

## Substantive Evaluation by ICANN Ombudsman of Request for Reconsideration 20-1

This substantive evaluation by the ICANN Ombudsman of Request for Reconsideration 20-1 (filed by Namecheap, Inc. on January 8<sup>th</sup>, 2020) is required under the Paragraph 4.2(l) of the current ICANN Bylaws (“Bylaws” (amended July 22, 2017)).

Under current ICANN Bylaws 4.2(c) (“Bylaws”), a Requestor can bring a Request for Reconsideration concerning an action or inaction as follows:

### Section 4.2. RECONSIDERATION...

(c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that 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.

Request for Reconsideration (RfR) 20-1 was filed by Namecheap, Inc. (“Namecheap”) who recently (RfR 19-2 in 2019) requested reconsideration of ICANN actions and inaction relating to the 10-year renewal of the Registry Agreement (“RA”) between ICANN and Public Interest Registry (“PIR”), for the generic Top Level Domain (“TLD”) “.org” (I use lowercase .org and uppercase .ORG interchangeably throughout this evaluation—back around 2002 the preference looks to be for .ORG in caps). Namecheap requested reconsideration for four different “actions” / “inactions” by the ICANN Board and Staff: three of these reconsideration requests have been summarily dismissed on procedural grounds by the Board Accountability Mechanisms Committee (“BAMC”).

The first request in RfR 20-1 related to price caps (specifically the alleged removal of price limits in the recently renewed PIR RA) was deemed untimely by the BAMC (this first request relating to the removal of price caps in renewal RAs, was also a part of RfR 19-2 [<https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf>]).

The second 20-1 request was summarily dismissed by BAMC due to finding that there’s no real adverse effect on Requestor Namecheap, a prerequisite for a Request to proceed.

The third 20-1 request related to future action/inaction by the ICANN Board or Staff—namely the approval (or not) of the change of control (as required of ICANN in PIR’s RA), which is needed if PIR converts from a not-for-profit entity into a for-profit LLC (under the laws of Pennsylvania where PIR is registered)—that approval/disapproval decision is in the process of being made by ICANN at this moment, and as yet there has been no action or inaction that can be reconsidered. Thus, Requestor’s third request relating to future/potential action/inaction was summarily dismissed by the BAMC.

This leaves us with Namecheap’s fourth and final request in RfR 20-1:

The Requestor’s challenge to the ICANN Board’s and Staff’s 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 is not applying the 2002 DNSO Policy Guidelines to the Change of Control Request: (i) was timely filed; (ii) sufficiently identifies the Bylaws provisions and established ICANN policies that ICANN org allegedly violated; and (iii) sufficiently identifies an alleged adverse effect of the challenged conduct.

March 18<sup>th</sup>, 2020 PARTIAL SUMMARY DISMISSAL BY THE BOARD  
ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC) RECONSIDERATION  
REQUEST 20-1 located here:

<https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-partial-summary-dismissal-18mar20-en.pdf>

As seen in the partial summary dismissal above, the fourth request was *not* summarily dismissed by the BAMC:

Accordingly, the BAMC finds it appropriate to proceed through the Reconsideration process only as to the portion of Request 20-1 challenging the ICANN Board’s and Staff’s 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 is allegedly not applying the 2002 DNSO Policy Guidelines to the Change of Control Request.

Under the relevant ICANN Bylaw:

4.2(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

And, when the Ombudsman is not recusing himself, which I am not, here:

4.2(1)(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

My substantive evaluation here is limited to a) an alleged lack of transparency by ICANN's Board and Staff insofar as, according to the Namecheap, ICANN has not disclosed "criteria" they may be using to evaluate the Change of Control request made by PIR under its recently renewed RA; and b) as a subset of the issue of transparency, whether ICANN's Board and/or Staff are "applying" 2002 DNSO Policy Guidelines (the "2002 DNSO Guidelines") relating to the ongoing approve/disapprove decision viz. a Change of Control ("CoC"). It is worth noting that what Namecheap styles in its request as the "2002 DNSO Policy Guidelines" actually refers to a report presented by the Names Council .ORG Divestiture Task Force to the DNSO Council, and not an actual "DNSO policy".

<https://archive.icann.org/en/meetings/accra/org-topic.htm>

As I have noted previously (in my Evaluation of RfR 19-2): "In providing the Board Accountability Mechanism Committee ("BAMC") and the ICANN Board of Directors a 'substantive evaluation' of a Request for Reconsideration, the Ombudsman must look at the substance of what is being requested in the Request, and of course at the actions (or inaction) for which the Requestor seeks Reconsideration."

