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

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

WITNESS STATEMENT OF J. BECKWITH BURR

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31 May 2019

I, J. Beckwith Burr, declare as follows:

1. I am currently a member of the Board of Directors for the Internet Corporation for Assigned Names and Numbers ("ICANN") and have been since November 2016. I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN's Response to Afilias Domains No. 3 Ltd.'s ("Afilias") Amended Request for Independent Review Process ("Amended IRP Request").

2. Throughout my career, I have advised government officials, clients, and ICANN on Internet governance as well as regulatory, competition, and consumer protection issues as they relate to the Internet. Between January 1995 and June 1997, I served as an Attorney-Advisor at the Federal Trade Commission ("FTC"). In this role, I was responsible for assisting in the development of the FTC's approach to competition and consumer protection policy regarding the Internet and the digital marketplace.

3. From the FTC, I moved to the National Telecommunications and Information Administration ("NTIA") of the United Stated Department of Commerce, first as Senior Internet Policy Advisor, from June 1997 to December 1997, and subsequently as Associate Administrator and Director of International Affairs, from December 1997 to October 2000. NTIA is the United States government agency responsible for advising the President on telecommunications and information policy issues and developing policies to preserve an open, interconnected global Internet that supports continued innovation and economic growth, investment, and the trust of its users.

4. During my time at NTIA, I was responsible for the formulation, analysis, and implementation of Internet and information technology policy as well as international telecommunications and information technology policies. I served as a member of the Clinton Administration's inter-agency task force on e-commerce, responsible for development and implementation of policy on Internet governance and privacy, and I co-chaired the United States government's inter-agency working group on privatization of the Internet's domain name system ("DNS").

5. As part of the United States government's effort to promote global electronic commerce by supporting continued and expanded private sector leadership in managing the Internet, one of NTIA's chief aims at this time was to identify and select a private organization that would be responsible for overseeing the operation of the Internet's DNS on behalf of the Internet community, and I was personally involved in this work. The DNS's essential function is to convert easily-remembered domain names, such as "ebay.com" or "icann.org," into numeric IP addresses understood by computers. Our job at NTIA was to select a private organization that could oversee operation of the DNS and ensure its continued security, stability and integrity. This work ultimately led to ICANN's creation, in 1998, and NTIA's recognition of ICANN as the private organization that would be responsible for the coordination of the DNS.

6. I left NTIA in 2000 and I entered private practice as a partner at the law firm Wilmer, Cutler & Pickering LLP, in 2000. While in private practice, I advised clients on regulation and transactions focused on e-commerce, information technology, intellectual property licensing, and international regulation of communications and information technology.

7. While in private practice, I served two terms as a Nominating Committee appointee to ICANN's Country Code Name Supporting Organisation ("ccNSO") Council, between 2006 and 2012. Between 2012 and 2016, I served on the ccNSO Council as the representative of the .US country code top-level domain ("ccTLD"), which my employer operated under a contract with the United States Department of Commerce. The ccNSO is a body within ICANN tasked with creating consensus, technical cooperation and skill building among ccTLDs. The ccNSO is also responsible for developing and recommending global policies to the ICANN Board regarding issues relating to ccTLDs, such as the introduction of Internationalized Domain Name ccTLDs. The ccNSO's policy development process is managed by the ccNSO Council.

8. Between June 2012 and March 2019, I served as the Deputy General Counsel and Chief Privacy Officer at Neustar, Inc., a technology company that provides a variety of services to the global communications and Internet industries. Among other things, Neustar was (and

remains) an Internet registry operator. During my years at Neustar, I was responsible for implementing the company's "privacy by design" program and ensuring that the company maintained state-of-the-art privacy and data security to protect customer and consumer information. I also provided legal advice related to the company's registry services operations.

9. In 2016, I was selected to serve on the ICANN Board for a three-year term starting in November 2016.

10. In March 2019, I joined the law firm of Harris, Wiltshire & Grannis LLP as a partner in its Privacy, Security, and Data Governance practice.

