

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

AFILIAS DOMAINS NO. 3 LIMITED,

Claimants

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

EXPERT REPORT BY THE HONORABLE JOHN KNEUER

ICANN INDEPENDENT REVIEW PROCESS

May 29, 2020

EXPERT REPORT OF THE HONORABLE JOHN KNEUER

I. INTRODUCTION

1. It is my understanding that Afilias claims that ICANN has the authority and obligation to act as an economic or competition regulator based on a mission statement to promote competition set forth in ICANN’s Bylaws. Specifically, Afilias contends that it would violate ICANN’s competition mandate for ICANN to allow Verisign to become the registry operator for the .WEB gTLD and, therefore, ICANN is required to use its alleged regulatory authority to prevent that outcome.

2. As Assistant Secretary of Commerce for the U.S. Department of Commerce (“DOC”), I had responsibility for executing the U.S. government’s rights and responsibilities under relevant contracts between or among ICANN, Verisign, and the U.S. government, and had responsibility for exercising oversight over competition within the Domain Name System (“DNS”). In these roles, I was responsible for the approval of amendments, respectively, to the Cooperative Agreement between DOC and Verisign, and the .com Registry Agreement between Verisign and ICANN, that provide that (i) DOC, along with advice from the Department of Justice, is responsible for oversight of the DNS and Verisign with respect to matters of competition, and (ii) ICANN does not have the authority or responsibility to act as a regulator in matters of competition, including over Verisign. As Assistant Secretary, I further was responsible for oversight of ICANN under the original Memorandum of Understanding between DOC and ICANN (“MOU”).

3. I was asked by Verisign, *amicus* in this Independent Review Proceeding (“IRP”), to evaluate Afilias’ claims that ICANN is an economic regulator based on my knowledge and expertise regarding the scope of authority of ICANN. I am being compensated for my testimony in this matter at my ordinary rates for consulting services.

4. It is my opinion that:

- a. ICANN has no authority to regulate competition in the DNS. ICANN was created as part of a plan by the United States government to remove itself from direct technical administration of the DNS and, instead, to have the technical infrastructure of the DNS administered by a private non-governmental entity, which became ICANN, under a contractual MOU with DOC. That plan did not include any transfer of the U.S. government's regulatory authority, including over competition, to ICANN. ICANN has never possessed any authority to regulate competition, and ICANN lacks the expertise and resources necessary to provide such competitive oversight of the DNS. ICANN does not have a staff of economists or antitrust lawyers and, as explained below, ICANN is obligated to refer relevant matters of competitive concern to appropriate governmental authorities, such as the U.S. Department of Justice.
- b. Under the Memorandum of Understanding between ICANN and DOC, ICANN was to provide technical coordination and management of the DNS on behalf of DOC.¹ The MOU and successor agreements confirm the limited scope of ICANN's mission. The stated purpose of the MOU was to transfer responsibilities related to the technical management of the DNS.² The MOU did not delegate governmental authority or responsibility to ICANN to police or regulate competition.
- c. ICANN's authority with respect to Verisign, as well as other registries and registrars, is contractual in nature. ICANN has individual contracts with registries and registrars under which ICANN provides technical administration and management of the DNS.

¹ Exhibit B (Memorandum of Understanding ("MOU"), DOC-ICANN, § 2.B., (Nov. 25, 1998), *available at* <https://www.ntia.doc.gov/page/1998/memorandum-understanding-between-us-department-commerce-and-internet-corporation-assigned->).

² *Id.*

- d. The MOU and its successor agreements terminated in January 2017, severing ICANN's connections with the U.S. government.³ ICANN obtained this independence from U.S. government oversight only by demonstrating its willingness to perform its technical mission and not seek to overreach that mission by attempting to expand its oversight into regulatory areas that are not within the scope of its mission or government authorization.
- e. As with other registries, ICANN's only authority over Verisign is based on contracts between ICANN and Verisign. These agreements do not provide for ICANN to serve as a regulatory authority over Verisign. Rather, under these agreements, competition issues with respect to Verisign's conduct are to be performed by a competent competition authority, such as the U.S. Department of Justice, and not ICANN, which is obligated to refer competition concerns to these authorities.
- f. The DOC possesses oversight on certain matters of competition with respect to Verisign pursuant to a Cooperative Agreement between Verisign and DOC,⁴ although those controls have been loosened over time as competition in the DNS has grown. ICANN's first registry agreement with Verisign, entered into in 1999, was explicit that in the case of any conflict between the Cooperative Agreement between Verisign and DOC, and the Registry Agreement between Verisign and ICANN, the terms of the DOC's Cooperative Agreement with Verisign took precedence.⁵

³ See Exhibit C (Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information, Department of Commerce, to Stephen D. Crocker, Chairman of the Board of Directors, ICANN (Jan. 6, 2017), available at <https://www.icann.org/en/system/files/correspondence/strickling-to-crocker-06jan17-en.pdf>).

