



Afilias Plc
4th Floor, International House
3 Harbourmaster Place
IFSC, Dublin 1, D01 K8F1, Ireland
T +353.1.854.1100
F +353.1.791.8569
W Afilias.info

October 7, 2016

Christine A. Willett
Vice President, gTLD Operations
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Response of Afilias Domains No. 3 Ltd. ("Afilias") to 16 September 2016 Request for Comments from the Internet Corporation for Assigned Names and Numbers ("ICANN")

Dear Ms. Willett:

We appreciate the opportunity to provide comments on behalf of Afilias to the questions posed by ICANN in its 16 September 2016 letter. Further, we acknowledge receipt of the letter from Mr. Atallah, dated 30 September 2016, providing a response to previous letters submitted by Afilias regarding this matter. However, we note that Mr. Atallah's letter fails to respond to the serious issues concerning the auction for the rights to administer the .WEB generic top-level domain ("gTLD") raised in Scott Hemphill's letters of 8 August 2016 and 9 September 2016. Further, Mr. Atallah states that, while the .WEB/.WEBS contention set was placed on hold by ICANN on 19 August 2016, such action was taken because of the initiation of an ICANN Accountability Mechanism by another applicant. We are concerned that this statement appears to imply that ICANN is not placing the contention set on hold in order to address the issues raised by Afilias.

As reflected in the accompanying answers to ICANN's questions, Afilias reaffirms its position that the actions taken by NU DOT CO LLC ("NDC") and Verisign, Inc. ("Verisign") in connection with the auction and NDC's failure to disclose material information relating to its bid for the .WEB rights should result in the disqualification of NDC as a member of the contention set for .WEB and the invalidation of NDC's bid.

As part of its review, ICANN must recognize and investigate the significant harm to competition arising from Verisign's agreement with NDC to acquire the rights to .WEB. Verisign's actions are clearly designed to preserve Verisign's existing monopoly in gTLD services that results from its control of .COM and .NET. If awarded to Afilias, the .WEB gTLD will be uniquely situated to challenge Verisign's gTLD services dominance by providing registrants a compelling alternative to .COM and .NET. If Verisign is permitted by ICANN to succeed in its efforts to secure the rights to .WEB, on the other hand, this potential for important new competition will be destroyed. Verisign (through NDC) cannot be allowed to obtain the rights to .WEB through subterfuge, when all of the remaining applicants agreed to and played by the rules.

Accordingly, we urge ICANN to disqualify NDC's bid and prevent Verisign from obtaining control over the .WEB gTLD in order to ensure competition in the gTLD marketplace and prevent an unlawful act of monopolization based on anti-competitive behavior.

Sincerely,

A handwritten signature in black ink, appearing to read "John Kane". The signature is stylized and somewhat abstract, with a long horizontal line extending to the right.

John Kane
Vice President, Corporate Services



Afilias' Comments on ICANN's September 16, 2016 Topics

Topic 01. Afilias and Ruby Glen have alleged that NDC failed promptly to notify ICANN of "changes in ownership and control of the applicant" [i.e., NDC], as contemplated by Section 1.2.7 of the gTLD Applicant Guidebook (Version 2012-06-04) (AGB). Please provide or describe any evidence of which you are aware regarding whether ownership or control of NDC changed after NDC applied for the .WEB gTLD.

Response. According to Afilias' review of publicly available documents, "ownership or control of NDC changed after NDC applied for the .WEB gTLD." Specifically,

- Verisign's 1 August 2016 press release states that it "entered into an agreement with Nu Dot Co LLC wherein the Company provided funds for Nu Dot Co's bid for the .web TLD. ... We anticipate that Nu Dot Co ... will then seek to assign the Registry Agreement to Versign upon consent from ICANN."
- Verisign's 10-Q for the quarter ended 30 June 2016, filed with the U.S. Securities and Exchange Commission on 28 July 2016, states that "[s]ubsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during third quarter of 2016."
- Ruby Glen alleges that "NDC also made statements indicating a potential change in the ownership of NDC, including an admission that the board of NDC had changed to add 'several others'" in its Amended Complaint for *Ruby Glen, LLC v. ICANN*.

In the unique circumstances of the present case, the arrangement between Verisign and NDC constitutes the effective control of NDC by Verisign. If NDC is granted the rights to administer the .WEB gTLD from ICANN, those rights would constitute the principal business asset of NDC. NDC appears to have given Verisign de facto control over NDC's business by entering into an agreement by which Verisign will fund NDC's bid for .WEB and which gives Verisign the power to direct and control NDC's participation in the auction for .WEB in exchange for an assignment of all rights in .WEB from NDC to Verisign. Thus, Afilias has a good faith basis to believe that "ownership or control of NDC changed after NDC applied for the .WEB gTLD" and NDC did not disclose this change in violation of ICANN's rules.

