

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 20-1  
21 April 2020**

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The Requestor, Namecheap, Inc., seeks reconsideration of the ICANN Board’s and Staff’s: (a) alleged lack of transparency insofar as the Requestor alleges that ICANN organization has not disclosed the criteria that it will use to evaluate Public Interest Registry’s (PIR) request for indirect change of control of PIR (Change of Control Request); and (b) alleged failure to apply established policies consistently insofar as the Requestor alleges that ICANN org is not applying recommendations from a 2002 Report of the Domain Name Supporting Organization Dot ORG Task Force (2002 DNSO Recommendations) to the Change of Control Request. The Requestor claims that the ICANN Board’s and Staff’s alleged failure to disclose the criteria they will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Recommendations contradict: (1) ICANN org’s Commitment to “operate . . . through open and transparent processes”;<sup>1</sup> (2) ICANN org’s Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment”;<sup>2</sup> and (3) the 2002 DNSO Recommendations.

**I. Brief Summary.**

PIR is the registry operator for the .ORG top-level domain (TLD).<sup>3</sup> On 13 November 2019, PIR, its parent entity the Internet Society (ISOC), and Ethos Capital publicly announced

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<sup>1</sup> ICANN Bylaws, Art. 1, § 1.2(a); Request 20-1, § 8, at Pgs. 7-8.

<sup>2</sup> ICANN Bylaws, Art. 1, § 1.2(a)(v); Request 20-1, § 8 at Pgs. 7-8.

<sup>3</sup> <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

Ethos Capital’s proposed acquisition of PIR.<sup>4</sup> PIR has asked ICANN org for approval of the indirect change of control of the registry operator (Change of Control Request).<sup>5</sup>

The Requestor asserts in Request 20-1 that the ICANN Board and Staff are not disclosing the criteria they are using to evaluate the Change of Control Request and are not applying the 2002 DNSO Recommendations to its evaluation of the Change of Control Request.<sup>6</sup>

The Ombudsman has evaluated these claims, and concluded that ICANN org has been transparent about the information it is considering in its evaluation of the Change of Control Request, and ICANN org is not required to “apply” the 2002 DNSO Recommendations to the Change of Control Request.<sup>7</sup>

Based on its extensive review of all relevant materials, the BAMC concludes that the ICANN Board and Staff have not violated the ICANN org Commitments on which the Requestor relies or the 2002 DNSO Recommendations. First, the BAMC agrees with the Ombudsman that ICANN org acted “as transparently as possible” in its evaluation of the Change of Control Request, including by disclosing its process for evaluation and by posting voluminous correspondence and materials to icann.org for public review. Second, ICANN did not adopt the 2002 DNSO Recommendations<sup>8</sup>; rather, ICANN org considered the recommendations and then defined its own principles and criteria for evaluating and selecting from among the proposals received in 2002 for operating .ORG. Moreover, although ICANN org is not required to make the same assessment now, in 2020, ICANN org has explained that it will consider the principles

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<sup>4</sup> .ORG Update, <https://www.icann.org/news/blog/org-update>; 2019 .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

<sup>5</sup> *Id.*

<sup>6</sup> Request 20-1, § 5, at Pg. 4.

<sup>7</sup> Evaluation by the ICANN Ombudsman of Reconsideration Request 20-1 (“Ombudsman Evaluation”), at Pgs. 13-14, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf>.

<sup>8</sup> The DNSO was tasked with providing *recommendations* to the ICANN Board about how to proceed with selecting a new registry operator of .ORG; those recommendations were not, and are not, an established policy or procedure.

and criteria that ICANN org set forth in 2002, along with all relevant information, when evaluating the Change of Control Request.

## **II. Facts.**

### **A. The 2002 .ORG Reassignment.**

The original registry operator of .ORG was Verisign, Inc., which also was the registry operator for .COM and .NET; and the registry agreement between ICANN and Verisign provided that Verisign's operation of .ORG would end as of 31 December 2002.<sup>9</sup> Accordingly, in June 2001, the ICANN Board tasked ICANN's Domain Name Supporting Organization (DNSO)<sup>10</sup> with developing a recommendation to the Board regarding a new registry operator for .ORG.<sup>11</sup> The DNSO created a task force (Dot ORG Task Force) to "prepare a report" and "make[] several recommendations" to the ICANN Board regarding selection of a new .ORG registry operator.<sup>12</sup> After reviewing the report, the ICANN Board was to "consider how to proceed with selecting an entity to succeed VeriSign in operating the .org TLD" at its regularly-convened meeting in March 2002.<sup>13</sup>

The Dot ORG Task Force issued its report and the DNSO adopted it in January 2002, making a number of recommendations to the ICANN Board.<sup>14</sup> The Board considered the

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<sup>9</sup> 2001 .ORG RA, Art. 5, § 5.1, <https://www.icann.org/resources/unthemed-pages/registry-agmt-org-2001-05-25-en>; see also ICANN Accra Meeting Topic Reassignment of the .ORG TLD, <https://archive.icann.org/en/meetings/accra/org-topic.htm>.

<sup>10</sup> The DNSO is the precursor to the Generic Names Supporting Organization (GNSO).

<sup>11</sup> ICANN Board Minutes, 14 March 2002, <https://www.icann.org/resources/board-material/minutes-2001-06-04-en>.

<sup>12</sup> ICANN Accra Meeting Topic Reassignment of the .ORG TLD, <https://archive.icann.org/en/meetings/accra/org-topic.htm>.

<sup>13</sup> *Id.*

<sup>14</sup> See generally ICANN Accra Meeting Topic Reassignment of the .ORG TLD, Annex E, Dot Org Task Force report to the Names Council, <https://archive.icann.org/en/meetings/accra/org-topic.htm>.

