IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ALTANOVO DOMAINS LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. _____

EXPERT REPORT OF PETER CRAMTON
ON VERISIGN AND NDC'S CONDUCT REGARDING THE ICANN AUCTION FOR .WEB

---

24 May 2023

TABLE OF CONTENTS

Page

Expert Report of Peter Cramton
On Verisign and NDC's Conduct regarding the ICANN Auction for .WEB

I. INTRODUCTION

1. At the request of Altanovo Domains Limited f/k/a Afilias Domains No. 3 Limited (**Afilias**), I have prepared this expert report to assist the IRP Panel in assessing the conduct of NuDot Co, LLC (**NDC**) and VeriSign, Inc. (**Verisign**) in relation to the ICANN auction of last resort for the .WEB top-level domain (**.WEB**). The vast majority of opinions I present in this report were previously presented in an expert report I provided to counsel for Afilias which was submitted to the ICANN Board Accountability Mechanisms Committee (**BAMC**). I have updated my opinions to reflect Board Resolutions 2023.04.30.12—2023.04.30.14 and their Rationale (the **Resolutions**).[1]

2. Dechert LLP and Constantine | Cannon LLP, as counsel for Afilias, requested me (i) to describe ICANN's policy objectives and on that basis the resulting design of the ICANN auction of last resort, and (ii) to provide my independent opinion on NDC and Verisign's conduct based on certain facts that I have been asked to assume.[2]

3. Although this expert opinion was requested by Afilias' counsel and counsel has provided me with materials, the opinions expressed are my own. I am being remunerated for my work on this report, however, this has not affected the independence of my analysis or conclusions.

II. SUMMARY OF QUALIFICATIONS TO PROVIDE THIS OPINION

4. I am a professor of economics at the University of Maryland (Emeritus since 2018). For thirty years, I have researched auctions and market design, focusing on the design of complex markets to best achieve goals. Applications include electricity markets, financial markets, and auctions for radio spectrum and many other assets. I have introduced

[1] On the instructions of counsel, I have not included in this report the opinion I previously gave on the auction "blackout period." I note, however, that there is nothing I have read in NDC and Verisign's written submissions to the BAMC; or the Declaration of Dr. Bradley Miller dated 29 August 2022, which was submitted in support of NDC and Verisign's submissions to the BAMC; or the Resolutions to cause me to change my earlier opinion on whether Afilias can be considered to have violated the blackout period.

[2] To prepare this expert report, I reviewed several documents from the Independent Review Process initiated in 2018 by Afilias (the **First IRP**), including the Final Decision of the Panel dated 20 May 2021 (the **First IRP Decision**) **(Exhibit C-1)**, excerpts of the testimony of Jose Rasco and Paul Livesay at the hearing held in August 2020, and the Domain Acquisition Agreement between NDC and Verisign dated 25 August 2015 (the **DAA**) **(Exhibit C-2)**, as well as documents in the public domain, specifically the following: the Auction Rules for New gTLDs: Indirect Contentions Edition, Version 2015-02-24 (the **Auction Rules**) **(Exhibit C-3)**, the New gTLD Auctions Bidder Agreement, Version 2014-04-03 (the **Bidder Agreement**) **(Exhibit C-4)**, and the gTLD Applicant Guidebook, Version 2012-06-04 (the **AGB**) **(Exhibit C-5)**. For ease of reference, I refer to the AGB, the Auction Rules and the Bidder Agreement, collectively, as the **New gTLD Program Rules** or the **Rules**.

innovative market designs in many industries. I have advised many governments on market design and dozens of bidders in major auctions. I am an advisor and chief economist to several companies. Since 1993, I have advised regulators and system operators on electricity market design in North America, South America, and Europe. I received my B.S. in Engineering from Cornell University and my Ph.D. in Business from Stanford University. My full professional biography, as of the date of this report, is provided as **Exhibit PC-1**.