Accordingly, ICANN must carefully investigate NDC's conduct by obtaining further information from NDC and Verisign, including: (1) agreements between NDC and Verisign; (2) changes to NDC's board of directors; and (3) inter-company transactions between NDC and Verisign, including the sale of assets to Verisign. Such information must also be disclosed to Afilias, the party materially affected and injured by Verisign's and NDC's actions.

Topic 02. In the *Ruby Glen, LLC v. ICANN* lawsuit, two NDC officers, Jose Ignacio Rasco III and Nicolai Bezsonoff, provided declarations dated 25 July 2016 under penalty of perjury regarding ownership and control of NDC. What evidence, if any, is there that statements made in those declarations are false?

Response. Please see our response to Topic 01. In the event that Messrs. Rasco and Bezsonoff are deposed or questioned by ICANN, Afilias requests that it be informed of the



same. If necessary, in due course, we will seek the deposition of Messrs. Rasco and Bezsonoff among others.

Topic 03. AGB Section 1.2.7 speaks of changes in ownership and control specifically "*of the applicant.*" Please describe other NDC activities besides its having applied for the .WEB gTLD, and the activities relating to that application. Do you think that a change regarding only one of many activities of an applicant constitutes a change in ownership and control within the meaning of AGB Section 1.2.7? Please explain why or why not.

Response. Please see our response to Topic 01.

Topic 04. In his 8 August 2016, letter, Scott Hemphill stated: "A change in control can be effected by contract as well as by changes in equity ownership." Do you think that an applicant's making a contractual promise to conduct particular activities in which it is engaged in a particular manner constitutes a "change in control" of the applicant? Do you think that compliance with such a contractual promise constitutes such a change in control? Please give reasons.

Response. Please see our response to Topic 01.

Topic 05. Do you think that AGB Section 1.2.7 requires an applicant to disclose to ICANN all contractual commitments it makes to conduct its affairs in particular ways? If not, in what circumstances (if any) would disclosure be required?

Response. The plain language of AGB § 1.2.7 states that disclosure "via submission of the appropriate forms" is required when "information previously submitted by an applicant becomes untrue or inaccurate" or gives rise to a material "change in circumstances" during the evaluation process. The plain language of the AGB thus clearly identifies circumstances that require a disclosure to ICANN. Afilias believes that the AGB requires applicants to disclose extraordinary commitments and changes in circumstances that materially affect the implications of the award of registry rights in terms of ICANN's authorities. Here, as the commitment between NDC and Verisign uniquely raises antitrust issues, Afilias believes that NDC was required to disclose its contractual arrangement with Verisign because such arrangement will potentially destroy any new competition given Verisign's existing monopoly in gTLD services. ICANN's exercise of its authorities includes a duty to ensure that there will be an effective potential for development of competition among providers of gTLD registry services. One of ICANN's core values is to "promot[e] competition in the registration of domain names where practicable and beneficial in the public interest." Bylaws, Art. 1 § 2(6). A third party (such as Verisign) secretly funding bids to gain or preserve a monopoly directly contravenes this core value.

Topic 06. In his 8 August 2016, letter, Scott Hemphill stated that "an agreement to provide at least \$135 Million to an applicant constitutes a material change in that applicant's financial condition." In your view, does AGB Section 1.2.7 require applicants to notify ICANN of all changes in their financial condition? If the requirement is limited by an (unstated) materiality test, how should materiality be determined?

Response. Please see our response to Topic 05.



Topic 07. Do you think that changes to an applicant's financial condition that do not negatively reflect on an applicant's qualifications to operate the gTLD should be deemed material? If so, why? Do you think that an applicant's obtaining a funding commitment from a third party to fund bidding at auction negatively affects that applicant's qualifications to operate the gTLD? Please explain why, describing your view of the relevance of (a) the funding commitment the applicant received and (b) the consideration the applicant gave to obtain that commitment (e.g., a promise to repay; a promise to use a particular backend provider; an option to receive some ownership interest in the applicant in the future; some promise about how the gTLD will be operated).

Response. The plain language of AGB § 1.2.7 requires the applicant to "promptly notify ICANN" if "at any time during the evaluation process information [including changes in financial position] previously submitted by an applicant becomes untrue or inaccurate". And failure to notify ICANN of "any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application."