DNSO's recommendations, adopting only some and rejecting others.<sup>15</sup> Notably, the Board explicitly did not adopt the recommendation that .ORG be operated by a non-profit entity.<sup>16</sup>

On 20 May 2002, ICANN org posted the "Application Instructions for the .ORG [TLD]"<sup>17</sup> and ICANN's "Criteria for Assessing Proposals [to operated .ORG]," which "discusses the criteria that ICANN intends to consider in evaluating and selecting from among the proposals that are received" to operate .ORG (ICANN's 2002 Assessment Criteria).<sup>18</sup> ICANN org made clear that ICANN's 2002 Assessment Criteria was not an exhaustive list of things that it would consider: "The general criteria include those listed below. ICANN expects that additional considerations in the evaluation and selection of proposals may be suggested by analysis and comparison of the proposals received."<sup>19</sup>

Notably, ICANN's 2002 Assessment Criteria were materially different from the DNSO's recommendations. For example, applicants to operate .ORG were not limited to non-profit entities (contrary to the DNSO's recommendation);<sup>20</sup> and ICANN org did not include the DNSO's recommended language that .ORG "should be operated for the benefit of the worldwide community . . . engaged in noncommercial communication via the Internet."<sup>21</sup> Rather, ICANN noted that applicants' "policies and practices should strive to be responsive to and supportive of the noncommercial Internet user community."<sup>22</sup> Furthermore, ICANN's 2002 Assessment

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<sup>15</sup> See ICANN Board Minutes, 14 March 2002, <https://www.icann.org/resources/board-material/minutes-2001-06-04-en>.

<sup>16</sup> *Id.*; see also ICANN Board Discussion of .org Reassignment, Accra, Ghana, 14 March 2002, <https://archive.icann.org/en/tlds/org/board-org-discussion-14mar02.htm> ("[T]he nature of the organization that undertakes to run dot ORG does not have to be a not for profit or for profit.").

<sup>17</sup> Application Instructions for the .ORG Top-Level Domain, 20 May 2002, <https://archive.icann.org/en/tlds/org/app-instructions.htm>.

<sup>18</sup> Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals, 20 May 2002 (2002 Assessment Criteria) <https://archive.icann.org/en/tlds/org/criteria.htm>.

<sup>19</sup> *Id.*

<sup>20</sup> 2002 Assessment Criteria.

<sup>21</sup> 2002 DNSO Recommendations.

<sup>22</sup> 2002 Assessment Criteria.

Criteria were not ICANN policy but rather, simply provided operational guidance to support ICANN in selecting a new registry operator for .ORG.

Through the request for proposals process, the ICANN Board selected PIR to operate .ORG, and ICANN org executed a registry agreement with PIR in December 2002.<sup>23</sup>

#### **B. The 2019 .ORG RA.**

PIR currently operates .ORG pursuant to the .ORG Registry Agreement (.ORG RA), which has been renewed periodically since 2002.<sup>24</sup> Most recently, the .ORG RA was set to expire on 30 June 2019. Following extensive consultation with the ICANN Board and consideration of public comments on a draft of the 2019 .ORG RA, and with the Board's support, ICANN org announced the execution of the 2019 .ORG RA on 30 June 2019.<sup>25</sup>

#### **C. The Change of Control Request.**

On 13 November 2019, PIR, ISOC, and Ethos Capital publicly announced Ethos Capital's proposed acquisition of PIR.<sup>26</sup> Under the 2019 .ORG RA, PIR must obtain ICANN org's prior approval before there can be a direct or indirect change of control of the registry operator.<sup>27</sup> Accordingly, on 14 November 2019, PIR sought the requisite approval from ICANN org via the Change of Control Request.<sup>28</sup> Typically, requests to ICANN org for approval of a

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<sup>23</sup> Special Meeting of the Board Minutes, 14 October 2002, <https://www.icann.org/resources/board-material/minutes-2002-10-14-en>; 2002 .ORG Registry Agreement, <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

<sup>24</sup> Proposed Renewal of .ORG Registry Agreement, <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

<sup>25</sup> Staff Report of Public Comment Proceeding, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>; 2019 .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

<sup>26</sup> .ORG Update, <https://www.icann.org/news/blog/org-update>; 2019 .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

change of control are confidential.<sup>29</sup> In this case, ICANN org pressed PIR for permission to publish the Change of Control Request;<sup>30</sup> PIR initially declined.<sup>31</sup>

1. ICANN's Requests for Information Relating to the Change of Control Request.

Under the 2019 .ORG RA and ICANN processes for reviewing change of control requests, ICANN org may request additional information, including information about the party acquiring control as well as its ultimate parent entity.<sup>32</sup> On 9 December 2019, ICANN org issued a Request for Additional Information regarding the Change of Control Request (Information Request)<sup>33</sup> and, separately, asked PIR and ISOC to: (1) reconsider publishing the Change of Control Request; and (2) consider publishing the Information Request and PIR's response to the Information Request.<sup>34</sup> On 20 December 2019, PIR submitted confidential responses to the Information Request.<sup>35</sup>

On 10 January 2020, ICANN org received a revised version of PIR's responses to the Information Request (Revised Submission).<sup>36</sup> With the agreement of PIR, ISOC, and Ethos Capital, ICANN org published the Revised Submission, along with the Change of Control Request and the Information Request.<sup>37</sup> ICANN org and PIR agreed to extend ICANN org's deadline to provide or withhold consent to the Change of Control Request to 17 February 2020.<sup>38</sup>

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<sup>29</sup> *See id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See* 9 December 2019 letter from J. Jeffrey to A. Sullivan and J. Nevett (9 December 2019 Letter) (asking PIR to reconsider ICANN org's request to publish the Change of Control Request), <https://www.icann.org/en/system/files/correspondence/jeffrey-to-sullivan-nevett-09dec19-en.pdf>.

<sup>32</sup> 2019 .ORG RA, Art. 7, § 7.5; Registry Transition Processes, <https://www.icann.org/resources/pages/transition-processes-2013-04-22-en>.

<sup>33</sup> .ORG Update, <https://www.icann.org/news/blog/org-update>.

