

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE 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

**AFILIAS DOMAINS NO. 3 LIMITED'S SUPPLEMENTAL BRIEF ON
THE PROCEDURES OFFICER'S DECLARATION AND THE SCOPE OF
AMICUS CURIAE PARTICIPATION IN INDEPENDENT REVIEW PROCESS**

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I. INTRODUCTION

1. The position of Claimant Afilius Domains No. 3 Limited (“**Afilius**”) in Phase I of this Independent Review Process (“**IRP**”) is essentially as follows.¹

2. *First*, the record before the Procedures Officer (the “**Record**”) and his Declaration dated 28 February 2019 (the “**Declaration**”) confirm that the Internet Corporation for Assigned Names and Numbers (“**ICANN**”) violated its Bylaws by adding the *amicus* provisions to Rule 7 of the “Interim Supplementary Procedures” for IRPs, which ICANN adopted on 25 October 2018 (the “**Interim Procedures**”).² In light of the Declaration, Afilius amended its IRP Request specifically to claim that ICANN violated its Bylaws in adopting the *amicus* provisions.³ Based on the Record and Declaration, the Panel in this Phase I should grant Afilius’ claim on the *amicus* provisions, declare that they are unenforceable, and, consequently, that the Applicants cannot participate as *amici* in this IRP.

3. *Second*, and in the alternative, if the Panel is not prepared to decide Afilius’ claim that ICANN violated its Bylaws in adopting the *amicus* provisions in this Phase I, it should join that claim to the other claims to be decided in Phase II, and allow the Applicants to participate as *amici* on a provisional basis. Their participation must be limited to the terms of the *amicus* provisions they seek to invoke, which provide that an *amicus* “may submit to the IRP Panel written briefing(s) on the 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.”⁴ This language must be

¹ Afilius specifically incorporates herein all of its written and oral submissions made to the Procedures Officer.

² The International Centre for Dispute Resolution (the “**ICDR**”) appointed Mr. M. Scott Donahey to act as the Procedures Officer on 21 December 2018, after the Applicants, VeriSign, Inc. and Nu Dotco, LLC, submitted their requests to participate as *amici* in the IRP. Declaration of the Procedures Officer (28 Feb. 2019) (hereinafter “**Declaration**”), ¶ 25.

³ Amended Request by Afilius Domains No. 3 Limited for Independent Review (21 Mar. 2019), ¶¶ 84-89.

⁴ Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted October 25, 2018) (hereinafter “**Interim Rules**”), [Ex. VRSN-1], p. 10 (footnote omitted).

interpreted in accordance with ICANN's Bylaws, which require the IRP Rules to "conform with international arbitration norms."⁵

II. SUMMARY OF THE KEY RECORD FACTS LEADING TO ICANN'S ADOPTION OF RULE 7

4. Recognizing that the Record is voluminous, Afilias provides this summary of the key record facts leading to ICANN's adoption of the *amici* provisions at issue.

5. In 2014, in advance of the U.S. government transferring control of the Internet to ICANN, a working group of ICANN community members ("**CCWG-Accountability**") began developing a set of proposed enhancements to the processes and procedures that govern ICANN's accountability to the global internet community.⁶ To this end, the CCWG-Accountability recommended several changes to ICANN's Bylaws, including to ICANN's most significant accountability mechanism, the IRP.

6. Pursuant to these recommendations, on 27 May 2016, ICANN adopted a set of new Bylaws that included revised rules for ICANN's accountability and review mechanisms, including for the IRP.⁷ The Bylaws provide that the "IRP Implementation Oversight Team" or "**IRP-IOT**," which is to be comprised of "members of the global Internet community,"⁸ should establish "clear published rules for the IRP ... that conform with international arbitration norms" ⁹ David McAuley, a senior executive of Applicant VeriSign, Inc. ("**Verisign**"), has chaired the IRP-IOT since November 2016.¹⁰

⁵ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) (hereinafter "**Bylaws**"), [Ex. C-1], Art. 4, Sec. 4.3(n)(i).

⁶ Afilias Domains No. 3 Limited's Response to VeriSign, Inc.'s and Nu Dotco LLC's Requests to Participate as *Amicus Curiae* in Independent Review Process (28 Jan. 2019) (hereinafter "**Response**"), ¶ 15.

⁷ Declaration, ¶ 74.

⁸ Bylaws, [Ex. C-1], Art. 4, Sec. 4.3(n)(i).

⁹ *Id.*

¹⁰ Declaration of David McAuley in Support of VeriSign, Inc.'s Request to Participate as *Amicus Curiae* in Independent Review Process (5 Feb. 2019) (hereinafter "**McAuley Declaration**"), ¶ 8.

7. The IRP-IOT began its work on new supplementary IRP rules in June 2016.¹¹ On 19 July 2016, counsel to the CCWG-Accountability provided draft supplementary rules to the IRP-IOT.¹² Over the next several months, the IRP-IOT met to discuss these rules, producing five further drafts.¹³ While each of these drafts provided for limited third party intervention rights, none of them provided for *amicus curiae* participation in an IRP, regardless of what interest a third party may have in its outcome.

