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

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

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

(i) ICANN org's commitment to "seek input from the public, for whose benefit ICANN in all events shall act."[3]

(ii) ICANN org's Core Value of "[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent."[4]

(iii) ICANN org's Public Comment Opportunities page, which states that "Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption," and is "used to guide implementation work, reviews, and operational activities of the ICANN organization."[5]

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[1] Request 19-2, § 3, at Pg. 2.
[2] *Id.* § 8, at Pg. 3.
[3] *Id.* § 8, at Pg. 4.
[4] *Id.* § 8, at Pg. 4.
[5] *Id.* § 8, at Pg. 4.

(iv) ICANN org's statements concerning its call for Public Comment that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."[6]

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

The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs."[8]

I. Brief Summary.

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

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

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[6] *Id.*, § 8, at Pg. 4.
[7] *Id.*, § 8, at Pg. 10.
[8] *Id.*, § 9, at Pg. 12.
[9] Public Comment Proceeding, Proposed Renewal of .ORG RA, 18 March 2019 (2019 .ORG RA Public Comment Proceeding), https://www.icann.org/public-comments/org-renewal-2019-03-18-en.
[10] *Id.*
[11] Public Comment Proceeding, Proposed Renewal of .INFO RA, 18 March 2019 (2019 .INFO RA Public Comment Proceeding), https://www.icann.org/public-comments/info-renewal-2019-03-18-en.
[12] 2002 .ORG RA, https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en; 2001 .INFO RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en.

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

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

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

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

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

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

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

protection mechanisms (RPMs), including the Uniform Rapid Suspension (URS) rules; and (3) the RA renewal process.[17]

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

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

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[17] Report of Public Comments, .INFO, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.
[18] ICANN org received some comments supporting removal of the price cap provision because "ICANN org is not and should not be a price regulator," and because the Base RA would provide certain protections to current registrants. Report of Public Comments, .ORG, at Pg. 6.
[19] *Id.*, at Pg. 8.
[20] *Id.*
[21] *Id.*
[22] *Id.*, at Pg. 1.
[23] *See* ICANN org announcements: .ORG Renewed RA, https://www.icann.org/resources/agreement/org-2019-06-30-en; .INFO Renewed RA, https://www.icann.org/resources/agreement/info-2019-06-30-en.

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

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

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

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

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

[25] *Id*.

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

[27] Rebuttal in Support of Request 19-2, https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-requestor-rebuttal-board-proposed-determination-18nov19-en.pdf.

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

II. Facts.

A. Historic .ORG and .INFO RAs.

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

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

B. The New gTLD Program and the Base RA.

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

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[28] 2019 .ORG RA Public Comment Proceeding; *see also* https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en; https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en.
[29] 2019 .INFO RA Public Comment Proceeding.
[30] 2002 .ORG RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en; 2001 .INFO RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en.
[31] 2006 Public Comment of .BIZ, .INFO, .ORG, https://www.icann.org/news/announcement-3-2006-07-28-en.
[32] *See* Revised .BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, https://www.icann.org/news/announcement-2006-10-24-en.
[33] .ORG RA, 8 December 2006, https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en; .INFO RA, 8 December 2006, https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en.
[34] https://newgtlds.icann.org/en/about/program.

[gTLDs]."[35] Accordingly, ICANN org established and implemented the New gTLD Program, "enabling the largest expansion of the [DNS]."[36]

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

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

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[35] GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015.
[36] https://newgtlds.icann.org/en/about/program.
[37] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 4, March 2009 https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf. Professor Carlton has been a Professor of Economics at the Booth School of Business of The University of Chicago, and Co-Editor of the Journal of Law and Economics, Competition Policy International since 1984. *Id.*, at ¶¶ 1-2. He also served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, United States Department of Justice from October 2006 through January 2008. *Id.*, at ¶ 3. In 2014, Professor Carlton was designated Economist of the Year by Global Competition Review. https://www.chicagobooth.edu/faculty/directory/c/dennis-w-carlton. Professor Carlton previously served as Professor of Economics at the Massachusetts Institute of Technology. Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 1.
[38] *Id.*, at ¶ 12.
[39] *Id.*
[40] *See* New gTLD Program gTLD Applicant Guidebook, Version 2012-06-04, Preamble, *available for download at* https://newgtlds.icann.org/en/applicants/agb.

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

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

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

[41] https://www.icann.org/public-comments/base-agreement-2013-04-29-en; *see also* 26 July 2019 Letter, at Pg. 1.
[42] 26 July 2019 Letter, at Pg. 1; *see also* GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015.
[43] 26 July 2019 Letter, at Pg. 1.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*, at Pg. 2.