ICANN And Its Accountability Mechanisms

11. ICANN is a California non-profit public benefit corporation formed in 1998. As originally envisioned by NTIA, ICANN's core mission is the technical coordination of the Internet's DNS on behalf of the Internet community, ensuring the DNS's continued security, stability and integrity.

12. ICANN has a several Accountability Mechanisms built into its Bylaws that help ensure ICANN's accountability and transparency in all of its practices. ICANN considers these principles to be fundamental safeguards in ensuring that its bottom-up, multistakeholder model remains effective. The mechanisms through which ICANN achieves accountability and transparency are built into every level of the organization and are mandated by ICANN's Bylaws.

13. For instance, ICANN's Bylaws provide for a process by which "any person or entity materially affected by an action or inaction" of ICANN may request review or reconsideration of that action or inaction ("Reconsideration Request").[1] Reconsideration Requests are elevated to the Board Accountability Mechanisms Committee ("BAMC"), a committee of the ICANN Board empowered to hear, consider and make a recommendation to the Board regarding whether to accept or deny Reconsideration Requests.[2] In November 2017, I

[1] ICANN Bylaws, Art. 4, § 4.2, Ex. C-1.
[2] *Id.*

became a member of the BAMC.

14. Similarly, ICANN's Bylaws provide for an Office of the Ombudsman ("Ombudsman").[3] The principal function of the Ombudsman is "to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly."[4]

15. ICANN's Bylaws also create the Independent Review Process ("IRP") under which a party materially and adversely affected by an ICANN action or inaction may submit its claims to an independent, third party IRP panel for review.[5] The core task of an IRP panel selected to hear a particular IRP is to determine whether ICANN has exceeded the scope of its mission or otherwise has failed to comply with its Articles of Incorporation ("Articles"), Bylaws, or internal policies and procedures.

16. In addition to considering Reconsideration Requests, the BAMC, on which I sit, is also tasked with considering certain declarations and decisions made by IRP panels prior to their submission to the full Board for consideration.

17. Beyond the invocation of ICANN's Accountability Mechanisms, community members frequently express their views, complaints and concerns to ICANN through written correspondence. ICANN posts most of these communications on the Correspondence page of ICANN's website so that the general public can view this information.[6] The public posting of these written communications is a part of ICANN's accountability and transparency efforts. And while in some cases these communications may be properly addressed by ICANN outside of ICANN's formal Accountability Mechanisms, communications that call for reconsideration or reversal of a decision to act (or not act) or that otherwise challenge an ICANN or Board decision, should be raised by invoking one of ICANN's formal Accountability Mechanisms, and resolved through those Mechanisms. The ICANN Board is, of course, obligated to participate in and/or

[3] *Id*., Art. 5.
[4] *Id*., Art. 5, § 5.2.
[5] *Id*., Art. 4, § 4.3.
[6] https://www.icann.org/resources/pages/correspondence.

respond to Ombudsman's recommendations, Reconsideration Requests, and IRPs.

ICANN And Its Bylaws Obligations Regarding Competition

18. When it was first created, ICANN obtained its authority through a series of agreements with NTIA, under which NTIA empowered ICANN to exercise certain authority over the DNS. Effective 1 October 2016, after years of planning and policy-development work, NTIA formally transferred its residual role in overseeing certain of ICANN's functions to the global Internet community as the final step in the decades-long effort to privatize coordination and management of the DNS.

19. ICANN is obligated by its Bylaws Commitments to act "through open and transparent processes that enable competition and open entry in Internet-related markets."[7] One of ICANN's Core Values, as set forth in ICANN's Bylaws, requires ICANN to promote competition in the registration of domain names "where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process."[8] The Bylaws further require ICANN, "[w]here feasible and appropriate," to "depend[] on market mechanisms to promote and sustain a competitive environment in the DNS market."[9] Taken together, these provisions obligate ICANN to coordinate the community's development of, and implement, policy that facilitates market-driven competition.

