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August 30, 2007

VIA SIGNED EMAIL AND U.S. MAIL

Vinton Cerf
Chairman, Board of Directors
Internet Corp. for Assigned Names and Nos.
4676 Admiralty Way, Suite 330
Marina del Rey, California 90292-6601

Doug Brent
Chief Operating Officer
Internet Corp. for Assigned Names and Nos.
4676 Admiralty Way, Suite 330
Marina del Rey, California 90292-6601

Re: .III Top-Level Domain

Dear Dr. Cerf and Mr. Brent:

This letter is written on behalf of NextDNS, Inc. ("NextDNS"). NextDNS is one of three companies that together have submitted a joint application to ICANN for the creation and operation of the .III top-level domain. As explained on the opening page of the .III TLD proposal, NextDNS is to be the registry operator, under contract with ICANN, with support from the two other applicants, Sarnoff Corporation and AtomicTangerine, Inc.¹

Since it first filed its application with ICANN on October 2, 2000,² NextDNS has continued to follow ICANN's new gTLD process with interest. Although ICANN's Generic Names Supporting Organization ("GNSO") has a policy process on new gTLDs now underway, NextDNS believes that certain issues regarding the .III application rest properly with ICANN's management and its Board of Directors, rather than the GNSO.

Accordingly, we are addressing this letter to you but forwarding a courtesy copy to the GNSO public comment board so it also may become part of the record for the GNSO Council's current deliberations.³

As explained in more detail below, .III was one of many new gTLD applications submitted to ICANN in October, 2000.

¹ http://www.icann.org/tlds/i1/REGOP/REG_OP.HTM

² <http://www.icann.org/tlds/tld-applications-lodged-02oct00.htm>

³ <http://forum.icann.org/lists/gtldfinalreport-2007/>

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The current status of the .III application is the subject of ICANN Board Resolution 01.53, adopted on 7 May 2001, following the Board's decision not to include .III in ICANN's new TLD testbed.⁴ That resolution adopted the recommendation of the Board's Reconsideration Committee, specifically Recommendation 00-11, together with its reasoning ("RC 00-11 is adopted for the reasons stated in that recommendation").

Recommendation 00-11 provided, in pertinent part:

[I]t should be clear that no [new gTLD] applications were rejected; the object was not to pick winners or losers, but to select a limited number of appropriate proposals for a proof of concept. All of the proposals not selected *remain pending*, and *those submitting them will certainly have the opportunity to have them considered if and when additional TLD selections are made.*

(emphasis added).⁵

Given the fact that the GNSO policy process appears to be nearing completion, NextDNS believes that this is an appropriate time for ICANN to give effect to the language quoted above and consider the pending .III application for ICANN's planned expansion of the Internet's domain name system.

In this letter, NextDNS will provide some historical context for its request, explain what it believes Board Resolution 01.53 and Recommendation 00-11 require, and propose some reasonable steps forward.

Background. ICANN's decision to add seven new gTLDs in 2000 followed an extensive discussion of the subject within ICANN's Domain Name Supporting Organization ("DNSO"). The DNSO was a predecessor to the current GNSO and encompassed policy issues regarding both gTLDs and ccTLDs. On 19 April 2000, the DNSO recommended that ICANN introduce new TLDs in stages, with "a limited number of new top-level domains...introduced initially" followed by the "future introduction of additional top-level domains...only after careful evaluation of the initial introduction."⁶

At its Public Board Meeting in Yokohama, Japan on 16 July 2000, the ICANN Board accepted the DNSO's recommendation and tasked ICANN Staff with the responsibility of issuing a formal Request for Proposals for new top-level domains.⁷

⁴ <http://www.icann.org/minutes/minutes-07may01.htm>

⁵ <http://www.icann.org/committees/reconsideration/rc00-11.htm>

⁶ <http://www.dns0.org/dns0/notes/20000419.NCgtlds-statement.html>

⁷ <http://www.icann.org/tlds/new-tld-resolutions-16jul00.htm>

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The .III Proposal. On 1 October 2000, NextDNS, backed by Sarnoff Corporation and AtomicTangerine, Inc., submitted a proposal for the creation of a new .III top-level domain targeted to individual Internet users. Under the application, NextDNS was to act as the registry operator.