5. My work on the design and implementation of public sector auctions is especially relevant to this matter. Many of the auction innovations that my colleagues and I worked on, for example spectrum auctions, served as a model for the auction design eventually selected by ICANN. These auctions were designed to be efficient, transparent, simple, and fair. My work involved developing the auction design, establishing the auction rules, and often implementing the auction. Like ICANN, relevant government regulators put a high premium on a transparent, fair, and effective process. For example, the Federal Communications Commission's primary goal was to put the radio spectrum in the hands of companies best able to create value for consumers.[3]

6. My involvement with ICANN's New gTLD Program and the contention set resolution procedures dates back to July 2012 when my colleagues and I created a set of rules for private auctions that could be used by contention set members to resolve gTLD contention privately.[4] My work on designing the private auction contention set resolution mechanism necessarily involved familiarizing myself with the objectives and details of ICANN's last resort auction (the **ICANN Auction**). ICANN selected the simultaneous ascending clock auction for the ICANN Auction, which I have studied and written about extensively. I have also used this type of auction in different settings.

III. THE ICANN AUCTION'S POLICY FRAMEWORK AND OBJECTIVES

7. ICANN's decision to use a well-designed auction for resolving gTLD contention sets was a sensible one. ICANN took advantage of recent innovations in state-of-the-art public-sector auctions, which emphasized the objectives of simplicity, transparency, efficiency, and fairness:

    - Simplicity: the auction is simple and easy to understand based on clear, comprehensive and easy-to-understand rules. The rules are unambiguous and faithfully followed.

[3] Peter Cramton, Evan Kwerel, Gregory Rosston, and Andrzej Skrzypacz "Using Spectrum Auctions to Enhance Competition in Wireless Services," *Journal of Law and Economics*, 54:4, S167-S188, 2011, **(Exhibit PC-2)**.

[4] I first developed the idea of using an efficient private auction (the **Private Auction**) to divide jointly held assets such as a partnership. Peter Cramton, Robert Gibbons, and Paul Klemperer, "Dissolving a Partnership Efficiently," *Econometrica*, 55, 615–632, 1987, **(Exhibit PC-3)**. Since then, I have used private auctions in other contexts.

- Transparency: all competing applicants are known to ICANN, the Internet Community and each other.

- Efficiency: the auction maximizes total value by assigning the gTLD under contention to the qualified applicant who values it the most.

- Fairness: no applicant is favored in any way.

8. Governments, public sector agencies, and entities that oversee provisioning of public-interest goods and services have used auctions for centuries to fairly and transparently allocate assets to those seeking to become their stewards. ICANN has a public trust responsibility—it operates for the benefit of the Internet Community as a whole. The same objectives that guide the design of public sector auctions apply to ICANN in the context of "performing and overseeing functions related to the coordination of the [DNS], including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system[.]"[5]

9. ICANN's objectives are also expressed in the New gTLD Program Rules. Among other things, and as discussed more fully below, the Rules reflect ICANN's core value of transparency, ICANN's preference that applicants resolve contention for a gTLD string privately, that the ICANN Auction was intended only to be a tie-breaking mechanism among directly competing applicants, that ICANN desired its "auction of last resort" to be final and binding on all competing applications, and that ICANN was not seeking to maximize revenue from the allocation of new gTLDs.

A. Simplicity

10. ICANN adopted a well-established auction procedure as a mechanism to resolve any competing applications that were not privately resolved: the simultaneous ascending clock auction. This is an auction design that has been used in many contexts, including radio spectrum, electricity, and minerals.

11. The rules and procedures for the ICANN Auction are simple and clear, and were set out in a comprehensive set of Auction Rules and the associated Bidder Agreement. Both are clear as to who can participate, what the rules of participation are, how bids are submitted and how the auction will be run, including how the bids determine the winner and the winner's payment. ICANN held several educational sessions and published several documents to ensure that Bidders understood the purpose of the restrictions regarding, and the process involving, participation in the ICANN Auction. This type of comprehensiveness and clarity was critical to ensure the legitimacy of the outcome of the Auction.

[5] Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1998), **(Exhibit C-6)**, Section III(B)(iii).

12. The rules and procedures were comprehensive, well-crafted, and well-communicated, something the Board should appreciate in assessing the conduct of NDC and Verisign.

B. Transparency

13. ICANN placed significant emphasis on the principle of transparency in the development and administration of the New gTLD Program, including the design and implementation of the ICANN Auction. This is completely understandable, as transparency is a core ICANN value, is reflected in its governance documents and my understanding is that ICANN strives to ensure enhanced transparency.