⁴ Exhibit D (Cooperative Agreement, NCR 92-18742, NSF-NSI, (Jan. 1, 1993), available at <https://archive.icann.org/en/nsi/coopagmt-01jan93.htm>); Exhibit E (Amendments to Cooperative Agreement, NCR 92-18742, NSF-Verisign, available at <https://www.ntia.doc.gov/page/verisign-cooperative-agreement>).

⁵ Exhibit F (Registry Agreement (1999), ICANN-NSI, § 16, (Nov. 10, 1999), available at <https://archive.icann.org/en/nsi/nsi-registry-agreement-04nov99.htm>).

Further, under the MOU between ICANN and DOC, ICANN could not amend or change the terms of the Registry Agreement without the prior approval of DOC.⁶ Still today, changes to the .COM Registry Agreement regarding matters of competition are subject to review and approval by DOC.⁷

- g. The limits on ICANN's authority over Verisign with respect to competition matters were confirmed by Amendment 30 to the Cooperative Agreement,⁸ and the related 2006 .COM Registry Agreement,⁹ both of which I personally was responsible for approving. Among other terms regarding competition, these agreements required ICANN to refer matters raising competition concerns to appropriate governmental competition authorities.¹⁰ Following such referral, under the express terms of the Registry Agreement and Cooperative Agreement, ICANN had no responsibility with respect to such competition issues, and Verisign had no obligation to ICANN with respect to such issues.¹¹ The agreements further included limits on pricing and vertical integration by Verisign as well as the renewal and/or amendment of the Registry Agreement. For example, Amendment 30 required DOC approval for any renewals of the .COM Registry Agreement as in the "public interest" in part based on the provision of registry services on "reasonable prices, terms and

⁶ Exhibit G (MOU, Am. 1, DOC-ICANN, ¶ 1, (Nov. 10, 1999), *available at* <https://www.ntia.doc.gov/page/1999/icann-ammdment-1>).

⁷ Exhibit H (.com Registry Agreement (2012), ICANN-Verisign, § 3.1(d)(iv)(E), (Dec. 1, 2012), *available at* <https://www.icann.org/resources/pages/agreement-2012-12-05-en>).

⁸ Exhibit I (Cooperative Agreement, Am. 30, NCR 92-18742, DOC-VeriSign, (Nov. 29, 2006), *available at* https://www.ntia.doc.gov/files/ntia/publications/amend30_11292006.pdf).

⁹ Exhibit J (.com Registry Agreement (2006), ICANN-VeriSign, (Mar. 1, 2006, amended Sept. 22, 2010), *available at* <https://www.icann.org/resources/unthemed-pages/registry-agmt-com-2010-09-22-en>).

¹⁰ Exhibit I (Cooperative Agreement, Am. 30, *supra* note 8, at § 3.1(d)(iv)(E)); Exhibit J (.com Registry Agreement (2006), *supra* note 9, at § 3.1(d)(iv)(E)).

¹¹ *Id.*

conditions.”¹² The Cooperative Agreement, which incorporated by reference the terms of the Registry Agreement,¹³ required DOC prior approval to any change in the terms addressing matters of competition and provided for direct supervision and enforcement of these terms by the DOC.¹⁴ Based on increases in competition subsequent to 2006, the renewal provision quoted above has been removed from the Cooperative Agreement and other restrictions on Verisign’s operation of the .COM registry have been relaxed.¹⁵

- h. The Cooperative Agreement originally applied to all of the gTLDs operated by Verisign.¹⁶ As competition in the DNS has developed, all gTLDs operated by Verisign other than .COM have been removed from oversight under the Cooperative Agreement, including the removal of oversight over Verisign’s operation of the .NET gTLD.¹⁷ .NET is the second largest gTLD in the world, next in size only to .COM.
- i. Based on express findings by DOC that the DNS is a more dynamic marketplace by reason of the new gTLDs (among other things), Amendment 35 to the Cooperative Agreement, executed in October 2018, further relieved competitive restrictions on Verisign.¹⁸ Amendment 35 provides that “the Department finds that ccTLDs, new gTLDs, and the use of social media have created a more dynamic DNS marketplace...”¹⁹ Accordingly, the Amendment confirms that competitive restrictions

¹² Exhibit I (Cooperative Agreement, Am. 30, *supra* note 8, § 2(A)(ii)).

