months after *Afilias* initiated this IRP. And, yet, the *Amici* and ICANN contend that the Board’s conduct at this workshop meeting—where a vote of the ICANN Board could not by definition have occurred—constitutes a proper decision worthy of protection by the business judgment rule.

173. The *Amici*’s support of ICANN’s opaqueness regarding the November 2016 workshop further violates the very spirit of the Accountability Mechanisms provided for in ICANN’s Bylaws. ICANN’s Accountability Mechanisms are designed to hold ICANN “accountable to the community”³¹⁶ by permitting members of the Internet community to contest improper ICANN Board decisions.³¹⁷ However, in order to initiate such Accountability Mechanisms, ***Afilias (or any other Internet community member) must know about the ICANN Board action or inaction*** (or, under the new Bylaws, the actions or inactions of staff). That is certainly not the case in regards to whatever ICANN Staff and the ICANN Board claim to have done in November 2016. The *Amici* and ICANN nonetheless expect *Afilias* to have somehow learned about a secret informal ICANN Board workshop meeting in November 2016 and contested the ICANN Board’s conduct in 2016. Such a position is inherently illogical.

174. Simply put, even if the ICANN Board had purported to take a decision at the November 2016 informal Board workshop to defer any consideration of *Afilias*’ complaints during pending and anticipated accountability mechanisms, that decision does not comply with the ICANN Bylaws and thus does not constitute a decision or actions that can be protected by the business judgment rule. Given the terms of the DAA and the New gTLD Program Rules, no proper exercise of the Board’s discretion consistent with its

³¹⁵ NDC Br., ¶ 78; Verisign Br., p. 1 (“Thus, the only question properly before the Panel here is whether ICANN violated its Bylaws when it decided to defer a decision on *Afilias*’ objections.”). As discussed in Section V above, this IRP concerns far more issues than whether the ICANN Board violated its Bylaws in November 2016.

³¹⁶ Bylaws, [Ex. C-1], Sec. 4.1.

³¹⁷ Bylaws, [Ex. C-1], Sec. 4.1. These Accountability Mechanisms are especially important in regards to the New gTLD Program, since the Applicant Guidebook contains a litigation waiver that makes the Accountability Mechanisms the only non-contested means to contest ICANN decision-making. ICANN, gTLD Applicant Guidebook (4 June 2012) (“AGB”), [Ex. C-3], Module 6.

Articles and Bylaws could have yielded any other result other than disqualification of NDC's application and bid. The failure by ICANN's Board (as well as ICANN's staff) to act on Afilias' complaints and to disqualify NDC—and then to proceed to contract with NDC for .WEB in June 2018—violated ICANN's Articles and Bylaws.

175. California “case law is clear that conduct contrary to governing documents [(i.e., corporate bylaws)] may fall outside the business judgment rule.”³¹⁸ California courts do not assume, and neither should this IRP Panel, that “the business judgment rule would apply to [an] action that violated the governing documents.”³¹⁹ As ICANN's Board has failed to comply with its Bylaws in regards to its alleged decision not to decide in November 2016, the business judgment rule does not protect its actions.³²⁰

176. *Last*, even assuming *arguendo* that the business judgment rule has any application to this case, ICANN's secrecy regarding the ICANN Board's November 2016 conduct renders it impossible for this Panel to evaluate the reasonableness of that conduct under the business judgment rule. NDC relies on Section 4.3(o) of the ICANN Bylaws to argue that this Panel should not “second-guess the reasonable business judgment of the ICANN Board.”³²¹ But what, exactly, was the ICANN Board's judgment? As the Board is prevented by its Bylaws from taking any action or decision in an informal Board workshop, it is impossible to know given ICANN's scant disclosures in document production. The *Amici*, however, entreat this Panel to blindly rely on ICANN's vague descriptions of the ICANN Board's November 2016 workshop

³¹⁸ *Palm Springs Villas II Homeowners Assn., Inc. v. Parth*, 248 Cal.App.4th 268, 283 (Cal. Ct. App. 2016), [Ex. CA-106] (emphasis added) (considering causes of action against a nonprofit's President (and board members) for breach of fiduciary duty and violation of the nonprofit's governing documents); *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.*, 168 Cal.App.4th 1111, 1124 (Cal. Ct. App. 2008), [Ex. CA-107] (“Even if the Board was acting in good faith and in the best interests of the community as a whole, its policy of excepting all palm trees from the application of section 7.18 was not in accord with the CC & Rs, which require all trees be trimmed so as to not obscure views. The Board's interpretation of the CC & Rs was inconsistent with the plain meaning of the document and thus not entitled to judicial deference.”).

³¹⁹ *Palm Springs Villas II Homeowners Assn., Inc. v. Parth*, 248 Cal.App.4th 268, 283 (Cal. Ct. App. 2016), [Ex. CA-106].

³²⁰ Bylaws, [Ex. C-1], Sec. 1.2(a)(v).

³²¹ NDC Br., ¶ 70.

session to establish that the ICANN Board's actions are reasonable and deserving of protection under the business judgment rule.

177. This Panel should not accept and adopt ICANN's conclusory statements as incontrovertible fact. ICANN does not provide support for the reasonableness of the ICANN Board's choice "not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending..."³²² The *only evidence* about ICANN's November 2016 workshop meeting is Mr. Disspain's Witness Statement, and his account of the workshop is frustratingly vague. Specifically, Mr. Disspain does not provide any specific information on:

- the "issues being raised regarding .WEB;"
- the "relevant information about the dispute" considered by the Board;
- the "parties" whose "legal and factual contentions" were discussed, or information about those contentions;
- the "set of options" that the ICANN Board considered;
- the ICANN "Board members" that attended the meeting, and whether they voted on this choice not address the .WEB issue;
- the "questions" that members of the ICANN Board had about the .WEB matter;
- the "claims arising from the .WEB auction" that the ICANN Board chose not to act upon;
- the specific "Accountability Mechanisms that had already been initiated over .WEB;"
- the prospective "further Accountability Mechanisms and legal proceedings" considered by the ICANN Board; and
- any justification for the ICANN Board's choice "to await the results of such proceedings before considering and determining what action, if any, to take at that time."³²³

178. In so doing, ICANN (through Mr. Disspain) fails to provide the Panel with sufficient evidence to determine whether the ICANN Board acted reasonably in November 2016—even if the business judgment

³²² ICANN's Rejoinder Memorial, ¶ 3.

³²³ Disspain WS, ¶¶ 10-11.

rule were applicable here. Given this significant deficiency in ICANN's defense, and for the reasons stated above, ICANN cannot—and should not—be granted protection under the business judgment rule.

VII. AFILIAS DID NOT VIOLATE THE BLACKOUT PERIOD

179. In an auction context, a “blackout period” is designed to prevent bid rigging by prohibiting bidders from coordinating in advance of the auction. Here, the relevant “Blackout Period” prohibited members of the .WEB contention set from collaborating, discussing bids or bidding strategies, or otherwise discussing or negotiating settlement agreements related to the upcoming ICANN-administered .WEB Auction “from the Deposit Deadline for the Auction until full payment had been received in the Auction Bank Account from the Winner of the Contention Set.”³²⁴ These “Blackout Period” rules do not prohibit any and all contact among the members of the contention set.

180. The weeks leading up to the ICANN .WEB Auction were not usual. Members of the contention set had complained to ICANN about the status of NDC's application and had petitioned ICANN to postpone the auction until a thorough investigation could be completed. Although Afilias had not joined the request to delay the auction, the pendency of that request introduced some uncertainty as to whether the ICANN auction would, in fact, go forward. In that context, Mr. John Kane of Afilias texted Mr. Jose Ignacio Rasco III of NDC to see whether NDC would be interested in pursuing a private auction if, in fact, the ICANN auction was delayed. Mr. Kane specifically requested only a “Y/N” answer to his question.³²⁵ Of course, none of the contention set members had any idea that Mr. Rasco was unable to respond freely to any inquiries in light of NDC's commitments to Verisign.

³²⁴ The Blackout Period rules prohibit applicants “from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements....” Auction Rules, [Ex. C-4], Sec. 2.6; Auction Rules, [Ex. C-4], ¶ 68(a).

³²⁵ The full text of Mr. Kane's communication reads: “If ICANN delays the auction next week would you again consider a private auction? Y/N.” NDC Br., ¶ 49.

181. If Mr. Rasco had replied in the affirmative, and if ICANN had delayed the auction, Mr. Kane was prepared to open discussions with NDC about the terms of a private auction. However, Mr. Rasco did not reply and ICANN did not delay the auction, so Mr. Kane's brief text was the only communication that was made between the parties.

182. The *Amic's* argument that this single text constituted a violation of the Blackout Period is entirely without merit and is simply intended to serve as a distraction. *First*, it is clear that the plain language of Mr. Kane's text (a) did not discuss a bid for .WEB, (b) did not discuss bidding strategies for .WEB, and (c) did not discuss or negotiate a settlement agreement concerning .WEB. For this reason alone, Afilias did not violate the Blackout Period.

183. *Second*, the *Amic's* argument that Mr. Kane's text referenced or otherwise incorporated a proposal that Afilias had made and that NDC had rejected in the context of discussions about a private auction *prior* to the Blackout Period is not only false, it is irrelevant. There is nothing in Mr. Kane's text that remotely suggests a renewal of any offer made in the context of the private auction discussions prior to the Blackout Period. Mr. Rasco's witness statement asserts that he "understood Afilias' text message to refer back to a proposal Afilias made to Mr. Calle in June 2016"³²⁶ Mr. Rasco provides no basis for his "understanding" and there is no basis for it in Mr. Kane's text. Moreover, the offer that Afilias has previously made (and that NDC had rejected) was made in the context of the private auction; it could have no application to an ICANN Auction. Accordingly, even if Mr. Rasco had, in fact, misinterpreted Mr. Kane's brief text as a restatement of Afilias' prior offer,³²⁷ those terms were not relevant to and, in fact, not applicable to an auction where ICANN would retain 100% of the auction proceeds.

³²⁶ Rasco Decl., ¶ 97.

³²⁷ NDC Br., ¶ 118. NDC's statement that "Afilias sent these text messages after the commencement of the Blackout Period" is misleading and false. *Id.* (emphasis omitted). As NDC admits, the only communication between Afilias and NDC during the Blackout Period consisted of a single, innocuous 14-word text that hardly constitutes an attempt to rig the ICANN .WEB Auction.

184. In short, Mr. Kane's text—requesting nothing more than a Yes or No answer to the question on whether NDC would again consider a private auction if ICANN were to delay the ICANN Auction scheduled for the following week—did not discuss a bid for .WEB; did not discuss bidding strategies for .WEB; and did not discuss or negotiate a settlement agreement concerning .WEB. The allegation by the *Amici* that the text violated the prohibitions of the Blackout Period is entirely without merit.

VIII. THE *AMICI* MISREPRESENT THE SCOPE AND EFFECT OF ICANN'S COMPETITION MANDATE

185. Contrary to the *Amici's* arguments that ICANN is *prohibited* from taking actions and making decisions to promote competition,³²⁸ this is exactly what ICANN's Articles and Bylaws specifically authorize ICANN to do. *First*, the *Amici* ignore the express commands of ICANN's Articles of Incorporation:

The Corporation ***shall operate*** in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that ***enable competition*** and open entry in Internet-related markets.³²⁹

186. *Second*, the *Amici* ignore ICANN's Bylaws, which specifically authorize ICANN to take disparate and discriminatory actions and decisions, where justified by ICANN's mandate to promote competition:

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment ***unless justified by substantial and reasonable cause, such as the promotion of effective competition.***³³⁰

³²⁸ NDC Br., ¶¶ 8-11 (arguing that ICANN lacks “legal or regulatory authority to police competition”); Verisign Br., ¶¶ 95-97.

³²⁹ Articles, [Ex. C-2], Sec. III.

³³⁰ Bylaws, [Ex. C-1], Sec. 2.3. Given the testimony of ICANN's first chairwoman that ICANN's “primary purpose” was to “break” the .COM monopoly it is reasonable to infer that Section 2.3 of the Bylaws was specifically drafted to enable ICANN to treat Verisign differently. Indeed, as of today, Verisign is treated differently from every other registry operator, since .COM and .NET are the only two registries subject to price regulation. It is also reasonable to infer, based on the fact that .NET is subject to price controls, despite being a fraction of the size of .COM and similar in size to other registries such as .ORG, that Verisign is being treated differently based on its market power, rather than simply as the registry operator of .COM.

187. For these reasons, the *Amici* misconstrue Afilias' arguments concerning ICANN's core value to promote competition.

188. ICANN contends in response to Afilias' claims that it retained "discretion to determine whether NDC committed a breach of the Guidebook or Auction Rules and, if so, the appropriate remedy or penalty, if any."³³¹ But the plain terms of its Bylaws restrain ICANN's exercise of its discretion by providing that "ICANN *will act* in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values."³³² To that end, ICANN's "Core Value" to "introduc[e] and promot[e] competition in the registration of domain names"³³³ must "guide the decisions and actions of ICANN."³³⁴ As discussed below in Section IX, it is Afilias' position that this Panel is authorized to make findings of fact as to whether ICANN's failure to act violated its Articles or Bylaws and, further, to render a decision that is binding and that "directs" ICANN's Board and Staff on the "appropriate action to remedy" for that violation.³³⁵ That "appropriate action" must reflect, and in determining such action this Panel should be guided by, ICANN's Core Value to "introduce[e] and promot[e] competition."

A. The New gTLD Program Was Designed to Promote Competition

189. Neither the *Amici* nor their experts dispute the fact that the Guidebook makes clear that the New gTLD Program was intended to promote competition, fulfilling one of ICANN's key mandates:

Since ICANN was founded in 1998³³⁶ as a not-for-profit, multi-stakeholder organization, *one of its key mandates has been to promote competition in the domain name market*. ICANN's mission specifically calls for the

³³¹ ICANN's Rejoinder Memorial, ¶ 4. This argument was adopted by the *Amici*. See NDC Br., ¶ 15.

³³² Bylaws, [Ex. C-1], Sec. 1.2.

³³³ Bylaws, [Ex. C-1], Sec. 1.2(b)(iv).

³³⁴ Bylaws, [Ex. C-1], Sec. 1.2(b).

³³⁵ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), [Ex. C-122], ¶ 57.

³³⁶ In November 1998, ICANN signed a Memorandum of Understanding ("MOU") with the U.S. Commerce Department, which mandated that ICANN "*support competition and consumer choice* in the technical management of the DNS ... [to] lower costs, promote innovation, and enhance user choice and satisfaction." ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1999), [Ex. C-57], Sec. II(c)(2) (emphasis added).

corporation to maintain and build on processes that will ensure competition and consumer interests.... New gTLDs are viewed by ICANN as important to fostering choice, innovation and competition in domain registration services[.]³³⁷

190. Indeed, in its resolution that approved the Guidebook, ICANN's Board wrote:

The launch of the new gTLD program is in fulfillment of a core part of ICANN's Bylaws: the *introduction of competition and consumer choice in the DNS*. ... This decision represents ICANN's continued adherence to its *mandate to introduce competition* in the DNS, and also represents the culmination of an ICANN community policy recommendation of how this can be achieved.³³⁸

191. Contrary to ICANN's position that it fulfills its competition mandate exclusively through the policy development,³³⁹ the new gTLD application form itself requires applicants to detail what the applied-for gTLD "will add to the current space, in terms of *competition*, differentiation, or innovation."³⁴⁰ If ICANN had already satisfied its competition mandate by developing the New gTLD Program, there would not have been any reason to enquire how applicants would promote competition in the DNS.³⁴¹

192. In connection with its development of the New gTLD Program, ICANN retained Dr. Dennis Carlton to opine on the competitive benefits of introducing new gTLDs. Dr. Carlton opined in that context that:

ICANN's plan to introduce new gTLDs is likely to benefit consumers by facilitating entry which *would be expected to mitigate market power associated with .com* and other major TLDs and increase innovation.³⁴²

³³⁷ AGB, [Ex. C-3], Attachment to Module 2, p. A-1.

³³⁸ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), [Ex. C-9], p. 7.

³³⁹ Witness Statement of J. Beckwith Burr (31 May. 2019), ¶¶ 19, 22.

³⁴⁰ AGB, [Ex. C-3], Attachment to Module 2, Sec. 18(b) (Mission Purpose).

³⁴¹ Further, Ms. J. Beckwith Burr's contention that the New gTLD Program was not intended to create competition for .COM is flatly contradicted by the sworn Congressional testimony of Ms. Esther Dyson, ICANN's first chairwoman. Ms. Dyson, appearing to support the introduction of the New gTLD Program, testified that ICANN's "primary mission" was to "break" the .COM "monopoly." S. Hrg. 112-394, ICANN's Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112th Congress, First Session, December 8, 2011, [Ex. JZ-2], p.46.

³⁴² Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at <https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf>, [Ex. GS-33], ¶ 20.

193. Dr. Carlton specifically disagreed with critics who opined that the competition would *only* be furthered if new gTLDs were able to erode .COM's market power:

Even if *.com* (or, for that matter, any other TLD) today exercises market power, new gTLDs could enhance consumer welfare by creating new products and fostering innovation, and promoting future competition with *.com* and other TLDs. That is, ***entry of a new gTLD can be desirable even if the gTLD does not erode any of the market power that .com may possess.***³⁴³

194. Dr. Carlton further opined that the introduction of a new gTLD would promote competition, ***even if its introduction did not result in a price effect on .COM.***

Even if the new gTLDs authorized under the ICANN proposal would not compete with *.com* for *existing* registrants and ***did not result in the reduction of the fee for .com registration below the price cap level,*** entry would still be likely to benefit consumers by increasing the likelihood of the successful introduction of ***new and innovative registration services*** which generate benefits to consumers.³⁴⁴

195. Regarding .COM specifically, Dr. Carlton opined:

The DOJ, for example, speculates that the network effects that make *.com* registrations so valuable to consumers will be difficult for other TLDs to overcome. However, any market power associated with *.com* will attract entrants with strategies built around bringing new registrants to the new gTLDs. ***Restricting the opportunity for entrants to compete for such profits necessarily has the effect of preserving profits associated with .com.***³⁴⁵

196. Dr. Carlton also rejected any criticisms that he had not quantified consumer benefit on a cost/benefit basis:

³⁴³ Dennis Carlton (Compass Lexecon), Comments on Michael Kende's Assessment of Preliminary Reports on Competition and Pricing (5 June 2009), [Ex. C-126], ¶ 5.

³⁴⁴ Dennis Carlton (Compass Lexecon), Comments on Michael Kende's Assessment of Preliminary Reports on Competition and Pricing (5 June 2009), [Ex. C-126], ¶ 8; *see also* Michael Katz *et al.*, An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names: A Report Prepared for ICANN (June 2010), available at <https://archive.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf> (last accessed on 23 July 2020), ¶ 28 (noting a "broad consensus among economists" that competition is preferable to regulation, specifically because competition is better at promoting innovation).

³⁴⁵ Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at <https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf>, [Ex. GS-33], ¶ 22.

Requiring entrants to justify entry on [a] cost/benefit basis, however, is likely to result in significant consumer harm because the competitive benefit of new business methods or technologies facilitated by entry can be very hard to predict *a priori*.³⁴⁶

197. For this reason, Dr. Carlton concluded that the introduction of new gTLDs was “likely to *improve consumer welfare by facilitating entry and creating new competition* to the major gTLDs such as *.com, .net, and .org*.”³⁴⁷

198. In this IRP, Dr. Carlton inexplicably takes a contrary view:³⁴⁸

- First, despite opining in 2009 that even if the entry of a gTLD “*did not result in the reduction of the fee for .com registrations below the price cap level, entry would still be likely to benefit consumers*,”³⁴⁹ Dr. Carlton opines here that Afilias must show that “an Afilias-operated .WEB would cause Verisign to reduce its .COM prices” to demonstrate that the acquisition of .WEB by Verisign would not “promote competition.”³⁵⁰ Indeed, Dr. Carlton had opined to the contrary in 2009, when he advised that “[r]equiring entrants to justify entry on [a] cost/benefit basis is likely to result in significant consumer harm.”³⁵¹
- Second, despite opining in 2009 that “*entry of a new gTLD can be desirable even if the gTLD does not erode any of the market power that .com may possess*,”³⁵² Dr. Carlton opines here that Afilias must establish that an Afilias-operated .WEB would restrain Verisign’s .COM pricing above and beyond those restraints imposed by the U.S. government-imposed price caps on .COM.³⁵³
- Third, despite recognizing in 2009 the procompetitive benefits of introducing new gTLDs “*holds even if .com pricing continues to be regulated through price caps* because competition has the potential for inducing registries of regulated TLDs to reduce prices below

³⁴⁶ Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at <https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf>, [Ex. GS-33], ¶ 41.

³⁴⁷ Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at <https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf>, [Ex. GS-33], ¶ 5.

³⁴⁸ Each of Dr. Carlton’s new opinions are joined by the *Amic/s* expert, Dr. Murphy.

³⁴⁹ Dennis Carlton (Compass Lexecon), Comments on Michael Kende’s Assessment of Preliminary Reports on Competition and Pricing (5 June 2009), [Ex. C-126], ¶ 8.

³⁵⁰ Expert Report of Dennis Carlton (30 May 2019), ¶ 6. *See also* Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 4 (criticizing Dr. Sadowsky for not conducting an “analysis of how the acquisition of .web by Verisign would alter the pricing incentives for .com”).

³⁵¹ Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at <https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf>, [Ex. GS-33], ¶ 41.

³⁵² Dennis Carlton (Compass Lexecon), Comments on Michael Kende’s Assessment of Preliminary Reports on Competition and Pricing (5 June 2009), [Ex. C-126], ¶ 5.

³⁵³ Expert Report of Dennis Carlton (30 May 2019), ¶¶ 29-30. *See also* Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 3(d) (arguing that there is “no economic basis to believe that Verisign would lower the price of .COM if .WEB were owned by someone else” because .com is subject to price regulation).

these caps,”³⁵⁴ Dr. Carlton opines here that, to demonstrate that allowing Verisign to control .WEB would violate ICANN’s mandate to promote competition, Afilias must demonstrate that “competitive pressure from an Afilias-operated .WEB would cause Verisign to reduce its .COM prices or otherwise improve the quality of the .COM offering.”³⁵⁵

Neither the *Amici* nor ICANN offer any explanation for Dr. Carlton’s *volte face*.

B. Any Decision Furthering Verisign’s Acquisition of .WEB Is Inconsistent With ICANN’s Competition Mandate

199. There is no legitimate argument against the obvious conclusion that Verisign possesses market power. The *Amici*’s arguments to the contrary are meritless.

- First, in 2008, the *DOJ specifically determined that Verisign possesses significant market power because many registrants do not perceive .COM and other gTLDs and ccTLDs to be substitutes*.³⁵⁶ Specifically, as there is no genuinely adequate substitute TLD for .COM at present, Verisign remains the only source for new registrants wishing to enjoy the distinct benefits of branding on a .COM domain name. The DOJ has never opined otherwise.
- Second, the U.S. government continues to regulate the price of .COM, as it has done consistently over the last 20 years.³⁵⁷ The U.S. government may only regulate the pricing of private companies where they are deemed to have a monopoly or near monopoly.³⁵⁸ In 2018, the U.S. Department of Commerce determined that price regulation of .COM continues to be necessary.³⁵⁹ Contrary to the *Amici*’s representations to this Panel, Amendment 35 of Verisign’s Cooperative Agreement with the U.S. government does not eliminate pricing regulation, but rather permits Verisign to pursue with ICANN an up to 7

³⁵⁴ Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at <https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf>, [Ex. GS-33], ¶ 24.

³⁵⁵ Expert Report of Dennis Carlton (30 May 2019), ¶ 6. *See also* Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 35 (restricting competitive analysis to whether the introduction of .WEB will reduce .COM pricing).

³⁵⁶ Expert Report of Dennis Carlton (30 May 2019), ¶¶ 51-52 (citing the December 2008 letter from Deborah A. Garza of DOJ to Meredith Baxter of NTIA, [Ex. C-125]).

