

**BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC) SUMMARY
DISMISSAL OF RECONSIDERATION REQUEST 23-1
19 SEPTEMBER 2023**

I. Introduction and Summary

The Requestor, Michael Palage, seeks reconsideration of the 2023 renewal of the .NET Registry Agreement (RA) between ICANN and Verisign, Inc. (.NET RA Renewal) on certain grounds. Specifically, the Requestor alleges that the .NET RA Renewal is contrary to the provisions of ICANN Amended Articles of Incorporation Sections 2.II and 2.III and ICANN Bylaws Section 1.2 because: (i) a 2006 settlement agreement between ICANN and Verisign, Inc. (Verisign Settlement Agreement) limits Verisign Inc.'s (Verisign) ability to support efforts that may undermine ICANN's role as the technical coordinator of the Domain Name System (DNS); (ii) the .NET RA Renewal exempts Verisign from certain provisions in the base registry agreement (Base RA) regarding participation in economic studies; (iii) the .NET RA Renewal continues to incorporate its own version of the Registry Services Evaluation Policy (RSEP) that is not as expansive as the RSEP consensus policy incorporated by reference in the Base RA; (iv) the .NET RA Renewal allows Verisign to remain exempt from the Registry Services Technical Evaluation Panel (RSTEP) fee without sufficient explanation; and (v) Verisign is permitted preferential access to ICANN staff to discuss policy related issues.¹

The Requestor asks that the Board: (i) publicly post a comparison of the .NET RA Renewal against the Base RA, along with an explanation of the differences; (ii) re-engage in contractual negotiations with Verisign to execute the Base RA for .NET; (iii) if Verisign does not agree to the inclusion of the economic study and the RSEP provisions of the Base RA for the .NET RA, publish a summary of the negotiations (iv) expand the ongoing .INFO and .ORG

¹ See Request for Reconsideration 23-1 (Request 23-1), 31 July 2023, § 8 at Pgs. 7-11.

economic studies to undertake a comprehensive economic analysis of the entire domain name marketplace; (v) remove the provisions of Paragraph 1.B of the Verisign Settlement Agreement;² and (vi) disclose whether Verisign threatened to sign the Base RA and thereby allegedly deprive ICANN of certain funds.³

Article 4, Section 4.2(k) of the ICANN Bylaws provides that upon receipt of a reconsideration request, the BAMC is to review the request “to determine if it is sufficiently stated.”⁴ A request that is not sufficiently stated is not a proper reconsideration request and must be summarily dismissed in accordance with the Bylaws.⁵ As discussed below, the BAMC concludes that Request 23-1 does not meet the sufficiently stated standard because the Requestor has not demonstrated that he has been materially harmed and adversely affected by the challenged ICANN action or inaction.⁶ The BAMC therefore summarily dismisses Request 23-1.

II. Factual Background

The Requestor describes himself as a domain name registrant, domain name industry consultant, and long-time volunteer with the ICANN community.⁷ The Requestor served on the

² Paragraph 1.B of the Verisign Settlement Agreement provides, in relevant part, as follows: “Verisign agrees that, effective immediately upon the execution of this Agreement, it will not participate in, contribute monies for, encourage or provide other support for any activities by or for third parties that seek to undermine ICANN’s role as set out in paragraph 1A above, and it will immediately cease any such ongoing activities.” Request 23-1, Attachment (ICANN-Verisign Settlement Agreement), at ¶ 1.B.

³ *Id.* § 9 at Pgs. 12-13

⁴ ICANN Bylaws (Bylaws), 2 June 2022, Art. 4, § 4.2(k).

⁵ *Id.*

⁶ As originally submitted, Request 23-1 incorporates privileged and confidential information that was provided to the Requestor, in confidence, during the time he owed fiduciary obligations to ICANN in connection with his service on the ICANN Board. *Id.* § 6 at Pgs. 2, 4-5; *id.* § 8 at Pgs. 9, 11; *id.* § 9 at Pgs. 12-13; *id.* § 13 at Pg. 15. The Requestor has, and continues to have, attendant fiduciary obligations to ICANN requiring that he maintain the privilege and confidentiality over those records and information. The privilege over these records and information belongs to ICANN, which declines to waive it. Further, that information is non-public and not subject to disclosure, and thus, cannot be considered by the BAMC under Section 4.2(p) of the Bylaws.