<sup>34</sup> 9 December 2019 Letter.

<sup>35</sup> Update on Change of Control Request of PIR by Ethos Capital, <https://www.icann.org/news/announcement-2020-01-11-en>.

<sup>36</sup> *See id.*

<sup>37</sup> <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>.

<sup>38</sup> 17 January 2020 letter from C. Namazi to J. Nevett, <https://www.icann.org/en/system/files/files/icann-to-pir17jan20-en.pdf>.

On 23 January 2020, ICANN org received a letter from the Office of the Attorney General of the State of California (CA-AGO) seeking information regarding the proposed change in control of PIR “in order for Attorney General to analyze the impact to the nonprofit community, including to ICANN.”<sup>39</sup> ICANN is cooperating fully with the Attorney General’s investigation, and has thus far provided numerous links to publicly available information as well as responsive confidential documents.<sup>40</sup> ICANN org received a second letter from the CA-AGO on 15 April 2020.<sup>41</sup>

In light of the Attorney General’s investigation, as well as ICANN’s evaluation of the Change of Control Request, ICANN sought further extensions from PIR regarding the deadline to respond to the request. PIR initially agreed to an extension to 29 February 2020,<sup>42</sup> later agreed to a further extension to 20 March 2020,<sup>43</sup> then to 20 April 2020,<sup>44</sup> and ultimately has granted ICANN an extension until 4 May 2020.<sup>45</sup>

On 19 February 2020, ICANN org requested additional information and submitted additional questions to PIR related to the Revised Submission (Follow Up Request).<sup>46</sup> PIR responded to the Follow Up Request on 4 March 2020.<sup>47</sup>

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<sup>39</sup> 23 January 2020 letter from CA-AGO to ICANN Board,

<https://www.icann.org/en/system/files/correspondence/ca-ago-to-icann-board-23jan20-en.pdf>.

<sup>40</sup> 31 January 2020 letter from J. Rabkin to CA-AGO, <https://www.icann.org/en/system/files/correspondence/rabkin-to-barrientos-31jan20-en.pdf>.

<sup>41</sup> 15 April 2020 letter from CA-AGO to ICANN Org & Board, <https://www.icann.org/news/announcement-2020-04-16-en>.

<sup>42</sup> 14 February 2020 letter from J. Jeffrey to J. Nevett,

<https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-14feb20-en.pdf>.

<sup>43</sup> 21 February 2020 letter from J. Jeffrey to J. Nevett,

<https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-21feb20-en.pdf>.

<sup>44</sup> 17 March 2020 letter from J. Jeffrey to J. Nevett, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-17mar20-en.pdf>.

<sup>45</sup> 16 April 2020 letter from J. Jeffrey to J. Nevett, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-16apr20-en.pdf>.

<sup>46</sup> 19 February 2020 letter from J. Jeffrey to J. Nevett,

<https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf>.

<sup>47</sup> 4 March 2020 PIR submission, <https://www.icann.org/en/system/files/correspondence/cimboric-to-jeffrey-04mar20-en.pdf>.

On 3 April 2020, ICANN org posed two sets of additional questions to PIR (Second Follow Up Request): one in follow-up to prior ICANN inquiries, “to further understand the proposed transaction and its potential effect on PIR and the .ORG [TLD]”; and a second set related to updated Public Interest Commitments that PIR proposed adding to the .ORG RA if ICANN org approves the Change of Control Request (Revised PICs).<sup>48</sup>

In furtherance of ICANN’s review and evaluation of the Change of Control Request, the Board also submitted a letter to ISOC’s Board of Trustees on 13 February 2020, containing 18 questions concerning the proposed change of control;<sup>49</sup> ISOC responded on 24 February 2020.<sup>50</sup>

## 2. ICANN’s Transparency Regarding the Change of Control Request.

Throughout this process, ICANN org has made every effort to be transparent in its evaluation of the Change of Control Request. While change of control requests are typically confidential, in this instance, ICANN org urged PIR to permit publication of the related materials and, ultimately, ICANN org has published not only the Change of Control Request but also the requests for further information as well as PIR’s responses. These publications, in conjunction with various correspondence, blogs, transcripts and responses to community questions that have been posted, clearly demonstrate what ICANN is considering in its evaluation of the Change of Control Request.

For example, on the day it issued the Information Request, ICANN org published an update on the .ORG Change of Control Request (.ORG Update),<sup>51</sup> disclosing the status of

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<sup>48</sup> PIR Transaction and Proposed Public Interest Commitments Update, ICANN Blog, 8 April 2020 (“8 April .ORG Update”), <https://www.icann.org/news/blog/pir-transaction-and-proposed-public-interest-commitments-update>; see also 3 April 2020 letter from J. Jeffrey to J. Nevett, with attachments, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-03apr20-en.pdf>.

<sup>49</sup> 13 February 2020 letter from M. Botterman to G. Camarillo, <https://www.icann.org/en/system/files/correspondence/botterman-to-camarillo-13feb20-en.pdf>.

<sup>50</sup> 24 February 2020 letter from G. Camarillo to M. Botterman, <https://www.icann.org/en/system/files/correspondence/camarillo-to-botterman-24feb20-en.pdf>.

<sup>51</sup> .ORG Update, <https://www.icann.org/news/blog/org-update>.



