

**DETERMINATION  
OF THE BOARD GOVERNANCE COMMITTEE (BGC)  
RECONSIDERATION REQUEST 16-9**

**21 JULY 2016**

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The Requesters, Ruby Glen, LLC and Radix FZC, submitted a reconsideration request seeking urgent reconsideration of ICANN’s decision not to delay the .WEB/.WEBS auction (scheduled for 27 July 2016) following ICANN’s investigation into alleged material changes in Nu Dot Co LLC’s (Nu Dot’s) application for .WEB.

**I. Brief Summary.**

Seven applications for .WEB and one application for .WEBS are currently in a contention set (.WEB/.WEBS Contention Set) and scheduled to participate in an auction of last resort on 27 July 2016 (Auction). The Requesters and Nu Dot each submitted an application for .WEB and are Auction participants. The Requesters contacted ICANN staff on or about 23 June 2016 and submitted a complaint to the Ombudsman during ICANN56 in June 2016 alleging that Nu Dot had experienced changes in leadership and/or control without notifying ICANN, as it is obligated to do. The Requesters then submitted an urgent Reconsideration Request on 17 July 2016 (Request 16-9) claiming that: (a) the Auction should be postponed because there are pending accountability mechanisms (initiated by the Requesters); and (b) reconsideration is warranted because ICANN’s investigation of the alleged changes in Nu Dot’s application was insufficient and, in the Requesters’ view, comprises “a clear violation of the principles and procedures set forth in the ICANN Articles of Incorporation and Bylaws[,] and the ICANN gTLD Applicant Guidebook.”<sup>1</sup>

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<sup>1</sup> Request, Pg. 2.

The Requesters' claims do not warrant postponement of the Auction or reconsideration. First, the Requesters argue that their pending complaint with the Ombudsman and initiation of Request 16-9 require ICANN to postpone the Auction. However, there is no policy requiring ICANN to postpone the Auction here because these accountability mechanisms were not initiated before the .WEB/.WEBS Contention Set entered into the Auction process on 27 April 2016. Indeed, the timing parameters within the auction rules were established specifically so that auction participants could not game the system by filing last-minute accountability mechanisms. Second, reconsideration is not warranted because the Requesters do not identify any misapplication of policy or procedure by ICANN staff in its investigation of the allegations regarding Nu Dot's application.

Contrary to the Requesters' claims, ICANN diligently investigated the alleged potential changes to Nu Dot's application and found no basis to initiate the application change request process.<sup>2</sup> Because the Requesters have failed to show that ICANN staff acted in contravention of established policy or procedure, the BGC concludes that Request 16-9 be denied.

## **II. Facts.**

### **A. Background Facts.**

In June 2012, Ruby Glen, LLC, DotWeb Inc. (an affiliate of Radix FZC), Nu Dot, Charleston Road Registry, Inc., Web.com Group, Inc., Afilias Domains No. 3 Limited, and Schlund Technologies GmbH each submitted an application for .WEB; Vistaprint Limited filed two applications for .WEBS (one standard, and one community-based that was later withdrawn).

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<sup>2</sup> Furthermore, even if ICANN *had* determined that an applicant change request was necessary, ICANN has discretion to determine whether a change request warrants postponing an auction.

Nu Dot's application listed three officers/directors: Jose Ignacio Rasco II, CFO; Juan Diego Calle, CEO; and Nicolai Bezsonoff, COO.<sup>3</sup>

The seven applications for .WEB and the remaining application for .WEBS are in the .WEB/.WEBS Contention Set.<sup>4</sup>

On 27 April 2016, ICANN initiated the Auction process by notifying all active members of the .WEB/.WEBS Contention Set that the Auction had been scheduled and providing instructions and deadlines to participate in the Auction.

According to the Requesters, on or about 7 June 2016 they contacted Nu Dot and asked Nu Dot to reconsider its decision to forego private resolution of the .WEB/.WEBS Contention Set. The Requesters have indicated that Nu Dot's reply included the following statement: "Nicolai [Bezsonoff] is at NSR full-time and is no longer involved with our TLD applications. [Jose Ignacio Rasco II is] still running our program and Juan [Diego Calle] sits on the board with me and several others."<sup>5</sup> This communication apparently led the Requesters to believe that Nu Dot had experienced some change in ownership and/or leadership. Thereafter, on or about 23 June 2016, the Requesters contacted ICANN staff regarding their apparent belief that changes to Nu Dot's application were required. The Requesters also formally raised the issue with the ICANN Ombudsman during ICANN56 in June 2016.