8. On 28 November 2016, the IRP-IOT published draft supplementary rules for public comment (the “**Public Comment Draft**”).¹⁴ In the notice accompanying the Public Comment Draft, the IRP-IOT stated that it would “consider amending [the rules] *in light of the comments received*. If there are no significant issues, the final version [of the rules] ... will be presented to the CCWG-Accountability for approval. Once approved, the CCWG-Accountability will forward [the rules] to the ICANN Board of Directors for final approval.”¹⁵

9. Rule 7 of the Public Comment Draft, consistent with each of the five prior drafts, provided for very limited intervention rights, *i.e.*, only where the intervening person or entity was independently “qualified to be a Claimant” as that term is defined by the Bylaws.¹⁶ The Public Comment Draft did not contain *any* provisions for participation as an *amicus curiae*.

10. The public comment period closed on 1 February 2017. Three of the public comments addressed the substance of Rule 7, each requesting the same limited expansion of intervention rights for

¹¹ See IRP-IOT Meeting #3 (1 June 2016), Transcript (1 Jun. 2016), [Ex. 225].

¹² Response, ¶ 21.

¹³ *Id.*, ¶ 24.

¹⁴ Bylaws, [Ex. C-1], Art. Sec. 4.3(n)(ii); see also Declaration, ¶ 77.

¹⁵ ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), [Ex. 221], p. 2 (emphasis added).

¹⁶ Draft as of 31 October 2016 – Updates to ICDR Supplementary Procedures, [Ex. 235], p. 8.

“IRP actions that may be taken pursuant to ‘decisions of *process-specific expert panels*’¹⁷ as provided for by the new Bylaws at Section 4.3(b)(iii)(A)(3).¹⁸ The new Bylaws provided, for the first time, that decisions taken by these “process-specific expert panels” could be challenged on the limited basis that their decisions were inconsistent with ICANN’s Bylaws.

11. The public comments identified three such specific “process-specific expert panels,” namely panels constituted by (i) the World Intellectual Property Organization to adjudicate new gTLD legal rights objections, (ii) the International Chamber of Commerce to adjudicate community objections; and, (iii) the International Centre for Dispute Resolution to adjudicate string confusion objections.¹⁹ The public comments described these “process-specific expert panels” as “arbitration tribunals” and expressed concern that losing parties before these panels, in essence, would be able to appeal the panel’s decision in an IRP without the participation of the winning party.²⁰ The public comments further suggested that the winning party could participate by submitting a “friend of the court type brief.” This IRP does not concern an underlying “process-specific expert panel” of any kind.

12. The IRP-IOT, led by Verisign’s McAuley, discussed the public comments in March 2017 and determined to amend Rule 7 in accordance with the commentators’ recommendations. On 3 May 2017, McAuley circulated to the IRP-IOT mailing list a first draft of the proposed new language.²¹ McAuley’s draft provided that “all those who participated in the underlying proceeding as a ‘party’ [would] receive notice” of

¹⁷ CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], p. 47 (emphasis added). The term “process-specific expert panels” is referenced both at Bylaws Section 4.3(b)(iii)(A)(3) and in the definition of Disputes in the Interim Procedures at Section 1.

¹⁸ Response, ¶¶ 28-32.

¹⁹ *Id.*, ¶ 29; CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], p. 47.

²⁰ CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], pp. 47-48.

²¹ *Presentation: Suggestions for disparate Joinder comments* (3 May 2017), [Ex. 238]; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (3 May 2017), [Ex. 239].

the IRP and that “all such parties [would] have a right to intervene in the IRP.”²² The proposed language was discussed extensively within the IRP-IOT during its meetings of 11 May 2017, 18 May 2017, 5 June 2017, 21 July 2017, and 7 September 2017.²³ McAuley repeatedly asserted at these meetings that the IRP-IOT had “agreed” to provide **only** “entities that participated in an underlying proceeding (process-specific panel) as contemplated in Bylaw Section 4.3(b)(iii)(A)(3)” a right to intervene in the IRP, either as a party if they could establish “Claimant standing” under the Bylaws, or otherwise by submitting an *amicus curiae* brief.²⁴ No one asserted at any of these meetings that any other entities should be granted intervention rights.

13. On 10 October 2017, McAuley circulated a “final draft” of the proposed new Rule 7 language, which provided that “**only** those persons/entities who participated in the underlying proceeding as a ‘party’ receive notice” and that “all such parties have a right to intervene in the IRP.”²⁵ Having received no objections, this “final draft” was circulated for a second reading on 23 October 2017.²⁶

14. On 8 May 2018, a full set of the proposed supplementary rules was circulated within the IRP-IOT (the “**8 May Draft**”).²⁷ The new language in Rule 7 provided:

- “If a person, group, or entity participated in **an** underlying proceeding (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)[,])” such participant would receive notice of an IRP challenging the decision of that panel and would have a right to intervene (a) as a party if the participant has Claimant standing under the Bylaws or (b) as an *amicus curiae* otherwise.²⁸

²² *Presentation: Suggestions for disparate Joinder comments* (3 May 2017), [Ex. 238], p. 1.

²³ Response, ¶¶ 38-39.

