

Rebuttal to the BAMC Recommendation in Reconsideration Request 20-1

Namecheap (Requestor) submits this Rebuttal to the Board Accountability Mechanisms Committee's ('BAMC') Recommendation on Reconsideration Request (RfR) 20-1 (the 'Recommendation'). The Recommendation concerns Requestor's request that ICANN (i) reconsider the lack of openness and transparency with respect to the renewal of the Registry Agreements for legacy TLDs and the actions surrounding the (proposed) acquisition of PIR and ICANN's approval process, (ii) preserve the non-profit character of .ORG, (iii) observe the criteria that have led to the reassignment of the .ORG registry to PIR/ISOC, (iv) reverse its decision to eliminate price caps in the .ORG, .INFO and .BIZ TLDs and include (or maintain) price caps in these TLDs, (v) ensure that domain name registration and renewal fees in .ORG are "as low as feasible consistent with the maintenance of good quality service", and (vi) to the extent PIR cannot live up to its commitments made during the reassignment process for the .ORG registry, reassign the .ORG registry in accordance with the 2002 Domain Name Supporting Organization's (DNSO) policy and assessment criteria for the reassignment and operation of the .ORG registry (unless the community comes up with an updated policy).

Requestor further asked that, in the event that ICANN did not immediately grant its requests, ICANN engage in conversations with the Requestor and that a hearing be organized. In such event, Requestor requested that, prior to the hearing, ICANN (i) provide full transparency regarding negotiations pertaining to the reassignment, renewal and amendments of the .ORG, .BIZ and/or .INFO Registry Agreements, (ii) provide full transparency regarding the (proposed) change of control of PIR, and (iii) provide the documents requested in the Requestor's DIDP request. The BAMC unduly dismissed part of Namecheap's RfR on 18 March 2020 and now recommends that the ICANN Board deny RfR 20-1 altogether. By this

Rebuttal, Requestor requests that the Board deny the BAMC's Recommendation on the grounds that it is based on both factual errors and on a misrepresentation of Requestor's position and of the applicable rules.

This RfR is not rendered moot by the ICANN Board's recent decision to reject the proposed change of control of the .ORG registry. On 30 April 2020 (*i.e.*, after the BAMC's Recommendation), the ICANN Board directed ICANN's President and CEO to withhold ICANN's consent to PIR's Change of Control Request, thereby rejecting PIR's request.¹ Notably, the ICANN Board decided to withhold consent only after it received a warning letter from the California Attorney General's Office on 15 April 2020.²

While Requestor commends the ICANN Board for – finally – taking this action, the concerns raised by Namecheap remain. Specifically, Requestor still (i) challenges the opaque way in which ICANN handled the price cap removal and PIR Change of Control processes, (ii) calls for an investigation regarding the involvement of former ICANN officials in the proposed PIR/Ethos Capital transaction, and (iii) calls for clear criteria and processes that should govern major changes to legacy TLDs going forward.

A rejection of the BAMC's Recommendation would be consistent with the ICANN Board's decision to withhold its consent to PIR's Change of Control Request. It would also give ICANN the opportunity to correct past errors and enhance ICANN's processes going forward.

¹ ICANN, *Approved Board Resolution 2020.04.30.01 – Special Meeting of the Board*, 30 April 2020, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>; Letter from Russ Weinstein (Sr. Director, gTLD Accounts and Services ICANN) to Public Interest Registry, 1 May 2020, <https://www.icann.org/en/system/files/correspondence/weinstein-to-nevett-01may20-en.pdf>.

² Letter from Xavier Becerra (Attorney General, State of California) to ICANN, 15 April 2020, <https://www.icann.org/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf>.

Finally, Requestor notes that the subject matter of this RfR forms part of the discussions that are currently pending in the IRP initiated by Namecheap (ICDR Case No. 01-20-0000-6787). The present rebuttal by no means constitutes a full statement of facts and legal arguments in view of the procedural imbalance in the present RfR proceedings. Should the ICANN Board, in spite of this Rebuttal, accept the BAMC's summary dismissal and Recommendation, Requestor reserves the right to have this decision reversed by the IRP Panel and to supplement its arguments once Requestor is given access to all information relevant to its requests.