⁷ Request 23-1, § 10 at Pg. 13.

ICANN Board from April 2003 to April 2006, and received certain privileged and confidential materials in connection with his Board service.

On 1 July 2005, ICANN and Verisign executed a RA for the .NET generic top-level domain (gTLD).⁸ Relevant here is Section 3.1(d)(iv), which sets forth the process by which Verisign may make a change to a Registry Service.⁹

Effective as of 15 August 2006, the RSEP is a consensus policy developed as a mechanism to add, modify, or remove a Registry Service; its development was guided by the provisions in the 2005 .NET RA.¹⁰

On 26 February 2006, the ICANN Board approved a set of agreements settling a long-running dispute between ICANN and Verisign.¹¹ Among other provisions, the Verisign Settlement Agreement provided that Verisign “agrees that . . . it will not participate in, contribute monies for, encourage or provide other support for any activities by or for third parties that seek to undermine ICANN’s role” as “the appropriate technical coordination body for DNS.”¹²

On 3 July 2013, the New gTLD Program Committee of the ICANN Board approved a Base RA for new gTLDs, which, under Sections 2.1 and 6.2 respectively, incorporates by reference, the RSEP and a requirement for a registry operator to remit to ICANN the invoiced cost of any review by the RSTEP.¹³

⁸ <https://www.icann.org/en/registry-agreements/net/net-registry-agreement-1-7-2005-en>.

⁹ *Id.*

¹⁰ <https://www.icann.org/resources/pages/rsep-requests-summary-2016-04-20-en>; <https://www.icann.org/rsep-en>.

¹¹ <https://www.icann.org/en/announcements/details/icann-board-approves-verisign-settlement-agreements-28-2-2006-en>; <https://www.icann.org/en/board-activities-and-meetings/materials/minutes-special-meeting-of-the-board-28-02-2006-en>.

¹² <https://archive.icann.org/en/topics/vrsn-settlement/revise-settlement-redline-29jan06.pdf>. As noted below, to the extent the Requestor seeks reconsideration of the ICANN Board’s approval of the Verisign Settlement Agreement, the time do so has long since passed. *Infra* note 39.

¹³ <https://www.icann.org/en/announcements/details/last-contractual-hurdle-cleared-in-the-introduction-of-new-domain-names-updated-5-july-2013-3-7-2013-en>; <https://www.icann.org/en/public-comment/proceeding/proposed-final-new-gtld-registry-agreement-29-04-2013>; <https://newgtlds.icann.org/sites/default/files/agreement-approved-02jul13-en.pdf>.

On 24 June 2017, following public consultation, the Board approved a renewal of the .NET RA.¹⁴ No changes were made to Section 3.1(d)(iv) in the 2017 renewed .NET RA from the 2005 agreement.¹⁵

On 27 March 2020, following public comment, ICANN approved and executed the terms of Amendment 3 to the .COM RA and the proposed binding Letter of Intent (LOI) related to enhancing the security, stability, and resiliency of the DNS.¹⁶ Under the LOI, Verisign and ICANN agreed to work with the ICANN community to address Security Threats by determining and developing “best practices” for Registry Operators.¹⁷ Verisign further agreed that, for a five year period beginning on 1 January 2021, it would “make a payment in the amount of USD four million to ICANN . . . for costs to be incurred by ICANN during the upcoming 12-month period . . . in conducting, facilitating or supporting activities that preserve and enhance the security, stability and resiliency of the DNS”¹⁸

On 13 April 2023, ICANN posted for public comment a proposed renewal of the 2017 .NET RA, which was set to expire on 30 June 2023.¹⁹ The renewal proposal was a result of bilateral discussions between ICANN and Verisign.²⁰ It was based on the expiring RA with proposed modifications, including the incorporation of some provisions from the 2023 Global

¹⁴ *Id.*

¹⁵ Compare <https://www.icann.org/en/registry-agreements/net/net-registry-agreement-1-7-2005-en> (1 July 2005 .NET RA) with <https://itp.cdn.icann.org/en/files/registry-agreements/net/net-agmt-html-01jul17-en.htm> (1 July 2017).