²⁴ *Id.* (quoting Email from D. McAuley to Members of the IRP-IOT (5 June 2017), [Ex. 241], p. 1).

²⁵ Email from D. McAuley (VeriSign) to Members of the IRP-IOT (10 Oct. 2017), [Ex. 246], pp. 1-2 (emphasis added); Response, ¶ 42.

²⁶ Email from D. McAuley (VeriSign) to Members of the IRP-IOT (23 Oct. 2017), [Ex. 247].

²⁷ Email from S. Eisner (ICANN) to Members of the IRP-IOT (8 May 2018), [Ex. 248] (attaching 1 May 2018 draft set of supplementary procedures); Draft as of 1 May 2018 - Draft Interim ICDR Supplementary Procedures, [Ex. 1].

²⁸ Draft as of 1 May 2018 - Draft Interim ICDR Supplementary Procedures, [Ex. 1], p. 8 (emphasis added).

- “Any person, group, or entity that did not participate in **the** underlying proceeding” could nonetheless still participate in an IRP challenging the decision of that panel (a) as a party if it has Claimant standing under the Bylaws or (b) as an *amicus curiae* otherwise.²⁹

15. The discussion of the 8 May Draft reflected the limited expansion of participation rights proposed in the public comments in accordance with the IRP-IOT’s procedures described in the November 2016 public comment notice and its subsequent discussion about Rule 7 over the prior year. When the IRP-IOT met on 7 June 2018, the text of Rule 7 was described as “agreed upon.”³⁰ No opposition or further comments to Rule 7 were received at that time. The IRP-IOT would not meet again until October 2018.³¹

16. On 20 June 2018, ICANN disclosed on its website that Afilias Domains No. 3 Limited (“**Afilias**”) had invoked the Cooperative Engagement Process (“**CEP**”) with ICANN over .WEB.³² On 30 August 2018, lawyers representing Verisign and Nu DotCo LLC (“**NDC**”) wrote an aggressive letter to counsel for Afilias, noting (i) that they were “advised” that Afilias had invoked the CEP and planned to initiate an IRP should the CEP prove unsuccessful and (ii) that Verisign and NDC intended to take legal action against Afilias to protect their business interests.

²⁹ *Id.* (emphasis added). The drafter refers to “**an underlying proceeding**” in the first reference by using the indefinite article “**an**.” In other words, notice of an IRP will not be provided, unless there was “an underlying proceeding” and, if so, only to entities that participated in that proceeding. The indefinite article (“an”) is used before **a noun that is general or when its identity is not known**. *Chicago Manual of Style Online*, ¶ 5.72 (Indefinite article), [Ex. 254]. The second reference, however, uses the definite article “**the**”. The definite article (“the”) is used before a noun to indicate that **the identity of the noun is known to the reader**. *Chicago Manual of Style Online*, ¶ 5.71 (Definite article), [Ex. 253]. Rules of English grammar may guide the interpretation of rules. A drafter’s choice between the definite and indefinite article therefore affects the meaning of the text. See, e.g., *Reid v. Angelone*, 369 F.3d 363, 367 (4th Cir. 2004), [Ex. 251] (“[B]ecause Congress used the definite article ‘the,’ we conclude that ... there is only one order subject to the requirements.”); *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1356 (Fed. Cir. 2003), [Ex. 252] (reference to “the” use of a drug is a reference to an FDA-approved use, not to “a” use or “any” use).

³⁰ IRP-IOT Meeting #41 (7 June 2018), Transcript, [Ex. 255], p. 12.

³¹ Declaration, ¶ 85. A planned September 2018 meeting was cancelled “despite several reminders ... over a period of about a month” because the IRP-IOT was “unable to gather a quorum.” Email from David McAuley to the IRP-IOT (24 Sep. 2018), [McAuley Declaration, Ex. G].

³² Response, ¶ 50.

17. On 5 October 2018, McAuley circulated a revised draft of the supplementary rules to the IRP-IOT (the “**5 October Draft**”).³³ The 5 October Draft contained material changes to Rule 7, including a new section entitled “Participation as an *Amicus Curiae*” that marked a significant departure from the 8 May Draft of Rule 7 that had been “**agreed upon**” only a few months earlier. In relevant part, the 5 October Draft provided that:

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.³⁴

This general rule went far beyond (a) the limited intervention rights set forth in the November 2016 Public Comment Draft, (b) the limited expansion of Rule 7 proposed by the Public Comments, and (c) any of the prior drafts of Rule 7 created in light of the Public Comments.

18. On 9 October 2018, the IRP-IOT met to discuss the 5 October Draft. Despite lacking a quorum,³⁵ McAuley proceeded to lead a discussion of the proposed changes to Rule 7. McAuley stated:

I had my hand up because I want to speak as a participant here.

And I do have [a] concern about this and what I believe is that on joinder[,] intervention, whatever we are going the call it[,] ***it's essential that a person or [an] entity have a right to join an IRP if they feel that a significant – if they claim that a significant interest [that] 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 [interest].³⁶

19. McAuley’s new position was a significant departure from his repeated assertions to the IRP-IOT that, consistent with the public comments, Rule 7 should be amended **only** to provide participation rights in connection with IRPs that challenged decisions of underlying process-specific expert panels.³⁷ Two days

³³ *Id.* Although the draft was circulated on 5 October, the draft itself bears a date of 25 September 2018.