ICANN org’s evaluation of the Change of Control Request and explaining that: (1) ICANN org would “thoroughly evaluate” PIR’s responses to the Information Request; (2) the .ORG RA “requires a standard of reasonableness for ICANN’s determination” on the Change of Control Request; and (3) ICANN Org would “thoughtfully and thoroughly evaluate the proposed acquisition to ensure that the .ORG registry remains secure, reliable, and stable.”<sup>52</sup>

ICANN org posted another update on 8 April 2020.<sup>53</sup> ICANN org explained that it was posting the Revised PICs and that it intended to “post PIR’s responses to [the Second Follow Up Request] when they are available, subject to any appropriate requests for confidentiality made by PIR.”<sup>54</sup> ICANN org also explained that its “follow-up questions to PIR seek to ensure that ICANN has a clear understanding of each commitment within the PICs, such that it could be enforced should the need arise.”<sup>55</sup> ICANN org invited public feedback on the Revised PICs and noted that because of the “fast-approaching deadline for ICANN to make a decision to approve or withhold consent . . . , the typical 30-day public notice period has been condensed to seven days.”<sup>56</sup>

Additionally, ICANN org’s 13 February 2020 letter to PIR<sup>57</sup> explains that the “parties’ contracts authorize ICANN to evaluate the reasonableness of the proposed change of control under the totality of circumstances, including the impact on the public interest and the interest of the .ORG community.”<sup>58</sup> The letter further notes that the “plain terms” of the 2019 .ORG RA

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<sup>52</sup> *Id.*

<sup>53</sup> 8 April .ORG Update.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 13 February 2020 letter from J. LeVee to L. Boglivi, <https://www.icann.org/en/system/files/correspondence/levee-to-boglivi-13feb20-en.pdf>.

<sup>58</sup> *Id.* at Pgs. 1-2.

“do[] nothing to confine ICANN’s consideration to any arbitrary subset of criteria.”<sup>59</sup> ICANN org also explained that, when PIR was selected as the registry operator for .ORG in 2002:

- “ICANN made clear that ‘a key objective’ was ‘differentiating the .org TLD from TLDs intended for commercial purposes’”;<sup>60</sup>
- “[T]he .ORG operator was expected to ‘promote the registry’s operation in a manner that is responsive to the needs, concerns, and views of the noncommercial Internet user community’”;<sup>61</sup>
- As a result of ICANN org’s clear directive, PIR committed, in its application, to “institute mechanisms for promoting the registry’s operation in a manner that is responsive to the needs, concerns, and views of the non-commercial Internet user community”;<sup>62</sup> and
- ICANN org and PIR have “long recognized the unique public-interest-focused nature of the .ORG domain, and [its] contractual role in evaluating proposed changes of control relating to .ORG effectuates those longstanding principles.”<sup>63</sup>

And, in conclusion, ICANN org indicated that it “is reviewing PIR’s request for change of control in light of all of the relevant circumstances.”

ICANN has also engaged with the community regarding this matter, including through publication of the Revised PICs (as noted above) as well as designated time during ICANN67. The first Public Forum of ICANN67 focused entirely on the PIR Change of Control Request process.<sup>64</sup> The session provided “an opportunity for the ICANN community to ensure that it understands the scope of ICANN’s role in this matter, and to provide feedback.”<sup>65</sup> At the beginning of the session, held on 9 March 2020, ICANN’s General Counsel and Secretary explained that:

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<sup>59</sup> *Id.* at Pg. 2.

<sup>60</sup> *Id.* at Pg. 2, quoting 2002 Assessment Criteria.

<sup>61</sup> *Id.* at Pgs. 2-3, quoting 2002 Assessment Criteria.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Transcript, 9 March 2020, at Pg. 10,

<https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>.

<sup>65</sup> <https://www.icann.org/news/announcement-2020-03-04-en>.

ICANN's role [with regard to the proposed change of control of PIR] comes from ICANN's authority under the .ORG Registry Agreement with PIR to manage the .ORG registry. Under the terms of the .ORG Registry Agreement, ICANN may only evaluate whether it will permit the change of control over the party to ICANN's agreement, PIR, from ISOC to Ethos.

Information ICANN considers includes the following: Information about the party acquiring control, so information about Ethos; its ultimate parent entity, who controls Ethos, what is the relationship that it has relating to its controls; whether it meets ICANN's adopted registry operator criteria; the financial resources and wherewithal to manage the registry or to operate it; and the operational and technical capabilities.<sup>66</sup>

After the meeting, ICANN org posted a transcript of the meeting and provided additional responses to questions asked at the meeting.<sup>67</sup>

As of the date of this Recommendation, ICANN org has not provided or declined approval of the Change of Control Request.

#### **D. Independent Review Process Proceeding.**

On 25 February 2020, Namecheap (the Requestor here in Reconsideration Request 20-1) initiated a request for Independent Review Process (IRP).<sup>68</sup> The IRP challenges ICANN's decision in June 2019 not to include a price control provision in the most recent version of the registry agreements for .ORG, .INFO, and .BIZ, and challenges ICANN's consideration of the Change of Control Request.<sup>69</sup> In the IRP proceeding, Namecheap sought emergency relief and asked the Emergency Panelist to, among other things, "stay all actions that further the change of control of the .org registry operator to a for-profit entity during the pendency of the IRP."<sup>70</sup>

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<sup>66</sup> Transcript, 9 March 2020, at Pg. 10,

<https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>.

<sup>67</sup> *Id.*; 11 March 2020 Responses to Questions from ICANN67 Public Forum 1,

<https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>.

<sup>68</sup> Request for IRP, <https://www.icann.org/en/system/files/files/irp-namecheap-request-26feb20-en.pdf>.

<sup>69</sup> *Id.* at Pg. 1.

