

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

VERISIGN, INC. and NU DOTCO, LLC.

Proposed *Amicus Curiae*.

ICDR CASE NO: 01-18-0004-2702

**DECLARATION OF DAVID MCAULEY IN SUPPORT OF VERISIGN, INC.'S  
REQUEST TO PARTICIPATE AS *AMICUS CURIAE* IN INDEPENDENT  
REVIEW PROCESS**

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VeriSign, Inc.

I, David McAuley, declare as follows:

1. I am employed as a Senior International Policy & Business Development Manager for VeriSign, Inc. (“Verisign”), the prospective *amici* in this Independent Review Process (“IRP”) between Afilias Domains No. 3 Ltd. (“Afilias”) and the Internet Corporation for Assigned Names and Numbers (“ICANN”). I was hired by Verisign in late September 2014 and since that time I have only served on the policy team within Verisign’s Naming organization, focusing on global public policy matters in the areas of Internet governance, including ICANN policy. My employment duties do not include involvement with ICANN’s new gTLD program, or Verisign’s activities with respect to the new gTLD program, including .web. I have personal knowledge of the matters set forth herein and am competent to testify to those matters.

2. From January 2016 to the present, I have served as a member of ICANN’s Independent Review Process -- Implementation Oversight Team (“IRP-IOT”). The IRP-IOT is charged with drafting updated Supplementary Procedures for the Independent Review Process (“Updated Supplementary Procedures”) for adoption by ICANN’s Board in accordance with ICANN’s revised Bylaws effective October 1, 2016.

3. The IRP-IOT was formed in response to a recommendation by the Cross Community Working Group on ICANN Accountability (“CCWG-Accountability”), a working group of ICANN members formed in or about December 2014 to develop a set of proposed enhancements to ICANN’s accountability to the global Internet community. The first phase of this work culminated in a set of recommendations made by the CCWG-Accountability to ICANN’s Board in February 2016, commonly known as “Work Stream 1.” The CCWG-Accountability’s recommendations included enhancements to ICANN’s existing IRP process. Those recommendations with respect to the IRP process ultimately were included in ICANN’s revised Bylaws effective October 1, 2016.

4. The CCWG-Accountability’s recommendations with respect to the IRP process included creation of updated rules of procedure that would govern IRPs. The CCWG-Accountability Work Stream 1, in its final report regarding implementation for

Recommendation 7 concerning IRPs, included the following: “The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.”

5. This recommendation is reflected in Section 4.3(n)(i) of ICANN’s Bylaws, which provide that “An IRP Implementation Oversight Team shall be established ... [and] shall develop clear published rules for the IRP (“Rules of Procedure”) that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight shall have the assistance of counsel and other appropriate experts.”

6. The CCWG-Accountability created the IRP IOT in early 2016 to work on creation of the Updated Supplementary Procedures. The IRP-IOT functioned separately from the CCWG-Accountability, which then turned to addressing a series of unrelated issues designated as “Work Stream 2,” which were to be completed by June 2018. At the time of formation of the IRP-IOT, it was expected that the work of the IRP-IOT could continue past the June 2018 completion date of Work Stream 2.

7. The IRP-IOT initially consisted of 25 members (later expanded to 26). Consistent with ICANN’s multi-stakeholder model of governance, committee members were drawn from a variety of geographical areas and groups that potentially would be impacted by the IRP and the Updated Supplementary Procedures. Among others, the IRP-IOT’s members included me, representing Verisign (a registry operator); Becky Burr, representing Neustar (another registry operator); Malcolm Hutty, representing the Internet Service Providers Association (a pan-European organization representing the interests of Internet service providers); Greg Shatan, representing ICANN’s Intellectual Property Interests Constituency (“IPC”); and Robin Gross, representing ICANN’s Non-Commercial Stakeholders Group (“NCSG”). The IRP-IOT

membership also included ICANN Staff Liaisons, such as Samantha Eisner, and representatives from ICANN's outside counsel, Jones Day.

8. Initially Becky Burr was the lead member of the IRP-IOT. When Ms. Burr stepped down from the committee in November 2016 to join ICANN's Board, I was asked to take the lead in running the committee. To my knowledge, no one objected to my taking the lead, and no one else sought to take the lead in running the IRP-IOT. I have continued to act as the chair of the IRP-IOT through to the present. My duties as chair of the IRP-IOT are primarily administrative, and include tasks such as organizing the IRP-IOT's meetings. The chair of the IRP-IOT does not have the power to determine the substance of the IRP-IOT's meetings or discussions; that is determined equally by each participating member of the IRP-IOT.