³⁴ Draft as of 25 September 2018 – Updated Draft Interim ICDR Supplementary Procedures (REDLINE of 25 September to 8 May 2018 versions), [Ex. 256], p. 10.

³⁵ Declaration, ¶ 86.

³⁶ IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, [Ex. 202], p. 15 (emphasis added).

³⁷ Response, Annex A.

later, when three members of the IRP-IOT again met to discuss the changes to Rule 7, McAuley stated he had changed his position because entities that “have contracts that [are] effected by ICANN have to be able to [protect] their interest in competitive situations.”³⁸ McAuley’s statement reflected Verisign and NDC’s 30 August 2018 letter, which accused Afiliis of acting anti-competitively and interfering with their businesses.

20. On **Friday 19 October 2018**, McAuley circulated a new draft of the supplementary procedures to the IRP-IOT for comment.³⁹ This draft contained a version of Rule 7 that McAuley conceded was “not exactly as discussed” previously.⁴⁰ Specifically, Rule 7 now additionally provided that applicants would have a ***mandatory right*** to appear as an *amicus curiae* if either (i) “the IRP relates to [] an application arising out of ICANN’s New gTLD Program” and the applicant was a member of the contention set for the relevant gTLD, or (ii) “the briefings before the IRP PANEL ***significantly refer to actions taken by***” the applicant.⁴¹ Critically, the October 5 Draft had provided the Procedures Officer ***with discretion*** to determine who has a “material interest” in the dispute. McAuley’s new draft ***eliminated that discretion***—providing that persons falling within these categories (which effectively covered both Verisign and NDC) “***shall*** be deemed to have a material interest relevant to the DISPUTE and ... ***shall*** be permitted to participate as an *amicus* before the IRP Panel[.]”⁴² Unsurprisingly, these two 11th hour additions to Rule 7 provide the textual basis for Verisign’s and NDC’s applications before this Panel.

³⁸ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 14.

³⁹ Declaration, ¶ 95; Email from B. Turcotte (on behalf of D. McAuley (VeriSign)) to Members of the IRP-IOT (19 Oct. 2018), [Ex. 262], pp. 1-2.

⁴⁰ Email from B. Turcotte (on behalf of D. McAuley (VeriSign)) to Members of the IRP-IOT (19 Oct. 2018), [Ex. 262], p. 1.

⁴¹ Draft as of 19 October 2018 – Interim IRP Supplementary Procedures, [Ex. 263], p. 10 (boldface added; underscoring in original).

⁴² *Id.* (boldface added; underscoring in original). This new language was apparently added so hastily that the underscoring—which ICANN admitted was redlining markings—remained in the text as adopted by ICANN. See Interim Rules, [Ex. VRSN-1], p. 10.

21. The IRP-IOT was never given an opportunity to discuss or debate this new language. Deeming the language approved by lack of comments from the IRP-IOT over the weekend, McAuley submitted the October 19 Draft to ICANN Board for approval on Monday 22 October 2018.⁴³ The supplementary rules were adopted by the Board three days later.⁴⁴

III. THE PROCEDURES OFFICER'S FINDINGS OF FACT DEMONSTRATE MULTIPLE VIOLATIONS OF ICANN'S BYLAWS AND RULEMAKING PRACTICES

22. In his Declaration, the Procedures Officer made a number of findings concerning the IRP-IOT's violations of ICANN's rulemaking practices as identified by the CCWG-Accountability, the ICANN Board, and the IRP-IOT itself.

23. *First*, the IRP-IOT violated the provision of the Bylaws, as recommended by the CCWG-Accountability and adopted by the ICANN Board, that explicitly provides that "once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ('Rules of Procedure') that conform with international arbitration norms[.]"⁴⁵ Mr. Donahey found, however, that "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."⁴⁶

24. *Second*, the IRP-IOT routinely violated its own quorum rules. As Mr. Donahey found: "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. ... [T]here were

⁴³ ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314], p. 63.

⁴⁴ *Id.*, pp. 1, 57-59.

⁴⁵ Bylaws, [Ex. C-1], Art. 4, Sec. 4.3(n)(i) (emphasis omitted).

⁴⁶ Declaration, ¶ 75.

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."⁴⁷ At the final intensive October 2018 meeting, Mr. Donahey found that, in addition to Verisign's McAuley and one other committee member, "an ICANN consultant, an ICANN [legal] counsel, a partner of the Jones Day law firm, an ICANN Research Analyst, and an ICANN Projects & Operations Assistant" were the only attendees.⁴⁸

25. *Third*, the IRP-IOT violated its own protocols by adopting significant changes to Rule 7 without a second public comment. As Mr. Donahey found: "ICANNs [*sic*] 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."⁴⁹

26. *Fourth*, the IRP-IOT violated its own working rules by sending a draft set of rules to the ICANN Board for approval even though that draft contained new language that was never discussed within the IRP-IOT and no vote was taken to approve the draft for submission to the Board. As Mr. Donahey wrote:

At the hearing of 19 February 2019, the Procedures Officer specifically asked all counsel present if anyone knew of a vote by the [IRP-IOT] on the procedures that were promulgated and approved by the ICANN Board in October 2018. No one

⁴⁷ *Id.*, ¶¶ 83-84. While the Bylaws provide that the IRP-IOT was supposed to be comprised of members of the Internet community, Mr. Donahey found that the IRP-IOT frequently and improperly included ICANN lawyers who are not, according to ICANN's President, part of that community. See *id.*; Email from M. Rodenbaugh to Members of the IRP-IOT (6 Dec. 2018), [Ex. 223], p. 1 ("It seems to me that 'comprised of members of the Internet community' ought to exclude ICANN Staff and Board Members, and include literally everyone else in the world. [ICANN President] Goran [Marby] seems to have that interpretation."). That the IRP-IOT could only make quorum by counting these lawyers during the "intensive" meetings in October 2018 raises serious concerns that ICANN was unduly controlling the development of procedures that are necessary to ensure its accountability to the global Internet community.

⁴⁸ Declaration, ¶ 87.

⁴⁹ *Id.*, ¶ 102.

could identify any [IRP-IOT] vote on these at any time, although Verisign's February 5, 2019 brief had represented that "the entire 26 member [IRP-IOT]" and the ICANN Board had "approved" the new Interim Supplementary Rules.⁵⁰

27. Mr. Donahey's findings raise serious and important questions about the process by which the Rule 7 was adopted:

- *First*, the Bylaws require the IRP-IOT to draft new supplementary rules "in consultation with the Standing Panel." The IRP-IOT, however, decided to draft the new rules first.
- *Second*, although the Bylaws envisioned that the IRP-IOT's membership would be drawn from members of the broader Internet community, the IRP-IOT more closely resembled a Verisign-ICANN joint venture. Indeed, the critical language at issue here was drafted by David McAuley and an ICANN lawyer, offline and outside of the supervision of any independent IRP-IOT members.⁵¹
- *Third*, the Bylaws require that the draft supplementary rules be "**published and subject to a period of public comment.**" When the draft rules were published for public comment in November 2016, the IRP-IOT represented that the rules would only be presented to the Board without a second public comment period "if there are no significant issues" that required material changes to the rules. ICANN specifically advised the IRP-IOT that "[i]f there are significant changes that are brought as a result of the first [public] comment, meaning material changes, it is usually the practice to go back out for a second round of public comments[.]"⁵² McAuley, however, decided to submit the rules directly to the Board without a second public comment period despite the fact that (i) there had been material amendments to Rule 7 from the version included in the November 2016 Public Comment Draft and (ii) those amendments went far beyond anything suggested in any of the public comments.⁵³
- *Fourth*, the IRP-IOT had developed a working practice of (i) circulating proposed language by email, (ii) discussing the language during committee meetings, (iii) revising the language for a "first reading," and, (iv) assuming no further comments, circulating the unrevised language for a "second reading." McAuley, however, circulated a version of Rule 7 that differed substantially from what had been discussed in committee and unilaterally deemed the language approved in the absence of any comments received over a weekend.

⁵⁰ *Id.*, ¶ 97.

⁵¹ Response, ¶¶ 53-58.

⁵² IRP-IOT Meeting #31 (7 Dec. 2017), Transcript, [Ex. 275], p. 8.

⁵³ A redline comparing Rule 7, as adopted, against the version published for public comment in November 2016 was attached to Afilias' Response to VeriSign, Inc.'s and Nu Dotco LLC's Requests to Participate as Amicus Curiae in Independent Review Process as Annex B. Response, Annex B.

- *Fifth*, McAuley submitted the rules to the Board as having been approved by the IRP-IOT, when in reality (i) no vote had ever been taken and (ii) McAuley had deemed the rules to be approved simply because he had received no comments from any IRP-IOT member.

28. For these reasons, Mr. Donahey rightly questioned the veracity of the IRP-IOT's representations to the Board about its drafting practices. Specifically, the IRP-IOT represented to the Board:

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 IOT 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.⁵⁴

As regards Rule 7, each of these representations was false. Rule 7 no longer remained “as close as possible” to the version of Rule 7 in the Public Comment Draft. Rule 7 went far beyond reflecting the “movement” recommended by the public comments and which had requiring “significant drafting.” Indeed, far from taking “no action to materially expand” Rule 7, the IRP-IOT had done exactly that—despite the lack of a quorum, despite the lack of any meaningful opportunity for the committee to discuss and debate the proposed amendments, and despite the fact that these “significant changes” from the Public Comment Draft were never posted for a second public consultation.

29. Accordingly, having reviewed the record and considered the parties' arguments, Mr. Donahey concluded that “the issues raised in the present matter are of such importance to the global Internet

⁵⁴ Interim Rules, [Ex. VRSN-1], pp. 1-2 (emphasis added).

community and Claimants that they should not be decided by a ‘Procedures Officer,’ and therefore the issues raised are hereby referred to ... the IRP Panel for determination.”⁵⁵ Significantly, Mr. Donahey agreed with the arguments made by ICANN that it was not within his jurisdiction to conclude that the *amicus* provisions were added in violation of the Bylaws, and to deny the Applications on that basis. But—as demonstrated by his factual findings and the closing language of the Declaration—he was sufficiently troubled by the manner in which ICANN added the *amicus* provisions to the Interim Procedures to conclude that he would not grant the Applications, notwithstanding the arguments of ICANN, Verisign, and NDC that he had no choice but to do so based on the language that was added shortly before Afilias commenced this IRP.

