

**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 SUR-REPLY TO
VERISIGN, INC.'S AND NU DOTCO LLC'S REQUESTS TO PARTICIPATE AS
AMICUS CURIAE IN INDEPENDENT REVIEW PROCESS**

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1. In response to Afilias' Opposition, ICANN, VeriSign, and NDC submitted a total of 77 pages of briefing. Nothing in their submissions or evidence adds anything materially new or refutes the narrative Afilias presented in its Opposition:

- 1) The IRP-IOT was established to draft rules of procedure that reflected the recommendations of the CCWG-Accountability.¹ The IRP-IOT's mandate was further refined by the subsequent amendment of ICANN's Bylaws, which provided that such rules of procedure must "conform with international arbitration norms."² Membership in the IRP-IOT was to be drawn from across the Internet community, reflecting ICANN's multi-stakeholder process. The parts of Rule 7, as adopted, that are in controversy in this IRP do not reflect "international arbitration norms," or for that matter, any norms pursuant to which *amicus curiae* participation in a dispute is permitted. Moreover, they were not the outcome of a "multi-stakeholder process" reflecting the views from "across the Internet community," but rather were the product of VeriSign's insistence and ICANN's acquiescence to VeriSign's pressure.
- 2) Suggestions were floated in June 2016 that "all interested parties be brought to the table" in IRPs, including by way of *amicus curiae* briefing; however, *none* of the six drafts of Rule 7 prepared between July and October 2016 reflected those suggestions. To the contrary, these six drafts *only* provided for a limited right of intervention for entities that could demonstrate Claimant standing under ICANN's Bylaws; that is, entities claiming to have been injured by an ICANN action or inaction violating ICANN's Articles or Bylaws. The Public Comment Draft, published on 28 November 2016, provided *only* for this limited third-party right of intervention. ICANN's representation that broad third-party rights, including *amicus curiae* participation, were always contemplated by the IRP-IOT is simply incorrect.
- 3) In response to the Public Comment Draft, there were three sets of comments addressing Rule 7. The commentators proposed a limited expansion of third-party intervention rights specifically to provide for a right of intervention for winning parties in underlying "process-specific expert panel" proceedings, including by submitting *amicus* briefing. The process-specific expert panels were those that had been established to resolve particular types of objections that were permitted under the New gTLD Applicant Guidebook—"Legal Rights Objections," "Community

¹ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 (Recommendation #7) (23 Feb. 2016), [Ex. 220], p. 3.

² ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) ("ICANN Bylaws"), [Ex. [VRSN] 2], Art. 4, Sec. 4.3(n)(i).

Objections,” and “String Confusion Objections,”³ which were newly subject to challenge at an IRP under the new Bylaws.⁴ None of the Public Comments suggested that a right of intervention, including as an *amicus curiae*, should be extended to any person or entity simply because they asserted an interest in the outcome of an IRP.

- 4) For the next 15 months, the IRP-IOT made it clear, as evinced by its discussions in committee, its draft proposals, and in the draft rules it created, that it would respond to the Public Comments by narrowly expanding Rule 7 to provide for additional intervention rights *only* where an IRP challenged the decision of an underlying “process specific expert panel.” As David McAuley, chair of the IRP-IOT reminded his committee: “We are not displacing rule #7 (Consolidation, Intervention, and Joinder) from the draft supplementary rules ... that went out for comment.”⁵
- 5) After Afilius invoked its CEP rights in June 2018, the text of Rule 7 began to change—and to expand—significantly.
- 6) On 5 October 2018, after four months of inactivity, a new draft set of Interim Procedures was circulated within the IRP-IOT.⁶ Rule 7 of this draft provided for the first time that entities with a material interest in the subject matter of the IRP would be allowed to intervene as *amicus curiae*. This change was not suggested by *any* prior discussion within the IRP-IOT and went far beyond *any* proposal made in the Public Comments. The draft also, for the first time, removed the discretion of the Procedures Officer to deny certain entities the right to submit an *amicus* brief.
- 7) By October 2018, active participation in the IRP-IOT had dwindled to David McAuley of VeriSign, ICANN’s lawyers (in-house and Jones Day), and a couple of other members. As ICANN’s President noted, ICANN’s lawyers are not part of the Internet community. Accordingly, when the IRP-IOT met for those “intensive meetings” in October 2018, it lacked a quorum in each of those meetings.
- 8) On 9 October 2018, VeriSign’s McAuley stated that the October 5 Draft’s version of Rule 7 was insufficient protection for entities with “material interests.” McAuley stated that, rather than discuss the current version, he

³ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. [VRSN] 4], pp. 3-4 – 3-9, 3-16 – 3-17.

⁴ ICANN Bylaws [Ex. [VRSN] 2], Art. 4, Sec. 4.3(b)(iii)(A)(3); CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium (2 Feb. 2017), [Ex. 236], pp. 30, 35-36, 47-56.

⁵ Email from D. McAuley to Members of the IRP-IOT (21 July 2017), [Ex. 207], p. 2.

⁶ ICANN, Independent Review Process – Implementation Oversight Team (IRP-IOT), Plenary Meetings, 2018 Calls, [Ex. 302]; June 2018 Archives by Date (IRP-IOT Messages), [Ex. 303]; July 2018 Archives by Date (IRP-IOT Messages), [Ex. 304]; August 2018 Archives by Date (IRP-IOT Messages), [Ex. 305]; September 2018 Archives by Date (IRP-IOT Messages), [Ex. 306].

would propose an alternative, which he did on 11 October 2018. McAuley proposed that entities with a “material interest” in the subject matter of the IRP must be allowed to intervene as a party. This proposal stood in marked contrast to McAuley’s repeated statements up to this point that Rule 7’s joinder provisions should be strictly limited to participants in underlying “process-specific expert panels” to reflect the Public Comments. McAuley’s proposal also conflicted with ICANN’s position that expanding party rights in an IRP in this way would “open[] up the IRP to be used in ways that are not anticipated to if they don’t meet the requirement that they are alleging a violation that ICANN violated the bylaws.”⁷