³⁵⁷ It should be noted that both .COM and .NET are uniquely subject to price regulation by the U.S. government, which removed all price regulation from the other so-called legacy gTLDs earlier this year. The U.S. government’s decision to retain price control over Verisign alone is an implicit recognition of Verisign’s continued market power. *See* Amendment to Financial Assistance Award between the U.S. Department of Commerce and VeriSign, Inc., Award No. NCR-92-18742, Amendment Thirty-Five (35) (26 Oct. 2018), [Ex. KM-25], Sec. 2; *see also* .Net Registry Agreement between ICANN and Verisign (1 July 2017), available at <https://www.icann.org/sites/default/files/tlds/net/net-agmt-html-01jul17-en.htm> (last accessed 23 July 2020).

³⁵⁸ Price controls imposed by the U.S. government are generally deemed to be unconstitutional if they are arbitrary, discriminatory, or otherwise irrelevant to a legitimate government purpose. *See Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988), [Ex. CA-44]. The exception to this rule is that the U.S. government may intervene in markets to regulate pricing where “prices ... are artificially inflated as a result of the existence of a monopoly or near monopoly.” *Id.* That is exactly why the U.S. government intervened 20 years ago and imposed price caps on .COM. Sadowsky Report, ¶¶ 17, 50.

³⁵⁹ Amendment to Financial Assistance Award between the U.S. Department of Commerce and VeriSign, Inc., Award No. NCR-92-18742, Amendment Thirty-Five (35) (26 Oct. 2018), [Ex. KM-25], Sec. 2.

percent increase in the prices of .COM domain names in each of the last four years of the new six-year contract.³⁶⁰ Thus, the U.S. government has effectively ceded to ICANN the authority to determine whether the price cap on .COM annual registrations should be raised from \$7.85 to \$10.29.³⁶¹ *Thus, in 2018, the U.S. government again determined that Verisign possesses a monopoly or near-monopoly.*³⁶²

- Third, as Dr. Carlton observes, Verisign has always priced .COM registrations at the maximum price allowable under government price caps.³⁶³ Indeed, Dr. Carlton opines that “[t]he fact that Verisign has consistently charged the maximum-allowable price for .COM domain name registrations indicates that regulation is a binding constraint and that Verisign would set a higher price for .COM absent the regulation.”³⁶⁴ Dr. Carlton’s concession that an unregulated Verisign would raise prices is telling, since Verisign’s internal costs have remained constant and the current \$7.85 annual price for a .COM registration remains considerably above the annual cost of operating a registry, estimated at only approximately \$1.00 per registration.³⁶⁵ Indeed, Afilias offered to charge only \$1.65 per registration if it were granted approval to operate the .IN registry on behalf of the Government of India.

³⁶⁰ Amendment to Financial Assistance Award between the U.S. Department of Commerce and VeriSign, Inc., Award No. NCR-92-18742, Amendment Thirty-Five (35) (26 Oct. 2018), [Ex. KM-25], Sec. 2.

³⁶¹ Over widespread objections, ICANN, in exchange for a \$20 million payment from Verisign, approved the increase in the .COM cap earlier this year. See Zak Muscovitch, “Report and Analysis of Public Comments Submitted to ICANN on the .COM Pricing Provisions (Part II),” *CircleID* (6 Mar. 2020), available at http://www.circleid.com/posts/20200306_report_and_analysis_of_public_comments_submitted_to_icann_part_ii/ (last accessed 23 July 2020).

³⁶² Dr. Murphy is incorrect on two grounds in this respect. First, contrary to his assertions at ¶ 37 of his report, the recent action by the U.S. government to *continue to regulate the price of* .COM registrations means that the U.S. government continues to believe that Verisign wields monopoly or near monopoly power as a result of its control of the .COM registry. Second, Dr. Murphy’s reliance on the U.S. government’s characterization of Amendment 35 as providing for “pricing flexibility” at ¶ 37 of this report ignores the fact that this “flexibility” amounts to raising the price cap by only 7% over 6 years.

³⁶³ Expert Report of Dennis Carlton (30 May 2019), ¶ 30.

³⁶⁴ Expert Report of Dennis Carlton (30 May 2019), ¶ 30. Drs. Carlton and Murphy opine in their reports that government price regulation of Verisign is the best means of constraining Verisign’s market power. Expert Report of Dennis Carlton (30 May 2019), ¶ 32; Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 35. The U.S. government takes a decidedly different view. See Stuart Chemtob, U.S. Department of Justice, *The Role of Competition Agencies in Regulated Sectors* (5th International Symposium on Competition Policy and Law, Institute of Law, Chinese Academy of Social Science, Beijing, China, 11 May 2007), available at <https://www.justice.gov/atr/speech/role-competition-agencies-regulated-sectors> (last accessed 23 July 2020), [Ex. CA-108] (agreeing with the “general principle that the invisible hand of the market results in a more optimal distribution of resources and a higher level of economic welfare than does regulation of economic activity by the heavy, visible hand of the government.”). Dr. Murphy’s opinion thus conflicts with the generally held principle that competition is preferably to regulation. See also Michael Katz *et al.*, *An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names: A Report Prepared for ICANN* (June 2010), available at <https://archive.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf> (last accessed on 23 July 2020), ¶ 28 (noting a “broad consensus” among economists that competition is preferable to regulation of prices).

³⁶⁵ Registries often price their domain names at or around \$1.00, suggesting that this is a reasonable approximation of costs. Indeed, the .SITE registry reduced the cost of registration to \$0.48 in May 2019. See Kieren McCarthy, “Dot-com web addresses prices to swell, thanks to sweetheart deal between Uncle Sam, Verisign: Freeze on renewal, base costs lifted so we all pay a bit more,” *Register* (2 Nov. 2018), available at https://www.theregister.com/2018/11/02/dotcom_domains_pricing/ (last accessed 23 July 2020).

- Fourth, there is scant evidence to suggest that the New gTLD Program has, to date, constrained Verisign's market power. Since the introduction of new gTLDs in the third quarter of 2013, Verisign has gained more new registrations (35.3 million) than all new gTLDs *combined* (26.1 million). Furthermore, while Verisign secured at least 9.2 million new *unique* registrations since 2013, neither ICANN nor the *Amici* have demonstrated how many of the registrations in new gTLD registries were made in addition to registrations taken in the .COM registry. Moreover, while Dr. Kevin M. Murphy contends that gTLDs compete with ccTLDs,³⁶⁶ he cites no evidence to support this sweeping conclusion. If this was in fact true, the decision by the U.S. government to continue to impose price regulations on the .COM registry would be unconstitutional.³⁶⁷

200. Perhaps in light of the obviousness of Verisign's market power, the *Amici* (and ICANN) dismiss .WEB as "just another gTLD," suggesting that adding .WEB to Verisign's stable would not impact competition.³⁶⁸ As explained by Drs. George Sadowsky and Jonathan Zittrain, there are compelling reasons to believe why this is not true.³⁶⁹ Of all potential gTLD domains, only .WEB is (1) three-letters long,³⁷⁰ (2) completely generic, (3) closely identified with the Internet, and (4) memorable.³⁷¹ None of the alternatives proposed by the *Amici* satisfy this standard. As the table set forth in **Annex B** demonstrates, the *Amici's* complete failure to identify even a single alternative for .WEB from the entirety of the English language is telling.

³⁶⁶ Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 21.

³⁶⁷ For the reasons set forth in the Sadowsky Report, n. 12, it is obvious that ccTLDs do not compete with .COM. *First*, it is highly unlikely that a U.S. company would choose to have a ".uk, .fr, or .de" web address, which would imply that the company is British, French, or German, respectively. *Second*, companies that wish to reach consumers globally are unlikely to choose to brand themselves by adopting a web address that ties them to a particular geography. This is why, as Verisign concedes, its .COM registry is just as popular outside of the United States as within it. Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 23. Moreover, while some ccTLDs have marketed themselves as de facto gTLDs (e.g., .co and .tv), none of these ccTLDs have amassed a sufficient number of registrations to restrain Verisign's pricing of .COM, which Dr. Murphy concedes must be restrained by government regulation. *Id.*, ¶ 3(d).

³⁶⁸ Verisign Br., Sec. III(C); Expert Report of Dennis Carlton (30 May 2019), Sec. V(A); Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), Sec. V. *See also* ICANN's Rejoinder Memorial, ¶ 103.

³⁶⁹ Zittrain Report, Sec. 8; Sadowsky Report, Sec. VII.

³⁷⁰ Three-letter domains are uniquely attractive. Sadowsky Report, ¶ 35.

³⁷¹ Sadowsky Report, ¶ 41. There are two other domains that satisfy this three-part test: .COM and .NET, both of which are controlled by Verisign. Verisign's protestations to the contrary, .COM is perhaps the most obvious manifestation of the concept of the Internet in a domain name, as evidence by the event known as "the .COM boom" and the identification of leading internet companies as ".COMs."

201. For this reason, .WEB has been uniquely identified by members of the Internet community as the next best competitor for .COM:

- "Is it likely that .web will be a standout among new TLDs? Here are a few points that may indicate *.web is poised to gain traction relative to other recently introduced TLDs*. ... We're already used to using the term 'web' for internet-related activities. We refer to online properties as 'websites' or 'web pages' and the talent who create them are 'web designers' and 'web developers.' We use 'web servers' and 'web browsers' and even 'web apps'. The common references make a transition to a .web domain a natural activity for a mass online and mobile audience."³⁷²
- "*.WEB is a different animal*.WEB is what we call a '*super generic*' and arguably the *best new TLD alternative to .COM*. It is a word that is commonly used with intuitive meaning. *.WEB could make a serious dent to .COM* over the long run."³⁷³
- "[.WEB] is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient semantic value to provide *a real challenge to .com*."³⁷⁴
- ".web is widely considered [to be] *the gTLD with the most potential* out of 1,930 applications for new domain extensions ICANN received to battle .com and .net for widespread adoption."³⁷⁵
- "*.web is the one domain that could unseat .com*."³⁷⁶

202. Verisign's own conduct marks .WEB as unique among all new gTLDs. As Mr. Livesay states, in 2014, he was "put in charge of identifying potential business opportunities for Verisign in ICANN's New gTLD Program."³⁷⁷ As Verisign notes, ICANN received applications to run over 1,200 unique new gTLD registries.³⁷⁸ Yet Verisign chose to pursue just one of these, .WEB. Verisign's focus on acquiring .WEB has been singular, focused and relentless. Industry commentators have identified why:

³⁷² Derek Vaughn, "Inside the High Stakes Auction for .WEB," *InetServices* (25 July 2016), available at <https://www.inetservices.com/blog/inside-the-high-stakes-auction-for-web/> (last accessed 19 July 2020), [Ex. C-130], p. 2.

³⁷³ Peter Lamantia, ".WEB Acquired for \$135 Million. Too much? How does it compare?," *Authentic Web* (undated), [Ex. C-29], p. 2.

³⁷⁴ Kevin Murphy, "Verisign likely \$135 million winner of .web gTLD," *Domain Incite* (1 Aug. 2016), [Ex. C-30], p. 2.

³⁷⁵ Cybele Negris, "How a \$135 million auction affects the domain name industry and your business," *BIV* (10 Aug. 2016), [Ex. C-31], p. 2.

³⁷⁶ "The Next Big Domain Extension," *Supremacy SEO* (undated), [Ex. C-32], p. 2.

³⁷⁷ Livesay WS, ¶ 4.

³⁷⁸ Verisign Br., ¶ 36.

- “.web is expected to pose significant competition to .com and .net domain systems in the future. As a result, VeriSign was keen to secure the management of this domain name when it was put to auction by ICANN.”³⁷⁹
- “With correct positioning, marketing, and rollout, [.WEB] could become a \$500M recurring business over the next decade.”³⁸⁰
- “Recall VeriSign is paying \$135M for the ownership rights to be the registry operator of .web. This could offer a new growth opportunity for the company into the future, but just as important, we think it is *a very good defensive strategic move keeping .web out of the hands of the potential competitor as we believe .web could be the closest thing to .com in the minds of customers looking for domain names.*”³⁸¹

203. The *Amic's* arguments that attempt to explain away Verisign's efforts to stymie competition are unavailing. For example, despite the record price paid at auction for .WEB, Dr. Carlton speculates that Verisign's valuation of .WEB “may have been based on its desire to sell registrations, not necessarily to prevent competition.”³⁸² However, economic theory accepts that incumbent firms like Verisign will, at least in part, base their valuation on the benefits derived from keeping competitive assets out of the hands of competitors. Indeed, “in a highly concentrated industry with large margins between the price and incremental cost ... the value of keeping [competing assets] out of competitors' hands could be very high” and warning

³⁷⁹ Dilantha de Silva, “VeriSign: An Overvalued Company With A Strong Moat,” *Seeking Alpha* (23 Sep. 2019), available at <https://seekingalpha.com/article/4293005-verisign-overvalued-company-strong-moat> (last accessed 19 July 2020), [Ex. C-175], p. 2.

³⁸⁰ Ash Anderson, “VeriSign Is Immune From Coronavirus,” *Seeking Alpha* (16 Mar. 2020), available at <https://seekingalpha.com/article/4332180-verisign-is-immune-from-coronavirus> (last accessed 19 July 2020), [Ex. C-176], p. 4. Industry projections for .WEB are in stark contrast to Dr. Murphy's flawed net present value (“NPV”) analysis, which purports to estimate the number of registrations .WEB can be expected to achieve based on the results of the .WEB auction. Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶¶ 50-57. The limits of this flawed analysis are obvious. Dr. Murphy's conclusion that .WEB would achieve registrations of only 0.5 million in year one and only 3.1 million registrations after 5 years, based on his NPV analysis, are belied by the new gTLD .ICU, which amassed 1 million registrations in its first year after being delegated and over 6 million registrations in its first two years. No one would suggest that .ICU is a better domain name than .WEB. See NTLDSTATS, STATISTICS: NEW GTLDS, <https://ntldstats.com/tld/icu> (last accessed 23 July 2020).

³⁸¹ J.P.Morgan, *VeriSign (VRSN US): DoJ Clears Way for VRSN to Close .web Purchase* (10 Jan. 2018), [Ex. JZ-3].

³⁸² Expert Report of Dennis Carlton (30 May 2019), ¶ 45.

that acquisitions may “foreclose or raise the costs of competitors”.³⁸³ Indeed, Verisign structured the DAA to avoid setting a cap on how much it could bid for .WEB³⁸⁴

204. In particular, Dr. Murphy’s analysis of the future competitiveness of .WEB, based on inferences drawn from the \$135 million price Verisign paid at auction for .WEB, is fundamentally flawed for two reasons.³⁸⁵

205. *First*, while most auctions are open to the public generally, the .WEB auction was limited to just the seven applicants for .WEB that comprised the contention set. Indeed, these applicants were required to express their interest in .WEB in 2012, two years before the first gTLDs were introduced and four years before the .WEB Auction was conducted. In 2012, no one knew what any new gTLD was worth, let alone .WEB specifically. Indeed, it is unlikely that many of the .WEB contention set members would have applied for .WEB if they knew in 2012 what they knew about .WEB’s valuation by 2016, since few contention set members had the financial resources to compete at the .WEB Auction and there would have been little incentive to pay the \$185,000 application fee simply to lose at auction. It is equally probable that had the .WEB Auction been open to the public, rather than limited to contention set members, better financed bidders would have participated in the auction and the auction price would have been substantially higher.³⁸⁶

³⁸³ *In the Matter of Policies Regarding Mobile Spectrum Holdings*, FCC, WT Docket No. 12-269, Ex Parte Submission of the United States Department of Justice (11 Apr. 2013), [Ex. CA-109]. This description perfectly mirrors Verisign’s position as the dominant incumbent in a highly concentrated market where it enjoys a profit margin that bests the rest of the Fortune 100 companies.

³⁸⁴ Verisign has tried to characterize the DAA as merely a “financing arrangement.” But in a typical financing arrangement, a lender would specify a funding limit based on its assessment of either (a) the applicant’s ability to repay the loan, or (b) the value of the target acquisition. Here, the DAA’s structure confirms that Verisign’s bids for .WEB were not based on its valuation of .WEB itself—that valuation could have been completed in advance and NDC provided with a bidding cap. Verisign specifically structured the DAA to ensure that it would be in the room to respond to competing bids in real time. The only reason to structure the DAA this way—to gain total control of how much was bid during each round—was because the real value to Verisign was in keeping .WEB out of the hands of competitors.

³⁸⁵ Dr. Murphy’s analysis is set forth at paragraphs 50-57 of his Report.

³⁸⁶ In 2019, a private equity firm valued .ORG at \$1.135 billion despite the fact that the .ORG registry is less than 10% of the size of the .COM registry. Dr. Sadowsky opines that “a .web TLD would have a degree of attraction similar to .com and would attract a very large number of registrations.” Sadowsky Report, ¶ 54. The auction price therefore bore little resemblance to the true value of .WEB.

Dr. Murphy's analysis fails for this reason alone: the value .WEB realized at auction was largely based on the fact that eligibility to participate in the auction was determined four years earlier.

206. *Second*, even though some very well-financed companies such as Google participated in the .WEB auction,³⁸⁷ press reports suggest that by 2015 (one year prior to the .WEB Auction), Google's strategy had shifted and it was now pursuing only those gTLDs where it was the only applicant.³⁸⁸ Accordingly, Google's bids (if any) at the .WEB auction bore no resemblance to what Google would have bid in 2012. The inherent fatal flaw in Dr. Murphy's analysis can be simply explained thusly: if NDC had not violated the New gTLD Program Rules and Verisign had not participated in the .WEB Auction, .WEB would have sold for \$70.9 million instead of \$135 million.³⁸⁹ By Dr. Murphy's analysis, that would mean that .WEB would be nearly 50% less successful simply because Verisign had not participated in the bidding.

207. Moreover, both Drs. Murphy and Carlton speculate that Verisign would be a more efficient supplier of .WEB domain names given its experience and leading position in the market.³⁹⁰ Neither of these opinions, however, are based on anything more than rank speculation and, as such, should be ignored.³⁹¹

208. In making decisions about the disposition of .WEB, therefore, ICANN must, consistent with its Bylaws, be guided by the potential for .WEB to compete with .COM. To simplify, there are essentially two

³⁸⁷ It is unclear how much Donuts and Radix, the other two larger companies in the .WEB contention set, were able to bid in 2016, having spent so much already on acquiring other new gTLDs. Dr. Murphy does not even attempt to estimate whether the other contention set members were able to submit bids in line with their valuation of .WEB.

³⁸⁸ See Kieren McCarthy, "Larry Page was held back by Google execs from flooding world with new dot-word domains: Moneybags CEO wanted to own rights to scores of gTLDs," *Register* (13 Aug. 2015), available at https://www.theregister.com/2015/08/13/larry_google_domain_names/ (last accessed 23 July 2020) (reporting that Google's plan to acquire 101 gTLDs was "boiled down to the company's brand names and those it has already applied for but was the only applicant.").

³⁸⁹ Indeed, if Afilias had not be constrained by the terms of its bank financing arrangements, Afilias would have bid more for .WEB.

³⁹⁰ Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶¶ 77-81; Expert Report of Dennis Carlton (30 May 2019), ¶ 55.

³⁹¹ The DOJ's view is that efficiency claims, such as those offered by Drs. Murphy and Carlton, cannot be taken at face value. The DOJ will not consider efficiency claims if they are vague, speculative, or otherwise cannot be verified by reasonable means. See U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (19 Aug. 2010), [Ex. CA-110], p. 30 (requiring that efficiency claims be verify by reasonable means, i.e., "the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific").

possible actions that will resolve the current conflict: .WEB will be awarded to either Afilias or Verisign. Concentrating on outcomes near the extremes, .WEB will be either relatively unsuccessful or it will succeed and become a significant competitive force. The decision facing ICANN therefore has only a few possible effects:

ICANN Decision	.WEB succeeds	.WEB fails
Delegate .WEB to Verisign	Verisign's market dominance is enhanced. Price regulation required.	No competitive effects
Award .WEB to Afilias	Verisign's market dominance is challenged. Price may be set by market competition.	No competitive effects

209. Even accepting that the effects of new entry are always uncertain, under the worst case scenario, if .WEB fails to attract significant registrations, the state of competition will remain unchanged, regardless of which action is taken. The only opportunity to enhance competition is the possibility that .WEB will be successful and it is awarded to an operator other than Verisign: if .WEB proves to be a success, market competition may be sufficient to stop regulating Verisign's pricing power. Indeed, "there is a broad consensus among economists that regulation is an imperfect substitute for competition, particularly with respect to its ability to promote innovation."³⁹²

C. The DOJ's Decision to Close its Investigation Is Irrelevant to the Panel's Analysis

210. The *Amici* argue that the DOJ's decision to close its investigation without taking any action is dispositive of any competitive questions concerning Verisign's potential acquisition of .WEB. *First*, because ICANN did not refer this matter to the DOJ for investigation, the DOJ's investigation focused on whether it should file a lawsuit to enjoin Verisign from acquiring .WEB because its doing so would tend "*substantially*

³⁹² Michael Katz *et al.*, An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names: A Report Prepared for ICANN (June 2010), available at <https://archive.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf> (last accessed on 23 July 2020), at ¶ 28.

*to lessen competition.*³⁹³ This is a significantly higher standard than ICANN's competition mandate to "*introduce and promote competition,*" which must, by ICANN's Bylaws, "guide the decisions and actions of ICANN."³⁹⁴

211. *Second*, the fact that the DOJ investigation lasted for more than a year demonstrates that the DOJ believed that Verisign's proposed acquisition of .WEB raised significant competition concerns. As a DOJ official recently testified before Congress, of all potential transactions notified each year to the agency, the DOJ conducts lengthy investigations of transactions in only 1-2% of the thousands of transactions filed each year – in "ordinarily, only the most concerning deals."³⁹⁵

212. *Third*, the DOJ's decision to close its investigation does not suggest that the DOJ "concluded ... that Verisign's operation of .WEB is not likely to harm competition."³⁹⁶ To the contrary, there are many reasons that the DOJ, a federal agency that has limited resources, may elect to close an investigation without taking any actions that are completely unrelated to the competition concerns raised by the deal. In a recent brief filed by the DOJ, the agency completely refuted the *Amici's* and ICANN's argument that this Panel should view the DOJ's decision to close its .WEB investigation as dispositive of any competition issues. Rejecting exactly that argument, the DOJ stated:

Contrary to [appellant]'s suggestion, *no inference should be drawn from the Division's closure of its investigations* into [appellant]'s proposed and consummated acquisition of [the target]. As the United States has stated twice previously in this case in response to [appellant]'s assertions,

³⁹³ Clayton Act, § 7, 15 U.S.C. § 18 (1996), [Ex. CA-111] (emphasis added). ICANN's mandate to take decisions consistent with its core value of promoting competition is necessarily considerably broader than Section 7 of the Clayton Act. DOJ's discretionary authority to enforce Section 7 requires, at a minimum, the agency to conclude that it can prove that a proposed transaction will, in fact, substantially lessen competition. ICANN's mandate requires ICANN to exercise its discretionary authority in a manner that will best promote competition. Thus, DOJ may decline to enforce the antitrust laws even in cases where it has substantial concerns about future competition, but ICANN may not exercise its discretion to foreclose the only opportunity to enhance competition.

³⁹⁴ The Bylaws' command that its Core Values must guide ICANN's decisions and actions is significantly broader than Ms. Burr's statement that ICANN fulfills its competition mandate through policy development alone. See notes 339-340 above.

³⁹⁵ Written Testimony of John W. Elias before the U.S. House Committee on the Judiciary (24 June 2020), available at https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf?utm_campaign=4024-519 (last accessed 19 July 2020), [Ex. C-177], p. 2.

³⁹⁶ Expert Report of Dennis Carlton (30 May 2019), ¶ 61. Notably, Dr. Carlton cites no authority for his assertion.

there are many reasons why the Antitrust Division might close an investigation or choose not to take an enforcement action. *The Division's decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive.*³⁹⁷

213. As the DOJ itself, recently and repeatedly, instructed U.S. courts to do, this Panel should not infer anything from the DOJ's decision to close its .WEB investigation.