<sup>70</sup> Procedural Order No. 1 on Request for Emergency Relief, 3 March 2020, at Pg. 3,

<https://www.icann.org/en/system/files/files/irp-namecheap-emergency-relief-03mar20-en.pdf>. In its responsive

On 20 March 2020, the Emergency Panelist denied Namecheap’s request for emergency relief.<sup>71</sup> The Panelist concluded, among other things, that “ICANN has demonstrated that it is engaging in due diligence to evaluate the change of control request,” and that Namecheap had not identified any “express policy requiring that the .ORG Registr[y Operator] be controlled by and operated as a non-profit corporation.”<sup>72</sup>

**E. Request 20-1.**

On 8 January 2020, the Requestor submitted Request 20-1 seeking, among other things, reconsideration of the ICANN Board’s and Staff’s: (i) alleged lack of transparency insofar as the Requestor alleges that ICANN org has not disclosed the criteria that it will use to evaluate the Change of Control Request; and (ii) alleged failure to apply established policies consistently insofar as the Requestor alleges that ICANN org is not applying the 2002 DNSO Recommendations to the Change of Control Request.<sup>73</sup>

On 18 March 2020, the BAMC reviewed Request 20-1 “to determine if it is sufficiently stated.”<sup>74</sup> And except for the remaining claim, as set forth above, the BAMC determined that the

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brief, ICANN org confirmed, among other things, that “irrespective of whether Ethos Capital becomes the owner of PIR, the 2019 .ORG [RA] will remain in effect. . . . [S]hould Ethos capital become the owner of PIR, PIR will continue to be obligated to comply with all of the covenants in the 2019 .ORG [RA].” ICANN’s Opposition to Namecheap’s Request for Emergency Arbitrator and Interim Measures of Protection, at ¶ 29, <https://www.icann.org/en/system/files/files/irp-namecheap-icann-opp-interim-measures-protection-11mar20-en.pdf>.  
<sup>71</sup> <https://www.icann.org/en/system/files/files/irp-namecheap-emergency-relief-decision-20mar20-en.pdf>.

<sup>72</sup> *Id.* at ¶¶ 121-22.

<sup>73</sup> The Requestor also submitted a letter on 14 February 2020 asking ICANN to provide documents (pursuant to the DIDP) and to deny the Change of Control Request unless certain conditions were met. (See 14 February 2020 letter from F. Petillion to ICANN, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-petillion-Janssen-to-icann-board-redacted-14feb20-en.pdf>.) ICANN org addressed the documentary requests pursuant to its DIDP. (See <https://www.icann.org/en/system/files/files/didp-20200214-1-petillion-response-15mar20-en.pdf>.) The remaining portion of the letter is not part of Request 20-1; moreover it does not identify any actions or inactions by ICANN’s Board or Staff that contravened ICANN’s Bylaws, established policies, or procedures.

<sup>74</sup> BAMC Partial Summary Dismissal of Request 20-1, at Pg. 6, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-partial-summary-dismissal-18mar20-en.pdf>.

other three claims in Request 20-1 did not meet the requirements for bringing a reconsideration request and, on that basis, summarily dismissed those claims.<sup>75</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted the sufficiently stated portion of Request 20-1 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.<sup>76</sup> The Ombudsman concluded that: (1) ICANN org “has been nothing less than transparent” “about the information [it] is using in [its] process of deciding whether to approve the Change of Control requested by PIR”; (2) ICANN org is not “required” to “apply” the 2002 DNSO Recommendations, “or that the application of such principles is paramount, or dispositive”; and (3) even so, ICANN has stated that it is considering the “2002 criteria” and it need not “do more than consider” them.<sup>77</sup>

### **III. Issues Presented.**

The issue as presented by the Requestor is as follows:

1. Whether the ICANN Board’s and Staff’s alleged failure to disclose the criteria they will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Recommendations to the Change of Control Request contradict:
  - a. ICANN org’s Commitment to “operate . . . through open and transparent processes.”<sup>78</sup>

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<sup>75</sup> The Requestor brought three other challenges in Request 20-1; the BAMC summarily dismissed those challenges because each was either untimely or not sufficiently stated. *Id.* at Pgs. 6-7.

<sup>76</sup> Ombudsman Action Regarding Reconsideration Request 20-1, 24 March 2020, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-ombudsman-action-24mar20-en.pdf>.

<sup>77</sup> Ombudsman Evaluation, at Pgs. 13-14, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf>.

<sup>78</sup> ICANN Bylaws, Art. 1, § 1.2(a); Request 20-1, § 8, at Pgs. 7-8.

- b. ICANN org’s Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”<sup>79</sup>
- c. The 2002 DNSO Recommendations.

#### **IV. The Relevant Standards for Reconsideration Requests.**

Articles 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity “may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or Staff’s reliance on false or inaccurate relevant information.”<sup>80</sup>

Request 20-1 seeks reconsideration of ICANN Staff and Board action on the grounds that the action taken contradicted ICANN’s Commitments and the 2002 DNSO Recommendations.

The BAMC has reviewed the Request and now provides a recommendation to the Board.<sup>81</sup>

Denial of a Request for Reconsideration of ICANN Staff or Board action is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>82</sup>

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<sup>79</sup> ICANN Bylaws, Art. 1, § 1.2(a)(v); Request 20-1, § 8 at Pgs. 7-8.

<sup>80</sup> ICANN Bylaws, 28 November 2019, Art. 4 § 4.2(a) and (c).

<sup>81</sup> *See id.* at § 4.2(e).

<sup>82</sup> *Id.*

## V. Analysis and Rationale.

The Requestor asserts that ICANN org has not disclosed “the criteria ICANN intends to use for evaluation [of the Change of Control Request],” and has not confirmed that it is following the recommendations in the 2002 DNSO Recommendations.<sup>83</sup> The Requestor believes that this contravenes: (1) ICANN org’s Commitment to operate in an open and transparent manner (because it has not disclosed the criteria that ICANN org will use to evaluate the Change of Control Request); (2) ICANN org’s Commitment to apply documented policies consistently (because it has not affirmed that it will apply the 2002 DNSO Recommendations); and (3) the 2002 DNSO Recommendations.<sup>84</sup>

### A. ICANN org’s Evaluation of the Change of Control Request Has Been Open and Transparent.

The Requestor asserts that ICANN org has violated its Commitment to transparency by not disclosing “the criteria ICANN intends to use for evaluation” of the Change of Control Request.<sup>85</sup> However, the Requestor has not demonstrated that ICANN org’s transparency Commitment mandates that ICANN org create or disclose a list of each criteria it will consider in evaluating the Change of Control Request. Indeed, no policy or procedure requires ICANN org to undertake such efforts in the context of a change of control request.

