

TurnCommerce Inc. Public Comment

ICANN's Proposed Renewal of the Verisign Registry Agreement for .NET: Déjà Vu All Over Again

I. Introduction

With zero consideration of the significant harm to consumers or the proven benefits of competition to the public interest, ICANN is once again preparing to hand another six-year term to the incumbent .NET registry operator, Verisign. That decision, as well as the charges authorized by the new agreement, were not based on any cost-study or economic analysis. Nor was the .NET registry put out for competitive bid. Instead, the pending award appears to be based on the single factor that the United States Department of Justice Antitrust Division warned about 15 years ago: how much Verisign is willing to pay ICANN for the right to charge the public over \$1 billion for .NET registrations over the next six years.¹

The answer to that question this time around is \$59.4 million. ICANN collects this payment via a surcharge Verisign imposes on .NET registrants and passes it on to ICANN. Tellingly, while this ICANN surcharge for every other TLD is \$0.25, the .NET surcharge has remained \$0.75. There is no explanation for this anomaly other than that the .NET surcharge is the mechanism through which Verisign shares some of its monopoly profits with ICANN.

Renewal for Verisign should not occur under these circumstances. Competitive bidding should proceed before any contract award. Anything less would be contrary to the public interest.

Yet as anyone who has paid even the slightest attention to this marketplace knows, the adoption of another agreement contrary to the public interest is exactly what is going to happen (as it has repeatedly with .NET, .COM, and now apparently .WEB). ICANN will yet again ignore its charter and the cries of stakeholders and industry participants, as ICANN and Verisign once again impose supra-competitive prices on TLD registrants. As a famous baseball manager and coach once said, "déjà vu all over again."

II. Competition for Registry Agreements Benefits Registrants and Consumers

Stakeholders in the domain name industry have called repeatedly for ICANN to put the .NET Registry Agreement (and many other legacy TLD agreements) out for competitive bid. As always, ICANN refuses to listen², despite obvious and demonstrable benefits to registrants stemming from a competitive process. For example:

- The one time ICANN did put the .NET registry agreement out for a competitive bid in 2005, five companies submitted bids to operate the registry. And while ICANN re-awarded the contract to Verisign for an additional 6 years, the bidding process forced Verisign to compete on a variety of

¹ <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>

² ICANN claims its public comment process is a "vital part of our multistakeholder model" and "an opportunity for the ICANN community to effect change and improve policies and operations" and "an important step in the renewal of registry agreements before ICANN's Board consideration" to "inform the Board discussion and decision-making." However, prior comment periods have held significant volume of consistent messages around price caps, the need for economic studies, perpetual renewal terms, and ICANN putting TLD agreements out for competitive tender. The community has told ICANN about the anticompetitive implications of awarding no-bid agreements – yet ICANN does not listen. <https://www.icann.org/en/public-comment/about>

factors – including cutting its proposed fee almost in half, from \$6.00 to \$3.50 per domain.³ This competition directly benefited more than 6.1 million registrants at the time. Today, there are more than 13.0 million .NET registrants, and the fee, for something that gets cheaper over time based on quantum improvements in computing costs, is instead almost three times the amount Verisign charged in 2005.

- In 2016, Public Interest Registry (PIR), the registry operator for the .ORG database, put the back-end technical operations out for bid.⁴ Twenty companies responded to the RFP. In response, Afilias (the incumbent operator) agreed to reduce fees from \$3.49 per domain to \$1.67 per domain.⁵ On March 17, 2023, Public Interest Registry announced it would launch a new RFP Process and put the contract out for competitive tender again.⁶
- The US Government put the .GOV registry database out for competitive bid. In January of 2023, Verisign lost the contract to CloudFlare.⁷ Competition allowed the US Government to ensure that the .GOV registry services were being offered at reasonable prices and favorable terms.

The United States Department of Justice Antitrust Division has long recognized the value and importance of competitive bidding in this marketplace:

“Experience with the .NET TLD and other gTLDs has shown that competitive bidding in the award of gTLD registry agreements, and periodic rebidding, has served as an effective tool for managing the interest of registrants in gTLDs. Indeed, competitive bidding has resulted in lower domain prices and higher operating specifications than what ICANN has achieved through non-competitive negotiations. In particular, competitive bidding prompts bidders to propose and accept registry improvements, higher operating standards, and lower registration fees to win the contract.”⁸

In response, ICANN claims it “does not have the right under the current .NET Registry Agreement to unilaterally refuse to renew the agreement or to bifurcate registry functions.”⁹ But the presumptive renewal provisions of the .NET Registry Agreement are fatally flawed, as they conflict with ICANN’s express mission and bylaws to enhance competition and to act for the benefit of the Internet community as a whole. Presumptive renewal imposes monopolistic costs on the entire Internet community by allowing Verisign and ICANN to raise prices even further in an environment of falling costs.