The .III application was among the most well reviewed applications by ICANN's independent evaluators. For example, the evaluation team considered the NextDNS proposal "a model for registry security," writing that "planned precautions against cyber attacks are as good as they possibly could be, and include mechanisms to ensure their continued improvement over time."⁸ Evaluating the business plan, the independent team wrote that .III included a "thorough assessment of the market by target segment," with "a strong assessment of the marketing mix including a plan by quarter." The business evaluators concluded: "Overall, this is a stronger application in this category from a business perspective."⁹

On the day of the Board's selection of the testbed TLDs, at the ICANN Public Meeting in Los Angeles on 15 November 2000, the Board spoke highly of the .III application, keeping .III on the Board's list of possible selections as the field of new TLDs was narrowed from over forty applications to less than twenty-five, from twenty to twelve, and again from twelve to ten. The .III application was still in the Board's "basket" of selections when the field had been narrowed to only eight. By the end of the day, however, the .III application had been removed from the testbed – the last application removed from ICANN's "basket" of TLD selections – primarily because of questions over the choice of the TLD string.¹⁰

NextDNS filed a timely request for reconsideration raising a number of issues for review.¹¹ The Board's Reconsideration Committee recommended against reconsidering the decision on .III,¹² but the *reasons* for that recommendation, and official statements made by ICANN both before and after the recommendation was adopted, support NextDNS's request here that its application be considered again.

⁸ <http://www.icann.org/tlds/report/i1.html>.

⁹ <http://www.icann.org/tlds/report/i1.html>.

¹⁰ Straw polls of the Board showed consensus support for the NextDNS application with a different set of letters than ".III," but concerns over whether post-selection negotiations between a bidder and ICANN presented procedural unfairness issues to other applicants derailed its selection. *See*, Partial Transcript of ICANN Board Meeting, 15 November 2000, attached to Sarnoff Reconsideration Request 00-11, at 33-34.
<http://www.icann.org/committees/reconsideration/sarnoff-exhibit-a.pdf>

¹¹ <http://www.icann.org/committees/reconsideration/sarnoff-request-15dec00.htm>

¹² The undersigned counsel also made a timely written request for Independent Review of the Board's decision to ICANN's General Counsel, but such review was never initiated because, at the time the request was made, ICANN had no Independent Review process in place.

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The .III Application is Still Pending. In the Reconsideration Committee's Recommendation on the NextDNS request, the Committee illuminated the Board's thought process behind its selection of only seven proposals (.INFO, .BIZ, .NAME, .PRO, .AERO, .COOP, and .MUSEUM).

The Committee wrote that the purpose of the selections was "to find a limited number of diverse proposals which, taken in the aggregate, could safely be introduced and would likely produce enough information to enable ICANN and the community to make educated decisions about the speed and type of future TLD introductions."¹³ Because ICANN's modest objective was only to find a diverse set of applications – not the "best" set of applications – the Committee wrote that the Board's decision needed only to be "rational," which it believed it was. As the Reconsideration Committee wrote:

We also believe that the conclusion reached was rational. This is not to say that this particular collection of proposals was the only possible rational collection, nor that it was the "best" in some purely objective way. But it does reflect an appropriate number of proposals, providing a diversity of business models, registration policies, geographic connections and focuses, as well as sufficient technical and financial capacity to serve, in the aggregate, as an effective proof of concept.

Recommendation of the Reconsideration Committee, Request 00-11, 16 March 2001.¹⁴

Similarly, in February, 2001, both ICANN's former President Mike Roberts and its current Chair Vint Cerf testified before Congress that ICANN's goal in its November, 2000 TLD selections had been only to find a sufficiently large sample set of applicants for a testbed, not a complete set of all qualified applicants:

This effort was not a contest to find the most qualified, or the most worthy, or the most attractive for any reason of the various applicants.

...Because this was a proof of concept, the emphasis was on diverse business models, technical capacity, and diversity of geography and focus – and not on some weighing of the relative merits, however measured, of the applicants.

