INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION

REQUEST FOR ARBITRATION

(For Coordination with Arbitration Previously Initiated by ICANN [Article 4(6)])

VERISIGN, INC. (United States of America)
Claimant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS
(United States of America)
Respondent.

January 15, 2005

Ronald L. Johnston, Esq.
Laurence J. Hutt, Esq.
Sean Morris, Esq.
Thaddeus Pope, Esq.
ARNOLD & PORTER LLP
777 SOUTH FIGUEROA STREET, 44TH FLOOR
LOS ANGELES, CA 90017-5844
TELEPHONE: (213) 243-4000
FACSIMILE: (213) 243-4199

Brian Davis, Esq.
VERISIGN, INC.
21355 RIDGETOP CIRCLE
DULLES, VIRGINIA 20166
TELEPHONE: (703) 948-3200
FACSIMILE: (703) 450-7326

ATTORNEYS FOR CLAIMANT
VeriSign, Inc.

PARTIES

1. Claimant VeriSign, Inc. ("VeriSign") is a corporation, duly organized and existing under the laws of the State of Delaware, with its principal office and place of business located in Mountain View, California, with an address of 1350 Charleston Road, Mountain View, California 94043, USA (Telephone: (650) 961-7500). Since 1992, VeriSign or its predecessor, Network Solutions, Inc. ("NSI"), has acted as the exclusive registry operator for the ".net," ".com" and other top-level domains within the Internet Domain Name System ("DNS").

2. Respondent Internet Corporation for Assigned Names and Numbers ("ICANN") is a private nonprofit corporation, organized and existing under the laws of the State of California, with its principal office and place of business located in Marina Del Rey, California, with an address of 4676 Admiralty Way, Suite 330, Marina Del Rey, California 90292, USA (Telephone: (310) 823-9358). ICANN currently performs certain technical coordination tasks with respect to the DNS pursuant to contracts it has executed with VeriSign and others.

NATURE OF THIS ARBITRATION

3. By its claims in this Arbitration, VeriSign seeks relief for breach of contract and a declaratory judgment against ICANN arising out of ICANN's violation of the renewal provisions of the .net Registry Agreement existing between VeriSign and ICANN. The .net Registry Agreement requires ICANN to select a successor registry operator for the .net registry through an open and transparent process that is developed based upon a consensus of Internet stakeholders, that reasonably determines the "best qualified" operator to perform the registry function, and that does not disadvantage

VeriSign as an applicant to serve as the successor registry operator. Despite these requirements and obligations, ICANN has adopted a process for the selection of a successor registry operator that is not open and transparent, is not reasonably designed to select the best qualified registry operator, does not constitute a valid consensus policy, and seriously disadvantages VeriSign. Under the express terms of the .net Registry Agreement, neither the current ICANN selection process nor the selection of a successor registry operator pursuant to that process would be of any force or effect with respect to VeriSign.

4. ICANN's chosen process for the selection of the successor registry operator for the .net registry is reflected in a ".NET Request for Proposals" (the "RFP") that is currently out for bid until 23:59 UTC on January 18, 2005. On its face, the RFP violates ICANN's contractual obligations to VeriSign under the .net Registry Agreement. The RFP fails to meet such rudimentary requirements for an open and transparent selection process or for determining the best qualified registry operator as: clearly defining the criteria that will be used to evaluate potential successor registry operators, establishing an objective basis for measurement of each bid against such criteria, or providing for the weighing of important criteria in the selection process. Rather than provide a defined, objective, or complete set of criteria, ICANN has instead created an RFP that (i) is based on uncertain and subjective criteria that preclude an open and transparent selection process or an evaluation that is predictable, bidder to bidder or evaluator to evaluator; and (ii) limits a full consideration and weighing of the most fundamental and important criteria in the selection process, the security and stability of the .net registry.

5. As described below, the .net Registry Agreement explicitly provides that VeriSign has the right to challenge the process for the selection of a successor registry operator through an "Independent Review Panel," which would review whether or not the process constitutes a valid consensus policy, or by filing a legal proceeding, among other alternatives. However, ICANN has failed to establish an Independent Review Panel in breach of the .net Registry Agreement, thereby preventing VeriSign from pursuing certain of its contractual remedies.

6. As a result of ICANN's breaches of the .net Registry Agreement, VeriSign seeks (i) a declaration of VeriSign's rights with respect to the selection of a successor .net registry operator under the agreement, including, as the agreement explicitly provides, that VeriSign "shall not be obligated to comply" with the RFP or other procedures ICANN has established with respect to a successor operator; and (ii) the entry of an injunction or stay against any award of a contract for the operation of the .net registry to a third party based on the process ICANN has established. VeriSign further reserves the right to seek additional relief, including monetary damages, arising out of ICANN's conduct in selecting a successor registry operator.

THE RELEVANT ARBITRATION AGREEMENT

7. The relevant agreement to this arbitration is the 2001 .net Registry Agreement dated May 25, 2001, a copy of which is attached hereto as Exhibit A, and its Appendices. This same agreement is the subject of another arbitration between these parties, which was initiated by ICANN by a Request for Arbitration dated November 10, 2004, Case No. 13 568/JNK.

8. Subsection 5.9 of the .net Registry Agreement provides:

> Disputes arising under or in connection with this Agreement, including requests for specific performance, shall be referred in the first instance to arbitration conducted as provided in this Subsection 5.9 pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC"). The arbitration shall be conducted in the English language and shall occur in Los Angeles County, California, USA. There shall be three arbitrators: each party shall choose one arbitrator and, if the two arbitrators are not able to agree on a third arbitrator, the third shall be chosen by the ICC. The parties shall bear the costs of the arbitration in equal shares, subject to the right of the arbitrators to reallocate the costs in their award as provided in the ICC rules. The parties shall bear their own attorneys' fees in connection with the arbitration, and the arbitrators may not reallocate the attorneys' fees in conjunction with their award.

9. Specifically with respect to challenges to any award to a successor registry operator other than VeriSign, paragraph 5.2.5 of the .net Registry Agreement provides:

> In the event that a party other than Registry Operator or its assignee is designated as the successor Registry Operator, Registry Operator shall have the right to challenge the

reasonableness of ICANN's failure to designate Registry Operator or its assignee as the successor Registry Operator pursuant to Section 5.9 [above]. Any such challenge must be filed within 10 business days following any such designation, and shall be decided on a schedule that will produce a final decision no later than 60 days following any such challenge.

10. VeriSign contends in separate pending judicial proceedings that the arbitration clause in the .net Registry Agreement provides for non-binding arbitration. VeriSign sets forth in this proceeding its claims challenging the process for selecting a successor registry operator in light of Paragraph 5.2.5 above and to insure that its rights to challenge the process for selecting a successor registry operator, or an award, are fully preserved. By filing this claim, VeriSign does not admit that the arbitration clause is binding, valid, or enforceable, that the ICC has jurisdiction over these or other claims, or that the rules of the ICC apply to proceedings on these claims, beyond what is lawfully required, if anything, by the terms of .net Registry Agreement itself. VeriSign hereby expressly reserves its rights to challenge the enforceability of any arbitration award, the enforceability of the arbitration provisions of the .net Registry Agreement, and the jurisdiction of the ICC, on any and all grounds that may exist therefor.

FACTUAL BACKGROUND TO THE DISPUTE

The Internet Domain Name System

11. The Internet is a network of interconnected computers and computer networks. Every computer connected directly to the Internet has a unique address. These

addresses, which are known as Internet Protocol ("IP") numbers, are necessary for computers to "communicate" with each other over the Internet. An example of an IP number might be: 98.27.241.30.

