



The Internet Corporation for Assigned Names and Numbers

16 September 2016

Mr. John Kane
Vice President, Corporate Services
Afilias Domains No. 3 Limited
2 La Touche House
IFSC Dublin 1
Ireland

Dear Mr. John Kane:

In various fora, Ruby Glen LLC (Ruby Glen) and Afilias Domains No. 3 Limited (Afilias) have raised questions regarding, among other things, whether NU DOT CO LLC (NDC) should have participated in the 27-28 July 2016 auction for the .WEB contention set and whether NDC's application for the .WEB gTLD should be rejected. To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information.

Accordingly, ICANN invites Ruby Glen, NDC, Afilias, and Verisign, Inc. (Verisign) to provide information and comment on the topics listed in the attached. Please endeavor to respond to all of the topics/questions for which you have information to do so. To allow ICANN to promptly evaluate these matters, please provide responses to globalsupport@icann.org no later than 7 October 2016.

Thank you for your cooperation and attention to this matter. Please do not hesitate to let me know if you have any questions.

Sincerely,

Christine A. Willett
Vice President, gTLD Operations



The Internet Corporation for Assigned Names and Numbers

**TOPICS ON WHICH RUBY GLEN, NU DOT CO LLC,
AFILIAS, AND VERISIGN ARE INVITED TO COMMENT**

Please note that all responses to these questions will be taken into consideration in ICANN's evaluation of the issues raised, but that does not mean that ICANN will adopt any particular response as definitive and authoritative.

Topics for Comment

1. Afiliias 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.

2. 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?

3. 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.

4. 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.

5. 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?

6. 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?

7. 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).

8. 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?

9. 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?

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?

11. Afiliias 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.

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?

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?

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.

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?

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.

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?

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?

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.

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?