- 9) ICANN’s lawyers objected to McAuley’s proposal. But, because of pressure to deliver a set of rules to the Board in two weeks’ time, they accepted that Rule 7 could “account for *a bit broader of representation* than is currently within these rules”⁸ by broadening the scope of entities that could participate in IRPs as *amicus curiae*.
- 10) On Friday 19 October 2018, McAuley circulated a new full set of Interim Procedures to the IRP-IOT. This draft contained a substantially revised Rule 7, which McAuley conceded “*was not exactly as discussed*” within the IRP-IOT. The new text in this Rule 7 created two new classes of mandatory *amici* specifically tailored to allow VeriSign and NDC to participate as of right in this IRP. The 19 October Draft also restricted the Procedures Officer’s discretion to deny participation to two new classes of *amicus curiae*, namely the two classes that were developed at McAuley’s instigation and which VeriSign and NDC now argue unambiguously apply to them.
- 11) Despite the fact that these last minute amendments to Rule 7 were never discussed within the IRP-IOT, McAuley unilaterally declared on Friday 19 October that unless comments were received by Sunday 21 October (*i.e.*, over the course of the weekend), he would (as chair) deem the draft—including this substantially revised Rule 7—to have been approved by the entire IRP-IOT. McAuley did not disclose that his employer planned imminently to invoke these new provisions to its benefit, citing directly to them in an application filed in this IRP weeks later.
- 12) The 19 October Draft was presented to the Board for approval on 25 October. The presentation to the Board misrepresented the nature, degree, and intent of the changes to Rule 7 that had occurred behind closed doors at the 11th hour.

⁷ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 13.

⁸ *Id.*, p. 14 (emphasis added).

- 13) Following the Board’s approval, members of the IRP-IOT suggested that the process by which the Interim Procedures had been drafted and adopted was flawed. These IRP-IOT members stated that this flawed process “*fundamentally compromises the legitimacy*” and “*calls into question*” the Interim Procedures adopted by the Board.⁹

2. The facts demonstrate that VeriSign intentionally undermined ICANN’s rulemaking process for its own ends.¹⁰ The protestations by ICANN and the proposed *amici* that the *amicus curiae* section of Rule 7 unambiguously requires their participation in this IRP misses the fundamental point: the only reason NDC and VeriSign have any path to participate at all is because VeriSign used its insider position specifically to ensure that such a path would exist. VeriSign rigged the rules in its favor and should not now be allowed to benefit from its malfeasance.

3. Moreover, ICANN’s efforts to protect a privileged insider like VeriSign in manipulating the rulemaking process for its own benefit makes a mockery of the Core Values and Commitments by which ICANN is *required* to act—such as employing “open, transparent and bottom-up, multistakeholder policy development processes” and making decisions “by applying

⁹ Email from M. Hutto (Linx) to D. McAuley (VeriSign) (6 Dec. 2018), [Ex. 257], p. 2; Email from M. Rodenbaugh to M. Hutto (Linx) (6 Dec. 2018), [Ex. 277], p. 1 (emphasis added).

¹⁰ In response to Afiliias’ briefing, ICANN has produced several emails between and among Samantha Eisner, David McAuley and lawyers at the Sidley Austin firm. Afiliias objects to this *ad hoc* production and moves that these cherry-picked emails be stricken until such time that ICANN certifies that it has produced *all* relevant emails concerning the workings of the IRP-IOT. In response to Afiliias’ DIDP request seeking such emails, ICANN admitted that it had collected a large volume of documents. Except for these few emails, however, ICANN has refused to produce any additional documents. Specifically, ICANN has not certified that the handful of emails it produced between McAuley and Eisner for the days prior to circulating the 19 October 2018 draft represent all communications between McAuley and Eisner for this period. Indeed, ICANN has not produced any additional “Off-List Correspondences,” despite its commitment to “continue to its review of these emails to determine if additional documents should be publicly disclosed and if so, . . . post these documents on the IRP-IOT community wiki page on a rolling basis.” ICANN DIDP Response to Request No. 20181221-1 (20 Jan. 2019), [Ex. 307], pp. 8-9. Moreover, ICANN refused to produce any correspondence between the members of the IRP-IOT and its legal counsel, stating that such documents “[were] not appropriate for disclosure.” *Id.*, p. 8. Yet while ICANN has now produced a handful of such emails, it continues to refuse to produce the balance (despite having waived whatever privilege claim it might have had). The Procedures Officer should not rule based on such an incomplete and likely cherry-picked production.

documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party” for special or disparate treatment.¹¹

1. AN IRP IS AN ICANN ACCOUNTABILITY MECHANISM

4. Under the Bylaws, an IRP “[e]mpower[s] the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions....”¹² Claimants invoke their right to an IRP to “[e]nsure that ICANN is [held] accountable to the global Internet community and Claimants.”¹³

5. Although VeriSign and NDC feature prominently in the matrix of underlying facts, this IRP is solely about ICANN’s conduct: specifically, ICANN’s failure, in violation of its Articles and Bylaws, to enforce the New gTLD Program Rules. This IRP is Afilias’ effort, as a member of the Internet community, to hold ICANN accountable for what it chose to do and not to do regarding its administration of the .WEB Auction, in light of what VeriSign and NDC agreed to

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6. Third Party Designated Confidential Information Redacted

The only question, therefore, is whether ICANN should have disqualified NDC. Third Party Designated Confidential Information Redacted

¹¹ ICANN Bylaws [Ex. [VRSN] 2], Art. 1, Sec. 1.2(a)(iv) and (v). The IRP-IOT continues to avoid transparency into its workings. On 21 December 2018, Afilias wrote to ICANN’s Board to raise concerns about the process by which the Interim Procedures, and Rule 7 in particular, had been drafted, approved, and adopted. Letter from A. Ali (Counsel for Afilias) to ICANN Board (21 Dec. 2018), [Ex. 260]. Since that time, there have been no reported meetings of the IRP-IOT and no emails have been published in the archive. Indeed, the last email published by the IRP-IOT is from 20 December 2018, one day before Afilias’ letter was sent. December 2018 Archives by Date (IRP-IOT Messages), [Ex. 308].

¹² ICANN Bylaws [Ex. [VRSN] 2], Art. 4, Sec. 4.3(a)(ii).

¹³ *Id.*, Art. 4, Sec. 4.3(a)(iii).

7. Neither VeriSign nor NDC contest any of the foregoing, nor can they.

Third Party Designated Confidential Information Redacted The only issues before the IRP Panel are (i) whether ICANN is correct that NDC did not violate the New gTLD Program Rules; and (ii), if NDC did violate the

¹⁴ Third Party Designated Confidential Information Redacted

¹⁵ Third Party Designated Confidential Information Redacted

¹⁶ Nu Dotco, LLC's Reply in Support of Its Request to Participate as *Amicus Curiae* in Independent Review Process (5 Feb. 2019) ("**NDC Reply**"), ¶ 34 (emphasis added).

¹⁷ Third Party Designated Confidential Information Redacted

¹⁸ NDC Reply, ¶ 40.