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

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

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

The .ORG RA with PIR was renewed several times, including on 22 August 2013.[53] Likewise, the .INFO RA with Afilias was renewed on 22 August 2013.[54]

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

[48] Rationale for Board Resolution 2015.09.28.06 (renewal of .PRO RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e.rationale; *see also* Rationale for Board Resolution 2015.09.28.04 (renewal of .CAT RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c.rationale; Rationale for Board Resolution 2015.09.28.05 (renewal of .TRAVEL RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d.rationale; 2019 .ORG RA, Art. 2, § 2.13, at Pg. 7, https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf.
[49] Rationale for Board Resolution 2015.09.28.06; *see also* 2019 .ORG RA, Specification 11, at Pgs. 95-96, https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf.
[50] Rationale for Board Resolution 2015.09.28.06.
[51] *Id.*
[52] *Id.*
[53] 2019 .ORG RA Public Comment Proceeding.
[54] 2019 .INFO RA Public Comment Proceeding.

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

> [i]n alignment with the [Base RA], the price cap provisions in the current .ORG [and .INFO] agreement[s], which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG [and .INFO] renewal agreement[s]. Protections for existing registrants will remain in place, in line with the [Base RA]. This change will not only allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].[56]

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

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[55] *See* 2019 .ORG RA Public Comment Proceeding ; 2019 .INFO RA Public Comment Proceeding.
[56] 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.
[57] 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.
[58] Report of Public Comments, .ORG, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf.
[59] Report of Public Comments, .INFO, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf.
[60] *Id.*, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.

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

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

ICANN org also noted that

> the Base [RA] would also afford protections to existing registrants . . . [e]nacting this change will not only allow the .ORG renewal agreement to conform to the Base [RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base [RA].[63]

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

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

[61] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[62] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[63] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[64] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[65] Report of Public Comments, .ORG, at Pg. 1; Report of Public Comments, .INFO, at Pg. 1.
[66] 26 July 2019 Letter, at Pg. 2.
[67] 26 July 2019 Letter at Pg. 2.

Delegation of Authority Guidelines, on 30 June 2019, ICANN org executed the .ORG/.INFO Renewed RAs.[68]

D. The Request for Reconsideration.

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

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

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

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

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

[70] Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019.

[71] *Id.*

[72] *Id.*

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

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

E. Relief Requested.

The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs."[76]

III. Issues Presented.

The issues are as follows:

1. Whether ICANN Staff's decision not to include price caps in the .ORG/.INFO Renewed RA contradicts ICANN's Mission, Commitments, Core Values, or established ICANN policies; and

2. Whether ICANN Staff failed to consider material information when it executed the .ORG/.INFO Renewed RAs.

[74] Board action on Proposed Determination on Request 19-2, https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.a; Proposed Determination on Request 19-2, https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf.
[75] Rebuttal in Support of Request 19-2, https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-requestor-rebuttal-board-proposed-determination-18nov19-en.pdf.
[76] Request 19-2, § 9, at Pg. 12.

IV. The Relevant Standards for Reconsideration Requests.

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

(i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);

(ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information."[77]

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

V. Analysis and Rationale.

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

[77] Bylaws, Art. 4 §§ 4.2(a) and (c).
[78] The Requestor sought reconsideration of Board and Staff Action, and brought the Request on behalf of itself and "725 Namecheap customers and internet users." *See* Request 19-2, § 2, at Pg. 2; *id.* § 10, at Pg. 12. Request 19-2 does not identify an action or inaction of the Board. Further, the Requestor's claim on behalf of its customers is not sufficiently stated because it does not satisfy the requirement that the Requestor, not a third party, must have been adversely affected by the challenged action. Accordingly, the Board's consideration is with respect to the Requestor's challenge to Staff action.
[79] Bylaws, Art. 4 § 4.2(e).