IX. SCOPE OF THE PANEL'S REMEDIAL AUTHORITY

214. The *Amici* support ICANN's erroneous—and indeed surprisingly misguided—position that the scope of the Panel's remedial authority is limited and that the Panel may only issue a declaration as to whether ICANN acted in conformity with its Articles and Bylaws when ICANN claims that its Board deferred taking any action on the merits of Afiliias' .WEB complaints in November 2016.³⁹⁸

215. In the first instance, and as discussed *supra*, Afiliias disputes that any such “decision to defer” took place. It appears that, at an informal Board workshop session, some members of the Board were briefed on the dispute concerning .WEB. But ICANN's Board is not permitted to take decisions in secret and Board practice is that any decisions or actions coming out of a Board workshop session would subsequently be adopted publicly by resolution.³⁹⁹ The Bylaws require that “any actions” taken by the Board be publicly reported. Here, no resolutions were adopted with respect to .WEB; nor were any actions reported. And if a

³⁹⁷ *Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 19-1397 (4th Cir. 2019), Brief for the United States of America as *Amicus Curiae* in Support of Appellee Steves and Sons, Inc. (23 Aug. 2019), [Ex. C-118], p. 15 (internal citations omitted; emphasis added). In this case, Jeld-Wen had acquired CMI, the only other manufacturer of doorskins for molded interior doors. DOJ investigated the acquisition twice, closing both investigations without taking any action. Plaintiff Steves & Sons, which purchased doorskins from Jeld-Wen and which competed with Jeld-Wen in the sale of molded interior doors, sued Jeld-Wen, claiming that its acquisition of CMI was anticompetitive. Despite the fact that the deal had been investigated by DOJ twice and that those investigations were closed without DOJ taking any action, the jury returned verdict in favor of Steves, awarding treble antitrust damages in amount of \$175,879,362. Steves moved for equitable relief, under Clayton Act, seeking order, inter alia, to restore competition in doorskin market. The District Court granted Steves' motion to require Jeld-Wen divest itself of the acquired facility. *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 345 F.Supp.3d 614, 682 (E.D. Va. 2018), [Ex. CA-112].

³⁹⁸ NDC Br., ¶ 78; Verisign Br., p. 1.

³⁹⁹ ICANN in its Rejoinder states that at its November 2016 Board meeting, “the Board chose to see if the results of such [Accountability Mechanism] proceedings might require the Board to take any action related to the .WEB Contention Set.” ICANN's Rejoinder Memorial, ¶ 41. That assertion seems to suggest that the Board anticipated that an IRP Panel might order ICANN to take specific action. Surely, ICANN cannot be arguing that the Board could fail to take any action—wait for years while proceedings play out—so that the Panel can order ICANN to make the decision that it failed to make in the first place (without weighing in on how the decision should be made).

decision of some sort was made in November 2016, there is no evidence that ICANN Staff respected that decision when they commenced the process to delegate .WEB to NDC in June 2018, or that they reverted to the ICANN Board to take direction regarding their plans. Nor is there any evidence that any sort of informed, transparent and neutral analysis was undertaken by the Staff or Board of Afilias' complaints—or the legitimacy of the DAA with reference to the AGB, irrespective of Afilias' complaints, even though ICANN has represented in these proceedings that it did evaluate something—prior to Staff's decision to move forward with NDC.

216. Whichever of ICANN's various angles or attempted rationalizations regarding its conduct the Panel considers, there is no escaping the conclusion that ICANN failed to "[*make*] *decisions*" by applying documented policies consistently, neutrally, objectively, and fairly....⁴⁰⁰ Given ICANN's conduct that led to these proceedings, and the positions that ICANN has adopted in these proceedings—to say nothing of its conduct—the only fair and final way for Afilias' claims to be considered is for the Panel to resolve this Dispute. As envisioned by the Bylaws, the Panel should resolve this Dispute not simply by deciding whether ICANN violated its Articles and Bylaws—in the manner that we have demonstrated—but also by directing ICANN to take sufficient actions to give effect to the relief Afilias has requested.

217. The following points suffice to demonstrate that (i) the *Amic's* assessment of what this Panel may or may not order is simply incorrect, and (ii) the Panel has the necessary authority to direct ICANN to adopt the relief that Afilias has requested.⁴⁰¹

⁴⁰⁰ Bylaws, [Ex. C-1], Sec. 1.2(a)(v) (emphasis added).

⁴⁰¹ We note that this is the first IRP under the new Bylaws. Accordingly, what the Panel decides regarding the scope of an IRP panel's remedial authority will be of the *utmost precedent-setting importance*.

A. Meaningful and Effective Accountability Requires Review and Redress of ICANN's Conduct

218. Corporate bylaws are interpreted according to the general rules governing construction of statutes and contracts.⁴⁰² As such, bylaws “are construed according to their plain meaning within the context of the document as a whole”⁴⁰³ and in light of the “usual, ordinary, and commonly accepted meaning” of the language.⁴⁰⁴ “Any ambiguity in the bylaws will be construed against the corporation and its officers.”⁴⁰⁵

219. “Accountability” is commonly understood as “the quality or state of being accountable[;] *especially*: an obligation or willingness to accept responsibility or to account for one's actions.”⁴⁰⁶ In other contexts, ICANN has endorsed a definition of the term “accountability” that is instructive for this Panel's consideration of its remedial authority. That definition confirms that the Panel's authority to hold ICANN accountable is broader than issuing a simple declaratory statement of the type urged by the *Amici* and ICANN. Thus, accountability entails both “mechanisms for independent checks and balances,” as well as “review” and “redress.”⁴⁰⁷

The group adopted the definition of ‘accountability’ used by the board and organization in its development of the board resolution on delegated authorities, passed in November 2016. Accountability in this context is defined, according to the NETmundial multistakeholder statement, as “*the existence of mechanisms for independent checks and balances as well as for review and redress.*”⁴⁰⁸

⁴⁰² *Singh v. Singh*, 114 Cal. App. 4th 1264, 1294 (2004), [Ex. CA-113].

⁴⁰³ 18A Am. Jur. 2d *Corporations* § 262 (2020), [Ex. CA-114] (citations omitted).

⁴⁰⁴ 18A Am. Jur. 2d *Corporations* § 262 (2020), [Ex. CA-114].

⁴⁰⁵ 18A Am. Jur. 2d *Corporations* § 262 (2020), [Ex. CA-114].

⁴⁰⁶ *Merriam-Webster Dictionary* (on-line version): accountability, available at <https://www.merriam-webster.com/dictionary/accountability> (last accessed 23 July 2020), [Ex. CA-115]; see also *Oxford English Dictionary* (on-line version): accountability, available at <https://www.oed.com.nyli.idm.oclc.org/view/Entry/1197?redirectedFrom=accountability&&print> (last accessed 24 July 2020), [Ex. CA-116] (“The quality of being accountable; liability to account for and answer for one's conduct, performance of duties, etc. (in modern use often with regard to parliamentary, corporate, or financial liability to the public, shareholders, etc.); responsibility.”).

⁴⁰⁷ ICANN, Recommendations to Improve ICANN Staff Accountability (13 Nov. 2017), [Ex. C-84], p. 4.

⁴⁰⁸ ICANN, Recommendations to Improve ICANN Staff Accountability (13 Nov. 2017), [Ex. C-84], p. 4.

220. The most common definitions of the word “redress” include: “the setting right of what is wrong,” “relief from wrong or injury,” and “compensation or satisfaction for a wrong or injury.”⁴⁰⁹ Thus, if the Panel is to properly hold ICANN accountable for breaching its Articles and Bylaws, it must issue a decision that provides relief or satisfaction that would eliminate the effects of the breach. This is also required under international law: “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”⁴¹⁰

B. The Internet Community Broadened the Scope of ICANN’s Accountability under the Current Bylaws

221. One of the conditions and consequences of ICANN’s long-sought-after independence from the U.S. Government’s oversight was the requirement that ICANN’s accountability mechanisms be strengthened through “[a]n enhanced Independent Review Process and redress process with broader scope and the power to ensure ICANN stays within its Mission.”⁴¹¹ This did not just simply entail coming up with more didactic rules for IRPs, but also, following a detailed review process by CCWG-Accountability, an expansion of the mandate given to panels in their review of ICANN’s actions and inactions. Thus, for example, the scope of an IRP panel’s accountability review was extended to encompass the conduct of ICANN Staff and not just that of the Board.

222. CCWG-Accountability’s other recommendations are also instructive regarding the scope of the remedial authority the ICANN community intended for an IRP panel, requiring that claimants be given the right to “seek redress” through an IRP of ICANN’s conduct and authorizing an IRP panel to ‘direct[] [ICANN] to take appropriate action to remedy the breach.’”

⁴⁰⁹ Dictionary.com: redress, available at <http://dictionary.reference.com/browse/redress> (last accessed 23 July 2020), [Ex. CA-117]; see also *Black’s Law Dictionary* (11th ed. 2019): redress, [Ex. CA-118] (“[r]elief; remedy”).

⁴¹⁰ *Factory at Chorzów (Claim for Indemnity) (Merits)*, Judgment (Sep. 13), 1928 P.C.I.J. (Ser. A) No. 17, [Ex. CA-119], p. 29; see also *id.* (“[R]eparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.”).

⁴¹¹ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], p. 5.

- “Standing: Any person/group/entity ‘materially affected’ by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to *file a complaint under the IRP and seek redress*.”⁴¹²
- “Decisions[:] ... The CCWG-Accountability intends that if the panel determines that an action or inaction by the Board or staff is in violation of ICANN’s Articles of Incorporation or Bylaws, then that decision is binding and the ICANN Board and staff *shall be directed to take appropriate action to remedy the breach*. However, the Panel shall not replace the Board’s fiduciary judgment with its own judgment.”⁴¹³

C. The Panel Must Assess its Authority Based on the Text, Context, Object and Purposes of the IRP

223. ICANN and the *Amici* rely upon Section 4.3(o) of the Bylaws to argue that the Panel’s authority is circumscribed to the items listed in that Section.⁴¹⁴ But Section 4.3(o) does not say that the Panel’s authority is limited to the listed items.⁴¹⁵ The drafters of the Bylaws could certainly have inserted the word “only” if they had intended to restrict an IRP panel’s remedial authority to just those items. They did not, but instead specified that the scope of an IRP panel’s authority is “[s]ubject to” the other provisions of Section 4.3. Section 4.3(o), therefore, must be read, *inter alia*, with reference to Section 4.3(a).

224. Section 4.3(a) mandates that “[t]his Section 4.3 [i.e., the Bylaws section addressing IRPs] shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.”⁴¹⁶ Thus, the Panel’s authority must be determined with reference to the entirety of Section 4.3, with the scope and effect of each individual article interpreted through the lens of the enumerated “Purposes of the IRP.” Read within a proper context of the objectives that the ICANN community intended to achieve through an “enhanced” accountability process for Board and Staff conduct, the requirement of a declaration by an IRP panel is thus a formalistic one. The Panel must, in issuing its decision, make a formal “declaration” that

⁴¹² CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], ¶ 178 (at p. 35).

⁴¹³ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN’s Independent Review Process (23 Feb. 2016), [Ex. C-122], ¶¶ 54, 57.

⁴¹⁴ ICANN’s Rejoinder Memorial, Sec. V; Verisign Br., p. 1; NDC Br., Sec. III.A.

⁴¹⁵ Bylaws, [Ex. C-1], Sec. 4.3(o) (at p. 28).

⁴¹⁶ Bylaws, [Ex. C-1], Sec. 4.3(a) (at p. 21).

“an action/failure to act complied or did not comply” with the Articles and/or Bylaws. This does not, however, preclude the Panel from declaring that ICANN must take certain steps to remedy the breaches of its Articles and Bylaws to “resolve” the Dispute and provide an aggrieved claimant with “redress.”

225. As relevant to the issues in dispute in these proceedings, the Bylaws provisions supporting the foregoing are as follows:

226. **Section 4.3(a), Preamble:** The Preamble to Section 4.3 of the Bylaws provides that an IRP panel’s decision must “resolve Disputes,”⁴¹⁷ meaning that the remedy or remedies granted must “settle or find a solution to” the Disputes that have been put before that Panel.⁴¹⁸ This requirement is also stated in Section 4.3(g) of the Bylaws.⁴¹⁹ As we have discussed elsewhere, for present purposes, “Disputes” are defined as or consist of “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws....”⁴²⁰ The Bylaws define a “Covered Action” as “any action[] or failure[] to act by or within ICANN committed by the Board ... or Staff members that give[s] rise to a Dispute.”⁴²¹ Hence, the Panel’s mandate is to “resolve” (i.e., “settle or find a solution to”) Afiliás’ claims regarding “any actions or failures to act”—here, ICANN’s failure to disqualify NDC’s application and award .WEB to Afiliás—by the Board or Staff that the action or failure to act violates the Articles and Bylaws.

⁴¹⁷ Bylaws, [Ex. C-1], Sec. 4.3(a) (at p. 20).

⁴¹⁸ Lexico.com: resolve, available at <https://www.lexico.com/en/definition/resolve> (last accessed 23 July 2020), [Ex. CA-120]; see also *Oxford English Dictionary* (on-line version): resolve, available at <https://www-oed-com.nyli.idm.oclc.org/view/Entry/163733?rskey=u3QyP2&result=2&isAdvanced=false&print> (last accessed 24 July 2020), [Ex. CA-121] (“To answer (a question); to solve (a problem of any kind); to determine, settle, or decide upon (a point or matter regarding which there is doubt or dispute).”).

⁴¹⁹ Section 4.3(g) states that “[the] IRP Panel shall be charged with *hearing and resolving the Dispute*, considering the Claim and ICANN’s written response (“Response”) in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law. Bylaws, [Ex. C-1], Sec. 4.3(g).

⁴²⁰ The definition is all-inclusive (“including but not limited to any action or inaction that: (1) exceeded the scope of the Mission....”). Bylaws, [Ex. C-1], Sec. 4.3(b)(iii). To adopt ICANN’s and *Amici’s* view of the Panel’s authority would make this meaningless, as opposed to “meaningful.” See *id.*, Sec. 4.3(a)(ii).

⁴²¹ Bylaws, [Ex. C-1], Sec. 4.3(b)(ii).

227. **Section 4.3(a)(i):** In resolving the Disputes, the Panel's mandate is to determine not only whether ICANN "exceed[ed] the scope of its Mission," but more broadly also to ensure that ICANN has "otherwise complie[d] with its Articles of Incorporation and Bylaws."⁴²² This is a broad mandate, and one that cannot simply be satisfied through the issuance of the type limited declaration advocated by ICANN and the *Amici*.

228. **Section 4.3(a)(ii):** In resolving the Disputes, an IRP panel is required to issue a remedy that would allow a "Claimant[] to *enforce compliance* with the Articles of Incorporation and Bylaws...."⁴²³ A simple thumbs-up or thumbs-down declaration, as ICANN and the *Amici* suggest is all that an IRP panel can do, would not be sufficient to allow a Claimant to "enforce" ICANN's compliance in respect of the Dispute that has been put before the Panel.

229. **Section 4.3(a)(iii):** In resolving the Disputes, the Panel must "ensure" that its decision reflects ICANN's accountability to the global Internet community and the claimant.⁴²⁴ As mentioned above, accountability requires that the Panel's decision serve as a check and balance on ICANN, and also provides for review and redress.

230. **Section 4.3(a)(viii):** In resolving the Disputes, the Panel is directed to issue a decision that "[l]ead[s] to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction."⁴²⁵ This instruction would hardly be achieved if the Panel were to simply issue a declaration instructing ICANN to assess whether NDC's .WEB application should be disqualified—an outcome that ICANN appears to have already decided should not happen, given its June 2018 decision to enter in to a registry agreement with NDC.

⁴²² Bylaws, [Ex. C-1], Sec. 4.3(a)(i).

⁴²³ Bylaws, [Ex. C-1], Sec. 4.3(a)(ii).

⁴²⁴ Bylaws, [Ex. C-1], Sec. 4.3(a)(iii).

⁴²⁵ Bylaws, [Ex. C-1], Sec. 4.3(a)(viii).

231. **Section 4.3(g):** "Following the selection of an IRP Panel, that IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN's written response ... in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law."⁴²⁶

232. **Section 4.3(i):** In resolving the Disputes, an IRP panel is directed to "conduct an objective, de novo examination of the Dispute."⁴²⁷ Insofar as this requirement is concerned, CCWG-Accountability provided guidance:

Standard of Review:[] The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of ICANN's Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN's Mission and/or violates ICANN's Articles of Incorporation and/or Bylaws and prior IRP decisions. Decisions will be based on each IRP panelist's assessment of the merits of the claimant's case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts.⁴²⁸

233. **Section 4.3(i)(i):** Where the claim is based on actions or failures to act by or within the Board or Staff (*i.e.*, a Covered Action), the IRP panel is directed ("shall") to "make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws." It is firmly established in international law that such findings of fact and conclusions of law, embodied in the form of a declaratory judgment by an international court or tribunal, are legally binding on the parties.

As stated by the Permanent Court of International Justice in the *Chorzów Factory* case:

the intention of [a declaratory judgment] is to ensure recognition of a situation at law, once and for all, and with *binding force as between the*

⁴²⁶ Bylaws, [Ex. C-1], Sec. 4.3(g).

⁴²⁷ Bylaws, [Ex. C-1], Sec. 4.3(i).

⁴²⁸ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), [Ex. C-122], ¶¶ 33-34.

parties; so that the legal position thus established cannot again be called in question in so far as the legal facts ensuring therefrom are concerned.⁴²⁹

234. **Section 4.3(v):** The Bylaws also provide, again taking in to account all of the requirements and directions set out in Section 4.3 as a whole (“Subject to this Section 4.3”), that an IRP panel’s decision “reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.”

235. **Section 4.3(x):** Finally, the Bylaws provide that “[t]he IRP is intended as a final, binding arbitration process,” including in that “IRP Panel decisions are binding final decisions to the extent allowed by law” and in that “ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.” As Gary Born reports in his leading treatise on international arbitration, “under most national arbitration regimes, it is well-settled that arbitrators have broad discretion in fashioning relief,” and indeed may have broader discretion than do the domestic courts.⁴³⁰ This is true, in particular, under the English Arbitration Act, which provide the *lex arbitri* for this arbitration seated in London.⁴³¹ Thus, the Bylaws’ commitment to IRPs as a binding arbitration process carries with it the consequence that IRP panels have broad remedial authority.

236. In sum, in order to comply with its accountability mandate under the Articles and Bylaws, the Panel must:

⁴²⁹ *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)*, Judgment (Dec. 16), 1927 P.C.I.J. (Ser. A) No. 13, [Ex. CA-122], p. 20 (emphasis added).

⁴³⁰ Gary Born, *International Commercial Arbitration* (2d ed. 2014), [Ex. CA-123], pp. 3069-3070.

⁴³¹ Gary Born, *International Commercial Arbitration* (2d ed. 2014), [Ex. CA-123], p. 3069, n. 363. It is also worth noting that uniquely, the English Arbitration Act 1996 explicitly empowers an arbitral tribunal to provide remedies in the form of declarations, monetary payment, and several types of specific performance absent party agreement to the contrary. Arbitration Act 1996 (Eng.), [Ex. CA-124], c. 23, § 48. Although it is Afilias’ position that ICANN’s Bylaws provide agreement that the Panel is empowered to issue any appropriate remedy, the Arbitration Act 1996 would so empower the Panel if it were to decide that the Bylaws themselves are silent on this issue.

- Base its decision on an objective and de novo review of ICANN's actions and inactions;
- Include in its decision findings of fact as to whether the Covered Actions complained of constituted an action or inaction that violated the Articles of Incorporation or Bylaws
- Issue a decision that actually resolves the Disputes that have been put before it;
- Issue a decision that reflects a well-reasoned application of the how the Disputes submitted to it were resolved;
- Declare that ICANN must take certain steps to remedy the breaches by ICANN of its Articles and Bylaws;
- Direct ICANN Staff to take appropriate action to remedy the breaches determined by the Panel; and
- Include in its decision a declaration as to whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

X. CONCLUSION

237. For the foregoing reasons, and those stated in Afilias' other submissions, the Tribunal should grant Afilias the relief requested in its Amended Request.

Respectfully submitted,



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Annex A

RELEVANT PROVISIONS OF THE DAA

Redacted - Third Party Designated Confidential Information

Annex B

TABLE OF GTLD ALTERNATIVE FOR .WEB

Domains Identified by <i>Amici</i>	Three-Letters	Completely Generic	Associated with the Internet	Memorable
.com	X	X	X	X
.net	X	X	X	X
.web	X	X	X	X
.online		X	X	X
.website		X	X	X
.site		X	X	X
.link		X	X	X
.click		X		X
.xyz	X	X		X
.top	X			X
.loan				X
.club				X
.vip	X			X
.shop				X
.ltd	X			X
.work				X

EXHIBIT C-51



S&P 500
2,841.26
-4.81 (-0.17%)



Dow 30
25,552.31
+138.21 (+0.53%)



Nasdaq
7,873.27
-58.97 (-0.74%)



Russell 2000
1,701.36
+16.16 (+0.96%)



Crude Oil
69.83
+0.53 (+0.76%)



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Corporate Participants

* D. James Bidzos

VeriSign, Inc. - Founder, President, CEO & Executive Chairman

* David Atchley

VeriSign, Inc. - VP & Corporate Treasurer

* George E. Kilguss

VeriSign, Inc. - Executive VP & CFO

Conference Call Participants

* Gregg Steven Moskowitz

Cowen and Company, LLC, Research Division - MD and Senior Research Analyst

* Matthew Steven Lemenager

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Fortune

At this time, I would like to turn the conference over to Mr. David Atchley, Vice President of Investor Relations and Corporate Treasurer. Please go head, sir.

David Atchley, VeriSign, Inc. - VP & Corporate Treasurer [2]

Thank you, operator, and good afternoon, everyone. Welcome to VeriSign's Fourth Quarter and Full Year 2017 Earnings Call. With me are: Jim Bidzos, Executive Chairman, President and CEO; Todd Strubbe, Executive Vice President and COO; and George Kilguss, Executive Vice President and CFO.

A California DMV employee who napped at work every day for 3 hours cost the state at least \$40,000

Business Insider

This call and our presentation are being webcast from our Investor Relations website, which is available under About VeriSign on verisign.com. There, you will also find our fourth quarter and full year 2017 earnings release. At the end of this call, the presentation will be available on that site. And within a few hours, the replay of the call will be posted.

How Marriage Can Impact Credit Score

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Financial results in our earnings release are unaudited, and our remarks include forward-looking statements that are subject to the risks and uncertainties that we discuss in detail in our documents filed with the SEC, specifically the most recent reports on Forms 10-K and 10-Q, which identify risk factors that could cause actual results to differ materially from those contained in the forward-looking statements. VeriSign retains its long-standing policy not to comment on financial performance or guidance during the quarter, unless it is done through a public disclosure.

What Wall Street analysts are saying about Facebook's disastrous quarter

Yahoo Finance

The financial results in today's call and the matters we will be discussing today include GAAP and non-GAAP measures used by VeriSign. GAAP to non-GAAP reconciliation information is appended

to our earnings release and slide presentation, as applicable, each of which can be found on the Investor Relations section of our website.

In a moment, Jim and George will provide some prepared remarks. And afterward, we will open the call for your questions. With that, I would like to turn the call over to Jim.

Nokia CEO Refutes Claims It's Losing Market Share to Arch Rival
Bloomberg

D. James Bidzos, VeriSign, Inc. - Founder, President, CEO & Executive Chairman [3]

Thanks, David, and good afternoon, everyone. I'm pleased to report another solid quarter, which capped a strong 2017 for VeriSign. Fourth quarter and full year results were in line with our objectives of offering security and stability to our customers while generating profitable growth and providing long-term value to our shareholders.

EARNINGS: Comcast shares jump on surprise subscriber growth
Yahoo Finance Video

For 2017, VeriSign delivered strong financial performance, reporting \$1,165,000,000 in revenues, resulting in \$653 million in free cash flow and generating full year 2017 non-GAAP operating margins of 65.3%.

2017 was a strong year for the .com and .net domain name base in which the company processed 36.7 million registrations and finished the year with 146.4 million names. During the year, we marked more than 20 years of uninterrupted availability of the VeriSign DNS for .com and .net. Also last year, we renewed the .net registry agreement for another 6 years until 2023.

Arnold Schwarzenegger Makes Manliest Move Ever
Describedigest Sponsored

During the fourth quarter, we continued our share repurchase program by repurchasing 1.3 million shares for \$145 million. During the full year 2017, we repurchased 6.3 million shares for \$593 million. Effective today, the Board of Directors increased the amount of VeriSign common stock authorized for share repurchase by approximately \$586 million to a total of \$1 billion authorized and available under the share repurchase program, which has no expiration.