¹⁹ *Id.*, ¶ 34 (emphasis added). Third Party Designated Confidential Information Redacted

rules, whether ICANN’s failure to disqualify NDC constitutes a breach of ICANN’s Articles and Bylaws. Accordingly, there are no facts that are uniquely in the possession of either NDC or VeriSign, and NDC and VeriSign therefore are not the “true parties in interest” here. This is an **ICANN accountability mechanism**, not a dispute between Afilias and VeriSign/NDC.²⁰

²⁰ VeriSign and NDC claim that they have a due process right to participate in this IRP, including by presenting evidence and fully participating in hearings before the IRP Panel. Yet, VeriSign and NDC do not—nor could they—request to *intervene* in this IRP. Rule 7 is abundantly clear: intervention is limited to entities with Claimant standing, which neither VeriSign nor NDC possess. VeriSign’s and NDC’s copious references to Rules 19 and 24 of the Federal Rules of Civil Procedure are thus irrelevant, since they expressly concern rights of *intervention*. VeriSign and NDC instead seek to participate as *amicus curiae*, a role traditionally restricted to the submission of “friend of the court” briefs. Yet, *amicus curiae* are not directly involved in an arbitration or litigation; accordingly, the question of due process rights is utterly irrelevant to the issue of whether or not to permit *amicus* briefing here.

Moreover, VeriSign and NDC are incorrect that the concepts set forth in Rule 24 mandate their participation here, even if such standards were to apply. **First**, neither NDC nor VeriSign would be entitled to intervene as of right because “existing parties adequately represent [their] interest.” Fed. R. Civ. Pro. 24(a)(2) (2019), [Ex. 278]. Where “the objective of the applicant for intervention is identical to that of one of the parties,” courts “presume representation is adequate.” *Tri-State Generation & Transmission Ass’n, Inc. v. New Mexico Public Regulation Com’n*, 787 F.3d 1068, 1072-73 (10th Cir. 2015), [Ex. 309] (motion to intervene denied because proposed intervenor’s interests “flowed directly” from same objective as defendant’s, namely to establish constitutionality of defendant’s regulation of plaintiff’s rate increases, and therefore existing defendant “adequately represented” proposed intervenor’s interests). *Id.*, 1073. Here, VeriSign’s and NDC’s interests flow directly from the same objective as ICANN’s, namely to establish that ICANN complied with its Articles and Bylaws in its administration of the New gTLD Program Rules concerning .WEB. The adequacy of ICANN’s representation must therefore be presumed, *id.*, and VeriSign and NDC would not be able to intervene as of right.

Second, neither NDC nor VeriSign would likely be granted intervention under the discretionary standards set forth in Rule 24(b), because, on balance, their participation would burden the parties with unnecessary costs and delay. Rule 24(b) requires a court to consider, in the exercise of its discretion, “whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. Pro. 24(b)(3) [Ex. 278]. Considerations of costs and delay have been cited by courts in denying motions under Rule 24(b). *See, e.g., Tri-State*, 787 F.3d at 1074-75 [Ex. 309]. As Afilias has elsewhere noted, NDC and VeriSign wish their participation in this IRP to be much broader than that of the typical *amicus curiae*; they wish to present evidence (including on novel issues they raise), brief all issues, and argue at hearings, all of which will require Afilias to conduct costly discovery and fight the same battle on three fronts instead of one. The burdens have already begun to mount: in this very motion, just NDC’s and VeriSign’s Reply briefs comprised 50-odd pages of duplicative argument on top of ICANN’s 25-page Reply brief, and the Requests themselves, filed on 11 December 2018, have caused significant additional costs. For the reasons described in the preceding paragraph, ICANN is able to adequately represent NDC’s and VeriSign’s interests in this IRP, and therefore the needless burdens posed by their participation may easily be averted by denying their Requests here.

2. THE PROCEDURES PANELIST SHOULD NOT GIVE EFFECT TO RULE 7

8. As set forth in Afilias' Opposition, the Procedures Panelist should not give effect to Rule 7 of the Interim Procedures (in pertinent part²¹) because the process by which certain language was "added" and "approved" was fundamentally flawed. *First*, as the drafting history²² makes clear, the process by which Rule 7 was developed was non-transparent, did not reflect the consensus of the Internet community, and was designed to further the interests of one company²³ whose employee chaired the IRP-IOT and who manipulated its process to serve his employer's goals. *Second*, given the substantial and material modifications that were made to the Public Comment Draft's version of Rule 7, the IRP-IOT was obligated but failed to seek a second public comment on the language of Rule 7. *Third*, the ICANN Board's vote to adopt Rule 7 was premised on several misrepresentations and omissions of key details.

2.1 The Secretive 11th Hour Addition of the *Amicus Curiae* Provisions Subverted ICANN's Rulemaking Process to Serve VeriSign's Purposes

9. As set forth above and in greater detail in Afilias' Opposition, the Public Comment Draft version of Rule 7 provided only for third party participation rights for entities that could

²¹ Afilias does not challenge the enforceability of the Interim Procedures generally, but rather only those parts of Rule 7 that were added in the 11th hour at the request of VeriSign's employee David McAuley and which were apparently designed to provide VeriSign and NDC a mandatory right to participate in this IRP between Afilias and ICANN; specifically, the following language that NDC and VeriSign have invoked: "... (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."

²² VeriSign and NDC misrepresent Afilias' arguments concerning the drafting history of Rule 7. Afilias does not argue that the language of Rule 7 is, in relevant part, ambiguous. To the contrary, Afilias maintains that the 11th hour additions to Rule 7, made late at night on 19 October 2018 and "deemed approved" by VeriSign's McAuley on 21 October 2018, are suspiciously too perfectly and narrowly drafted. The drafting history demonstrates that the *process* by which Rule 7 was drafted and adopted was flawed and violated ICANN's Bylaws.

²³ Third Party Designated Confidential Information Redacted

demonstrate Claimant standing. Despite comments to allow *amicus curiae* briefing and general recommendations to “bring all interested parties to the table,” the Public Comment Draft provided for neither. Nor did any of the five drafts that preceded it.