¹⁶ <https://www.icann.org/en/public-comment/proceeding/proposed-amendment-3-to-the-com-registry-agreement-03-01-2020>; <https://itp.cdn.icann.org/en/files/registry-agreements/com/com-decision-document-27mar20-en.pdf>; <https://www.icann.org/en/blogs/details/icann-decides-on-com-amendment-and-proposed-binding-letter-of-intent-between-icann-and-verisign-27-3-2020-en>.

¹⁷ <https://itp.cdn.icann.org/en/files/registry-agreements/com/com-loi-27mar20-en.pdf>. The LOI defines Security Threats as “phishing, malware distribution, and botnet command and control[], which definition may be expanded to include other threats or be revised to be more fully defined through the mutual agreement of the Parties.” *Id.*

¹⁸ *Id.*

¹⁹ <https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-net-11-07-2023-en.pdf>.

²⁰ *Id.*

Amendment to the Base RA.²¹ The proposed renewal agreement included ICANN and Verisign’s proposal to amend the binding LOI between the parties dated 27 March 2020 to extend its requirements to the .NET RA.²²

The Requestor submitted a response during the .NET RA public comment period.²³ Among other things, the Requestor commented that the Base RA’s provision requiring registry operators’ cooperation with economic studies should be included in the .NET RA and that ICANN should post a redline of the proposed 2023 .NET RA against the Base RA.²⁴

On 27 June 2023, ICANN published a Public Comment Summary Report for the Proposed Renewal of the Registry Agreement for .NET.²⁵ “In response to the request from commenters to conduct an economic study or to add Section 2.15 of the Base RA to the proposed RA,” ICANN explained:

[I]t is important to understand that Section 2.15 which addresses cooperation with economic studies, is intended to ‘study the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters.’ It does not pertain to the overall market with legacy TLDs. In addition, some of these comments suggest that adding the provision would enable ICANN to collect data to determine if the price increases are in the public interest or may have an impact on the DNS marketplace. However, since the pricing for .NET is public and the zone file information is available, conducting a study, if necessary, would not be impeded.²⁶

²¹ *Id.* The 2023 Global Amendment to the Base RA did not modify from the 2013 Base RA the sections (sections 2.1 and 6.2) addressing RSEP and RSTEP expenses. <https://itp.cdn.icann.org/en/files/registry-agreements/base-registry-agreement-30-04-2023-en.pdf>.

²² <https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-net-11-07-2023-en.pdf>; <https://itp.cdn.icann.org/en/files/registry-agreements/multiple/verisign-loi-amendment-1-01-07-2023-en.pdf>.

²³ <https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-net-11-07-2023-en.pdf>.

²⁴ <https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-net-27-06-2023-en.pdf>.

²⁵ <https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-net-27-06-2023-en.pdf>.

²⁶ Request 23-1, § 8 at Pgs. 7-8.

On 29 June 2023, ICANN published a Decision Paper regarding the 2023 .NET RA Renewal. As the paper explained, “After careful consideration of the public comments and detailed discussion with the ICANN Board, and for all of the reasons set forth above the ICANN Interim President and CEO has decided to execute the 2023 .NET RA as recommended by the ICANN org team, and to execute the amended LOI with Verisign as was proposed for public comment.”²⁷

On 1 July 2023, ICANN and Verisign executed the renewed .NET RA and an amended LOI.²⁸ Section 3.1(d)(iv) of the renewed RA remains unchanged from the 1 July 2005 and 1 July 2017 .NET RAs and sets forth the process (analogous to the RSEP), by which the Registry Operator (Verisign) may make a change in a Registry Service.²⁹ The RA further states that the “Registry Operator will fully comply with and implement all consensus policies.”³⁰

On 31 July 2023, the Requestor submitted a request for reconsideration of certain aspects of ICANN’s .NET RA Renewal (Request 23-1).³¹ Request 23-1, as submitted, contained privileged and confidential information that was provided to the Requestor, in confidence, during the time he owed fiduciary obligations to ICANN in connection with his service on the ICANN Board.