An applicant that obtains a funding commitment from a third party to fund bidding at an auction negatively affects that applicant's qualifications when the third party is attempting to gain or preserve a monopoly. One of ICANN's core values is to "promot[e] competition in the registration of domain names where practicable and beneficial in the public interest." Bylaws, Art. 1 § 2(6). A third party secretly funding bids to obtain a monopoly directly contravenes this core value.

Verisign's significant financial strength was built upon its ICANN-granted position as a monopoly provider of registry services. When those monopolist profits are then employed to finance a bid to maintain that dominant market position, it is anticompetitive and material to the affected bid and to ICANN new gTLD process as a whole.

Here, NDC's agreement with Verisign is essentially an agreement not-to-compete, which stifles competition. Neither NDC nor Verisign has offered any procompetitive justification for the deal or otherwise indicated that they are engaged in a procompetitive joint venture to operate the .WEB gTLD. Verisign's monopoly position gives it significant market power in the gTLD registration market. Through its secret agreement with NDC, Verisign intends to foreclose the possibility of any competition from .WEB.

Verisign's acquisition of .WEB likely means (1) fewer resources being invested in maximizing .WEB's competitive potential, (2) a dramatically reduced chance that .WEB will act as a competitive check on .COM and .NET, and (3) that .WEB will not be marketed to compete and siphon away customers from .COM and .NET. This will deprive Internet users, businesses, and Web site developers of commercially promising and viable new domains for their Web sites. This competitive harm will likely never be undone.

Topic 08. Do you have any knowledge or information that applicants in other circumstances have obtained post-application funding commitments (whether received through loans, contributions from affiliated companies, or otherwise) for their auction bidding or other operations? If so, please elaborate. Do you know if applicants have commonly notified ICANN of those funding commitments? If so, please explain. Should applicants be required to notify ICANN of those funding commitments? If so, in what circumstances?

Response. We are not aware of similar arrangements that would have the effect of creating or preserving a monopoly in gTLD registry services like Verisign's monopoly. Afilias is aware



of applications in other circumstances that have obtained post-application funding commitments. These situations are not analogous to the commitment between NDC and Verisign, however, because Verisign's acquisition of .WEB raises serious antitrust issues by stifling competition in favor of Verisign's dominance in gTLD services. Prior applicants' circumstances have no relevance to this unique situation.

Topic 09. Do you think that requiring applicants to disclose funding commitments (whether through loans, contributions from affiliated companies, or otherwise) they obtain for auction bids would help or harm the auction process? Would a requirement that applicants disclose their funding arrangements create problems for applicants (for example, making funding commitments harder to obtain)? To what extent, if any, do you think scrutinizing such arrangements (beyond determining whether they negatively reflect on an applicant's qualifications) would be within ICANN's proper mission? Would required disclosure of applicants' funding sources pose any threat to robust competition?

Response. Please see our response to Topic 08.

Disclosure is required when there is a change in circumstances that affects competition. AGB § 1.2.7 clearly states that a disclosure "via submission of the appropriate forms" is required when "information previously submitted by an applicant becomes untrue or inaccurate" during the application process. NDC deliberately chose not to disclose its relationship with Verisign in order to avoid questions about their anti-competitive relationship, deliberately violating AGB § 1.2.7 and thus harming the auction process.

ICANN should act in accordance with its core values, which dictate that it should not only "promote and sustain a competitive environment" but also "introduce[e] and promot[e] competition in the registration of domain names where practicable and beneficial to the public interest." Bylaws, Art. I §§ 2(5), (6). In accordance with its mission, then, ICANN must therefore scrutinize arrangements that contravene these values and stifle competition – such as the one between NDC and Verisign.

The importance of a competitive environment is particularly stressed in ICANN's Bylaws. Despite ICANN's core value of "applying documented policies neutrally and objectively, with integrity and fairness", Bylaws, Art. I § 2(8), ICANN's own Bylaws permit the disparate treatment of parties for the "promotion of effective competition." Bylaws, Art. II § 3.

Topic 10. The final sentence of AGB Section 1.2.7 states that failures to notify ICANN of changes "may result in denial of the application." What standards do you think ICANN should follow in determining whether a particular failure to make a required notification should lead to denial of an application? If an applicant or related entities have multiple applications and it is discovered that the applicant or related entities have external funding commitments not disclosed to ICANN, should all of that applicant's or its related entities' applications be denied?