In fact, ICANN acknowledged in 2001 that TLD registry operators “will inevitably acquire some attributes of monopoly power [as a result] of (a) the technical impracticality of having more than one operator of

³ <https://www.govinfo.gov/content/pkg/CHRG-109hrg30233/html/CHRG-109hrg30233.htm>

⁴ https://circleid.com/posts/20160216_pir_invites_bids_for_org_back_end_operations

⁵ <https://domainnamewire.com/2019/10/28/pir-org-slashes-registry-fee-to-afilias-in-half-to-18-million/> - 2017 total backend cost of \$37.8 million with a base of .ORG domains at 10.8 million as of July 2017 = \$3.49 per domain. 2018 total backend cost of \$18.1 million with a base of .ORG domains at 10.7 million as of July 2018 = \$1.67 per domain.

⁶ <https://domainincite.com/28668-org-back-end-contract-up-for-grabs>

⁷ <https://domainincite.com/28517-verisign-loses-prestige-gov-contract-to-cloudflare>

⁸ <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>

⁹ <https://itp.cdn.icann.org/en/files/registry-agreement/report-comments-net-renewal-13jun17-en.pdf>

the core registry function for a given TLD and (b) the economic ‘lock-in’ that consumers undergo when they establish web sites and other services at a registered domain name within the TLD. To prevent abusive behavior from registries, ICANN said “the price caps on the fee a registry may charge registries for a registration can be adjusted downwards, but not upwards. Registries, for the most part, have accepted these constraints as part of the privilege of operating a TLD.”¹⁰

In 2004, an ICANN-commissioned economic study found “Even without price caps, demand among existing registrants is likely to remain relatively inelastic at most imaginable price points because of the lock-in effect” and the “switching costs generally discourage changing that decision later. As noted above, these cost can be quite substantial. It is therefore rare to find registrants that have switched from an existing TLD to a new gTLD.”¹¹

III. Flawed Process and Sham Public Comment Process

ICANN has received criticism in the past for negotiating its contracts with registries in private behind closed doors – before seeking public input. If ICANN truly cared about serving the public interest and seeking community input – it would first call for public comments before entering negotiations with Verisign. This process is flawed and appears to be intentionally designed to limit outside input or competition. By not allowing public input until after the agreement has been drafted and finalized between the two parties, ICANN is disregarding calls for competition and price limits that could benefit consumers. There is no opportunity for those offering comments to sway the terms of the agreement, thus giving Verisign and ICANN complete control over their contract. This process ultimately protects the interest of Verisign.

The public comment process has also been labeled as a “sham”¹² within the industry and nothing more than an illusion that ICANN cares and will take into consideration valuable input and feedback. Recent examples with the .ORG^{13 14} and .COM^{15 16} public comment is direct evidence that ICANN is not willing to make any changes to its contracts after public comment periods.¹⁷

¹⁰ <https://www.icann.org/resources/unthemed-pages/report-name-tld-2001-07-31-en>

¹¹ <https://archive.icann.org/en/tlds/new-gtld-eval-31aug04.pdf>

¹² <https://freespeech.com/2019/08/20/icann-public-comment-periods-are-a-sham-all-public-comment-periods-should-be-suspended-until-a-full-investigation-has-occurred/>

¹³ In March 2019, ICANN put its proposed .ORG Registry Agreement out for public comment which removed all price caps. In ICANN own words the “*primary concern in the comments was with respect to the proposed removal of the price cap provisions.*” ICANN ignored the unanimous opposition – and simply executed the proposed contracts without making any changes to the contract. <https://itp.cdn.icann.org/en/files/registry-agreement/report-comments-org-renewal-03jun19-en.pdf>

¹⁴ https://www.theregister.com/2019/07/29/icann_slammed_org_price/

¹⁵ In March of 2020, ICANN put its proposed .COM Registry Agreement out for public comment, with ICANN staffers concluding that “*the comments about the proposed changes to the maximum allowable wholesale price for .COM registry services were nearly unanimous in voicing disagreement or concern.*” <https://itp.cdn.icann.org/en/files/registry-agreement/report-comments-com-amendment-3-26mar20-en.pdf>