On 15 August 2023, ICANN advised the Requestor that he does not have the authority to disclose the privileged and confidential information included with his request. ICANN further advised the Requestor that the BAMC can only consider reconsideration requests “on the basis of

²⁷ <https://itp.cdn.icann.org/en/files/registry-agreements/net/net-decision-paper-2023-agreement-29-06-2023-en.pdf>.

²⁸ <https://itp.cdn.icann.org/en/files/registry-agreements/net/net-agreement-pdf-01-07-2023-en.pdf>;
<https://itp.cdn.icann.org/en/files/registry-agreements/multiple/verisign-loi-amendment-1-01-07-2023-en.pdf>.

²⁹ <https://itp.cdn.icann.org/en/files/registry-agreements/net/net-agreement-pdf-01-07-2023-en.pdf>;
<https://itp.cdn.icann.org/en/files/registry-agreements/net/net-agmt-pdf-01jul17-en.pdf>.

³⁰ *Id.*

³¹ Request 23-1, § 3 at Pg. 1.

the public record,” and that ICANN cannot publish the privileged and confidential information.³² For those reasons, ICANN asked the Requestor to withdraw Request 23-1.

On 17 August 2023, the Requestor declined to withdraw Request 23-1. ICANN then prepared a redacted version of Request 23-1 for public posting and the BAMC’s consideration, a version which maintains the privileged and confidential nature of certain materials and information submitted by the Requestor.³³

III. Standard of Review

Article 4, Sections 4.2(a) and (c) of ICANN’s Bylaws provide, in relevant part, that “any person or entity materially affected by an action or inaction of the ICANN Board or Staff . . . may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or Staff’s reliance on false or inaccurate relevant information.”³⁴

The BAMC reviews each reconsideration request upon its receipt to determine if it is sufficiently stated.³⁵ The BAMC may summarily dismiss a reconsideration request if the BAMC

³² See Bylaws, Art. 4, § 4.2(p).

³³ The Requestor offered to coordinate with ICANN on the preparation of a redacted version of Request 23-1 appropriate for public filing. However, the privilege is ICANN’s to uphold and therefore the determination of which portions remain privileged and confidential is ICANN’s, not the Requestor’s. Accordingly, ICANN declines the Requestor’s offer. Further, ICANN advised the Requestor that the information upon which the Requestor relies is non-public and not subject to disclosure, and thus, cannot be considered by the BAMC under Section 4.2(p) of the Bylaws.

³⁴ Bylaws, Art. 4, §§ 4.2(a) and (c).

³⁵ *Id.* § 4.2(k).

determines the request: (i) does not meet the requirements for filing reconsideration requests under the Bylaws; or (ii) it is frivolous.³⁶

IV. Analysis

In evaluating whether a reconsideration request is sufficiently stated, the following factors are considered: (1) is the reconsideration request timely; and (2) has the requestor met the requirements for bringing a reconsideration request. The BAMC concludes that Request 23-1 is insufficiently stated because it does not sufficiently allege that the Requestor has been materially harmed and adversely affected by a challenged ICANN action that allegedly violated a Bylaws provision or established ICANN policy.

A. Request 23-1 Is Timely.

A reconsideration request must be filed “within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of,” the challenged Staff or Board action or inaction.³⁷ The challenged action identified by the Requestor, namely the .NET RA Renewal, was executed on 1 July 2023.³⁸ The Request asserts that the Requestor became aware of the .NET RA Renewal on approximately 3 or 4 July 2023. The Requestor filed Request 23-1 on 31 July 2023, within 30 days of the .NET RA Renewal, and is thus timely as to that renewal.³⁹

³⁶ *Id.*

³⁷ *Id.* § 4.2(g)(i)(B).

³⁸ Request 23-1, § 4 at Pg. 1.