20. Throughout its history, ICANN has complied with these Commitments and Core Values in a number of ways. For example, in the early days of the Internet, Network Solutions, Inc. ("NSI") was the sole operator and "registrar" for the .COM, .NET and .ORG top-level domains ("TLDs"), pursuant to a Cooperative Agreement between NSI and NTIA. A registrar is an entity that contracts with consumers and facilitates the registration of a second-level domain name in a particular TLD. In practice, this meant that any entity or individual seeking to register a domain name in the .COM, .NET and .ORG TLDs, which were essentially the only TLDs

[7] Bylaws, Art. 1, § 1.2 (a).
[8] *Id*.,§ 1.2 (b)(iv).
[9] *Id*. § 1.2 (b)(iii).

available to consumers at that time, had to contract with NSI at rates insulated from competition by other registrars. Consistent with the US government's Statement of Policy on Management of Internet Names and Addresses, commonly referred to as the "White Paper,"[10] in October 1998, NTIA – and not ICANN – negotiated an amendment to the Cooperative Agreement ("Amendment 11") that required Verisign, which had acquired Verisign, to take specific steps designed to permit the development of competition in the domain name registration market by, among other things, building a Shared Registration System ("SRS") in which an unlimited number of registrars would be allowed to compete for domain name registration business utilizing this SRS.

21. In February 1999, NTIA notified Verisign that ICANN was empowered to oversee a transition to registrar competition under the SRS, and directed Verisign, in accordance with its obligations under Amendment 11, to cooperate with ICANN in connection with its development and implementation of policy to govern use of the SRS by competing registrars. I was personally involved in NTIA's directions to ICANN and Verisign regarding the SRS. Part of the responsibilities delegated to ICANN by NTIA included establishing and implementing a procedure for accrediting companies that wished to act as registrars and compete with NSI. Over the course of the next year, ICANN adopted registrar accreditation standards and, since then, has accredited thousands of registrars that – to this day – compete for domain name registration business. In other words, ICANN facilitated policy development in support of the United States government's decision to create competition in domain name registration services. A list of current ICANN-accredited registrars can be found here: https://www.icann.org/registrar-reports/accredited-list.html. On account of the enormous increase in the number of registrars made possible by Verisign's government-mandated SRS, as well as government-imposed price caps on .COM domain name registrations, domain name registration prices have fallen tremendously since 1998.

[10] United States Department of Commerce, Management of Internet Names and Addresses ("White Paper"), attached hereto as Exhibit A.

22. In the White Paper, the United States government elected to defer creation of new TLDs pending ICANN policy development, leading ultimately to ICANN's New gTLD Program.[11] The New gTLD Program is thus another example of how ICANN has attempted to foster an environment in which competition can arise. The Program resulted from a community driven policy-development process mandated by ICANN's Bylaws, and ICANN's role was to implement that policy. The Program provides for qualified entities to apply for and, if successful, to operate new gTLDs. One of the goals of the New gTLD Program was to increase consumer choice, diversity and competition in the DNS through implementation of the community-developed policy. ICANN received 1,930 new gTLD applications – truly an extraordinary number – resulting in over 1,200 new gTLDs that have become available to consumers over the past few years.

23. A final example of how ICANN has addressed potential competition concerns is ICANN's occasional referral of competition issues to relevant competition regulators, such as the United States Department of Justice, Antitrust Division ("DOJ"). Because ICANN is a coordinator, rather than a regulator, of the DNS, and because ICANN was not designed to have (and does not have) specific expertise in antitrust or competition law and policy, ICANN has historically referred competition concerns to DOJ for analysis and possible government response or action.

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[11] *Id*. at ¶ 6(b) ("**Response:** Both sides of this argument have considerable merit. It is possible that additional discussion and information will shed light on this issue, and therefore, as discussed below, the U.S. Government has concluded that the issue should be left for further consideration and final action by the new corporation. The U.S. Government is of the view, however, that competitive systems generally result in greater innovation, consumer choice, and satisfaction in the long run. Moreover, the pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically. Further, in response to the comments received, the U.S. government believes that new corporation should establish and implement appropriate criteria for gTLD registries. Accordingly, the proposed criteria are not part of this policy statement."), ¶ 7 ("**Response:** The challenge of deciding policy for the addition of new domains will be formidable. We agree with the many commenters who said that the new corporation would be the most appropriate body to make these decisions based on global input. Accordingly, as supported by the preponderance of comments, the U.S. Government will not implement new gTLDs at this time. At least in the short run, a prudent concern for the stability of the system suggests that expansion of gTLDs proceed at a deliberate and controlled pace to allow for evaluation of the impact of the new gTLDs and well-reasoned evolution of the domain space. New top level domains could be created to enhance competition and to enable the new corporation to evaluate the functioning, in the new environment, of the root server system and the software systems that enable shared registration.").

