

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01 -18 – 0004 -2702

In the matter of an Independent Review

AFILIAS DOMAINS NO. 3 LIMITED

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS
(ICANN)

Respondent

DECLARATION OF THE PROCEDURES OFFICER

28 February 2019

I. PARTIES AND APPLICANTS

A. PARTIES TO THE INDEPENDENT REVIEW PROCESS (“IRP”)

1. Afilias Domains No. 3 Ltd.

§1. Afilias, Inc., the parent company of Afilias Domains No. 3 Ltd., is a United States Corporation that operates as a registry in the Internet domain name system. It is the world’s second-largest Internet domain name registry. Afilias acts as the registry for the generic top-level domains (“gTLDs”) *.info*, *.mobi*, and *.pro*. It also is a service provider to the registry operators for the top-level domains *.org*, *.ngo*, *.lgbt*, *.asia*, and *.aero*. Afilias, Inc. is also the registry service provider to various country code top-level domains, including Antigua and Barbuda (*.ag*), Australia (*.au*), Belize (*.bz*), Bermuda (*.bm*), Gibraltar (*.gi*), India (*.in*), Montenegro (*.me*), the Seychelles (*.sc*), and St. Vincent and the Grenadines (*.vc*).

§2. Afilias Domains No. 3 Ltd. (hereinafter, “Afilias”) was one of the bidders that made up the contention set for the operation of the new gTLD *.web*. It initiated the Independent Review Process (“IRP”), asserting that ICANN violated its Bylaws in preparing to award the registry operating rights to Verisign, Inc. (hereinafter “Verisign”). Verisign had acquired the rights to operate as the registry for *.web* pursuant to a pre-award contract that it had entered into with the winning bidder, Nu DotCo LLC (hereinafter “NDC”).

2. Internet Corporation for Assigned Names and Numbers (“ICANN”)

§3. ICANN is a nonprofit public benefit corporation organized under the laws of the State of California incorporated on September 30, 1998. Jon Postel, a

computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network (“ARPANET”), which eventually morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations, when normal means of communication were unavailable or deemed insecure.

§4. Prior to ICANN’s creation, there existed seven gTLDs, each of which were intended for specific uses on the Internet:

- a. *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use;
- b. *.org*, intended for the use of non-commercial organizations;
- c. *.net*, intended for the use of network related entities;
- d. *.edu*, intended for United States higher education institutions;
- e. *.int*, established for international organizations;
- f. *.gov*, intended for domain name registrations for branches of the United States federal government or for state governmental entities, and;
- g. *.mil*, designed for the use of the United States military.

§5. ICANN’s “mission” as set out in its Bylaws, is “to ensure the stable and secure operation of the Internet’s unique identifier systems” Bylaws, Art. 1,

§1.1. ICANN's "commitments" are to "operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets." Bylaws, Art. 1, §1.2(c). ICANN has several "Core Values" which "must be balanced . . . [with] potentially competing Core Value[s and] the result of the balancing must serve a policy developed through the bottom-up multi[-]stakeholder process" *Id.*

§6. The original ICANN board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's Bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. 7.1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VIII of the Bylaws.

§7. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN board of Directors began to consider an invitation to the general public to operate new gTLDs. The application window for new gTLDs opened in 2012. ICANN received 1,930 applications, which has so far resulted in the introduction of 1,232 new gTLDs. Seven applicants sought the right to create and operate the registry for *.web*.

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B. APPLICANTS FOR *AMICUS CURIAE* STATUS

1. NDC

§8. NDC was formed on 19 March 2012 as a limited liability company pursuant to Delaware law; its purpose was to submit applications to ICANN to acquire the rights to operate certain gTLDs. In June 2012, NDC applied for various gTLDs, including an application to operate as the registry for *.web*. NDC's application to ICANN represented that only two entities held at least a 15% interest in the company at that time: Domain Marketing Holdings, LLC; and NUCO LP, LLC.

§9. NDC had entered into a pre-award Domain Acquisition Agreement with Verisign, Third Party Designated Confidential Information Redacted

Ultimately, NDC was the successful bidder in the auction process.

2. Verisign

§10. Verisign is a publicly traded United States-based corporation listed on the NASDAQ; it is one of the companies whose stock is a component of the S&P 500 Index. In 2017, Verisign had revenues of 1.17 billion US dollars. It serves as operator of two of the thirteen Internet root nameservers and is the registry operator of the *.com*, *.net*, and *.name* gTLDs, and of the back-end systems for the *.jobs*, *.gov*, and *.edu* gTLDs. Through its pre-award contract with NDC and the proposed

transfer of the operating rights by ICANN to NDC, Verisign would become the registry operator for the new gTLD *.web*.

3. The Verisign/NDC Domain Acquisition Agreement

§11. Third Party Designated Confidential Information Redacted

[Redacted]

§12. Third Party Designated Confidential Information Redacted

[Redacted]

§13. Third Party Designated Confidential Information Redacted

[Redacted] Upon execution

of the Registry Agreement by NDC and ICANN, NDC agreed to notify ICANN promptly of NDC's intent to seek ICANN's consent to, assign the Registry Agreement to Verisign. *Id.*

§14. Third Party Designated Confidential Information Redacted

II. PROCEDURAL HISTORY

§15. On 25 October 2018, ICANN adopted a new section 7 to the 2016 Interim IRP Supplementary Procedures. This new section allows the Procedures Officer to permit *amicus curiae* to participate in ICANN proceedings.