12. Since IP numbers can be cumbersome and difficult for Internet users to remember or use, the IP number system has been overlaid with a more "user-friendly" system of domain names: the Internet Domain Name System, or "DNS." This overlay associates a unique alpha-numeric character string -- or domain name -- with a specific IP number.

13. Internet domain names consist of a string of "domains" separated by periods. "Top-level" domains, or "TLDs," are found to the right of the period and include (among others) ".net," ".com," ".org." ".gov," and ".biz," which are sometimes referred to as "generic" TLDs (also known as "gTLDs"). Other top-level domains are referred to as country code TLDs (also known as "ccTLDs") and are represented by two-letter abbreviations for each country, such as ".uk" (United Kingdom) and ".ca" (Canada). For relevant purposes herein, gTLDs are functionally equivalent to ccTLDs. There are approximately 250 top-level domains, which are administered and operated by numerous entities, both in and outside of the United States.

14. "Second-level" domains ("SLDs") are those domains immediately to the left of the top-level domains, such as "iccwbo" in the domain name "iccwbo.org." There are over 50 million second-level domains currently registered within the various TLDs.

15. Because domain names serve as "addresses" that allow computers connected to the Internet to communicate with each other, each domain name must be

unique, even if it differs from another domain name by only one character (*e.g.*, "iccwbo.org" is different from "icocwbo.org" or "icc-wbo.org"). A given domain name, therefore, can be registered to only one entity.

16. Since a registry maintains the authoritative database of second-level domain names and IP addresses within a TLD, there necessarily can be only one registry for each TLD. VeriSign is that sole registry for the .net gTLD, .com gTLD and other TLDs. As the registry for the .net gTLD, VeriSign maintains the definitive directory that associates registered domain names in this gTLD with the corresponding IP numbers of their respective domain name servers. The domain name servers, in turn, direct Internet user queries to resources such as websites and e-mail systems.

17. A domain name does not exist until it is requested and registered. The individual or organization that seeks to register a specific domain name (such as "iccwbo.org") is a "registrant." Potential registrants, however, do not have direct access to the gTLD registries. Instead, to register a domain name, a potential registrant must complete the necessary applications with one of the private companies that act as domain name "registrars." The domain name registrar, in turn, submits a request to the authorized registry for that top-level domain. Thus, a domain name is created when, following a request from a registrar, the domain name is included in the master database of registered domain names of the authorized registry for that top-level domain. For example, an individual seeking to register the second-level domain name "iccwbo.org" would submit a request to register that domain name in the .org gTLD registry's master database through a domain name registrar.

Background Regarding the .net Registry

18. On December 31, 1992, the National Science Foundation ("NSF") entered into Cooperative Agreement NCR 92-18742 (the "Cooperative Agreement") with VeriSign's predecessor, Network Solutions, Inc., to provide certain services for the registration and dissemination of domain names. The Cooperative Agreement stated that NSI had primary responsibility for ensuring the quality, timeliness, and effective management of the registration services provided under the agreement. In September 1998, responsibility for the Cooperative Agreement was transferred, pursuant to Amendment 10 of the Cooperative Agreement, from the NSF to the National Telecommunication and Information Administration ("NTIA") of the Department of Commerce ("DOC").

19. In November 1998, the DOC entered into a Memorandum of Understanding ("MOU") with ICANN for ICANN to perform certain technical coordination functions in connection with the DNS. The MOU established the stability of the Internet as a guiding principle of ICANN's coordination efforts. The MOU also explicitly prohibited ICANN from acting arbitrarily or unjustifiably to injure any person or entity, or from "singl[ing] out any particular party for disparate treatment unless justified by substantial and reasonable cause."

20. At all times relevant hereto, ICANN has operated through a board of directors, assisted by three "supporting organizations," each of which had primary responsibility for policy development in its area of expertise. The Generic Name Supporting Organization ("GNSO") has primary responsibility for developing policy relating to domain names. The GNSO operates under the auspices of its "GNSO

Council." As formally organized, the GNSO Council includes representatives from each of six constituencies, including registrars and gTLD registries. The constituencies are self-organized and determine their own criteria for participation.

21. The members of the GNSO Council and the constituencies of the GNSO include existing and potential competitors of VeriSign, including potential successor registry operators of the .net registry. In fact, as more specifically described below, certain members of the GNSO Council and constituency groups have direct interests in entities that plan to submit bids competing against VeriSign in response to the RFP, notwithstanding the fact that they participated in the preparation of the terms of the RFP.

22. In November 1999, NSI and ICANN entered into a Registry Agreement, which was later superceded by the existing 2001 .net Registry Agreement between VeriSign and ICANN.

23. As the operator of the .net registry during the Internet's unprecedented development and growth over the last decade, NSI and later VeriSign have been responsible for the development of the .net registry as a critical part of the DNS. Overall, 30 percent of all e-commerce runs over .net. Every minute, .net enables over $1.4 million in e-commerce and the routing of over 640 thousand e-mails.

24. There can be no functioning Internet without an operational .net. Many of the services at the core of the DNS and the operations of many TLDs are absolutely reliant on the .net servers. For example, banks, telephone carriers and other large institutions with blocks of names in .com depend on the smooth functioning of .net. In fact, as many as 36 of the 100 most visited .com websites have relied on .net servers

for consumers to reach their websites. For example, while Wal-Mart's website is walmart.com, it relies on a .net server and, if .net goes down, walmart.com becomes unavailable. Each branch of the U.S. government has an infrastructure reliance on .net; specifically, senate.gov, whitehouse.gov, supreme-court.gov, nsa.gov and fema.gov all use .net as the backbone to their infrastructure. Additionally, many ISPs and corporate networks run their own consumer networks directly on .net, such as Earthlink.net, Comcast.net, and ATT.net.

25. Through the efforts of VeriSign, the .net registry, as well as the .com registry also operated by VeriSign, have set the standard for DNS security and stability. Indeed, ICANN, in an April 2001 report on "Proposed VeriSign Agreement Revisions," acknowledged the scale of VeriSign's efforts in the development and operation of these registries in the context of future renewals of the registry agreements, stating:

> [I]t is likely that VeriSign (whether in 2003 or 2007) would be able to argue that it is the only registry operator with the *"demonstrated ability . . . to handle operations at the required scale."* In addition, because it will have already built the infrastructure in the course of operating the three top-level domains, it seems likely that VeriSign will not need to make significant additional investments in order to demonstrate its capacity to operate these important registries in a stable and effective manner; other applicants will likely be in the position of having to make significant investments to demonstrate their capacity.

The 2001 .net Registry Agreement

26. On or about May 25, 2001, VeriSign entered with ICANN into the .net Registry Agreement at issue in this proceeding. Under the .net Registry Agreement, VeriSign undertook, as registry operator, to provide "Registry Services" to ICANN-accredited registrars in a manner meeting the performance and functional specifications referenced and described in the agreement and to pay certain registry-level fees to ICANN. VeriSign has fully performed and continues to perform all of its obligations under the 2001 .net Registry Agreement.

27. The .net Registry Agreement, in Subsection 2.1, sets forth the following "General Obligations of ICANN." "With respect to all matters that affect the rights, obligations, or role of Registry Operator," the agreement explicitly provides that ICANN "shall," among other obligations: (1) "exercise its responsibilities in an open and transparent manner," (2) "not unreasonably restrain competition and, to the extent feasible, promote and encourage robust competition," (3) "not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause," and (4) establish and maintain "independent review policies" and "adequate appeal procedures" to be available to VeriSign to the extent it "is adversely affected by ICANN standards, policies, procedures or practices."