9. All IRP-IOT meetings are open to all members of the IRP-IOT committee, although it is not uncommon for members to skip some of the telephonic meetings. However, all committee members are included on all IRP-IOT correspondence, including any drafts of the Updated Supplementary Procedures, and are able to and are encouraged by me to comment on the telephone and by email on issues being considered by the committee. The meetings themselves are transcribed by an automated transcription service and the meeting transcriptions, and correspondence among the IRP-IOT members, along with any documents considered during those meetings, are publicly posted on ICANN's website at

<https://community.icann.org/display/IRPIOTI/Independent+Review+Process+->

[+Implementation+Oversight+Team+%28IRP-IOT%29+Home](https://community.icann.org/display/IRPIOTI/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home) and

<https://mm.icann.org/pipermail/iot>.

10. From the outset, the IRP-IOT retained the law firm of Sidley Austin ("Sidley") as independent counsel to the IRP-IOT. Sidley's role was to assist the IRP-IOT in drafting the Updated Supplementary Procedures and weighing in on questions posed to Sidley by the IRP-IOT regarding the draft procedures. My recollection is that the initial draft of the Updated Supplementary Procedures was created by Sidley, and that Sidley continued to assist the IRP-

IOT off and on thereafter. ICANN staff, in particular Samantha Eisner, was responsible for communicating with Sidley regarding the Updated Supplementary Procedures.

11. The October 1, 2016 Bylaws direct the IRP-IOT to address “issues relating to joinder, intervention, and consolidation of Claims.” (October 1, 2016 Bylaws, § 4.3(n)(iv)(B)). The draft as of October 31, 2016 of the Updated Supplementary Procedures, which was published for input from the ICANN community, limited intervention to “[a]ny person or entity qualified to be a CLAIMANT.” Attached hereto as Exhibit A is a true and correct copy of the October 31, 2016 Updated Supplementary Procedures.

12. The IRP-IOT received multiple comments on the October 31, 2016 draft of the Updated Supplementary Procedures. The majority of the comments addressed proposed Rule 4, which set forth limitations on the time to file an IRP, and provoked comments that were both strongly in favor and strongly opposed to such a limitation. The IRP-IOT also received several comments suggesting that the rules be amended to allow for participation in IRPs by third parties with a significant interest in the dispute. For example, the Intellectual Property Constituency (“IPC”) of the Generic Names Supporting Constituency (“GNSO”) submitted a comment that: “Any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s).” The IPC stressed that “these rights of intervention and joinder are necessary to serve the due process goals of the enhanced IRP.” Attached hereto as Exhibit B is a true and correct copy of the IPC’s comment, which is available at <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdf75S74tOev.pdf>.

13. The IRP-IOT received another comment from the NCSG that echoed the same point: “Currently, the IRP Updated Supplementary Procedures only have the disgruntled party and ICANN as the parties to the proceedings. All others have to apply to [be] accepted -- and the first argument the Claimant’s Counsel makes is “No!” That’s not the procedure in any other litigation forum which practices due process. Everywhere else, all parties to the underlying

proceeding *have the right to intervene -- the right to be heard in the challenge to their proceeding.*” The NCSG further commented that “[s]hould the winning party not have the time and resources to fully engage in the IRP, they should at least be able to file proceedings analogous to *Amicus Briefs* to inform the IRP Panel of information that is materially-relevant to the proceeding and of which the winning party may be in sole possession.” Attached hereto as Exhibit C is a true and correct copy of the NCSG’s comment, which is available at <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfLoCFUVHjfN.pdf>.

14. I understand that Afilius has asserted that the IRP-IOT was only concerned about rights of participation by parties to “process-specific expert panel” proceedings conducted pursuant to Bylaws Section 4.3(b)(iii)(A)(3). Another public comment to the October 31, 2016 draft of the Updated Supplementary Procedures from the Fletcher law firm did comment that third-party participation rights should be added to the Updated Supplementary Procedures for parties that had participated in process-specific expert panel proceedings that became the subject of subsequent IRPs. Several of the drafts of the Procedures, including the final Interim Supplementary Procedures submitted by the IRP-IOT, included participation rights for parties to such proceedings. However, it is not true that the IRP-IOT was only concerned with protection for that limited set of third parties. On the contrary, beginning in 2017, the IRP-IOT began to discuss and then include language in the draft Updated Supplementary Procedures intended to provide a right of participation in IRPs for persons with a material interest in the dispute.