¹³ *Id.* ¶ 1.

¹⁴ *Id.* § 3.1(d)(iv)(E); Exhibit J (.com Registry Agreement (2006), *supra* note 9, § 3.1(d)(iv)(E)).

¹⁵ Exhibit K (Cooperative Agreement, Am. 32, NCR 92-18742, DOC-Verisign, (Nov. 29, 2012), *available at* https://www.ntia.doc.gov/files/ntia/publications/amend30_11292006.pdf).

¹⁶ *See generally* Exhibit D (Cooperative Agreement, *supra* note 4).

¹⁷ Exhibit I (Cooperative Agreement, Am. 30, *supra* note 8, § 1.2).

¹⁸ Exhibit L (Cooperative Agreement, Am. 35, NCR 92-18742, DOC-Verisign, at preamble (Oct. 26, 2018), *available at* https://www.ntia.doc.gov/files/ntia/publications/amendment_35.pdf).

¹⁹ *Id.*

imposed on Verisign by the Cooperative Agreement would be limited to the .COM TLD and would not include competitive restrictions on other TLDs operated by Verisign -- such as Verisign's potential operation of .WEB. I also am aware that the U.S. Department of Justice conducted a year-long investigation of Verisign, specifically into the potential assignment of .WEB to Verisign and terminated the investigation without action.

5. In summary, as explained more fully in this report, a review of the record demonstrates that ICANN is not an economic or competition regulator as Afilias claims. The express mission of ICANN from its founding, the explicit terms of the agreements governing the DNS (including the Cooperative Agreement, MOU and registry agreements), ICANN's lack of resources or expertise to provide such oversight, and, importantly, the lack of any congressional or regulatory authorization for ICANN to act as a regulator -- all are inconsistent with ICANN having any role as an economic regulator.

II. BACKGROUND AND QUALIFICATIONS

6. From October 2003 through November 2007, I served first as the Deputy Assistant Secretary, and then as the Assistant Secretary of Commerce for Communications and Information, in the United States Department of Commerce. In this capacity, I was the principal advisor to the President of the United States on telecommunications policy and the Administrator of the National Telecommunications and Information Administration ("NTIA"). In addition to representing the Executive Branch in domestic and international telecommunications and information policy activities, NTIA also manages the federal use of spectrum; performs cutting edge telecommunications research and engineering, including resolving telecommunications issues for the federal government and private sector; and administers infrastructure and public telecommunications infrastructure grants.

7. Currently, I am the President and founder of JKC Consulting LLC ("JKC LLC") and a Senior Advisor to the American Continental Group. I also sit on the Board of Terrastar

Corporation and serve as the Chairman of the Board of Directors of Sonim Technologies. I have worked in the private sector as a board member, consultant, and advisor to companies and institutions with interests in domestic and international telecommunications and technology markets, including Verisign, for whom I have provided consulting services for several years on public policy issues relating to the DNS. During my time in the private sector I have remained engaged in DNS-related policy issues, including testimony before Congress, public speaking engagements, and publishing on these topics.

8. Prior to serving at NTIA, I practiced law at Piper Rudnick in Washington, D.C., providing regulatory and legislative representation to corporate clients in the telecommunications, defense and transportation industries. Earlier in my career, I served as an Attorney-Advisor in the Federal Communication Commission's Wireless Bureau.

9. I received B.A. and J.D. degrees from Catholic University of America. I am a member of the District of Columbia Bar.

10. My curriculum vitae setting forth my educational and professional experience, speaking engagements, publications, and testimony is attached hereto as Exhibit A.