28. In addition to express obligations that ICANN not unreasonably or inequitably interfere with VeriSign's registry business, under applicable law, ICANN is subject to an implied covenant of good faith and fair dealing not to take actions unfairly

or in bad faith to deprive VeriSign of the intended benefits of the .net Registry Agreement.

29. VeriSign and ICANN's legal relationship is, and always has been, purely contractual. Both are wholly private, *non*-governmental entities. Neither corporation has any authority over the other beyond what their contracts confer upon it. The relevant infrastructure of the DNS and Internet is self-governed and contractually based, not regulatory based.

Renewal Provisions for the .net Registry Agreement

30. Subject to certain adjustments not at issue here, the .net Registry Agreement expires on June 30, 2005. At the expiration of the 2001 .net Registry Agreement, the agreement contemplates that ICANN will designate a "successor Registry Operator."

31. Although the 1999 Registry Agreement provided that NSI/VeriSign would operate as the .net registry operator until 2007, VeriSign was willing to enter into the 2001 .net Registry Agreement, which superceded the 1999 Registry Agreement and which reduced VeriSign's term as the registry operator by two years (*i.e.*, to June 2005), based upon, among other things, ICANN's explicit assurance that the selection of a successor registry operator would be conducted in a fair, open, and transparent manner and that VeriSign would not be prejudiced or disadvantaged in efforts to become the "successor."

32. The .net Registry Agreement contains provisions designed to ensure ICANN adopts a successor selection procedure that is open, transparent, and objective and that specifically protects VeriSign's right not to be disadvantaged. Subsection 5.2 of

the .net Registry Agreement requires that, before selecting a successor registry operator, ICANN must adopt a selection procedure as follows:

> 5.2.1 Not later than one year prior to the end of the term of this Agreement, ICANN shall . . . adopt an open, transparent procedure for designating a successor Registry Operator.
>
> 5.2.2 [N]either the procedure established in accordance with subsection 5.2.1 nor the fact that [VeriSign] is the incumbent shall disadvantage [VeriSign] in comparison to other entities seeking to serve as the successor Registry.

33. The .net Registry Agreement obligates ICANN to select as a successor registry operator the entity that ICANN reasonably determines to be the best qualified to perform the registry functions, taking into account a number of relevant factors and using a procedure that has been developed pursuant to the contract's Consensus Policy requirements. Thus, paragraph 5.2.4 provides:

> 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 [governing "Consensus Policies"], 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, the relevant experience of the party, and the demonstrated ability of the party to manage domain name or similar databases at the required scale.

34. To constitute a procedure that satisfies the requirements of a "Consensus Policy," paragraph 4.3.1 requires that the process and criteria for selection of a successor registry be:

> established based on a consensus among Internet stakeholders represented in the ICANN process, as demonstrated by (a) action of the ICANN Board of Directors establishing the specification or policy, (b) a recommendation, adopted by at least a two-thirds vote of the council of the ICANN Supporting Organization to which the matter is delegated, that the specification or policy should be established, and (c) a written report and supporting materials (which must include all substantive submissions to the Supporting Organization relating to the proposal) that (i) documents the extent of agreement and disagreement among impacted groups, (ii) documents the outreach process used to seek to achieve adequate representation of the views of groups that are likely to be impacted, and (iii) documents the nature and intensity of reasoned support and opposition to the proposed policy.

Thus, a valid successor registry selection procedure requires, among other things, that the designated ICANN Supporting Organization solicit and document input from all impacted groups and then either adjust the policy to address dissenting opinions, or explain why the dissenting opinions do not defeat the "consensus" and were not incorporated into the selection policy.

35. If VeriSign disputes that the procedure ICANN adopts for selecting a successor registry operator constitutes a valid Consensus Policy, VeriSign may, pursuant to paragraph 4.3.2, seek review of that issue "from an Independent Review Panel established under ICANN's bylaws." Pursuant to paragraph 4.3.2, VeriSign need not participate in any procedure for designating a successor registry operator purportedly established by ICANN if no Independent Review Panel exists to consider VeriSign's request for review of whether the chosen selection procedure constitutes a valid "Consensus Policy." As specifically stated in paragraph 4.3.6:

> In the event that, at the time the ICANN Board of Directors establishes a specification or policy under Subsection 4.3.1 during the Term of this Agreement, ICANN does not have in place an Independent Review Panel established under ICANN's bylaws . . . Registry Operator shall not be obligated to comply [with the ICANN] specification or policy in the interim.

36. Despite these clear provisions and limitations in the .net Registry Agreement, ICANN has adopted a procedure to select the successor registry operator that materially violates each of these terms of the agreement. In addition, ICANN has

never established an Independent Review Panel, as it was required to do under the .net Registry Agreement.

THE .NET RFP VIOLATES THE REGISTRY AGREEMENT

The Development of the .net RFP

37. On March 6, 2004, ICANN adopted Resolution 04.18, pursuant to which the ICANN Board resolved to "authorize[] the President to take steps to initiate the process as specified in Section 5.2 of the .net Registry Agreement for designating a successor operator for the .net registry, including referrals and requests for advice to the GNSO" -- the relevant ICANN "Supporting Organization." In a letter dated March 31, 2004, ICANN Vice President Paul Verhoef requested guidance from the GNSO "concerning the criteria for designating a successor operator for .net" because "§ 5.2.4 of the .net Registry Agreement . . . calls for the establishment of a consensus policy regarding the identification and definition of these criteria." Specifically, Mr. Verhoef asked the GNSO Council to "issue a consensus statement defining criteria and conditions to be applied in the selection of a successor registry operator."

38. Pursuant to Mr. Verhoef's request, on April 1, 2004, the GNSO Council held a teleconference meeting at which it decided not to form a Task Force to develop the requested consensus policy, as had been ICANN's practice with respect to previous consensus policy matters because a Task Force provides the GNSO with the ability to pursue appropriate outreach to various Internet stakeholders. Instead, noting that it did not have sufficient time to conduct appropriate outreach, the GNSO Council decided to appoint a seven-member subcommittee (the "GNSO Subcommittee") "to draft a set of criteria and conditions for .net consistent with the ICANN mission and core

values for consideration by the Council, taking account of any elements from the dot org re-assignment where relevant."

39. During the period from May 6 through July 20, 2004, the GNSO Subcommittee publicly posted versions of a draft report outlining substantive criteria it intended to recommend ICANN use to evaluate potential successor .net registry operators. During this same time period, ICANN was working on a procedural format by which ICANN evaluators would implement and use the criteria being developed by the GNSO to select a successor registry operator. Like the GNSO, ICANN posted its drafts, in which it informed the public that it intended to follow a "request for proposals" format to solicit interested successor registry operators and to evaluate them using the criteria being developed by the GNSO.

40. During this draft RFP period, VeriSign and many other interested parties (including NeuLevel, the Progress and Freedom Foundation, and Melbourne IT) provided detailed comments on and objections to the GNSO proposed criteria and RFP format. VeriSign alone sent several letters that detailed its well-reasoned and appropriate criticisms of the draft selection process. These letters include those dated May 13, 2004, June 18, 2004, and June 24, 2004.