¹⁶ <https://www.icann.org/en/system/files/correspondence/muscovitch-to-botterman-icann-board-02apr20-en.pdf>

¹⁷ https://www.theregister.com/2019/07/01/org_domain_icann/ - “*The failure to account for, or even respond to, the thousands of responses has renewed concerns that ICANN lacks basic accountability and is failing to live up to its public interest mandate*” and “*The fact that ICANN signed a new contract with such far-reaching consequences despite having carried out no economic analysis, despite thousands of comments opposing the change, and then did so without an explanation, or public discussion, or a Board resolution, is indicative of an organization that can,*

Which brings us to an important question: Why is ICANN putting this already negotiated contract with Verisign out for public comment? If ICANN does not have any plans to change an already negotiated contract with VeriSign – why waste the community’s time by pretending to listen?

IV. The .NET Registry Agreement and ICANN’s Current Proposed Renewal Violate ICANN’s Mandate to Promote Competition

ICANN was formed with the primary purpose to introduce and promote competition, including, specifically, competition that could break VeriSign’s monopoly.¹⁸ But ICANN is doing exactly the opposite. ICANN continues to award (or perhaps more accurately, sell) perpetual contracts to Verisign that will never be subject to any competition.

As the first CEO of ICANN, Mike Roberts, recently admitted:

“The chartering goals include ‘promote competition.’ [But] as everyone knows, ICANN has actually been handing out monopoly licenses with no price constraints on the dubious theory that many monopolies will promote lower prices and provide the benefits of competition to the Internet community. That hasn’t happened...”¹⁹

The United States Department of Justice Antitrust Division told ICANN (emphasis added):

“ICANN is obligated to manage gTLDs in the interest of registrants and to protect the public interest in competition” and “*should require competitive bidding for renewals of a gTLD registry agreement, rather than granting the incumbent operator a perpetual right to renew without competition.*”²⁰

“ICANN’s approach to TLD management demonstrates that it has adopted an *ineffective approach* with respect to its obligation to promote competition at the registry level.”²¹

The Antitrust Division’s analysis of the competition issues and recommendation to “give greater consideration to consumers interests before ... renewing registry agreements” rings true today, just as loudly as it did in 2008.

V. Economic Impact of the .NET Registry Agreement:

and does, act in its own interests and with impunity, despite the fact its oversees a vast public resource and claims to be acting in the public interest.”

¹⁸ <https://www.commerce.senate.gov/services/files/C81CE454-F519-4373-A51D-234C61755E39>

¹⁹ <https://circleid.com/posts/20200219-isoc-and-the-pir-sale-lessons-being-learned>

²⁰ <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>

²¹ Id.

The total value of the proposed ICANN .NET Registry award contract to Verisign is \$1.17 billion in fees over a six-year term.^{22 23} And in exchange, ICANN will receive \$59.4 million in fees²⁴ from Verisign.

The Department of Justice has concluded that consumers have no option but to pay arbitrary fees established by ICANN, which are based on no economic study or analysis. These fees and authorized increases for .NET domains were established 18 years ago by ICANN – yet ICANN is unwilling to study the market, commission an economic study, and consult with experts to determine if the fees and ICANN imposed price caps are still justified.

VI. Increasing Domain Fees in Today's Technology Environment is Unconscionable

In 2005, the fee Verisign collected for a .NET domain was \$3.50 per year. Today the fee is \$9.92 per year. (And, as noted previously, Verisign also collects an additional \$0.75 fee per domain²⁵ which is entirely passed along to ICANN.) But the cost to operate the registry database has declined significantly. The actual cost to operate the registry database was \$4.67 in 2009²⁶ and \$2.66 in 2021.²⁷ The core registry functions are entirely automated, with Verisign functioning as little more than a look-up database.

Yet under the new agreement, Verisign is authorized to increase the fee from \$9.92 to \$17.56. These margins are extraordinary and made possible by the lock-in effect of domain names and because the .NET registry database has not faced any competition since it was last put out for competitive tender by ICANN in 2005.