To the contrary, and as the Ombudsman noted in his evaluation, the standard for evaluating the Change of Control Request is set forth in the 2019 .ORG RA: ICANN’s “approval will not be unreasonably withheld.”<sup>86</sup> ICANN org has confirmed that it is applying

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<sup>83</sup> Request 20-1, § 8, at Pg. 7.

<sup>84</sup> *Id.* at Pgs. 7-8.

<sup>85</sup> *Id.* at Pg. 7.

<sup>86</sup> 2019 .ORG RA, § 7.5; *see also* Ombudsman Evaluation, at Pg. 11, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf>.

this standard.<sup>87</sup> To support its evaluation of the reasonableness of the transaction, ICANN org has taken extensive steps to seek additional information from PIR, ISOC, and the public.

ICANN org has published the following materials, which provide insight into ICANN org’s considerations concerning the Change of Control Request:

- The Information Request,<sup>88</sup> Follow Up Request,<sup>89</sup> and Second Follow Up Request;<sup>90</sup>
  - The Information Request asked PIR “to provide information relating to the continuity of the operations of .ORG, the nature of the proposed transaction, how the proposed new ownership structure would continue to adhere to the terms of our current agreement with PIR, how PIR intends to act consistently with its promises to serve the .ORG community with more than 10 million domain registrations.”<sup>91</sup>
  - The Follow Up Request asked PIR about, among other things, PIR’s “belief that Ethos Capital will be a responsible owner and fully intends to support the public interest and the .ORG community,” and how PIR and Ethos Capital would continue to protect the .ORG community.<sup>92</sup>
  - The Second Follow Up Request asked additional follow up questions concerning the effect of the indirect change of control on .ORG and the Revised PICs.<sup>93</sup>
- ICANN org’s 13 February 2020 letter to PIR concerning ICANN’s evaluation of the Change of Control Request,<sup>94</sup> which indicates that ICANN org is considering:

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<sup>87</sup> 13 February 2020 letter from J. LeVee to L. Boglivi, <https://www.icann.org/en/system/files/correspondence/levee-to-boglivi-13feb20-en.pdf>.

<sup>88</sup> Information Request, at Pgs. 12-21, <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>.

<sup>89</sup> 19 February 2020 letter from J. Jeffrey to J. Nevett, with attachment, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf>.

<sup>90</sup> 3 April 2020 letter from J. Jeffrey to J. Nevett, with attachments, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-03apr20-en.pdf>.

<sup>91</sup> Transcript, 9 March 2020, at Pg. 11, <https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>.

<sup>92</sup> 19 February 2020 letter from J. Jeffrey to J. Nevett, with attachment, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf>.

<sup>93</sup> See 3 April 2020 letter from J. Jeffrey to J. Nevett, with attachments, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-03apr20-en.pdf>.

<sup>94</sup> 13 February 2020 letter from J. LeVee to L. Boglivi, <https://www.icann.org/en/system/files/correspondence/levee-to-boglivi-13feb20-en.pdf>.



- “the reasonableness of the proposed change of control under the totality of circumstances, including the impact on the public interest and the interest of the .ORG community”;<sup>95</sup>
- Whether the .ORG registry operator would continue to “promote the registry’s operation in a manner that is responsive to the needs, concerns, and views of the noncommercial Internet user community”;<sup>96</sup>
- PIR’s commitments to “institute mechanisms for promoting the registry’s operation in a manner that is responsive to the needs, concerns, and views of the non-commercial Internet user community”;<sup>97</sup> and
- The “unique public-interest-focused nature of the .ORG domain.”<sup>98</sup>
- The ICANN Board’s 13 February 2020 letter to Gonzalo Camarillo, Chair of the ISOC Board of Trustees, containing 18 questions to ISOC concerning the Change of Control Request;<sup>99</sup>
- ICANN org’s statements during and after the Public Forum at ICANN67, including that:<sup>100</sup>
  - ICANN General Counsel and Secretary John Jeffrey explained the “process that the ICANN Board and the organization is following regarding ICANN’s Registry Agreements with PIR”;<sup>101</sup>
  - ICANN org’s publicly-posted correspondence with PIR and ISOC “identified relevant information that it is considering” in its evaluation of the Change of Control Request”;<sup>102</sup>
  - The 2002 Assessment Criteria were “based on relevant principles for the .org TLD” that “remain relevant today”;<sup>103</sup> and
  - “ICANN org and [the] Board have consistently evidenced their consideration of how [ISOC’s] 2002 commitments might impact the Change of Control request. For example, ICANN’s external counsel discussed the 2002 [Assessment C]riteria in a letter to PIR, ICANN org

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<sup>95</sup> *Id.* at Pgs. 1-2.

<sup>96</sup> *Id.* at Pgs. 2-3 (internal alterations and citations omitted).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> 13 February 2020 letter from M. Botterman to G. Camarillo,

<https://www.icann.org/en/system/files/correspondence/botterman-to-camarillo-13feb20-en.pdf>.

<sup>100</sup> Transcript, 9 March 2020, <https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>; 11 March 2020 Responses to Questions from ICANN67 Public Forum 1,

<https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>.

<sup>101</sup> Transcript, 9 March 2020, at Pg. 8, <https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>.

<sup>102</sup> 11 March 2020 Responses to Questions from ICANN67 Public Forum 1, responses to Questions 15, 16 <https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>.