<https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf>

Before proceeding to my evaluation, some substantive background seems pertinent.<sup>1</sup>

The Renewed Registry Agreement (RA) (and Addenda) contains the "necessary"<sup>2</sup> Change of Control clause, which change PIR requested of ICANN, here:  
<https://www.icann.org/resources/agreement/org-2019-06-30-en>

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<sup>1</sup> My Substantive Evaluation of RfR 19-2 sets out on pp. 2-3 some facts and gives a brief background which may provide useful additional context for this evaluation.

[<https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf>] My Substantive Evaluation of Reconsideration Request 19-3 pertained to other terms in the renewal Registry Agreement for .org (I submitted both of these evaluations to the BAMC on September 7<sup>th</sup>, 2019; my Analysis of 19-3 is here: <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf> .

<sup>2</sup>The current scheduled date by which ICANN will issue in writing the approval or disapproval of the Change of Control has been set as April 20<sup>th</sup>, 2020: this deadline is mutually agreed on by ICANN and the Public Interest Registry ("PIR").

PIR, the Public Interest Registry is Registrar for the historic and significant Top-Level Domain (TLDs) “.org” (“PIR” or the “Registry Operator”); it is currently a Pennsylvania non-profit corporation. ICANN and PIR bilaterally negotiated a renewal of its Agreement—a ten-year extension of the Agreement that allows it to operate .org (here): <https://www.icann.org/resources/agreement/org-2019-06-30-en>

Currently, .org is the third largest TLD, with upwards of 10 million registrants, a significant number of these are some form of non-profit entity (including ICANN).

The initial Registry Agreement for .org was due to expire on June 30<sup>th</sup>, 2019. The renewal was based on ICANN’s current base TLD Registry Agreement, and includes the standard RA Change of Control clause (7.5):

**Change of Control; Assignment and Subcontracting.** Except as set forth in this Section 7.5, neither party may assign any of its rights and obligations under this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld. For purposes of this Section 7.5, a direct or indirect change of control of Registry Operator or any subcontracting arrangement that relates to any Critical Function (as identified in Section 6 of Specification 10) for the TLD (a “Material Subcontracting Arrangement”) shall be deemed an assignment.

In November 2019, ISOC (the “Internet Society”), whose Board to a degree oversees PIR and under whose aegis PIR is the Registry Operator, and the parties PIR and Ethos Capital, publicly announced the deal it had struck for PIR to be converted to a for-profit LLC, and then to become wholly-owned by a Delaware company: in essence, PIR is being purchased by Ethos Capital through the vehicle of a company called Purpose Domains, LLC.<sup>3</sup>

In a joint Blog Post published on December 9<sup>th</sup>, 2019, ICANN’s President & CEO Göran Marby and ICANN’s Board Chair Maarten Botterman have set the tone of transparency around the CoC decision:

The proposed acquisition of Public Interest Registry (PIR) by Ethos Capital was announced on 13 November 2019 by the parties and the Internet Society (ISOC). This announcement has raised many questions. In light of this, we want to be transparent about where we are in the process.

<https://www.icann.org/news/blog/org-update>

ISOC is the non-profit that, back in 2002, was reassigned the right to take over operation of the .org TLD from Verisign, Inc. This grant was made following a Report on the .org domain first posted in February 2002 (“Report”); this Report was made by the Dot Org Task Force and adopted by the DNSO Names Council on the 17<sup>th</sup> of January 2002.

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<sup>3</sup> I found this piece written by a professor (Benjamin Leff, at the *American University Washington College of Law* helpful in terms of what the proposed transactions are surrounding PIR: <http://infojustice.org/archives/42044> .

<https://archive.icann.org/en/meetings/accra/org-topic.htm>

In its pursuit of the rights to become the Registry Operator for .org, ISOC (in August of 2002) stated it would make certain commitments, based on the Report and selection process ICANN's Board had set forth for reassignment of the Registry Operator for .org.

