

I. Introduction

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

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Carlton's 2009 analysis is misguided because it is an opinion not based upon evidence or facts, but relies upon outdated and incomplete assumptions.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

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

II. Professor Carlton's 2009 "Analysis"

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

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

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

by training, and the report struck me as more argument than study, more an attempt to justify the new gTLD process than a serious evaluation of the facts of the matter.”² Another comment included a longer report (with supporting data) that concluded, “Professor Carlton has made a number of assumptions about both the benefits and costs of new gTLDs that are simply not supported by market facts.”³ While it appears that ICANN disregarded the feedback and data provided disputing the findings in Prof. Carlton’s analysis, Requestor attempted to review ICANN’s Summary/analysis of comments⁴ to confirm. However, that link redirected to Prof. Carlton’s preliminary analysis and Requestor could not review ICANN’s analysis or the reasons why it ignored facts and feedback contrary to its position. Furthermore, to date, ICANN has not conducted a data-based economic study regarding pricing and competition in the DNS (despite multiple requests over the past decade)⁵. One possible reason ICANN has not conducted such a study is because at least one assessment by ICANN based upon empirical data (rather than opinion) support’s Prof. Carlton’s position that price caps in legacy TLDs have maintained lower prices. As the assessment states on page 1: “The presence of price caps on legacy TLDs may help to explain the absence of changes in legacy TLD wholesale prices”.⁶

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

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

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

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

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

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

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

III. Reliance upon Base RA

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

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

argument to justify its current decision, as those protections were present in the [.org](#) and [.info](#) registry agreements since 2006.⁷

The Base RA was adopted by ICANN on 2 July 2013,⁸ and the registry agreements for [.org](#) and [.info](#) were last renewed on 22 August 2013⁹. As the Base RA was available to ICANN during the 2013 RA renewal process for these legacy TLDs, and if converting legacy TLDs to the Base RA was so important as to ignore massive public comment to the contrary, it is not clear why ICANN waited an additional six years to make the change.

IV. Public Comments

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

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

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

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

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

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

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

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

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

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

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

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

VI. Sale Of Public Interest Registry

On 13 November 2019, the Internet Society and Public Interest Registry (PIR) announced that PIR was sold to the investment firm Ethos Capital for an undisclosed sum of money¹¹ (however there is reasoned speculation the price was over \$1 billion¹²). PIR is no longer a nonprofit company, will not pay upwards of \$50 million annually to the Internet Society¹³, and is now able to pay dividends to its shareholders. Additionally, it is not known how much of this acquisition was through debt (which will be required to be repaid with interest). Because this information was not available to Requestor (or ICANN) until last week, it is pertinent to be addressed in Requestor's rebuttal. The timing and the nature of this entire process is suspicious, and in a well-regulated industry, would draw significant scrutiny from regulators. For ICANN not to scrutinize this transaction closely in a completely transparent and accountable fashion (including public disclosure of pertinent information regarding the nature, cost, the terms of any debt associated with the acquisition, timeline of all parties involved, and the principals involved) would demonstrate that ICANN org and the ICANN Board do not function as a trusted or reliable internet steward.

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

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

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

The likely corporate entity for Ethos Capital was formed on 14 May 2019- the day after ICANN was due to publish its summary of public comments regarding the renewal of the .org registry agreement. The domain name ethoscapital.com was obtained by the investment firm sometime after July 2019 (as indicated by Exhibit B)- after ICANN removed the price cap requirement from the .org registry agreement. The domain name ethoscapital.org was registered on 7 May 2019 by the former CEO of ICANN Fadi Chehadé- who is a Senior Advisor for Abry Partners that led the acquisition of Donuts, Inc. (the entity that operates the most new gTLDs¹⁴ and also the top 20 registrar Name.com¹⁵) (see attached registration data report from August 2018 to present as Exhibit C).

Mr. Chehadé is not the only former senior ICANN executive involved in these entities. Akram Atallah (former President of ICANN Global Domains Division (GDD)) is the CEO of Donuts (which was acquired by an affiliated private equity company). Nora Abusitta-Ouri (former Senior Vice President, Development and Public Responsibility Programs at ICANN, then employed by Mr. Chehadé’s firm Chehadé & Company¹⁶) is the Chief Purpose Officer of Ethos Capital¹⁷. Ms. Abusitta-Ouri’s LinkedIn profile indicates that she is also the Executive Director of the Digital Ethos Foundation. That Foundation uses the domain name digitaletmos.foundation, which is registered to Binky Moon, LLC, the company operated by Donuts for contractual purposes with ICANN.¹⁸ The word “ethos” has a connection for Mr. Chehadé, as he created the Multistakeholder Ethos Award while CEO of ICANN.¹⁹ There are several other principals not previously employed by ICANN that make this transaction worthy of

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

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

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

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

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

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

scrutiny. Jon Nevett is the current President and CEO of PIR.²⁰ He is a co-founder of Donuts, and left in October 2018²¹ - and was replaced by Mr. Atallah.²² The founder and CEO of Ethos Capital is Erik Brooks, who previously was at Abry Partners²³ and as recently as of October 2018, a board member of Donuts.²⁴

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

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

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

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

²³ See <https://ethoscapital.com/>

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

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

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

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

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

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

VII. Conclusion

Based on the foregoing and on the reasons expressed in RfR 19-2 and the letters exchanged in relation to this RfR, Requestor requests that the Board deny the Recommendation and grant RfR 19-2. This rebuttal is made reserving all rights, especially in view of the procedural imbalance, created *inter alia* by ICANN's requirement to respond to a 23-page Recommendation in a 10-page rebuttal, which was provided to Requestor 24 days after the expiration of the 90-day limit specified in the Standard Reconsideration Request Process³¹ (and which also happened to be received on the first day of an ICANN meeting).

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

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

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

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