41. Comments sent to the GNSO and ICANN included, for example, that the draft RFP criteria and procedural format failed properly to assign "weights" to criteria such that bids could be evaluated in an objective and clearly defined manner that rewarded bidders that were particularly strong in areas of high importance. The draft documents also failed to establish a numerical or other objective scoring system that evaluators would be required to use so that ICANN's selection could be meaningfully

reviewed and tested. Instead, the draft documents merely set forth general descriptions of the criteria to be considered, and divided those criteria into either "absolute" or "relative" criteria. Under the draft selection documents, bidders would have to meet certain minimum requirements (the "absolute" criteria) after which, if they passed that threshold, they would be differentiated based only on evaluation of the "relative criteria." Even ICANN considers the most important criteria in the selection process to be those designated as "absolute criteria," but the two-tiered system contained in the draft RFP documents inappropriately and inexplicably de-emphasized these criteria. As comments sent to the GNSO and ICANN also explained, the proposed reliance on the .org reassignment procedures would create significant problems, including for the reason that those procedures resulted in demonstrated performance problems for the DNS following their use for the .org reassignment.

42. More specifically, comments from the Internet community regarding the draft RFP documents included:

- "Criteria thus should be relevant to predicting how an applicant will in fact operate the registry . . . [and] evidence of direct experience should far outweigh planning documents. . . . Moreover, ICANN must do this in a transparent and objective manner. This means at a minimum that ICANN must clearly state the decision criteria it will use, and their relative importance, in specific and concrete terms. This will provide a transparent process in which applicants can design their proposals with full information on how they will be evaluated. It will also help make application of the criteria accurate and fair." (Comments by William F. Adkinson, Jr. of the Progress and Freedom Foundation, June 18, 2004 (emphasis added)).

- "[T]he elements of the selection criteria and their relative weighting must be clear and directly targeted to the relevant skill set of the entity to be selected"; the language dividing the criteria into "absolute" and "relative" "could be interpreted to mean that bidders that have satisfied the 'threshold' requirements of the absolute criteria will be distinguished solely by their respective rating on the relative criteria. However, the absolute criteria are the factors by which the technical expertise and experience of the applicants are evaluated. Given the technical nature of the .net registry contract and that technical expertise and experience will be essential to successfully executing its functions, award of the contract should require further consideration of each bidder's technical expertise beyond the mere achievement of a minimum threshold." (Comments by NeuLevel, June 18, 2004 (emphasis added)).
- "The Constituency believes that each applicant should be judged primarily on its showing that its operation of the .net registry will contribute to the stability and security of the Internet. This absolute criterion should not simply be a matter of meeting or exceeding the technical specifications spelled out in the subcommittee's recommendations." "The Constituency urges that ICANN (1) make clear the extent to which bidders are comparatively evaluated on the absolute criteria; and (2) further elaborate as to the specific elements and/or level of capability sought with respect to the various criteria, both absolute and relative." (Comments by Registry Constituency (emphasis added)).
- "[T]he degree to which a bidder exceeds the minimum criteria must be taken into account in the subsequent evaluation . . . [i]f one bidder far exceeds the baseline, according to the identified performance metrics, that bidder's 'score' on absolute

criteria should be factored into the bidder's overall performance in the relative criteria evaluation." "The criteria need to be weighted to show the importance of 'relative criteria related to stability, security, technical and financial competence . . .'" And, any RFP "needs to define a numerical scoring method to be used to rate each proposal against ICANN's requirements and against each other, as well as a clearly defined evaluation process to ensure that the evaluation criteria, associated sub factors, and scores for each bidder are fairly applied through a transparent, fair and objective process." Moreover, "the [GNSO] Subcommittee should not take into account any elements from dot org 're-assignment'" due to the significant deficiencies of that process as noted by VeriSign and many others. (Comments by VeriSign, June 18, 2004).

The RFP was not revised to reflect these comments and others, nor did the GNSO or ICANN explain why the comments were ignored, despite the contractual requirement that the selection criteria be established through a valid Consensus Policy.

43. Not only did ICANN and the GNSO fail to address the valid substantive comments submitted, but ICANN and the GNSO also failed to follow their own internal policy development procedures during the drafting process. These procedures exist, in part, to ensure the openness, transparency, and objectivity of ICANN's decision-making. VeriSign notified the GNSO of these procedural failings in VeriSign's June 18, 2004 letter, identifying, among other things, deadlines that were repeatedly missed, the failure of ICANN and its General Counsel to provide clear and detailed guidance or instruction to the GNSO, and the lack of timely and appropriate

disclosure to the public of the status of the drafting process and the methods being employed to generate the .net successor selection process and criteria.

44. Despite such failings, at its June 29, 2004 meeting, ICANN approved the draft RFP procedures and posted the "Final Procedure for Designating Subsequent .net Registry Operator." The "Final Procedure" provided that ICANN would post its draft of the RFP (that would merge the format/procedure with the substantive criteria) between August 1 and September 30, 2004, and that a final RFP would be released by ICANN by September 30, 2004.

45. On July 20, 2004, the GNSO Council held a public meeting in which it reviewed the work of the GNSO Subcommittee on the draft RFP criteria. One of the public comments received at that meeting (by NeuLevel) was that "one of the things that's kind of been lacking is when comments have been submitted is kind of getting feedback from the Subcommittee on what comments were considered and basically feedback on those comments that were submitted. If they weren't adopted, why weren't they placed into the report." Such concerns are consistent with the requirement, including under the .net Registry Agreement, that the RFP would only be a valid Consensus Policy if the comments the GNSO received from the Internet community were considered and incorporated -- or an explanation were given as to why the comments do not defeat a consensus. Nonetheless, the Chair of the GNSO Subcommittee admitted that the Subcommittee had ignored public comments, responding that "we, as a subcommittee, felt a little uncomfortable with and thought it might be more appropriate to be left to ICANN staff to respond."

46. The GNSO Council concluded that the Subcommittee had done an inadequate job of incorporating public comments or describing how public comments otherwise had been addressed. The Chair of the Council noted that he "would like to see the Subcommittee address a couple of those issues before we effectively are in a position where we're voting on a report, because I think the report, for example, seems to be missing . . . a summary of what those comments are and an explanation of how those comments have been addressed."

47. Notwithstanding the recommendation of the Chairperson of the GNSO Council that the Subcommittee "summarize what public comments were and how the Subcommittee has taken it into account," the Subcommittee never did so. Instead, on July 21, 2004, the GNSO Subcommittee submitted its "Final Report" that contained the criteria that it asserted were appropriate for use within the RFP format for selecting a successor .net registry operator without any explanation regarding why well-reasoned comments that were received had been ignored. Despite the conclusion of the Chair of the GNSO Council that the Subcommittee had not adequately addressed the community's comments, on August 5, 2004, the GNSO Council voted to approve the report as a "consensus statement."

48. The Final Report voted on and submitted to ICANN by the GNSO never appropriately reflected or otherwise addressed the comments received from the Internet community, including VeriSign, and a valid Consensus Policy was never established -- either as a procedural matter or in fact.

49. On August 25 and September 24, 2004, VeriSign provided to ICANN letters outlining in detail objections that had been ignored by the GNSO regarding the

criteria in the GNSO's Final Report as well as objections to ICANN's RFP procedural format. These comments again were largely ignored by ICANN.

50. ICANN did not release a draft .net RFP (combining both the substantive criteria and the procedural format) by September 30, 2004, as it had promised. Instead, ICANN released a draft .net RFP on November 12, 2004, six weeks later. The draft RFP stated that "the RFP [substantive] criteria are based primarily on the GNSO Council's consensus recommendation concerning the criteria for designating a successor operator for the .NET registry," notwithstanding the fact that the GNSO already had acknowledged that the criteria did not reflect nor otherwise take into account the valid criticisms that had been submitted by the Internet community.