10. The three Public Comments received on Rule 7 all requested the same limited expansion of participation rights in IRPs that challenged the decisions of underlying “process-specific expert panels” pursuant to Section 4.3(b)(iii)(A)(3) of the Bylaws.²⁴ The drafting history disproves ICANN’s, VeriSign’s, and NDC’s attempts at revisionist history. For example, prior to the 23 March 2017 IRP-IOT meeting, McAuley circulated slides²⁵ where he summarized the scope of the Public Comments to Rule 7:

IRP IOT Meeting, March 23 rd , 2017	Joinder-related issues
Joinder-related issues (Section 7 of Draft Supplementary Rules):	• From appeals of other panels (Bylaw 4.3.(b)(iii)(A)(3)):
<ul style="list-style-type: none">• From appeals of other panels.• Joinder - Procedures Officer or IRP panel decision?• Page limitation for written statements.	<ul style="list-style-type: none">• <u>Fletcher, Heald & Hildreth</u>:<ul style="list-style-type: none">• Actual notice to all original parties to an expert panel under appeal.• Mandatory right of intervention to parties to expert panel under appeal.• Right for such parties to be heard prior to IRP granting interim relief.• <u>GNSO-IPC</u>:<ul style="list-style-type: none">• Any 3d party directly involved in action below can petition (panel or provider) to intervene as additional claimant or in opposition to claimant.

11. Over the next several months, McAuley made it abundantly clear—when he was not acting “as a participant” but objectively implementing the IRP-IOT’s mandate from CCWG-Accountability—that the *only* expansion to third party participation rights would be in the context of “appeals of other panels” pursuant to Bylaw Section 4.3(b)(iii)(A)(3), as requested by the Public Comments:

²⁴ It is not surprising that the commentators fixated on this discrete limited issue. The October 2016 Bylaws provided, for the first time, that parties who lost before a “process-specific expert panel” could, in essence, appeal that decision in an IRP as a violation of ICANN’s Bylaws. ICANN Bylaws [Ex. [VRSN] 2], Art. IV, Sec. 4.3(b)(iii)(A)(3).

²⁵ IRP IOT Meeting, March 23, 2017 (Joinder Issues), [Ex. 310].

11 May 2017: “Where I think we are on joinder, and it’s as follows: I think we’ve agreed that *anybody that has participated in the underlying expert panel proceedings*, and with respect to a certain section of the bylaw, that they would get – if they participated as a party there and another person challenges that, then those participants below would get full notice of the IRP and the request for IRP.... And all of *those parties would have a right* – a right – to intervene in the IRP.”²⁶

* * * *

18 May 2017: “And, on the joinder issue, you’ve seen the slides that I sent before, and basically *where we have come down on joinder is that anybody that participated in an underlying expert panel proceeding as a party* would receive notice from an IRP claimant, and they would receive a copy of the notice and a request for an IRP, two separate things, but together they constitute the body of the request for IRP.

And, they would be to get the documents, that they would have *such people that participated below would have a right to intervene in the IRP, but the [procedures] officer of the panel would have the final say on how that is executed, whether as a party or as an amicus brief*, and the [procedures] officer would be exhorted to do their best to stick within the timeframes that the bylaws call for in handling IRPs.”²⁷

* * * *

5 June 2017: “Our agreed approach at first reading deals with joinder issues concerning *entities that participated in an underlying proceeding (process-specific panel) as contemplated in Bylaw Section 4.3(b)(iii)(A)(3)*.

Our approach was agreed at first reading following consideration of various public comments received from the first draft public comment period.”²⁸

* * * *

21 July 2017: “*The intent is to allow all ‘parties’ at the underlying proceeding to have a right of intervention*, but that the IRP Panel (through the Procedures Officer) may limit such intervention to that of Amicus in certain cases. *It is not envisioned to allow non-parties from below (or others) to join under these provisions - noting that these provisions just deal with parties below*. We are not displacing rule #7 (Consolidation,

²⁶ IRP-IOT Meeting #21 (11 May 2017), Transcript, [Ex. 206], p. 6 (emphasis added).

²⁷ IRP-IOT Meeting #22 (18 May 2017), Transcript, [Ex. 240], p. 8 (emphasis added).

²⁸ Email from D. McAuley to Members of the IRP-IOT (5 June 2017), [Ex. 241], p. 1 (emphasis added).

Intervention, and Joinder) from the draft supplementary rules ... that went out for comment.”²⁹

21 September 2017: “[W]hat I’m doing is suggesting *only those persons or entit[ies] participating in the under lying proceedings* receive notice from a claimant, this is the *expert panel challenge* instance, of the full notice of IRP and the request for IRP.... The second point I’m suggesting *all such part[ies] have a right to intervene in the IRP*. ... The manner [of intervention] should be up to the procedure officer who may allow such intervention through granting IRP party status or by allowing such parties to file amicus [] briefs.”³⁰

12. This uninterrupted narrative only began to change once Afilias invoked its right to CEP regarding .WEB.³¹ By October 2018, McAuley was proposing something radically different:

9 October 2018: “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].”³²

11 October 2018: “Where members of contracted party houses or others who have contracts with ICANN or others that have contracts that [are] effected by ICANN have to be able to [protect] their interest in *competitive situations*.”³³

²⁹ Email from D. McAuley to Members of the IRP-IOT (21 July 2017) [Ex. 207], p. 2 (emphasis added).

³⁰ IRP-IOT Meeting #28 (7 Sep. 2017), Transcript, [Ex. 204], pp. 3-4 (emphasis added).

³¹ ICANN and VeriSign cite a February 2018 report as evidence that the IRP-IOT intended to expand third party participation rights to those with a “material interest in the subject of the IRP” long before Afilias’ invocation of CEP became public. ICANN’s Reply to Afilias’ Response to the Requests of VeriSign and NDC to Participate as *Amicus Curiae* (5 Feb. 2019), ¶ 42; VeriSign, Inc.’s Reply in Support of Its Request to Participate as *Amicus Curiae* in Independent Review Process (5 Feb. 2019) (“**VeriSign Reply**”), ¶ 39. As explained in our discussion in Afilias’ Opposition of the 8 May 2018 Draft, which tracks the February 2018 report’s language, that interpretation is at odds with the plain language of the text, the broader context of Rule 7, and the discussions within the IRP-IOT up to that date. Afilias Opposition, Sec. 2.1. The exact language contained in the February 2018 report was drafted by Liz Liu, an ICANN lawyer, who in McAuley’s words “tweaked” the October 2017 language to clarify that “directly and causally connected to the alleged violation at issue in the dispute” meant “directly relating to the injury or harm that is claimed by the claimant that has resulted from the alleged violation.” IRP-IOT Meeting #30 (14 Nov. 2017), Transcript, [Ex. 311], p. 9; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (1 Dec. 2017), [Ex. 312], p. 1.

³² IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, [Ex. 202], p. 15 (emphasis added).

³³ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 14 (emphasis added).