The Requestor claims that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Commitment to "seek input from the public, for whose benefit ICANN in all events shall act."[80]

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

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

The Reports of Public Comment were the result of ICANN Staff's extensive analysis of the comments;[88] consistent with ICANN Staff's ordinary process for preparing the Report of

[80] Request 19-2, § 8, at Pg. 4.
[81] *Id.* § 8, at Pg. 3.
[82] *Id.* § 8, at Pgs. 10, 12; *see also* Rebuttal, at Pg. 5 ("it is still not clear why ICANN [org] bothered to solicit public comment"; omitting price caps from the .ORG/.INFO Renewed RAs "effectively silenced" those who submitted public comments opposing removal of price caps).
[83] Request 19-2,§ 8, at Pg. 12.
[84] 26 July 2019 Letter at Pg. 2.
[85] Report of Public Comments, .ORG, at Pg. 3; Report of Public Comments, .INFO, at Pg. 3.
[86] 26 July 2019 Letter, at Pg. 2.
[87] Ombudsman Evaluation of Request 19-2, at Pg. 5.
[88] The Requestor argues that ICANN Staff did not conduct an extensive analysis of the public comments because of "glaring issues" with the manner in which certain comments were posted to ICANN org's website. Rebuttal, at Pg. 5. Those issues do not concern the substance of public comments concerning the proposed price caps. They are not relevant to Request 19-2.

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

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

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

[89] *See* Report of Public Comments, .ORG, at Pg. 3 ("This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor."); Report of Public Comments, .INFO, at Pg. 3 (same).
[90] The Board acknowledges the ICA's disagreement with the Ombudsman's characterization of certain comments as "spam" and "computer generated." 12 September 2019 Letter, at Pgs. 1-2. ICANN Staff acknowledged both the volume of comments submitted concerning the proposed .ORG/.INFO Renewed RAs and the issues they raised—including the removal of price cap provisions—without discounting the comments based on their apparent source. *See* Report of Public Comments, .ORG; Report of Public Comments, .INFO. Accordingly, the ICA's arguments do not change the Board's determination that reconsideration is not warranted here.
[91] 26 July 2019 Letter, at Pg. 2.

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

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

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

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

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

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

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[92] Report of Public Comments, .ORG, at Pg. 8.
[93] Request 19-2, § 8, at Pg. 12.
[94] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf.
[95] *See* Rationale for Board Resolution 2015.09.28.06.
[96] Request 19-2, § 8, at Pg. 4.

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

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

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

[97] Bylaws, Art. 1, § 1.2(a)(v); *see also* 26 July 2019 Letter, at Pg. 1.
[98] Bylaws, Art. 1, § 1.2(b)(iii), (iv); *see also* 26 July 2019 Letter, at Pg. 2.
[99] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

Renewed RA, "was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment."[100] In sum, "[r]emoving the price cap provisions in the .org Registry Agreement is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market."[101]

On rebuttal, the Requestor asserts that the Base RA "was developed for the new gTLD registries" and there is no evidence that participants in the Base RA development understood that ICANN org might use the Base RA for legacy gTLDs.[102] But ICANN org "has consistently used the Base RA as the starting point for discussions with legacy gTLD operators about renewing their Registry Agreements" since no later than 2014.[103] Since then, the following other legacy gTLDs have adopted the Base RA in renewed agreements: .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, .ASIA, and .BIZ.[104]

Moreover, all registry agreements include a presumptive right of renewal clause. This clause provides a registry operator the right to renew the agreement at its expiration provided the registry operator is in good standing (e.g., the registry operator does not have any uncured breaches), and subject to the terms of their presumptive renewal clauses.

In the course of engaging with a legacy registry operator on renewing its agreement, ICANN org prefers to and proposes that the registry operator adopts the new form of registry

[100] 26 July 2019 Letter, at Pg. 1.
[101] Report of Public Comments, .ORG, at Pg. 8.
[102] Rebuttal, at Pg. 4.
[103] 26 July 2019 Letter, at Pg. 1.
[104] *Id.*

agreement that is used by new gTLDs as the starting point for the renewal negotiations. The new form includes several enhancements that benefit the domain name ecosystem such as better safeguards in dealing with domain name infrastructure abuse, emergency backend support, as well as adoption of new bilaterally negotiated provisions that ICANN org and the gTLD Registries Stakeholder Group conduct from time to time for updates to the form agreement and adoption of new services (e.g., RDAP) and procedures.

Although ICANN org proposes the new form of registry agreement as a starting place for the renewal, because of the registry operator's presumptive right of renewal ICANN org is not in a position to mandate the new form as a *condition* of renewal. If a registry operator states a strong preference for maintaining its existing legacy agreement form, ICANN org would accommodate such a position, and has done so in at least one such instance.