**I. ICANN'S UNDUE RELIANCE ON FORMAL REQUIREMENTS AND ITS REFUSAL TO PRODUCE DOCUMENTS
MAKE THIS PROCEEDING FUNDAMENTALLY UNFAIR**

This rebuttal is submitted in accordance with Article 4(2)(q) of ICANN's Bylaws (the 'Bylaws'). However, ICANN's undue reliance on the formal requirements of Article 4(2)(q) and the circumstances of this case create an unjustified imbalance that prevents Requestor from participating in the reconsideration proceedings in a meaningful way. The imbalance is illustrated by the fact that, for example, ICANN has taken more than two months to prepare its 13-page "summary" dismissal and almost four months to prepare its 23-page Recommendation, whereas Requestor must respond within 15 days to these 36 pages in a 10-page rebuttal.

Critically, Requestor is given no access to essential documents kept by ICANN³ and is therefore not given a fair opportunity to contest all arguments and evidence adduced by the BAMC. For example, as support for its supposed transparency, the Board in its 30 April 2020 Resolutions states that it has received "approximately 30 briefings from ICANN org" on the

³ *E.g.*, ICANN is the only party that has access to all correspondence between ICANN and the registry operators (and their representatives) in relation to the .ORG, .BIZ and/or .INFO Registry Agreements, the requests from registry operators (and their representatives) in relation to the reassignment, renewal of these Registry Agreements, their requests for modifying or removing price caps in these Registry Agreements, exchanges of communication between ICANN and the registry operators as to such renewal, modification, and removal, etc.

Change of Control issue, representing over 30 hours of scheduled meetings,⁴ but none of these briefings or minutes are publicly available. Other documents provided by PIR and Ethos were published in heavily redacted form.⁵ Without access to the underlying documents, Requestor is unable to verify the BAMC's factual arguments regarding the adequacy and transparency of its process.

As a result, this Rebuttal is not intended to be a complete statement of the elements of fact or law relevant to this matter and is sent without prejudice. Requestor is reserving all rights.

II. ICANN MUST PROVIDE FULL TRANSPARENCY ABOUT PIR'S CHANGE OF CONTROL REQUEST

Requestor and others have made it clear that the timing of the removal of price caps and announcement of PIR's Change of Control Request, and the role of former ICANN executives in the proposed transaction between PIR and Ethos, raise suspicion that both transactions were tainted by conflicts of interest from the start. As recognized by the Emergency Arbitrator in the IRP, this is a matter that ICANN is enabled to, and should investigate. Indeed, *"ICANN is clearly obligated to consider both conduct by Ethos and PIR, and persons related to them, for purposes of making its decision on change of control. Any suggestion that Ethos is not a subject of the change of control evaluation because it is not the contract party would be misplaced and constitute a failure on the part of ICANN. [...] Namecheap's suspicions regarding the timing of the announcement and role of former ICANN executives [...] are matters ICANN is enabled to investigate."*⁶ Yet, in this RfR ICANN has stonewalled production of all its communications with PIR and has refused to disclose the steps, if any, it has taken to investigate these issues.

⁴ ICANN, *Approved Board Resolution 2020.04.30.01 – Special Meeting of the Board*, 30 April 2020, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>.

⁵ E.g., <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>.

⁶ ICDR Case No. 01-20-0000-6787, *Namecheap v. ICANN*, Decision on Request for Emergency Relief, 20 March 2020, para. 126, fn 21 and 22.

The concerns regarding the lack of transparency about the proposed Change of Control were shared by many, including the Attorney General of California. The ICANN Board now appears to accept these concerns as grounds to withhold ICANN’s consent to PIR’s Change of Control Request. While Requestor commends ICANN for doing so, it should go further. It should disclose the information that was shared between PIR and ICANN. It should also investigate the conduct by Ethos, PIR, persons related to them, the role of ICANN staff and executives in the proposed transaction, and the decision-making process that led to the removal of price caps.