30. For these reasons—and for the reasons stated in Afilias’ submissions to the Procedures Officer and in the Amended Request—the manner in which ICANN added the *amicus* provisions to the Interim Procedures violated ICANN’s Bylaws. In adding the *amicus* provisions, ICANN failed to

- apply its “documented policies consistently, neutrally, objectively and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties);”⁵⁶
- “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole ... through open and transparent processes[;]”⁵⁷
- develop and implement policies “though a bottom-up consensus-based multistakeholder process[;]”⁵⁸
- “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;”⁵⁹

⁵⁵ Declaration, p. 38.

⁵⁶ Bylaws, [Ex. C-1], Art. 1, Sec. 1.2(a)(v).

⁵⁷ *Id.*, Art. 1, Sec. 1.2(a).

⁵⁸ *Id.*, Art. 1, Sec. 1.1(a)(i).

⁵⁹ *Id.*, Art. 1, Sec. 1.2(a)(iv).

- “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work[.]”⁶⁰
- “[w]ith respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, ... (i) provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board; [and] (ii) provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments (such comment period to be aligned with ICANN’s public comment practices), prior to any action by the Board;”⁶¹
- comprise the IRP-IOT “of members of the global Internet community” and comply with the requirement that the IRP-IOT “in consultation with the Standing Panel, shall develop clear published rules for the IRP ... that conform with international arbitration norms[.]”⁶² and
- adopt Interim Procedures that are “informed by international arbitration norms and consistent with the Purposes of the IRP” and “published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN[.]”⁶³

Moreover, ICANN’s violations were designed to provide “disparate” (and preferable) treatment to Verisign and NDC:⁶⁴ neither would have been able to even claim a right to *amicus* status but for the eleventh-hour revisions of the Interim Procedures in violation of ICANN’s Bylaws and Rulemaking processes. The Panel should so declare and deny the Applications on that basis.

⁶⁰ *Id.*, Art. 3, Sec. 3.1.

⁶¹ *Id.*, Art. 3, Sec. 3.6(a)(i)-(ii).

⁶² *Id.*, Art. 4, Sec. 4.3(n)(i).

⁶³ *Id.*, Art. 4, Sec. 4.3(n)(ii).

⁶⁴ *Id.*, Art. 2, Sec. 2.3 (“ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”).

IV. THE SCOPE OF *AMICUS CURIAE* PARTICIPATION SHOULD BE LIMITED

31. In the alternative, if the Panel is not prepared at this stage to rule on Afiliias' claim that ICANN's addition of the *amicus* provisions to the Interim Rules violated ICANN's Bylaws, then the Panel should join that claim to the other claims to be decided in Phase II, and allow the Applicants to participate on a provisional—and limited—basis.

32. By their applications, Verisign and NDC seek the right to: (1) submit briefs on all substantive issues; (2) introduce new issues and case-specific evidence beyond what has been submitted by the parties; (3) access all filings and evidence submitted in this IRP; and (4) participate fully at all hearings. In short, Verisign and NDC seek to participate as full parties in this IRP, consistent with their assertion that they are “the real parties in interest” in a dispute about whether ICANN has acted consistently with its Bylaws.⁶⁵ However, while Verisign and NDC demand rights of participation equivalent to a party, they refuse to accept any of the consequences of party participation. Among other things, Verisign and NDC refuse to accept the Panel's ultimate determination as binding upon them, expressly reserving their right to launch a collateral attack in the courts should they disagree with the Panel's ruling.

33. Verisign's and NDC's demands are inconsistent with the scope of *amicus curiae* participation as (i) contemplated by any members of the IRP-IOT, or (ii) as reflected in “norms of international arbitration.” Moreover, although there is no merit to the notion that federal practice in the United States should provide the basis for *amicus* participation in an international arbitration procedure (as suggested by McAuley in meetings of the IRP-IOT), the Applicants' demands are also inconsistent with U.S. federal court practice.

⁶⁵ Request by VeriSign, Inc. to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), ¶ 5; Request by Nu Dotco, LLC to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), ¶ 16.