Buy now, pay later options are increasing
Yahoo Finance

Our financial position is strong with \$2.4 billion in cash, cash equivalents and marketable securities at the end of the quarter. We continually evaluate the overall cash and investing needs of the business and consider the best uses for our cash, including potential share repurchases.

At the end of December, the domain name base in .com and .net totaled 146.4 million, consisting of 131.9 million names for .com and 14.5 million names for .net. During the fourth quarter, we processed 9 million new registrations and the domain name base increased by 0.57 million names. During the quarter, we continued to see strength from domestic registrars, which was offset by a lower second-time renewal rate associated with the remaining China surge names from late 2015.

What happened on Facebook's nightmare conference call that wiped out nearly \$150B in market value in 90 minutes (FB)
Business Insider

Although renewal rates are not fully measurable until 45 days after the end of the quarter, we believe that the renewal rate for the fourth quarter of 2017 will be 72.2%. We expect full year 2018 domain name base growth of between 2% and 3%. For the first quarter, we expect

Twitter 'shadow banning' is Trump's latest

an increase to the domain name base of between 1.5 million to 2 million registrations.

social media cause
TechCrunch

I'd like to comment now on a recent positive development in our efforts to become the registry operator for .web. You may have seen the 8-K we filed in January. In it, we disclosed that the U.S. Department of Justice's Antitrust Division notified us that it had disclosed its investigation regarding the .web top level domain. We are now engaged in ICANN's process to move the delegation of .web forward. However, as this is ICANN's process, we cannot say when it will conclude. And while it's possible that our operation of .web will commence this year, the 2018 revenue guidance we will provide does not include any revenue from .web. Of course, we'll provide you with updates as appropriate.

News Anchor Stuns Viewers With An Off Air Photo

Worldatation Sponsored

And now I'd like to turn the call over to George.

George E. Kilguss, VeriSign, Inc. - Executive VP & CFO [4]

Thank you, Jim, and good afternoon, everyone. For the year ended December 31, 2017, the company generated revenue of \$1,165,000,000, up 2% from fiscal 2016, and delivered GAAP operating income of \$708 million, up 3% from \$687 million for the full year 2016.

Trump hotel ruling could open door to his financial records

Associated Press

Revenue for the fourth quarter totaled \$296 million, up 3.2% year-over-year and up by 1.1% sequentially. During the quarter, 60% of our revenue was from customers in the U.S. and 40% was from customers abroad.

Qualcomm ends \$44 billion NXP bid after fail to win China approval

Reuters

As it relates to fourth quarter GAAP results, operating income totaled \$176 million compared with \$169 million in the fourth quarter of 2016. The operating margin in the quarter came to 59.7% compared to 59% in the same quarter a year ago. Net income totaled \$103 million compared to \$106 million a year earlier, which produced diluted earnings per share of \$0.83 in the fourth quarter this year compared to \$0.84 for the fourth quarter last year.

As of December 31, 2017, the company maintained total assets of \$2.9 billion and total liabilities of \$4.2 billion. Assets included \$2.4 billion of cash, cash equivalents and marketable securities, of which \$729 million were held domestically with the remainder held abroad.

I'll now review some additional fourth quarter financial metrics, which include non-GAAP operating margin, non-GAAP earnings per share, operating cash flow and free cash flow. I then will discuss our 2018 full-year guidance.

As it relates to non-GAAP metrics, fourth quarter operating expense, which excludes \$13 million of stock-based compensation, totaled \$106 million compared to \$97 million last quarter and \$103 million in the same quarter a year ago. Non-GAAP operating expenses were higher in the fourth quarter as we had indicated on our last call, primarily due to an increase in sales and marketing spending in the fourth quarter.

Non-GAAP operating margin for the fourth quarter was 64.1% compared to 63.9% in the same quarter of 2016. Non-GAAP net income for the fourth quarter was \$119 million, resulting in a non-GAAP diluted earnings per share of \$0.96 based on a weighted average diluted share count of 124.3 million shares. This compares to \$0.92 in the fourth quarter of 2016 and \$1 last quarter based on 125.5 million and 124.1 million weighted average diluted shares, respectively.

Dilution related to the convertible debentures was 25.2 million shares based on the average share price during the fourth quarter compared with 20.6 million for the same quarter in 2016 and 24 million shares last quarter. The share count was reduced by the full effect of third quarter 2017 repurchase activity and the weighted effect of the 1.3 million shares repurchased during the fourth quarter. Operating cash flow for the fourth quarter was \$199 million and free cash flow was \$190 million compared with \$205 million and \$198 million, respectively, for the fourth quarter last year.

Now I'd like to provide an update on implications to the company of the Tax Cuts and Jobs Act enacted in December 2017, which I will refer to as the Tax Act. As stated in today's earnings release, fourth quarter and full year 2017 GAAP financial results include a net \$9 million tax expense increase resulting from the Tax Act. This increase is comprised of a provisional income tax expense of \$196 million, consisting of onetime U.S. taxes on accumulated foreign earnings triggered by the Tax Act and related foreign withholding taxes, both net of applying previously unrecognized foreign tax credits. This expense is offset by an income tax benefit of \$187 million resulting from the revaluation of our net deferred tax liabilities from 35% to the 21% U.S. federal income tax rate in the Tax Act.

As a result of the onetime U.S. taxes on accumulated foreign earnings, we also intend to repatriate by early in the second quarter of 2018 approximately \$1.1 billion of cash held by foreign subsidiaries, net of foreign withholding taxes and based on current exchange rates. Additionally, on a go-forward basis, due to the Tax Act, annual earnings of our foreign subsidiaries will be taxed by the U.S. This allows for annual repatriation without further U.S. taxation of distributable capital reserves from foreign entities. The taxation of foreign earnings and withholding taxes associated with ongoing repatriations will increase cash taxes over the amount the company has historically paid.

Also the lower corporate tax rates and limitations under deductibility of interest implemented by the Tax Act decreases the value of future interest expense deductions. In light of the Tax Act, we are presently evaluating our capital structure, including a possible redemption of our convertible debentures.

Finally, since mid-2017, we have used a tax rate of 25% to calculate our non-GAAP net income and non-GAAP earnings per share. Looking ahead, we believe a more reasonable estimate of the tax rate to calculate our non-GAAP net income and non-GAAP earnings per share is 22%. As a result, we will begin to use 22% non-GAAP tax rate when reporting first quarter 2018 non-GAAP results.

With respect to full year 2018 guidance, revenue is expected to be in the range of \$1,195,000,000 to \$1,215,000,000. Non-GAAP operating margin is expected to be between 65.5% and 66.5%. Our non-GAAP interest expense and non-GAAP nonoperating income net is expected to be an expense of between \$115 million and \$122 million. Capital expenditures are expected to be between \$45 million and \$55 million. And finally, cash taxes are expected to be between \$70 million and \$90 million. This 2018 cash tax guidance reflects our best estimate of the various impacts of the Tax Act, including the impacts of our intended repatriation.

In summary, the company continued to demonstrate sound financial performance during the fourth quarter and the full year 2017. Now I'll turn the call back to Jim for his closing remarks.

D. James Bidzos, VeriSign, Inc. - Founder, President, CEO & Executive Chairman [5]

Thank you, George. 2017 was another solid year for VeriSign. There was further expansion of the domain name base and revenues. We generated an efficiently returned value to shareholders. We renewed the .net registry agreement for another 6 years until 2023. And we marked more than 20 years of uninterrupted availability of the VeriSign DNS for .com and .net.

Finally, earlier this year, we disclosed that the U.S. Department of Justice notified us that it closed its investigation regarding the .web top level domain. We continued our work to protect, grow and manage the business while continuing our focus on providing long-term value to our shareholders. We think our focus on profitable growth and disciplined execution will extend the long trend lines of growth in our top and bottom line and allow us to continue our consistent track record of generating and returning value to our shareholders in the most efficient manner.

We will now take your questions. Operator, we're ready for the first question.

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Questions and Answers

Operator [1]

(Operator Instructions) We'll take our first question from Gregg Moskowitz with Cowen and Company.

Gregg Steven Moskowitz, Cowen and Company, LLC, Research Division - MD and Senior Research Analyst [2]

Jim, in the third quarter, the top 5 keyword searches for .com involved some form of cryptocurrency and/or blockchain. How instrumental do you think crypto has been in driving .com gross adds over the past several months or so?

D. James Bidzos, VeriSign, Inc. - Founder, President, CEO & Executive Chairman [3]

I don't think I have at the tip of my fingers the precise numbers. But I don't believe that they're material. I have seen a lot of activity in the secondary markets of trading in .com registrations that have crypto in them. But I don't think that there any meaningful direct contributions to new .net registrations in the numbers that we reported. And there's just a huge amount of interest in cryptocurrencies and Bitcoin, as you know, now that it's hit the exchanges. And what we've seen, I would say specifically, is a spike in value in the secondary market of .com names with any multiple keyword names with crypto in them.

Gregg Steven Moskowitz, Cowen and Company, LLC, Research Division - MD and Senior Research Analyst [4]

Okay. And then George, you had told us that you would spend more on marketing in Q4 and you did. And I know I'm dating myself here, but I would have go all the way back to 2007 to find another quarter where sales and marketing expense grew this much in absolute dollars on a sequential basis. So can you maybe just sort of give a little bit more color on the activities that you undertook in Q4 as well as what the sales and marketing strategy is for 2018?

George E. Kilguss, VeriSign, Inc. - Executive VP & CFO [5]

Sure. I mean, keep in mind though on an annual basis, our total marketing expense is pretty flat year-over-year. As I talked about a few quarters ago, we clearly look to execute our marketing programs that we think drive the best return for the company. And sometimes those programs we have to pivot during the year. And we had lighter marketing expenses, as we talked about, in the middle of 2017. And we finally got some programs coming out. We did make a little bit of a shift away from some registrar marketing programs to more direct marketing programs. We did do some of our advertising for our brands, both .com and .net, both domestically and abroad. And so we've been doing a little bit more direct marketing as a result of that. And those programs came out in the fourth quarter and will continue to run in the first half of 2018 here.

Gregg Steven Moskowitz, Cowen and Company, LLC, Research
Division - MD and Senior Research Analyst [6]

Okay, great. And then just one last question for me. Can you expand on why your cash taxes are so much higher in 2018? And as part of that, is the (inaudible) tax shield associated with the convert, is that less valuable going forward under the tax reform?

George E. Kilguss, VeriSign, Inc. - Executive VP & CFO [7]

Yes. So as mentioned in my prepared remarks, from a GAAP perspective, we made an accrual for the onetime transition tax. And that was partially offset by the reevaluation of our DTLs. So from a GAAP perspective, that was about \$9 million. From a cash tax perspective, as you mentioned, we're guiding to \$70 million to \$90 million in 2018. And that's up from about \$28 million this year. As mentioned, this reflects a variety of the impacts from the Tax Act, including the impacts of our intended repatriation. And while I don't think it makes sense to go through all the puts and takes of the tax calculation, I think the big items impacting the company from a cash tax perspective going forward are really the tax on foreign earnings, the U.S. tax on foreign earnings, and then the U.S. limitations on interest deductions, partially offset by the U.S. tax rate. But that amount does include impacts as well from our repatriation. As far as interest limitations, yes, tax reform clearly has diminished benefits for interest expense. There are some limitations there. And as a result, as I've mentioned, we are looking at our entire capital structure. We're looking at it. We'll be evaluating it. And as our converts are part of that capital structure, we look at them as well.

Operator [8]

We'll go next to Rob Oliver with Baird.

Matthew Steven Lemenager, Robert W. Baird & Co. Incorporated,
Research Division - Junior Analyst [9]

This is Matt Lemenager on for Rob. I realize it might be early, but just looking to see if there's any plan around .web, maybe things around go-to-market, how that might look any different than .com. And would you be doing extra marketing just to get that brand up and going? Any early thoughts? I realize no expectation on the guidance or anything. But any early thoughts?

D. James Bidzos, VeriSign, Inc. - Founder, President, CEO & Executive Chairman [10]

Yes, I think it's just too early at this point to discuss any details about go-to-market or launch plans for .web. There's an ICANN process that we're now engaged in with the Department of Justice having closed their investigation of .web. And when that process completes, I'm sure we'll have a lot more to say. But at this point, it would just be premature.

Matthew Steven Lemenager, Robert W. Baird & Co. Incorporated, Research Division - Junior Analyst [11]

Got it. And on the expectations for domain growth 2% to 3% for this year, any difference in the expectations for U.S. versus international? I know you've talked about strength in the economy in the United States and that the China phenomenon has kind of rolled off. I didn't know if any of the international markets were starting to come back.

George E. Kilguss, VeriSign, Inc. - Executive VP & CFO [12]

So in 2017, we absolutely have seen a good U.S. market. But having said that, European markets have also done well for us. Our expectation is that we'll see good growth in both U.S. and international markets next year. But we don't guide to the specific markets or their performances.

Matthew Steven Lemenager, Robert W. Baird & Co. Incorporated, Research Division - Junior Analyst [13]

Got it. And the last question I had on the repatriation. Would it be fair to assume that the primary use case would be for share repurchases? Or do you think there would be other avenues that you would look to deploy the repatriated cash?

George E. Kilguss, VeriSign, Inc. - Executive VP & CFO [14]

Well, I think in general, I don't think there will be a change in how we approach capital allocation. As always, we look at the needs of the business using our strategic framework of protect, grow and manage. And we do what we think is best for the business. As you may recall, our strategic framework includes making sure we maintain an adequate amount of liquidity for the business, both today and for tomorrow, what we think the needs are to continue to invest in our

protect mission for the network and our business for today and tomorrow, to invest in technology and innovation that we think will drive profitable growth of the business. And then once we accomplish those goals, we then evaluate how much excess capital we think is appropriate to return to shareholders and in what form. So we think that framework, which we've been using for the past 6 years, has served us well. And we'll continue to use that framework as it relates to the capital of the corporation.

Operator [15]

And we'll go next to Sterling Auty with JPMorgan.

Ugam Kamat, JP Morgan Chase & Co, Research Division - Analyst [16]

This is Ugam Kamat on for Sterling Auty. So Jim, you mentioned that the renewal rate out of China was disappointing, especially the second-time renewal rate. So just wondering what was the renewal rate especially in China? Like you gave the blended renewal rate, but just wondering, what was the renewal rate in China? And how many names are left? And what would be the future renewal rates that you expect to come out from this region?

D. James Bidzos, VeriSign, Inc. - Founder, President, CEO & Executive Chairman [17]

Yes. So we don't guide renewal rates by country. As mentioned, the cohort that was originally from the 2015 China surge, that cohort was about 1.4 million names coming into the year. And that renewal rate was probably, on a blended basis, maybe about 40% for that cohort. So we did have a portion of those names come out. However, we were anticipating that. We did comment on that last quarter. And that was in the guidance that we gave and we fell within the range of the guidance. But most of that cohort now is, I would say, through the system for many material names. And I would expect renewal rates to go back to more normalized rates.

Ugam Kamat, JP Morgan Chase & Co, Research Division - Analyst [18]

All right, perfect. That's helpful. And secondly, since we are coming closer to the Cooperative Agreement date in October, any particular update that you can give us on the process that you're having with the Department of Commerce? Or any particular survey that they

might have done to allow the renewal of Cooperative Agreement or just allow it to expire?

D. James Bidzos, VeriSign, Inc. - Founder, President, CEO & Executive Chairman [19]

Well, so first of all, I guess just to remind everybody on the call, in late September 2016, NTIA approved the .com Registry Agreement to be extended to November 30, 2024. At that time, NTIA chose not to extend the Cooperative Agreement. So it is currently scheduled to terminate on November 30 in 2018. Whether to extend that Cooperative Agreement or not is NTIA's decision and their process, and so can't comment on that. They do have the right to conduct a public interest review for the sole purpose of determining whether or not they'll exercise their right to extend the term of the Cooperative Agreement. Now one update that is new since the last time we talked is that David Redl was confirmed as the Assistant Secretary and Administrator of the NTIA in November of 2017. Unfortunately, that's all the update I can give you there. We can't comment on Mr. Redl's appointment or the NTIA in regard to their process related to the Cooperative Agreement. That's theirs, not ours. As soon as we can, we'll share whatever information we do have though.

Operator [20]

And we'll take our last question from Walter Pritchard with Citi.

Walter H Pritchard, Citigroup Inc, Research Division - MD and U.S. Software Analyst [21]

I think all my questions have been answered. Just one I wanted to make sure I clarified. On the tax scenario that you've outlined, the \$70 million to \$90 million and the tax rate going down to 22%, does that contemplate redeeming the convert? And if not, does the redeeming of the convert potentially have additional tax impact beyond what you talked about?

George E. Kilguss, VeriSign, Inc. - Executive VP & CFO [22]

So Walter, as I mentioned, we're just evaluating our convertible debentures in conjunction with evaluating our capital structure. So we're still looking at that. So our guidance is really based on where we see it today of what we're doing. It doesn't involve looking at any changes from that fact. We're still evaluating it.

Walter H Pritchard, Citigroup Inc, Research Division - MD and U.S.
Software Analyst [23]

And then does that \$70 million to \$90 million cash tax rate, it sounds like that doesn't mean most companies are talking about having an 8-year (inaudible)

George E. Kilguss, VeriSign, Inc. - Executive VP & CFO [24]

Yes. So if you're referring to -- so I think you're referring to the transition tax. The Tax Act allows you to look at your taxes, what they would have been with the Tax Act or without. So it's a with-or-without calculation. And for us, when we do that calculation, we expect to actually defer that amount of tax over the 8 years allowed by the Tax Act.

Walter H Pritchard, Citigroup Inc, Research Division - MD and U.S.
Software Analyst [25]

Okay. So the \$70 million to \$90 million, would that be a pretty good number for the next, say, several years that would include that 8-year period, too?

George E. Kilguss, VeriSign, Inc. - Executive VP & CFO [26]

So as we mentioned previously, we don't guide to a long-term cash tax rate. However, I would say in the short term, we expect that, that rate to still be below our GAAP tax rate as we use up foreign tax credits. At the end of 2017, we had about \$122 million of foreign tax credits. And we now expect to utilize those over the next 2 to 3 years.

Walter H Pritchard, Citigroup Inc, Research Division - MD and U.S.
Software Analyst [27]

Okay. So sorry to be -- just to keep going on this. But the \$70 million to \$90 million does include still the benefits of some of those foreign tax credits. And then those would expire at some point here?

George E. Kilguss, VeriSign, Inc. - Executive VP & CFO [28]

That's correct.

Walter H Pritchard, Citigroup Inc, Research Division - MD and U.S.
Software Analyst [29]

Okay. Any just detail on how much per year you can use up that \$122 million?

George E. Kilguss, VeriSign, Inc. - Executive VP & CFO [30]

Like I said, they'll be probably fully utilized over the next 3 years. So obviously, you'll use them up -- use more of them up in year 1 and 2 and probably less in year 3. But the utilization of FTCs, to be perfectly candid, is somewhat complex and is dependent on a variety of factors. So it's a little bit -- clearly, I have an idea of what they'd be. But it's probably premature to give that number because they can change over time depending on how foreign income is recognized overseas.

Operator [31]

And at this time, I would like to turn the call back over to David Atchley for any additional or closing remarks.

David Atchley, VeriSign, Inc. - VP & Corporate Treasurer [32]

Thank you, operator. Please call the Investor Relations department with any follow-up questions from this call. Thank you for your participation. This concludes our call. Have a good evening.

Operator [33]

And again, this does conclude today's call. You may now disconnect.

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EXHIBIT C-52

PART ONE -- POLICY DEVELOPMENT PROCESS

Last Updated:31 August 2009

Date:

01 August 2007

GNSO new TLDs Committee

Part B: Final Report**Introduction of New Generic Top-Level Domains****Table of Contents**

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PART SIX – GOVERNMENTAL ADVISORY COMMITTEE PUBLIC POLICY PRINCIPLES

PART SEVEN – CONSTITUENCY IMPACT STATEMENTS

PART EIGHT -- REFERENCE MATERIALS

Return to Final Report: Part A

1. This section provides detailed information about the progress of the policy development process and the documentation produced throughout the series of teleconferences and face-to-face consultations that have taken place since December 2005, through 2006 and 2007. All of the meetings were open to observers and many different stakeholders attended the meetings taking an active part in the discussion. In addition, all

meetings were open to remote participation by teleconference and file-sharing technology for some meetings. Participation data is provided in Part Two below.

2. The first step of the policy development process was the release of the *Issues Report* on 5 December 2005. The *Report* sets out an early collation of issues that the GNSO wished to take into account in developing the Terms of Reference for future rounds. For example, the selection criteria used in previous application rounds for new top-level domains were used to guide the development of Term of Reference Two in this PDP. An evaluation of the selection criteria and methods used in the re-bidding of the .org and .net registry contracts was also conducted. The *Issues Report* contained Staff Recommendations about potential terms of reference and, in the main, those Recommendations were adopted by the GNSO Council. The *Report* is found at <http://gns0.icann.org/issues/new-gtlds/gns0-issues-rpt-gtlds-05dec05.pdf>.

3. A Public Comment Period was launched on 6 December 2005 to solicit input from the ICANN community about the proposed Terms of Reference (found at <http://www.icann.org/announcements/announcement-06dec05.htm>). The Public Comment Period ran until 31 January 2006. For this PDP public comment periods have been used in different ways than in the past. In general, public comment calls have been far more targeted and highly structured to get responses on particular areas of concern to the Committee. This was a successful initiative enabling information to be collected in a consistent way that improved the quality of subsequent *Reports*. The archive of comments can be found at <http://forum.icann.org/lists/new-gtlds-pdp-comments/>).

4. In addition to a Public Comment Period, a *Call for Expert Papers* was announced on 3 January 2006 (found at <http://icann.org/announcements/announcement-03jan06.htm>). The request for input was advertised widely in the international press and yielded eleven responses from a diverse range of stakeholders. The authors of the papers were invited to present their papers and participate in a question and answer session at the 23 - 25 February 2006 Washington meeting. A full listing of all the inputs, including the *Expert Papers*, can be found at <http://gns0.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>.

5. The ICANN Board has been regularly updated on the progress of and taken a keen interest in the work of the new TLDs Committee. For example, the Board meeting of 10 January 2006 shows discussion within the Board about its involvement in new TLDs policy development process (found at <http://www.icann.org/minutes/minutes-10jan06.htm>). The Board passed a resolution at the March 2006 Wellington meeting urging the Committee to work as quickly and efficiently as possible.

6. A draft *Initial Report* was released on 19 February 2006 (found at <http://icann.org/topics/gns0-initial-rpt-new-gtlds-19feb06.pdf>) and a request for public comments was announced at the same time that was open between 20 February 2006 and 13 March 2006. The archives for those comments are found at <http://forum.icann.org/lists/new-gtlds-pdp-initial-report/>. The draft *Initial Report* was used to facilitate discussion at subsequent Committee meetings and to give some guide to the broader community about the Committee's progress in its early stages.

7. The GNSO's new TLDs Committee held a three day meeting in Washington DC between 23 and 25 February 2006. The meeting notes can be found on the GNSO's Committee archive at (<http://forum.icann.org/lists/gtld-council/msg00030.html>). A central element of the discussion focused on re-visiting ICANN's Mission and Core Values to ensure that the deliberations on the Terms of Reference were tightly constrained. The substantive discussion over the three-day meeting also included discussion on whether to introduce new top-level domains (<http://forum.icann.org/lists/gtld-council/msg00027.html>) and potential selection criteria which could be used in a new round of top-level domain applications (<http://forum.icann.org/lists/gtld-council/msg00026.html>).

8. Analysis of the lessons learned from previous TLD rounds was included in the broader discussions held in Washington DC (<http://forum.icann.org/lists/gtld-council/msg00030.html>). In addition to discussing general selection criteria, detailed discussion of technical requirements also took place (<http://forum.icann.org/lists/gtld-council/msg00028.html>). Following the Washington meetings, it was clear that further information about technical criteria was necessary to inform the Committee's work. On 15 March 2006 a formal call was made for additional information on technical criteria (found at <http://gnso.icann.org/issues/new-gtlds/tech-criteria-15mar06.htm>). No responses were received to that specific call but, in the resulting recommendations, particular attention has been paid to addressing relevant technical standards across the full range of registry operations, including those that relate to Internationalised Domain Names.