51. Between November 12 and December 3, 2004, eleven interested parties, including VeriSign, submitted yet another round of comments on the draft selection procedures and criteria. These comments repeated the same types of objections and concerns that had been voiced earlier in the drafting process but that had been ignored by ICANN and the GNSO. In its November 24, 2004 letter, VeriSign, for example, again objected that the draft RFP documents still did not "assign and state clear and objective scoring methodology to be applied in the evaluation of criteria" and did not "assign a weighting as between the absolute and relative criteria with the absolute criteria having a heavier weighting than the relative criteria."

52. Ignoring these and other comments, on December 5, 2004, the ICANN Board "adopt[ed] the recommendation of the GNSO Council" and authorized ICANN's President and General Counsel to "post the final .NET RFP in accordance with the previously adopted procedure."

53. On December 10, 2004, ICANN posted the final RFP, ".NET Request for Proposals," a copy of which is attached hereto as Exhibit B. Like the draft RFP, the final RFP recited that "the RFP selection criteria were developed considering the GNSO Council's consensus recommendation." The final RFP contained substantially the same deficiencies that VeriSign and other Internet stakeholders had been voicing since early in the drafting process and, as would have been required for a valid consensus policy, ICANN never explained whether or how the comments and objections of the Internet community were considered in the final RFP.

The .net RFP Fails to Comply with the Requirements of the .net Registry Agreement

54. The .net RFP fails to meet the requirements of the .net Registry Agreement that ICANN adopt a procedure for determining a successor registry operator that is open and transparent and that is designed to allow ICANN to "reasonably determine" the eligible party that is best qualified to perform the functions of the .net registry operator. Critical to these requirements is a selection process that clearly articulates the criteria to be evaluated, compares applicants objectively, and weighs appropriately the criteria that are important to a properly operated registry. The .net RFP does none of this.

55. The .net RFP purports to identify the criteria by which applicants will be measured. The RFP organizes the criteria into eight categories: 1. ICANN Policy Compliance; 2. Equivalent Access for Registrars; 3. Registry Operations; 4. Revenue and Pricing Model; Financial Strength and Stability; 5. Technical Competence; 6. Security and Stability; 7. Additional Relative Criteria; and 8. Transition and Migration Plans.

56. The criteria is divided by ICANN into either "absolute" or "relative" criteria. The RFP indicates that the "absolute criteria" reflect those requirements that are so important that a bidder's failure to meet some threshold requirements results in the automatic rejection of its proposal. However, once a bidder "satisfies" the absolute criteria, the bidder proceeds to the relative criteria. "Relative criteria" are those items that ICANN states "will be most helpful in distinguishing the otherwise qualified applicants . . . ." (emphasis added). Other than defining each criterion as either "absolute" or "relative," the RFP does not further indicate the relative importance of any criterion.

57. Examples of absolute criteria include "security and stability," "financial strength and stability," and the ability to provide "equivalent access" for those accessing the registry. Examples of relative criteria include "promotes competition in the registration of domain names" and "the degree to which an applicant's proposal results in improved implementation of, and support for, GNSO policies."

58. The criteria, as well as the manner in which the RFP proposes to use them as evaluation tools, fail to establish an open and transparent process for the selection of the applicant best qualified to perform registry functions. First, the criteria included within the RFP are not formed in a sufficiently detailed or clear manner to provide meaningful guidance to the applicants, including VeriSign. Vague statements -- such as "maintain .NET registry functions efficiently and reliably," "deliver high quality of service for all .NET users worldwide," or "insur[e] a very high level of security and stability" (RFP at 15 of 19) -- fail to inform applicants adequately of the standards against

which the selection process will be measured. Accordingly, applicants cannot reasonably identify the standard against which they are to make their proposal.

59. Second, the .net RFP does not establish any method for placing weight on, or affording more value based on, the strength of the applicant with respect to each criterion that is designated as "absolute," nor does the RFP allow for any weighting of those criteria against the admittedly less important "relative" criteria. Indeed, in the RFP, once an applicant passes some vaguely defined threshold for an absolute criterion, that criterion is no longer used to distinguish among the applicants, or is not done so with any certainty. This inappropriately de-emphasizes the most critical areas of performance -- including what should be *the most important* criteria, stability and security[1] -- and places undue importance on subjective, undefined, and less important criteria, such as vague notions of the competitive marketplace. In short, in the key areas of registry operation, the RFP does not establish a method to distinguish an "A+" proposal from a "C+" proposal.

60. Third, not only does the RFP fail to define the criteria with any specificity, it also fails to provide for the use of an objective scoring system to inform or constrain the evaluators' ranking and assignment of relative weight to each criterion. For example, the RFP does not require that the evaluators assign a numerical score -- or even

---

[1] Any other criteria are of little or no consequence to the operation of the .net Registry if the stability of the registry or the security of the operating system were compromised, if technical qualifications are sub-par, or if the registry operator cannot provide the financial resources to provide services at the scale necessary to accommodate the ongoing growth of the .net gTLD.

use an adjectival rating (*i.e.*, "poor," "average," "above average," "outstanding," "superior") -- based on a defined scale when evaluating the criteria.

61. With these substantial flaws, ICANN's RFP fails to satisfy what are commonly and widely considered to be the baseline standards for any fair and open RFP process. *See, e.g.*, Federal Acquisition Regulations, 48 C.F.R. §§ 15.304(a)(2) & 15.305(a) (government solicitations must clearly state all of the factors and subfactors that will affect the contract award decision -- as well as their relative importance -- and should use a rating system that supports meaningful comparison and discrimination between and among competing proposals); *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal. App. 2d 803, 821 (1962) ("proposals and specifications inviting [] bids must be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard . . ."); *Federal Elec. Corp. v. Fasi*, 527 P.2d 1284, 1289 (Hawaii 1974) (request for bids that failed to include definitive specifications against which bidders' proposals could be measured "patently violated the very essence of competitive bidding" even in the absence of actual fraud or favoritism); *Corel Corp. v. U.S.*, 165 F. Supp. 2d 12, 19 (D.D.C. 2001) (to constitute a fair and open competitive bid procedure, a bid request should "state the factors it will consider in assessing bids and the relative weights it will assign to those factors").

62. By not defining with specificity the criteria, by not indicating the relative weight provided to each evaluation criterion and each sub-factor, and by not defining a numerical or other objective scoring method to be used to rate each proposal against ICANN's requirements and against each other, it is impossible to ensure consistency among evaluations by different evaluators, consistency in the evaluation of

different bidders, or application of the criteria in a manner designed to select the best qualified registry operator. A process marked by such inadequacy of standards likewise cannot be truly open or transparent.

63. ICANN has designed the .net RFP so that it is impossible to scrutinize in any meaningful way the ultimate selection of the successor registry operator. The RFP affords ICANN and the unknown evaluators the maximum opportunity to exercise favoritism by enabling them to make weighting and scoring determinations (if any) after the fact. This prejudices VeriSign's ability to bid intelligently and leaves the selection process susceptible to bias and extreme subjectivity.

The similar failings of the .org assignment.

64. ICANN has a history of failing to establish fair, open, and reliable processes for selecting gTLD registry operators. Indeed, (over VeriSign's objection) ICANN recommended to the GNSO that such an earlier flawed process, the .org assignment, be the very model for the .net selection.