³⁹ The Requestor raises, but does not seek reconsideration regarding, the ICANN staff renewal of the .COM Registry Agreement (.COM RA Renewal). *Id.* § 6 at Pgs. 2-3; *id.* § 7 at Pg. 7; *id.* § 8 at Pgs. 11-12. The Requestor additionally requests a modification to Paragraph 1.B of the Verisign Settlement Agreement to remove the provision stating, “Verisign agrees that, effectively immediately upon the execution of this Agreement it will not participate in, contribute monies for, encourage or provide other support for any activities by or for third parties that seek to undermine ICANN’s role as set out in Paragraph 1 A.” *Id.* § 9 at Pg. 13; *see also id.* § 8 at Pg. 11. Finally, the Requestor asks that ICANN “expand the current .INFO and ORG economic studies to undertake a comprehensive economic analysis of the entire domain name marketplace.” *Id.* § 9 at Pg. 12. Each of these actions occurred more than 30 days prior to the filing of Request 23-1: (1) ICANN staff executed the .COM RA Renewal on 1 December 2012; (2) the ICANN Board approved the Verisign Settlement Agreement on 28 February 2006; and (3) the Board adopted the recommendation of the BAMC to retain an economist to prepare an opinion regarding the current DNS

B. The Requestor Fails to Meet the Requirements Set Forth Under Article 4, Sections 4.2(c) and 4.2(k) of the ICANN Bylaws for Bringing a Reconsideration Request.

Request 23-1 fails to meet the requirements set forth under Article 4, Sections 4.2(c) and 4.2(k) of the ICANN Bylaws.

The Requestor alleges that certain aspects of the .NET RA Renewal violated established ICANN policies, Mission, Commitments, and Core Values, as articulated in the Articles of Incorporation, and was contrary to the Bylaws regarding reconsideration requests in certain aspects.⁴⁰ Specifically, the Requestor claims that the renewal violates ICANN Article of Incorporation Sections 2.II and 2.III, as well as ICANN Bylaws Sections 1.2(a), 1.2(a)(v), 1.2(b)(iii), 1.2(b)(iv), and 1.2(b)(v), by not including provisions from the Base RA on cooperation with economic studies and the RSEP, exempting Verisign from RSTEP fees, and allowing Verisign preferential access to ICANN staff.⁴¹

As an initial matter, the BAMC is unable to review Request 23-1 in its entirety because it incorporates privileged and confidential information not subject to disclosure. The BAMC may only consider reconsideration requests “on the basis of the public written record,” and therefore makes its determination solely based on the public redacted version of Request 23-1.⁴²

The Requestor fails to adequately allege that he has been materially and adversely harmed by the challenged action to state a reconsideration request. The Bylaws prescribe that

marketplace as it relates to the market power of .INFO and .ORG domains on 11 June 2023, with the Board decision and accompanying rationale published on 21 June 2023. The Requestor failed to file his reconsideration request “within 30 days after the date on which the Requestor became aware or, or reasonably should have become aware of,” these actions, and therefore any claims based on them are untimely. Bylaws, Art. 4, § 4.2(g)(i)(A)-(B); <https://www.icann.org/en/announcements/details/icann-board-approves-verisign-settlement-agreements-28-2-2006-en> (28 February 2006); <https://www.icann.org/en/registry-agreements/com/com-registry-agreement-1-12-2012-en> (1 December 2012); <https://www.icann.org/en/board-activities-and-meetings/materials/preliminary-report-regular-meeting-of-the-icann-board-11-06-2023-en> (21 June 2023).

⁴⁰ Request 23-1, § 6 at Pg. 2-3; *id.* § 8 at Pgs. 9-12.

⁴¹ *Id.*

⁴² Bylaws § 4.2(p).

requestors must be “adversely affected” by the challenged action or inaction.⁴³ This Bylaws-mandated criterion requires that a requestor must have suffered an actual injury from the challenged conduct in order to have standing to bring a reconsideration request. This criterion is not satisfied by claims by an individual requestor of potential, speculative future injury to that requestor or potential injury incurred by others, such as the general public.