14. The New gTLD Program was based fundamentally on the premise of advancing competition and innovation in the DNS. In this regard, the New gTLD Program Rules reflect the possibility that several applicants might apply and be qualified to compete for a particular gTLD. The arena for this competition is the **Contention Set**, and the method for resolution either a private arrangement between Contention Set members or through the ICANN Auction of "last resort."[6]

15. The importance—by which I mean the composition and integrity—of the Contention Set in the ICANN gTLD delegation process is reflected in the following Rules:

- Rule 12 of the Auction Rules provides: "Participation in an Auction is limited to Bidders."[7]

- The Auction Rules and Bidder Agreement further provide that the universe of Bidders is limited to "Qualified Applicants."[8] A Qualified Applicant is defined as an applicant who is a member of a Contention Set for a gTLD, which is an entity that had submitted an application for a gTLD, passed ICANN's evaluation, passed through public comment, had no objections pending with respect to its application, and was therefore pre-approved to enter into a registry agreement.[9] Qualified Applicants could also use a Designated Bidder, but only upon proper disclosure, vetting and approval.[10] These restrictions—

[6] The AGB defines contention sets as "groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings." AGB, **(Exhibit C-5)**, Module 4, Section 4.1.1.

[7] Auction Rules, **(Exhibit C-3)**, Rule 12.

[8] Auction Rules, **(Exhibit C-3)**, Rule 12; Bidder Agreement, **(Exhibit C-4)**, Section 1.1.

[9] Auction Rules, **(Exhibit C-3)**, page 19 (defining "Qualified Applicant" as "[a]n entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction").

[10] The Auction Rules also provide that a Qualified Applicant can designate a third party to bid on its behalf, i.e., a Designated Bidder. The Designated Bidder rule is irrelevant for present purposes. NDC could not have acted as

namely, that only Qualified Applicants or their Designated Bidders could participate in the resolution-by-auction mechanism—are completely aligned with the objectives of a straightforward and predictable resource allocation that is intended to ensure finality, as well as transparency.

- As in many other public sector auctions, applicants were required to promptly notify ICANN if any information previously submitted by the applicant became untrue or inaccurate, including but not limited to "changes in ownership or control of the applicant."[11]

- Also reflecting the emphasis that ICANN placed on the identity of an applicant for a particular gTLD, I note that, per the AGB, an "Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application."[12]

- Applicants were required to agree "to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading."[13] From a process design perspective, this language yet again reflects ICANN's emphasis on the identity of the applicant of a particular gTLD and the centrality of transparency in the new gTLD application process.

16. Transparency of Contention Set members was imperative to the successful implementation of this model. To reiterate, only those applicants for a gTLD that were included in a Contention Set were eligible to participate in a Private Auction or ICANN Auction.[14] Importantly, ICANN made public the names of all applicants for a particular gTLD by posting parts of completed applications on its website for public comment and objection for a period of 60 days.[15] By providing for transparency as to the identity of bidders in advance of an auction, any concerns regarding those bidders could be voiced and addressed *ex ante*.[16]

Verisign's Designated Bidder since Verisign was not a member of the .WEB Contention Set and thus was not a Qualified Applicant. And Verisign was not identified or approved as NDC's Designated Bidder.

[11] AGB, **(Exhibit C-5)**, Module 1, Section 1.2.7

[12] AGB, **(Exhibit C-5)**, Module 6, paragraph 10.

[13] AGB, **(Exhibit C-5)**, Module 6, paragraph 1.

[14] The AGB provides that the ICANN Auction "is a tie-breaker method for resolving string contention among the applications within a contention set." AGB, **(Exhibit C-5)**, Module 4, Section 4.3.

[15] AGB, **(Exhibit C-5)**, Module 1, Section 1.1.2.3.