15. During the IRP-IOT’s March 23, 2017 meeting, I proposed, in response to the public comments regarding Rule 7, that, in addition to allowing participation by participants in process-specific expert proceedings, other interested parties (beyond just participants in process-specific expert proceedings) should be allowed to participate as *amici*. Specifically, I stated that “[w]e can also consider whether there are ancillary parties that might have a right to file an amicus brief, a friend of the court brief.” Attached hereto as Exhibit D is a true and correct copy of the transcript of the March 23, 2017 meeting of the IRP-IOT, which is available at <https://community.icann.org/pages/viewpage.action?pageId=64069813&preview=/64069813/64>

079672/IRP-IOT\_Meeting\_23March2017.pdf. My reason for proposing an expanded participation right for third parties, as well as my contributions on the other issues being addressed by the IRP-IOT, such as Rule 4's time for filing an IRP, arose out of my continued examination of ICANN's Bylaws, which directed the IRP-IOT to formulate rules that "ensured fundamental fairness and due process," including by providing for rights of intervention, consolidation, and joinder. (Bylaws, § 4.3(n)(iv)). In my view, expanding third party participation rights was consistent with the public comments the IRP-IOT had received and the IRP-IOT's directive in the Bylaws. It is my understanding that the IRP-IOT shared this belief.

16. I made these comments to the IRP-IOT as a "participant," meaning that they expressed my views as a member of the committee, as opposed to the views of the IRP-IOT as chair of the committee. In my communications with the IRP-IOT, I always tried to identify the "hat" I was wearing when communicating with the committee by identifying myself as a "Participant" when providing my personal views on a subject.

17. The IRP-IOT continued to discuss these issues off and on during 2017. However, during that time period, the committee primarily was focused on how to address the time for filing requirements of Rule 4. There were significant disagreements within the IRP-IOT and reflected in the public comments regarding Rule 4, which required the committee to spend the majority of its time attempting to resolve those differences.

18. In February 2018, the IRP-IOT prepared a draft memorandum to Sidley setting forth proposed revisions to the Updated Supplementary Procedures that reflected the public comments received by the IRP-IOT on the Procedures. The memorandum stated: "With respect to USP, the IRP-IOT plans (1) to use the specific descriptions below to instruct the Sidley-Austin law firm (outside legal advisors to CCWG Accountability and the IRP-IOT) to amend the draft USP by incorporating these revisions in appropriate language (thus explaining directions below in the nature of "we request"), (2) to review the Sidley-drafted amended language for accuracy in reflecting these conclusions, and then (3) to submit the amended draft USP to the ICANN Board for approval in accordance with Bylaw Section 4.3(n)(ii)." Attached hereto as Exhibit E is a true

and correct copy of the IRP-IOT's memorandum to Sidley, which is available at <https://community.icann.org/download/attachments/59643726/IRP.IOT.ReportonPubComments.Rules%28V2%29.pdf?version=1&modificationDate=1519322649000&api=v2>.

19. Specifically, with respect to Rule 7, the memorandum instructed Sidley to amend Rule 7 to provide that “any person, group, or entity” that “*did not* participate in the underlying proceeding” and does not satisfy the standing requirements of the Bylaws “may intervene as an amicus if the Procedures Officer determines, in her/his discretion, that the entity has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute.” (Emphasis added). The memorandum defines “Underlying Proceeding” as “a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)”.

20. On May 8, 2018, Samantha Eisner, on behalf of ICANN, circulated a draft proposed set of Interim Supplementary Procedures for the IRP-IOT's consideration. The proposed Procedures, which were presented in redline against the October 31, 2016 Updated Supplementary Procedures, included participation rights for both parties that *were* participants in process-specific expert panels *and* those that *were not*. With respect to “Intervention and Joinder,” the Interim Supplementary Procedures provided as follows:

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)), (s)he/it/they shall receive notice that the INDEPENDENT REVIEW has commenced. Such a person, group, or entity shall have a right to intervene in the IRP as a CLAIMANT or as an amicus, as per the following:

- i. (S)he/it/they may only intervene as a party if they satisfy the standing requirement to be a CLAIMANT as set forth in the Bylaws.
- ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an amicus.