The Requestor asserts that he has standing to assert the Request on four grounds:

- i. “As a domain name Registrant who will be paying more for domain names based upon ICANN’s failure to incorporate appropriate tools in the Registry Agreement to conduct economic studies to promote and sustain a competitive environment in the DNS market.”
- ii. “As a domain name industry consultant who has been negatively impacted by consolidation within the industry and ICANN’s failure to incorporate appropriate tools in the Registry Agreement to conduct economic studies to promote and sustain a competitive environment in the DNS market.”
- iii. “As a long-time volunteer within the ICANN community who fears that the ICANN multistakeholder model is at risk and that ICANN is on the precipice of becoming a de facto trade association.”
- iv. “As an individual respondent who submitted a response during the .NET public comment period, ICANN staff grossly mischaracterized.”⁴⁴

The third and fourth grounds are on their face insufficient to allow the Request to proceed. As to the third, sustaining the multistakeholder model is undoubtedly important. Through the multistakeholder model, individuals, non-commercial stakeholder groups, industry, and governments play important roles in ICANN’s community-based, consensus-driven, policy-making approach. But an alleged injury to the multistakeholder model does not satisfy the standing requirement set forth in the Bylaws that the Requestor was personally or individually harmed. Article 4, Section 4.2 of the Bylaws does not permit requests made on behalf of the general public. Similarly, as to the fourth asserted ground for standing, having participated in the

⁴³ *Id.* § 4.2(a).

⁴⁴ Request 23-1, § 10 at Pg. 13.

public comment period by submitting a response does not establish more than a general interest in the proceedings—the Requestor does not establish that he has been harmed in any personal or individual way.⁴⁵

As to the remaining grounds, the Requestor does not sufficiently allege that he has been materially and adversely affected by the challenged action or inaction. To be “adversely affected” by the challenged action or inaction, the Requestor must have suffered *an actual injury* from the challenged conduct in order to have standing to bring a reconsideration request.⁴⁶ Neither the first nor second grounds offered by the Requestor here establish that he has been adversely affected and suffered an actual injury with regards to the aspects of the .NET RA Renewal that he challenges.

First, the Requestor alleges that he, as a registrant, could potentially “be paying more for domain names based upon ICANN’s failure to incorporate appropriate tools,” that is, Section 2.15 of the Base RA, “in the [RA] to conduct economic studies.”⁴⁷ Although the Requestor posits he *might* be harmed in the future by the conduct being challenged in Request 23-1, speculation about any such future harm is not “directly and causally connected to the alleged violation” at issue now,⁴⁸ because the alleged harm (speculative future price increases for .NET domain names) is not a natural or expected consequence of the challenged action (failure to include in the .NET RA Renewal provisions from the Base RA on economic studies and the RSEP).⁴⁹

⁴⁵ To the extent the Requestor seeks to challenge ICANN staff’s Public Comment Summary Report, including any response to comments submitted by the Requestor, Request 23-1 was filed more than 30 days after that staff action, and therefore any such challenge is untimely. <https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-net-27-06-2023-en.pdf> (27 June 2023).

⁴⁶ Bylaws §§ 4.2(a) and (c).

⁴⁷ Request 23-1, § 10 at Pg. 13.

⁴⁸ Bylaws, Art. 4, § 4.3(b) (defining “materially affected,” in the related context of the Independent Review Process, to refer to suffering “an injury or harm that is directly and causally connected to the alleged violation”).

⁴⁹ <https://www.icann.org/en/system/files/files/irp-namecheap-procedural-order-8-10mar21-en.pdf>.