<https://archive.icann.org/en/tlds/org/applicant-comments/isoc-29aug02.htm>

In the "Internet Society Response to the Preliminary Staff Report on Evaluation of the Proposals for the Reassignment of the .org Registry" available immediately above, ISOC noted that it had been a not-for-profit entity for ten years, and that it would oversee the new non-profit PIR: ISOC stated that if awarded the .org Registry rights, it would "form a new not-for-profit company – the Public Interest Registry (PIR) to run the .ORG registry. PIR's board will be appointed by ISOC, but PIR will be a separate legal entity and isolated from ISOC financially and operationally. PIR (not ISOC) will enter into the registry management agreement with ICANN..." ICANN's Board, at its March 14<sup>th</sup>, 2002 meeting, made clear, however, that being a "non-profit" was not to be considered as a criteria or "preference" in deciding which entity should become the RA for .org:

Four points emerged as supported by the majority of the Board: (1) the crucial importance of demonstrated technical ability, without unduly restricting the pool of applicants; (2) there should be no restrictions on eligibility for registrations (there were some qualifications to Mr. Abril i Abril's views on this); (3) there should be no explicit mechanism in ICANN's relationship with the registry operator for the use of excess registry revenues for "good works" (although the operator could choose to spend excess funds as it saw fit); and (4) there should be no preference in favor or against not-for-profit applicants.

The resolutions were adopted by a 17-0-0 vote.

<https://www.icann.org/resources/board-material/minutes-2002-03-14-en>

On October 14<sup>th</sup>, 2002, the ICANN Board voted 11-1 (with three abstaining) to reassign the .org TLD Registry to ISOC and its newly formed, ISOC-controlled, Pennsylvania not-for-profit, PIR. The Board's announcement from that day is worth presenting in full:

### **ICANN Board Selects New .org Registry Operator**

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Marina del Rey, California USA (14 October 2002) – The Internet Corporation for Assigned Names and Numbers (ICANN) Board of Directors voted 11 to 1 (with three abstentions) today to select the proposal submitted by the Internet Society (ISOC) for a new registry operator of the .org top-level domain, to replace VeriSign.

ISOC has established a new organization, Public Interest Registry (PIR), which will be the registry operator, subject to agreements to be negotiated

between ICANN and PIR. PIR will subcontract with Afilias, the operator of .info – the new gTLD approved by ICANN last year – to provide operational support. ISOC is responsible for appointing the Board of Directors of PIR, which will otherwise operate as a not-for-profit entity separate from ISOC.

Subject to final agreements, PIR will assume operations of the .org registry from VeriSign on 1 January 2003. Stuart Lynn, president of ICANN, noted "ISOC/PIR presented ICANN with a very solid transition plan. Current registrants in .org should notice no interruption of service."

An extensive bid solicitation and evaluation process was launched last April. Eleven bids were received in response to a request for proposals. These bids were analyzed and evaluated by three evaluation teams that operated independently of each other. Lynn thanked all eleven bidders for the excellence of their proposals and for their "commitment and interest through a long and arduous process. It is a shame that we cannot select all eleven, but obviously that is impossible."

As part of the evaluation, two evaluation teams focused on technical issues: one from Gartner, Inc., an international consulting and research organization that specializes in information technologies, and the other a team mainly composed of CIOs of major universities that just participated in the early stages of the evaluation. Another team was provided by ICANN's Non Commercial Domain Name Holders Constituency that focused on the effectiveness of the proposals to address the particular needs of the .org registry. Additional input came from extensive comments by the public and the applicants themselves.

PIR now seeks ICANN's "permission" (written approval) for a Change of Control from its current non-profit status to the new for-profit entity, a Pennsylvania LLC (this change would also seem to be subject to approval by the State of Pennsylvania).<sup>4</sup> PIR has duly and timely sought ICANN's written approval for the Change of Control.

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<sup>4</sup> Although what the State of Pennsylvania might do is *there* and not *here* with regards to this request, one possibility would be for ICANN to condition its decision on Pennsylvania's approval of the change in PIR's not-for-profit status.

Now, having set forth what I believe to be relevant background facts, my evaluation:

The current RfR seeks two things from ICANN's Board and Staff: transparency, including declarations of what criteria ICANN is using in making the decision to approve or withhold change of control to PIR; and second, in what I take to be a subset of transparency, assurance that ICANN is "applying" the 2002 DNSO Policy Guidelines in making its Change of Control ("CoC") decision. These kinds of decisions (relating to terms and conditions in Registry Agreements) have previously been delegated to ICANN Staff by the Board.<sup>5</sup>

Transparency is "baked in" to ICANN's Bylaws. Article 3 is titled "Transparency."

### ARTICLE 3 TRANSPARENCY

#### *Section 3.1. OPEN AND TRANSPARENT*

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).

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<sup>5</sup> With regards to ICANN's decisions on terms in Registry Agreements I noted in my evaluation of RfR 19-2: "The choice to include unique terms (or any terms, unique or not) properly belongs to the CEO and Staff..."