After receiving the Requesters' notification that they believed Nu Dot's application needed to be changed, ICANN staff proceeded to investigate the claims. On 27 June 2016, ICANN sent Nu Dot's authorized primary contact a message to determine whether there had been any "changes to your application or the [Nu Dot] organization that need to be reported to

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<sup>3</sup> Nu Dot Application for .WEB, *available at* <https://gtdresult.icann.org/applicationstatus/applicationdetails/1053>.

<sup>4</sup> Contention Set for .WEB/.WEBS, *available at* <https://gtdresult.icann.org/applicationstatus/contentionsetdiagram/233>.

<sup>5</sup> Request, § 8, Pg. 9.

ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors, application contacts).” Jose Ignacio Rasco, CFO of Nu Dot, replied that same day to “confirm that there have been no changes to the [Nu Dot] organization that would need to be reported to ICANN.”

Subsequently, both ICANN staff and the Ombudsman reached out to Mr. Rasco to again inquire about the claims of potential changes in Nu Dot’s organization that the Requesters believed required notification to ICANN. Specifically, ICANN staff conducted a telephone conversation with Mr. Rasco on 8 July 2016 regarding the allegations. During that call, and later in a confirming email on 11 July 2016, Mr. Rasco stated that: “Neither the ownership nor the control of Nu Dotco, LLC has changed since we filed our application. The Managers designated pursuant to the company’s LLC operating agreement (the LLC equivalent of a corporate Board) have not changed. And there have been no changes to the membership of the LLC either.” Mr. Rasco also confirmed to ICANN that he provided this same information to the ICANN Ombudsman in responding to the Ombudsman’s investigation of the complaint lodged with him. According to Mr. Rasco, he informed the Ombudsman that there had been no changes to Nu Dot’s ownership, operating agreement, or LLC membership. After receiving information from Nu Dot and ICANN, the Ombudsman informed ICANN that, in his opinion, there was nothing to justify a postponement of the .WEB/.WEBS Auction based on unfairness to the other applicants.

On 11 July 2016, the Requesters sent an email to ICANN “support[ing] a postponement of the .WEB auction to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, [Nu Dot,]” and stating that,

“[t]o do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.”<sup>6</sup>

After completing its investigation of the allegations regarding Nu Dot’s application, ICANN sent a letter to the members of the .WEB/.WEBS Contention Set on 13 July 2016 stating, among other things, that “in regards to potential changes of control of [Nu Dot], we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.”<sup>7</sup>

On 17 July 2016, the Requesters filed Request 16-9, seeking postponement of the .WEB/.WEBS Auction and requesting a “thorough and transparent investigation into the apparent discrepancies and/or changes in [Nu Dot’s] .WEB/.WEBS application.”<sup>8</sup>

The .WEB/.WEBS Auction is scheduled to occur on 27 July 2016.<sup>9</sup>

## **B. Relief Requested.**

The Requesters ask ICANN to:

1. “[D]elay the ICANN auction of last resort for the .WEB/.WEBS contention set *on an emergency basis*”, and;
2. “[C]onduct a thorough and transparent investigation into the apparent discrepancies and/or changes in [Nu Dot’s] .WEB/.WEBS application in accordance with ICANN’s Bylaws (including ICANN’s guiding principles to ensure transparency, openness and accountability), the Auction Rules, and the

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<sup>6</sup> Email from Brijesh Joshi to Akram Atallah, Christine Willett, and John Jeffrey, dated 11 July 2016, *available at* <https://www.icann.org/en/system/files/correspondence/joshi-to-atallah-et-al-11jul16-en.pdf>.

<sup>7</sup> Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

<sup>8</sup> Request, § 9, Pg. 11. On 20 July 2016, ICANN received a letter of support from Donuts Inc. regarding Request 16-9. Donuts requested that the letter not be published.

<sup>9</sup> Auction Schedule, *available at* <https://newgtlds.icann.org/en/applicants/auctions>.

### **III. The Relevant Standard For Reconsideration Requests.**

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>11</sup> The Requesters challenge staff action. Dismissal of a request for reconsideration of staff action or inaction is appropriate only if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

### **IV. Analysis and Rationale.**

#### **A. No Established Policy Requires ICANN to Postpone the .WEB/.WEBS Auction.**

The Requesters argue that the Auction should be postponed because of the pending accountability mechanisms. Those accountability mechanisms, however, were not pending at the required time—namely, the time when the .WEB/.WEBS Contention Set entered into the Auction process—and do not warrant postponement of the Auction.

The Requesters argue that a stay is “mandated by ICANN’s own rules governing Auction Eligibility given the pendency of (a) [the Requesters’] complaint to the ICANN Ombudsman and (b) this Request.”<sup>12</sup> In particular, the Requesters assert that “[a]s plainly stated on ICANN’s ‘New gTLD Program Auctions’, a string contention set will be eligible to enter into a New gTLD

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<sup>10</sup> Request, § 9, Pg. 11 (emphasis in original).