§16. On 26 November 2018, Afilias filed a Request for and Notice of the IRP and supporting documents.

§17. On 27 November 2018, Afilias filed a Request for Emergency Panelist and Interim Measure of Protection (“Afilias Interim Request”).

§18. On 28 November 2018, the International Centre for Dispute Resolution (“ICDR”) appointed Kenneth B. Reisenfeld to serve as Emergency Panelist.

§19. On 3 December 2018 the Emergency Panelist issued his Scheduling Order No. 1. Scheduling Order No. 1 summarized the results of a Scheduling Conference held on 30 November 2018.

§20. The Emergency Panelist recorded ICANN's agreement to keep the registration process of the *.web* gTLD “on hold” pending a decision by the Emergency Panelist on the Afilias Interim Request and to file a written undertaking confirming the stay on or before 3 December 2018.

§21. ICANN advised the Emergency Panelist that there was a distinct possibility that third parties would seek participation as *amicus curiae* in the proceeding. Afilias indicated that it would oppose any such participation as creating unnecessary delay in the proceedings.

§22. A procedural order detailing submission dates and schedule for a video conference hearing on the Afilias Interim Request was agreed. These dates and schedule were subsequently abrogated to allow applications for *amicus curiae* status to be heard by a Procedures Officer, as provided in the new in Section 7 of the Interim IRP Supplementary Procedures.

§23. On 11 December 2018, Verisign and NDC each filed a Request to Participate as Amicus Curiae in the Independent Review Process.

§24. On 17 December 2018, ICANN filed an Opposition to Appointment of Emergency Panelist and for Interim Measures of Protection.

§25. On 21 December 2018, the ICDR appointed M. Scott Donahey to serve as the Procedures Officer in this matter.

§26. On 4 January 2019, a conference call was held with the Procedures Officer, counsel for the parties, and counsel for the applicants for *amicus curiae* status. The conference call was recorded, and transcripts of the call were made available to the parties and applicants.

§27. On 5 January 2019, the Procedures Officer prepared and distributed to the parties, the applicants, and the ICDR a Summary of the 4 January 2019 Conference Call No. 1. That summary was placed in the public file of the IRP

Process Documents, which is available online. An online search did not reveal that the position of “Procedures Officer” had ever been used in International Arbitration or in any other comparable legal proceedings. This was the first time that anyone had acted as a Procedures Officer under the newly adopted Interim Supplemental Rule 7, and also the first time that anyone had applied for *amicus curiae* status under that new rule. Consequently, the Procedures Officer specifically requested that the parties brief the legislative history that gave rise to the portion of Section 7 dealing with the Procedures Officer and with *amicus curiae*. A copy of that request is attached to the Summary of the 4 January 2019 conference call as Appendix A and is publicly available online on the Independent Review Process documents for this matter (<https://www.icann.org/resources/pages/accountability/irp.en>).

§28. As reflected in the Summary of that conference call, the parties agreed that they would discuss an appropriate briefing schedule among themselves and notify the Procedures Officer of the agreed schedule.

§29. On 15 January 2019, having heard nothing from the parties, the Procedures Officer requested a status update.

§30. On that date, counsel for ICANN notified the Procedures Officer that he could expect to receive ICANN’s opening brief on 16 January 2019 and that the parties were close to agreement on the remain briefing schedule.

§31. On 16 January 2019, the Procedures Officer received ICANN’s Response to the Procedures Officer’s Questions Concerning Drafting History of the Supplemental Procedures, ICANN’s Submission Regarding the Requests by

Verisign and NDC to Participate as *Amicus Curiae*, and Declaration of Samantha Eisner.

§32. On 22 January 2019, still not having received a complete briefing schedule on this matter, the Procedures Officer again requested this from the parties.

§33. By email of the same date the Procedures Officer received the following schedule: 1) Afilias would submit its brief on 28 January 2019; 2) ICANN and the applicants would submit their reply briefs on 5 February 2019; and 3) Afilias would submit its sur-reply brief on 12 February 2019.

§34. On 28 January 2019, Afilias submitted Afilias's Response to Verisign and NDC's Request to Participate as *Amicus Curiae* and a letter responding to the Procedures Officer's questions regarding the legislative history.

§35. On 30 January 2019, the parties and the Procedures Officer agreed on 19 February 2019 as the date for a conference call on the issues presented to the Procedures Officer, to begin at 10:00 a.m. PST.

§36. On 5 February 2019, the Procedures Officer received the following papers: 1) ICANN's Reply to Afilias' Response to the Requests of Verisign and NDC to Participate as *Amicus Curiae*; 2) Nu Dotco, LLC's Reply in Support of its Request to Participate as *Amicus Curiae* in Independent Review Process; and, 3) Verisign, Inc.'s Reply in Support of Its Request to Participate as *Amicus Curiae* in Independent Review Process, and Declaration of David McAuley in Support of

Verisign, Inc.'s Request to Participate as *Amicus Curiae* in Independent Review Process.

§37. On 12 February 2019, the Procedures Officer received Afilias Domains No. 3 Limited's Sur-Reply to Verisign, Inc.'s and Nu Dotco LLC's Requests to Participate as *Amicus Curiae* in Independent Review Process.

§38. On 19 February 2019, a telephonic hearing was held in which the Procedures Officer, and counsel for the parties and the applicants for *amicus curiae* participated. The telephonic hearing lasted approximately three hours and counsel for both parties and both applicants for *amicus* status made arguments and responded to questions from the Procedures Officer. The hearing conference was recorded, and transcripts of the call were made available to the parties and applicants.

