

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

NAMECHEAP, INC.,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-20-0000-6787

WITNESS STATEMENT OF J. BECKWITH BURR

14 January 2022

I, J. Beckwith Burr, declare as follows:

1. I am currently a member of the Board of Directors for the Internet Corporation for Assigned Names and Numbers (“ICANN”) and have been since November 2016. I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN’s Pre-Hearing Brief on the Merits.
2. Throughout my career, I have advised government officials, clients, and ICANN on Internet governance as well as regulatory, competition, and consumer protection issues as they relate to the Internet. Between January 1995 and June 1997, I served as an Attorney-Advisor at the Federal Trade Commission (“FTC”). In this role, I was responsible for assisting in the development of the FTC’s approach to competition and consumer protection policy regarding the Internet and the digital marketplace.
3. From the FTC, I moved to the National Telecommunications and Information Administration (“NTIA”) of the United States Department of Commerce, first as Senior Internet Policy Advisor, from June 1997 to December 1997, and subsequently as Associate Administrator and Director of International Affairs, from December 1997 to October 2000. NTIA is the United States government agency responsible for advising the President on telecommunications and information policy issues and developing policies to preserve an open, interconnected global Internet that supports continued innovation and economic growth, investment, and the trust of its users.
4. During my time at NTIA, I was responsible for the formulation, analysis, and implementation of Internet and information technology policy as well as international telecommunications and information technology policies. I served as a member of the Clinton Administration’s inter-agency task force on e-commerce, responsible for development and implementation of policy on Internet governance and privacy, and I co-chaired the United States government’s inter-agency working group on privatization of the Internet’s domain name system (“DNS”).
5. As part of the United States government’s effort to promote global electronic commerce by supporting continued and expanded private sector leadership in managing the Internet, one of NTIA’s chief aims at this time was to identify and select a private organization

that would be responsible for overseeing the operation of the Internet's DNS on behalf of the Internet community, and I was personally involved in this work. The DNS's essential function is to convert easily-remembered domain names, such as "ebay.com" or "icann.org," into numeric IP addresses understood by computers. Our job at NTIA was to select a private organization that could oversee operation of the DNS and ensure its continued security, stability, and integrity. This work ultimately led to ICANN's creation, in 1998, and NTIA's recognition of ICANN as the private organization that would be responsible for the coordination of the DNS.

6. I left NTIA in 2000, and I entered private practice as a partner at the law firm Wilmer, Cutler & Pickering LLP, in 2000. While in private practice, I advised clients on regulation and transactions focused on e-commerce, information technology, intellectual property licensing, and international regulation of communications and information technology.
7. While in private practice, I served two terms as a Nominating Committee appointee to ICANN's Country Code Names Supporting Organisation ("ccNSO") Council, between 2006 and 2012. Between 2012 and 2016, I served on the ccNSO Council as the representative of the .US country code top-level domain ("ccTLD"), which my employer operated under a contract with the United States Department of Commerce. The ccNSO is one of ICANN's three Supporting Organizations ("SO"), which develop and recommend policies concerning the Internet's technical management within each of their areas of expertise. The ccNSO is tasked with creating consensus, technical cooperation, and skill building among ccTLDs. The ccNSO is also responsible for developing and recommending global policies to the ICANN Board regarding issues relating to ccTLDs, such as the introduction of Internationalized Domain Name ccTLDs. The ccNSO's policy development process is managed by the ccNSO Council.
8. Between June 2012 and March 2019, I served as the Deputy General Counsel and Chief Privacy Officer at Neustar, Inc., a technology company that provides a variety of services to the global communications and Internet industries. Among other things, Neustar was an Internet registry operator, including for the .BIZ gTLD. During my years at Neustar, I

was responsible for implementing the company’s “privacy by design” program and ensuring that the company maintained state-of-the-art privacy and data security to protect customer and consumer information. From time to time I also provided legal advice related to the company’s registry services operations. I supported Neustar in connection with limited aspects of the 2013 renewal of the .BIZ registry agreement between Neustar and ICANN, but did not participate in Neustar’s negotiations with ICANN for the June 2019 renewal of the .BIZ registry agreement.

9. In 2016, I was selected to serve on the ICANN Board by the Generic Names Supporting Organization for a three-year term starting in November 2016, and was appointed to a second three-year term in November 2019.
10. In March 2019, I joined the law firm of Harris, Wiltshire & Grannis LLP as a partner in its Privacy, Security, and Data Governance practice.