Any person, group, or entity that *did not participate in the underlying proceeding* may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. *If the standing requirement is not satisfied, such persons may intervene as an amicus* if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed amicus has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly and causally connected to the alleged violation at issue in the DISPUTE.



(Emphasis added). Attached as Exhibit F hereto is a true and correct copy of the May 1, 2018 Interim Supplementary Procedures redlined against the October 31, 2016 Updated Supplementary Procedures.

21. Between May 2018 and September 2018, the IRP-IOT did not meet but did occasionally discuss the Interim Supplementary Procedures. In addition, during this time period, Sidley and/or ICANN drafted revisions to the Interim Supplementary Procedures that further refined the intervention and *amicus* concepts set forth in the May 1, 2018 draft. On September 24, 2018, I emailed the IRP-IOT and proposed that we attempt to complete the Interim Supplementary Procedures by October 11, 2018 so that they could be presented to the ICANN Board at the ICANN 63 meeting in Barcelona on October 25, 2018. Attached hereto as Exhibit G is a true and correct copy of my September 24, 2018 email to the IRP-IOT, which is available at <https://mm.icann.org/pipermail/iot/2018-September/000435.html>. My reasons for sending this email were that the IRP-IOT had been meeting for well over two years, and the new Bylaws had been in effect for two years, yet we still did not have final Supplementary Procedures for IRPs. Based on the draft circulated in May 2018, the IRP-IOT was close to finalizing the Interim Supplementary Procedures and there was no reason the committee could not finish the task by ICANN's October 25 meeting.

22. On October 5, 2018, Bernard Turcotte, an ICANN contractor responsible for supporting the IRP-IOT, circulated an updated draft of the Interim Supplementary Procedures, dated September 25, 2018, to the IRP-IOT. My understanding is that this draft reflected further revisions to the draft Procedures by Sidley, the IRP-IOT's counsel, and/or ICANN. The September 25 draft expanded upon but was consistent with the May 1, 2018 draft and public comments regarding participation by third parties with a material interest in the dispute. Neither the May 1 nor the September 25 drafts of the Interim Supplementary Procedures limited *amicus* participation to parties involved in process-specific expert panels. However, parties that had participated in such panels were "deemed" to have a material interest for purposes of *amicus* participation.

23. Among other things, the new draft clearly separated the concepts of intervention and participation as *amicus curiae*, reserving intervention for those parties qualified to be a Claimant and *amicus* participation for those that did not. With regard to *amicus* participation, the September 25, 2018 draft states:

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL.

Attached hereto as Exhibit H is a true and correct copy of a redline comparing the September 25, 2018 draft of the Interim Supplementary Procedures to the May 1, 2018 draft.

24. The IRP-IOT met on October 9, 2018 to discuss the revised Procedures. During that meeting, I expressed my concern that the provisions for intervention or participation as of right were not sufficiently clear. As I stated during that meeting, I had reviewed the United States Federal Rules of Procedure and was concerned that the proposed rules were not sufficiently clear that parties with a significant interest relating to the subject of the IRP, that would be impaired by adjudication of that interest in their absence, be guaranteed a right to participate in the proceedings. The September 25, 2018 draft guaranteed such rights for parties to process-specific expert panels, but left participation in the discretion of the Procedures Officer in all other instances. Attached hereto as Exhibit I is a true and correct copy of the transcript of the IRP-IOT's October 9, 2018 meeting.

25. On October 11, 2018, I proposed revising the intervention portion of Rule 7 to broaden the mandatory rights of persons with a significant interest relating to the subject matter of the IRP to participate in that IRP. Attached hereto as Exhibit J is a true and correct copy of my October 11, 2018 email to the IRP-IOT, which is available at <https://mm.icann.org/pipermail/iot/2018-October/000449.html>, and my proposed revision to Rule 7. During a meeting later that same day, Ms. Eisner objected to my proposed language on

the ground that it expanded intervention to include persons that did not qualify as Claimants. Ms. Eisner proposed that protection for persons with a significant interest be moved to the *amicus curiae* section of Rule 7. In the discussion that followed, Malcolm Hutty supported my position, stating that “even if you don’t qualify as a claimant, but you satisfy the conditions in this paragraph you should be allowed to intervene as amicus and it shouldn’t be merely discretionary.” Attached hereto as Exhibit K is a true and correct copy of the transcript of the IRP-IOT’s October 11, 2018 meeting.