III. **PARTIES' AND APPLICANTS' SUBMISSIONS**

A. PARTIES' SUBMISSIONS

1. Afilias's Position

§39. ICANN's commitment to accountability is a fundamental safeguard for ensuring that its bottom-up stakeholder model, as established in its Bylaws, remains effective. Bylaws, Art. 4., Sec. 4.3(a)(iii).

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§40. Fundamental principles of good faith and equity, including the principles of unclean hands and abuse of process, require that Verisign should not be allowed to participate in any aspect of Afilias's dispute with ICANN.

§41. The IRP Independent Oversight Team (hereinafter, the "Oversight Committee") meetings were held with only a minimum number of participants present, and the majority of those present were ICANN attorneys or employees.

§42. ICANN failed to submit revised Rule 7 for public comment. ICANN Bylaw, Art. 4, Sec. 4.3(n)(ii). Policies that "substantially affect third parties" are required to be published for 21 days prior to adoption. Ex. 221.

§43. Article 7 as adopted violates general principles of international arbitration norms. In international arbitration, participation of *amicus curiae* is limited.

§44. The manner in which the procedures were adopted violated the written rationales that ICANN staff prepared for the ICANN Board in advance of its meeting on 25 October 2018, during which revised Rule 7 was adopted. Ex. 314.

§45. The Chair of the Oversight Committee was an employee of Verisign and used his position as Chair and member of the Committee to promote the participation of Verisign and NDC in the IRP process.

§46. Verisign has no interest relating to the property or transaction that is the subject of the IRP, since the Terms and Conditions applying to the application for operation of a new gTLD expressly prohibit the reselling, assigning or transferring of any of the rights or obligations in connection with the application to any third party. ICANN *gTLD Applicant Guidebook* (4 June 2012, at p. 6-6).

§47. The position of "Procedures Officer" was created to resolve questions of consolidation, joinder, and intervention, and the 11th hour changes engineered by the Chair of the Oversight Committee should be held by the Procedures Officer to be invalid.

§48. The Procedures Officer has the inherent equitable power to punish bad faith conduct.

2. ICANN's Position

§49. ICANN supports the requests of Verisign and NDC to participate as *amicus curiae* in this IRP proceeding.

§50. Rule 7 of the Supplementary Procedures is unambiguous, and by its express terms Verisign and NDC are entitled to participate in this IRP proceeding as *amicus curiae*.

§51. The briefings in the present case significantly refer to actions taken by NDC and Verisign and by the terms of new Rule 7 they are entitled to participate as *amicus*. Interim Supplementary Procedures, Rule 7(iii).

§52. NDC also was "part of the contention set for the string at issue in the IRP." Rule 7(ii).

§53. The Procedures Officer has no discretion to decline to give effect to the newly adopted Interim Supplementary Procedures.

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§54. The role of the Procedures Officer exists solely as a function of Rule 7, and the powers of the Procedures Officer are created defined and circumscribed by Rule 7.

§55. The Procedures Officer has no further powers and thus no authority to decide any matter not expressly reserved under Rule 7.

§56. The draft Updated Supplementary Procedures were published for public comment in November 2016, consistent with ICANN's designated practice for comment periods. The Interim Supplementary Procedures approved by the Board on 25 October 2018 are derived from that November 2016 draft.

B. APPLICANTS' SUBMISSIONS

1. NDC's Position

§57. The Interim Supplementary Procedures which were adopted unequivocally require that the Procedures Officer "**must** permit NDC to participate in the IRP as an *amicus curiae*."

§58. The Procedures Officer has no authority to invalidate or ignore a rule which has been approved by ICANN.

§59. Section 7 of the Interim Supplementary Procedures confers automatic *amicus curiae* standing on all members of the contention set in a proceeding under the IRP.

§60. "The role of a Procedures Officer is solely 'to adjudicate requests for consolidation, intervention and/or participating as an *amicus*' under Section 7.

[Citation omitted]. The IRP Panel in contrast consists of 'three neutral members appointed to decide the relevant DISPUTE,' i.e., whether an action or inaction by ICANN or its Board 'violated ICANN's Articles of Incorporation or Bylaws "' [Citation omitted].

§61. There is no requirement for additional public comment. "Even if the Procedures Officer concludes that the better practice would have been for ICANN to have solicited additional public comment, that is hardly a reason to deny **NDC** the ability to participate in this case."

§62. The clear intent of the Interim Supplementary Procedures is to insure fairness and due process.

2. Verisign's Position

§63. The fact that David McAuley, the Oversight Committee chair and Verisign's employee, had "knowledge of Afilias's CEP or IRP prior to the ICANN Board unanimously approving the Interim Supplementary Procedures is inapposite and should make no difference to the enforceability of the *amici* rule.

§64. The Interim Supplementary Rules at issue "were drafted by ICANN's counsel, Samantha Eisner, together with Sidley Austin and approved without objection by the entire 26 member Oversight Committee and ICANN's Board. The specific language about which Afilias now complains . . . was drafted by Ms. Eisner of ICANN, not [the Verisign employee serving as chair of the Oversight Committee]."

§65. Afilias fails to identify any rule that required ICANN to submit the Interim Supplementary Rules to another round of public comments prior to their submission to the Board.

