

# JONES DAY

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February 13, 2020

## VIA EMAIL

Lauren K. Boglivi, Esq.  
Proskauer Rose LLP  
11 Times Square  
New York, NY 10036-8299

Re: Public Interest Registry Request for Change of Control

Dear Ms. Boglivi:

I write in response to your February 3, 2020 letter to John Jeffrey of ICANN.

ICANN very much appreciates PIR's cooperation with ICANN's evaluation of its request for change of control pursuant to Section 7.5 of the ORG Registry Agreement (and other registry agreements pursuant to which PIR has sought a change of control).<sup>1</sup> That section addresses ICANN's review of a proposed "assign[ment]" of rights by PIR, which is defined to include "a direct or indirect change of control of" PIR. ICANN looks forward to completing its review consistent with its obligations under the .ORG Registry Agreement.

ICANN appreciates and accepts your agreement to extend ICANN's deadline to respond to PIR's request for change of control until February 29, 2020. ICANN also strongly urges PIR to grant ICANN a further extension until April 20, 2020, as ICANN previously requested by letter of January 30, 2020. In view of the complexity and importance of this matter, ICANN believes that such a limited further extension is reasonable and appropriate.

I also write in response to a misapprehension reflected in your February 3 letter. The penultimate paragraph of your letter purports to "remind" ICANN that its role in this circumstance is limited to ensuring registry security, reliability, and stability, and, in particular, that consideration of "PIR's conversion from a nonprofit to a for-profit entity" is beyond the permissible scope of ICANN's review. This is wrong. 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

<sup>1</sup> While this letter predominantly focuses on issues related to PIR's request for change of control pursuant to the .ORG Registry Agreement, ICANN also notes that PIR has requested a change of control pursuant to other registry agreements PIR has with ICANN.

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community. Nothing in the parties' agreements limit the scope of ICANN's review to the technical criteria you discuss.

Your letter wholly ignores the text of the .ORG Registry Agreement. In fact, as noted above, Section 7.5 provides that PIR may not effectuate "a direct or indirect change of control of" PIR "without the prior written approval of the other party," ICANN. The section specifically addresses the standard governing ICANN's approval or disapproval of such a change of control. The standard is that "approval will not be unreasonably withheld." Subsequent subsections address timing, § 7.5(a), the scope of supplementary information requests, § 7.5(b), the requirement of background checks, § 7.5(c), and other matters unrelated to the approval standard. By its plain terms, this section imposes a standard of overarching reasonableness and does nothing to confine ICANN's consideration to any arbitrary subset of criteria.

While your letter ignores the provisions of the .ORG Registry Agreement, it cites several letters sent by Maarten Botterman, ICANN's Chair of the Board, acknowledging receipt of correspondence relating to the proposed change of control. While these letters are wholly irrelevant to the scope of ICANN's authority under the agreement,<sup>2</sup> far from supporting the limitation on the scope of review that you propose, the letters refute it. You quote Mr. Botterman's commitment "to ensure that the registry remains secure, reliable, and stable." But you fail to observe that a separate paragraph of each of these letters addresses the scope of ICANN's review. In that paragraph, Mr. Botterman makes clear that ICANN "will apply a standard of reasonableness in making its determination," and that this review will encompass "a full understanding of the proposed transaction," taking into account all relevant factors, as opposed to an artificially constrained focus on a few enumerated technical criteria.

The history of the parties' contractual relationship relating to the .ORG domain reinforces the plain language of Section 7.5 in the context of that domain. Among other things, in the process that led to PIR's selection as the operator for the .ORG domain in 2002, ICANN made clear that "[a] key objective" was "differentiat[ing] . . . the .org TLD from TLDs intended for commercial purposes."<sup>3</sup> As such, the .ORG operator was expected to "promot[e] the registry's operation in a manner that is responsive to the needs, concerns, and views of the noncommercial Internet user community."<sup>4</sup> The PIR application thus committed to "institute mechanisms for promoting the registry's operation in a manner that is responsive to the needs, concerns, and

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<sup>2</sup> See §§ 7.7 (setting out procedures governing "any revision(s) to this Agreement"), 7.10 (providing that the written agreement "constitutes the entire agreement").

<sup>3</sup> <http://archive.icann.org/en/tlds/org/criteria.htm>.

<sup>4</sup> *Id.*

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views of the non-commercial Internet user community.”<sup>5</sup> Accordingly, the parties have long recognized the unique public-interest-focused nature of the .ORG domain, and ICANN’s contractual role in evaluating proposed changes of control relating to .ORG effectuates those longstanding principles.

Finally, were there otherwise any doubt about the scope of ICANN’s review as an abstract legal matter (and there is no such doubt), the practical realities of the proposed change in control strongly undermine any artificial restriction on the scope of ICANN’s analysis. The .ORG domain is exceptionally important, including more than 10 million registered second level domains. In recognition of the obvious importance to the public interest of its operation, the proposed acquirer of PIR has made a variety of public commitments, such as that it will consider “the entire corporate social responsibility and public interest policy and what standards for social, environmental and community performance we aspire to achieve.”<sup>6</sup> Having recognized the centrality of the public interest to the propriety of the proposed change of control and directed public commitments to them, the parties cannot reasonably dispute ICANN’s role in evaluating these same considerations.

ICANN is reviewing PIR’s request for change of control in light of all of the relevant circumstances, and it looks forward to your client’s continued cooperation in this process. Please let me know if you would like to discuss these issues.

Very truly yours,



Jeffrey A. LeVee

cc: John O. Jeffrey, Esq.

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<sup>5</sup> <https://archive.icann.org/en/tlds/org/applications/isoc/section2.html#c11.4>, at § 5.

<sup>6</sup> <https://www.keypointsabout.org/blog/strengthening-org-for-the-future>.