[\[https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf\]](https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf)

The Board proposed a determination denying RfR 19-2 (there was not at the moment a BAMC quorum) in which it found: "Based on its extensive review of all relevant materials, the Board finds that reconsideration is not warranted because ICANN org's execution of the .ORG/.INFO Renewed RAs was consistent with ICANN's Bylaws, policies, and procedures, and ICANN Staff considered all material information prior to executing the .ORG/.INFO Renewed RAs."

[\[https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf\]](https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf)

This finding was affirmed by a final determination (on the 21<sup>st</sup> of November, 2019) by the Board denying the reconsideration sought in RfR 19-2:

<https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf>

As part of this evaluation, I investigated, focusing mainly on the question of ICANN's "transparency"<sup>6</sup>— in this case, my investigation did not require vast efforts, because there has been a fair bit of disclosure on the part of ICANN around PIR's CoC request.

The Board has, by all appearances, fully engaged on this issue. First, new Chairman of the Board Maarten Botterman (he became Chair in November of 2019) sent a letter to Gonzalo Camarillo, who is the Chair of ISOC's Board of Trustees (again, ISOC created PIR, and chooses its Board, giving it theoretically at least, some modicum of control over PIR). ICANN's Chairman sought from the Chair of the ISOC additional information about the pending PIR transaction, asking for "complete, truthful, clear facts available for those looking at the broader impacts of the proposed sale. It is in furtherance of our organizations' longstanding relationship that I reach out and seek additional information."

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

ICANN has now held an entire hours'-long (virtual) public forum on the issues, complete with a question and answer session: most of the answers to questions asked were provided off-line, because the entire six-day ICANN Community Forum, ICANN67, slated for Cancun, Mexico, was instead held virtually, in light of an ongoing coronavirus pandemic.

It was the first virtual public forum ICANN has ever held. The transcript of the public forum is here: <https://67.schedule.icann.org/meetings/1152519>.

John Jeffrey, ICANN's General Counsel (the "GC") and Board Secretary, led off the virtual public forum by laying out a timeline of events since 14 November 2019:

Although much of the activity that has occurred between PIR, ISOC, and ICANN is well documented and publicly available, it is worthwhile to provide a time line of those activities to date.

According to the .ORG Registry Agreement and our processes for reviewing such requests, ICANN org initially had 30 days from 14 November to request additional information about the proposed transaction or provide or withhold consent to PIR's proposed change of control. Because of the public announcements made by PIR, ISOC, and Ethos Capital, and the fact that they contain relevant facts that were not set forth in the request for approval that ICANN received on December 9th, ICANN org -- on December 9th, ICANN org sent PIR an additional information request to ensure that we had a full understanding of the proposed acquisition. PIR was asked 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

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<sup>6</sup> Indeed, I am not going to evaluate the question of whether and to what extent there is or could be any harm to Namecheap properly stated in this RfR—although I think it might be hard for them to convince the BAMC and the Board that there is any harm from any ICANN actions or inactions relating to the pending Change of Control ("CoC") approval sought by PIR.

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.

On 20 December 2019, PIR submitted confidential responses to ICANN's request for additional information regarding the proposed acquisition which in normal circumstances typically would remain confidential. As a result of the questions and concerns being raised and directed to ISOC, PIR, and ICANN relating to the change, ICANN urged PIR, ISOC, and Ethos to act in an open and transparent manner throughout this process to ease those concerns.

We indicated our willingness to publish the request and related materials involved in ICANN's review, including the request for approval, the request for additional information, and PIR's responses.

In response to ICANN's request for transparency, on 10 January, PIR provided ICANN a revised and redacted version of its response to ICANN's additional information request.

That version is also available on [icann.org](http://icann.org). On 17 January, PIR and ICANN mutually agreed to an extension to 17 February from ICANN's time to review and respond to PIR's submissions.

This allowed us more time to look at it.

On 30 January, ICANN announced that the Office of Attorney General of the State of California had requested information from ICANN regarding the proposed transfer in order to, quote, analyze the impact to the nonprofit community, including ICANN, end quote.

ICANN is a California public benefit nonprofit corporation. Although a global organization, that's how we're structurally and legally organized.

We...we are subject to regulation of the California attorney general and are responsible for responding to requests such as this, which have the force and effect of a subpoena.

The attorney general of California is the responsible acting authority for supervising charitable organizations inside California.

ICANN is fully cooperating with the attorney general's request for information. We have begun the process of sharing the information requested and have had regular contact with the attorney general's office ever since.