§66. “Neither the Procedures Officer nor any other arbitration officer in this proceeding has authority to address the contention that the *amicus* rule should be invalidated based on Afilias’ unfounded allegations concerning Verisign’s and ICANN’s participation in the enactment of the Interim Supplementary Procedures.”

§67. Under the Interim Supplementary Procedures, the scope of participation by an *amicus* is for the IRP panel to decide, not the Procedures Officer. The only issue for the Procedures Officer to determine is whether the applicants qualify under Rule 7 to act as *amicus*.

IV. THE NEW IRP PROCESS: A BRIEF CHRONOLOGY

A. THE CROSS COMMUNITY WORKING GROUP ON ENHANCING ICANN ACCOUNTABILITY

§68. The Cross Community Working Group on Enhancing ICANN Accountability (hereinafter the “Accountability Working Group”) issued its Supplemental Final Proposal on Work Stream 1 Recommendations on 23 February 2016 (hereinafter “Final Proposal”).

§69. The Accountability Working Group stated that “[t]he purpose of the Independent Review Process (IRP) is to ensure that ICANN does not exceed the

scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.” Final Report, ¶174.

§70. One of the first significant changes it called for was that “[t]he IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities and/or the community who have been materially affected by ICANN’s action or inaction in violation of the Articles of Incorporation and/or Bylaws.” The panel was to be composed of a minimum of seven panelists from which decision panel of three members would be selected for a specific matter. The panel appointments were to be made for a fixed term of five years with no removal except for specific cause (corruption, misuse of position for personal gain, etc.). The panelists were to have significant legal expertise, particularly in international law, corporate governance, and judicial systems/dispute resolution, and arbitration. Final Report, ¶178.

§71. Detailed rules for the implementation of the IRP were to be created “by the ICANN community through an Accountability Working Group assisted by counsel, appropriate experts, and the Standing Panel when confirmed.” *Id.*

§72. In Annex 7, the Accountability Working Group discussed rule-making more specifically. “The [Accountability Working Group] anticipates that the Standing Panel would draft, issue for comment, and revise procedural rules. The Standing Panel should focus on streamlined, simplified processes with rules that conform with international arbitration norms and are easy to understand and follow.” Final Report, Annex 7, ¶ 52.

§73. “The [Accountability Working Group] proposes that the revised IRP provisions be adopted as Fundamental Bylaws. . . . Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a[n Accountability Working Group] (assisted by counsel, appropriate experts, and the Standing Panel when confirmed)” Final Report, Annex 7, ¶ 63.

B. THE NEW BYLAWS

§74. Some three months later, on 27 May 2016, the Board adopted new Bylaws. Article 4 was entitled, “Accountability and Review.” Section 4.3 dealt with “Independent Review Process for Covered Actions.” Among the purposes of the IRP, the Bylaws provided that the IRP was to “[e]nsure that ICANN is accountable to the global Internet community and Claimant, to “secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes,” and to “lead to binding, final resolutions consistent with international arbitration norms, that are enforceable in any court with proper jurisdiction.” Bylaws, Art. 4, Sec. 4.3 (a)(iii)(vii) (viii). The new Bylaws called for the creation of a Standing Panel according to the recommendations set out in the Final Report. Bylaws, Art. 4, Sec. 4.3(j), (k), (l), and (m). It called for the Oversight Committee (called the “IRP Implementation Oversight Team” in the Bylaws) in consultation with the Standing Panel, to “develop clear published rules for the IRP that conform with international arbitration norms” “The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP.” Bylaws, Art. 4, Sec. 4.3 (n)(i) and (ii).

C. THE STANDING PANEL

§75. The Standing Panel has yet to be established. Consequently, there has been no consultation between the Oversight Committee and a Standing Panel to develop rules that conform to International Arbitration norms; none took place with respect to Interim Rule 7.

V. CHRONOLOGY OF THE EVOLUTION OF THE SUPPLEMENTARY RULES

§76. In mid-1976 the Oversight Committee went to work on a set of Updated Supplementary Procedures. Under the then-chair, Becky Burr, the Oversight Committee prepared a new set of Updated Supplementary Procedures which were put out for Public Comment. Section 7 of these procedures consisted of three paragraphs:

7. Consolidation, Intervention and Joinder:

At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and

efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.

§77. On 28 November 2016, the Updated Supplementary Procedures were open for public comment for a three-month period beginning 28 November 2016 and closing on 1 February 2017. During that period, the public made 24 comments, some from individuals and many from organizations. Three of these comments focused on the role of the Procedures Officer.

§78. The Comments of the Intellectual Property Constituency Comments on the Draft Independent Review Process Updated Supplementary Procedures, dated February 1, 2017 ("Intellectual Property Constituency Comments") included the following comments related to the Procedures Officer:

- a. "Under Consolidation, Intervention and Joinder: Requests should be determined by the IRP Panel and not by a Procedures Officer."
- b. "[T]he draft merely permits **an existing party** to request the appointment of a Procedures Officer to determine whether other parties should be permitted to intervene or join the proceeding the draft then states that any person or entity qualified to be a Claimant may intervene in an IRP with the permission of the Procedures Officer, but it is not clear what would happen if a party does not

request the appointment of a Procedures Officer in the first place. In our view it is not appropriate for such important decision to be made [by] a Procedures Officer in the first place. In our view it is not appropriate for such important decisions to be made a Procedures Officer [sic] or by the Dispute Resolution Provider; decisions on whether to allow consolidation, joinder or intervention should always be made by the IRP Panel.”