9. In response to the Committee's work and to discussions at the March 2006 Wellington meeting, the Board indicated its intention to facilitate the implementation of new top-level domains (found at <http://www.icann.org/minutes/minutes-31mar06.htm>.)

10. The new TLDs Committee met in Brussels between 11 and 13 May 2006 to discuss, in further detail, the work that had been undertaken on refining the selection criteria and allocation methods. In addition, a full day was spent on discussing policies for contractual conditions with a special presentation from ICANN's Deputy General Counsel. The Committee has archived, on 18 May 2006, records of the Brussels discussion and output from the meeting can be found at <http://forum.icann.org/lists/gtld-council/msg00133.html>

11. At the Brussels meeting, a revised work plan was devised (found at <http://forum.icann.org/lists/gtld-council/msg00130.html>) which include a high level commitment to producing an *Initial Report* in time for discussion at ICANN's June 2006 Marrakech meeting.

12. A draft *Initial Report* was released on 15 June 2006 (found at <http://gnso.icann.org/issues/new-gtlds/issues-report-15jun06.pdf>) and further discussion took place on the Committee's mailing list prior to the Marrakech meeting.

13. The ICANN Board meeting of 30 June 2006 showed, again, the Board's interest in facilitating the policy development process on new top-level domains, particularly in encouraging ongoing discussions with the GAC. (found at <http://www.icann.org/minutes/resolutions-30jun06.htm>). After inputs from the Marrakech

meeting a final version of the *Initial Report* was released on 28 July 2006 (found at <http://gnso.icann.org/drafts/newgtlds-issues-report-01-28jul06.htm>).

14. The Committee conducted another set of face-to-face consultations in Amsterdam between 29 and 31 August 2006 to further refine the Committee's findings and to develop a set of draft *Recommendations*. Prior to the Amsterdam meeting, a comprehensive public comment period was conducted. These public comments (found at <http://forum.icann.org/lists/gtld-council/msg00189.html>) were used as working materials for the Committee to consider, in addition to Constituency Statements, the previous set of Expert Papers and comprehensive commentary for a wide variety of observers to the meetings.

15. The Committee met with the GAC on four occasions during the course of the consultations – in Wellington, Marrakech, Sao Paulo and San Juan – where progress on the Committee's work was shared with GAC members. In addition, at the San Juan meeting, GAC members were given a presentation about how the GAC's Public Policy Principles had been incorporated directly into the Committee's principles, recommendations and implementation guidelines.

16. Considering all the materials derived from the face-to-face meetings, discussions on email lists, expert materials and expert papers, on 14 September 2006 a set of draft *Recommendations* was released by the Committee for broader consideration (found at <http://gnso.icann.org/issues/new-gtlds/recom-summary-14sep06.htm>).

17. Between 14 September and 5 October 2006 email discussion took place that improved and clarified the language of the *Recommendations* and ensured that Constituencies had sufficient time to rework their recommendations where necessary.

18. On 5 October 2006, the Committee conducted a two-hour teleconference to discuss the draft *Recommendations* (the MP3 recording can be found at <http://forum.icann.org/lists/gtld-council/msg00224.html>). The purpose of the meeting was to confirm that the *Recommendations* reflected the intentions of the Committee and to conduct further work on refining elements of the *Recommendations*, particularly with respect to the selection criteria and allocation methods to resolve contention between string applications.

19. On 11 October 2006, the GNSO Committee Chairman and GNSO Chair, Dr Bruce Tonkin, sent formal correspondence to the Chair of the Governmental Advisory Committee and the Chair of GAC Working Group I, requesting the GAC's assistance with the public policy impacts of the introduction of new TLDs (found at <http://gnso.icann.org/mailing-lists/archives/council/msg02891.html>).

20. Based on the substantive nature of the Committee's email traffic on the draft *Recommendations*, a further update was released to the Committee on 18 October 2006 (found at <http://forum.icann.org/lists/gtld-council/msg00234.html>) for consideration whilst the drafting of the *Final Report* takes place.

21. The Committee met again at ICANN's Sao Paulo meeting in December 2006 and continued their work with the release of an updated version of the *Final Report* (found at <http://gnso.icann.org/drafts/GNSO-PDP-Dec05-FR13-FEB07.htm>).

22. From February 2007 until May 2007 a series of working groups continued with separate streams of work. The Internationalised Domain Names Working Group (IDN-WG) released its *Final Report* on 22 March 2007

(found online here <http://gnso.icann.org/drafts/idn-wg-fr-22mar07.htm>). The Reserved Names Working Group (RN-WG) released its first report on 16 March 2007 (found online here <http://gnso.icann.org/drafts/rn-wg-fr19mar07.pdf>) and its *Final Report* on 23 May 2007 (found online here <http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm>). The Protecting the Rights of Others Working Group (PRO-WG) completed its *Final Report* on 1 June 2007 (found online here <http://gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf>).

23. After the June 2007 San Juan meeting, the Committee continued to meet on a weekly basis with small sub-groups working on, in particular, Recommendation 6 and 20 and more detailed implementation guideline

24. The updated version of the draft *Final Report: Part A* was released on 30 July for a Committee "last call" on the package of recommendations.

25. The following timetable was released in conjunction with the updated draft to enable the completion of the Committee's work prior to the ICANN Board meeting on 2 November 2007.

- i. Committee comment 30 July to 6 August
- ii. Committee meeting 6 August
- iii. Public comment period begins 9 August
- iv. Public comment period ends 29 August
- v. Synopsis of public comments released to Committee for consideration
- vi. GNSO Council vote on recommendations

26. After the GNSO Council's vote, the Board Report can be prepared.

	Washington DC	Wellington, NZ	Wellington, NZ	Brussels			Telecon
	24/25 Feb 06	Mar-23	Mar-24	May-11	May-12	May-13	
CBUC							
Marilyn Cade	x	x	x	x	x	x	aa
Philip Sheppard	absent	x	x	x	x	x	
Alistair Dixon	Grant Forsyth RP	x + Grant F.		RP	RP		x
Mike Rodenbaugh							
ISPC	Mark McFadden						

Tony Holmes	RP	x	x	na	na	na	aa)
Tony Harris	M.Mansourkia	x	x	x	x	x	x)
Greg Ruth	RP	x		na	na	na	x)
IPC								
L.Nichols/K.Rosette	x	absent		x	x	x	aa)
Ute Decker	Steve Metalitz	absent		x	x	x	aa)
Kiyoshi Tsuru	x	x	x	na	na	na	a)
NCUC								
Robin Gross	na	x	x	na	na	na	x)
Mawaki Chango	x	absent		x	x	x	a)
Norbert Klein	na	x	x	na	na	na	a)
Registrars								
Bruce Tonkin	x	x	x	x	x	x	x)
Ross Rader	x	x	x	na	na	na	a)
Tom Keller	na	absent		na	na	na	a)
Registry								
Cary Karp	na	x	x	na	na	na	x)
Ken Stubbs	x	x	x	x	x	x	x)
June Seo		x	x	na	na	na	a)
Edmon Chung)
Nominating Com								
Avri Doria	RP	x	x	x	x	x	x)
Sophia Bekele	x	x	x	a	a	a)

Maureen Cubberley	RP	x	x	na	na	na		
Jon Bing								
ALAC								
Bret Fausett	RP	x		RP	RP	RP		
Alan Greenberg								
GAC								
Suzanne Sene	x							
Observers								
Neal Blair								
Marcus Faure								
Chuck Gomes	x	x	x	x	x	x	x	
Werner Staub		x	x	x	x	x	x	
Ray Fassett	x	x	x	x	x	x		
Elmar Knipp								
David Maher	x ry	x	x					
Kristina Rosette	x ipc							
Matthew Embrescia	x ry	x	x					
Danny Younger	xncuc							
Dirk Krischenowski	RP	x	x	x	x	x		
Alexander Schubert		x	x	x	x	x		

Jon Nevett		x	x	x	x	x
Philipp Grabensee				x	x	x
M. M-Schönherr				x	x	x
Becky Burr		x	x			
Keith Drazak	x	x	x			
Sebastien Bachelot		x	x			
eNOM participant						
Bhavin						
Jon Nevett	I believe in Amsterdam he came on the phone?					
Amadeu Abril Abril						
Jordi Iparraguirre						
observers						
steve metalitz						
mike palage						
Steve Crocker						
Victoria McEvedy						
Johannes Lenz-Hawlizcek						
Susan Crawford						
Stuart Duncan						
Ken Stubbs						
Marilyn Cade						
Staff						

Liz Williams	x	x	x	x	x		x)
Olof Nordling	x	x	x	x	x	x	x	
Denise Michel								
Glen de Saint Gery	x	x	x	x	x	x	x)
Dan Halloran		x	x)
Kurt Pritz	x				x	x	x)
Donna Austen								
Craig Schwartz)
Maria Farrell	x	x	x					
Tina Dam		x	x					
Paul Twomey								
John Jeffrey		x	x					
Patrick Jones								
Tim Denton								
Karen Lentz								
a = absent								
aa = absent apologies								
na= not available- one constit member paid for, or other conflict								
RP= remote participation								







GAC PRINCIPLES REGARDING NEW gTLDs

Presented by the Governmental Advisory Committee

March 28, 2007

1.1 The purpose of this document is to identify a set of general public policy principles related to the introduction, delegation and operation of new generic top level domains (gTLDs). They are intended to inform the ICANN Board of the views of the GAC regarding public policy issues concerning new gTLDs and to respond to the provisions of the World Summit on the Information Society (WSIS) process, in particular *"the need for further development of, and strengthened cooperation among, stakeholders for public policies for generic top-level domains (gTLDs)"*[2] and those related to the management of Internet resources and enunciated in the Geneva and Tunis phases of the WSIS.

1.2 These principles shall not prejudice the application of the principle of national sovereignty. The GAC has previously adopted the general principle that the Internet naming system is a public resource in the sense that its functions must be administered in the public or common interest. The WSIS Declaration of December 2003 also states that *"policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues."*[3]

1.3 A gTLD is a top level domain which is not based on the ISO 3166 two-letter country code list[4]. For the purposes and scope of this document, new gTLDs are defined as any gTLDs added to the Top Level Domain name space after the date of the adoption of these principles by the GAC.

1.4 In setting out the following principles, the GAC recalls ICANN's stated core values as set out in its by-laws:

- a. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
- b. *Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*
- c. *To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- d. *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.*
- e. *Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*
- f. *Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*
- g. *Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development*

process.

h. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

i. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

j. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

k. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

2. Public Policy Aspects related to new gTLDs

When considering the introduction, delegation and operation of new gTLDs, the following public policy principles need to be respected:

Introduction of new gTLDs

2.1 New gTLDs should respect:

a) The provisions of the Universal Declaration of Human Rights^[5] which seek to affirm "*fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women*".

b) The sensitivities regarding terms with national, cultural, geographic and religious significance.

-

2.2 ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities.

2.3 The process for introducing new gTLDs must make proper allowance for prior third party rights, in particular trademark rights as well as rights in the names and acronyms of inter-governmental organizations (IGOs).

2.4 In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains no two letter gTLDs should be introduced.

Delegation of new gTLDs

2.5 The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

2.6 It is important that the selection process for new gTLDs ensures the security, reliability, global interoperability and stability of the Domain Name System (DNS) and promotes competition, consumer choice, geographical and service-provider diversity.

2.7 Applicant registries for new gTLDs should pledge to:

a) Adopt, before the new gTLD is introduced, appropriate procedures for blocking, at no cost and upon demand of governments, public authorities or IGOs, names with national or geographic significance at the second level of any new gTLD.

b) Ensure procedures to allow governments, public authorities or IGOs to challenge abuses of names with national or geographic significance at the second level of any new gTLD.

2.8 Applicants should publicly document any support they claim to enjoy from specific communities.

2.9 Applicants should identify how they will limit the need for defensive registrations and minimise cyber-squatting that can result from bad-faith registrations and other abuses of the registration system

Operation of new gTLDs

2.10 A new gTLD operator/registry should undertake to implement practices that ensure an appropriate level of security and stability both for the TLD itself and for the DNS as a whole, including the development of best practices to ensure the accuracy, integrity and validity of registry information.

2.11 ICANN and a new gTLD operator/registry should establish clear continuity plans for maintaining the resolution of names in the DNS in the event of registry failure. These plans should be established in coordination with any contingency measures adopted for ICANN as a whole.

2.12 ICANN should continue to ensure that registrants and registrars in new gTLDs have access to an independent appeals process in relation to registry decisions related to pricing changes, renewal procedures,

service levels, or the unilateral and significant change of contract conditions.

2.13 ICANN should ensure that any material changes to the new gTLD operations, policies or contract obligations be made in an open and transparent manner allowing for adequate public comment.

2.14 The GAC WHOIS principles are relevant to new gTLDs.

3. Implementation of these Public Policy Principles

3.1 The GAC recalls Article XI, section 2, no. 1 h) of the ICANN Bylaws, which state that the ICANN Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues. Insofar, therefore, as these principles provide guidance on GAC views on the implementation of new gTLDs, they are not intended to substitute for the normal requirement for the ICANN Board to notify the GAC of any proposals for new gTLDs which raise public policy issues.

3.2 ICANN should consult the GAC, as appropriate, regarding any questions pertaining to the interpretation of these principles.

3.3 If individual GAC members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them.

3.4 The evaluation procedures and criteria for introduction, delegation and operation of new TLDs should be developed and implemented with the participation of all stakeholders.

N.B. The public policy priorities for GAC members in relation to the introduction of Internationalised Domain Name TLDs (IDN TLDs) will be addressed separately by the GAC.

ICANN GNSO new TLDS report 2007 – impact statement on behalf of the Commercial and Business Users Constituency (BC)

Background

Under ICANN existing guidelines within the Policy Development Process constituencies are asked under section 11c to provide: "an analysis of how the issue would affect each constituency, including any financial impact on the constituency".

There are innumerable uncertainties to the outcome of the PDP for TLDs including:

- the number of TLDs
- the nature of the TLDs
- the ability of ICANN to implement the safeguards discussed by the GNSO
- the number of those safeguards that reach consensus support within the GNSO
- the weight given by the Board to those safeguards.

For this reason the BC impact statement is necessarily written in terms of what the impact may look like given certain implementation scenarios.

A world of healthy competition and good faith

If the outcome is the best possible there will be a beneficial impact on business users from:

- a reduction in the competitive concentration in the Registry sector
- increased choice of domain names
- lower fees for registration and ownership
- increased opportunities for innovative on-line business models.

A world of increased opportunity for abusive competitive practises and fraud

There are a number of recommendations that seek to control abusive competitive practices as well as opportunities for consumer and business fraud such as cyber-squatting, typo-squatting, phishing and other forms of bad faith activity:

- graduated sanctions for contract compliance by Registries and Registrars
- avoiding confusingly similar domain names
- avoiding infringement of third party prior rights especially trade mark rights
- clear, quick and low-cost procedures for dispute resolution and the removal of bad faith registrations
- measures to prevent abuse of personal data or other commercially-valuable data.

If ICANN fails to implement the above recommendations there will be a negative impact on business users from:

- user confusion about site ownership and subsequent reputational damage to well-known businesses
- costs from diminished user confidence in e-commerce
- wasted costs of defensive registrations and online brand monitoring and enforcement

- wasted costs in legal and other actions to prevent avoidable criminal and cyber-squatting activity
- wasted costs and fraudulent losses to businesses and their customers from phishing and malware sites.

In the worst case scenario the negative impact on business users globally both directly and indirectly from reputation and confidence-related loss could be billions of dollars.

END

The Intellectual Property Constituency Impact Statement Regarding the Introduction of New gTLDs

	PRINCIPLE	IPC IMPACT
A	New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.	To the extent that new gTLDs are introduced, the IPC strongly agrees with this principle, especially with respect to the need for an orderly introduction. However, the IPC still takes issue with the notion that new gTLDs must be introduced. Based on past experience, the addition of new gTLDs will likely result in numerous defensive registrations of otherwise unnecessary domain names by IP owners (which we note include all trademark owners such as Registrars, Registries, ISPs, etc.). Such an introduction not only places a significant burden and cost to IP owners, it results in absolutely no value whatsoever to IP owners, not to mention Internet users in general. In fact, while arguments are made that the introduction of new gTLDs will increase competition and thus lower registration costs for domain name owners, this is not the case. In October of 2007, Verisign will increase the registry fee for registering domain names for .com, .org and .net domain names. To the extent that there has been any rise in the registration of domain names, the IPC submits that this is not as a result of increased demand, but rather represents in large part the practice of defensive registrations or the abusive practices of domain name tasting, parking, kiting and the like. Finally, it is critical that appropriate mechanisms be in place to address conflicts that may arise between any proposed new gTLD and the IP rights of others.

The IPC believes that many of these concerns may be minimized by limiting any new gTLDs to those that offer a clearly differentiated domain name space with mechanisms in place to ensure compliance with the purposes of a chartered or sponsored TLD. Market differentiation will create a taxonomic or directory-style domain name structure, ensuring that certainty and confidence are part of the user experience and that registrants will find a unique name space where they want to be and in which they can easily be located.

<p>B Some new generic top-level domains should be internationalised domain names (IDNs) subject to the approval of IDNs being available in the root.</p>	<p>As mentioned above, appropriate mechanisms must be in place to address conflicts that may arise between any proposed new gTLD and the IP rights of others.</p>
<p>C The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity. [Consistent with GAC Principle 2.6]</p>	<p>To begin with, there has been little empirical evidence that the introduction of new gTLDs has, in fact, promoted competition, or added to consumer choice or market differentiation, even though it might have the potential to do so. Any proposed new gTLD must be clearly targeted at a particular industry, economic sector, or cultural or language community, with a requirement that there is sufficient support or demand the relevant industry, economic, cultural or language sector to minimize the concerns set forth with respect to Principal A above. The mere introduction of competition for registry services must be outweighed by the burdens and costs to IP owners and Internet users et forth with respect t Principal A above. ICANN does not need to and should not encourage registry competition in the absence of a clear need for a new gTLD, without which will only create a gTLD replete with defensive registrations and no added value to consumers.</p>
<p>D A set of technical criteria must be used for assessing a new gTLD registry applicant to minimise the risk of harming the operational stability, security and global interoperability of the Internet.</p>	<p>IPC agrees that technical and operational stability are imperative to any new gTLD introduction.</p>

E	A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meet its obligations under the terms of ICANN's registry agreement.	ICANN should be in a position to inquire whether a registry applicant will depend for its financial viability on defensive registrations, and if so to withhold approval of such applicant.
F	A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.	To be feasible, the terms of registry agreements should be aligned with policies adopted by ICANN and allow enforcement by ICANN of any non-compliance. The impact of the absence of such criteria or the lack of enforcement thereof on the IPC and Internet users in general is evidenced in ICANN's 2006 Consumer Complaint Analysis (see, http://www.icann.org/compliance/pie-problem-reports-2006.html) In particular, the lack of access to Whois data, or the false or inaccurate submission thereof, significantly impacts the time and resources of and costs to IP owners vis-à-vis the handling of infringements on the Internet.

NUMBER	RECOMMENDATION	IPC Comment
1	<p>ICANN must implement a process that allows the introduction of new top-level domains.</p> <p>The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process. [GAC2.5]</p>	<p>See comments with respect to Principle A.</p>
2	<p>Strings must not be confusingly similar to an existing top-level domain.</p> <p>In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains no two letter gTLDs should be introduced. [GAC2.4]</p>	<p>Agreed.</p>
3	<p>Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.</p> <p>The process for introducing new gTLDs must make proper allowance for prior third party rights, in particular trademark rights as well as rights in the names and acronyms of inter-governmental organizations (IGOs). [GAC2.3]</p>	<p>Agreed, and as stated before, appropriate mechanisms must be in place to address conflicts that may arise between any proposed new string and the IP rights of others.</p> <p>While the IPC notes that GAC has made a specific reference to trademark rights, the IPC agrees with NCUC that such rights could include "freedom of expression" rights to the extent they are recognized and enforceable under generally accepted and internationally recognized principles of law provided that such rights do not infringe the existing legal rights of others as set forth in the first paragraph.</p>
4	<p>Strings must not cause any technical instability.</p>	<p>IPC agrees that technical and operational stability are imperative to any</p>

		new gTLD introduction.
5	<p>Strings must not be a Reserved Word.</p> <p>ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities. [GAC2.2]</p>	<p>Agreed, to the extent that a Reserved Word is such that its use could cause technical or operational instability to the DNS.</p>
6	<p>Strings must not be contrary to generally accepted legal norms relating to morality and public order.</p> <p>New gTLDs should respect:</p> <p>a) The provisions of the Universal Declaration of Human Rights which seek to affirm "fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women".</p> <p>b) The sensitivities regarding terms with national, cultural, geographic and religious significance. [GAC2.1]</p>	<p>The IPC simply concurs with NCUC regarding the implementation issues raised by such a recommendation.</p>
7	<p>Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.</p>	<p>IPC supports this recommendation.</p>
8	<p>Applicants must be able to demonstrate their financial and organisational operational capability.</p> <p>An application will be rejected or otherwise deferred if it is determined, based on public comments or otherwise, that there is substantial opposition to it from among significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support.</p>	<p>ICANN should be in a position, through various mechanisms, to determine that adequate resources exist to ensure that the applicant will not be dependent on defensive registrations for financial viability.</p> <p>Moreover, the IPC believes that the ability to reject an application as set forth in the second provision of this recommendation is an important feature for many members of the IPC (if there is substantial opposition, this raises the concerns set forth in our comments with respect to Principle A) and thus specifically and wholeheartedly endorses it.</p>

9	There must be a clear and pre-published application process using objective and measurable criteria.	IPC supports this recommendation.
10	There must be a base contract provided to applicants at the beginning of the application process.	IPC supports this recommendation.
11	Staff Evaluators will be used to make preliminary determinations about applications as part of a process which includes the use of expert panels to make decisions.	IPC supports this recommendation, and in doing so stresses the need for ICANN to continue to increase its staffing resources to maintain the security and stability of the DNS.
12	Dispute resolution and challenge processes must be established prior to the start of the process.	IPC supports this recommendation.
13	Applications must initially be assessed in rounds until the scale of demand is clear.	IPC supports this recommendation
14	The initial registry agreement term must be of a commercially reasonable length.	IPC supports this recommendation.
15	There must be renewal expectancy.	IPC supports this recommendation.
16	Registries must apply existing Consensus Policies and adopt new Consensus Polices as they are approved.	IPC supports this recommendation.
17	A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.	IPC supports this recommendation assuming the process will have "teeth" and assuming ICANN's continued monitoring and enforcement of registry contractual obligations.
18	If an applicant offers an IDN service, then ICANN's IDN guidelines must be followed.	IPC supports this recommendation.
19	Registries must use ICANN accredited registrars.	IPC supports this recommendation, assuming accreditation of registrars is held to high standards to avoid a "Register Fly" situation.

Implementation Guideline

IPC Comments

IG A	The application process will provide a pre-defined roadmap for applicants that encourages the submission of applications for new top-level domains.	To the extent that the submission of applications is encouraged, it should be because of the clear need for a new TLD.
IG B	Application fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process. Application fees may differ for applicants.	ICANN should be a position, through various mechanisms, to determine that adequate resources exist at an applicant to ensure that the applicant will not be dependent on defensive registrations for financial viability.
IG C	ICANN will provide frequent communications with applicants and the public including comment forums which will be used to inform evaluation panels.	IPC supports a requirement for public posting of string applications in internationally recognized publications and comment forums on applicants.
IG D	A first come first served processing schedule within the application round will be implemented and will continue for an ongoing process, if necessary. Applications will be time and date stamped on receipt.	Based on experience with the 'land rush' effect in domain name registration, it is apparent that first-come, first-serve simply does not work when many valid applications are received at the same time. IPC endorses the use of comparative evaluation methods to allocate new gTLDs. IPC strongly advises against the use of auctions or lotteries (that have nothing to do with the competence and financial viability of an applicant) to resolve competition between applicants.
IG E	The application submission date will be at least four months after the issue of the Request for Proposal and ICANN will promote the opening of the application round.	Given the potential impact any new gTLD will have on the IPC, ICANN must ensure that there will also be an adequate time period for public comment once applications are submitted.
IG F	If there is contention for strings, applicants may: i) resolve contention between them within a pre-established timeframe ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application	i) Yes. ii) Yes. IPC prefers the market driven approach and encourages the sponsorship by a well defined community. However, the "priority" for a claimed community support

iii) **If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and;**

should be subject to Recommendation 8, second paragraph).

iii) Yes.

iv) **the ICANN Board may be used to make a final decision, using advice from staff and expert panels.**

iv) Yes.