65. Pursuant to the 2001 .org Registry Agreement, VeriSign was the registry operator for the .org TLD. Pursuant to paragraph 5.1.1 of that agreement, the agreement expired on December 31, 2002. Unlike the .net Registry Agreement at issue in this Arbitration, pursuant to paragraph 5.1.2 of the .org contract, VeriSign was not eligible to seek to continue to be the registry operator for .org.

66. Beginning in April 2002, ICANN engaged in the process for the designation of a successor operator for the .org TLD. The .org bidders submitted hundreds of pages of questions, concerns, and issues associated with the .org selection process, many of which related to a lack of clarity and objectivity in the scoring/weighting of the .org RFP that left the selection process too subjective.

67. Moreover, like the .net RFP, the .org RFP failed to recognize that stability of the Internet must be considered *the most important* evaluation criterion. Instead, the .org RFP merely stated that ICANN will "place significant emphasis on the demonstrated ability of the applicant to provide affordable service with a high degree of responsiveness and reliability."

68. ICANN posted the final .org RFP on May 20, 2002, which failed either (a) to include evaluation criteria and a ranking system that were sufficiently clear to ensure non-arbitrary decision making, or (b) to articulate the relative values of the stated evaluation criteria. On October 8, 2002, after the responses to the .org RFP had been submitted, VeriSign submitted comments to ICANN, pointing out the likely negative effects on the .org registry from "the lack of weighting of criteria," "the absence of meaningful safeguards to ensure a fair, open, competitive process," and the overall "arbitrary nature of ICANN's handling of the .org bid process."

69. Comments from other Internet stakeholders noted that:

- the .org process "can best be described as a 'beauty contest'. . . where the proposals looking the most impressive got the best rankings and proposals based on stability, efficiency, cost effectiveness got inferior rankings" (comments by SWITCH Swiss Academic and Research Network);
- the reports leading up to the .org RFP "brings into question the transparency and accountability of this process . . . [and] is based on flawed evaluation reports . . . [and] applies inconsistent weighting to the evaluation reports" (comments by Neustar);

- the process "would have allowed for a more fair and transparent process had ICANN indicated up front to the bidders how the criteria would be weighted so that [applicants] could have all prepared [their] bids with this knowledge in mind. We believe that this was the biggest inherent flaw in ICANN's approach to the .org bid, and probably the root cause of the plethora of problems associated with the evaluations. It has exposed the process to criticism and gives the impression that the decision has been 'reverse engineered.'" (comments by UIA/Diversitas).

70. On October 14, 2002, ICANN selected the Public Interest Registry ("PIR") as the successor registry operator of .org, along with PIR's partner and technical provider, Afilias Limited ("Afilias"), to run the .org registry operations. Because the selection of PIR was not based on any objectively appropriate selection process, ICANN was not able to articulate in any meaningful way why PIR was selected instead of any other applicant.

71. .org is a critical gTLD for the not-for-profit and non-profit world. Yet, since the time PIR and Afilias have taken over responsibility for operation of the .org registry, that registry has suffered significant reported DNS resolution outages, far exceeding the allowed outage time under the applicable registry agreement. For example, on June 8, 2004, .org suffered a DNS resolution outage of more than five hours and wildly erratic response times during the following 4 1/2 hours; on July 1, 2004, there were reports of DNS resolution outages totaling approximately two hours. There also have been widespread reports of other DNS resolution outages. When operations of .org are interrupted by these types of outages, it restrains the ability of organizations such as

the United Way and other similar charity organizations to communicate about their activities and to raise money through online donations through their .org websites.

72. Notwithstanding the problems associated with the .org reassignment and the even greater importance of the .net registry, ICANN has followed essentially the same faulty process for finding a .net successor registry operator. Far from acknowledging the problems with the .org successor selection process and avoiding similar problems with respect to .net, in its March 31, 2004 letter requesting the GNSO to issue a consensus statement, ICANN *specifically instructed* the GNSO "to consider the work of the DNSO with respect to the reassignment of the .org registry" and, following ICANN's admonition, the GNSO identified as part of its "mission" to "take account of any elements from the dot org re-assignment."

The .net RFP Was Not Established Pursuant to Consensus Policy Requirements

73. ICANN is contractually limited to utilizing a process for designating a successor registry operator that has been developed properly as a "Consensus Policy" pursuant to Subsection 4.3 of the .net Registry Agreement, which sets forth the contractual requirements for a Consensus Policy and which is quoted, in relevant part, at paragraph 34, *supra*.

74. ICANN has failed to follow the procedures necessary to a Consensus Policy, and this failure has resulted in an RFP that does not reflect a substantive consensus of Internet stakeholders. ICANN and the GNSO ignored voluminous critical substantive comments and objections submitted by VeriSign and other interested parties, and the GNSO failed to pass its policy recommendation by the requisite number of votes. Accordingly, the RFP is not a policy that has been endorsed by a consensus of Internet stakeholders. Moreover, ICANN has failed to implement the required Independent

Review Panel designed to prevent any variance from such contractual standards, depriving VeriSign of a contractual remedy for ICANN's breach of the Consensus Policy provisions of the .net Registy Agreement.

(1) The .net RFP was not adopted by at least two-thirds vote of the GNSO.

75. ICANN delegated responsibility to the GNSO for satisfying the Consensus Policy requirements with respect to establishing a procedure for designating a successor registry operator. The GNSO Council purported to adopt its Final Report as a "consensus statement" by a two-thirds majority. However, as reflected in the GNSO Council's own records, the Final Report was not, in fact, adopted by at least two-thirds of that body.

76. At the time that the GNSO "voted" to adopt its Final Report as its recommendation to the ICANN Board (*i.e.*, August 5, 2004), there were 21 members of the GNSO Council. Due to weighted voting procedures utilized by the GNSO Council, its 21 members held a total of 27 votes. The three "registry constituency" and the three "registrar constituency" representatives had two votes each. The other 15 members had one vote each.

77. The ICANN Bylaws in effect at the time that VeriSign and ICANN entered into the .net Registry Agreement provided that a consensus recommendation (*i.e.*, the type of recommendation at issue here) must be supported -- not by two-thirds of the "votes" held by members of the GNSO Council -- but rather by "two-thirds (2/3) <u>of the members</u> of the [GNSO Council]." (July 16, 2000 Bylaws, Art. VI-B §2(d) (emphasis added)).

78. Both ICANN's current Bylaws as well as the GNSO Council's Rule of Procedure provide that "a Supermajority Vote of the Council members will be deemed to reflect the view of the Council, and may be conveyed to the Board as the Council's recommendation. Abstentions shall not be permitted; thus all Council members must cast a vote unless they identify a financial interest in the outcome of the policy issue." (Bylaws, Annex A § 12; GNSO Council New Rules of Procedure § 12).

79. Accordingly, to be a valid consensus policy as voted by two-thirds of the GNSO, the GNSO's Final Report must have been supported by at least 14 members or, if weighted voting was considered appropriate, 18 valid "votes."[2] In fact, however, the Final Report was supported by only 13 members or 14 votes that could be considered valid under ICANN rules.

80. The voting tally reported by the GNSO from its August 5, 2004 meeting was 17 members casting 21 votes in favor of the consensus recommendation, one member with two votes against the recommendation, and two members with two abstentions.

81. Seven of the votes that were cast "in favor" of the recommendation, however, were voted by proxy for GNSO Council members who had previously declared conflicts of interest. The three registrar representatives -- Thomas Keller, Ross Rader, and Bruce Tonkin -- with two votes each, as well as Amadeu Abril I Abril (one vote) declared conflicts of interest because of financial interests in companies that would be

---

[2] At its August 5, 2004 vote, the GNSO Council itself recognized that the requisite two-thirds vote was "eighteen," two-thirds of "the total votes capable of being voted."

submitting applications to become the successor .net registry operator. All seven of these "conflicted" votes were proxied to Alick Wilson, who then voted all seven proxies in favor of the Final Report.