III. THE COOPERATIVE AGREEMENT BETWEEN DOC AND VERISIGN

11. The Internet is an outgrowth of United States government investments in packet-switching technology and communications networks carried under agreements with the Defense Advanced Research Projects Agency (DARPA), the National Science Foundation (NSF) and other U.S. research agencies. The government encouraged development of networking technologies through work at NSF, which established the NSFNET as a network for research and education purposes. The NSFNET fostered a wide range of applications, and in 1992 the United States Congress gave the NSF statutory authority to commercialize the NSFNET, which formed the basis for today's Internet. The NSF assumed responsibility for coordinating and funding the management of the non-military portion of the Internet infrastructure. NSF solicited competitive proposals to provide a variety of infrastructure services, including domain name registrations services.

12. On or about January 1, 1993, NSF entered into a Cooperative Agreement with Verisign's predecessor, Network Solutions, Inc. ("NSI"), for the provision of some of these services, including domain name registration (the "Cooperative Agreement").²⁰ Pursuant to the terms of that agreement, NSI undertook the task of registering second-level domains ("SLDs") within the generic TLDs of ".com," ".net," ".edu," ".org," and ".gov."²¹ Under the Cooperative Agreement, Verisign performed both the functions of a registrar and registry, as those functions are viewed today. Today, Verisign serves only as a registry, and there are thousands of independent registrars providing the function of registering second level domain names in registries on behalf of end users or registrants with whom the registrars contract. There are also over 1,500 gTLDs and ccTLDs.

13. Initially, the Cooperative Agreement between NSI and NSF provided for a grant to be paid to NSI for offering registration services.²² Beginning in September 1995, pursuant to Amendment 4 to the Cooperative Agreement, NSI was allowed to charge \$100 for an initial 2-year domain name registration, of which NSI retained \$70 and \$30 was placed by NSI in a separate account available for use by the NSF for investment in network infrastructure.²³ The \$30 set aside for network infrastructure was eliminated in March 1998, and the price for an initial 2-year domain name registration reduced to \$70.²⁴ These prices included both the registrar and registry functions, as the industry is organized today. As discussed *infra*, DOC, as the successor to NSF, continues to have authority over pricing and other competition related terms for the .COM registry pursuant to this Cooperative Agreement. The price charge by Verisign for the registration of a .COM domain name today is less than \$8.

²⁰ Exhibit D (Cooperative Agreement, *supra* note 4).

²¹ Exhibit M (Cooperative Agreement, Am. 4, NCR 92-18742, DOC-NSI, ¶ 2 (Sept. 13, 1995), available at <https://archive.icann.org/en/nsi/coopagmt-amend4-13sep95.htm>).

²² Exhibit D (Cooperative Agreement, *supra* note 4); Exhibit N (Cooperative Agreement, Am. 13, NCR 92-18742, DOC-NSI, ¶ 1 (Apr. 1999), available at <https://www.ntia.doc.gov/files/ntia/publications/amendment13.pdf>).

²³ Exhibit M (Cooperative Agreement, Am. 4, *supra* note 21, ¶ 2).

²⁴ Exhibit O (Cooperative Agreement, Am. 9, NCR 92-18742, DOC-NSI, ¶ 1(G)(3)(a) (Mar. 31, 1998), available at <https://archive.icann.org/en/nsi/coopagmt-amend9-00xx98.htm>).

IV. THE MEMORANDUM OF UNDERSTANDING BETWEEN DOC AND ICANN

14. Notwithstanding the rapid growth of the commercial internet, major components of the administration and technical coordination of the DNS continued to be performed by DOC as of the late 1990's. On July 1, 1997, as part of the Clinton Administration's Framework for Global Electronic Commerce, the President directed the Secretary of Commerce to privatize, increase competition in, and promote international participation in the DNS.²⁵

15. Accordingly, on July 2, 1997, the DOC issued a Request for Comments (RFC) on DNS administration.²⁶ The RFC solicited public input on issues relating to the overall framework of the DNS system, the creation of new top-level domains, policies for registrars, and trademark issues.²⁷ On January 30, 1998, following the period of public comment on the RFC, the NTIA issued for comment "A Proposal to Improve the Technical Management of Internet Names and Addresses" (the "Green Paper"), which was published in the Federal Register on February 20, 1998.²⁸ On June 5, 1998, the DOC issued a statement of policy on the "Management of Internet Names and Addresses (the "White Paper").²⁹ The White Paper set forth U.S. government policy for privatizing the administration of the DNS. Privatization was to be guided by four principles: (i) continued stability of the Internet; (ii) encouragement of competition; (ii) private, bottom-up coordination of technical management functions; and (iv) technical management of the Internet reflective of the diversity of the Internet's users and their needs.³⁰

²⁵ Exhibit P (Memorandum on Electronic Commerce, 33 Weekly Comp. Pres. Doc. 1006 (July 1, 1997), available at <https://fas.org/irp/offdocs/pdd-nec-ec.htm>).