As explained in the Public Comment Summary Report, “Section 2.15 which addresses cooperation with economic studies, is intended to ‘study the impact or functioning of new generic top-level domains on the Internet the DNS or related matters,’” and “does not pertain to the overall market with legacy TLDs.”⁵⁰ Additionally, “registration information and wholesale pricing for .NET already exists in the public realm as the registry operator of .NET is required to provide notice to ICANN of any increases to its wholesale pricing.”⁵¹ Because the pricing for .NET is public and the zone file information is available, conducting an economic study would not be impeded by the .NET RA Renewal.⁵² Accordingly, the Requestor’s claim that prices will increase for .NET domain names as a result of ICANN’s decision to not include the cooperation with economic studies provision in the .NET RA Renewal is not only speculative, but also comprises an alleged harm that is not a natural or expected consequence of the challenged action.⁵³

Similarly, the Requestor has not explained how, by not incorporating by reference the RSEP in the .NET RA Renewal or a provision regarding remittance of RSTEP fees (as was done in the Base RA), an increase in .NET domain name pricing will result or how the Requestor

⁵⁰ <https://itp.cdn.icann.org/en/files/registry-agreement/public-comment-summary-report-proposed-renewal-registry-agreement-net-27-06-2023-en.pdf>.

⁵¹ <https://itp.cdn.icann.org/en/files/registry-agreements/net/net-decision-paper-2023-agreement-29-06-2023-en.pdf>.

⁵² <https://itp.cdn.icann.org/en/files/registry-agreements/net/net-decision-paper-2023-agreement-29-06-2023-en.pdf>.

⁵³ The Namecheap IRP Panel’s Final Declaration does not suggest otherwise.

<https://www.icann.org/en/system/files/files/irp-namecheap-icann-final-declaration-redacted-23dec22-en.pdf>. There, the IRP Panel determined that Namecheap had standing to challenge the .ORG Registry Agreement renewal, finding that the risk of future price increases that exceed the then-existing price caps was the natural and expected consequence of removing such caps, since such increases would not be possible if the price caps were still in place. Here, by contrast, it is entirely speculative to claim that a price increase will result if the registry agreement omits a provision requiring cooperation in economic studies. This is particularly so given that pricing information for .NET, which the Requestor claims would be necessary to conduct an economic study, already is publicly available. Moreover, performance of an economic study does not determine the prices for registry services of new gTLDs. Further, the .NET RA explicitly “maintains the same pricing constraints that existed in the .NET RAs going back to 2005, under which Verisign’s ability to increase the price it charges registrars for domain name registrations in .NET is limited to no more than 10% annually”—simply put, “there is no change to that pricing structure in the” .NET RA. <https://itp.cdn.icann.org/en/files/registry-agreements/net/net-decision-paper-2023-agreement-29-06-2023-en.pdf>. Accordingly, unlike the IRP Panel’s determination in the Namecheap IRP, a price increase is not a natural or expected consequence of the Requestor’s challenged action.

might otherwise be harmed. The .NET RA Renewal continues to maintain the same provisions in the 2005 RA governing changes in Registry Services, including a nearly identical definition of Registry Services as the RSEP, whose own “[d]efinition comes from [the .NET RA].”⁵⁴ The Requestor provides no explanation as to how the RSEP and the RSEP-analogous provisions in the Base RA and the .NET RA, respectively, or the Base RA provision on RSTEP fees, have or could harm the Requestor in any personal or individual way.

Thus, the Requestor has not shown that he has been “adversely affected” by the challenged conduct, but merely speculates about potential or hypothetical price increases for registry services under the RA even though an economic study and asserted differences from the Base RA regarding the RSEP have no outcome-determinative effect on such prices. If standing were permitted simply by virtue of the Requestor’s status as a registrant, any consumer could establish standing on the basis of speculative harm without a showing that the “Requestor has been adversely affected by” Board or staff action or inaction, in contravention of the established Bylaws.⁵⁵

The Requestor’s general claim that “prices in .NET as well as other generic top-level domains (gTLDs) have increased at a significantly higher rate than similarly situated ccTLDs” also is not sufficient to establish standing because the Requestor does not explain how that alleged harm relates to the aspects of the .NET RA Renewal about which the Requestor seeks reconsideration.⁵⁶ To the extent the Requestor intended to allege such harm in his capacity as a

⁵⁴ Compare <https://www.icann.org/rsep-en> to <https://itp.cdn.icann.org/en/files/registry-agreements/net/net-agreement-html-01-07-2023-en.html>. As ICANN previously explained as between RSEP and legacy GTLD Registry Agreements, “The ICANN Board has directed that the definition of registry service in the .NET Agreement be used in the implementation of the Policy because that is the only definition available and the Consensus Policy does not conflict.” <https://www.icann.org/resources/pages/reconciliation-2012-02-25-en>. In addition, and as previously stated, the RA contains the same pricing structures or constraints as existed from the prior RA. *Supra* note 53.