Response. Consistent with ICANN's obligations to promote competition, ICANN must deny an application improperly and surreptitiously funded by a third party in order to obtain control over a gTLD and to stifle competition and harm consumers. Here, ICANN must disqualify NDC's bid and prevent Verisign from acquiring the rights in .WEB. Verisign, which already exercises exclusive control over .COM and .NET, chose not to apply for .WEB, as it could have done. Rather, Verisign secretly funded NDC's application to game the system and to obtain control over .WEB for Verisign in order to stifle competition for .COM and .NET's



existing monopoly. Indeed, Verisign has few incentives to market .WEB aggressively because its growth would inevitably come at the expense of Verisign's dominant position with .COM and .NET. The damage will likely be irreparable as ICANN contracts are generally automatically renewed.

Indeed, there are several standards from ICANN's own Articles of Incorporation and Bylaws that support NDC's disqualification. They are as follows:

- ICANN is required to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets." Articles of Incorporation, Art. 4.
- ICANN is required to "[m]ak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness." Bylaws, Art. I § 2(8).
- ICANN is required to "not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." Bylaws, Art. II § 3.
- ICANN is required to "[a]ct[] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected." Bylaws, Art. I § 2(9).
- ICANN is directed to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Bylaws, Art. III § 1.
- ICANN is required to "promot[e] competition in the registration of domain names where practicable and beneficial in the public interest." Bylaws, Art. I § 2(6).
- ICANN is required to "[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness." Bylaws, Art. I § 2(10).

Topic 11. Afilias and Ruby Glen have also raised questions as to whether NDC violated the last sentence of AGB, Module 6, Paragraph 10, which states: "Applicant may not resell, assign, or transfer any of the applicant's rights or obligations in connection with the application." Do you think the "rights or obligations" mentioned in that sentence are limited to those that flow from approval of the application (e.g., the right to enter a registry agreement), or do you think that they also include rights and obligations concerning the prosecution of the application (e.g., obligations to respond to additional inquiries from ICANN; rights to assist in pursuing the application by raising or addressing concerns)? In responding on this topic, please address the context established by the first two sentences of AGB Module 6, Paragraph 10.

Response. Under the plain language of AGB Module 6, Paragraph 10, an "[a]pplicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application." Thus, it is clear that "any" rights or obligations in "connection" with the application cannot be resold, assigned, or transferred to a third party.



Topic 12. Do you have knowledge or information that gTLD applicants in other circumstances have assigned others to handle aspects of the process by which applications are evaluated? If so, please describe with specifics what you know about this practice. For example, do applicants empower persons or companies with which they are working to take charge of handling various stages of the evaluation process? If so, do you think this violates AGB Module 6, Paragraph 10?

Response. Afilias is not aware of other circumstances where an applicant (such as NDC) empowers a person or a company to improperly gain or preserve a monopoly in violation of ICANN's Bylaws. The commitment between NDC and Verisign uniquely raises antitrust issues for the reasons discussed above. Prior applicants' circumstances thus have no relevance to this unique situation.

Topic 13. Specifically with regard to the auction process, what knowledge or information do you have regarding the extent to which applicants within contention sets have taken suggestions or direction from others regarding how to conduct bidding? How common is this practice? (It is noted that Clause 68 of the "Auction Rules for New gTLDs (Version 2014-11-03)" (Auction Rules) and Section 2.6 of the "New gTLD Auctions Bidder Agreement (Version 2014-04-03)" (Bidder Agreement) prohibit certain collusive activities between applicants; the immediately preceding two questions are directed to suggestions or directions not violating those prohibitions.) Clause 12 of the Auction Rules states in part "Before an Auction to resolve a given Contention Set, each Qualified Applicant may designate a party to bid on its behalf ('Designated Bidder')." Designated Bidders must execute Bidder Agreements with the Auction Manager reflecting their rights and obligations concerning the conduct of the auction. Do you think that designation of a Designated Bidder violates the last sentence of AGB Module 6, Paragraph 10?

Response. The actions of other gTLD applicants are not relevant to NDC's actions. NDC deliberately chose not to disclose its relationship with Verisign in order to avoid questions about their anti-competitive relationship and deliberately violated AGB § 1.2.7's requirement to "promptly notify ICANN" of "any change in circumstance" that would have a material effect on the potential to create effective new competition for Verisign's existing monopoly in gTLD services.

NDC is helping Verisign solidify its monopoly over gTLDs. Verisign has enjoyed uninterrupted gTLD dominance for over a decade thanks to its control over .COM and .NET. As a result of this control, Verisign has a dominant share of all gTLD registrations. The next closest competitors have much smaller shares.

As stated above, Verisign's acquisition of .WEB likely means (1) fewer resources being invested in maximizing .WEB's competitive potential, (2) a dramatically reduced change that .WEB will act as a competitive check on .COM and .NET, and (3) that .WEB will not be marketed to compete and siphon away customers from .COM and .NET. If NDC and Verisign are permitted to consummate their arrangement, the result will deprive Internet users, businesses, and Web site developers of commercially promising and viable new domains for their Web sites. This competitive harm will likely never be undone.