In addition to this request for information, the California attorney general asked for more time, surpassing the agreed-to 17 February deadline. Accordingly, ICANN asked PIR to give additional time to 20 April 2020 to

allow both the California attorney general and ICANN more time to conclude their reviews.

PIR initially agreed to a further extension to 29 February 2020.

On the 21st of February, PIR agreed to a new deadline of 20 March. ICANN is working to that 20 March date but continues to seek further time from PIR to allow both our review and the California attorney general's review to complete.

ICANN has continued its diligence in its review of PIR's request to its proposed change of control.

On 19 February, ICANN provided an additional set of PIR and PIR has responded to those questions as of the 4th of March. Those materials are also now available on [icann.org](https://icann.org) in a nearly unredacted fashion.

Recognizing that some questions might be better addressed to ISOC, on 13 February, the chair of the ICANN board sent a letter to the ISOC board chair setting out our questions to ISOC and asking for a response that can be shared publicly. ISOC's chair responded on the 24th of February. And those are also available on [icann.org](https://icann.org).

Throughout this inquiry, ICANN will continue to conduct thorough due diligence in its consideration of the proposed change of control and related conversion of PIR from a nonprofit to a for-profit.

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

The Written Responses to the questions asked at the public forum (where they are properly directed to and can be answered by ICANN) are below; they're worth reading:

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

The first answer set forth at the above link is particularly telling (I quote in part):

ICANN has asked PIR to provide additional 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. Mr. Jeffrey stressed that ICANN continues to conduct thorough due diligence in its consideration of the proposed change of control and related conversion of PIR from a nonprofit to a for-profit entity. Please also see the letter dated 13 February 2020 from Jeffrey LeVee (ICANN's outside counsel) to Lauren Boglivi (PIR's outside counsel) which is published on the Correspondence page.

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

ICANN has made numerous requests for information from PIR (and from the ISOC). Whatever information ICANN can make available it *has* made available. ICANN has published numerous letters back and forth between ICANN, and ICANN’s counsel, and PIR, and their counsel. I count upwards of 30 letters to and from ICANN published since this RfR was filed on January 8<sup>th</sup>, 2020.

For example, on the 19<sup>th</sup> of February 2020: ICANN’s GC has 5-pages’ worth of additional requests for information about the proposed PIR transaction (the requested CoC). Whatever information PIR (and ISOC) make available that *can* be posted and made available to the public, is then posted.<sup>7</sup>

There is a lot of transparency here. There is a lot of engagement by ICANN. I can see how, on January 8<sup>th</sup>, 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.

This approval/ disapproval process and pending decision has garnered quite a bit of attention from all around the world, and particularly in the United States, where ICANN is headquartered (ICANN is a not-for-profit public benefit corporation registered in California.) California Attorney General Xavier Becerra gave notice to ICANN’s Board on January 23<sup>rd</sup>, 2020, that it is looking into this process to determine the “impact” this CoC would have on the non-profit community (presumably he means the impact on non-profits that use .org TLD domains, as well as ICANN itself), and has requested numerous documents, with which document requests ICANN is in the midst of complying.

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

Recently, several US Senators have weighed in, calling on ICANN to disapprove the Change of Control (the letter is to the ICANN leadership from Elizabeth Warren, Senator from Massachusetts, and is signed by her fellow Mass. Senator Ed Markey, as well as Senators Ron Wyden, Richard Blumenthal, and Representative Anna Eshoo).

<https://www.icann.org/en/system/files/correspondence/warren-et-al-to-marby-et-al-18mar20-en.pdf>

Despite the clamor, ICANN has gone about its mission of gathering relevant information, and then making that information as publicly available as possible. Again, I’m not a lawyer myself, but it seems to me that ICANN is required to make a contractual determination based on a reasonableness standard—as to whether or not it is *reasonable* to approve PIR’s requested Change of Control, which will then likely result in its becoming a for-profit that is ultimately acquired by Ethos Capital.<sup>8</sup> This will be done by the Staff, and when they do make their decision, they will also present their

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<sup>7</sup> PIR at least, and perhaps ISOC as well, have redacted some lines, or refused permission for certain requested and provided information to be made public, including the identities of all the owners of Ethos Capital.