34. First, the scope of *amicus curiae* participation was never debated within the IRP-IOT, which uniformly understood that such participation would be limited to the submission of a “friend of the court” brief. For example, the first draft of the new Rule 7 language from 3 May 2017 refers expressly to “amicus brief(s)” as the sole vehicle for *amici* participation in an IRP.⁶⁶ McAuley expressly stated during the 18 May 2017 IRP-IOT meeting that the participation of intervenors would be either “as a party or as an amicus brief,” subject to the discretion of the Procedures Officer.⁶⁷ McAuley reiterated his limited view of *amicus curiae* participation at the 7 September 2017 IRP-IOT meeting: “The manner [of intervention] should be up to the procedure[s] officer who may allow such intervention through granting IRP party status or by allowing such [parties] to file amicus [] briefs.”⁶⁸ The “final draft” of 10 October 2017 also expressly limited *amici* participation to the filing of “amicus brief(s).”⁶⁹

35. Other sources informed the IRP-IOT’s view. As McAuley observed at the 23 March 2017 IRP-IOT meeting, the public comments on Rule 7 suggested that “ancillary parties [] might have a right to file an amicus brief, a friend of the court kind of brief.”⁷⁰

36. Second, the Bylaws provide that Rule 7 must “conform with international arbitration norms” and no form of international arbitration endorses the scope of *amicus curiae* participation sought by Verisign and NDC.⁷¹ An *amicus curiae* in international arbitration “is not party,” but rather a “friend of the court” whose purpose is to “assist” the tribunal—which is free to “accept or reject” its assistance—in arriving at a decision

⁶⁶ *Presentation: Suggestions for disparate Joinder comments* (3 May 2017), [Ex. 238], p. 1.

⁶⁷ IRP-IOT Meeting #22 (18 May 2017), Transcript, [Ex. 240], p. 8.

⁶⁸ IRP-IOT Meeting #28 (7 Sep. 2017), Transcript, [Ex. 204], pp. 3-4.

⁶⁹ Email from D. McAuley (VeriSign) to Members of the IRP-IOT (10 Oct. 2017), [Ex. 246], p. 2.

⁷⁰ IRP-IOT Meeting #16 (23 Mar. 2017), Transcript, [Ex. 237], p. 29.

⁷¹ Bylaws, [Ex. C-1], Art. 4, Sec. 4.3(n)(i).

about the issues already before it.⁷² As non-parties, *amici* cannot “consider themselves as simply in the same position as either party’s lawyers” or even suggest “how issues of fact or law as presented by the parties ought to be determined (which is the sole mandate of the Arbitral Tribunal itself).”⁷³ And when allowed to participate, *amici* cannot introduce evidence in their written submissions and are precluded from participating in hearings.⁷⁴ Nor are *amici* granted access to materials from the proceedings to support their briefs, as their participation “is not intended to be a mechanism for enabling [*amic*] to obtain information from the Parties.”⁷⁵

37. *Third*, although the Bylaws provide that the supplementary rules must “conform with international arbitration norms,”⁷⁶ McAuley stated that he based his re-write of Rule 7’s *amicus curiae* provisions on the U.S. Federal Rules of Civil Procedure.⁷⁷ Although *amicus curiae* regularly participate in

⁷² *Aguas Argetinas, S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005), [Ex. 288], ¶ 13.

⁷³ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), [Ex. 289], ¶ 64.

⁷⁴ See, e.g., *Methanex Corp. v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as “*Amici Curiae*” (15 Jan. 2001), [Ex. 290], ¶ 47 (“The Tribunal also conclude[d] that it has no power to accept the [*Amici*’s] requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration.”); *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Letter from Eloïse M. Obadia (Secretary of the Tribunal) to Parties (5 Oct. 2009), [Ex. 291], p. 2 (“The Tribunal does not at this stage envisage that the [*amic*] will be permitted to attend or to make oral submissions at the hearing.”); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), [Ex. 289], ¶ 71 (declining *amicus curiae*’s request to attend or participate in arbitral hearings).

⁷⁵ *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Letter from Eloïse M. Obadia (Secretary of the Tribunal) to Parties (5 Oct. 2009), [Ex. 291], p. 1; *Methanex Corp. v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as “*Amici Curiae*” (15 Jan. 2001), [Ex. 290], ¶ 47 (“The Tribunal also conclude[d] that it has no power to accept the [*Amici*’s] requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration.”); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), [Ex. 289], ¶¶ 66-68 (“[F]or the time being only, and pending a further ruling after the ... hearing, the Arbitral Tribunal denies the [*Amici*’s] application for access to the documents filed by the parties in the arbitration.”).

⁷⁶ Bylaws, [Ex. C-1], Art. 4, Sec. 4.3(n)(i).

⁷⁷ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 14. As described in in footnotes 20 and 54 of *Afilias’ Sur-Reply to Verisign, Inc.’s and Nu DotCo LLC’s Requests to Participate as Amicus Curiae in Independent Review Process*, Verisign and NDC wrongly rely on U.S. Federal Rules of Civil Procedure, which do not apply to international arbitrations under the ICDR Rules and which, pursuant to ICANN’s Bylaws, may not inform the drafting of the Interim Rules. Notwithstanding this, even if the rules of intervention set forth in the Federal Rules were to apply, neither Verisign nor NDC would be permitted to intervene

U.S. litigation, U.S. courts also routinely reject the scope of participation sought by Verisign and NDC in this IRP. In general, *amici* are admitted merely to “assist the court” in resolving an issue already brought before it by the parties, generally by filing an *amicus curiae* brief.⁷⁸ U.S. courts have been clear that *amici* are not “permitted to rise to the level of a named party/real party in interest.”⁷⁹ For this reason, U.S. courts cautiously guard against *amicus curiae* participating in a “totally adversarial fashion” and “effectively control[ling] the future course of the proceedings,” thereby depriving the “real parties [] to expeditiously resolve their own dispute.”⁸⁰ Indeed, requests to participate as an *amicus curiae* are routinely rejected where, as here, the *amici* simply duplicate the arguments made by one party, thereby giving “one side more exposure than the rules contemplate.”⁸¹

38. U.S. courts therefore regularly reject *amicus curiae* requests to “expand the scope of [the case] to implicate issues that were not presented by the parties” or to introduce additional or case-specific

in this IRP. Nor would the rules of *amici* participation in the federal context allow them to “fully participate” in the IRP as requested here.

