ICANN's Bylaws Empower Price Negotiation of Top-Level Domains in the Public Interest [1]

Introduction

The Internet Corporation for Assigned Names and Numbers (ICANN) plays a pivotal role in the administration of the Internet's Domain Name System (DNS). One of ICANN's core duties is to contract with TLD operators, also called registries. In recent years, ICANN has asserted that it is not a "price regulator" concerning top-level domains (TLDs) like .Com, .Net, and .Org. Which means that ICANN does not make any effort to negotiate on what the price caps should be within registry agreements.

This stance has significant implications for the global Internet community, especially considering the monopolistic control some registry operators hold over certain TLDs. A thorough examination of ICANN's bylaws reveals that not only is ICANN permitted to negotiate and set prices, but it is obligated to do so in service of its mission to promote the public interest and competition.

ICANN's Mission Includes Policy Development Affecting Pricing

Section 1.1(a)(i) of ICANN's bylaws state (emphasis added):

> "*ICANN coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS") and coordinates* ***the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains*** *("gTLDs"). In this role, ICANN's scope is to coordinate the development and implementation of policies ... that are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.*"

This provision clearly empowers ICANN to develop and implement policies related to the DNS, which inherently includes contractual terms with registry operators. Pricing policies are a fundamental aspect of these contractual terms, especially when they impact the accessibility and affordability of domain names for registrants worldwide.

There is No Prohibition Against Setting Prices in the Bylaws

ICANN seemingly relies on **Section 1.1(c)** to support its claim of not being a "price regulator":

> "*ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the*

[1] https://www.icann.org/resources/pages/governance/bylaws-en

express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority."

However, this section explicitly limits ICANN's non-regulatory stance to actions **outside** the scope of **Section 1.1(a)**. Since **Section 1.1(a)** encompasses the coordination of policies for the DNS, including those affecting registration services and agreements with registries, ICANN is within its rights—and responsibilities—to set prices in its contract with TLD registries as part of its policy coordination role.

Obligation to Serve the Public Interest and Promote Competition

ICANN's commitment to the public interest and the promotion of competition is enshrined in multiple sections of its bylaws:

1. **Section 1.1(d)(iv):**
   "*ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.*"
2. **Section 1.2(b)(iv):**
   "*Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;*"
3. **Section 1.2(c):**
   "*In carrying out its Mission, ICANN shall be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws*"
4. **Section 2.3 (Non-Discriminatory Treatment):**
   "*ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.*"

These provisions not only allow, but compel ICANN to take actions—including setting appropriate fees on TLDs—that promote competition and serve the public interest. By preventing unreasonable price increases and monopolistic practices, ICANN would be fulfilling its mission to ensure the DNS remains accessible in the public interest.

Requirement for Transparent, Multistakeholder Policy Development

A cornerstone of ICANN's governance model is the bottom-up, consensus-based, multistakeholder process:

1. **Section 1.1(a)(i):**
   "*ICANN's scope is to coordinate the development and implementation of policies... that are developed through a bottom-up consensus-based multistakeholder process.*"

2. **Section 3.1 - Open and Transparent:**
   "*ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.*"

3. **Section 4.6(b)(i):**
   "*The Board shall cause a periodic review of ICANN's execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making reflect the public interest and are accountable to the Internet community.*"

Secret negotiations between ICANN and registry operators, such as Verisign's management of the .Com TLD, directly violate ICANN's bylaws on transparency. Policies and agreements that affect the global Internet community must be developed transparently, with ample opportunity for public input and consensus-building. Bypassing this process undermines ICANN's accountability and the legitimacy of its decisions.

There Is Nothing in the Bylaws that State ICANN Should Not Set Prices

The word "price" is not found a single time in ICANN's bylaws. However, the bylaws use the term "*public interest*" ten different times, and even tells ICANN that it should "*negotiate*" on its "*agreements*". As ICANN has put out this public comment period on the .COM Registry *Agreement*, it is clear that ICANN is supposed to be negotiating and setting prices in Registry Agreements, just as ICANN sets prices and negotiates on a daily basis across the entire industry.

In fact, ICANN has been using price caps in many of its registry agreements since its inception. So on one hand, ICANN is claiming that it does not have the authority to set price caps - but it currently sets price caps and has done this in the past. This is entirely hypocritical.

ICANN's Current Practices Go Against Its Bylaws

ICANN's assertion that it is not a price regulator and its engagement in private negotiations without broad community involvement are inconsistent with its bylaws. By allowing registry operators to increase prices without justification, ICANN fails to uphold its obligations to:

- Promote competition and prevent monopolistic practices.
- Act in the public interest by ensuring domain names remain affordable and accessible.
- Develop and implement policies through a transparent, bottom-up, multistakeholder process.