<sup>8</sup> That, at least, seems to be the position of ICANN’s outside counsel:

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

reasoning. ICANN want information because the mechanisms of ICANN require such for all new Registry Operators, and even, old Registry Operators with new owners.<sup>9</sup>

At the virtual public forum, the ICANN GC, described the present state of affairs regarding the pending Change of Control decision, and noted some of the relevant information ICANN is looking for from PIR/ISOC in making this major decision:

PIR was asked 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.

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

ICANN by all appearances, and in almost every publicly available statement, appears to be taking account of public feedback, information provided by PIR and ISOC, and acting *as transparently as possible*. I don't see how ICANN could be more transparent.

As for the second part of the Request for Consideration 20-1, which tasks me with evaluating whether or not ICANN is "applying" the 2002 DNSO Guidelines, that inquiry seems pretty straightforward to me. Here is what ICANN has said in its written answers to the questions asked by the Community at the public forum on this issue:

ICANN has stated that it is looking at a variety of factors in its review of the proposed Change of Control and Entity Conversion of PIR. The 2002 criteria were based on relevant principles for the .org TLD including the differentiation of the .org TLD from TLDs intended for commercial purposes. These principles remain important today. Please see the letter dated 13 February 2020 from Jeffrey LeVee (ICANN's outside counsel) to Lauren Boglivi (PIR's outside counsel) which is published on the Correspondence page. [Answer to Question 4 which was asked by Elliot Harmon of the Electronic Frontier Foundation]

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

The LeVee to Boglivi letter that is referred to (both above and below) is found here:

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

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<sup>9</sup> There is a standard published by ICANN relating to technological and operational issues when there is a change of control. You can find it here: <https://www.icann.org/resources/change-of-control> Those resources do not seem so relevant to me with regard to this matter, which has more to do with ownership and structure and commitments that may or may not be made by PIR, rather than the nuts and bolts of actually running and maintaining the .org Registry.

And then again, in ICANN's written answer to Question 5 asked by Bill Woodcock:

The 2002 criteria were based on relevant principles for the .org TLD including the differentiation of the .org TLD from TLDs intended for commercial purposes. These principles remain important today. Please see the letter dated 13 February 2020 from Jeffrey LeVee (ICANN's outside counsel) to Lauren Boglivi (PIR's outside counsel) which is published on the Correspondence page.

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

In its own words, as transparent as can be, ICANN has answered that the "principles set forth" in what it calls the "2002 criteria" (which are based on the 2002 DNSO Guidelines) are important. Thus, they are being considered. Whether they are "applying" said "important" principles to the decision on PIR's requested CoC is not clear. That said, nowhere is it required that ICANN "apply" such principles, or that the application of such principles is paramount, or dispositive. The criteria/principles from 2002 seem to be *a* factor, one among many, being *considered* by ICANN as it makes the CoC decision, under the reasonableness standard called for by its Registry Agreement with PIR.

ICANN Chair Maarten Botterman's recent letter (27 March 2020) to Moez Chakchouk, The Assistant Director-General for Communication and Information United Nations Educational, Scientific and Cultural Organization, underscores these points about transparency and the various factors and information ICANN is utilizing and considering:

Since learning of this proposed transaction, ICANN has consistently and repeatedly urged ISOC, PIR, and Ethos Capital to act in an open and transparent manner throughout this process. ICANN has published several announcements and blogs to update the community, along with the related correspondence. As you noticed, ICANN raised several questions to ISOC and PIR. We expect that these responses will provide a better understanding of the proposed structure, which will help us to evaluate the request, and bring additional transparency to questions raised.

...

You may also be aware that Ethos Capital issued a press release on 21 February 2020, announcing its proposal to the .ORG community to add contractual commitments related to pricing and accountability in the .ORG Registry Agreement. We encourage those interested to communicate their views about the registry operations and/or policies directly to PIR, Ethos Capital, and/or ISOC.

<https://www.icann.org/en/system/files/correspondence/botterman-to-chakchouk-27mar20-en.pdf>

What Requestor set forth and requests in Request for Reconsideration 20-1 merits this:

My recommendation to the BAMC is that ICANN Staff and Board should (as they appear to be) *continue* to be transparent about the information they are using in their process of deciding whether to approve the Change of Control requested by PIR (with or without amendment to PIR's RA). ICANN has urged transparency by PIR, ISOC, and Ethos Capital, and it appears to be nothing less than transparent itself. Additionally, ICANN states it is considering the 2002 DNSO Guidelines (the important "principles" and "criteria" therein) as part of its decision whether or not to approve a Change of Control sought by PIR under its extended RA; there's no reason for ICANN to do more than consider these *important principles*, and by every indication, they have been and at present *are doing* just that.