§79. The Registries Stakeholder Group Statement dated 31 January 2017 included the following comment related to the Procedures Officer:

With respect to Sec. 7 (Consolidation, Intervention and Joinder) – The IRP panel should consider whether it (as a panel) or a ‘Procedures’ officer from within the standing panel should make these decisions in particular cases. The IRP Panel will have better judgment as a panel what might be the best approach in any one case.

§80. The DotMusic Public Comments concerning the Updated Procedures for Independent Review Process (IRP) dated January 30, 2017 included the following comment related to the Procedures Officer:

New Rule 7. Consolidation, Intervention and Joinder: The appointment of a Procedures Officer from within the Standing Panel to consider issues of joinder, intervention and consolidation is unfair and liable to generate unnecessary costs. These issues should be decided by the duly constituted IRP Panel already hearing a claim, which will be best placed to gauge whether there is sufficient common ground for joinder or intervention.

§81. The Procedures Officer can find no report of any discussion of these comments in any of the Oversight Committee meeting transcripts, other than a brief

passing reference that such comments were made in the slide presentation given by Verisign's David McAuley, the then new chair of the Oversight Committee, at the 23 March 2017 meeting.

§82. In the Declaration of David McAuley in Support of Verisign, Inc.'s Request to Participate as *Amicus Curiae* in Independent Review Process, dated February 5, 2019, attached as Exhibit E is a document Mr. McAuley describes as a "correct copy of the [Oversight Committee]'s memorandum to Sidley." The Document is headed "DRAFT Report of the IRP-IOT Following Public Comments on the Updated Supplementary Procedures for the ICANN Independent Review Process." The document states:

This report presents conclusions reached by the ICANN Independent Review Process (IRP) Implementation Oversight Team (IRP-IOT) [the Oversight Committee] on public comments submitted regarding draft Updated Supplementary Procedures for the IRP.

In the ***Conclusions of IRP-IOT*** (emphasis in original) section of that document there is a discussion of Updated Supplementary Procedure 7: Consolidation, Intervention, and Joinder. In that section, there is no reference to the public comments quoted above regarding the Procedures Officer, nor any discussion of the role of the Procedures Officer.

§83. The meetings of the Oversight Committee were sparsely attended. According to the chair, a quorum consisted of five telephone participants within five minutes of the designated commencement time. For example, the following is a quote from one Oversight Committee meeting:

DAVID MCAULEY: As has been mentioned in previous calls there is a rough five by five rule, that is we have five participants by five minutes passed [sic] the hour. I believe we are there. Kate [Wallace, partner in the law firm of Jones, Day], with your indulgence you always hear me say this, that for purposes of counting that quorum, we don't consider you, though we are happy to have you here. With that being said I think we have enough to proceed. Aubrey, myself, Kavouss, Malcolm and Liz [Le, ICANN Associate General Counsel].

Meeting Transcript, 4 May 2017.

§84. The transcripts of other meetings reflect that there were rarely more than five attendees, counting ICANN's counsel as part of the five-person quorum. In addition, there are suggestions in some of the transcripts that there may not have been even that number present.

- a. David McAuley: "We are a small group hoping that nonetheless some more of us will gather during this call. And even though we're small, I would like to press on and have a call and have it on the record so we can ensure that those who can't join us today could listen to the record and find out what happened." Besides an ICANN consultant and an ICANN employee, only four people are shown to speak in the transcript of the meeting – David McAuley, Malcolm Hutty, Kavouss Arasteh, and Lis Le [ICANN Associate General Counsel]. Meeting Transcript 2 March 2017
- b. David McAuley: "Welcome, all, this is David McAuley speaking, and we have a small group so far, but in the past, a number of people have come in several minutes late, which is fine, so I would like to press on. We're close to the five-person rule, but I think we're in shape that we can roll on right now." Other than

ICANN Counsel and David McAuley's Chairing skills coach, only four people are shown to speak in the Transcript– David McAuley, Kavouss Arasteh, Malcolm Hutty, and Greg Shatan, Meeting Transcript 23 March 2017.

- b. At the 6 April 2017 meeting, if we do not count the three attorneys from ICANN and Jones Day, only three people are shown to speak in the transcript of that meeting: David McAuley, Kavouss Arasteh, and Avri Doria. Meeting Transcript 6 April 2017.
- c. David McAuley: “Very small group. My fond hope is that we don’t cancel today. . . . Hi, everyone, it’s now two minutes past the hour. I said maybe would wait until three minutes past. I’d like to do that. So I will – oops, never mind. It’s three minutes past the hour. We have enough to press on, at least for a while.” Meeting Transcript 27 April 2017.
- d. David McAuley: “It’s a small group, unfortunately, but I do think we have a quorum with which we can press ahead.” Only four people are shown to speak in the transcript of the meeting – David McAuley, Kavouss Arasteh, Samantha Eisner [ICANN Deputy General Counsel], and Greg Shatan. Transcript of Meeting of 11 May 2017.
- e. David McAuley: “I’m trying to determine if we have a quorum present so let me count for a minute and just take a look. I see Sam [Samantha Eisner, ICANN Deputy General Counsel] has joined.”
David McAuley: “Kavouss, you were expressing a concern about a quorum. I believe we are at a quorum now and I think we can proceed. If you feel otherwise Kavouss, could you comment now?”