ICANN's Current Practices Go Against The Creation of ICANN

On June 5, 1998, the NTIA published a paper formally titled "Statement of Policy on the Management of Internet Names and Addresses"[2] in the Federal Register, commonly referred to as the "White Paper". This document laid the groundwork for creating ICANN. One of the fundamental missions of the White Paper was to "*privatize the domain name system (DNS) in a manner that increases competition*" in the domain name registration process. This paper acknowledged a pressing issue: "*There is widespread dissatisfaction about the absence of competition in domain name registration.*" This dissatisfaction stemmed from a system where a few entities controlled most of the domain name market, leading to high prices for consumers. The White Paper's proposal aimed to dismantle this monopoly by introducing ICANN as a new body to oversee domain name registrations and ensure a more competitive environment.

The White Paper highlighted concerns about market manipulation and consumer protection: "*top level domain names are not, by nature, ever truly generic. As such, they will tend to function as 'natural monopolies' and should be regulated as a public trust and operated for the benefit of the Internet community as a whole.*" The paper stated: "*even if competition initially exists among various domain name registries, lack of portability in the naming systems would create lock-in and switching costs, making competition unsustainable in the long run.*"

And the White Paper even cited the issues critical to any Verisign agreement when it stated "*the pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically.*" The White Paper hit the nail squarely on the head when it predicted and stated "*The new corporation's processes should be fair, open and pro-competitive, protecting against capture by a narrow group of stakeholders.*" However, ICANN's current operations appear to diverge significantly from these founding principles, particularly in its captured relationship with registry operators like Verisign.

ICANN's Current Practices Go Against Its Earlier Actions

ICANN once had a clear focus on its mission. In 2004, ICANN put the .Net TLD out for competitive bid, stating: "*ICANN shall select as the successor Registry Operator the eligible party that it reasonably determines is best qualified to perform the registry function under terms and conditions developed pursuant to Subsection 4.3 of this Agreement, taking into account all factors relevant to the stability of the Internet, **promotion of competition, and maximization of consumer choice**, including without limitation: functional capabilities and performance specifications proposed by the eligible party for its operation of the registry, **the price at which registry services are proposed to be provided by the party**.*"[3] As a result of this competitive process, Verisign was compelled to reduce its fees ("*the price at which registry services are proposed*") from $6.00 per domain per year to $3.50.

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2 https://www.ntia.gov/federal-register-notice/statement-policy-management-internet-names-and-addresses

3 https://www.icann.org/en/announcements/details/draft-procedure-for-designating-subsequent-net-registry-operator-2-6-2004-en

Similarly, in 2002, ICANN opened the .Org TLD for competitive bid, transitioning its management from Verisign to PIR. The criteria in the .Org public bid request submitted by ICANN emphasized affordability, noting: "*In view of the noncommercial character of many present and future .org registrants, affordability is important.* ***A significant consideration will be the price at which the proposal commits to provide initial and renewal registrations*** *and other registry services. The registry fee charged to accredited registrars should be as low as feasible consistent with the maintenance of good-quality service.*" ICANN made it clear that cost considerations for the public benefit were paramount, stressing that "*A significant consideration*" would be placed on pricing.

In the past, ICANN acted in alignment with its bylaws, promoting competitive bids to serve the public interest. However, ICANN's recent stance that it "is not a price regulator" contradicts these earlier principles. This shift seemingly favors the organization's largest contributors, providing a facade for what could be perceived as collusion with major registries rather than the competitive and public-oriented oversight it once championed for.

Conclusion

ICANN's bylaws unequivocally empower and obligate the organization to negotiate prices of top-level domains as part of its mission to coordinate policies for the DNS. The bylaws mandate actions that promote competition, serve the public interest, and ensure transparent, multistakeholder policy development. ICANN's current stance of "not being a price regulator" does not mean that ICANN should sit on the sidelines and make zero efforts to negotiate reasonable fee caps for the benefit of the industry.

For ICANN to adhere to its bylaws and uphold its responsibility to the global Internet community, it must:

- Acknowledge its role in setting prices and negotiating as part of policy coordination.
- Commit to transparency and involve the multistakeholder community in policy development, especially with pricing on legacy TLDs.
- Put legacy TLDs out for periodic competitive bidding as ICANN has been asked to do countless times in the past, as ICANN has done in the past, to promote competition and protect the public interest, and to prevent regulatory capture of the world's most significant TLD.

By taking these steps, ICANN will once again reinforce its legitimacy, ensure the DNS remains stable and accessible, and fulfill its mission as the steward of the Internet's unique identifier systems.

ICANN's claim to be 'not a price regulator' is not only unfounded but directly conflicts with its fundamental mission; it's a narrative that misleads and betrays the global Internet community ICANN is duty-bound to protect.