[16] The approach is also illustrated in Federal Communications Commission (**FCC**) spectrum auctions, which was the primary model for the ICANN Auction. The FCC discloses the applicant's identity and its short form application in advance of the auction so that there is time for other auction participants and the FCC to challenge or require changes to an application. In that regard, I note that the FCC has developed processes that are designed to prevent

17. ICANN also made public portions of the applications for a gTLD[17] and the identities of those entities that were eventually included in a Contention Set.[18] In this way, the Internet Community knew which entities were pre-qualified to compete for a particular gTLD and all of the Contention Set members knew who they were competing against and could thus not only work towards private resolution of the contention, which ICANN strongly preferred, but could also develop their bidding strategies and financing arrangements knowing who was the competition.

18. Transparency in the process was critical not only for the sake of advancing an ICANN core value, but it also advanced the other goals of the application process: efficiency and fairness.

C. Efficiency

19. The objective of efficiency in the context of auction design has two aspects: process efficiency and outcome efficiency. The design of the ICANN Auction reflects both aspects.

20. From a process efficiency standpoint, the New gTLD Program Rules clearly reflect ICANN's strong preference for applicants to resolve Contention Sets by themselves. The AGB provides: "Applicants are encouraged to resolve string contention cases among themselves prior to the string contention resolution stage"[19] and that "[i]t is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants … ICANN expects that most contention cases will be resolved through other means before reaching the auction stage."[20] Elsewhere, ICANN stated: "Applicants in contention are encouraged to reach a settlement or agreement that results in resolution of the contention. This may occur at any stage of the process, once ICANN has posted the applications received"[21] and that "[c]ontending applicants should be given the opportunity to settle contention among themselves – this will result in innovative and economic solutions."[22] It was expected that the ICANN Auction would be a rarely invoked mechanism to "break the tie" as a last resort only.

21. ICANN did not stipulate how the applicants were to resolve Contention Sets, intentionally leaving that open to applicants; however, ICANN did note that certain methods of

---

dominant communications companies, like AT&T or Verizon, from hiding behind other entities to secure rights in secret.

[17] AGB, **(Exhibit C-5)**, Module 1, Section 1.1.2.2.

[18] AGB, **(Exhibit C-5)**, Module 1, Section 1.1.4.

[19] AGB, **(Exhibit C-5)**, Module 1, Section 1.1.2.10.

[20] AGB, **(Exhibit C-5)**, Module 4, Section 4.3.

[21] ICANN, New gTLD Program Explanatory Memorandum: Resolving String Contention (18 Feb. 2009), **(Exhibit C-7)**.

[22] ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), **(Exhibit C-8)**.

resolution (such as forming a joint venture) would require the new entity to re-apply (again reflecting ICANN's emphasis on transparency) for the gTLD and were therefore disfavored.[23] Accordingly, the most popular method for resolving Contention Sets proved to be a formal process such as a Private Auction.[24]

22. From an outcome efficiency standpoint, the design of the ICANN Auction also demonstrates that ICANN's objective was not to maximize the price paid by the winning applicant or otherwise maximize the revenue received by ICANN via the resolution-by-auction process. In fact, ICANN publicly disclaimed any such goal, stating that "revenue maximization is not one of ICANN's goals with the new gTLD process."[25]

23. Had revenue maximization been one of ICANN's primary goals, it could have organized the ICANN Auctions differently. Instead, ICANN prohibited certain bidding behaviors which would have resulted in ICANN receiving greater revenues. For example, the Rules restrict the Contention Set to applicants who had passed evaluation. This necessarily limited the pool of interested registry operators to those applicants who had demonstrated an interest in the gTLD, paid an application fee, completed an application, subjected themselves to evaluation, community objections and other vetting processes. Similarly, ICANN did not allow any entity, other than members of the Contention Set, to participate in an ICANN Auction.[26] Expressly restricting the ICANN Auction to those "Qualified Applicants" who were members of the Contention Set was consistent with ICANN's objective of selecting the applicant who would operate the registry to the best benefit of society and not maximizing revenue to ICANN. Obviously, ICANN could have received more revenue from an ICANN Auction opened up to the public generally (as increased competition could have led to a higher winning price).

24. In my view, ICANN's first priority was to identify which applicant would best operate the applied-for registry for the greatest benefit of society. The New gTLD Program, including the ICANN Auction, was designed to efficiently achieve this goal. The process included a high application fee of $185,000, ensuring only applicants who had a strong incentive to operate the registry would apply. The qualification process also included an opportunity to reject applicants whose operation of the registry would be inconsistent with the public interest.