24. While these types of referrals to competition regulators have been relatively rare, this is how ICANN has dealt with potentially anticompetitive situations involving the DNS. An example of this kind of referral process is found in ICANN's Registry Services Evaluation Policy ("RSEP") process, which is a mechanism TLD operators use to request ICANN's approval to add or modify services.[12] If a TLD operator seeks to add or modify one of its services through a RSEP request, ICANN evaluates the request for security, stability and competition concerns.[13] ICANN is authorized to prohibit the introduction of new or modified services that ICANN determines pose a threat to the stability and security of the DNS.[14] To the extent the proposed services might raise significant competition concerns, however, ICANN's authority is limited to referring the RSEP request to the appropriate government competition authority for analysis.[15] If ICANN does not receive a response to the referral from the competition authority (or authorities, depending on the case) in a specified time frame, ICANN approves the RSEP request without additional ICANN analysis.[16]

25. ICANN's Bylaws-mandated competition role is an important aspect of ICANN's operations, as are all of the Commitments and Core Values identified in ICANN's Bylaws. But ICANN's mandate in this respect is narrow as evidenced by ICANN's foundational documents and its creation. For instance, the text of the Core Value regarding competition makes clear that ICANN should only act "[w]here feasible and appropriate" and "depending on market [conditions]." Likewise, ICANN's Bylaws are clear that ICANN "shall not act outside its Mission," which is limited to ensuring "the stable and secure operation of the Internet's unique identifier systems." The Bylaws clearly establish that policy authority resides with the ICANN community – and not the organization or its Board. Similarly, the Bylaws mandate that ICANN "shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide. . . . For the avoidance of doubt,

[12] ICANN's Registry Service Evaluation Policy (RSEP), Sept. 2017 at p. 3, attached hereto as Exhibit B.
[13] *Id*. at p. 7.
[14] *Id*. at p. 8.
[15] *Id*. at p. 9.
[16] *Id*.

ICANN does not hold any governmentally authorized regulatory authority."[17] Finally, ICANN was created through an express transfer of powers and authority from the United States government. While this express transfer included the powers and authority necessary to oversee the secure and stable operation of the Internet's DNS, the transfer did not include the power, authority, or expertise to act as a competition regulator by challenging or policing transactions and conduct that could be deemed anticompetitive. That power and authority remains with the relevant government authorities.

Certain Conclusions Reached By Jonathan Zittrain And George Sadowsky Are Incorrect

26. I have reviewed the reports of Jonathan Zittrain and George Sadowsky, which I understand Afilias submitted in support of its Amended IRP Request. While I know Professor Zittrain and Mr. Sadowsky, and I have the highest respect for both of them, I do not agree with several conclusions made in their reports.

27. First, Professor Zittrain claims that "the purpose of the New gTLD Program was to create competition for Verisign."[18] It is accurate that one goal of the New gTLD Program was to foster consumer choice and diversity in the DNS and sustain an environment in which competition in the TLD name space could thrive. But the New gTLD Program, which was designed by the Internet community through ICANN's bottom-up, policy-development process, was not specifically designed to take market share from .COM, nor was Verisign prohibited from participating in any aspect of the Program. Rather, the Program was designed to support innovative uses of the TLD name space and to create opportunities for competition to arise as a result of this innovation. The community-developed Program does not prohibit Verisign from being able to submit applications of its own, from being the back-end provider for applicants (*i.e.*, performing registry functions for new gTLDs), nor does it bar Verisign from operating any of the new gTLDs, including .WEB. The ICANN Board's unilateral imposition of such policies after the fact would violate the Bylaws by usurping the Internet community's exclusive authority

[17] Bylaws Art 1, §§ 1.1 (a), (b), (c); 1.2(b)(iii).
[18] Zittrain Expert Report ¶ 52.

for policy development.