²⁶ Exhibit Q (Department of Commerce ("DOC"), Request for Comments on the Registration and Administration of Internet Domain Names, 62 Fed. Reg. 35896 (proposed July 2, 1997), available at <https://www.ntia.doc.gov/federal-register-notice/1997/request-comments-registration-and-administration-internet-domain-names>).

²⁷ *Id.*

²⁸ Exhibit R (National Telecommunications and Information Administration ("NTIA"), Improvement of Technical Management of Internet Names and Addresses (the "Green Paper"), 63 Fed. Reg. 8826 (proposed Feb. 20, 1998), available at <https://www.ntia.doc.gov/files/ntia/publications/022098fedreg.txt>).

²⁹ Exhibit S (Department of Commerce ("DOC"), Statement of Policy on the Management of Internet Names and Addresses (the "White Paper"), 63 Fed. Reg. 31741 (June 5, 1998), available at <https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses>).

³⁰ *Id.*

16. With regard to competition, the White Paper emphasized that “market mechanisms that support competition and consumer choice should drive the technical management of the Internet because they will promote innovation, preserve diversity, and enhance user choice and satisfaction.”³¹ At the same time, the White Paper emphasized that private management of the technical infrastructure of the DNS would not supplant existing legal regimes applicable to the Internet, including antitrust regulation: “[T]his policy is not intended to displace other legal regimes (international law, *competition law*, tax law and principles of international taxation, intellectual property law, etc.) that may already apply.”³² The White Paper further emphasized that the new private entity, which became ICANN, should not be granted antitrust immunity, which the government did not believe was necessary for ICANN’s role of technical coordination and management for the DNS.³³

17. In November 1998, DOC entered into a Memorandum of Understanding (“MOU”) with the Internet Corporation for Assigned Names and Numbers (“ICANN”).³⁴ As envisioned by NTIA, ICANN’s core mission was to provide technical coordination and administration of the DNS, relieving the DOC from the daily burden of technical management.³⁵ When formed in 1998 as a California non-profit public benefit corporation, and for at least many years thereafter, ICANN was a very small corporation, formed to provide a limited function of technical management. ICANN was not then, and never has been, an economic regulator for the DNS.

18. Under the MOU, ICANN was to collaborate with DOC on the design, development and implementation of the mechanisms that needed to be in place to privatize management of the DNS.³⁶ The stated purpose of the MOU was to transfer “important responsibilities related to the technical management of the DNS,” which included “[o]versight of

³¹ *Id.* § V.B.

³² *Id.* at 7.

³³ *Id.* at 15.

³⁴ Exhibit B (MOU, *supra* note 1).

³⁵ *Id.* § II.B.

³⁶ *Id.*

the policy for determining the circumstances under which new top level domains would be added to the root system.”³⁷ The MOU was originally intended only to be in effect for approximately two years.³⁸ The MOU did not delegate to ICANN responsibility for policing or regulating competition in the domain name marketplace. That was not ICANN’s mission and it lacked the expertise and resources necessary to fulfill such a regulatory function.

19. The MOU subsequently was extended and then replaced by a “Joint Project Agreement”³⁹ and then an “Affirmation of Commitments”⁴⁰ between ICANN and NTIA, each new agreement further reducing the U.S. government’s direct involvement in ICANN’s technical coordination of the DNS. The Affirmation of Commitments was terminated in January 2017.⁴¹

20. There currently is no link, contractual or otherwise, between ICANN and the United States government, and ICANN operates solely as a private, not-for-profit entity. There is no legislative authorization for ICANN to perform any regulatory functions. ICANN’s rights and obligation with respect to the activities of domain name registrars and registries derives not from governmental authority but from the terms of ICANN’s private agreements with each such entity.