IPC urges ICANN to ensure that its review of applications continues to be vigorous to keep a high standard to meet the selection criteria.

IPC urges caution in presenting any proposal that would eliminate those aspects of the gTLD application process providing for the security and stability of the DNS. This concerns not only technical matters, but those aspects of the Internet DNS and registry operation designed to safeguard users and the general public, including, e.g. the examination of proposals to protect intellectual property.

IG G

Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exception:

Yes, again subject to Recommendation 8, second paragraph. IPC again strongly advises against the use of auctions or lotteries to resolve competition between applicants.

i) **the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application**

A comparative evaluation process will best meet ICANN's goals of fostering competition in registration services and encouraging a diverse range of registry service providers.

Under this exception, Staff Evaluators will devise criteria and procedures to investigate the claim.

IG I

External dispute providers will give decisions on complaints.

IPC supports the use of external dispute providers in the same manner as existing UDRP mechanisms, but simply notes that this should not be necessarily to the exclusion of the ICANN Board. There may be decisions that only the ICANN Board can resolve and such issues should not be overlooked or not dealt with

		simply because there is no external dispute provider available to resolve it.
IG J	An applicant granted a TLD string must use it within a fixed timeframe which will be specified in the application process.	IPC does not support the warehousing of TLD strings and supports a timeframe after applicant grant by which the TLD string must be operational.
IG K	The base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing market place.	No comment
IG L	ICANN should take a consistent approach to the establishment of registry fees.	No comment
IG M	The use of personal data must be limited to the purpose for which it is collected.	Personal data collected by the registry should be used in ways that are not incompatible with the purposes for which it was collected, taking into account the full range of public policy considerations.
IG N	ICANN may establish a capacity building and support mechanism aiming at facilitating effective communication on important and technical Internet governance functions in a way which no longer requires all participants in the conversation to be able to read and write English.	IPC support multilingual effective communication on important Internet governance functions.
IG O	ICANN may put in place a fee reduction scheme for gTLD applicants from economies classified by the UN as least developed.	The IPC does not object <i>per se</i> to the use of a reduced fee scheme, but is skeptical that the positive effect of such a scheme will outweigh the negative impact of an underfunded applicant's inability to meet the selection criteria set by ICANN. We strongly recommend that any graduated fee structure be viable and significant enough to ensure compliance with appropriate registry selection criteria, as well as eliminate bad-faith actors who might seek to pay a minimal entry fee and then conduct unscrupulous activities.

IG P	ICANN may put in place systems that could provide information about the gTLD process in major languages other than English, for example, in the six working languages of the United Nations.	IPC supports the dissemination of information about the process in multiple languages.
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ISPCP Constituency Statement on Impacts – New TLDs Page 1

Internet Service Provider and Connectivity Provider Constituency

Statement on Impacts – Introductions of New Top Level Domains

Overview

This is the ISPCP's statement on Impacts relating to the GNSO PDP Dec 05 – Introduction of New Top Level Domains – Consolidated Recommendations.

Section 1 – Principles

The ISPCP is highly supportive of the principles defined in this section of the PDP, especially with regards to the statement in (A):

"New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way."

Network operators and ISPs must ensure their customers do not encounter problems in addressing their e-mails, and in their web searching and access activities, since this can cause customer dissatisfaction and overload help-desk complaints. Hence this principle is a vital component of any addition sequence to the gTLD namespace.

The various criteria as defined in D,E and F, are also of great importance in contributing to minimize the risk of moving forward with any new gTLDs, and our constituency urges ICANN to ensure they are scrupulously observed during the applications evaluation process.

Section 2 – Proposed Recommendations

Here the ISPCP would like to make the following observations:

With regards to recommendation 2:

"Strings must not be confusingly similar to an existing top-level domain."

This is especially important in the avoidance of any negative impact on network activities.

The same applies to recommendation 4:

"Strings must not cause any technical instability."

The ISPCP considers recommendations 7 and 8 to be fundamental. The technical, financial, organizational and operational capability of the applicant are the evaluators' instruments for preventing potential negative

impact of a new string on the activities of our sector (and indeed of many other sectors). ISPCP Constituency Statement on Impacts – New TLDs Page 2

With regards to recommendation 13:

"Applications must initially be assessed in rounds until the scale of demand is clear."

This is an essential element in the deployment of new gTLDs, as it enables any technical difficulties to be quickly identified and sorted out, working with reduced numbers of new strings at a time, rather than many all at once. Recommendation 18 on the use of IDNs is also important in preventing any negative impact on network operators and ISPs.

Section 3 – Implementations Guidelines

We consider that guideline B, which states:

"Application fees may differ for applicants." ,

has some potential for negative impact on our sector. Our recollection is that this caveat was proposed with a view to reducing the application fee for certain categories of applicants, as a mechanism for avoiding exclusion based on application cost. Recent discussions in the GNSO have exposed some opinions that question the 'fairness' of the application fee (as it has been applied heretofore), on the grounds that it constitutes an entry barrier and disenfranchises legitimate potential applicants. The risk in proceeding with such a policy, is that it paves the way for hasty, last minute me-too applications, that have not really developed a solid project, and are simply trying their luck in getting a string...Perhaps when such arguments on exclusion are expounded, then the '.cat' sTLD can be pointed at as a prime example of a well-planned 'grass-roots' community TLD, which successfully applied for a string without any 'special' cost considerations. A potential profusion of hasty, ill-conceived new gTLDs is not something the ISPCP would view as beneficial to our sector.

Section 4 – IDN Working Group Areas of Agreement

The ISP community believes that areas of agreement 5, 6, and 9 are essential to the careful implementation of IDN TLDs. Without careful adherence to these recommendations, the implementation of IDNs may be successful on a technical level but will result in support and user confusion problems amongst the customers of ISPs. The ISPCP believes that these "Areas of Agreement" are essential to implement **prior** to any pursuit or proposal for IDN TLDs.

The ISP community also believes that the third "Area of Agreement" will be particularly difficult to implement in practice. The ISP community would be significantly impacted if the mechanism for gathering language community input on new IDN gTLD strings included a process that reached out to general, public Internet users through the community that provides access and connectivity. The ISPCP believes that a process for **"Language Community Input for Evaluation of new IDN gTLD Strings"** must be clearly established and vetted prior to allowing introduction of new IDN gTLD string. Failure to do so will impact many sectors, including the ISP and connectivity community. ISPCP Constituency Statement on Impacts – New TLDs Page 3

Section 5 – Reserved Name Working Group Recommendations

The ISP community accepts and agrees with the ICANN and IANA recommendations of Section 5 and finds no negative impact on ISP operations or support. The ISPCP is also support of, and finds no negative impacts for, the recommendation on symbols in new gTLDs.

The ISPCP community notes that recommendation 6 – reservation of single letters at the top level – is an important and critical recommendation to the ISP community. We believe that there are old resolvers in

operation in developing countries that would be severely impacted (e.g. not work correctly) in the presence of single letters at the top level. Specifically we believe that very old versions of BIND – potentially in use in very small, underfunded ISPs in economically challenged areas – may not process incoming resolution requests properly. The ISP community strongly supports recommendation 6 and believes that further research, at a later date, would be necessary before all impacts on ISPs and connectivity providers could be identified.

The ISPCP notes that an unavoidable impact of these recommendations is problems resulting from poorly written application layer software. The ISP community was severely impacted during the introduction of TLDs that had more than 3 ASCII characters. Many pieces of software incorrectly filtered these TLDs – most likely because software designers thought that there could not be TLDs whose length was greater than three characters. During the first 18 months of introduction of those TLDs there were many calls to ISPs to "fix" the problem with the new TLDs – despite the fact that the ISP and connectivity community were not responsible for issues at the application layer. We fully expect that some software and application designers have also made assumptions about TLDs that will be contradicted by the new recommendations in section 5. The unavoidable impact on ISPs and connectivity providers will mirror the problems that occurred during the introduction of TLDs such as .areo, .travel, or .coop. The ISP community suggests that the existence of so-called "Controversial Names" will also lead to potential regulatory or community pressure impacts on those who provide connectivity.

Section 6 – PRO Areas of Agreement

The ISPCP believes that the six "Areas of Agreement" in the area related to PRO will have no significant impact on ISPs or connectivity providers.

Section 7 – Areas of Broad Agreement

The ISPCP sees the Principles and Recommendations in this section, as reasonable safeguards to a measured and controlled expansion of the generic domain namespace, subject to the comments expressed above.

COMMENTS FROM ICANN'S NON-COMMERCIAL USERS CONSTITUENCY (NCUC)

The GNSO New TLD Committee's Draft Final Report On The Introduction Of New Generic Top Level Domains

GNSO Policy Development Process (GNSO PDP- Dec05)

12 June 2007

Overview

ICANN's Non-Commercial Users' Constituency (NCUC) appreciates this opportunity to comment on the GNSO Draft Recommendations for New GTLD Policy. While much progress has been made in recent weeks to resolve differences, much work remains before a consensus policy can be reached. The NCUC refers to its earlier constituency statements on the introduction of new gTlds, in particular, its statement of December 2006.^[1]

Our overall concern remains that despite platitudes to certain, transparent and predictable criteria—the GNSO's draft recommendations create arbitrary vetoes and excessive challenges to applications. There are some for incumbents; for trademark rights holders; for the easily offended, for repressive governments and worst of all, for "the public". It's a wolf in sheep's clothing. A recipe for irregularity, discretion and uncertainty in the new domain name space.^[2]

Among the more troubling proposals is the introduction of criteria in which strings must be 'morally' acceptable and not contrary to 'public order' (Recommendation #6). A concept borrowed from trademark law without precedent in the regulation of non-commercial speech.^[3] NCUC opposes any string criteria related to 'morality' or 'public order' as beyond ICANN's technical mandate.

Following recent discussions and revisions, the draft now refers^[4], in passing, to 'freedom of speech' rights, but concerns remain that a restriction on certain expression in part of the world will be extended outside that nation, possibly even to the entire world, through ICANN policy. If the GNSO disagrees with NCUC and ultimately include string criteria on morality and public order in its final report, then the recommendations should make clear that ICANN policy on this matter will not be more restrictive than the national law in which an applicant operates.

NCUC remains particularly troubled with Recommendation #20 that would allow the showing of a "substantial opposition" to entirely reject an application. It swallows up any attempt to limit string criteria to technical, operational, and financial evaluations. Recommendation #20 violates internationally recognized freedom of expression guarantees and insures that no controversial string application will ever be granted.

NCUC continues to reject Recommendation 11 and an expanded role of ICANN staff and outside expert panels to evaluate string criteria that is not technical, financial, nor operational.

Recommendation 1.

This is a laudable Recommendation and we support it. We support the broad introduction of many new gTLDs.^[5] We welcome the recognition that there are no technical constraints to introducing new gtlds and we hope to see consumer choice and demand served by a more robust approach in the future. ICANN's role is not to second guess the market place and decide which ideas are likely to succeed, but rather, to facilitate the process for the consumer's decision.

We refer to our concerns above as to the relationship between transparent, predictable criteria and vetoes over applications from unlimited sources.^[6] By the many grounds for challenge introduced, criteria will be created and applied *ex post facto* by those responsible for determining challenges. We are also concerned that "normally" in this context be defined more precisely. These issues must be addressed if the objectives of this Recommendation are to be achieved. In particular, a public opposition period is in direct contraction with Recommendation 1 and Implementation Principle A: "New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way."

Recommendation 2

It is beyond dispute that the DNS does not mirror trade mark regulation. Rather it grants plenary rights in words,^[7] without any of the compromises in the requirements for recognition, the limits to infringement and the defenses.^[8] This is best reflected in the serious issue in the DNS, whereby— *all* rights-holders now seek protection from dilutive use —when only truly famous marks are entitled to that protection in trade mark law.

The Recommendation is vague and thus a general veto for incumbents at the top level. We refer to Professor Christine Haight Farley's legal briefing paper (Attachment A) as to the meaning of confusingly similar. ^[9] We also refer to Professor Jacqueline Lipton's legal briefing paper (Attachment B) and its discussion regarding the limitations within trademark law on the rights of trademark holders to regulate speech.

The GNSO's draft recommendations cherry pick from trade mark law to create a pastiche of 'values' — divorced from context and structure.^[10] No account is taken of the legal requirement of use in commerce^[11] — yet trade mark law requires this. What about fair use, comment, nominative use, criticism, parody and tribute? All protected at law. Under the US Anti-Cybersquatting Consumer Protection Act (ACPA) for example, unless inherently distinctive (i.e. made up words), marks comprised of descriptive (ordinary dictionary) words

must acquire secondary meanings in order to become distinctive, otherwise famousness must be made out.^[12] Even then there is the safe harbor for fair and lawful use of another's trademark in a domain name.^[13] These balancing requirements are not reflected in the Recommendation—although lip service is paid to them.^[14] Defined criteria are absent and the promised balance and protection—a blank page open to numerous interpretations.

This Recommendation fails to adequately accommodate non-commercial speech and fair use of trademarks. Presumably what this all really means is that no "sucks" gTLDs (cyber-gripes) will ever be granted, nor indeed notdotcom, or anything that refers to or discusses an association with an existing trademark. Real competition often requires overlapping services that offer consumers choice.^[15]

Recommendation 3.

This ground for challenge is for rights holders. The language is vague and overbroad— *"existing legal rights of others."*^[16]

There is no recognition that trade marks (and other legal rights) have legal limits^[17]and — *defenses.*^[18] This Recommendation should also state that *such legal rights are subject to their legal limits* under their own national law. Without this—only half of trade mark law is adopted—the claimed rights, *but none of the defenses.*

After recent discussion and forthcoming revisions, the draft now refers to 'Freedom of Speech'.^[19] We welcome the amendment to the Recommendation, although believe it should use the term "Freedom of Expression" since that is the term used in international treaties and agreements. We remain concerned however that general references to Conventions and Treaties must be translated into real protection for the right of the public to make use of their legal rights to language and free speech.

Bizarrely, the level of support for the rights-holder seems to be thought to be determining—rather than the validity or extent of his claimed rights and the existence of defences:

"ii. An application may be rejected or deferred if it is determined, based on public comments or otherwise, that there is **substantial opposition** to it from significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support. **ICANN staff will develop criteria and procedures for making this determination**, which may be based upon ICANN's procedures which were used to examine the 2003 round of sponsored TLD applications."

What is provided for here is discretion.^[20] This (now recommendation #20) cannot be meaningfully considered absent the criteria. We also oppose the *"substantial opposition"* formula—used again elsewhere. This is not predictable criteria and nor in this case is it of any relevance whatsoever to the nature and quality of the rights claimed and the existence of limits and defences. We refer to the objectives of Recommendation 1 and their contradiction with a public opposition period.

Recommendation 5

We oppose any attempts to create lists of reserved names. Even examples are to be avoided as they can only become prescriptive.

We are concerned that geographic names should not be fenced off from the commons of language and rather should be free for the use of all. This has been the traditional approach of trade mark law and remains the case in many nations.^[21] Moreover the proposed recommendation does not make allowances for the duplication of geographic names outside the ccTLDs—where the real issues arise and the means of resolving competing concurrent use and fair and nominative use.

Recommendation 6

Again, we welcome the amendment to include recognition of rights to Freedom of Expression.^[22] It is quite clear that this applies to single words and to strings, see *Taubman v. Webfeats* 319 F.3d 770 (6th Circuit 2003) ("*The rooftops of our past have evolved into the Internet domain names of our present. We find that the domain name is a type of public expression, no different in scope than a billboard or a pulpit, and [defendant] has a First Amendment right to express his opinion about [plaintiff], as long as his speech is not commercially misleading, the Lanham Act cannot be summoned to prevent it*).

We welcome the deletion of GAC Public Policy principle 2.1 from the GNSO's recommendations. We objected in the strongest possible terms to the vague standard of "*sensitivities*," which would subject all to the most restrictive views and had no place in the international legal order. GAC quoted selectively from the preamble to the 1948 Universal Declaration of Human Rights (UDHR) without reference to the enumerated specific right to Freedom of Expression in Article 19.^[23] The UDHR Art. 29(2) provides the only permitted limits.^[24] Similarly, the European Convention on Human Rights (ECHR) mandates Freedom of Expression should only be subject to limits prescribed by law^[25] and necessary in a democratic society for one of the enumerated purposes, see Article 10^[26] which also applies to commercial expression.^[27] Strict scrutiny is applied to any attempt to limit the free expression of an idea.^[28]

This Recommendation is borrowed from trade mark law^[29] and the French concept of '*ordre public*.'^[30] This is now subject to Article 10 ECHR^[31] and Freedom of Expression and the modern standard is high.^[32] While a few nations limit Free Expression by laws preventing hate speech, and incitement to violence, lowering the threshold to '*sensitivities*' is tantamount to mandating political correctness,^[33] forced hegemony, and is dangerous and to be resisted in every context. It does not matter how laudable the public policy objective, ICANN should remain content neutral.^[34]

We oppose any string criteria based on morality and public order. The context is not exclusively commercial speech so trade mark law is not an analogy as registration of marks on government Registers involves an element of state sanction^[35] that is not true of the DNS (though many seek it).^[36] There is no consensus on the regulation of morality in non-commercial speech in international law. We refer to the quote from *Taubman* (above)—the TLDs are billboards. *Democracies do not have laws requiring people to speak or behave morally*. Some nations do have such rules – undemocratic theocracies mainly.

ICANN should stick to its technical remit, which it risks grossly exceeding here. It should defer to applicable national laws on matters of public order and morality. Applicants should comply with the content laws in the countries in which they operate.^[37] The only real issue is, in any event, public order which is already served by nations' own laws on obscenity, fighting words, hate speech and incitement.

Please be aware that criticism, satire, parody of others and their beliefs are a fundamental tenant of Freedom of Expression^[38] which includes the right to offend. ICANN must ensure this *in practice* and mere references to Treaties and Conventions do not go far enough.

Recommendation 7

We record that this must be limited to transparent, predictable and minimum technical requirements only. These must be published. They must then be adhered to neutrally, fairly and without discrimination.

Recommendation 8

We support this recommendation to the extent that the criteria is truly limited to minimum financial and organizational operational capability. We remain concerned that in implementation of this recommendation, burdensome, expensive, and unnecessary criteria could be applied. All criteria must be transparent, predictable and minimum. They must be published. They must then be adhered to neutrally, fairly and without discrimination.

Recommendation 9

We strongly support this recommendation and again stress the need for all criteria to be limited to minimum operational, financial, and technical considerations. We also stress the need that all evaluation criteria be objective and measurable. We note that a 'public opposition process' as contemplated by Recommendation 20 and the use of ICANN staff and expert panels (Rec. #11) to evaluate any additional criteria will significantly detract from the goals of Recommendation 9.

Recommendation 11

The use of ICANN staff to evaluate applicant criteria should be limited to the function of determining whether objective operational, technical, and financial criteria are met only. ICANN staff should not be making evaluations about morality or other public policy objectives. We furthermore strongly oppose any use of "Expert" panels to adjudicate someone's right to use a domain name. Neither ICANN staff nor expert panels can provide any level of public accountability or legitimacy to adjudicate fundamental rights. This will only invite insider lobbying and gaming. Getting this issue right in the policy gives meaning to the rest of the recommendations. Without objectivity, neutrality, impartiality and accountability here –all of the other Recommendations are meaningless platitudes. This function should be tendered out – just as the validation process in the Sunrise Rights Protection Mechanism has been in some cases. Arms length contractors should perform this task.

Recommendation 12

Our position in relation to Recommendation 11 applies mutandis mutandi. This should be tendered to qualified professionals, selected by rota, at arms-length who apply certain criteria.

Recommendation 20

As discussed above, we strongly oppose the '*substantial opposition*' criteria for rejecting a domain. A public opposition period grants a veto on the creation of a domain for any vocal (or well-financed) minority, or for any competitor in the marketplace of ideas or services.

Recommendation #20 is *totally* incompatible with internationally recognized Freedom of Expression guarantees. Not even trade mark applicants must have everyone agree –they can still succeed in the face of an opposition. This Recommendation will insure that no controversial gtlds will exist and provides the means for killing the following types of applications for new gtlds:

- The Catholic Church objects to the Church of England's application for ".christian";
- China objects to an application of ".humanrights" in Chinese characters;
- A competing bank applies for a ".bank";
- Competing factions within the same community each claim to be the rightful owner;
- The Moral Majority objects to Planned Parenthood's application for ".abortion".

Recommendation 20 swallows up any attempt to narrow the string criteria to technical, operational and financial evaluations. It asks for objections based on entirely subjective and unknowable criteria and for unlimited reasons and by unlimited parties. ICANN should endeavor to keep the core neutral of these types of policy conflicts, both because they invite disaster for ICANN to become entwined in such issues, but also because such a policy is incompatible with freedom of expression rights. In short, Recommendation #20 is bad policy for the public and it is bad policy for ICANN.

ATTACHMENT A TO NCUC STATEMENT**LEGAL BRIEFING FROM LAW PROFESSOR CHRISTINE HAIGHT FARLEY****Professor of Law and Associate Dean for Faculty and Academic Affairs****American University Washington College of Law****RESPONSE TO THE DRAFT FINAL REPORT OF THE GNSO NEW GTLDS COMMITTEE ON THE INTRODUCTION OF NEW GENERIC TOP-LEVEL DOMAINS****June 6, 2007****Statement by Christine Haight Farley****Professor of law****American University Washington College of Law**

I want to begin by commending the GNSO New TLDs Committee on their policy recommendations and implementation guidelines for the introduction of new top-level domains. Through the Draft Final Report ICANN has explicitly stated its intention to make the GTLD application process open and transparent. The Draft Final Report has focused the issues and prompted a useful discussion. However, because I believe that the Draft Final Report includes a number of misstatements of domestic and international trademark law, I offer my legal analysis of these provisions.

I will address my remarks only to Recommendations 2, 3 and 6 as these recommendations rely heavily on trademark law concepts.

Before I make observations specific to these recommendations, I would like to offer some general remarks about the overall incongruence between trademarks and domain names. It is important to note at the outset this general lack of equivalence between trademark law and domain name policy. For instance, trademark law the world over is fundamentally based on the concept of territoriality. Thus trademark law seeks to protect regionally and market-based marks without implication for the protection or availability of that mark in another region. In contrast, domain names have global reach, are accessible everywhere and have implications for speech around the world.

Likewise, trademark protections hinge on what the relevant consumer thinks. Again, the law considers the viewpoints of consumers of a particular country, region or market, and acknowledges the variability of these viewpoints across regions. Domain names are not directed to a certain class or geographical region of consumers—they are accessible to all. Therefore in order to take account of consumers' viewpoints, it would be necessary to consider a global public. The resulting one-size-fits-all approach would be anathema to trademark law in that it would leave consumers confused in one place while unjustifiably denying speech rights in another.

Finally, trademarks rights are not applied abstractly of in theory, but are always considered in context. Thus, in order to determine whether the use of a mark by another would likely cause confusion, it is necessary to analyze how mark is used in commerce. Consideration will be given to what goods or services it is applied to, what design or color scheme accompanies the use, what the level of consumer sophistication is, what marketing channels are used, etc. Generic top-level domains are necessarily abstract. We can not know in advance what the content of a website hosted at a certain address will be. It is therefore impossible to make fine-tuned conclusions about the appropriateness of certain domains. For these reasons, I strongly urge domain name policy makers to consider carefully the appropriateness of importing trademark law concepts into domain name policy.

Recommendation 2: "Strings must not be confusingly similar to an existing top-level domain."