Kavouss Arasteh: "I have no problems to start the meeting. If we pass the [? [sic] we need the quorum. I don't think that eight people or nine people are sufficient for quorum." Meeting Transcript 18 May 2017.

- f. David McAuley: "Hello everyone and welcome to the IRP IOT call of the Thursday July 27th. It is again a small group. We had to cancel the last call for lack of a quorum." NOTE: If the two ICANN in house counsel on the call are not counted, only three people are shown to speak in the transcript of the meeting: David McAuley, Anna Loup, and Avri Doria. Meeting Transcript 27 July 2017.
- g. David McAuley: "Hello, everyone, this David McAuley. . . . Welcome to those on the call we're again a small group [sic] such as [sic] our lot." NOTE: If the ICANN attorney and the ICANN consultant are not counted, only two people are shown to speak in the transcript of the meeting: David McAuley and Avri Doria. Meeting Transcript 7 September 2017.
- h. Transcript of Meeting of 14 November 2017 – NOTE: excluding two ICANN Board member observers, ICANN counsel, an ICANN Projects and Operations Assistant, and an ICANN consultant, only two people are shown to speak in the transcript of the meeting: David McAuley and "Aubrey." "Aubrey" is assumed to be Aubrey Pennyman, a member of the Governmental Advisory Committee (the "GAC").
- i. David McAuley: "Hello it's three minutes past the top of the hour. If I said we would start at 3 but obviously we are struggling to get a group together." NOTE: excluding two in house ICANN

lawyers, one Jones, Day lawyer representing ICANN, an ICANN consultant, and two ICANN Board members present as observers, only two people are shown to speak in the transcript of the meeting: David McAuley and Malcolm Hutty. Meeting Transcript 7 December 2017

- j. David McAuley: "Hello this is David McAuley speaking. Welcome to the IRP implementation oversight team call. We are probably lacking a quorum. . . . I see that we have several participants and some observers, but probably not enough to make a quorum and that's disappointed [sic]. Meeting Transcript 22 February 2018

§85. There were no meetings of the Oversight Committee between May 2018 and September 2018. Declaration of David McAuley, ¶ 21. McAuley reported that the Oversight Committee was unable to get a quorum for the 6 September 2018 meeting and that "[t]his comes on the heel of difficulties gathering quorums for calls over the past year." Declaration of David McAuley, Exhibit G.

§86. After the four-month absence, Oversight Committee meetings resumed on 9 October 2018. Transcript of the Oversight Committee Meeting of 9 October 2018, McAuley Declaration, Exhibit I. All of the quotes that follow in this section 86 are from that Transcript of that meeting. The Transcript shows that in addition to ICANN in house counsel, a partner of the Jones, Day law firm, and an ICANN consultant, only three people spoke during the meeting: David McAuley, Malcolm Hutty, and Niels Ten Oever.

At the outset, Bernard Turcotte, the ICANN consultant, stated, "David, we have 5 formal members. That's enough to go ahead." David McAuley then

responded, “[A]s you saw from the e-mail I sent yesterday to agenda [sic] the hope is to try to get to interim rules of procedure.” Rule 7 of the proposed interim rules of procedure encompassed eleven paragraphs of some three pages in length.

Following the ICANN consultant’s reading of the rule, Verisign’s David McAuley spoke “as a participant:”

I do have a concern about this and what I believed is that on joinder intervention, whatever we are going to call it it’s essential that a person or entity have a right to join an IRP if they feel that a significant – if they claim that a significant interest they have relates to the subject of the IRP.

And that adjudicating the IRP in their absence would impair or impede their ability to protect that.

* * *

I would be happy to provide specific language with respect to this concept tomorrow on list. And we talk about it on Thursday.

* * *

So what I would do in language that I would put on the list is I would hope I would be would offer to make it more clear.

* * *

I’ll provide language probably by tomorrow that would clarify this and we can discuss it on Thursday.

§87. The next meeting followed in two days. A transcript of that meeting is also available. Transcript of the Oversight Committee Meeting of 11 October 2018, McAuley Declaration, Exhibit K. In addition to an ICANN consultant, an ICANN counsel, a partner of the Jones Day law firm, an ICANN Research Analyst, and an

ICANN Projects & Operations Assistant, only two other people spoke at the meeting: David McAuley and Malcolm Hutty.

§88. Mr. McAuley began the meeting with a description of the attendance on the call. “We are a light group again but I believe we have enough the more forward [sic]. This is two calls in quick succession.”

§89. Later in this October call, Ms. Eisner, ICANN counsel, interjected.

Thanks, David. So I think we have, I know from ICANN side we have some concern, if you go back to some of the principles we put forth in how the IRP the interim rules would work, it was to not make major changes to what was posted to public comment if they were still under significant deliberation by the [Oversight Committee.] And so the – with change that you proposed to caveat that has been proposed [sic] that actually makes a significant change.

While ICANN counsel’s comment was not directed at Section 7, it is addressed to any provision that underwent significant change.

§90. Verisign’s McAuley stressed the urgency of the task at hand.

[O]ne reason why Bernie and I scheduled two calls for this. Get the interim rules out. We recognize that the time has come the [sic] get interim rules out and we have to move to repose [sic], etc. I feel the pressures myself. So what I’d like to do is discussion [sic] on this one ask you Sam to come back with your amicus language.