28. Second, Professor Zittrain and Mr. Sadowsky both assert that ICANN must "take whatever steps are necessary to prevent the transfer of .web to Verisign because of Verisign's dominant position and ICANN's mandate to promote competition."[19] I do not agree with these assertions.

29. The White Paper, cited by Professor Zittrain and above, provided the United States government's policy for privatizing "the domain name system *in a manner that allows for the development of robust competition* and that facilitates global participation in the management of Internet names and addresses."[20] The government's White Paper went on to emphasize that ICANN should rely on market forces and leave regulation to regulators. On the one hand, the White Paper is the source for ICANN's reliance on market mechanisms, saying "[w]here possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction."[21] On the other hand, the White Paper emphasized the continuing role of antitrust regulators, saying: "this policy is not intended to displace other legal regimes (international law, competition law, tax law and principles of international taxation, intellectual property law, etc.) that may already apply. The continued applicability of these systems as well as the principle of representation should ensure that DNS management proceeds in the interest of the Internet community as a whole."[22] Notably, the White Paper affirmatively rejected the suggestion that ICANN should be granted antitrust immunity or indemnification, which the government believed should not be necessary in ICANN's role as a policy coordinator.[23]

30. Additionally, ICANN's Core Value regarding competition does not require, or

[19] Sadowsky Expert Report ¶ 49; Zittrain Expert Report ¶ 56 (allowing Verisign to operate .WEB would "[violate] ICANN's Competition Mandate.").
[20] Ex. A at p. 17 (emphasis added).
[21] *Id*., at p. 18.
[22] *Id*., at p. 7.
[23] *Id*., at p. 14.

even suggest, that ICANN take affirmative actions to block potentially anticompetitive transactions or conduct the way a government regulator would. Indeed, ICANN's Bylaws make clear that ICANN is prohibited from acting like a regulator. Moreover, ICANN does not have the resources or expertise necessary to serve as a competition regulator for the DNS. Instead, if ICANN were to take affirmative actions to regulate competition in the DNS it could be acting beyond its narrow Mission by acting as a regulator.

31. Taken together, the provisions in ICANN's Bylaws that address competition require ICANN to use the bottom-up, multistakeholder processes to enact policies – such as the community-developed New gTLD Program – that enable market-driven competition "[w]here feasible and appropriate." Furthermore, ICANN appropriately defers to the authority and expertise of relevant government regulators on questions about alleged anticompetitive conduct in the DNS, as I note above. And in this instance I know from personal experience that, in early 2017, DOJ launched an investigation relating to Verisign's proposed acquisition of Nu DotCo's contractual rights to operate the .WEB TLD. I understand that ICANN received a subpoena from DOJ and cooperated with that investigation. I also know from personal involvement that DOJ closed its investigation in January 2018 without taking any action to block Verisign from operating .WEB.

32. By facilitating the emergence of choice, diversity, and competition in the DNS based on community-developed policy and by cooperating with the government's investigation of potential competition issues associated with Verisign's proposed operation of .WEB, ICANN has fulfilled its competition mandate under the Bylaws. No policy, precedent, or authority permits ICANN, based on competition concerns, to block Verisign from acquiring the rights to operate .WEB or to second-guess the judgment of the DOJ – the ultimate competition regulator in the United States – in determining not to act following its own expert and thorough investigation.

33. Indeed, even when ICANN took actions to increase competition in registrar services for .COM, .NET and .ORG, ICANN only did so after NTIA directed it to create policies

and procedures to introduce competing registrars and directed Verisign to accommodate the introduction of those registrars. This kind of government direction has not occurred with respect to .WEB.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 31st day of May 2019 at Washington, DC.

By: _____
J. Beckwith Burr