⁷⁸ *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So.2d 522, 523 (Fla. Dist. Ct. App. 1996), [Ex. 297] (denying motion to file *amicus* as “an attempt to present a fact specific argument of the same type as is contained in the appellants’ 50 page brief”).

⁷⁹ *United States v. Michigan*, 940 F.2d 143, 165-166 (6th Cir. 1991), [Ex. 292] (citing, *inter alia*, *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (“Only a named party or an intervening real party in interest is entitled to litigate on the merits.”)).

⁸⁰ *Id.* (“To condone the fiction of ‘litigating *amicus curiae*,’ in reality an extrajudicial, de facto named party/real party in interest, would extend carte blanche discretion to a trial judge to convert the trial court into a free-wheeling forum of competing special interest groups capable of frustrating and undermining the ability of the named parties/real parties in interest to expeditiously resolve their own dispute and capable of complicating the court’s ability to perform its judicial function.”).

⁸¹ *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So.2d 522, 523 (Fla. Dist. Ct. App. 1996) [Ex. 297] (denying *amicus* brief as unhelpful for being “repetitious of the parties’ briefs” and admonishing against giving one side more exposure in briefs already limited for the parties).

evidence about what the parties did, when, and how.⁸² In other words, *amici* “must accept the case before the court with the issues made by the parties,” and nothing more.⁸³

39. Ignoring all of the above, Verisign and NDC assert that their role in this IRP is “more analogous to intervenors under Federal Rule of Civil Procedure 24” or “indispensable parties” under Federal Rule of Civil Procedure 19.⁸⁴ But Verisign and NDC could have intervened in the IRP as parties under the Supplemental Procedures, but expressly chose instead to apply for *amicus curiae* status.

40. In their briefs, Verisign and NDC assert that ICANN has not acted consistently with its Articles, Bylaws, the AGB, and Auction rules because ICANN (i) has not already delegated .WEB to NDC; (ii) has not already executed a .WEB Registry Agreement with NDC; (iii) has not already allowed NDC to assign the .WEB Registry Agreement to Verisign; and, (iv) did not disqualify Afilias based on allegations that Afilias violated the AGB. Accordingly, Verisign and NDC could have sought intervention or consolidation under Rule 7.⁸⁵ However, as a “CLAIMANT,” Verisign and NDC would, among other things, “be bound by the outcome to the same extent as any other CLAIMANT.”⁸⁶ Neither Verisign nor NDC wanted to be bound by the decision of an IRP Panel. Having rejected the path that would have provided the full rights of participation they seek here, they instead chose to pursue participation as *amici*. By the very terms of the *amicus* provisions they invoke (even putting aside the manner in which those terms were added to the Interim Procedures), that role is extremely limited. A review of the Record before the Procedures Officer demonstrates that the Applicants—if allowed to make lengthy submissions at every stage of these

⁸² *Wiggins Bros., Inc. v. Dep’t of Energy*, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981), [Ex. 295] (holding that “amicus curiae cannot expand the scope of this appeal to implicate issues that were not presented by the parties,” and that “amicus curiae [are] not entitled to introduce additional evidence”); Response, ¶ 97.

⁸³ Response, ¶ 96 (quoting *Commonwealth v. Cotto*, 708 A.2d 806, 808 n. 2 (Pa. Super. Ct. 1998), *aff’d*, 562 Pa. 32, 753 A.2d 217 (2000), [Ex. 294]).

⁸⁴ Nu Dotco, LLC’s Reply in Support of Its Request to Participate as Amicus Curiae in Independent Review Process (5 Feb. 2019), ¶ 48.

⁸⁵ See Interim Rules, [Ex. VRSN-1], pp. 8-9.

⁸⁶ *Id.*, p. 9.

proceedings—will add significantly to the cost and scope of this IRP, while purporting to reserve the right to assert claims based on the same arguments in other fora. At most, the Applicants should be allowed to file a single written brief on the dispute (or on such questions as the Panel decides to put to them) after the Parties have completed their main submissions in Phase II—following which the Parties should be given the opportunity to respond.

V. CONCLUSION

41. For the foregoing reasons, Afilias requests that the Panel find that the *amicus* provisions of Rule 7 of the Interim Rules were adopted by ICANN in violation of its Bylaws, and consequently, that Verisign's and NDC's applications must be denied. In the alternative, should the Panel determine to defer consideration of this issue and permit the participation of the Applicants on a provisional basis, Afilias requests that such participation be limited to what is specifically provided for in the text of Rule 7, consistent with the limited role of *amicus curiae* in international arbitration proceedings.

Respectfully submitted,



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