ICANN And Its Bylaws Obligations Regarding Competition

11. ICANN is a California non-profit public benefit corporation formed in 1998. As originally envisioned by NTIA, ICANN’s core mission is the technical coordination of the Internet’s DNS on behalf of the Internet community, ensuring the DNS’s continued security, stability, and integrity. While ICANN was intended from its inception to support and promote competition in the domain name space, its core mission does not include acting as a regulatory authority, either of competition or pricing in the DNS.
12. When it was first created, ICANN obtained its authority through a series of agreements with NTIA, under which NTIA empowered ICANN to exercise certain authority over the DNS. Effective 1 October 2016, after years of planning and policy-development work, NTIA formally transferred its residual role in overseeing certain of ICANN’s functions to the global Internet community as the final step in the decades-long effort to privatize coordination and management of the DNS.
13. ICANN is obligated by its Bylaws Commitments to act “through open and transparent

processes that enable competition and open entry in Internet-related markets.”¹ One of ICANN’s Core Values, as set forth in ICANN’s Bylaws, requires ICANN to promote competition in the registration of domain names “where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.”² The Bylaws further require ICANN, “[w]here feasible and appropriate,” to “depend[] on market mechanisms to promote and sustain a competitive environment in the DNS market.”³ Taken together, these provisions obligate ICANN to coordinate the community’s development of, and implement, policy that facilitates market-driven competition.

14. Throughout its history, ICANN has complied with these Commitments and Core Values in a number of ways. For example, in the early days of the Internet, Network Solutions, Inc. (“NSI”), which was later acquired by Verisign, was the sole operator and “registrar” for the .COM, .NET, and .ORG generic top-level domains (“gTLDs”), pursuant to a Cooperative Agreement between NSI and NTIA. A registrar is an entity that contracts with consumers and entities, known as “registrants,” to facilitate the registration of second-level domain names in a particular TLD. That Cooperative Agreement limited the prices that NSI/Verisign could charge registrars for domain name registrations in the .COM, .NET, and .ORG TLDs, based on NTIA’s view of the DNS at that time.⁴ Even so, in practice, this meant that any registrant seeking to register a domain name in the .COM, .NET, and .ORG TLDs, which were essentially the only gTLDs available to registrants at that time, had to contract with NSI at rates insulated from competition because there were no other registrars. Consistent with the U.S. government’s Statement of Policy on Management of Internet Names and Addresses, commonly referred to as the “White Paper,”⁵ in October 1998, NTIA—and not ICANN—negotiated an amendment to the Cooperative Agreement (“Amendment 11”) that required Verisign, which had

¹ Bylaws, Art. 1, § 1.2(a).

² *Id.*, § 1.2(b)(iv).

³ *Id.* 1.2(b)(iii).

⁴ For example, in Amendment 13 to the Cooperative Agreement, executed in April of 1999, the fee Verisign was permitted to charge for registrations in the .COM, .NET, and .ORG gTLDs was reduced from \$35 to \$9 per year. This fee was later reduced to \$6 per year in the Registry Agreements pursuant to further negotiations between NTIA and Verisign.

⁵ United States Department of Commerce, Management of Internet Names and Addresses (“White Paper”), attached hereto as Exhibit A.

acquired NSI, to take specific steps designed to permit the development of competition in the domain name registration market by, among other things, building a Shared Registration System (“SRS”) in which an unlimited number of registrars would be allowed to compete for domain name registration business utilizing this SRS.

15. In February 1999, NTIA notified Verisign that ICANN was empowered to oversee a transition to registrar competition under the SRS and directed Verisign, in accordance with its obligations under Amendment 11, to cooperate with ICANN in connection with its development and implementation of policy to govern use of the SRS by competing registrars. I was personally involved in NTIA’s directions to ICANN and Verisign regarding the SRS. Part of the responsibilities delegated to ICANN by NTIA included establishing and implementing a procedure for accrediting companies that wished to act as registrars and compete with NSI. Over the course of the next year, ICANN adopted registrar accreditation standards and, since then, has accredited thousands of registrars that—to this day—compete for domain name registration business. In other words, ICANN facilitated policy development in support of the United States government’s decision to create competition in domain name registration services. A list of current ICANN-accredited registrars can be found here: <https://www.icann.org/en/accredited-registrars>. On account of the enormous increase in the number of registrars made possible by Verisign’s government-mandated SRS, as well as government-imposed price caps on .COM domain name registrations, domain name registration prices have fallen tremendously since 1998.
16. In the White Paper, the United States government elected to defer creation of new gTLDs pending ICANN policy development, leading ultimately to ICANN’s New gTLD Program.⁶ The New gTLD Program (the “Program”) is thus another example of how