While the prevailing policy is that all new gTLD registries must adopt the new form of registry agreement, there is no consensus policy that prohibits a legacy registry operator from adopting the new form of the agreement. Accordingly, ICANN org adhered to its commitment to treat the .ORG and .INFO registry operators consistently with other legacy gTLD registry operators (rather than single them out for discriminatory treatment) when it used the Base RA as the starting point for its renewal discussions in 2019.[105]

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

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

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

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

The Requestor asserts that reconsideration is warranted because omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org's statement on its Public Comment Opportunities page that "Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption," and is "used to guide implementation work, reviews, and operational activities of the ICANN organization."[106] The Requestor asserts that omitting the price caps is inconsistent with ICANN org's statement that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."[107]

Ultimately, ICANN org's decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to "obtain community input" or "use[]" the public comment "to guide implementation work" of ICANN org.[108] To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board's support, to pursue, the global public interest.

Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies).[109] ICANN org's general description of the purpose of the public comment process is

[106] Request 19-2, § 8, at Pg. 4.
[107] *Id.*
[108] *See id.*
[109] Bylaws, Art. 4 § 4.2(c). The challenged action must adversely affect the Requestor as well. *Id.*

not a Commitment, Core Value, established policy, nor part of ICANN org's Mission. Accordingly, even if ICANN org's decision to execute the .ORG/.INFO Renewed RAs without price caps contradicted these statements—and it did not, as explained in Section V.A above — this inconsistency could not form the basis of a Reconsideration Request.

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

The Requestor asserts that ICANN org's analysis of the proposed removal of price caps "ignores significant information that is contrary to its sweeping conclusions."[110] Specifically, the Requestor asserts that ICANN org's analysis ignores that:

1. .ORG "is the 3rd largest" TLD, and "additional analysis is needed to determine whether this market share can result in uncompetitive practices,"[111]

2. .ORG "was established in 1985," "is universally known, associated with nonprofit use, and has an excellent reputation,"[112]

3. It can be "a cumbersome and costly process" for an established entity to change domain name, and "often" leads to "negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill)."[113]

4. "TLDs are not interchangeable, as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not useable by nonprofits . . . or targeted to certain uses . . .and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .ORG."[114]

5. Although some new gTLDs are targeted to nonprofits, "there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .ORG)."[115]

[110] Request 19-2, § 8, at Pg. 10.
[111] *Id.*
[112] *Id.*
[113] *Id.*, at Pg. 10-11.
[114] *Id.*, at Pg. 11.
[115] *Id.*

6. "There are some concerns [that] higher levels of abuse exists in new gTLD domains . . . . ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs."[116]

7. "[I]t is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name."[117]

The Report of Public Comments for the .ORG Renewed RA makes clear that ICANN org *did* consider some of these concerns. Specifically, with respect to Item 1, ICANN Staff noted that commenters "questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections."[118] With respect to Item 2, ICANN Staff acknowledged that commentators noted that ".ORG was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations."[119] With respect to Items 3, 4, 5, and 7, ICANN Staff acknowledged "concerns about the burden and costs associated with moving [a] web presence to another TLD," along with comments characterizing .ORG as "the most appropriate registry for a charity or non-profit."[120] Accordingly, the Requestor's argument that the information about these six "concerns" was not considered or was ignored is incorrect and therefore does not support reconsideration.

With respect the Requestor's assertion that "ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs,"[121] the Requestor mischaracterizes the cited ICANN report. As the Requestor notes, the 2019 Domain Abuse Activity Reporting (DAAR) report concluded that 48.11% of the "domains identified as security threats . . . were in legacy

[116] *Id.* citing https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf.
[117] *Id.*, at Pg. 11-12.
[118] Report of Public Comments, .ORG, at Pg. 5.
[119] *Id.*, at Pgs. 3-4.
[120] *Id.*, at Pgs. 4-5.
[121] *Id.*, citing 31 January 2019 DAAR Report, https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf.

[TLDs]," and the remaining 51.89% of the domains identified as threats were in new gTLDs.[122] Further, the Report indicates that about 12% of TLD domain names are hosted on new gTLDs.[123] However, the Report also notes that 88% of the new gTLD domains identified as security threats were concentrated in only 25 new gTLDs, out of over 340 new gTLDs.[124] The Report further noted that 98% of the domains identified as security threats were hosted by "the 50 most-exploited new [TLDs]."[125] Accordingly, even if ICANN Staff did not consider the 2019 DAAR Report, the Requestor has not shown that the information contained in it was material to the inclusion of price caps in the .ORG/.INFO Renewed RAs. Moreover, the cited portions of the DAAR Report relate to security threats, not domain name registration fees. This argument does not support reconsideration.