⁵⁵ Bylaws § 4.2(a), (c).

⁵⁶ Request 23-1, § 6 at Pg. 4.

registrant, for the same reasons discussed above, Request 23-1 still fails to sufficiently state how the alleged harm was caused by the aspects of the .NET RA Renewal that the Requestor challenges. Further, the Requestor asserts that .NET and “other [gTLD]” prices already “have increased” (citing data reflecting certain gTLD prices between 2001 to 2018),⁵⁷ and therefore those past price changes that already occurred could not have been a natural and expected consequence of the lack of a cooperation with economic studies provision or incorporation of certain Base RA provisions concerning the RSEP in the .NET RA Renewal.⁵⁸

Second, the Requestor states an alleged interest “[a]s a domain name industry consultant who has been negatively impacted by consolidation within the industry,” and claims that without an economic study provision or incorporation of certain RSEP-related provisions from the Base RA, the .NET RA Renewal will “impact[] the ability of individual consultants to make a livelihood unless working for one of the dominant market players.”⁵⁹ Beyond these conclusory statements, however, the Requestor does not explain how he has been adversely impacted by such consolidation. In particular, the Requestor does not address how, without certain Base RA provisions, market consolidation would ensue and his position as an industry consultant would be “negatively impacted,” but instead merely speculates that he might be affected by market consolidation in the future.⁶⁰ Speculative future harm does not support reconsideration, particularly where the Requestor does not explain how the challenged staff action—the .NET RA Renewal—relates in any way to the alleged harm.⁶¹

⁵⁷ *Id.* at Pg. 2.

⁵⁸ To the extent the Requestor intended to assert that any of the challenged actions discussed *supra* (see note 39), caused a general increase in gTLD prices, those requests are time-barred for the reasons previously stated. *Id.*

⁵⁹ Request 23-1, § 6 at Pg. 4; *id.* § 10 at Pg. 13.

⁶⁰ *Id.* § 6 at Pg. 4.

⁶¹ *Id.* § 10 at Pg. 13.

In addition, the Requestor’s alleged harm could not have been a natural or expected result of the .NET RA Renewal without a provision requiring cooperation with future economic studies or incorporation of certain RSEP-related provisions in the Base RA, because any such alleged consolidation necessarily took place before the .NET RA Renewal.⁶² The decision not to include an economic study provision in a single registry agreement, here the .NET RA Renewal, occurred on 1 July 2023, and therefore could not have caused “unchecked consolidation within the industry,” particularly where the Requestor states such consolidation already exists among the “four US-based companies, Verisign, PIR, GoDaddy, and Identity Digital which currently control almost the entirety of the gTLD registry market.”⁶³ Therefore, market consolidation, and any actual harm flowing therefrom, is not directly and causally connected to the alleged violation, nor a natural and expected consequence of executing the RA without the inclusion of certain Base RA provisions.⁶⁴

V. Conclusion

A substantive review of the merits of the Requestor’s claims is beyond the scope of this procedural evaluation. The BAMC’s conclusion is limited to the preliminary procedural assessment of whether the Requestor has sufficiently stated a reconsideration request. For the foregoing reasons, the BAMC concludes that Request 23-1 does not meet the requirements for bringing a reconsideration request and therefore it is summarily dismissed.

⁶² Bylaws § 4.3(b).

⁶³ Request 23-1, § 6 at Pgs. 3-4.

⁶⁴ To the extent the Requestor claims that the Verisign Settlement Agreement caused market consolidation as an actual harm, and the Requestor has been adversely affected by such harm, that claim is time-barred for the reasons previously stated. *Supra* note 39.