⁶ *Id.* at ¶ 6(b) (“**Response:** Both sides of this argument have considerable merit. It is possible that additional discussion and information will shed light on this issue, and therefore, as discussed below, the U.S. Government has concluded that the issue should be left for further consideration and final action by the new corporation. The U.S. Government is of the view, however, that competitive systems generally result in greater innovation, consumer choice, and satisfaction in the long run. Moreover, the pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically. Further, in response to the comments received, the U.S. government believes that new corporation should establish and implement appropriate criteria for gTLD registries. Accordingly, the proposed criteria are not part of this policy statement.”), ¶ 7 (“**Response:** The challenge of deciding policy for the addition of new domains will be formidable. We agree with the many commenters who

ICANN has attempted to foster an environment in which competition can arise. The Program resulted from a community driven policy development process mandated by ICANN's Bylaws, and ICANN's role was to implement that policy. The Program provides for qualified entities to apply for and, if successful, to operate new gTLDs. One of the goals of the New gTLD Program was to increase consumer choice, diversity, and competition in the DNS through implementation of the community-developed policy. ICANN received 1,930 new gTLD applications—truly an extraordinary number—resulting in over 1,200 new gTLDs that have become available to consumers under the Program to date.

17. A final example of how ICANN has addressed potential competition concerns is ICANN's occasional referral of competition issues to relevant competition regulators, such as the United States Department of Justice, Antitrust Division ("DOJ"). Because ICANN is a coordinator, rather than a regulator, of the DNS, and because ICANN was not designed to have (and does not have) specific expertise in registry pricing, or antitrust or competition law and policy, ICANN historically has referred competition concerns to DOJ for analysis and possible government response or action.
18. While these types of referrals to competition regulators have been relatively rare, this is how ICANN has dealt with potentially anticompetitive situations involving the DNS. An example of this kind of referral process is found in ICANN's Registry Services Evaluation Policy ("RSEP") process, which is a mechanism gTLD operators use to request ICANN's approval to add or modify services.⁷ If a gTLD operator seeks to add or modify one of its services through a RSEP request, ICANN evaluates the request for security and stability issues, and competition concerns.⁸ ICANN is authorized to prohibit the introduction of new or modified services that ICANN determines pose a threat to the

said that the new corporation would be the most appropriate body to make these decisions based on global input. Accordingly, as supported by the preponderance of comments, the U.S. Government will not implement new gTLDs at this time. At least in the short run, a prudent concern for the stability of the system suggests that expansion of gTLDs proceed at a deliberate and controlled pace to allow for evaluation of the impact of the new gTLDs and well-reasoned evolution of the domain space. New top level domains could be created to enhance competition and to enable the new corporation to evaluate the functioning, in the new environment, of the root server system and the software systems that enable shared registration.”).

⁷ ICANN's Registry Service Evaluation Policy (RSEP) and Implementation Notes, attached hereto as Exhibit B.

⁸ *Id.*

stability and security of the DNS.⁹ To the extent the proposed services might raise significant competition concerns, however, ICANN’s authority is limited to referring the RSEP request to the appropriate government competition authority for analysis.¹⁰ If ICANN does not receive a response to the referral from the competition authority (or authorities, depending on the case) in a specified time frame, ICANN considers this silence in its analysis of the public comments and approves the RSEP request without additional ICANN analysis regarding competition.¹¹

19. ICANN’s Bylaws-mandated competition role is an important aspect of ICANN’s operations, as are all of the Commitments and Core Values identified in ICANN’s Bylaws. But ICANN’s mandate in this respect is narrow, as evidenced by ICANN’s foundational documents and its creation. For instance, the text of the Core Value regarding competition makes clear that ICANN should only act “[w]here feasible and appropriate” and “depending on market [conditions].”¹² Likewise, ICANN’s Bylaws are clear that ICANN “shall not act outside its Mission,”¹³ which is limited to ensuring “the stable and secure operation of the Internet’s unique identifier systems.”¹⁴ The Bylaws clearly establish that policy authority resides with the ICANN community—and not the organization or its Board. Similarly, the Bylaws mandate that ICANN “shall not regulate (i.e., impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide. . . . For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”¹⁵ Finally, ICANN was created through an express transfer of powers and authority from the United States government. While this express transfer included the powers and authority necessary to oversee the secure and stable operation of the Internet’s DNS, the transfer did not include the power, authority, or expertise to act as a competition or pricing regulator by challenging or policing transactions, pricing, and conduct that could be deemed anticompetitive. Nor does ICANN possess the institutional capacity, resources, expertise,

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Bylaws, Art. 1, § 1.2(b)(iii).