13. Thanks to McAuley’s about face, the final revisions to Rule 7—the very language that NDC and VeriSign rely on in support of their applications here—were added late at night, over a weekend, and without any discussion within the IRP-IOT. In short, the language on which VeriSign’s and NDC’s only possibility of participation depends was actively sought by McAuley while “wearing his participant hat,” then circulated on Friday and “deemed approved” on Sunday, both by McAuley while “wearing his leader hat.”³⁴ The 11th hour significant and material revisions to Rule 7 was unnecessarily rushed and secretive, especially given that the IRP-IOT had only been able to meet its quorum requirements at the two “intensive” October 2018 meetings through the improper inclusion of ICANN lawyers.³⁵

14. In sum, the procedures that govern this ICANN accountability mechanism are supposed to reflect the views of the Internet community. The *amicus curiae* provisions of Rule 7, however, reflect only the views of ICANN and VeriSign.

2.2 Rule 7 Should Have Been Posted for a Second Public Comment

15. Separate and apart from the improper drafting and “approval” process that produced the very provisions that NDC and VeriSign argue unambiguously mandate their participation in this IRP, the *amicus curiae* provisions of Rule 7 should not be enforced because the IRP-IOT failed to seek a second Public Comment on them.

³⁴ Email from B. Turcotte (on behalf of D. McAuley (VeriSign)) to Members of the IRP-IOT (19 Oct. 2018), [Ex. 262], p. 2.

³⁵ ICANN cites the support of only one committee member, Malcom Hutto, the very same IRP-IOT member who objected to the process by which the Interim Procedures had been adopted and who now questions their validity. See Email from M. Hutto (Linx) to D. McAuley (VeriSign) (6 Dec. 2018) [Ex. 257]. Moreover, **Mr. Hutto did not comment on the text of Rule 7 that was circulated on 19 October 2018**, specifically the addition of two mandatory classes of *amicus curiae* which precisely capture the position of NDC and VeriSign here.

16. **First**, the specific Bylaws provision that discusses the IRP-IOT and its mandate provides that “[t]he Rules of Procedure shall be published and subject to a period of public comment that complies with the *designated practice for public comment periods within ICANN*.”³⁶ ICANN’s “designated practices for public comments” can be discerned by reference to other Bylaws provisions. For example, policies that “substantially affect third parties” must be published for 21 days prior to adoption, explaining what policies are being adopted and why.³⁷ Elsewhere, the Bylaws provide that recommendations proposed by internal reviews may not be acted upon by the Board unless the results of the reviews have been published for public comment for 30 days.³⁸ Here, by comparison, the 19 October 2018 draft was never published for public comment, nor was it apparently publicly disclosed anywhere prior to the 25 October 2018 Board vote.³⁹

17. **Second**, the IRP-IOT violated its representations to the Internet community that “significant changes to the Rules of Procedure” would be published for public comment.⁴⁰ Members of the IRP-IOT repeatedly stated that they were obligated to seek further public comments where changes to the Public Comment Draft were “significant” or “material.” On 7 December 2017, McAuley, as chair, requested that Bernard Turcotte, an ICANN employee assisting the committee, provide a summary of ICANN’s view on the necessity of seeking a second public comment:

³⁶ ICANN Bylaws [Ex. [VRSN] 2], Art. 4, Sec. 4.3(n)(ii) (emphasis added).

³⁷ *Id.*, Art. 3, Sec. 3.6(a) (emphasis added).

³⁸ *Id.*, Art. 4, Sec. 4.4(a) (emphasis added).

³⁹ Indeed, as of 12 February 2019, no materials for January 2019 have been posted to the IRP-IOT’s website.

⁴⁰ ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), [Ex. 221], pp. 2, 3 (noting that (1) the IRP IOT was “publishing” the draft rules for public comment because it was “recommending significant changes to the Rules of Procedures” and (2) the rules would be sent to the CCWG-Accountability, and then to the Board, for approval only “[i]f there are no significant issues”).

>> DAVID McAULEY: ... So Bernie if you would give us a few pointers on the public comment process.

>> BERNARD TURCOTTE: Thank you. Although we are not officially a Work Stream two project *we have been abiding by the CCWG accountability rules*. Up until now and I think it's worked quite well. So just as a quick reminder, no recommendations can be approved without having gone to public comment at least once. *If there are significant changes that are brought as a result of the first comment, meaning material changes, it is usually the practice to go back out for a second round of public comments* to see what there is there. Also, though in such cases, it's acceptable to say that we are not throwing the whole thing open. Meaning, we don't necessarily, we can say we don't want comments on things that have not been commented on and we may not accept comments on things where there were no material changes and the group has come to a change. So that we don't get into an endless cycle. And this may actually be the best approach in this case. As to focus on the places where there's not a 100% agreement *or where there have been material changes and go back out for a second public comment as specifically on those points*.

Does that answer your question, David?

>> DAVID McAULEY: It does, Bernie, thank you very much.⁴¹

18. McAuley later cited to this standard when proposing that Rule 4 be posted for a second public comment:

This is a *material change* and so this, while I don't think the rules need to go back out for public comment, I think this particular change would *need to go back out for public comment*.⁴²

19. By any measure, the changes made to Rule 7's *amicus curiae* provisions in October 2018 were both "significant" and "material." The fact that these changes went far beyond the limited expansion of third-party participation rights requested in the Public Comments only compounded the necessity of seeking a further public comment on this new text. Yet the IRP-IOT did not do so.

⁴¹ IRP-IOT Meeting #31 (7 Dec. 2017), Transcript, [Ex. 275], p. 8 (emphasis added).

⁴² IRP-IOT Meeting #36 (22 Feb. 2018), Transcript, [Ex. 313], p. 2 (emphasis added).

20. Indeed, by October 2018, the IRP-IOT was out of time to seek a second public comment on these significant and material changes to Rule 7; at the same time that McAuley was pushing for the addition of these expansive *amicus curiae* provisions, ICANN lawyers were also under pressure to finalize a set of rules in advance of the 25 October 2018 Board meeting:

[F]rom our standpoint, from the ICANN Org side, we are getting very nervous that we are on the precipice of having IRPs filed for which we don't have an adequate set of procedures [that] meet the bylaws. So we have that pressure.⁴³

Of course, Afiliias' IRP concerning .WEB was one of the IRPs "on the precipice" of being filed.