V. ICANN’S CONTRACTUAL RELATIONSHIP WITH VERISIGN

21. At the direction of DOC and pursuant to the terms of the MOU, ICANN entered into its first registry agreement with Verisign in 1999, shortly after its formation (the “1999 Registry Agreement”).⁴² Verisign entered into the 1999 Registry Agreement pursuant to Amendment 19 of the Cooperative Agreement between DOC and Verisign.⁴³ The 1999 Registry Agreement was explicit that in case of any conflict between the Cooperative Agreement and the

³⁷ *Id.* (emphasis added).

³⁸ *Id.* § VII.

³⁹ Exhibit T (Joint Project Agreement, DOC-ICANN, (Sept. 29, 2006), available at <https://www.ntia.doc.gov/files/ntia/publications/signedmou290906.pdf>).

⁴⁰ Exhibit U (Affirmation of Commitments, DOC-ICANN, (Sept. 30, 2009), available at https://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf).

⁴¹ Exhibit C (Letter from Lawrence E. Strickling, *supra* note 3).

⁴² Exhibit F (Registry Agreement (1999), *supra* note 5).

⁴³ *Id.* ¶ 16(A).

1999 Registry Agreement, the terms of the Cooperative Agreement shall take precedence.⁴⁴ Further, under the MOU between DOC and ICANN, ICANN was prohibited from agreeing to any amendment of the 1999 Registry Agreement without the prior approval of DOC.⁴⁵ DOC retained responsibility for registry agreements and DNS policy following execution of the MOU with ICANN and pursuant to the terms of both the MOU and Cooperative Agreement. In effect, the MOU and Cooperative Agreement created a contractual structure with DOC exercising oversight of both ICANN and Verisign.

22. Pursuant to an amendment to the Cooperative Agreement between DOC and Verisign's predecessor, in 1999, NSI agreed to separate the registry and registrar functions it formerly performed, allowing for the introduction of third party domain name registration services for the TLDs under NSI's management.⁴⁶ Subsequently, pursuant to terms of the Cooperative Agreement (and other arrangements), the operation of certain TLDs other than .COM and .NET were transferred to third party registry operators or put out for competitive bid (e.g., .ORG).⁴⁷ All of these transitions promoted competition in the DNS. Today, there are over 1,500 independent registries and thousands of independent registrars, which represent a major transition of the DNS, including competition in the registration of domain names, since the DNS was opened to commercial activity and ICANN was formed.

23. The price of .COM domain name registration and other terms implicating considerations of competition generally have been determined between DOC and Verisign, without significant involvement by ICANN, and set forth in the Cooperative Agreement. Most of those terms were negotiated directly between DOC and Verisign. The terms were then included in the registry agreement between ICANN and Verisign pursuant to an amendment to the Cooperative Agreement.

⁴⁴ *Id.* ¶ 16(C).

⁴⁵ Exhibit G (MOU, Am. 1, *supra* note 6, ¶ 1).

⁴⁶ Exhibit V (Cooperative Agreement, Am. 19, NCR 92-18742, DOC-NSI, (Nov. 10, 1999), *available at* <https://www.ntia.doc.gov/legacy/ntiahome/domainname/agreements/amendment19.htm>).

⁴⁷ *Id.*; *see also* Exhibit W (ICANN, "Advisory Concerning .org Transition" (Jan. 7, 2003), *available at* <https://www.icann.org/news/advisory-2003-01-07-en>); Exhibit X (InterNIC, "InterNIC FAQs on the .org Transition," *available at* <https://www.internic.net/faqs/org-transition.html>).

A. The 2006 Amendments to the Cooperative Agreement and .COM Registry Agreement

24. In early 2004, litigation was commenced between Verisign and ICANN. By February 17, 2005, ICANN and Verisign had reached a proposed settlement of the litigation between them, including a proposed agreement on the terms of renewal of the 2001 .COM Registry Agreement.⁴⁸ The proposed .COM registry agreement included modified terms for a number of provisions in earlier versions of the .COM registry agreement (the “February 2005 Proposed Registry Agreement”).⁴⁹ It required approval of the DOC.⁵⁰

25. Pursuant to the February 2005 Proposed Registry Agreement, there was no agreement setting the price for .COM domain name registrations; the agreement was silent on the pricing of .COM domain name registrations.⁵¹ Similarly, the February 2005 Proposed Registry Agreement included no price cap for .COM domain name registration prices, beyond a continuation through 2006 of the price cap in the existing registry agreement.⁵² Under the proposed agreement, if approved by DOC, pricing would be market based.⁵³

26. By letter dated February 17, 2005, ICANN submitted the proposed settlement, including the February 2005 Proposed Registry Agreement, to DOC for approval under the MOU between DOC and ICANN.⁵⁴ In my capacity as the Assistant Secretary of Commerce for Communications and Information, I had direct oversight over the ensuing negotiations and resulting Amendment 30 to the Cooperative Agreement and 2006 .COM Registry Agreement.