<sup>103</sup> *Id.*, responses to Questions 4, 5.

asked PIR additional questions relating to the 2002 commitments, and ICANN’s Chair of the Board asked the ISOC Board questions about the 2002 [Assessment C]riteria. ICANN has long recognized the unique public interest nature of the .ORG domain and the longstanding principles that PIR has upheld in the operation of the .ORG Registry.”<sup>104</sup>

- The Board’s 8 April 2020 confirmation to the Governmental Advisory Committee that the Board “will apply a standard of reasonableness in making its determination on” the Change of Control Request, and that the Board would “continue to consider the public interest in all its decision-making using the totality of the information received, including those comments received during the ICANN67 Public Forum.”<sup>105</sup>
- ICANN org’s other correspondence and announcements, posted on its website, concerning the Change of Control Request.<sup>106</sup>

These documents—particularly the transcript of the ICANN67 Public Forum and written responses to questions from that forum—provide extensive information about ICANN org’s evaluation of the Change of Control Request. Indeed, ICANN org explained that:

Information ICANN considers [in its evaluation of the Change of Control Request] includes the following: Information about the party acquiring control, so information about Ethos; its ultimate parent entity, who controls Ethos, what is the relationship that it has relating to its controls; whether it meets ICANN’s adopted registry operator criteria; the financial resources and wherewithal to manage the registry or to operate it; and the operational and technical capabilities.<sup>107</sup>

And that:

ICANN has identified relevant information that it is considering in various correspondence, including the questions posed to PIR and

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<sup>104</sup> 11 March 2020 Responses to Questions from ICANN67 Public Forum 1, response to Question 19 <https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>.

<sup>105</sup> 8 April 2020 letter from M. Botterman to M. Ismail, <https://www.icann.org/en/system/files/correspondence/botterman-to-ismail-08apr20-en.pdf>.

<sup>106</sup> ICANN org’s announcements concerning the Change of Control Request are catalogued in Maartin Botterman’s 14 February 2020 letter to Manal Ismail, <https://www.icann.org/en/system/files/correspondence/botterman-to-ismail-14feb20-en.pdf>; additional updates are catalogued in Goran Marby’s 7 March 2020 letter to Mark Surman, <https://www.icann.org/en/system/files/correspondence/marby-to-surman-07mar20-en.pdf>; ICANN org makes available incoming and outgoing correspondence on the ICANN Correspondence page as a matter of course unless there is a compelling reason for confidentiality, <https://www.icann.org/resources/pages/correspondence>.

<sup>107</sup> Transcript, 9 March 2020, at Pg. 10, <https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>.

ISOC, as well as from ICANN’s outside counsel to PIR’s outside counsel, all of which are posted on icann.org.<sup>108</sup>

In addition, consistent with its Commitment to transparency and as the Ombudsman noted in his evaluation,<sup>109</sup> ICANN org has: (1) posted extensive correspondence concerning the Change of Control Request;<sup>110</sup> (2) ensured that the Revised Submission, ICANN org’s Information Request and follow-up questions to PIR, and PIR’s responses are publicly available (even though those materials are normally not provided to the public);<sup>111</sup> and (3) made public statements and sought public input on the Change of Control Request and the Revised PICs.<sup>112</sup>

The BAMC acknowledges that many of these documents were not in ICANN org’s possession or did not yet exist—and therefore were not available to the Requestor—when the Requestor submitted Request 20-1.<sup>113</sup> But ICANN org’s various public postings make clear that it is providing transparency to the extent feasible into the information that ICANN org is considering in its evaluation of the Change of Control Request.

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<sup>108</sup> 11 March 2020 Responses to Questions from ICANN67 Public Forum 1, response to question 15, <https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>.

<sup>109</sup> Ombudsman Evaluation, at Pg. 12 (“ICANN by all appearances, and in almost every publicly available statement, appears to be . . . acting *as transparently as possible*.” (emphasis in original)), <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf>.

<sup>110</sup> See <https://www.icann.org/resources/pages/correspondence> (providing links to more than 30 letters concerning the Change of Control Request in 2020); ICANN org catalogued much of this correspondence in response to the Requestor’s DIDP requests. ICANN Response to DIDP Request No. 20200108-1, <https://www.icann.org/en/system/files/files/didp-20200108-1-petillion-response-07feb20-en.pdf>; ICANN Response to DIDP Request No. 20200214-1, <https://www.icann.org/en/system/files/files/didp-20200214-1-petillion-response-15mar20-en.pdf>.

<sup>111</sup> Revised Submission; Information Request; 19 February 2020 letter from J. Jeffrey to J. Nevett, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf>; 4 March 2020 PIR submission, <https://www.icann.org/en/system/files/correspondence/cimbolic-to-jeffrey-04mar20-en.pdf>.

<sup>112</sup> <https://www.icann.org/news/announcement-2020-03-04-en>; Transcript, 9 March 2020, <https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>; 11 March 2020 Responses to Questions from ICANN67 Public Forum 1, <https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>; 8 April .ORG Update, <https://www.icann.org/news/blog/pir-transaction-and-proposed-public-interest-commitments-update>.

<sup>113</sup> See also Ombudsman Evaluation, at Pg. 11 (“I can see how, on January 8th, Namecheap didn’t see all this coming—but at this point, after numerous publications, fora, etc., there is no doubt in my mind that ICANN has been acting transparently—both the Board and the Staff.”) <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf>.

For the above reasons, the Requestor’s arguments concerning transparency do not support reconsideration.

**B. ICANN org’s Evaluation of the Change of Control Request Has Adhered To its Commitment to Apply Documented Policies Consistently, Neutrally, Objectively, and Fairly.**

The Requestor asserts that “[u]nless the Internet community develops a specific policy for evaluating the [Change of Control Request], the criteria [set forth in the 2002 DNSO Recommendations] should comprise the policy and the evaluation criteria.”<sup>114</sup> The Requestor then claims that because ICANN org is not applying the 2002 DNSO Recommendations, ICANN org’s actions are inconsistent with its Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”<sup>115</sup> The Requestor’s claims do not support reconsideration.