2.3 ICANN's Board Adopted Rule 7 Based on Misrepresentations and Material Omissions

21. When the draft Interim Procedures were presented to the ICANN Board for adoption, the Board was not fully informed about the process by which Rule 7 had been most recently amended. Specifically, ICANN staff prepared a set of Rationales for the Board, which stated that:

In drafting these Interim Supplementary Procedures, the IRP IOT applied the following principles: (1) *remain as close as possible* to the current Supplementary Procedures or the Updated Supplementary Procedures *posted for public comment on 28 November 2016*; (2) *to the extent public comments received* in response to the Updated Supplementary Procedures reflected clear movement away from either the current Supplementary Procedures or the Updated Supplementary Procedures, *to reflect that movement* unless doing so would require significant drafting that should be properly deferred for broader consideration; and (3) *take no action that would materially expand any part* of the Supplementary Procedures that the IRP 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.⁴⁴

⁴³ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 15.

⁴⁴ Adopted Board Resolutions | Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314], Sec. 2(e) (at p. 62) (emphasis added).

22. The IRP-IOT, however, violated each of these three principles in drafting Rule 7. *First*, Rule 7 did not “remain as close as possible” to the original Supplementary Procedures (which did not provide for any third-party intervention rights) or the Public Comment Draft (which only provided for third-party intervention rights for entities with Claimant standing). *Second*, as described above and in fuller detail in Afiliias’ Opposition, the changes to Rule 7 made in October 2018 did not “reflect” the Public Comments received on Rule 7. *Third*, by adopting expansive rights for third-party intervention and *amicus curiae* participation, the IRP-IOT was proposing a rule that “represent[ed] a significant change from what was posted for comment and would therefore require a further public consultation.”⁴⁵

23. Further, regarding the IRP-IOT’s work in October 2018 generally, the Board was informed that:

The version considered by the Board today was the *subject of intensive focus by the IOT in two meetings on 9 and 11 October 2018*, convened with the intention of delivering a set to the Board for our consideration at ICANN63. *There were modifications to four sections identified through those meetings, and a set reflecting those changes was proposed to the IOT on 19 October 2018*. With no further comment, on 22 October 2018 the IOT process on the Interim Supplementary Procedures concluded and it was sent to the Board for consideration.⁴⁶

24. The Board was not informed that the IRP-IOT had satisfied its quorum requirement at these “intensive” October meetings only by counting ICANN’s internal and external lawyers.⁴⁷

⁴⁵ Interim Supplementary Procedures [Ex. [VRSN] 1], p. 2.

⁴⁶ Board Resolutions (25 Oct. 2018) [Ex. 314], Sec. 2(e) (at p. 63) (emphasis added).

⁴⁷ While the IRP-IOT was supposed to be comprised of members of the Internet community, it improperly included ICANN lawyers who are not, according to ICANN’s President, part of that community. 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. Goran seems to have that interpretation.”). That the IRP-IOT could only make quorum by counting these lawyers during the “intensive” meetings in October raises serious concerns that ICANN was unduly controlling the development of procedures that are necessary to ensure its accountability to the global Internet community.

Moreover, while the Board was told that there had been “modifications” made to four sections, the Board was led to believe that the 19 October 2018 Draft “reflect[ed] those changes” as “identified through those meetings.” That was plainly not true regarding Rule 7: McAuley himself admitted in his cover note to the 19 October 2018 Draft that “the [joinder] language you will see there is not exactly as discussed on the calls.”⁴⁸

25. The transcript of the 25 October 2018 Board meeting reveals that none of these issues were discussed. Accordingly, the Board was left with a false impression that Rule 7 (1) complied with the drafting principles that the IRP-IOT was required to observe, (2) did not contain significant changes from the Public Comment Draft, since it had not been published for a second Public Comment, and (3) that the “modifications” circulated on 19 October 2018 had already been discussed in “intensive” committee meetings and thus reflected the consensus of the Internet community.

26. Having been materially misled in this manner, the ICANN Board raised no questions about Rule 7 and unanimously voted to adopt the Interim Procedures.⁴⁹ Such a result flies in the face of ICANN’s professed commitment to transparency, honest dealing, and multi-stakeholder policy development. This part of the Rule was changed secretly, with no transparency and no opportunity for stakeholder participation or comment, solely to manufacture a “right” for

⁴⁸ Email from B. Turcotte (on behalf of D. McAuley) to Members of the IRP-IOT (19 Oct. 2018) [Ex. 262], p. 1.

⁴⁹ VeriSign and NDC claim that Afilias should be estopped from contesting Rule 7 since Ram Mohan, an Afilias executive and then-Board member, proposed adoption of the Interim Procedures. Like the rest of the ICANN Board, Mr. Mohan was denied the full story about how Rule 7 had been developed and had no reason to believe that there was anything nefarious about how Rule 7 had been drafted. Moreover, VeriSign’s and NDC’s argument that Mr. Mohan represented Afilias on the ICANN Board is wrong. Like all ICANN Board members, Mr. Mohan participated in his personal capacity and Afilias therefore cannot be bound by his actions in that respect. Indeed, Mr. Mohan’s actions on the Board contrast starkly with Mr. McAuley’s on the IRP-IOT. While Mr. Mohan proposed adopting rules that are not in Afilias’ interests, Mr. McAuley subverted the IRP-IOT’s rulemaking procedures to benefit VeriSign.

VeriSign (the most powerful player in the gTLD space) to participate in this IRP—a right that it never would have had absent its backroom manipulation of the rulemaking process.

2.4 The Procedures Officer Has the Authority to Deny the Requests

27. The office of the Procedures Officer was created to resolve questions regarding requests for consolidation, joinder, and intervention. In short, the Procedures Officer was intended to act as a gatekeeper, admitting those who seek to intervene or consolidate their IRPs only to the extent that doing so would further the interests of the IRP as an ICANN accountability mechanism. To that end, the Public Comment Draft provided that the Procedures Officer would have “reasonable discretion” in considering such requests. The Procedures Officer’s authority remained unchanged through the 8 May 2018 Draft. Here, the Procedures Officer draws his authority from this materially unaltered provision that survives from the Public Comment Draft.

28. Those provisions of the *amicus curiae* rule that seek to strip the Procedures Officer of his authority were adopted improperly in the 11th hour, without the required second public comment period, and are, accordingly, invalid. Indeed, reviewing the entirety of Rule 7 demonstrates that the denial of discretionary authority in three discrete cases makes no sense. Under Rule 7, the Procedures Panelist is only required to consolidate multiple IRPs if, in his discretion, “there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of DISPUTES would foster a just and more efficient resolution....”⁵⁰ Similarly, persons or entities “qualified to be a CLAIMANT pursuant to the standing requirements set forth in the Bylaws” may only intervene in an IRP with the “permission” of the Procedures Officer, who, in his “reasonable discretion” may deny such if he were to determine (based on

⁵⁰ Interim Supplementary Procedures [Ex. [VRSN] 1], Rule 7.

briefing that he may or may not order in his discretion) that the “potential claims of the prospective participant [do not] stem from a common nucleus of operative facts...”⁵¹ There are no classes of *mandatory* intervenors and no IRPs that *must* be consolidated. The only area where the Procedures Officer’s discretion is eliminated concerns, illogically, so-called “friends of the court.” There is no other legal system (other than this one created by VeriSign) where consolidation and intervention in a dispute resolution proceeding are discretionary, but *amicus curiae* participation is not.