In this recommendation, the Committee seems to be collapsing two distinctly different concepts: confusing similarity and likelihood of confusion. The Draft Final Report states that "'confusingly similar' is used to mean that there is a likelihood of confusion."^[39] However, confusingly similar is a different legal standard than likelihood of confusion. The Committee appears to base this recommendation on Section 3.7.7.9 of the ICANN Registrar Accreditation Agreement, which it cites, implying that the legal standard is consistent. But that section of the ICANN Agreement explicitly employs the standard of infringement, which is likelihood of confusion.

A determination about whether use of a mark by another is "confusingly similar" is simply a first step in the analysis of infringement. As the committee correctly notes, account will be taken of visual, phonetic and conceptual similarity. But this determination does not end the analysis. Delta Dental and Delta Airlines are confusingly similar, but are not likely to cause confusion, and therefore do not infringe. As U.S. trademark law clearly sets out, the standard for infringement is where the use of a mark is such "as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive..."^[40] While it may be that most cases of confusing similarity are likely to cause confusion, because the infringement standard takes account of how the mark is used, some cases of confusing similarity will not likely cause confusion.

In trademark law, where there is confusing similarity and the mark is used on similar goods or services, a likelihood of confusion will usually be found. European trademark law recognizes this point perhaps more readily than U.S. trademark law. As a result, sometimes "confusingly similar" is used as shorthand for "likelihood of confusion." However, these concepts must remain distinct in domain name policy where there is no opportunity to consider how the mark is being used. As applied to domain names, the only level of analysis is the first level of analysis: confusing similarity.

A related problem with this recommendation is that it equates domain names with trademarks as legally protectable properties. They are not. Trademarks are legally protected intellectual property because it is believed that the commercial use of a mark by another that is likely to cause confusion would injure consumers. Trademarks are legally protectable intellectual property also because their owners have developed valuable goodwill in the marks. Neither of these conditions of legal protection apply in the case of domain names.

Moreover, it is not clear what consumers would be confused about when encountering a string that is confusingly similar to an existing top-level domain. Because, unlike trademarks, strings are not inherently commercial communication means, it does not follow that consumers would incorrectly assume that the string would indicate source of origin. For example, <http://nmhm.washingtondc.museum/> does not suggest to consumers a connection with www.museum.com.

Beyond top-level domains, the Draft Final Report states that "strings should not be confusingly similar either to existing top-level domains like .com and .net or to existing trademark and *famous names*."^[41] The

Draft Final Report notes that the Committee relied on "a wide variety of existing law" to reach this standard. [42] And yet, "famous names" is not a legal category under any trademark law. International trademark law grants rights to "well-known marks"[43] and to "trade names,"[44] and U.S. law grants rights to "famous marks,"[45] but "famous names" seems to be a construct created by the Committee. Clearly, the domain name policy should protect only recognized intellectual property.

Recommendation 3: "Strings must not infringe the existing legal rights of others that are recognized or enforced under generally accepted and internationally recognized principles of law."

There are simply too many legally recognized trademarks in the world to make this recommendation workable. The United States alone registers well over 100,000 trademarks each year[46] and there were 1,322,155 active certificates of registration last year. In the United States, state registered trademarks and common law trademarks are also legally recognized. Protected trademarks include generic terms, geographical terms, names, and fanciful words.

Recommendation 6: "Strings must not be contrary to generally accepted legal norms relating to morality and public order."

The Committee is correct that a variety of trademark legislation restrict registrations based on some notion of offense or immorality. Unfortunately, the Committee seeks to extend this trademark law concept to domain name policy. This extension is not a natural one and presents many problems in its application.

Where these content restrictions exist in trademark law they are understood as merely restricting the registration of trademarks, not the use of such trademarks. That is, under certain legislation a trademark may be deemed unregistrable but the trademark owner may still use the trademark in commerce and may even have the benefit of legal protection over the trademark. The only restriction is that the trademark owner is denied certain benefits of registration.

The United States has such a content restriction in its trademark law.[47] What saves this legislation from violating the First Amendment is that it is not a restriction on use; it is merely a restriction on certain legal benefits deriving from federal registration. Any restriction of the use of the trademark would need to comply with the First Amendment. For instance, a mark may be restricted from use where it has been found to be obscene. Obscenity is a legal category whose threshold is well above the category of immoral or offensive speech.

The restriction of a generic top-level domain is more akin to the restriction on use than to the restriction on federal trademark registration. Because restricting offensive words in Generic top-level Domains would concomitantly restrict the ability of all speakers, commercial and non-commercial, ICANN should consider legal models outside of trademark law that better address the balance of speech rights.

This recommendation also illustrates the lack of fit between trademark law and domain name policy. Because trademark law is territorial in nature, legal standards reflect the consumer perspectives of the particular state. These standards are thus expected to vary from state to state as the way consumers respond to marks in one state may differ from the way consumers would respond to the same mark in another state. Trademark content restrictions are similar in approach. For instance, under U.S. trademark law, a mark will be refused registration if it is deemed to be scandalous or immoral when considered from the perspective of "a substantial composite of the general public." [48] The "public" is understood to mean the U.S. public. In order to extend this legal standard to domain names it would be necessary to consider a substantial composite of the general public of the entire world. This is obviously an unworkable standard.

Moreover, trademark law standards are always applied in the context of how a consumer would encounter the mark. Thus, the USPTO and the courts consider the entire label, what products or services are sold under the mark and what channels of commerce and marketing will be used. As a result, marks

challenged as being scandalous may in fact be found to have a double entendre.[49] The extension of this trademark law standard to domain name policy thus risks prohibiting words as generic top-level domains that could well be used in inoffensive ways.

A few other observations are in order. First, under U.S. trademark law, in cases of doubt or ambiguity, both the USPTO and the Federal Circuit will pass the mark to publication to give others the opportunity to object. [50] If ICANN finally decides to employ any content restrictions, erring on the side of permitting the speech should be the rule.

Second, the Paris Convention permits rather than requires content restrictions. Article 6*quinquies* of the Paris Convention merely allows a Member state to deny registration to a mark duly registered in another Member state on the grounds of morality or public order.[51] This article makes clear the expectation that a mark may be acceptable in one state, while it is offensive in another. The WTO TRIPS Agreement is silent on content restrictions.[52]

Finally, although some trademarks have been denied registration under U.S. trademark law, this remains a little known or utilized provision of U.S. trademark law. Furthermore, the majority of challenges brought under this provision are brought by third parties and not the USPTO.

Thank you for your consideration.

Respectfully submitted,

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ATTACHMENT B TO NCUC STATEMENT

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LEGAL BRIEFING FROM LAW PROFESSOR JACQUELINE LIPTON

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New Top Level Domain Name Introduction Proposals

Briefing Paper: Some Legal Issues

Professor Jacqueline Lipton

June 6, 2007

Background

I have been asked to prepare a brief legal issues paper for IP Justice, by its Executive Director, Robin Gross. The paper is in respect of ICANN's recent Proposed Recommendations for the introduction of new generic Top Level Domain Names (gTLDs) and the Noncommercial Users' Constituency's (NCUC) suggested amendments to those recommendations.[53]

Issues Raised by IP Justice and NCUC (ICANN Recommendations 3, 6, 8, and 11)

The current ICANN recommendations contemplate that ICANN should implement a process that would accommodate the introduction of new gTLDs that are not currently available to Internet domain name registrants or registries. In its recommendation paper,[54] it contemplates several principles for deciding on strings of characters that may be utilized in a new gTLD. These principles include:

- New strings should not infringe the existing legal rights of others (*Recommendation 3*).
- New strings should not be contrary to generally accepted legal norms relating to morality/public order (*Recommendation 6*).
- Applications for new strings should be rejected or deferred if there is substantial opposition to a relevant string from 'among significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support' (*Recommendation 8*).
- ICANN staff evaluators will make preliminary determinations about applications for new gTLD strings (*Recommendation 11*).

The NCUC and IP Justice have raised particular concerns about aspects of these recommendations.[55] Specifically, they are concerned that some of ICANN's proposals give too much weight to trademark holders' interests without giving sufficient weight to other competing legal interests in words and phrases, such as those arising from legal concepts of free speech.[56] They have also voiced concerns that under Recommendation 6, ICANN may by default be trying to legislate internationally for morality and public order and that this may not be an appropriate burden for ICANN, as opposed to national lawmakers. They raise related concerns with respect to ICANN Recommendations 8 and 11 in the sense that these recommendations focus more on international legal and cultural norms than on the technical capacities and functions of ICANN. Recommendation 8 also raises the specter of censorship in the introduction/use of new gTLDs by bodies that have not been clearly defined in the ICANN proposals. It is also unclear how decisions would be made as to the rejection or deferral of new strings on this basis. Which organizations would be consulted? Whose policies would be applied? What experts, if any, would ICANN consult?

ICANN Recommendations 5, 9 and 12

I would add some similar concerns about the following ICANN recommendations:

- New strings should not include country, territory or place names or words describing countries, territories, languages or peoples in the absence of agreement with relevant governments or public authorities (*Recommendation 5*).
- Applications for new gTLDs must entail a clear and pre-published application process using 'objective' and 'measurable' criteria (*Recommendation 9*).

- Dispute resolution processes must be established prior to the start of the relevant process (*Recommendation 12*).

Recommendation 5. This recommendation raises the specter of government censorship or control of particular gTLDs. This may or may not prove to be a problem in practice given the existence of two character country-code top level domains (ccTLDs) within the current system. These ccTLDs have apparently not, to date, created major problems, at least as compared with some of the issues arising under currently available gTLDs. However, it is possible that a new gTLD string pertaining to a country would prove to be more desirable than a corresponding ccTLD and this recommendation may give imbalances of power or control over particular new gTLDs to certain governments or public authorities. In some ways this concern mirrors the concerns of IP Justice and the NCUC about Recommendation 8 to the extent that it is unclear under that recommendation whose policies should be protected in the decision to defer or reject registration of a particular gTLD string. An associated concern with recommendation 5 is that it may not always be clear who is the relevant government or public authority who would need to agree to the use of a particular new gTLD: for example, would all Asian countries have to agree to the use of a '.asia' gTLD and, if so, how should 'Asian country' be defined in this context and who should define it?[57] Moreover, who should decide which 'public authorities' should be consulted about use of particular new gTLDs? How should 'public authority' be defined here?

Recommendation 9. This recommendation calls for the use of pre-published 'objective' and 'measurable' criteria in the application process for new gTLDs. It is not clear how ICANN *per se* would establish such criteria. If it is contemplated that ICANN would consult relevant national and international bodies or individuals in discharging this problem, then perhaps this recommendation is not so problematic. However, such a consultation process would likely take a long time and may slow down the introduction of new gTLDs for a considerable period. Such a process would entail: (a) identifying relevant expert bodies; (b) consulting with them on relevant issues: and, (c) translating relevant issues into a set of pre-published objective and measurable criteria for the new gTLD application process. This further assumes that such issues are indeed transferable to objective and measurable criteria.

Recommendation 12. Dispute resolution processes may be much more problematic in practice than contemplated by ICANN's recommendation 12. My assumption is that Recommendation 12 refers to simple dispute resolution processes for new gTLDs such as those currently in effect under the Uniform Domain Name Dispute Resolution Policy (UDRP)[58] for some existing gTLDs. The problem here is that dispute resolution processes that take account of multiple legal interests outside commercial trademark interests are not easy in practice. Different jurisdictions, and different bodies within the same jurisdiction, may diverge widely in attitudes and even in laws on free speech, public order etc. Arbitrators under simple UDRP-style dispute resolution processes may not be equipped to handle these kinds of disputes. Dispute resolution procedures may therefore have to be somewhat more complex than is currently contemplated by ICANN if they are to take account of a variety of competing legal interests, rather than merely trademark interests. For example, while there are some things a simple arbitration process can handle well, there are other things that are much more complex and difficult and may need to be turned over to national courts or experts.[59]

General Discussion

It is important to start re-focusing the regulation of the Internet domain name system generally on interests outside of pure trademark interests. The introduction of new gTLDs and the development of processes for introducing them may provide a good opportunity for achieving this goal. However, any attempt to regulate broad policy issues relating to social and cultural norms on speech, public order and morality in domain names will be very difficult for any national or international body or group. ICANN also faces the practical

difficulty that its major area of expertise is technical and functional. It is therefore important for ICANN to clarify what groups, bodies or individuals it might utilize in carrying out future legal and social developments within development of its domain name processes. In particular, ICANN should consider more specifically who to consult in formalizing specific processes for: (a) the introduction of new gTLD strings; (b) establishing dispute resolution procedures for those strings; and, (c) deciding whether the introduction of particular new strings should be deferred or rejected.

It should also be noted at the outset that many of the key problems identified by ICANN, IP Justice and the NCUC reflect legal issues that have arisen in the past with respect to existing gTLDs, although perhaps in slightly different contexts. In other words, the balance between trademark interests and other legitimate interests in Internet domain names, for example, has already proved problematic in situations involving disputes about registration and use of domain names under existing gTLDs (notably .com, .org and .net). Thus, in many ways, the 'balance of interests' questions in the new gTLD debates could be regarded as an extension of unresolved issues under current domain name laws and policies. The addition of new gTLD processes will likely exacerbate existing legal problems. The upside of this is that it may, and hopefully will, provide a new forum for addressing some of these problems.

In my view, it is important to put the debate about new gTLD processes into its historical context in order to properly address the concerns that have been raised here. So please bear with me for a couple of paragraphs while I describe this context and why it is important now. The current framework for regulating disputes relating to '.com', '.net' and '.org' domain names has been focused largely on the protection of commercial trademark holders against cybersquatters.[60] There is little harmonized attention paid to the protection of other legitimate interests in relevant Internet domain names within this framework. This is evidenced in the drafting of the UDRP and the American Anti-Cybersquatting Consumer Protection Act (ACPA).[61] While these regulations do make allowances for 'legitimate interests' in domain names where relevant domain names have not been registered or used in bad faith,[62] they do not set out rules to affirmatively protect non-trademark-based registrations and uses of .com, .org or .net domain names.[63] This is not particularly surprising because it was not the intention behind these rules to do so.

The historical focus on the protection of trademarks against bad faith cybersquatters is understandable within its context. These were key concerns of relevant regulators in the mid to late 1990s when e-commerce was in its infancy, and governments wanted to encourage this new medium of commerce. It was widely thought – although not universally agreed – that bad faith cybersquatting *per se* was a socially wasteful activity that potentially harmed the development of electronic commerce without producing any associated social benefits.[64] There is probably nothing inherently wrong with the UDRP and ACPA in this respect. They did deal with a real world problem and, in many respects, they are now old news. Presumably, this is why debates today about the introduction of new gTLD processes do not dwell on the rules and regulations implemented in 1999. However, those rules and regulations have raised new post-1999 problems that have not yet been addressed in a systematic way.[65]

Issues under the existing domain name system that relate to the balance of trademark interests with other legitimate interests in domain names do include the need to balance trademark interests with interests such as: interests in personal names, cultural and geographic indicators, free speech (including the right to parody, comment on and criticize a trademark holder), other basic human rights, and rights to free and democratic government.[66] ICANN has identified some of these issues in its recommendations. IP Justice and the NCUC have raised concerns about clarification of, as well as appropriate implementation of, ICANN's stated goals here.

The main problem for ICANN in identifying and implementing these kinds of 'interest balancing ideals' is that, as with its administration of existing gTLDs, ICANN's expertise is largely technical and functional. It is not a body staffed with people whose main expertise is to deal with these difficult balances of competing legal and

social interests in multiple societies around the world. Effectively bringing debates about international public order and morality, as well as free speech and human rights generally, into a predominantly technical process comes at a high cost. However, failing to address these issues in a relevant forum also comes at a high cost, as previous and current experiences have shown us.

What is needed at this point is a combination of the following: (1) ensuring that the technical aspects of this process do not somehow become a default proxy to legislate for important and complex national and international social, cultural and legal norms; (2) more clearly identifying bodies or individuals who can appropriately identify and make recommendations on relevant issues within the development of the more technical aspects of the process; and, (3) ensuring that these bodies are brought into the relevant process in time to prevent damage to important legal and social interests. To some extent, that may be what is happening at the moment, but this process may need to be more formalized to avoid exacerbating some of the problems that have arisen in the past under the current domain name system.

Conclusions

The aim of this briefing paper has been to raise awareness of ideas that may be pertinent in the ongoing process to develop new gTLDs. My hope is that this paper generates, or at least facilitates, useful debate in this context. There are, as yet, no clear solutions to many of the problems addressed. We seem to be at a point in the development of the new gTLD processes where it would be useful to more fully identify and discuss relevant legal and social issues, as well as bodies and individuals that may be best suited to advise on them, and ultimately help draft and implement regulations about them where possible. This is an important time in the development of the domain name system and this kind of debate and development would prove extremely useful, particularly in order to avoid some of the practical problems with respect to new gTLDs that are already evident in the administration of domain names registered under existing gTLDs.

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[1] Available online at: http://www.ipjustice.org/ICANN/NCUC_Comments_on_New_gTLDs.pdf

[2] Indeed— one of its refrains is a '*substantial opposition*' formula. This is not rule based predictable criteria.

[3] ICANN should defer to nations' laws on obscenity and not attempt to gold-plate them with unrelated concepts from trade mark law.

[4] This was added to the draft on 7 June 2007 to Recommendation 6.

[5] We note the defensive and cautious approach employed in the discussion on this recommendation is symptomatic of the suspicion with which the creation of new a gTLD has historically been approached— as the grant of an indulgence. This has led to the artificial scarcity of today.

[6] We also welcome standard contracts albeit that we believe that everyone would be also served by stronger analysis and recommendations on standardization in Rights Protection Mechanisms.

[7] G. Dinwoodie, *(National) Trademark Laws and the (Non National) Domain Name System*, 21 U. PA. J. Int'l Econ. L. 495 (2000) p. 520.

[8] Those include the requirements that marks be well-known or famous before dilution can be claimed; the limits to dilution, the requirement that the speech must be commercial and the infringing use— use as a trade mark, the prohibition on generic and descriptive marks; honest concurrent use; geographic and territorial limits and others.

[9] It says in (iii)"In addition, the concept of "confusingly similar" is used to mean that there is a likelihood of confusion on the part of the relevant public. In international trade mark law, confusion may be visual, phonetic or conceptual. The Committee used a wide variety of existing law to come to some agreement that strings should not be confusingly similar either to existing top-level domains like .com and .net or to existing trademark and famous names"

[10] The pre 7 June draft, referred to consumer confidence and security. These have now gone. No criteria replace them to provide any qualifications.

[11] See §10(6) of the UK 1994 Trade Marks Act 1994 which requires use in the course of trade for infringement. See also Art. 5 of the Trade Marks Directive (89/104). In *Arsenal Football Club v Matthew Reed* [2003] R.P.C. 9 the ECJ affirmed the proprietor cannot prohibit the use of a sign identical to the trade mark for goods also identical, if that use cannot affect his interests as proprietor having regard to its functions—so that certain uses for purely descriptive purposes are excluded from the scope of Art. 5(1). This includes use creating the impression of a link in trade, so that the use must be in the course of trade and in relation to goods within Art. 5(1). If there is identity of sign and goods or services, the protection under Art.5(1) (a) is absolute, whereas Art.5(1) (b) also requires a likelihood of confusion, see *Anheuser-Busch v Budejovicky Budvar NP* Case C -245/02 [2005] E.T.M.R 27. See also §10(6) which enables comparative advertising —also permitted by Directive (97/55/EC)—but also reference to and identification of genuine goods and services of the proprietor provided honest. See Lanham Act, 15 U.S.C. §1114(1)(a) which defines infringement as use of "a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive...". Further under the Federal Trademark Dilution Act (FTDA) a claimant alleging a violation must prove inter alia: " the defendant is making a commercial use of the mark in commerce." The Anticybersquatting Consumer Protection Act 1999 (ACPA) requires bad faith *intent to profit*. See *Taubman v. Webfeats* 319 F.3d 770 (6th Circuit 2003) ("The Lanham Act is constitutional because it only regulates commercial speech, which is entitled to reduced protections under the First Amendment" many expressions of a mark were not a 'trademark use' and not likely to cause confusion and therefore "outside the jurisdiction of the Lanham Act and necessarily protected by the First Amendment."). See *Bosley Med. Inst. v. Kremer*, 403 F.3d 672 (9th Cir. 2005)(non-commercial expression of opinion was not a "trademark use" subject to regulation by the mark holder). See also *1-800 Contacts v. WhenU.com* 414 F3d 400 (2d Cir. 2005), (the vast majority of uses were outside the scope of trademark law and only those specific uses visually associated with the sale of goods/services could be regulated by trademark).

[12] The following factors are to be considered in relation to distinctiveness and famousness under 15 U.S.C. §1125(c)(1): (A) the degree of inherent or acquired distinctiveness of the mark; (B)the duration and extend of use of the mark in connection with the goods or services with which the mark is used; (C)the duration and

extent of advertising and publicity of the mark; (D)the geographical extent of the trading area in which the mark is used; (E)the channels of trade for the goods and services with which the mark is used; (F) the degree of recognition of the mark in the trading areas and the channels of trade used by the marks' owner and the person against whom the injunction is sought; (G)the nature and extent of use of the same or similar marks by third parties; and (H) the Act by which it was registered.

[13]15 U.S.C. §1125(B)(ii).

[14] See (ix) *"The proposed implementation plan deals with a comprehensive range of potentially controversial (for whatever reason) string applications which balances the need for reasonable protection of existing legal rights and the capacity to innovate with new uses for top level domains that may be attractive to a wide range of users"* In fact –this claimed balance is entirely absent. We can only assume it refers to implementation guideline 6 *"ICANN will provide for the ability to settle conflicts between applicants (such as string contention) at any time. A defined mechanism and a certain period for resolution of identified conflicts will be provided."*

[15] Muller & McKnight, *The Post .com Internet*, (2003) at p. 11, www.digital-convergence.info.

[16] Prior to 7 June, it also employed *"prior third party rights"* and gave the examples of trade marks and rights in names and acronyms of inter-governmental organizations.

[17] E.g.—commercial use; geographic and territorial limits; the Nice Classification system for classes; requirements of true fame for dilution.

[18] E.g. fair use; genericness/descriptiveness; honest concurrent use; own name; invalidity; deceptiveness, geography, etc.

[19] We would also like to see recognition of the rights of all to the commons of language. These include but are not limited to the rights of the public to free speech and to use descriptive and generic words, including where permitted by the law of the nation state where they reside, to use words which may be subject to Legal Rights in particular classes of the Nice Classification System—outside those classes. In relation to unregistered Legal Rights, they include the right to use words that are not subject to protection in their nation state or where no goodwill or reputation arises in their nation state in relation to such a word. They include the right to make fair and legitimate use of words in which others may claim Legal Rights. Trade mark law does this—via the limits, and the highly sophisticated compromises in the defenses.

[20] Further, it continues: iii. There are a number of ways in which ICANN could approach the resolution of this type of problem which includes the full range of "ICANN saying nothing; ICANN identifies a possible issuing and ICANN files a complaint; ICANN identifies a possible issue but relies on a complainant to file it formally; ICANN identifies an issue, makes a decision and the applicant can appeal." iv. The final approach to this set of potentially controversial problems will be resolved through ongoing discussions with members of the Committee and ICANN's implementation team. This is Byzantine and esoteric. To the uninitiated it is also meaningless. To the initiated it represents the ability to lobby against a particular application. We refer the Council to the admirable aims expressed in Recommendation 1.

[21] The UK 1994 Trade Marks Act provides at §3(1)(c) that trade marks which consist exclusively of signs or designations which serve to indicate geographical origin should not be registered and the ECJ has interpreted this as requiring that geographical names which are liable to be used as undertakings must remain available to such undertakings as indications of the geographical origin of the category of goods concerned, see *Windsurfing Chiemsee* [1999] ETMR 585. See however the European Regulation 2081/92 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, as amended by Regulation 535/97, which allows protections for these products.

[22] This change was made on 7 June 2007.

[23] "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[24] " (2) *In the exercise of his rights and freedoms, everyone shall be subject only to such limitations **as are determined by law solely for the purpose** of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*"

[25] This binds all in the UK because it binds the courts who must interpret all law in accordance with it, §6 Human Rights Act 1998.

[26] "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...(2) The exercise of these freedoms, since it carries with it duties and responsibilities, *may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society*, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[27] See *Casado Coca v Spain* (1994) 18 EHRR 1 §§33-37

[28] Art 10's limitations must be justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued, see Case C-112/00 *Schmidberger Internationale Transporte und Planzuge v Austria* [2003] 2 CMLR 34, p.1043.