¹³ *Id.*, Art. 1, § 1.1(b).

¹⁴ *Id.*, Art. 1, § 1.1(a).

¹⁵ Bylaws Art. § 1.1(c).

or authority to act as a pricing regulator or affirmatively set prices in the DNS. Those powers and authority remain with the relevant government authorities.

20. I understand that Namecheap has cited to my June 2006 testimony that “The ICANN community must clarify and articulate ICANN’s responsibilities with respect to competition. ‘Competition’ is at the heart of the ICANN mission, and it is a highly complex issue, but the community clearly is not satisfied with the ‘leave it to the anti-trust authorities to intervene if they don’t like it’ approach.”¹⁶ Namecheap’s citations are taken out of context. My testimony was intended to provide background on the origins and purpose of the Department of Commerce’s approval provisions in the registry agreements between ICANN and Verisign for .COM, .NET, and .ORG, as of 2006.¹⁷ It was, and is, not meant to be a broad commentary on ICANN’s competition mandate set forth in the Bylaws. In the comment cited by Namecheap, I was simply acknowledging the ICANN community’s unhappiness with certain aspects of those agreements at that time. But, as the hearing record reflects, I did not then (and do not now) believe that ICANN has either the expertise or authority required to act as a competition regulator.¹⁸

The ICANN Board and ICANN Board Workshops

21. Under the Bylaws, the ICANN Board conducts three types of Board meetings, annual, regular, and special meetings. There are certain Bylaws requirements applicable to such annual, regular, and special meetings that the ICANN Board must meet.
22. In addition to the annual, regular, and special meetings, the ICANN Board also convenes Board workshops and Board informational calls. Board workshops are not Board meetings under the Bylaws and, therefore, are not subject to the Bylaws requirements applicable to annual, regular, and special meetings. Rather, they are working sessions for the Board, where the Board, among other things, receives briefings from ICANN staff (and often from ICANN’s in-house legal department) on topics that are relevant to the

¹⁶ Namecheap’s Pre-Hearing Brief at ¶ 50 (citing to RM 80, at p. 19).

¹⁷ RM 80, at p. 15.

¹⁸ In fact, at page 21 of the hearing record, in response to a suggestion that ICANN might act as a “substitute Justice Department,” I asked the obvious question of whether ICANN has “the ability and the legitimacy to be that.”

Internet community as well as certain ICANN operational topics or issues, prepares to interact with the Internet community, and accomplishes routine housekeeping matters. The Board does not make formal decisions or pass formal resolutions at Board workshops or informational calls.

23. The Board relies on Board workshops to get its work done and better fulfill its mandate to ICANN and the Internet community. It would be extremely difficult—if not impossible—for the Board to accomplish all of its duties if it could only have discussions and briefings at annual, regular, or special ICANN Board meetings, or if it had to meet all of the Board meeting requirements set out in the Bylaws every time the Board needed to discuss a topic or receive a briefing from ICANN staff.
24. While the Bylaws require ICANN to “operate to the maximum extent feasible in an open and transparent manner,”¹⁹ this does not mean that the ICANN Board must meet in public at all times. The Board must have the opportunity to meet in Board workshops and Board informational calls to get its work done. I have never understood the Bylaws provision regarding transparency to require that every single interaction of the Board and every Board discussion be public. That would not be feasible.

ICANN’s Standard Process For Negotiating Registry Agreements

25. ICANN’s Bylaws vest the Board with the authority to exercise the powers of the ICANN organization.²⁰ This includes the power to delegate the management of certain tasks to ICANN staff in order to ensure that ICANN continues to operate efficiently while still maintaining the security and stability of the DNS.
26. The ICANN Board is an oversight board that provides direction and advice to ICANN on major policy issues and initiatives, but it is not a managing or executive board directly handling day-to-day operational decisions. Rather, the ICANN Board has delegated to the ICANN organization (meaning ICANN staff) the authority to manage the day-to-day operations of ICANN, with the Board’s oversight. For instance, the ICANN Board has

¹⁹ Bylaws, Art. 3, § 3.1.

²⁰ Bylaws Art. § 2.1.

delegated to ICANN staff the authority to enter into contract negotiations with registry operators and other third parties. This includes the authority to enter into negotiations with legacy registry operators as well as with registry operators for new gTLDs, which makes sense because it is ICANN staff, and not the ICANN Board, that actually executes the registry agreements.