¹³ <http://www.icann.org/committees/reconsideration/rc00-11.htm>

¹⁴ <http://www.icann.org/committees/reconsideration/rc00-11.htm>. The explanation that the Board's decision needed only to be "rational" even extended to explain away any factual errors or subjective failures of individual Board members. As the Reconsideration Committee wrote: "Even if, for the purposes of argument, there were factual errors made, or there was confusion about various elements of a proposal, or each member of the Board did not fully understand all the details of some of the proposals, this would still not provide a compelling basis for reconsideration of the Board's conclusion. Given...the limited objective of finding a small number of acceptable proposals for this initial proof of concept, it would not serve the interests of the community to essentially allow these decisions to be reargued on grounds over which, at best, reasonable people could differ." *Id.*

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See, Testimony of Michael M. Roberts Before U.S. Senate Committee on Commerce, Science, and Transportation,¹⁵ *and* Testimony of Vint Cerf Before U.S. House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet.¹⁶

For obvious reasons, applicants were disappointed to learn that ICANN had selected a *representative* set of applications rather than the *most qualified* applications, by some objective measure. The Board and Staff addressed these concerns by reminding the applicants, through the responses to their Reconsideration Requests, that the applications would be reviewed again at the conclusion of the testbed and TLDs proposed by qualified applicants added to the root zone.

This promise was made to NextDNS in the Reconsideration Committee's response to the NextDNS Request for Reconsideration:

[I]t should be clear that no [new gTLD] applications were rejected; the object was not to pick winners or losers, but to select a limited number of appropriate proposals for a proof of concept. All of the proposals not selected *remain pending*, and *those submitting them will certainly have the opportunity to have them considered if and when additional TLD selections are made*.

(emphasis added).¹⁷ The ICANN Board formally adopted this language in Board Resolution 01.53: "RC 00-11 is adopted for the reasons stated in that recommendation."¹⁸

In a series of Congressional oversight hearings, held to examine ICANN's new gTLD testbed selections, ICANN also promised members of Congress that qualified applications bypassed for the testbed would be reviewed again. As Dr. Cerf testified before the House Commerce Committee "one of the things that allowed us to I think achieve consensus [on the seven TLDs selected on 16 November 2000] was the belief that any of the qualifying TLD applications would, in fact, be considered later...."¹⁹

¹⁵ <http://www.icann.org/correspondence/roberts-testimony-14feb01.htm>

¹⁶ <http://www.icann.org/correspondence/cerf-testimony-08feb01.htm>

¹⁷ <http://www.icann.org/committees/reconsideration/rc00-11.htm>

¹⁸ <http://www.icann.org/minutes/minutes-07may01.htm>

¹⁹ The complete question and answer involved a colloquy between Dr. Cerf and Representative Markey.

Mr. Markey. Let me ask, Dr. Cerf, what criteria would you look at on appeal in order to expand the number----

Mr. Cerf. The reconsideration process, as Mr. Kerner points out, is a very general one. It is for any actions taken by the board, and principally it looks to see whether the process was followed. It is not intended to reconsider decisions made by the board on, you know, on the merits. In fact, *one of the things that allowed us to I think achieve consensus was the belief that any of the qualifying TLD applications would, in fact, be considered later* once we had----

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What all of these statements make clear is that in November, 2000, ICANN purposefully followed a decision-making process that it knew would leave qualified applicants – perhaps even the “most” qualified applicants – on the sidelines. ICANN was able to make a rough cut of the applications for the testbed only because it knew that qualified applications would remain “pending” and reviewed again after issues with the testbed had been resolved.

This history is important, and provided here in detail with citations, because it shows that a recent ICANN Staff note, published on the ICANN website, may be in error.