§91. On 16 October 2018, Ms. Eisner sent Mr. McAuley and ICANN Contractor Bernard Turcotte an email in which she “[a]dded language to the amicus language.” Following Ms. Eisner’s proposed language additions, Ms. Eisner stated,

As we discussed, if we were to give other associated rights for defense of claims or other things that would create a new type of “party” (i.e. not claimant but not amicus) participation in the IRP, I do not think that we have that dictate at this time from the [Oversight Committee]. What I did not mention on the call is that I believe that would be a significant modification from what was posted for comment, and so even if we could build out procedures that allow that to happen in a manner that is consistent with the IRP, we’d still need to take that out for public comment.

McAuley Declaration, Exhibit L.

§92. By email dated October 17, 2018, Mr. McAuley responded to Ms. Eisner’s proposed changes. “I am attaching a few changes to Sam’s suggested language shown in track change format.” ICANN Exhibit 3.

§93. By email dated October 18, 2019, Ms. Eisner responded to Mr. McAuley:

Hi David – Thanks for your language. Attached is a further redline. The first paragraph appears to have a lot of changes, but what it does is: 1) adopt your language of ‘shall participate’; 2) makes that language applicable to all three types of situations; and 3) is reframed in a bulleted list so as to avoid repeating the same participation rights three times.

ICANN Exhibit 4.

§94. By email sent on 19 October 2018, Mr. McAuley responded:

Thanks, Sam. OK – I can accept it if we can make one clarification I suspect it will be ok [sic]. To avoid any doubt that expressing some interests may exclude others, please add introductory language to the second sentence of the intro paragraph as follows: ‘Without limitation to the persons, groups or entities that may have such a material interest

ICANN Exhibit 7.

§95. By email sent on 19 October 2018 at 14:53 UTC, David McAuley wrote to the members of the Oversight Committee:

We have an opportunity to have the board accept and approve 'interim rules of procedure at ICANN 63 but we must move quickly to do so. Attached is a draft of the interim rules meant to capture what we have discussed on the phone in the recent calls. . . Could you please review these rules and if you have any concern please post to the list by 23:59 UTC on October 21.

McAuley Declaration, Exhibit M.

§96. By email dated Sunday, October 21, 2018 at 22:23 UTC, the ICANN Consultant sent a letter out to the Oversight Committee members that stated in its entirety:

All,

This is simply to confirm that the deadline is now past and that no responses were received

Tank You [sic]

Bernard Turcotte

ICANN Staff Support to the IOT

McAuley Declaration, Exhibit N.

§97. At the hearing of 19 February 2019, the Procedures Officer specifically asked all counsel present if anyone knew of a vote by the Oversight Committee on the procedures that were promulgated and approved by the ICANN Board in October 2018. No one could identify any Oversight Committee vote on these at any time, although Verisign's February 5, 2019 brief had represented that "the entire 26

member [Oversight Committee]" and the ICANN Board had "approved" the new Interim Supplementary Rules. See Verisign, Inc.'s Reply in Support of its Request to Participate as Amicus Curiae in Independent Review Process, § I, p.5, ¶ 6.

§98. The final version of Rule 7 as submitted to and approved by the ICANN Board reads as follows:

7. Consolidation, intervention, and Participation as an *Amicus*

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, requests for consolidation, intervention and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient

resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

Any person group or entity who intervenes as a Claimant pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation

after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP Panel shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality personal data, or trade secrets; in which case the IRP Panel shall rule on objection [sic] and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an *Amicus Curiae*

Any person group or entity that has a material interest relevant to the Dispute, but does not satisfy the standing requirements for a Claimant set forth in the Bylaws may participate as an *amicus curiae* before an IRP Panel, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons groups or entities shall be deemed to have a material interest relevant to the DISPUTE, and, upon request of person [sic] group or entity seeking to so participate, shall be permitted to participate as an *amicus* before the IRP PANEL: (Emphasis in original)

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person group or entity that was part of a contention set for the string at issue in the IRP; and
- iii. If the briefings before the IRP Panel significantly refer to actions taken by a person, group or entity that is external

to the Dispute, such external person, group or entity.
(Emphasis in original).¹

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the

¹ This is a footnote by the Procedures Officer. The Procedures Officer had requested that the parties provide the reasoning for the underscoring emphasis contained in parts of Article 7 of the Interim Supplementary Procedures as adopted.

ICANN responded as follows:

ICANN's investigation of this issue, including its review of the IRP-IOT's meeting transcripts, meeting minutes, and email correspondence, does not indicate that any special meaning should be taken from the underlining beyond the fact that those words were added over the weeks leading up to the 21 October 2018 deadline for final IRP-IOT comment and approval. Indeed, the underlined text tracks directly to the edits that Ms. Eisner drafted between 16 and 19 October 2018, and, as such, it likely is nothing more than a remnant of the drafting process. These edits were not posted for public comment, so no public comments address them.

Afilias responded as follows:

The underscored language of Rule 7 was developed by Samantha Eisner and David McAuley between 16-19 October 2018. It was never published for public comment. The relevant emails, which are annexed to the Eisner Declaration, were first disclosed by ICANN in January 2019 in response to Afilias' Documentary Information Disclosure Policy Request. The underscored language, which created broad mandatory rights for third parties to participate as *amicus curiae* went far beyond the limited Public Comments that had been received in response to the Public Comment Draft. As discussed above, the Public Comments were strictly limited to providing third parties participation rights in IRP's where decision of underlying "process specific expert panels" were being challenged, pursuant to Section 4.3(b)(iii)(A)(3) of ICANN's Bylaws.