Financial analysts who have studied Verisign agree, describing it as having “a virtual monopoly on Internet domains” that gives it “unrivalled power” in “the fastest-growing industry in the world - the Internet.”²⁸ Others have said Verisign is “an extremely attractive and enviable competitive position that could be likened to a monopoly” and “the margin on this recurring revenue is extraordinarily high, and there is very minimal need for cash in this business. The high margin recurring revenue and the low

²² \$9.92 per domain fee x 13,192,825 current registrants x 6-year term. Assuming base of domains remains the same. If Verisign were to put this contract out for competitive bid – many other qualified operators would propose significantly lower fees and allow for innovation. Competitive bidding, between incumbent operator and prospective successor operators, benefits consumers by keeping prices in check, by ensuring that the registry operator invests in sufficient infrastructure and staff to maintain a stable and secure registry, by maintaining solid and reliable performance of the registry, and by preventing the registry from undertaking abusive practices that would financially benefit the registry at the expense of the end-users. The threat of future competitive bidding not only constrains the TLD operator at the moment when it bids, but also during its operation of the registry. A failure to act reasonably and provide service on competitive terms and conditions throughout the contract term poses a potential for the current operator to lose in future bidding competition for the TLD registry agreement.

²³ ICANN has established price caps which allow Verisign to increase its fees by a maximum amount of 10% per year. Assuming base of domains remains the same.

²⁴ \$0.75 per domain is collected from Retail Registrars and paid to Verisign and then passed along to ICANN.

²⁵ ICANN collects \$0.75 per domain from Verisign for each .NET domain name, and Verisign charges registers this same amount on top of the fee of \$9.92 per year. In every other registry agreement, ICANN only collects \$0.25 per domain. Why is ICANN treating Verisign different with regards to .NET?

²⁶ VRSN SEC filings – 2009 full year revenues of \$515.9 million and total expenses of \$455.9 million on a total base of 97 million .COM & .NET domains

²⁷ VRSN SEC filings – 2021 full year revenues of \$1.32 billion and total expenses of \$460.7 million on a total base of 173.4 million .COM & .NET domains

²⁸ https://www.cruz.senate.gov/imo/media/doc/Letters/20160812_DOJ-ICANNLetter.pdf

capital requirements lead to stable and predictable free cash flow, which the company uses almost exclusively to buy back stock.”²⁹

The proposed .NET Registry Agreement allows Verisign to continue printing money³⁰ from an automated database and ICANN will continue to receive fees from its largest ratepayer. Great economics for Verisign and ICANN – but horrible economics for more than 13 million worldwide .NET registrants – who have no choice but to pay higher fees because they are locked into their domain names.

Conclusion:

Increasing prices in the .NET registry – under a single-supplier contract – with more than 13 million registrants from the current \$9.92 to \$17.56 – over six years – is a gigantic increase. The ICANN board should be involved in the review of whether the public interest is served by such a massive fee increase on the operation of the Internet. ICANN should conduct a full economic analysis and proper assessment of how the current fees are justified.

ICANN essentially has two options.

Option 1: Heed the advice of the United States Department of Justice Antitrust Division and thousands of stakeholders who have called for ICANN to put TLD contracts out for competitive tender – and use the bidding process to ensure that domain registration fees are offered at reasonable price and terms guided by the forces of the competitive process.

Option 2: If ICANN is not willing to put the .NET Registry Agreement out for competitive tender and completely ignore its competition mandate – then it has an obligation to the global Internet community to perform the required work to determine if the current \$9.92 fee cap and the 10% yearly escalations are appropriate. This includes hiring an expert economist, conducting a full economic study and sharing the results with the community, looking at the cost of other registry operators, and ensuring fees are reasonable.

Doing neither should seriously call into question the entire ICANN multi-stakeholder model of Internet Governance.

We are at a pivotal point for ICANN. Does ICANN want to continue protecting Verisign and its money printing machine – and continue to ignore the global stakeholder community – or does ICANN want to live up to its mandate and promote competition within the Domain Name System?

²⁹ <https://sabercapitalmgt.com/wp-content/uploads/2013/03/Verisign-2016-09-02.pdf>

³⁰ “Normally, companies with regulated prices aren’t profit-making juggernauts. But in the third quarter of 2017, Verisign’s operating income as a percentage of revenue hit 61.9 percent, putting it near the top of all companies in the S&P 500. This number has climbed steadily since 2006. If the trend continues, sometime in the next decade Verisign will post the highest rate of profitability of any public company on earth.” David Dayen <https://www.thenation.com/article/archive/special-investigation-the-dirty-secret-behind-warren-buffetts-billions/>