25. Further, the design of the ICANN Auction reflects efficiency in that it is designed to result in the final and binding disposition of the Contention Set. One of the guiding principles behind virtually every auction is that it is final and binding on the participants, namely the organization (here ICANN) holding the auction and the bidders (here the members of the

[23] AGB, **(Exhibit C-5)**, Module 4, Section 4.1.3.

[24] Peter Cramton, Pacharasut Sujarittanonta, and Robert Wilson, "Applicant Auctions for Internet Top-Level Domains: Resolving Conflicts Efficiently," 27 January 2013, **(Exhibit PC-4)**, page 2.

[25] ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008), **(Exhibit C-9)**, page 3.

[26] See paragraph 9 above.

.WEB Contention Set).[27] Auction designs that do not provide for finality lead to bad outcomes and failed auctions. The need to redo an auction presents logistical problems, is wasteful from a cost perspective, and undermines faith in the process. Accordingly, one of the first principles of auction design is that the process must ensure finality, including by providing for a clear mechanism to correct irregularities in the auction process (*e.g.*, a default by the winning bidder).

26. Bidding incentives are undermined if bidders anticipate that bids may be nonbinding. Inefficient gamesmanship may occur. For example, a bidder may raise its bid beyond its willingness to pay, knowing that it can back out later if desired.[28]

27. The New gTLD Program Rules demonstrate that ICANN clearly intended the result of any ICANN Auction would be final. This is supported by the following rules:

- Ensuring that the bidders were limited to applicants who had already been approved to acquire the gTLD being auctioned.[29]

- Ensuring that all participants would be bound by the process: "By this Agreement, the Bidder agrees to be bound by the Auction Rules as published on ICANN's website."[30]

- Ensuring that all bids submitted could not be amended or withdrawn: "The valid Bids residing on the Auction Site at the Ending Time of the Round are binding on the respective Bidders and may not be amended or removed except pursuant to clause 39."[31]

- Ensuring the binding nature of all bids submitted: "At the end of each auction round, bids become the bidders' legally-binding offers to secure the relevant gTLD strings at prices up to the respective bid amounts, subject to closure of the auction in accordance with the auction rules."[32]

[27] Peter Cramton, "Spectrum Auctions," *in* Martin Cave, Sumit Majumdar, and Ingo Vogelsang, eds., *Handbook of Telecommunications Economics*, 605-639, Amsterdam: Elsevier Science B.V., 2002, **(Exhibit PC-5)**, page 31.

[28] Peter Cramton, "The FCC Spectrum Auctions: An Early Assessment," *Journal of Economics and Management Strategy*, 6:3, 431-495, 1997, **(Exhibit PC-6)**, Section 5.7.

[29] Auction Rules, **(Exhibit C-3)**, Rule 12.

[30] Bidder Agreement, **(Exhibit C-4)**, Section 1.4.

[31] Auction Rules, **(Exhibit C-3)**, Rule 36.

[32] AGB, **(Exhibit C-5)**, Module 4, Section 4.3.1.6.

- Ensuring that the winning bidder was obligated to pay: "The last remaining application is deemed the successful application, and the associated bidder is obligated to pay the clearing price."[33]

- Ensuring that the outcome of the auction would be the obligation to enter into a registry agreement with ICANN: "Any applicant that participates in an auction will be required to sign a bidder agreement that acknowledges its rights and responsibilities in the auction, including that its bids are legally binding commitments to pay the amount bid if it wins (i.e., if its application is approved), and to enter into the prescribed registry agreement with ICANN - together with a specified penalty for defaulting on payment of its winning bid or failing to enter into the required registry agreement."[34]

- Providing for the disqualification of a winning bidder.[35]

- Providing for a method for resolving the auction in the event of a default by the winning bidder.[36]

- Providing for a method of resolving the auction in the event of the disqualification of the winning bidder.[37]

28. In short, the ICANN Auction was designed—with the evaluation of bidders' eligibility being completed *before* the auction—so that the winner of the auction could immediately be declared the successful applicant.[38] If the winner of the auction was unable to pay the winning price or otherwise disqualified, the outcome of the auction is still final and binding on all the participants.