III. ICANN MUST CORRECT THE ILLICIT REMOVAL OF PRICE CAPS

The ICANN Board 30 April 2020 Resolutions underscore the need for the .ORG, .BIZ and .INFO price caps to be restored. When deciding to withhold its consent to PIR’s Change of Control Request, the ICANN Board recognized the specific nature of the .ORG registry and its long-standing history:

“The considerations in front of the Board here are specific to this transaction, particularly in light of the long-standing history of the .ORG registry.”

ICANN also recognized that the 2002 Assessment Criteria that have led to the designation of PIR as the .ORG registry operator “*remain relevant today*”.⁷ In its decision to withhold its consent, the ICANN Board acknowledged that “*the .ORG community has relied on PIR’s commitments for nearly 20 years*”⁸ and it recognized the importance of such reliance. The Board explains that it has “*deliberated and discussed this issue with ICANN org on approximately 30 separate occasions, receiving current updates and providing ICANN org*

⁷ BAMC’s Recommendation, pp. 17-18.

⁸ ICANN, *Approved Board Resolutions 2020.04.30.01-2020.04.30.02 – Special Meeting of the Board*, 30 April 2020, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>.

with direction concerning next steps. ICANN org has devoted countless hours in consideration of all aspects of PIR's request, and the collective hours from Board members devoted to consideration of this issue total in the thousands.”⁹

These (alleged) efforts appear to be in sheer contrast with the attention devoted to ICANN's decision to renew the registry agreements for legacy gTLDs without maintaining the price caps. The decision to remove the price caps was at least as important as ICANN's evaluation of PIR's Change of Control Request. In addition, both decisions cannot be considered separately, given that ICANN was dutybound in its evaluation of PIR's request to investigate conduct by Ethos, PIR, persons related to them, the role of ICANN staff and executives.

However, Requestor is given no transparency whatsoever as to whether ICANN engaged in any such investigation, or as to how ICANN came to the decision to remove price caps.

Just like a change of control review is *“more than just an exercise of checking boxes”*¹⁰, the renewal process for legacy registry agreements is a process that requires openness, transparency, and the involvement of those entities most affected. The point is all the stronger when, as here, a major change to the existing conditions is being proposed. The price caps were removed via an undocumented, non-transparent process. In contrast with previous contract renewals, there are no signs that the ICANN Board exercised any oversight over this process. However, the removal of price caps was a clear departure from long-standing practice and policy. With respect to .ORG, the removal of price caps also go against (i) the 2002 Assessment

⁹ ICANN, *Approved Board Resolutions 2020.04.30.01-2020.04.30.02 – Special Meeting of the Board*, 30 April 2020, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>.

¹⁰ ICANN, *Approved Board Resolutions 2020.04.30.01-2020.04.30.02 – Special Meeting of the Board*, 30 April 2020, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>.

Criteria that have led to the designation of PIR as the .ORG registry operator and that “*remain relevant today*”, and (ii) PIR’s commitments on which the .ORG community has relied on for nearly 20 years. These criteria and commitments include the requirement that the .ORG “*registry fee charged to accredited registrars should be as low as feasible consistent with the maintenance of good-quality service*”. Until the latest renewal of the .ORG registry agreement, this requirement has always been enforced via the inclusion of price caps in the registry agreement. ICANN offers no explanation whatsoever as to why it has abandoned these provisions.

In sum, ICANN’s failure to reintroduce the price caps and to provide the necessary transparency about the decision to remove the price caps is a protracted violation of ICANN’s Articles of Incorporation and Bylaws. Each day that ICANN fails to reintroduce the price caps and to provide the necessary transparency, ICANN commits a new inaction, *i.e.*, a wrongful act by omitting to correct an ongoing violation, that can be challenged. Requestor has asked ICANN to engage in corrective action in the framework of RfR 19-2, the cooperative engagement process, the IRP, and this RfR. Nothing prevents ICANN from reintroducing the price caps that were removed in an undocumented, unfair, and non-transparent process, resulting in an unreasoned decision and disparate treatment.