82. It was a violation of ICANN's Bylaws as well as the GNSO Council's own Rules of Procedure for Council members with financial interests to vote on a consensus recommendation. Because the conflicted Council members could not vote themselves, as they themselves recognized, neither could they give a proxy for their votes. The seven proxies voted by Alick Wilson were void and cannot count toward the GNSO Council's two-thirds vote.

83. Because the votes of the GNSO Council members with conflicts of interest cannot count toward the Council's two-third vote, the GNSO's Final Report on .net was supported by only 13 out of 21 members and 14 out of 27 votes, short of the two-thirds required for consensus policies.

(2) The GNSO failed to account for the numerous and valid objections to the .net RFP.

84. Paragraph 4.3.1(c) of the .net Registry Agreement is a mechanism requiring demonstration, by means of process and documentation, that there really is widespread agreement on a policy that VeriSign would be required to follow. Specifically, ICANN through its designated supporting organization must issue "a written report and supporting materials (which must include all substantive submissions to the Supporting Organization relating to the proposal) that (i) documents the extent of agreement and disagreement among impacted groups, (ii) documents the outreach process used to seek to achieve adequate representation of the views of groups that are likely to be impacted, and (iii) documents the nature and intensity of reasoned support

and opposition to the proposed policy." Those requirements were included in the agreement because ICANN was not intended to function as a regulatory body but rather to function based on contractual authority and consensus standard setting. Accordingly, paragraph 4.3.1(c) ensures that VeriSign would not be required to follow policies that are recommended by a "captured" GNSO or that do not reflect general agreement among those who would be affected by those policies.

85. Paragraph 4.3.1(c) requires ICANN to consider opposing views because, to establish a consensus, it must show that opposition is limited in intensity, isolated, or unreasoned. ICANN's own General Counsel, in an October 2002 briefing on consensus policies, concluded that "the policy-development process must . . . meaningfully address any reasoned concerns they have. This is the practical reality of a non-governmental body such as ICANN that relies on negotiated agreements rather than coercive legislation to accomplish policy goals. While unreasoned objections by some (or perhaps even all) of the registrars and registry operators should not prevent the adoption of consensus policies, and thus their implementation pursuant to the terms of ICANN's agreements, reasoned objections to a proposed policy by a substantial portion of those entities that must comply with the policy will likely make it impossible to require compliance with that policy."

86. Similarly, in December 2004, the GNSO published a self-review report, in which it described its role and responsibility in developing consensus policies to require "taking into account public comments received on a particular public policy recommendation" and "identifying and resolving substantive issues raised with respect to a policy."

87. The lack of consensus support for the recommended criteria for selecting a successor registry operator as contained in the GNSO's Final Report is amply demonstrated by the widespread, intense, and reasoned opposition to those recommendations. For example, numerous Internet stakeholders objected to the GNSO's recommendation for selection criteria on the grounds that it:

- included criteria that were vague and uncertain;
- did not provide for an objective and calculable scoring method to analyze each applicant's ability to satisfy each criterion;
- did not contain a clearly articulated statement of the relative weight to be provided to each criterion;
- did not ensure that stability and security of the Internet are the most important evaluation criteria; and
- did not provide for those applicants that not only meet but exceed minimum stability and security requirements to receive an objectively higher evaluation for those criteria than those applicants that simply meet minimum stability requirements.

88. As the GNSO has admitted (*supra*), these criticisms were ignored, which constitutes a failure to satisfy the Consensus Policy requirements and a material breach of the .net Registry Agreement. The GNSO failed to revise its recommendations to reflect the reasoned criticisms and suggestions of Internet stakeholders, and it failed to document sufficiently either the extent of agreement and disagreement among impacted groups or the nature and intensity of reasoned opposition to the RFP. Instead, the GNSO selectively summarized some criticisms and attached some, but not all, comments to its Final Report. The failure of the GNSO sufficiently to document the criticisms of its

recommendations is itself an independent breach of the Consensus Policy requirements of the .net Registry Agreement.

(3) ICANN's failure to establish an Independent Review Panel.

89. VeriSign has a contractual right to challenge the validity of any purported Consensus Policy. The first step in such a challenge is for VeriSign to seek expedited review of the issue from an Independent Review Panel specially established under ICANN's bylaws. (*See* .net Registry Agreement, Paragraph 4.3.2).

90. VeriSign sought such review of the purported Consensus Policy pursuant to which the RFP was issued, by a letter sent to ICANN dated December 23, 2004. However, ICANN has not established an Independent Review Panel, and, accordingly, no action has been taken on VeriSign's review request.

91. It is a material breach of contract to force VeriSign into a position where either it has to respond to the flawed RFP or not respond and risk not being selected as the successor registry operator. The failure to provide such a review renders the RFP void and without effect.

ICANN's Breaches of Equivalent Treatment
and Related Provisions of the Registry Agreement

92. Pursuant to paragraph 2.1.3 of the .net Registry Agreement, ICANN shall "not single out Registry Operator for disparate treatment" and shall not apply procedures "inequitably." Paragraph 5.2.2 requires that neither the rebid procedure nor VeriSign's incumbency as the operator of .net "shall disadvantage Registry Operator in comparison to other entities seeking to serve as the successor Registry." The RFP violates each of these prohibitions.

93. At page 16 of the RFP, ICANN identifies as a relative criterion "the degree to which the applicant's proposal promotes competition in the registration of domain names." ICANN included a nearly identical criterion for evaluation in the 2002 .org RFP. In the .org RFP, which ICANN directed be the model for the .net RFP, ICANN defined promotion (or "enhancement") "of competition for registration services" as follows: "As one illustration of this criterion, a major purpose of the reassignment of the .org registry is to diversify the provision of registry services by placing the .org registry under different operation than the .com and .net registries." (emphasis added). In other words, by promoting "competition," ICANN apparently has meant "not Verisign."

94. ICANN used this very criterion in that exclusionary way when it singled out and disadvantaged VeriSign when VeriSign was acting as a subcontractor for the Union of International Associations ("UIA"), which submitted a bid to operate .org. In its Final Staff Evaluation Report of September 23, 2002 (for the .org selection process), ICANN applied the "enhancement of competition" criterion to disqualify UIA's .org bid because "the UIA bid employs VeriSign as its registry operations provider." ICANN thus concluded, "the proposal ranks low on Criterion 3: Enhancement of Competition for Registration Services" and "UIA/VeriSign should not be favorably considered unless there was no satisfactory proposal of sufficient merit."

95. In its comments and objections to ICANN on the .net RFP, VeriSign explained that in light of fundamental differences between the .org and .net contracts, the GNSO should not make reference to the .org process. In particular, VeriSign notified ICANN that it "must define any criteria related to the promotion of competition in such a

way as to ensure that their application would not adversely affect consideration of VeriSign's proposal."

96. Nevertheless, ICANN recommended the use of the .org RFP as a guide in the .net RFP process and included a criterion in the .net RFP that ICANN previously has used to single out VeriSign and disadvantage it in prior successor registry operator bids. Indeed, on July 20, 2004, in one of its final meetings before submitting its Final Report to the ICANN Board, the Chairman of the GNSO Council explicitly stated that promoting competition means to "give consumers a choice that they don't have between, say, COM and NET now, because COM and NET is basically the same service." (emphasis added).