D. Fairness

29. Finally, the ICANN Auction was designed to achieve fairness, reflecting ICANN's Core Value that documented policies should be applied "consistently, neutrally, objectively and fairly," as well as best practice in the context of public sector auction design; in particular, the importance of this principle in spectrum auctions.

30. The objective of fairness is reflected in the requirement that only Qualified Applicants that were still part of the Contention Set for a particular gTLD by the applicable deadline

[33] AGB, **(Exhibit C-5)**, Module 4, Section 4.3.1.8.

[34] AGB, **(Exhibit C-5)**, Module 4, Section 4.3.2.

[35] AGB, **(Exhibit C-5)**, Module 4, Section 4.3.3.

[36] Auction Rules, **(Exhibit C-3)**, Rule 59.

[37] Auction Rules, **(Exhibit C-3)**, Rule 62.

[38] Auction Rules, **(Exhibit C-3)**, Rules 51-54; AGB, **(Exhibit C-5)**, Module 4, Section 4.3.8.

for the ICANN Auction could participate in the auction. To participate in an ICANN Auction, an applicant must have passed evaluation, had no pending objections, no pending GAC advice, and no pending change requests. All of those who were eligible to participate were thus on an equal footing insofar as ICANN screening was concerned. This ensured, if the Rules were followed, that the winner would be qualified to enter into a registry agreement post-auction.

31. The objective of fairness was also advanced by the requirement that all Qualified Applicants would be known to each other, given the requirement of public disclosure of members of the same Contention Set, and of those who would be participating in the ICANN Auction. Furthermore, for those bidders who would be using a Designated Bidder in the ICANN Auction, the identities of the Designated Bidder also had to be disclosed. In this way, no Qualified Applicant had an unfair advantage.

32. The principle of fairness is also reflected in the fact that the ICANN Auction treats all bids equally under the rules. The AGB provides that any bids that fail to comply with all aspects of the Auction Rules must be declared to be invalid. The Rules therefore do not allow any discretion in determining bid invalidity and ensure that all bids are assessed under the same standard.

33. Finally, I note that fairness can only be achieved if the Rules are followed and applied within the spirit of how they were drafted. As noted above, a failure to enforce the Rules, delegitimizes the process and the outcome, leads to reduced incentives to participate in future auctions, ultimately leading to inefficient results. This is because applicants will perceive the auction process as unfair.

IV. ASSESSMENT OF NDC AND VERISIGN'S CONDUCT IN RELATION TO THE ICANN AUCTION

34. At the request of counsel, I have reviewed the DAA between Verisign and NDC. Also, at the request of counsel, I have reviewed the testimony of Jose Rasco of NDC and Paul Livesay of Verisign. I have been informed that Mr. Rasco and Mr. Livesay negotiated the DAA and were responsible for its performance.

35. In my view, any objective observer would conclude that NDC violated the New gTLD Program Rules in both letter and spirit. I do not provide any form of legal opinion in expressing this opinion but express my views from the perspective of someone who designs auctions and who has firsthand knowledge of the policy objectives that ICANN sought to achieve.

36. As an economist, it is my view that NDC effectively transferred performance rights to Verisign Redacted - Third Party Designated Confidential Information that NDC was granted by virtue of its application and the New gTLD Program Rules, as well as various obligations it owed to

ICANN and the New gTLD Program process (e.g., the obligation to make disclosures to ICANN about changes to NDC's application and of information pertaining to the application). NDC transferred these rights and obligations without seeking approval from ICANN. NDC's highest winning bid in the ICANN Auction was effectively not its own bid, but that of a party that was not approved to be a part of the .WEB Contention Set. As discussed above, the ICANN Auction process was fundamentally premised on the requirement that only those who were still in the Contention Set at the time of the auction, or their Designated Bidders, could participate in it. There was no allowance for "indirect"[39] or undisclosed participation in a Contention Set or in the ICANN Auction. And, as far as I have been informed, Verisign was not disclosed or qualified as a Designated Bidder for NDC, and NDC could not be a Designated Bidder for Verisign, as the latter was not a member of the .WEB Contention Set.