[29] Art. 6 quinquies, paragraph B3 of the Paris Convention of 20 March 1883 (as last revised at Stockholm on 14 July 1967) provides for refusal and invalidity of registration in relation to trade marks that are 'contrary to morality or public order'. See Art. 7(1)(f) of the Community Trade Mark Regulation and Art. 3(1)(f) of the Trade Marks Directive. In the UK §3(3)(a) of the Trade Marks Act 1994, trade marks shall not be registered if they are 'contrary to public policy or accepted principles of morality'.

[30] *Philips Electronics NV v Remington Consumer Products* [1998] RPC 283 at 310 per Jacob J. See also the use of the words 'contrary to ... public order' in the English text of Article 6 quinquies of the Paris Convention and the words 'qui sont contraires à l'ordre public' in the French language versions of Article 7(1) (f) of the Community Trade Mark Regulation and Article 3(1)(f) of the Trade Marks Directive.

[31] This is treated as falling within prevention of disorder as the relevant enumerated purpose. That is, by accommodating the concept of '*ordre public*' within the '*prevention of disorder*' (in the French text of the Convention '*à la défense de l'ordre*') under Article 10. However, the right to freedom of expression predominates and any real doubt as to the applicability of the objection must be resolved by upholding the right to freedom of expression, hence acceptability for registration.

[32] See Case R 111/2002-4 *Dick Lexic Limited's Application* (25 March 2003) the Fourth Board of Appeal of the Community Trade Marks Office at §9 "these words merely designate things but they do not transmit any message; secondly, the association of the two words does not necessarily reinforce the connotation of the mark.... In principle, the mark does not proclaim an opinion, **it contains no incitement, and conveys no**

insult. In the Board's opinion, in these circumstances, the mark should not be regarded as contrary to either public policy or accepted principles of morality." See also IN THE MATTER OF Application No. 2376955, to register a trade mark in classes 25 & 26 by Sporting Kicks Ltd, Decision by C Hamilton 11 November 2005 where the level was a badge of antagonism and likely to cause alarm or distress.

[33] The only measure we are aware of is the Additional Protocol (to the European Convention on Cybercrime) concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems in force in 2006. The US did not sign or ratify due to its conflict with First Amendment Free Speech and nor did the UK.

[34] In *Reno v. American Civil Liberties Union*, 117 St. Ct. 2329 not even the legitimate and important congressional goal of protecting children from harmful materials, was to abridge the freedom of speech protected by the First Amendment.

[35] For the US position see, *Moral Intervention in the Trademark Arena: Barring the Registration of Scandalous and Immoral Trademarks* (1993) 83 TMR 661 by Stephen R. Baird

[36] Further, trade mark laws are territorially limited and ccTLDs are premised on the assumption that a nation is monocultural with a unitary legal system and a generally accepted standard of morality and taste often with only one or two dominant religions. No such standards can be extrapolated globally in a multicultural context.

[37] If the proposed name would infringe **a law** in a nation state which objects to the application—the application could be granted with conditions restricting or preventing its use in the objecting state(s) which we understand is technically possible. This would prevent one State imposing its laws on others.

[38] We refer to the Parliamentary Assembly of the Council of Europe Resolution 1510 (2006) on Freedom of Expression and Respect for Religious Beliefs: "10. *Human rights and fundamental freedoms are universally recognized, in particular under the Universal Declaration of Human Rights and international covenants of the United Nations. The application of these rights is not, however, universally coherent. **The Assembly should fight against any lowering of these standards**.....* 11.. *What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place.* 12. *The Assembly is of the opinion that freedom of expression as protected under Article 10 of the European Convention on Human Rights **should not be further restricted to meet increasing sensitivities of certain religious groups**. At the same time, the Assembly emphasises that hate speech against any religious group is not compatible with the fundamental rights and freedoms guaranteed by the European Convention on Human Rights and the case law of the European Court of Human Rights."*

[39] See Draft Final Report of the GNSO New TLDs Committee on the Introduction of New Generic Top-level Domains, 2.iii (2007), available at <http://gnso.icann.org/drafts/pdp-dec05-draft-fr.htm> (as of June 6, 2007).

[40] See Lanham Act, 15 U.S.C. § 1051 (3) (d).

[41] See Draft Final Report of the GNSO New TLDs Committee on the Introduction of New Generic Top-level Domains, 2.iii (2007) (emphasis added), available at <http://gnso.icann.org/drafts/pdp-dec05-draft-fr.htm> (as of June 6, 2007).

[42] *Id.*

[43] See Paris Convention, at Article 6*bis* (1979), available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (as of June 6, 2007).

[44] See Paris Convention, at Article 1 (stating "[t]he protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition."), available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (as of June 6, 2007).

[45] 15 U.S.C. § 1127 (c).

[46] In 2006, the USPTO reported that 147,118 trademarks were registered. See http://www.uspto.gov/web/offices/com/annual/2006/50315_table15.html (as of June 6, 2007).

[47] Under U.S. law, marks can be refused registration if they are regarded as "immoral or scandalous." 15 U.S.C. § 2 (a). However, even if a mark is found to be immoral and therefore unregistrable, a mark owner may still use the mark to market its goods in commerce and may still avail itself of federal trademark protections including bringing suit in U.S. courts.

[48] See e.g., *In re Mavety Media Group*, 33 F.3d 1367 (Fed. Cir. 1994).

[49] See e.g., *In re Hershey*, 6 U.S.P.Q.2d 1470 (T.T.A.B. 1988) (where the mark was considered in the context of the design that accompanied it and found not to be scandalous).

[50] *McCarthy on Trademarks and Unfair Competition*, § 19.77.

[51] See Paris Convention, at Article 6*quinquies* (stating that marks duly registered in another Member state *may* be refused registration "when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. "), available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (as of June 6, 2007).

[52] See TRIPS:Agreement on Trade Related Aspects of Intellectual Property Rights §2, available at http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm#2 (as of June 6, 2007).

[53] Available at <http://www.ipjustice.org/ICANN/062007.html>, last viewed on June 5, 2007.

[54] Available at <http://www.ipjustice.org/ICANN/GNSORecomOverview11May2007.htm>, last viewed on June 5, 2007.

[55] These concerns are voiced at on IP Justice's website in NCUC's Recommended Amendments to the ICANN proposals: <http://www.ipjustice.org/ICANN/062007.html>, last viewed on June 5, 2007.

[56] See for example recommendation 3 which specifically mentions 'trademark' rights under the original ICANN proposal, but would additionally include free expression rights under the suggested NCUC amendments.

[57] In Australia, for example, 'Asia' colloquially tends to refer to Asia-Pacific countries such as Malaysia, Thailand, Indonesia etc, while in the United Kingdom, the term is more likely to be used to refer to countries such as India and Pakistan, with the term 'oriental' often reserved for Asia-Pacific countries.

[58] Full text available at: <http://www.icann.org/udrp/udrp-policy-24oct99.htm>, last viewed on June 6, 2007.

[59] For example, an arbitrator can generally quite easily tell if a domain name has been registered for a socially wasteful purpose (eg registering a domain name and offering it up for sale without using the relevant website for any other purpose). This can be established by simply looking at the website and probably comes under a heading like 'socially wasteful bad faith cybersquatting'. However, if the relevant website contains some content and is being used in some way to communicate a message – whether complimentary or not - about an associated trademark holder or other entity, it is much more difficult for an

arbitrator to establish respective rights and interests in the relevant domain name. This kind of situation (eg unauthorized fan website, unauthorized political commentary, unauthorized gripe site or parody site about a trademark holder) will entail balancing free speech interests against the legal rights of the complainant. Those legal rights themselves may be based in a variety of laws such as trademark, privacy, unfair competition etc. Any dispute resolution mechanism that truly attempts to balance these interests effectively, either in an existing domain space or with respect to an application to register a new gTLD, is going to have to be a lot more complex than existing systems like the UDRP. The question is how to establish such a system and who should administer it. ICANN may not be best charged with this function at the end of the day. See also discussion in Conclusion section of: Jacqueline Lipton, *Who Owns 'Hillary.com'? Political Speech and the First Amendment in Cyberspace*, Boston College Law Review, (forthcoming, spring 2008), draft available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982430.

[60] "Cybersquatting, according to the United States federal law known as the Anti-Cybersquatting Consumer Protection Act, is registering, trafficking in, or using a domain name with bad-faith intent to profit from the goodwill of a trademark belonging to someone else. The cybersquatter then offers to sell the domain to the person or company who owns a trademark contained within the name at an inflated price." (definition from Wikipedia, available at: <http://en.wikipedia.org/wiki/Cybersquatting>, last viewed on June 6, 2007).

[61] 15 U.S.C. § 1125(d).

[62] 15 U.S.C. § 1125(d)(1)(B)(ii); UDRP, para. 4(c).

[63] With the exception of 15 U.S.C. § 1129 from the ACPA which does protect personal names against bad faith cybersquatters regardless of trademark status.

[64] See, for example, discussion in Jacqueline Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 Wake Forest Law Review 1361, 1369-1371 (2005) (full text available at: <http://www.law.wfu.edu/prebuilt/w08-lipton.pdf>, last viewed on June 5, 2007). The most cited example of traditional cybersquatting is probably the case of Dennis Toeppen who registered reportedly around 100 domain names corresponding with well known marks in the hope of making significant amounts of money for transfer of the names to relevant trademark holders. Today, Toeppen chronicles his own story at: <http://www.toeppen.com/>, last viewed on June 5, 2007. Many have written about conduct such as Toeppen's and about its place in the development of the current gTLD regulation system. For a summary of these legal developments in the late 1990s and more detail on the concerns I raise here, see: Jacqueline Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 Wake Forest Law Review 1361 (2005) (full text available at: <http://www.law.wfu.edu/prebuilt/w08-lipton.pdf>, last viewed on June 5, 2007).

[65] Despite some attempts to refer certain issues to the World Intellectual Property Organization ('WIPO'): for example, the need to balance trademark interests against interests in personal names and geographic and cultural indicators. These issues are discussed in the Second WIPO Internet Domain Name Process, Chapters 5-6, available in full text at: <http://www.wipo.int/amc/en/processes/process2/report/html/report.html>, last viewed on June 5, 2007.

[66] I have written previously, and in detail, about many of these issues in the following articles: Jacqueline Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 Wake Forest Law Review 1361 (2005) (full text available at: <http://www.law.wfu.edu/prebuilt/w08-lipton.pdf>); Jacqueline Lipton, *Commerce vs Commentary: Gripe Sites, Parody and the First Amendment in Cyberspace*, Washington University Law Review (forthcoming, summer 2007), draft available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925691; Jacqueline Lipton, *Who Owns 'Hillary.com'? Political Speech and the First Amendment in Cyberspace*, Boston College Law Review, (forthcoming, spring 2008), draft available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982430.

Impact Statement of the Registrars Constituency

Regarding the Draft Final Report on the

Introduction of New Generic Top-Level Domains

July 4, 2007

Recommendation 1	ICANN must implement a process that allows the introduction of new top-level domains.	IMPACT: New gTLDs present an opportunity to Registrars in the form of additional products and associated services to offer to its customers. However, that opportunity comes with the costs of implementing the new gTLDs as well as the efforts required to do the appropriate business analysis to determine which of the new gTLDs are appropriate for its particular business model.
Recommendation 2	Strings must not be confusingly similar[15] to an existing top-level domain.	IMPACT: Registrars would likely be hesitant to offer confusingly similar gTLDs due to customer service and support concerns. On the other hand, applying the concept too broadly would inhibit gTLD applicants and ultimately limit choice to Registrars and their customers.
Recommendation 3	Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.	IMPACT: Very little direct impact.
Recommendation 4	Strings must not cause any technical instability.	IMPACT: This is important to Registrars in that unstable registry and/or zone operations would have

a serious and costly impact on its operations and customer service and support.

Recommendation 5	Strings must not be a Reserved Word.	IMPACT: Depends on what Words are reserved and what, if any, the process is for adding Words to the reserved list. If applied too broadly it would inhibit gTLD applicants and ultimately limit choice to Registrars and their customers.
Recommendation 6	Strings must not be contrary to generally accepted legal norms relating to morality and public order.	IMPACT: If applied too broadly it would inhibit gTLD applicants and ultimately limit choice to Registrars and their customers.
Recommendation 7	Applicants must be able to demonstrate their technical capability to run a registry operation.	IMPACT: This is very important to Registrars in that inefficient registry operations would have a serious and costly impact on its operations and customer service and support. Minimum technical requirements should be applied, but not to the extent that it inhibits new entrants.
Recommendation 8	Applicants must be able to demonstrate their financial and organisational operational capability.	IMPACT: This is important to Registrars insofar as it might impact stable operations of the registry and/or zone. However, only minimal requirements should be applied so as not to inhibit new entrants or an open market.
Recommendation 9	There must be a clear and pre-published application process using objective and measurable criteria.	IMPACT: Important in that clear, objective, and measurable criteria will encourage applicants resulting

in more choice for Registrars and their customers.

Recommendation 10	There must be a base contract provided to applicants at the beginning of the application process.	IMPACT: This would benefit Registrars in that they would have a clear understanding of the policies and operational rules that will impact their and their customers' relationships with Registry Operators.
Recommendation 11	Staff Evaluators will be used to make preliminary determinations about applications as part of a process which includes the use of expert panels to make decisions.	IMPACT: Very little direct impact assuming that costs are recouped from application fees and not increases in Registrar fees.[AK1]
Recommendation 12	Dispute resolution and challenge processes must be established prior to the start of the process.	IMPACT: Very little direct impact assuming that costs are recouped from application fees and not increases in Registrar fees.
Recommendation 13	Applications must initially be assessed in rounds until the scale of demand is clear and there is a reduction to zero of applications for the same string.	IMPACT: Very little direct impact assuming that costs are recouped from application fees and not increases in Registrar fees.
Recommendation 14	The initial registry agreement term must be of a commercially reasonable length.	IMPACT: Same as for Recommendation 10.
Recommendation 15	There must be renewal expectancy.	IMPACT: Same as for Recommendation 10, except that this must also be qualified with clear

and reasonable termination provisions.

Recommendation 16	Registries must apply existing Consensus Policies[16] and adopt new Consensus Polices as they are approved.	IMPACT: Same as for Recommendation 10.
Recommendation 17	A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.	IMPACT: Same as for Recommendation 10.
Recommendation 18	If an applicant offers an IDN service, then ICANN's IDN guidelines[17] must be followed.	IMPACT: Creates a stable and consistent experience for Registrars and their customers, reducing the cost of implementation, operations, and customer service and support.
Recommendation 19	Registries must use ICANN accredited registrars.[AK2]	IMPACT: Registrars support this requirement that registries provide domain names only through ICANN-accredited registrars. Registrars have invested considerable resources to establish themselves under the Accreditation paradigm and are governed by ICANN's contract and policies. Permitting the use of non-ICANN accredited registrars would threaten the security and stability of the DNS, as ICANN would have no contract with – and therefore no control over – the providers or their activities. Allowing the use on non-accredited registrars or allowing Registries to offer registration services direct to consumers also would place accredited registrars at a competitive disadvantage as they

are required to follow certain ICANN-imposed requirements. Similarly, permitting registries to sell directly to consumers would place registrars at an unfair advantage and create certain antitrust concerns. Recent events have made it clear that some improvements to the Accreditation process may be warranted, but overall it has worked well in creating competition, reducing costs to consumers, and improving the quality of services offered.

Recommendation 20	<p>An application will be rejected if it is determined, based on public comments or otherwise, that</p> <p>there is substantial opposition to it from among significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support.</p>	Very little direct impact
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Impact Statement from the gTLD Registry Constituency regarding the Introduction of New gTLDs 6 June 2007

With regard to the GNSO Dec05 PDP (Introduction of New gTLDs) and in response to the requirement in the ICANN Bylaws Annex A (GNSO Policy-Development Process) for the GNSO Council to provide to the ICANN Board "(a)n analysis of how the issue would affect each constituency, including any financial impact on the constituency", the gTLD Registry Constituency (RyC) hereby provides the following information.

1. General Impact on the RyC

The introduction of new gTLDs directly impacts members of the RyC and the constituency as a whole by:

1. Increasing competition for existing gTLD registries
2. Enlarging the potential members of the RyC
3. Expanding the diversity of the RyC.

Regarding increased competition, the RyC has consistently supported the introduction of new gTLDs because we believe that:

- There is clear demand for new gTLDs
- Competition creates more choices for potential registrants
- Introducing TLDs with different purposes increases the public benefit
- New gTLDs will result in creativity and differentiation in the domain name industry
- The total market for all TLDs, new and old, will be expanded.

In the RyC consensus statement submitted at the beginning of the New gTLD PDP, we listed the following specific benefits of new gTLDs:

- Added choices for Internet users, not only in terms of the ability to obtain a domain name registration in a given new TLD, but also in terms of security options, trust features, use policies, and other innovative factors that vary by registry operator or sponsor
- Expansion of Internet usage through the market development efforts of new and existing providers of registry services
- Opportunity to test user demand for specific TLDs
- Particularly in case of TLDs with a focused and defined community, opportunity to develop a resource that best serves the needs of that community while providing intrinsic value to all internet users.

With regard to potentially enlarging the potential member base of the RyC and expanding the diversity of the RyC, we believe that this could have both negative and positive consequences. The RyC started out with one member, later expanded to eight members, then nine, and now has 15 members plus one pending member. Doing business as a constituency in some ways is much easier with a smaller number of members, so as the constituency continues to grow it can be expected that participating in the GNSO will become more complicated for the RyC. Attempting to reach consensus positions as part of the policy development process will sometimes be more difficult. On the other hand, as the RyC membership has increased, the diversity of ideas and varied experiences of constituency members have expanded and thereby broadened the perspective of the entire membership. We believe that the challenges that come with a larger membership are manageable and are worth the benefits that come from new ideas and different points of view.

2. Financial Impact on the RyC

The financial impact on the RyC may best be divided into two categories: impact on RyC members and impact on the Constituency as a whole.

The financial impact on individual gTLD registry operators and sponsors will vary depending on many factors such as, but not limited to, the following: 1) whether or not they are involved in any new gTLDs; 2) what effects increased competition has on their current business; 3) the extent to which they may be able to

leverage the investments they have made in their existing business model into new opportunities; 4) their ability to market their offerings in an expanded market; and 5) any changes in RyC fees as a consequence of increased membership and/or changes in expenses.

The financial impacts on the Constituency as a whole will be dependent on how many new members join the RyC and whether or not Constituency expenses grow in proportion to membership size or possibly can be used more effectively. At this point in time, the RyC believes that the financial impact on the RyC may be neutral. Some expenses may increase as the membership grows (e.g., Secretariat costs, luncheon meetings with the Board during ICANN meetings); other expenses may remain constant or rise at a rate that is lower than the membership growth. Regardless, the Constituency will have the ability to adjust RyC member fees up or down as needed to accommodate actual expenses approved by the membership.

3. Impact of Selected New gTLD Recommendations on the RyC

Recommendations included in the Draft Final New gTLD PDP Report that may have impact on the RyC and/or its members are listed below in italic font followed by discussion of possible impacts.

Recommendation 2

Strings must not be confusingly similar to an existing top-level domain.

This recommendation is especially important to the RyC. At least one gTLD registry has already received a customer service call that demonstrates user confusion with regard to an IDN version of an existing gTLD using an alternate root. It is of prime concern for the RyC that the introduction of new gTLDs results in a ubiquitous experience for Internet users that minimizes user confusion. gTLD registries will be impacted operationally and financially if new gTLDs are introduced that create confusion with currently existing gTLD strings or with strings that are introduced in the future.

There is strong possibility of significant impact on gTLD registries if IDN versions of existing ASCII gTLDs are introduced by registries different than the ASCII gTLD registries. Not only could there be user confusion in both email and web applications, but dispute resolution processes could be greatly complicated.

It is also critical to remember that there are several hundred thousand domain name registrants who have registered IDN domain names at the second level in existing gTLDs who would likely desire in most cases to expand their IDN registration at the top level. If confusingly similar versions of existing gTLDs are introduced, would those registrants have to defensively register their names in the new gTLDs? If so, that could have large impact on those gTLD registries that have in good faith introduced IDN second-level domain names in response to user demand from the non-English speaking Internet community.

Recommendation 9

There must be a clear and pre-published application process using objective and measurable criteria.

This recommendation is of major importance to the RyC because the majority of constituency members incurred unnecessarily high costs in previous rounds of new gTLD introductions as a result of excessively long time periods from application submittal until they were able to start their business. We believe that a significant part of the delays were related to selection criteria and processes that were too subjective and not very measurable. It is critical in our opinion that the process for the introduction of new gTLDs be predictable in terms of evaluation requirements and timeframes so that new applicants can properly scope their costs and develop reliable implementation plans.

There is nothing that can be done now to correct the flaws in previous new gTLD rounds, but on behalf of new organizations that may consider applying and potentially become members of the RyC, we strongly support this recommendation and firmly believe that it has the chance of reducing the impact on them.

Recommendation 10

There must be a base contract provided to applicants at the beginning of the application process.

Like the comments for Recommendation 9, we believe that this recommendation will facilitate a more cost-effective and timely application process and thereby minimize the negative impacts of a process that is less well-defined and objective. Having a clear understanding of base contractual requirements is essential for a new gTLD applicant in developing a complete business plan.

Recommendations 14 and 15

The initial registry agreement term must be of a commercially reasonable length.

There must be renewal expectancy.

The members of the RyC have learned first hand that operating a registry in a secure and stable manner is a capital intensive venture. Extensive infrastructure is needed both for redundant registrations systems and global domain name constellations. Even the most successful registries have taken many years to recoup their initial investment costs. The RyC is convinced that these two recommendations will make it easier for new applicants to raise the initial capital necessary and to continue to make investments needed to ensure the level of service expected by registrants and users of their TLDs.

These two recommendations will have a very positive impact on new gTLD registries and in turn on the quality of the service they will be able to provide to the Internet community.

Recommendation 19

Registries must use ICANN accredited registrars.

The RyC has no problem with this recommendation for larger gTLDs; the requirement to use accredited registrars has worked well for them. But it has not always worked as well for very small, specialized gTLDs. The possible impact on the latter is that they can be at the mercy of registrars for whom there is not good business reason to devote resources.

In the New gTLD PDP, it was noted that this requirement would be less of a problem if the impacted registry would become a registrar for its own TLD, with appropriate controls in place. The RyC agrees with this line of reasoning but current registry agreements forbid registries from doing this. Dialog with the Registrars Constituency on this topic was initiated and is ongoing, the goal being to mutually agree on terms that could be presented for consideration and might provide a workable solution.

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ICANN Links

For a full listing of all inputs including Constituency Statements, Public Comment archives and Expert Papers, <http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>.

GNSO gTLDs Committee Final Report on New gTLDs, May June 2003

9 May, v4: <http://www.dnso.org/dnso/notes/20030509.gTLDscommitteeconclusionsv4...>

21 May, v5: <http://www.dnso.org/dnso/notes/20030521.gTLDscommitteeconclusionsv5...>

02 Jun, v6: <http://www.dnso.org/dnso/notes/20030602.gTLDscommitteeconclusionsv6...>

12 Jun, v7: <http://www.dnso.org/dnso/notes/20030612.gTLDscommitteeconclusionsv7...>

IANA Listing of all TLDs

<http://data.iana.org/TLD/tldsalpha­>

bydomain.txt.

List of Registry Agreements <http://www.icann.ORG/registries/agreements.htm>

Return to Final Report: Part A

[1] The Participation Table will be completed after the GNSO Council meeting on 6 September 2007.

[2] See paragraph 64 of the WSIS Tunis Agenda, at <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>

[3] See paragraph 49.a) of the WSIS Geneva declaration at <http://www.itu.int/wsis/docs/geneva/official/dop.html>

[4] See: <http://www.icann.org/general/glossary.htm#G>

[5] See <http://www.un.org/Overview/rights.html>

[AK1]Note – this has been deleted on the most recent version.

[AK2]Registrars have suggested the following wording – "Registries must use only ICANN accredited registrars in registering domain names and may not discriminate between such accredited registrars."