ICANN org is committed to applying “documented policies consistently.” The Requestor argues that the 2002 DNSO Recommendations are, or should be, considered “policy for the operation of the .org registry,” and “ha[ve] never been amended nor revoked.”<sup>116</sup> This is incorrect. As previously discussed, the DNSO (which commissioned the Dot ORG Task Force) was tasked with providing recommendations to the ICANN Board about how to proceed with selecting a new registry operator of .ORG. The Board was clear on this point – repeatedly referring to the report as “recommendations,” “guidance” and/or “advice.”<sup>117</sup> As Dr. Cerf said: “Advice is advice, and the Board is making the decisions.”<sup>118</sup> And, ultimately, in providing

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<sup>114</sup> Request 20-1, § 8, at Pg. 10.

<sup>115</sup> ICANN Bylaws, Art. 1, § 1.2(a)(v); Request 20-1, § 8, at Pgs. 8-11.

<sup>116</sup> Request 20-1, § 8, at Pg. 9.

<sup>117</sup> ICANN Board Discussion of .org Reassignment, Accra, Ghana, 14 March 2002, <https://archive.icann.org/en/tlds/org/board-org-discussion-14mar02.htm>.

<sup>118</sup> *Id.*

direction to the ICANN President regarding the request for proposal (RFP) process for selecting a registry operator for .ORG, the Board specifically did not adopt certain of the DNSO's recommendations.<sup>119</sup>

The Board carefully considered the 2002 DNSO Recommendations during its 14 March 2002 meeting, adopting some of the recommendations and rejecting others, and ultimately developed the ICANN 2002 Assessment Criteria.<sup>120</sup> Key here, the Board explicitly did not adopt the recommendation that the registry operator of .ORG must be operated by a non-profit entity.<sup>121</sup> As such, the 2002 DNSO Recommendations were not adopted as an established ICANN policy as the Requester is defining them and, therefore, cannot support a reconsideration request alleging violation of ICANN org's Commitment to apply documented policies consistently.

The Requestor asserts that ICANN org should, in particular, consider three of the DNSO's recommendations in ICANN's evaluation of the Change of Control Request: (i) that .ORG be "operated for the benefit of the worldwide community . . . engaged in noncommercial communication via the Internet"; (ii) that .ORG should be operated by "a non-profit organization that has widespread support from and acts on behalf of the community"; and (iii) that the registry fee should be "as low as feasible consistent with the maintenance of good quality service."<sup>122</sup> The Requestor also cites ICANN's 2002 Assessment Criteria, asserting that those criteria "t[ook] up" the 2002 DNSO Recommendations.<sup>123</sup>

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<sup>119</sup> ICANN Board Minutes, 14 March 2002, <https://www.icann.org/resources/board-material/minutes-2001-06-04-en>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Request 20-1, § 8, at Pg. 9.

<sup>123</sup> *Id.*, § 8, at Pg. 9.

First, given the material differences between the DNSO’s recommendations and ICANN’s 2002 Assessment Criteria,<sup>124</sup> the Requestor is incorrect in assuming that the DNSO’s recommendations were “taken up in the criteria.”<sup>125</sup>

Second, the ICANN Board in 2002 explicitly did not adopt the DNSO’s recommendation that the .ORG registry operator should be a non-profit entity.<sup>126</sup> The Board was clear that “there should be no preference in favor or against not-for-profit applicants,”<sup>127</sup> and no such limitation was included in ICANN’s 2002 Assessment Criteria.<sup>128</sup> As such, there is no basis to include such limitation in ICANN’s evaluation of the Change of Control Request in 2020.

Third, as explained previously, neither the DNSO’s recommendations nor ICANN’s 2002 Assessment Criteria were, or are, adopted policies as the Requester is attempting to describe them.<sup>129</sup> As such, ICANN is not required to “apply” the 2002 DNSO Recommendations or the ICANN 2002 Assessment Criteria to a request for indirect change of control in 2020 in the way the Requester suggests.<sup>130</sup>

Fourth, ICANN org has made clear that it *is* taking into consideration the principles set forth in ICANN’s 2002 Assessment Criteria, along with all relevant information, in its evaluation of the Change of Control Request.

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<sup>124</sup> See § II.A, *supra*.

<sup>125</sup> Request 20-1, § 8, at Pg. 9.

<sup>126</sup> ICANN Board Discussion of .org Reassignment, Accra, Ghana, 14 March 2002, <https://archive.icann.org/en/tlds/org/board-org-discussion-14mar02.htm>.

<sup>127</sup> ICANN Board Discussion of .org Reassignment, Accra, Ghana, 14 March 2002, <https://archive.icann.org/en/tlds/org/board-org-discussion-14mar02.htm>.

<sup>128</sup> See 2002 Assessment Criteria.

<sup>129</sup> See § V.B.1, *supra*.

<sup>130</sup> *Id.* See also, Ombudsman Evaluation, at Pgs. 13-14, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf> (Ombudsman concluded that ICANN org is not “required” to “apply” the 2002 DNSO Recommendations, “or that the application of such principles is paramount, or dispositive”; and, even so, ICANN has stated that it is considering the “2002 criteria” and it need not “do more than consider” them.)

In sum, ICANN org is not required to apply the 2002 DNSO Recommendations. ICANN org also is not required to apply ICANN's 2002 Assessment Criteria in the way the Requester suggests; nevertheless, ICANN org has made clear that it recognizes the principles found in the assessment criteria and is considering them, along with all relevant information, in its evaluation of the Change of Control Request.<sup>131</sup>

## **VI. Recommendation.**

The BAMC has considered the merits of the portion of Request 20-1 that the BAMC found to be sufficiently stated<sup>132</sup> as well as all relevant information provided and, based on the foregoing, concludes that the ICANN Board and Staff have not violated ICANN's Commitment to transparency, ICANN's Commitment to apply documented policies consistently, or ICANN's established policies in relation to the Change of Control Request. Accordingly, the BAMC recommends that the Board deny Request 20-1.

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<sup>131</sup> See Section V.B.1, *supra*.

<sup>132</sup> The BAMC has not considered the merits of those portions of Request 20-1 that the BAMC previously summarily dismissed as untimely or not sufficiently stated.