37. In my view, the DAA undermined ICANN's preference for applicants to resolve contention privately, without resorting to an ICANN Auction of last resort. For example, the DAA prohibits NDC Redacted - Third Party Designated Confidential Information .[40] The DAA also prohibits NDC Redacted - Third Party Designated Confidential Information .[41] I understand from the testimony of Mr. Rasco and Mr. Livesay that these provisions were in fact followed by NDC.

38. It is also my view that Verisign participated in the ICANN Auction for .WEB (the **.WEB Auction**) as an undisclosed bidder in violation of the Rules. My opinion is supported by several key provisions of the DAA:

- A bidder would want to control the terms by which it participated in an auction. Redacted - Third Party Designated Confidential Information [42] Moreover, Redacted - Third Party Designated Confidential Information .[43] This is consistent with Verisign being the true bidder in interest for .WEB.

- A bidder would also want to control the timing and amount of all bids made. But Verisign ensured that it had total control over the bidding process. Redacted - Third Party Designated Confidential Information [44] which included Redacted - Third Party Designated Confidential Information

[39] DAA, **(Exhibit C-2)**, Section 10(a).

[40] DAA, **(Exhibit C-2)**, Section 4(j) and Exhibit A, Section 1(i).

[41] DAA, **(Exhibit C-2)**, Section 8.

[42] The DAA provides that Redacted - Third Party Designated Confidential Information ." DAA, **(Exhibit C-2)**, Exhibit A, Section 1(a).

[43] DAA, **(Exhibit C-2)**, Exhibit A, Section 1(b).

[44] DAA, **(Exhibit C-2)**, Exhibit A, Section 1(c).

Redacted - Third Party Designated Confidential Information

"[45] This is also consistent with Verisign being the true bidder in interest for .WEB.

- A bidder would want to control all of the externalities that could affect the submission of bids. While NDC and Verisign could have communicated by email or phone during the .WEB Auction, Redacted - Third Party Designated Confidential Information

.[46] These controls are consistent with Verisign being the true bidder in interest.

39. I note that the two individuals responsible for performing the terms of the DAA testified that, at the .WEB Auction, Redacted - Third Party Designated Confidential Information

[47] and that he (Mr. Livesay) Redacted - Third Party Designated Confidential Information

Mr. Rasco confirmed in his testimony that he "Redacted - Third Party Designated Confidential Information

[49] This is consistent with my view that Verisign was an undisclosed bidder at the .WEB Auction.

40. The identity of the true bidder in interest can be ascertained by determining which party bore the economic risk of the bids that were submitted. The DAA is clear in this regard: Redacted - Third Party Designated Confidential Information

[50] Because Verisign bore the economic risk of these bids,

[45] DAA, **(Exhibit C-2)**, Exhibit A, Section 1(h).

[46] DAA, **(Exhibit C-2)**, Exhibit A, Section 1(f).

[47] *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Witness Statement of Paul Livesay in Support of ICANN's Rejoinder and Amici's Briefs (1 June 2020) (**Livesay Witness Statement**), **(Exhibit C-10)**, paragraph 37. Also *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing Tr. (Day 7) (11 Aug. 2020) (**Merits Hearing Transcript Day 7**), **(Exhibit C-11)**, pages 1234-1241.

[48] Livesay Witness Statement, **(Exhibit C-10)**, paragraph 37.

[49] *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Witness Statement of Jose Ignacio Rasco III (1 June 2020), **(Exhibit C-12)**, paragraph 98. Also *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Hearing Transcript (Day 5) (7 Aug. 2020) (**Merits Hearing Transcript Day 5**), **(Exhibit C-13)**, pages 828-833.

[50] Merits Hearing Transcript Day 5, **(Exhibit C-13)**, pages 829-833; Merits Hearing Transcript Day 7, **(Exhibit C-11)**, pages 1213, 1217 and 1234-1238.

Verisign, not NDC, was the true bidder in interest. This is again consistent with my view that Verisign was an undisclosed bidder at the .WEB Auction.