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

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

[122] 31 January 2019 DAAR Report, Executive Summary.
[123] *Id.*, at Pg. 5.
[124] *Id.*, at Pg. 6. Similarly, four legacy TLDs hosted more than 94% of the legacy TLD domains identified as security threats. *Id.*
[125] *Id.*, at Pg. 6.
[126] Request 19-2, § 6, at Pg. 2; *see also id.* § 10, at Pg. 13.

stated.[127] However, the BAMC's conclusion that the Requestor sufficiently asserted that it was materially harmed was not a determination that the Requestor was in fact materially harmed or, if so, that removing the .ORG/.INFO Renewed RAs caused that harm.

The Board now concludes that the Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. As noted above, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.[128] Professor Carlton explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."[129] The Requestor disagrees with the Board's conclusion, but raises no new arguments or evidence supporting its disagreement.[130] Instead, in its Rebuttal, the Requestor merely repeats the argument from its original Request, namely that the claimed harm is "likely to occur," rather than presently existing.[131]

Regardless of whether the speculative harm on which Requestor bases Request 19-2 could be sufficient to support a Reconsideration Request, it is not sufficient here because (1) ICANN Staff acted consistent with ICANN Bylaws, policies, and procedures when it renewed the .ORG/.INFO RAs,[132] and (2) the additional safeguards discussed above demonstrate that, at this time, Requestor's concerns are not well founded.

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[127] *See* Ombudsman Action on Request 19-2, at Pg. 2.
[128] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf.
[129] *Id.*
[130] Rebuttal, at Pgs. 6-7.
[131] *Id.* at Pg. 6.
[132] *See supra* § V.B.

In its Rebuttal the Requestor also challenges the Board's reliance on Professor Carlton's 2009 Preliminary Analysis Regarding Price Caps.[133] The Requestor asserts that the Board should disregard Professor Carlton's analysis because: (1) it is an opinion and does not cite "any data sources or references," (2) certain public commenters disagreed with Professor Carlton, (3) it focused on the propriety of removing price caps for new gTLDs and not legacy gTLDs, and (4) the Board did not reference Professor Carlton's analysis when the .ORG/.INFO RAs were renewed in 2013.[134]

The Requestor's first and second arguments amount to a disagreement with Professor Carlton's conclusions. They do not support reconsideration. Professor Carlton is a leader in economic analysis, particularly concerning antitrust issues.[135] His 2009 Preliminary Analysis is based on his extensive experience with and expertise in market forces. It is not—and does not claim to be—a data-driven study or survey.[136] The Requestor's disagreement with Professor Carlton's conclusions does not necessarily render them incorrect.

The Requestor's third argument does not support reconsideration because, although Professor Carlton did note that price caps in some legacy gTLDs had the effect of limiting prices that new gTLDs could charge, as noted above Professor Carlton identified other controls that also have the effect of limiting price increases.[137] The Requestor's fourth argument likewise does not support reconsideration. The Requestor has identified no established policy or procedure (because there is none) requiring the Board to consider the exact same information and

[133] Rebuttal, at Pg. 2.
[134] *Id.* at Pg. 2-3.
[135] *See supra* § II.B.
[136] *See* Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf.
[137] *See supra* § II.B.

materials for every RA renewal. The Requestor has not demonstrated that consideration of Professor Carlton's analysis violates ICANN Bylaws or established policies or procedures.

The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that "additional analysis is needed to determine whether" the removal of price caps in the .ORG RA "can result in uncompetitive practices."[138] This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton's expert report—indicates that such harm is not expected. Accordingly, reconsideration is not warranted.

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

The Requestor argues that the "timing and nature" of the 13 November 2019 acquisition of the .ORG Registry Operator PIR by an investment firm "is suspicious" because the Requestor believes that negotiations for the acquisition began before the .ORG RA was renewed.[139] Accordingly, the Requestor asserts, ICANN should "scrutinize this transaction closely."[140] However, PIR's corporate structure is not relevant to Request 19-2, which concerns the 30 June 2019 renewal of the .ORG RA and must be evaluated in accordance with the grounds for reconsideration as set forth in ICANN's Bylaws. The Ethos Capital acquisition of PIR, which was announced more than four months after the execution of the .ORG Renewed RA, did not

[138] Request 19-2, § 8, at Pg. 10.
[139] Rebuttal, at Pg. 7.
[140] *Id.*

impact ICANN Staff's determination that ICANN's Mission and Core Values were best served by migrating the .ORG/.INFO RAs to the Base RA.[141]

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

VI. Determination.

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

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