29. The Procedures Officer should therefore give full force and effect to those sections of Rule 7 that are materially unaltered from the Public Comment Draft and refuse to enforce the balance. Helpfully, the relevant portions of the invalid sections are underlined in the text of Rule 7 for ease of reference. For the reasons set forth in Afilias’ Opposition, the Procedures Panelist should therefore exercise his discretion under Rule 7 and deny the Requests.⁵²

3. *AMICUS CURIAE* MAY NOT “PARTICIPATE FULLY” IN AN IRP

30. NDC argues that *amicus curiae* under Rule 7 should be deemed “real parties in interest” and that such *amici* “are more analogous to intervenors under Federal Rule of Civil Procedure 24 or “indispensable parties” under Federal Rule of Civil Procedure 19.⁵³ VeriSign

⁵¹ Interim Supplementary Procedures [Ex. [VRSN] 1], Rule 7.

⁵² ICANN argues that Afilias should have moved the Board to reconsider its adoption of the Interim Procedures pursuant to Section 4.2 of the Bylaws or otherwise initiate an IRP challenging the rules. As explained in Afilias’ Opposition and herein, the workings of the IRP-IOT were obscured from public view and Afilias was unaware of the chicanery that led to the improper 11th hour amendment of Rule 7’s *amicus curiae* provisions until it began work on its opposition to the Requests. This led Afilias to write to the ICANN Board on 21 December 2018, roughly one week after the Requests were filed, after the date by which Afilias could formally request Reconsideration under the Bylaws. Accordingly, Afilias will be amending its IRP Request to add claims that the Board’s adoption of the Interim Procedures breached its Bylaws and, by raising Afilias’ costs associated with this IRP, has damaged Afilias.

⁵³ NDC Reply, ¶¶ 43, 48.

similarly argues that *amicus curiae* rights under Rule 7 “must be viewed in the context of Rule 24 of the Federal Rules of Civil Procedure, which provides for intervention as of right for any party that ‘claims an interest relating to the property or transaction that is the subject of the action.’”⁵⁴

31. Even assuming *arguendo* that NDC and VeriSign should be allowed to participate as *amicus* at all, their arguments in support of “full” participation are wrong for three basic reasons. **First**, ICANN’s Bylaws provide that the IRP-IOT “shall develop clear published rules for the IRP (‘Rules of Procedure’) that conform with international arbitration norms.”⁵⁵ While VeriSign and NDC protest that Afilias is being “disingenuous” in pointing to the limited rights given to *amici* in international arbitration, VeriSign and NDC provide no justification for departing from the clear instruction in ICANN’s Bylaws.⁵⁶ **Second**, despite their proposed status as *amicus curiae*, VeriSign and NDC demand party rights that are reserved for intervenors. This is exactly what McAuley proposed on 11 October 2018 that drew objections even from ICANN’s lawyers, which led to the drafting of the current *amicus curiae* language. VeriSign and NDC seek to obtain from the Procedures Officer what McAuley could not in the drafting of Rule 7. **Third**, neither VeriSign nor NDC provide any rationale—because there is none—as to why the Federal Rules of Civil Procedure, which apply in U.S. court litigation, should infuse the interpretation and application of procedures developed to “conform with international arbitration norms.” These proceedings are governed by the ICDR Arbitration Rules (and the Supplemental Rules), and there is no agreement

⁵⁴ VeriSign Reply, ¶ 59 (emphasis omitted). As noted above, VeriSign and NDC wrongly cite U.S. federal case law applying Rule 24 of the 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 Procedures. Moreover, even applying the rules of intervention set forth in the Federal Rules, neither VeriSign nor NDC would be permitted to intervene in this IRP. *See supra* note 20.

⁵⁵ ICANN Bylaws [Ex. [VRSN] 2], Art. 4, Sec. 4.3(n)(i).

⁵⁶ Indeed, the fact that Rule 7 was based on Rule 24(a) of the Federal Rules of Civil Procedure is, in and of itself, evidence that by adopting Rule 7, the ICANN Board breached its Bylaws.

between the parties that the Federal Arbitration Act applies in any respect. In fact, it is Afiliias’ position that the seat of the proceedings out to be outside the United States of America.

3.1 The Interim Procedures Must Reflect “Norms of International Arbitration”

32. The IRP-IOT’s mandate was to implement the recommendation of the CCWG-Accountability by reference to norms of international arbitration. Specifically, the CCWG-Accountability recommended that the IRP Panel “should focus on streamlined, simplified processes with *rules that conform with international arbitration norms* and are easy to understand...”⁵⁷ For this reason, ICANN’s Bylaws provide that the IRP-IOT “shall develop clear published rules for the IRP ... that *conform with international arbitration norms* and are streamlined, easy to understand and apply fairly to all parties.”⁵⁸

33. Participation of *amicus curiae* in international arbitration is limited. As detailed in Afiliias’ Opposition,⁵⁹ where *amici* are allowed to participate, their participation is generally limited to the filing of a “friend of the court” brief. *Amici* in international arbitration are not allowed to submit evidence or argue their case at hearings, let alone “fully participate” as if they were a party to an arbitration. Neither VeriSign nor NDC cites any authority to the contrary.

3.2 VeriSign and NDC Wrongfully Seek Intervention Rights

34. Instead, VeriSign and NDC rely on the Federal Rules of Civil Procedure—which quite clearly do not represent norms of international arbitration—for the proposition that they must be allowed to *intervene* in this IRP and participate fully as if they were parties. This is of course

⁵⁷ CCWG-Accountability Supplemental Final Proposal [Ex. 220], ¶ 52 (emphasis added).

⁵⁸ ICANN Bylaws [Ex. [VRSN] 2], Art. 4, Sec. 4.3(n)(i) (emphasis added).