27. The Board's delegation of authority was most recently memorialized in November 2016 when the ICANN Board adopted ICANN's Delegation of Authority Guidelines ("Guidelines"). I understand that, pursuant to this general practice and the subsequent written Guidelines, ICANN staff has entered into thousands of agreements, renewals, amendments, and addendums with third parties, including registry operators.
28. ICANN staff can and does consult with the ICANN Board where it deems, depending on the circumstances of the contract negotiations. Occasionally, the ICANN Board will issue a formal Board resolution regarding registry agreement renewals, but it does not engage in this practice as a matter of course. Rather, it has appropriately delegated that authority to ICANN staff, and the Bylaws do not mandate that such decisions or resolutions must be made by the ICANN Board.
29. This delegation of authority to enter into registry agreements increases the Board's and ICANN staff's efficiencies. In fact, there are over 1,200 gTLDs in the DNS, each of which is subject to a registry agreement with ICANN that must be renewed at various intervals. There are also thousands of other agreements that ICANN has entered into with various third parties. If the Board were required to negotiate, consider, or issue formal resolutions for each of these registry agreements (or other third-party agreements), it would be impossible for the Board to complete its other tasks. ICANN staff, with approximately 400 employees across the world, has sufficient resources to efficiently and effectively negotiate these contracts. And again, it can and does consult with the Board as necessary.
30. This delegation of authority also is consistent with the ICANN Board's role as an oversight board and the fact that the Board is responsible for more high-level matters that are critical to the ultimate success of the ICANN organization and the Internet

community, such as strategic and policy initiatives, outreach with the Supporting Organizations and Advisory Committees, and policy recommendations. Therefore, while all corporate powers are exercised under the ultimate direction of the Board, the Board has empowered ICANN staff to manage aspects of ICANN's activities and affairs where appropriate so that the Board can focus appropriately on other important policy and strategy initiatives.

My Role At Neustar And As An ICANN Board Member

31. I understand that Namecheap is claiming in this IRP that I was “representing Neustar in the bilateral negotiations between ICANN and Neustar” at the same time that I was an ICANN Board member.²¹ Based on my recollection, I was included on a few communications regarding the 2019 renewal of the .BIZ Registry Agreement, but I was not intimately involved in the negotiation of that agreement. Neustar's commercial lawyers and its registry team had primary responsibility for contract negotiations with ICANN and, while they may have consulted me from time to time, I was fully engaged on privacy and data protection issues within my primary area of expertise and responsibility. Further, I never used my role as an ICANN Board member to influence the renewal negotiations in any way and was very careful to avoid any involvement that could create even the perception of a conflict. Finally, I began my transition from Neustar back into the private practice of law in December of 2018 and was not at Neustar in the months leading to the conclusion of the negotiations regarding the 2019 .BIZ Registry Agreement.
32. In addition, because of my previous Neustar employment, I have also recused myself from the Board's consideration of issues that might create the appearance of a conflict. For example, in an abundance of caution, I abstained from the discussion and the vote on Namecheap's Reconsideration Request 19-2, even though it did not challenge the absence of price control provisions in the .BIZ Registry Agreement (and only challenged .INFO and .ORG). I take potential conflicts of interest in my role as an ICANN Board member extremely seriously, and I did not want to jeopardize the work of the ICANN Board in

²¹ Namecheap's Pre-Hearing Brief, ¶¶ 137–138.

evaluating Namecheap's Reconsideration Request.

33. I did not abstain from considering the Electronic Frontier Foundation's Reconsideration Request 19-3 because that Reconsideration Request did not ask the Board to reconsider ICANN's decision not to include the price control provisions in the .BIZ, .INFO, or .ORG Registry Agreements; rather, the Request raised issues specific to a registry serving the non-profit community, as .ORG does. As to Reconsideration Request 20-1, I abstained from the vote in March 2020, in an abundance of caution, whereby the BAMC summarily dismissed Namecheap's claims pertaining to the price control provisions as untimely. Once those claims were dismissed, however, I did not abstain from consideration of the remainder of Namecheap's Reconsideration Request 20-1 in May 2020, because the Reconsideration Request no longer asked the Board to reconsider ICANN's decision not to include the price control provisions in the .BIZ, .INFO, or .ORG Registry Agreements. Thus, there were no actual, potential, or perceived conflicts of interest with respect to Requests 19-3 or 20-1.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 14th day of January 2022 in Flint Hill, Virginia.



By: _____
J. Beckwith Burr