27. The negotiation of Amendment 30 and the 2006 Registry Agreement extended from late 2004 through November 2006, to my recollection. The negotiations included months of investigations by the Department of Justice (“DOJ”) and negotiations between Verisign, on

⁴⁸ Exhibit Y (Letter from Dr. Paul Twomey, President and CEO of ICANN, to Department of Commerce, “Proposed Settlement Agreement between ICANN and Verisign,” (Feb. 17, 2005)).

⁴⁹ Exhibit Z (ICANN-Verisign Settlement Agreement, *New .COM Registry Agreement, and Root Server Management Transition Completion Agreement* (“February 2005 Proposed Registry Agreement”), (Feb. 2, 2005)).

⁵⁰ Exhibit Y (“Proposed Settlement Agreement between ICANN and Verisign,” *supra* note 48).

⁵¹ *See generally* Exhibit Z (“February 2005 Proposed Registry Agreement,” *supra* note 49).

⁵² *Id.*

⁵³ *Id.* § 7.3.

⁵⁴ Exhibit Y (“Proposed Settlement Agreement between ICANN and Verisign,” *supra* note 48).

the one hand, and DOJ and DOC, on the other. The development of pricing, tying and other terms relating to competition in Amendment 30 and the 2006 Registry Agreement was the result of direct negotiations between the DOJ/DOC and Verisign. ICANN was not involved in any of those negotiations. DOJ and DOC reached agreement with Verisign regarding pricing under the 2006 Registry Agreement independently based on their governmental authority over competition matters regarding the DNS. In addition, the change with respect to renewals of the .COM registry agreement, which required DOC approval of renewals based on pricing and other considerations, was negotiated between the government and Verisign without involvement of ICANN and inserted into Amendment 30 and the 2006 Registry Agreement.

28. The terms of Amendment 30 and the 2006 Registry Agreement negotiated between DOC and Verisign, largely without involvement by ICANN, included price caps, restrictions on vertical integration, requirements for DOC approval of changes in terms potentially impacting competition, prohibitions on tying arrangements, direct enforcement by DOC of the registry agreement limitations on competition, and requirements for referral of competition concerns by ICANN to government authorities without further involvement by ICANN.⁵⁵ ICANN was involved in negotiations of the referral process. Further, under Amendment 30, the Cooperative Agreement provided that “[w]ithout the prior written approval by the Department, VeriSign shall not enter into any renewal under Section 4.2 or any other extension or continuation of, or substitution for, the Registry Agreement. The Department shall provide such written approval if it concludes that approval will serve the public interest in (a) the continued security and stability of the Internet domain name system and the operation of the .com registry .. and (b) the provision of Registry Services ... offered at reasonable prices, terms

⁵⁵ Exhibit I (Cooperative Agreement, Am. 30, *supra* note 8, § 7.3); Exhibit J (.com Registry Agreement (2006), *supra* note 9, § 7.3). Similarly, ICANN’s standard registry agreement provides that ICANN is obligated to refer competition issues to “the appropriate governmental competition authority or authorities with jurisdiction over the matter.” Exhibit AA (ICANN, “Registry Services Evaluation Policy,” *available at* <https://www.icann.org/resources/pages/registries/rsep/policy-en>). As with the Verisign registry agreement, following such referral, ICANN shall have no further responsibility, and registry operator shall have no further obligation to ICANN, with respect to any competition issues relating to the registry service. *Id.*

and conditions.”⁵⁶ This renewal provision was the subject of detailed and extensive negotiations between the DOJ and DOC, on the one hand, and Verisign, on the other. ICANN was not involved in those negotiations. Subsequently, DOC has approved the renewal or extension of the .COM Registry Agreement on two occasions, each time affirming that its approval was in the public interest.⁵⁷ The specific requirement that DOC approve renewals of the Registry Agreement as in the “public interest” was removed from the Cooperative Agreement in October 2018 by Amendment 35, and DOC approval over renewals or other amendments to the .COM agreement is only required if the renewal or other amendment would change certain competition or other designated terms.⁵⁸ DOC’s oversight of competition issues with respect to the .COM registry generally remains (*see infra* at ¶¶ 30-33).⁵⁹

29. The negotiation and agreement of the competition related terms in Amendment 30 and the 2006 Registry Agreement between DOC/DOJ and Verisign again reflect and confirm the fact that ICANN is not, and was never intended to be, an economic or competition regulator and has neither the expertise or resources to perform such functions.