IV. ICANN FAILS TO APPLY DOCUMENTED POLICIES CONSISTENTLY, NEUTRALLY, OBJECTIVELY, AND FAIRLY

ICANN should have already had a policy in place for contract renewals, as instructed by the ICANN Board in 2008. On 23 January 2008, the ICANN Board accepted *inter alia* the GNSO’s policy recommendation on contractual conditions for existing gTLDs that “[t]here

should be a policy guiding registry agreement renewal’.¹¹

Requestor is unaware of any policy guiding registry agreement renewal that ICANN has used for the renewal of the .BIZ, .ORG, and .INFO registry agreements. Requestor has not been given any transparency as to the process that was used to renew these registry agreements. Requestor can only observe that ICANN made radical changes to the registry agreement to the sole benefit of the registry operators and despite strong opposition from an entire cross-section of the Internet community. Any departure from the principle that the price of Registry Services remains unchanged should be thoroughly examined and involve the Internet community as a whole. ICANN has not done so. It did not live up to its commitment to apply documented policies consistently neutrally, objectively, and fairly.

V. ICANN’S FAILURE TO CONSIDER THE SPECIFIC NATURE OF .ORG, .BIZ, AND .INFO WHEN IT REMOVED PRICE CAPS RESULTED IN DISCRIMINATORY TREATMENT

As mentioned above, the ICANN Board in its 30 April 2020 Resolutions recognized the specific nature of the .ORG registry in its decision to withhold its consent to PIR’s Change of Control Request. However, ICANN failed to consider the specific nature of the .ORG and the .BIZ and .INFO legacy gTLDs when deciding to renew the registry agreements without maintaining the price caps.

As Requestor has explained, these TLDs cannot be compared to any new gTLD or so-called sponsored TLD. They all have had a significant number of domain names under management (DUMs) for several years. The number of DUMs in .ORG has been rising consistently since

¹¹ ICANN, *Resolution 2008.01.02 – Minutes for the Special Meeting of the ICANN Board of Directors*, 23 January 2008, <https://www.icann.org/resources/board-material/minutes-2008-01-23-en>; ICANN GNSO, *Council Report to the Board – Policies for Contractual Conditions Existing Registries PDP Feb 06*, 4 October 2007, https://gns0.icann.org/sites/default/files/filefield_5954/council-report-to-board-pdp-feb-06-04oct07.pdf.

the registry was assigned to PIR to reach over 10 million DUMs in 2012. The .ORG registry maintained well over 10 million DUMs between 2012 and 2019. The .BIZ and .INFO registries also benefit from consistent levels of DUMs exceeding 1.6 million for more than a decade. No sponsored TLD comes even close to the levels of DUMs of .ORG, .INFO, and .BIZ. Apart from a handful of low priced new gTLDs, the new gTLDs contain significantly fewer DUMs than .INFO and .BIZ. All are lower than .ORG. The new gTLD market is also fluctuating much more than the market of legacy TLDs. Moreover, the operation of the .ORG registry requires special considerations in view of the nonprofit and non-commercial character of its registrants – a point emphasized by the California Attorney General in his 15 April 2020 letter.¹²

Yet, without any analysis of the particularities of the .ORG, .INFO, and .BIZ legacy TLDs, ICANN decided to remove the price caps. ICANN provided no justification for the disparate treatment of .ORG, .INFO and .BIZ as compared to .COM and .NET. As demonstrated by Section 4.2 of the 2013 registry agreements for .ORG, .INFO, and .BIZ, both ICANN and the registry operators concerned deem that the .ORG, .INFO, and .BIZ legacy TLDs are comparable with each other and with .COM and .NET. Yet, ICANN now treats them differently without any justification. ICANN also provided no justification for its treatment of the .ORG, .INFO, and .BIZ extensions in a similar manner to wholly incomparable new gTLDs when it decided to remove the price caps. ICANN's failure to take these considerations into account contradicts ICANN's mission, commitments, core values and established policies, as well as the principle of non-discrimination. The price caps should therefore be reinstated.

¹² Letter from Xavier Becerra (Attorney General, State of California) to ICANN, 15 April 2020, <https://www.icann.org/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf>

VI. CONCLUSION

Based on the foregoing and on the reasons expressed in RfR 20-1 and the letters exchanged in relation to this RfR, Requestors request that the Board deny the BAMC Recommendation and grant RfR 20-1.

Respectfully submitted,

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