<sup>11</sup> Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

(a) one or more staff actions or inactions that contradict established ICANN policy(ies); or  
(b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or  
(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.

<sup>12</sup> Request, § 9, Pg. 12.

Program auction only where all active applications in the contention set have ‘no pending ICANN Accountability Mechanisms.’”<sup>13</sup>

Contrary to what the Requesters argue, there were no pending accountability mechanisms when the .WEB/.WEBS Contention Set entered into the Auction process. ICANN initiated the Auction process on 27 April 2016 by notifying all active members of the .WEB/.WEBS Contention Set that the Auction had been scheduled and providing instructions and deadlines to participate in the Auction. The Requesters did not lodge a complaint with the Ombudsman until two months later (and less than one month before the Auction) during ICANN56 in June 2016. Similarly, Request 16-9 was not filed until 17 July 2016. As such, there were no accountability mechanisms pending on the date that the .WEB/.WEBS Contention Set entered the Auction process. Indeed, the auction rules were designed to, among other things, prevent exactly this sort of last-minute attempt to delay. The Requesters have not identified any violation of process or procedure. The .WEB/.WEBS Auction will therefore proceed as scheduled on 27 July 2016.

**B. ICANN Staff Complied with Established Policy when Investigating the Requesters’ Allegations Regarding Nu Dot.**

The Requesters contend that ICANN’s investigation regarding Nu Dot “was taken without attention to, in contravention of, and with apparent disregard for its obligation to investigate the veracity of the representations made by [Nu Dot] and its potential changes of control, leadership, and/or ownership.”<sup>14</sup> However, there is no established policy or procedure requiring ICANN to undertake an investigation in the manner that the Requesters would prefer. Nevertheless, ICANN did diligently investigate the Requesters’ claims and found nothing to support them.

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<sup>13</sup> Request, § 9, Pg. 12 (quoting ICANN’s New gTLD Program Auctions page, *available at* <https://newgtlds.icann.org/en/applicants/auctions>).

<sup>14</sup> Request, § 10, Pg. 16.

The Requesters cite the “Top-Level Domain Application –Terms and Conditions” (Guidebook Terms and Conditions) in which gTLD applicants authorize ICANN to:

8. ... [C]onduct thorough background screening[s] ... [including] identifying information may be required to resolve questions of identity of individuals within the applicant organization investigations[; and]

10. (a) Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, *in ICANN’s sole judgment*, may be pertinent to the application; (b) Consult with persons of ICANN’s choosing regarding the information in the application or otherwise coming into ICANN’s possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.<sup>15</sup>

These provisions of the Guidebook Terms and Conditions do not support the Requesters’ argument. In the course of evaluating Nu Dot’s application, ICANN performed the above referenced background screening in accordance with the Applicant Guidebook and standard procedures, and the results were released with the Initial Evaluation Report on 7 June 2013.<sup>16</sup> Thus, there is no dispute that ICANN performed all necessary checks of the application.

Rather, just one month before the scheduled Auction, the Requesters seemingly are suggesting that ICANN should have conducted another in-depth investigation and background check of Nu Dot because, according to the Requesters, certain unknown changes *may* have occurred with respect to Nu Dot’s organization which *might* require changes to Nu Dot’s application. Specifically, the Requesters claim that ICANN was obligated to investigate Nu Dot because the Applicant Guidebook grants ICANN “broad authority to investigate all applicants who apply to participate in the New gTLD Auction Program.”<sup>17</sup> But the Requesters’ proposed level of investigation is not what is required at this stage of the process. While the Requesters

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<sup>15</sup> Guidebook, §§ 6.8, 6.10 (emphasis supplied).

<sup>16</sup> Nu Dot New gTLD Program Initial Evaluation Report, *available at* ICANN’s New gTLD Program Auctions page, available at <https://newgtlds.icann.org/en/applicants/auctions>.

<sup>17</sup> Request, § 10, Pg. 14.



are correct that the Applicant Guidebook gives ICANN the authority to conduct investigations, the Applicant Guidebook does not require ICANN to investigate the Requesters' claims regarding Nu Dot in the manner that the Requesters suggest. Furthermore, the Guidebook Terms and Conditions cited by the Requesters confirm that it is within "ICANN's sole judgment" to determine whether additional information may be pertinent to an application and, consequently, to determine whether any investigation is warranted.<sup>18</sup> Accordingly, the Requesters fail to identify any policy or procedure that would require ICANN to investigate their claims.