97. ICANN has additionally breached its obligations not to disadvantage VeriSign and to create a selection process designed to "reasonably determine" the best qualified applicant by arbitrarily limiting the amount and type of information applicants can submit in response to the .net RFP. ICANN has informed VeriSign that it -- and other bidders -- can only submit a limited number of graphic and other non-textual information in response to the .net RFP. However, much of the data that demonstrates VeriSign's ability to meet and exceed the selection criteria, including VeriSign's significant, excellent, and unparalleled performance history, is contained in graphic or non-textual form (such as charts, graphs, and illustrations).

98. Indeed, even VeriSign's competitors recognized that unduly limiting the amount and type of information that applicants can submit in response to the RFP would unfairly skew the bidding process in favor of applicants that could only theorize about how they would run the registry, rather than appropriately rewarding those bidders

who have practical experience. As NeuLevel informed ICANN and the GNSO during the drafting stage of the .net RFP, "NeuLevel would strongly urge ICANN not to so drastically limit .net submissions as it did for the latest round of sponsored TLD applications. 10,000 characters of text with no opportunity for the submission of figures, diagrams or spreadsheets is simply not adequate for a bidder to demonstrate its ability to satisfy the criteria. Indeed, such severe content limitations actually discourage the submission of specific evidence of practical (as opposed to theoretical) experience -- the kind of information ICANN should be seeking in the comparative process." (Comments by NeuLevel, July 14, 2004.)

99. As the incumbent registry operator, VeriSign necessarily has relevant and substantial performance data that demonstrates its history of success in operating the .net Registry and that it should be permitted to submit in support of its response to the RFP. To structure the RFP in such a way that limits VeriSign's ability to provide this relevant information unfairly disadvantages VeriSign, because -- as ICANN itself has recognized in its analysis of the 2001 .net Registry Agreement -- this is information that other applicants likely do not have, and the applicants therefore are not affected by ICANN's limitations.

VERISIGN'S CLAIMS

First Claim for Breach of Contract

100. The .net Registry Agreement constitutes a valid and binding contract between VeriSign and ICANN. The material terms of that agreement, insofar as they are pertinent to VeriSign's claims are set forth above.

101. VeriSign has duly and properly performed, and is continuing duly and properly to perform, all of its obligations under the .net Registry Agreement, except those

obligations it has been prevented or excused from performing as a result of ICANN's breaches and other conduct alleged herein.

102. ICANN has materially breached its obligations to VeriSign under and in connection with the .net Registry Agreement, including the implied covenants of good faith and fair dealing therein, in that, among other conduct:

- The .net RFP adopted by ICANN for designating a successor registry operator does not allow the selection process to be open and transparent.
- ICANN's use of the .net RFP as the procedure for designating a successor registry operator prevents ICANN from reasonably determining the best successor to perform registry functions.
- The .net RFP adopted by ICANN for designating a successor registry operator was not established pursuant to the express requirements for Consensus Policies set forth in the .net Registry Agreement and was not, in fact, based upon a consensus among Internet stakeholders, and therefore does not constitute a valid Consensus Policy.
- ICANN has failed to establish the required Independent Review Panel to review VeriSign's allegation that the .net RFP does not constitute a valid Consensus Policy.
- The .net RFP adopted by ICANN for designating a successor registry operator disadvantages VeriSign as the incumbent registry operator.

103. VeriSign has suffered, and will continue to suffer, substantial injuries as a proximate result of the breaches and other conduct of ICANN alleged herein.

104. VeriSign has no adequate legal remedy against ICANN to obtain full compensation or other monetary redress for all of its injuries and losses in that, among other things, (i) VeriSign is being forced to choose between responding to the .net RFP that violates its contractual rights or not responding to the .net RFP and risking the loss of the operation of the .net registry; and (ii) if an applicant other than VeriSign is selected as the successor .net registry operator through the .net RFP process, the further injuries and losses that VeriSign will suffer as a result of that improper selection will be difficult or impossible fully to calculate in monetary terms.

105. The .net Registry Agreement provides that VeriSign can obtain a decree of specific performance and other equitable relief for a breach of the agreement. (Subsection 5.9).

106. Accordingly, VeriSign is entitled to a decree of specific performance commanding and compelling ICANN to perform fully the terms and conditions of the 2001 .net Registry Agreement, including, without limitation to adopt an open and transparent procedure for designating a successor registry operator that is based upon a valid consensus of Internet stakeholders and that will permit a reasonable determination of the best qualified applicant to perform .net registry functions.

107. VeriSign also is entitled to preliminary and permanent injunctive relief prohibiting ICANN, its officers, directors, employees, agents, and others acting in concert or in association with it, from directly or indirectly taking any action, or engaging in any conduct, to select and appoint a third party as a successor .net registry operator as a result of the ineffective and invalid .net RFP.

Second Claim for Declaratory Judgment

108. An actual and justiciable controversy has arisen, and now exists, between VeriSign and ICANN with respect to the interpretation of essential terms of the .net Registry Agreement and the application of those terms, if any, to the selection of a successor .net registry operator.

109. More particularly, VeriSign contends:

- The .net RFP adopted by ICANN for designating a successor registry operator does not allow the selection process to be open and transparent.
- ICANN's use of the .net RFP as the procedure for designating a successor registry operator prevents ICANN from reasonably determining the best successor to perform registry functions.
- The .net RFP adopted by ICANN for designating a successor registry operator was not established pursuant to the express requirements for Consensus Policies set forth in the .net Registry Agreement and was not, in fact, based upon a consensus among Internet stakeholders, and therefore does not constitute a valid Consensus Policy.
- ICANN has failed to establish the required Independent Review Panel to review VeriSign's allegation that the .net RFP does not constitute a valid Consensus Policy.
- The .net RFP adopted by ICANN for designating a successor registry operator disadvantages VeriSign as the incumbent registry operator.
- The .net RFP is of no force or effect as against VeriSign.

110. ICANN has expressly or impliedly denied each of these contentions by VeriSign and contends the opposite.

111. VeriSign is in need of a determination of the above contentions under and with respect to the .net Registry Agreement because ICANN is otherwise threatening to proceed under the .net RFP to select a successor registry operator in violation of VeriSign's rights.

VERISIGN'S REQUEST FOR COORDINATION AND OTHER PROCEDURAL ISSUES

112. VeriSign submits, pursuant to Article 4(6) of the ICC Rules of Arbitration, that this arbitration should be coordinated with the arbitration that has previously been filed by ICANN by a Request for Arbitration dated November 10, 2004, Case No. 13 568/JNK. The place of arbitration shall be in Los Angeles, California, USA.

113. VeriSign further submits that the arbitration should be conducted in English as established in the .net Registry Agreement. (Subsections 5.9 & 5.17).

114. VeriSign submits that the arbitration will be governed by the laws of the State of California. The contract was entered into in the State of California, the parties' primary places of business are in the State of California, and the .net Registry Agreement provides that all disputes are to be resolved in the State of California.

115. Claimant reserves the right to provide a more precise accounting of circumstances, to supplement and modify the claims set forth herein, and to submit

further briefs, documents, schematic drawings, designs, exhibits and any other evidence at its own discretion in the course of the proceedings herein.

DATED: January 15, 2005.

Respectfully submitted:

ARNOLD & PORTER LLP
RONALD L. JOHNSTON
LAURENCE J. HUTT
SEAN MORRIS
THADDEUS POPE

By: Ronald L. Johnston /sm
RONALD L. JOHNSTON
Attorneys for Claimant VeriSign, Inc.

344938/LA