41. Finally, I observe that a winning bidder in interest retains an economic interest in the subject of the auction. But, as I understand the terms of the DAA, NDC does

Redacted - Third Party Designated Confidential Information

[51] This is again consistent with Verisign being the true bidder in interest and NDC being effectively a service provider to Verisign. There is no circumstance in which NDC would remain the registry for .WEB as a result of the DAA.

42. In my view, the DAA violates the purpose of the ICANN Auction—to be a tie-breaker *among Contention Set members*—by inserting a new and undisclosed bidder into the mix. Verisign fundamentally distorted the process by resolving the tie in favor of itself, despite not having applied for .WEB, not having passed evaluation, not being a member of the .WEB Contention Set, not being a Qualified Applicant and was therefore ineligible to be a Bidder at the .WEB Auction. NDC's agreement to cede control over its application to Verisign fundamentally distorts the ICANN's Auction process.

V. CONSEQUENCES OF NDC'S VIOLATION OF THE AUCTION RULES AND BIDDER AGREEMENT

43. I have also been asked by Afilias to address what should be the remedy for NDC and Verisign's conduct. In my opinion, the integrity of the New gTLD Program, and especially of the ICANN Auction, would be best served by ICANN disqualifying NDC's bids in the ICANN Auction, or applying any other solution that would result in NDC being denied the right to operate the .WEB gTLD. I believe this to be the appropriate remedy given the seriousness of NDC's violations of the New gTLD Program Rules.

44. If NDC is disqualified, the New gTLD Program Rules are clear regarding what should happen next. As noted above, consistent with the objective of finality, both the Auction Rules and the AGB state that, if the winning bidder is declared ineligible, the gTLD string

[51] DAA, **(Exhibit C-2)**, Exhibit A, Secti 9.

should be offered to the next highest bidder at the price of its exit bid.[52] In the .WEB Auction, this was Afilias.

Peter Cramton

24 May 2023

Date

[52] Auction Rules, **(Exhibit C-3)**, Rule 62; AGB, **(Exhibit C-5)**, Module 4, Section 4.3.3.

LIST OF EXHIBITS

Exhibit No.	Description
PC-1	Professional Biography of Peter Cramton
PC-2	Peter Cramton, Evan Kwerel, Gregory Rosston, and Andrzej Skrzypacz "Using Spectrum Auctions to Enhance Competition in Wireless Services," *Journal of Law and Economics*, 54:4, S167-S188, 2011
PC-3	Peter Cramton, Robert Gibbons, and Paul Klemperer, "Dissolving a Partnership Efficiently," *Econometrica*, 55, 615–632, 1987
PC-4	Peter Cramton, Pacharasut Sujarittanonta, and Robert Wilson, "Applicant Auctions for Internet Top-Level Domains: Resolving Conflicts Efficiently," 27 January 2013
PC-5	Peter Cramton, "Spectrum Auctions," in Martin Cave, Sumit Majumdar, and Ingo Vogelsang, eds., Handbook of Telecommunications Economics, 605-639, Amsterdam: Elsevier Science B.V., 2002
PC-6	Peter Cramton, "The FCC Spectrum Auctions: An Early Assessment," Journal of Economics and Management Strategy, 6:3, 431-495, 1997

LIST OF IRP EXHIBITS

Exhibit No.	Description
C-1	*Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Final Decision (20 May 2021, as corrected)
C-2	Domain Acquisition Agreement between VeriSign Inc. and Nu Dotco LLC (25 Aug. 2015)
C-3	Power Auctions LLC, Auction Rules for New gTLDs: Indirect Contentions Edition (24 Feb. 2015)
C-4	ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014)
C-5	ICANN, gTLD Applicant Guidebook (4 June 2012)
C-6	Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1998)
C-7	ICANN, New gTLD Program Explanatory Memorandum: Resolving String Contention (18 Feb. 2009)
C-8	ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011)
C-9	ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008)
C-10	*Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Witness Statement of Paul Livesay in Support of ICANN's Rejoinder and Amici's Briefs (1 June 2020)
C-11	*Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing Tr. (Day 7) (11 Aug. 2020)
C-12	*Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Witness Statement of Jose Ignacio Rasco III (1 June 2020)
C-13	*Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Hearing Transcript (Day 5) (7 Aug. 2020)