Nevertheless, in response to the Requesters' allegations, ICANN *did* diligently investigate the claims regarding potential changes to Nu Dot's leadership and/or ownership. Indeed, on several occasions, ICANN staff communicated with the primary contact for Nu Dot both through emails and a phone conversation to determine whether there had been any changes to the Nu Dot organization that would require an application change request. On each occasion, Nu Dot confirmed that no such changes had occurred, and ICANN is entitled to rely upon those representations. For example, on 27 June 2016, ICANN sent Nu Dot's authorized primary contact a message to determine whether there had been any "changes to your application or the [Nu Dot] organization that need to be reported to ICANN ... [including] changes to officers and directors, [or] application contacts." Jose Ignacio Rasco, CFO of Nu Dot, replied that same day to "confirm that there have been no changes to the [Nu Dot] organization that would need to be reported to ICANN." Shortly thereafter, both ICANN staff and the Ombudsman reached out to Mr. Rasco to again inquire about the claims of potential changes requiring notification to ICANN. Specifically, ICANN staff conducted a telephone conversation with Mr. Rasco on 8 July 2016 regarding the allegations. During that call, and later in a confirming email on 11 July 2016, Mr. Rasco stated that "[n]either the ownership nor the control of Nu Dotco, LLC has

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<sup>18</sup> Guidebook, §§ 6.8, 6.10.

changed since we filed our application. The Managers designated pursuant to the company’s LLC operating agreement (the LLC equivalent of a corporate Board) have not changed. And there have been no changes to the membership of the LLC either.” Mr. Rasco also confirmed that he had provided this same information to the ICANN Ombudsman in responding to the Ombudsman’s investigation of the complaint lodged with him. After completing its investigation of the Requesters’ allegations regarding Nu Dot’s organization, ICANN informed the Requesters that “we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.”<sup>19</sup>

**C. ICANN Staff Complied with Established Policy when Determining that No Changes Were Necessary to Nu Dot’s Application.**

The Requesters also suggest that ICANN violated its established policy of non-discriminatory treatment by allowing Nu Dot’s application to proceed without a change request.<sup>20</sup> Specifically, the Requesters claim that ICANN engaged in “disparate treatment in favor of Nu Dot” by allowing Nu Dot’s application to proceed despite “clear statements from [Nu Dot] that representations made in its application are, at best, misleading.”<sup>21</sup>

The Applicant Guidebook provides that, “[i]f at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN.”<sup>22</sup> First, Nu Dot never notified ICANN that there were any changes to the information provided in the application. Second, as discussed above, after investigating the Requesters’ allegations that there were changes in Nu Dot’s organization requiring changes to the application, ICANN concluded that there was no evidence to suggest

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<sup>19</sup> Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

<sup>20</sup> Bylaws, Article II, § 3 (“ICANN shall 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.”)

<sup>21</sup> Request, § 10, Pg. 20.

<sup>22</sup> Guidebook, § 1.2.7.

that Nu Dot’s application was no longer accurate. Thus, as ICANN explained to the Requesters, there was no need for Nu Dot to “initiate the application change request process.”<sup>23</sup>

Finally, the Requesters’ claims rest upon one email (provided in redacted form), purportedly received from Nu Dot, stating that: “Nicolai [Bezsonoff] is at NSR full-time and is no longer involved with our TLD applications. [Jose Ignacio Rasco II is] still running our program and Juan [Diego Calle] sits on the board with me and several others.”<sup>24</sup> This email does not indicate that these persons have left the organization or that the organization has “resold, assigned or transferred its rights in the application.”<sup>25</sup> Moreover, after investigating the Requesters’ allegations, ICANN found no evidence to suggest that Nu Dot experienced a change of leadership and/or control, and in fact received explicit confirmation from the primary contact for Nu Dot, Jose Ignacio Rasco, that no such changes had occurred, which ICANN is entitled to rely upon. Thus, there appears to be no need for an application change request, and ICANN acted in accordance with established policy and procedure in reaching this conclusion.

## **V. Determination.**

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore denies Request 16-9. If the Requesters believe that they have somehow been treated unfairly here, they are free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board consideration is required. As discussed above, Request 16-9 seeks reconsideration of a staff

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<sup>23</sup> Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

<sup>24</sup> Request, § 8, Pg. 9.

<sup>25</sup> *Id* at 10.

action or inaction. As such, after consideration of Request 16-9, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing, because the BGC agreed to consider the matter on an urgent basis, Section 2.19 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within seven days, or as soon thereafter as feasible.<sup>26</sup> The Requesters submitted this Request on 17 July 2016. By issuing its Determination on 21 July 2016, the BGC has acted within the established time limit for urgent reconsideration requests.

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<sup>26</sup> Bylaws Article IV, Section 2.19.