26. Ms. Eisner subsequently circulated another draft of the Interim Supplementary Procedures that added two categories of entities who would be deemed to have a material interest and thus would be allowed to participate as *amicus curiae*: (a) in an IRP arising out of an application for a new gTLD, persons who were part of a contention set for the new gTLD; and (b) persons whose actions were significantly referred to in the briefings before the IRP Panel. Attached hereto as Exhibit L is a true and correct copy of a October 16, 2018 email from Ms. Eisner to Bernard Turcotte and me setting forth these proposed revisions. This language was developed by Ms. Eisner alone. I never suggested to Ms. Eisner that she should add these two categories of persons who would be deemed to have a material interest for purposes of *amicus* participation.

27. Ms. Eisner and I exchanged emails regarding these proposed revisions over the next several days. I proposed certain revisions but ultimately the language proposed by Ms. Eisner was added to the existing draft of the Interim Supplementary Procedures. On October 19, 2018, Mr. Turcotte, on my behalf as chair of the IRP-IOT, circulated draft Interim Supplementary Procedures to the IRP-IOT, which contained Ms. Eisner’s revisions, and requested the IRP-IOT to “please review these rules and if you have any concern please post to the list by 23:59 UTC on October 21. If we are agreed I will forward for board action.” I expected that members of the IRP-IOT would be looking at the draft rules over the weekend as they were all preparing for the upcoming ICANN meeting starting the next week. Attached hereto as Exhibit M is a true and correct copy of Mr. Turcotte’s October 19, 2018 email to the

IRP-IOT, which is available at <https://mm.icann.org/pipermail/iot/2018-October/000451.html>.

On October 21, 2018, Mr. Turcotte sent a message to the IRP-IOT “to confirm that the deadline is now past and that no responses were received.” Attached hereto as Exhibit N is a true and correct copy of Mr. Turcotte’s October 21, 2018 email to the IRP-IOT, which is available at <https://mm.icann.org/pipermail/iot/2018-October/000452.html>.

28. During the course of our September and October discussions, no one opposed or objected to further clarification of the participation rights of persons with a material interest in an IRP. Indeed, as stated early, Mr. Hutto affirmatively stated his support for stronger participation rights for affected third parties. Ms. Eisner and I disagreed with respect to the specific language to effectuate that goal (ultimately, it was Ms. Eisner’s proposed language, not my own, that was included in the final Interim Supplementary Procedures), but no member of the IRP-IOT disagreed with the proposed approach. In my view, the unanimous approach of the IRP-IOT was because the proposed revisions were merely implementing the participation rights advocated in public comments to the proposed Procedures and supported by Section 4.3(n)(iv) of the Bylaws.

29. Subsequently, I sent the proposed Interim Supplementary Procedures to the ICANN Board for consideration during its October 25, 2018 meeting. I understand that the Board unanimously voted in favor of adopting the Interim Supplementary Procedures.

30. I did not consider sending the proposed Interim Supplementary Procedures to the CCWG-Accountability before submission to the Board. My understanding was that, by October 2018, the CCWG-Accountability Work Stream 2 had been completed and thus the Work Stream 2 working group effectively had been disbanded. In my view, there wasn’t any CCWG-Accountability left to whom to submit the proposed Interim Supplementary Procedures.

31. Neither I nor anyone on the IRP-IOT considered sending the revised Rule 7 of the Interim Supplementary Procedures out for a second round of public comments. The revisions to Rule 7 were made in response to public comments, and reflected the views expressed in those public comments that the Interim Supplementary Procedures should provide additional participation rights for third parties with an interest in the IRP.

32. While I understand generally that ICANN identifies publicly matters subject to the Cooperative Engagement Process (“CEP”), to the best of my knowledge and belief, I was not aware that Afilias had filed a Cooperative Engagement Process (“CEP”) on any subject, including with respect to the .web gTLD while any of the proceedings described in this declaration were ongoing. I do not, in my personal or professional capacities, check ICANN’s website to find out information regarding CEPs or IRPs. I first learned that Afilias had filed an IRP regarding .web a couple of weeks after it had been filed. None of my proposed edits or comments to the Interim Supplementary Procedures were made because of a CEP or IRP by Afilias with respect to .web.

I affirm that the foregoing statements are true and correct to the best of my knowledge and belief.

Dated: February 5, 2019

A handwritten signature in cursive script, appearing to read "David McAuley", written over a horizontal line.

David McAuley