DISPUTE or on such discrete questions as the IRP PANEL may request briefing in the discretion of the IRP Panel and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.² The IRP Panel shall determine in its discretion what materials related to the Dispute to make available to a person participating as an *amicus curiae*.

VI. DISCUSSION OF THE ISSUES

§99. The question which must be addressed in an IRP proceeding is whether ICANN is failing to act in compliance with its Bylaws.

A. IS ICANN ACTING IN COMPLIANCE WITH ITS BYLAWS?

1. ICANN's Expressed Position

§100. Nothing in the Bylaws requires that ICANN submit a version of the Interim Supplemental Procedural Rules for Public Comment. ICANN asserts that Bylaw Sections 3.6(a) and 4.4(a), cited by Afiliac for the proposition that ICANN has a designated practice for public comment periods," which practice required an additional round of public comments in respect of the recently adopted interim Supplemental Procedural Rules prior to their submission to and approval by the Board, do not apply to the present situation.

² The following is a footnote that was appended by the draftspersons to the Rule 7 passage cited: The underlining shown below in the footnote is as it is contained in the original footnote as adopted by the Board as part of Rule 7.

During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae*, the IRP Panel shall lean in favor of allowing broad participation of an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

§101. ICANN argues that these provisions only apply to "policy actions" and do not apply to procedural rules which govern IRP proceedings. "The Bylaws' specific provisions for public comments in two inapposite circumstances do not establish an overarching practice for public comment under all other circumstances."

2. The Advice of ICANN's Lawyers

§102. As discussed, *supra*, ICANN's attorneys who were advising the IRP Implementation Oversight Committee counseled that whenever the Oversight Committee were contemplating significant changes to the Interim Supplementary Procedures in the form that had been submitted for public comment in November 2016, those changes would need to be put out for public comment before adoption.

§103. At the Oversight Committee meeting of May 18, 2017, Samantha Eisner, ICANN's Deputy General Counsel stated during a discussion of proposed rule changes:

This is Sam [Samantha Eisner, ICANN's Deputy General Counsel]. [I'm here with Liz [Elizabeth Le, ICANN Associate General Counsel], and I think that that is -- we'd want to evaluate the rules across to see where the substantial changes have been and if they're so substantial that another public comment is warranted and that's an ICANN internal position, is that removal of our Period of Repose that was previously put out for public comment would be something that would be so significant that would require a further public comment, and there might be other things that we see within the rules changes, too. And then hopefully, we as the IOT would go through and identify some of the areas that we wish to highlight in a communication to help focus the public comments that we would receive on those areas of changes.

David McAuley: Thanks, Sam.

§103. This advice was iterated at the meeting of 11 October 2018, as the Oversight Committee was in the process of formulating the version of Rule 7 that is now before us. See, *supra*, § 89.

§105. This was reiterated in an email from Samantha Eisner to Bernard Turcotte, consultant to ICANN, and David McAuley on 16 October 2018. See, *supra*, §91.

3. Representations Made by the IRP – IOT in the Rules

§104. In the preamble to the Interim Supplementary Procedures which were adopted by the Board and which form a part of the Rules that were promulgated, the Oversight Committee made the following representations:

In drafting these Interim Supplementary Procedures, the IRP Implementation Oversight Team (IOT) applied the following Principles: 1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016; (2) to the extent public comments received in response to the USP reflected clear movement away from either the current Supplementary Procedures or the USP, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the [Oversight Committee] has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

§105. The Procedures Officer offers no opinion as to whether these representations by the Oversight Committee as to its drafting processes are

accurate. Doing so would potentially involve the Procedures Officer in a matter that is more appropriately decided by the Standing Panel, which was not been established, although required in the ICANN Bylaws adopted in 2016. In the absence of the Standing Panel, issues related to adoption of Interim Rule 7 and the role of the Procedures Officer with respect to proposed *amicus curiae* should be decided by the IRP Panel. As has been argued by ICANN, NDC, and Verisign, issues of this nature are beyond the mandate given to the Procedures Officer in Interim Rule 7 and are not appropriate for the Procedures Officer to resolve. Nonetheless, these issues are significant to and perhaps determinative of the current dispute.

4. The Role of the Procedures Officer

§106. As discussed, *supra*, §§ 77-80, when the draft of the Updated Supplementary Procedures circulated for public comment in 2016-2017, the three comments received rejected the concept of a “Procedures Officer” entirely. In all three instances, the comments called for any decision to be made by the Standing Panel, or, pending its formation, by the IRP Panel. All comments indicated it was inappropriate for a single, individual “Procedures Officer” to decide issues of such importance.

§107. As discussed, *supra*, §§ 81 and 82, there was no consideration or discussion by the Oversight Committee of the public comment objections to the very concept of a “Procedures Officer” or to an individual Procedures Officer acting on matters that were the province of the Standing Panel or the IRP Panel under the Bylaws.

VII. DECLARATION OF THE PROCEDURES OFFICER

As one of the principal purposes of the IRP is to “[e]nsure that ICANN is accountable to the global Internet community and Claimants” (Bylaws, Section 4.3(a)(iii)), the Procedures Officer declares that the issues raised in the present matter are of such importance to the global Internet community and Claimants that they should not be decided by a “Procedures Officer,” and therefore the issues raised are hereby referred to the Standing Panel, and, until such time as the Standing Panel is formed, to the IRP Panel for determination.

28 February 2019



M. Scott Donahey
Procedures Officer