⁵⁹ Afiliias Opposition, ¶ 95.

exactly what McAuley tried to force through the IRP-IOT on 11 October, two weeks before the Board vote:

In addition, any person, group or entity shall have *a right to intervene* as a CLAIMANT where (1) that person, group or entity claims a significant interest relating to the subject(s) of the INDEPENDENT REVIEW PROCESS and adjudicating the INDEPENDENT REVIEW PROCESS in that person, group or entity's absence might impair or impede that person, group or entity's ability to protect such interest, and/or (2) where any question of law or fact that is common to all who are similarly situated as that person, group or entity is likely to arise in the INDEPENDENT REVIEW PROCESS.⁶⁰

35. McAuley's proposal, however, was rejected. As Samantha Eisner stated:

I have some concerns about the second section that the full paragraph that was added that said in addition any group, person group or entity should have a right as a claimant. ... [O]ne of the things that we had talked about, many times as we were going over this, was the fact that claimant has a very specific definition under the bylaws. And only those people who are not just impacted by the action but impacted because they allege that ICANN [] violated its article or by bylaws those are the only people that qualify as a claimant.⁶¹

Mindful of the need to get a set of rules to the Board in time for its meeting on 25 October, Eisner offered a compromise:

I understand on the whole that this is an issue that we need to make more progress on for -- as the IOT before we have a final set of rules. If we are not able to completely satisfy, because I think there's definitely room to put in some language to account for *a bit broader of representation* than is currently within these rules. I hear that, I see that, I think we can do something quickly on the [interim] rules to get there.⁶²

That compromise resulted in the current *amicus curiae* language. These facts are not contested by either VeriSign or NDC, who readily admit to them.

⁶⁰ New Joinder language from D. McAuley (VeriSign) to Members of the IRP-IOT (11 Oct. 2018), [Ex. 259], p. 2. McAuley's proposal was admittedly based on Rule 24 of the Federal Rules of Civil Procedure. This is further evidence of McAuley's subversion of ICANN's rulemaking processes, as the Interim Procedures were, as per ICANN's Bylaws, to be based on "norms of international arbitration" not U.S. federal court practice.

⁶¹ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], pp. 12-13.

⁶² *Id.*, p. 14 (emphasis added).

36. Yet, VeriSign and NDC have no intention of behaving like true *amici* in this IRP: they demand the *right* to submit briefs on whatever issues they want, the *right* to “fully participate” in all hearings, and the *right* to access all papers filed in this IRP. NDC and VeriSign also clearly claim the *right* to submit case-specific evidence to support their arguments, having now done so again in the second round of briefing. In short, they demand the right to intervene as a party (while conveniently opposing any of the obligations of parties, such as accepting liability for costs, being subject to discovery, and agreeing to be bound by the Panel’s decision). That is entirely inconsistent with the drafting history of Rule 7 and norms of international arbitration.

4. *AMICUS CURIAE* MAY NOT PARTICIPATE IN EMERGENCY PROCEEDINGS

37. ICANN, VeriSign, and NDC argue that prohibiting *amicus curiae* from participating in emergency proceedings under Rule 10 is nonsensical. To the contrary, as the name indicates, emergency proceedings are designed to provide relief on an emergency basis. They almost invariably seek to preserve the *status quo* on a temporary basis—to ensure that a *party* will not be adversely impacted in a manner that the full proceedings cannot rectify. Allowing non-parties to be heard in such expedited proceedings makes no sense whatsoever. Indeed, as this case illustrates, the efforts by VeriSign and NDC to be heard by the Emergency Panelist have slowed the emergency proceedings to a snail’s pace. At this point, it is entirely possible that a full IRP Panel will be in place before the Emergency Panelist has had the opportunity to rule on Afiliias’ emergency application, so that the time and resources that the Emergency Panelist and the parties have devoted to the emergency proceedings will have been for nothing.

38. The conclusion that *amici* may not participate in emergency proceedings is compelled not only by simple logic and common sense, but also by the clear text of Rule 10, which

provides that only *parties* have a right to have their arguments heard in such proceedings.⁶³ The rule clearly states that “any *Party* whose arguments were not considered prior to the granting of such interim relief *may submit any opposition* to such interim relief[.]”⁶⁴ The rule does not state that *amicus curiae* may do so, but is specifically limited to *parties*. For that reason, ICANN’s argument that rules regarding the IRP Panel apply *mutatis mutandis* to the Emergency Panelist is nothing more than an effort to rewrite the Rule to add language that could have been but was not included in the actual text. It is of course the actual text of Rule 10 that must control in this case. ICANN provides no reason for the Procedures Panelist to depart from that text. To do so would not only subvert the plain language of the Rule but also the expedited and streamlined resolution that emergency requests for interim relief are supposed to provide.

39. Finally, there is no truth to the argument that the emergency proceedings arise out of “a tactical maneuver [by Afiliias] to prevent the real parties in interest from briefing on the merits.”⁶⁵ To the contrary, ICANN—acting under pressure from VeriSign/NDC—created the “emergency” that forced Afiliias to seek interim relief on an emergency basis. Specifically, by email dated 14 November 2018, ICANN stated that “[i]f Afiliias does not file its request for *emergency* interim relief with the ICDR on or before 27 November 2018, the .WEB contention set will be taken off the ‘on hold’ status.”⁶⁶ Afiliias responded to ICANN a few days later, noting that “there is nothing to suggest that the removal of the on hold status is either urgent or necessary here” and that “[o]nce the panel is constituted, ICANN can determine whether to seek an early

⁶³ Interim Supplementary Procedures [Ex. [VRSN] 1], Rule 10.

⁶⁴ *Id.* (emphasis added).

⁶⁵ NDC Reply, ¶ 43.

⁶⁶ Email from Independent Review (ICANN) to A. Ali and R. Wong (Counsel for Afiliias) (14 Nov. 2018), [Ex. 315], p. 1.

ruling from the panel as to whether it has the right to change the status of the contention set.”⁶⁷ Nonetheless, ICANN insisted that Afiliias seek interim relief in emergency proceedings simply to preserve the *status quo*. At the initial hearing before the Emergency Panelist, ICANN’s counsel stated that ICANN was under considerable “pressure” (obviously from VeriSign/NDC) to remove the .WEB contention set from its “on hold” status—and that ICANN was therefore unwilling to wait for a full IRP Panel to be constituted for Afiliias’ request for interim relief to be decided.

40. Based on representations made by ICANN before the Emergency Panelist, this is an emergency of ICANN’s own creation, instigated by pressure brought by the industry monopolist, VeriSign, and/or VeriSign’s puppet (NDC). Having caused this emergency, it is the height of duplicity for VeriSign and NDC to claim that this was a tactical decision by Afiliias.

Respectfully submitted,



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⁶⁷ Letter from A. Ali (Counsel for Afiliias) to ICANN (20 Nov. 2018), [Ex. 316], p. 2.