Topic 14. Clause 12 of the Auction Rules states that a purpose for an applicant's selection of a Designated Bidder is to allow the Designated Bidder to bid on the applicant's behalf. Do you think that clause merely states a purpose for designation, or does it obligate the Designated Bidder to bid on



behalf of only the applicant? What do you think the phrase "its behalf" means in the Auction Rules and Bidder Agreement? Do you think it indicates that the Designated Bidder acts in the stead of the applicant, or does it additionally indicate that the Designated Bidder must act in only the interest of the applicant? (In this regard, please discuss the wording of the seventh recital in the Bidder Agreement.) Where no Designated Bidder is designated, do you think the Auction Rules or the Bidder Agreement requires that an applicant acting for itself as the Bidder act only in its own interest? If so, please explain why. As relevant to this topic 14, do you think there are any inconsistencies between the Auction Rules and the Bidder Agreement? If so, please explain those inconsistencies in detail.

Response. Afilias believes that in applying its rules in the present circumstances, ICANN should focus on the uniquely harmful competition implications of an undisclosed arrangement between NDC and Verisign, the current dominant monopolist in gTLD services. Other applications or potential applications of the rules in other circumstances are not necessarily relevant to the present unique situation.

Topic 15. Clause 13 of the Auction Rules states: "Before each Auction, each Bidder shall nominate up to two people ('Authorized Individuals') to bid on its behalf in the Auction." Authorized Individuals have certain rights and obligations in connection with the auction. Do you think that an applicant's nomination of an Authorized Individual violates the last sentence of AGB Module 6, Paragraph 10?

Response. Please see our response to Topic 14.

Topic 16. Do you think that an applicant's entry into a contract promising in exchange for a payment of money to make bids and otherwise participate in the auction in the manner directed by the other party to the contract constitutes "resell[ing], assign[ing], or transfer[ing] any of applicant's rights or obligations in connection with the application," as prohibited by AGB Module 6, Paragraph 10? Please explain why or why not.

Response. Please see our responses to Topics 05, 07, 08, and 14.

Topic 17. Do you think that AGB Module 6, Paragraph 10 would be violated by a contractual promise by an applicant to request ICANN's consent to transfer to another party any registry agreement it receives as the result of its application? If so, under what circumstances? To the best of your knowledge and information, in the context of any other gTLD has an applicant agreed, before entry into a registry agreement, to seek ICANN's consent to transfer the agreement after it is entered?

Response. Please see our responses to Topics 05, 07, 08, and 14.

Topic 18. Do you think that AGB Module 6, Paragraph 10 would be violated by a contractual promise by an applicant to seek to transfer to another party, but only upon consent of ICANN, any registry agreement it receives as the result of its application? If so, under what circumstances? To the best of your knowledge and information, in the context of any other gTLD has an applicant made such an agreement?

Response. Please see our responses to Topics 05, 07, 08, and 14.



Topic 19. Do you think that AGB Module 6, Paragraph 10 means that a resale, assignment, or transfer contrary to its last sentence constitutes a violation that can result in forfeiture or denial of the application, or is its effect simply that any such attempted resale, assignment, or transfer of the application is ineffective? In your response, please address Restatement (Second) of Contracts §§ 317 and 322 (including comment b) and any other applicable legal principles.

Response. Please see our responses to Topics 05, 07, 08, and 14.

Topic 20. In his 9 September 2016 letter, Scott Hemphill stated that NDC and Verisign's efforts to give Verisign control over the .WEB gTLD "must be sanctioned by ICANN by disqualifying NDC's bid and rejecting its application." Assuming that a resale, assignment, or transfer contrary to the last sentence of AGB Module 6, Paragraph 10 can result in forfeiture or denial of the application (see topic 19 above), do you think that the application must be forfeited or denied in all cases? If ICANN has discretion to determine an appropriate remedy, what factors do you think should guide ICANN's discretion?

Response. Afilias contests the specific circumstances surrounding NDC's actions, which violate the AGB, and declines to make generalizations regarding resales, assignments, or transfers contrary to the AGB. For the reasons provided in our responses above, ICANN should disqualify NDC's bid based on the principles found in ICANN's Bylaws and Articles of Incorporation, and on NDC's violations of the AGB. ICANN cannot permit Verisign to acquire rights in .WEB and thereby stifle competition and preserve its existing monopoly of gTLD services in direct contravention of ICANN's core values, all to the likely detriment of consumer choice and trust in ICANN.