January, 2007 Correspondence on 2000 Round Selections. On 15 January 2007, M. Scott Hemphill, Vice-President and General Counsel of Afilias Limited, sent an email message to John Jeffries, General Counsel of ICANN, asking two hypothetical questions about the status of applications from 2000.²⁰ Mr. Hemphill’s email message did not provide any background on the issue for Mr. Jeffries or the other members of ICANN who were not employed by, or participating in, ICANN when the testbed selections were made. Not surprisingly, Mr. Hemphill’s cursory email generated a response from ICANN’s newly appointed Chief gTLD Registry Liaison erroneously stating that applicants from 2000 would need to reapply, submit new applications, and pay new applications fees in order to be considered in future rounds.²¹

If this statement were intended to apply to those pending applicants not selected in 2000 – as opposed to successful testbed registries like Afilias – it is mistaken, as it failed to take account of the history described above.²²

The Reconsideration Committee Recommendations, Board Resolutions, and sworn testimony of ICANN Board Members and Senior Staff before Congress all say the same thing: the 2000 applications were “not rejected,” they remain “pending,” and the applicants who submitted them will “have the opportunity to have them considered if and when additional TLD selections are made.”²³

²⁰ See, Letter from M.S. Hemphill to J. Jeffries, 15 January 2007, at <http://www.icann.org/correspondence/hemphill-to-jeffrey-15jan07.pdf>. Mr. Hemphill asked simply, without exposition: “1. What is the status of the proposals for new TLDs submitted during the RFP process conducted by ICANN in 2000?” and “2. Will any applicant from the 2000 round of proposals receive any special consideration from ICANN in future TLD application rounds as a result of their 2000 application?”

²¹ See, Letter from C. Schwartz to M.S. Hemphill, 24 January 2007, <http://www.icann.org/correspondence/schwartz-to-hemphill-24jan07.pdf>.

²² This Staff response was understandable given that all of ICANN’s senior staff has turned over since November, 2000. At the time of the new gTLD selections in November, 2000, only Daniel E. Halloran, then ICANN’s “Registrar Liaison,” and Diane R. Schroeder, then “Office Manager,” remain.

²³ In spite of the fact that the conclusion in ICANN’s letter to Afilias of 24 January 2007 is mistaken, one of the concerns raised (“It would be problematic again for ICANN to verify that the identities of the applicants match those who applied in the earlier round”) has merit and will be addressed in the recommendations below.

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What “Pending” Status Means. Since the time that the Reconsideration Committee and ICANN Board stated that the .III application was “pending,” NextDNS is not aware of any Board decision to reject the .III application. Because its Application remains “pending,” NextDNS cannot reconcile “pending” status with the statements in the 24 January 2007 Staff note suggesting that applicants like NextDNS will need to reapply.

In light of the possible conflict between the Reconsideration Committee Report, as adopted by the Board, and the ICANN Staff note of 24 January 2007, NextDNS asks the ICANN Board to clarify certain issues regarding the treatment of the NextDNS legacy TLD application. NextDNS specifically asks the Board to:

- Reaffirm the right of NextDNS to Board consideration of its pending .III application;
- Direct ICANN Staff to review the NextDNS legacy application (as it may be reasonably supplemented in light of lessons learned from the testbed) against the GNSO’s new TLD criteria *after* such criteria are finalized *but before* accepting any new TLD applications; and,
- In the Staff review of the pending .III application, direct ICANN Staff to reuse as much of the independent evaluation work from the 2000 selection round as possible to reduce the burden, if any, of the second review.

Finally, in the Staff Note of 24 January 2007, ICANN’s gTLD Registry Liaison writes that it would be “problematic” for ICANN “to verify that the identities of the applicants match those who applied in the earlier round.”²⁴ To address this problem squarely, NextDNS will agree to provide ICANN with its *bona fides*, establishing that it is who it says it is, and to defend and indemnify ICANN against any claim from a third-party asserting that it, not NextDNS, is the rightful party in interest to the pending .III application.

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²⁴ <http://www.icann.org/correspondence/schwartz-to-hemphill-24jan07.pdf>

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Although almost seven years have passed since it submitted its application, substantially more time than it ever expected, NextDNS continues to believe in the concept of the .III top-level domain and is eager to see it added to the Internet's root zone.

Please let me know if you have any additional questions about this request, or any aspect of the .III application, because I know that NextDNS and its supporters would welcome a dialogue with ICANN on these issues.

Very truly yours,

Bret A. Fausett

BAF/lh

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