B. DOC’s Relaxation of Price Controls and other Restrictions on Verisign

30. Amendments of the Cooperative Agreement subsequent to 2006 reflect increased competition in the DNS and the loosening of limitations on Verisign by DOC. Under Amendment 35 to the Cooperative Agreement, which was executed in October 2018, DOC specifically agreed to loosen the price cap for .COM domain name registrations, eliminate the regulatory requirement that DOC approve renewals of the .COM Registry Agreement as in the public interest, and confirmed that regulatory restrictions on vertical integration would not apply

⁵⁶ Exhibit I (Cooperative Agreement, Am. 30, *supra* note 8, § 2(A)(ii)).

⁵⁷ Exhibit K (Cooperative Agreement, Am. 32, *supra* note 15); Exhibit AB (Cooperative Agreement, Am. 34, NCR 92-18742, DOC-VeriSign, (Oct. 20, 2016), *available at* https://www.ntia.doc.gov/files/ntia/publications/amendment_34.pdf).

⁵⁸ Exhibit L (Cooperative Agreement, Am. 35, *supra* note 18, §§ 4 (a) & (c)).

⁵⁹ Based on public comments in response to the October 24, 2005 posting of the draft registry agreement, the price terms were modified so that prices could be increased by up to 7% in 4 of the 6 years in the term of the .COM registry agreement and by like amount in the other two years if justified based on registry costs. ICANN may have been involved in the formulation of the specifics of these terms.

to Verisign's activities outside the .COM registry.⁶⁰ These changes are expressly the result of "the more dynamic marketplace"⁶¹ since Verisign acquired the .COM TLD in 2000.

31. Amendment 35 provides "that ccTLDs, new gTLDs, and the use of social media have created a more dynamic DNS marketplace" and that DOC determined, given this dynamic marketplace, "it is appropriate to amend the Cooperative Agreement to provide pricing flexibility for the registration and renewal of domain names in the .com registry."⁶² In place of a strict price cap, the DOC agreed that Verisign and ICANN may agree to amend the Maximum Price provision of the .COM Registry Agreement to permit, in each of the last four years of every six year Registry Agreement period, beginning two years after the effective date of Amendment 35, which would be 2020, the Maximum price charged for a .COM domain name registration or renewal to be increased by up to 7% over the Maximum Price for the previous calendar year.⁶³

32. Amendment 35 further confirmed that any restrictions in the Cooperative Agreement apply only to the .COM registry and do not apply to any other registries -- such as potentially .WEB -- operated by Verisign: "The parties hereby clarify that the restrictions on Verisign's ownership of any ICANN-accredited registrar(s) were, and remain, intended to apply solely to the .com registry."⁶⁴

33. Finally, Amendment 35 confirms that regulatory oversight of Verisign with respect to competition matters remains the responsibility of the U.S. government and not, as claimed by Afilias, ICANN.⁶⁵

34. In summary, ICANN was not intended, and has never served, as an economic regulator, as Afilias claims. ICANN lacks the necessary congressional authorization, expertise or resources for such a role. Instead, ICANN was to serve, and has served well in my experience, as a technical coordinator and manager of the DNS. ICANN's mission is to maintain

⁶⁰ Exhibit L (Cooperative Agreement, Am. 35, *supra* note 18, § 2).

⁶¹ *Id.* at preamble.

⁶² *Id.* ¶ 2.

⁶³ *Id.* ¶ 2(a).

⁶⁴ *Id.* ¶ 3.

⁶⁵ *Id.* at preamble & ¶ 4 ("[I]t is appropriate to remove certain unnecessary and burdensome regulations while maintaining sufficient oversight").

a secure and stable internet, not determine antitrust claims, as Afilias asserts in substance here.
The regulation of competition is the role of government antitrust authorities and courts of law --
not ICANN.

Respectfully submitted,



Dated: May 29, 2020

Honorable John Kneuer