

December 21, 2018

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VIA E-MAIL

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Adoption of the Interim Supplementary Procedures

Dear Members of the ICANN Board:

We write on behalf of Afilias Domains No. 3 Limited (“**Afilias**”) regarding what would appear to be a serious irregularity in the development of the Interim Supplementary Procedures for ICANN’s Independent Review Process (“**Interim Procedures**”), adopted by the Board on 25 October 2018 (the “**Board-Approved Procedures**”). From our review of the drafting history of the Board-Approved Procedures, it appears that VeriSign, Inc. (“**VeriSign**”) likely caused specific language to be included in the final draft of the procedures presented to the Board to support an argument that VeriSign and NDC should be allowed to participate in Afilias’ IRP with ICANN over the .WEB gTLD. In fact, barely six weeks after the Interim Procedures were approved, VeriSign and NDC specifically invoked this very language in an effort to insert themselves into the ICANN-Afilias dispute. We ask that the Board immediately investigate this matter and take whatever action is necessary to address any irregularities, including suspension of the Interim Procedures.

The Board approved the Board-Approved Procedures on the understanding that (i) this version was “as close as possible to” a version of the Interim Procedures made available for public comment on 28 November 2016 (the “**Public Comment Draft**”); and (ii) that the IRP Implementation Oversight Team (“**IRP-IOT**”), the group tasked with developing the new procedures, had “take[n] no action that would ... 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.”¹ The IRP-IOT was presided over by David McAuley, VeriSign’s Senior International Policy and Business Development Manager.

A review of the Interim Procedures’ drafting history, however, reveals that Section 7 of the Board-Approved Procedures—which addresses third parties’ rights of participation in an IRP—is materially different from the version of that section contained in the Public Comment Draft. A redline comparison of the two versions is attached hereto.² The drafting history shows that Section 7’s language was amended at Mr. McAuley’s insistence at the 11th hour, when full discussion within the IRP-IOT (let alone a further public consultation) would not have been possible, and that this was likely intentionally done for the specific purpose of enabling VeriSign to argue that VeriSign

¹ Adopted Board Resolutions | Regular Meeting of the ICANN Board (25 Oct. 2018), 2(e), *available at* <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en>. The IRP-IOT also applied a third principle, which is not relevant to Afilias’ concerns about the Interim Procedures.

² *See* Annex A hereto.

and NDC have standing to intervene in the then-imminent IRP between ICANN and Afilias regarding the .WEB gTLD.³

Responses to the Public Comment Draft

As demonstrated by the attached redline, the Public Comment Draft did not contain any provisions for participation in an IRP by a so-called *amicus curiae* or “friend of the court,” which is precisely the status in which VeriSign and NDC are now seeking to participate the Afilias-ICANN IRP. The Public Comment Draft featured a new Section 7 (“Consolidation, Intervention, and Joinder”), which provided that multiple pending IRPs may be consolidated if based on “a sufficient common nucleus of common facts” and that any person or entity may intervene in an IRP, but only if they satisfied the standing criteria to be a claimant in that IRP, as set forth in ICANN’s Bylaws.⁴ In an accompanying report, the IRP-IOT noted that this new Section had been drafted to address recommendations by the ICANN working group that created the IRP-IOT.⁵

Several public comments addressed this new Section 7. Based on these public comments, the IRP-IOT resolved to amend Section 7 to provide limited intervention for parties that had participated in an underlying procedure before an ICANN expert panel pursuant to Section 4.3(b)(iii)(A)(3) of the Bylaws.⁶ This linkage between a third party’s participation in an IRP and the existence of an underlying expert panel remained part of the internal discussions of the IRP-IOT for many months, and can be seen in drafts of the Interim Procedures as late as May 2018. The concept of *amicus curiae* standing was developed to allow those parties who had participated in such an underlying proceeding, but who lacked claimant standing under the Bylaws, the opportunity to participate in an IRP, thus avoiding any collateral broadening of IRPs.

³ See *Afilias Domains No. 3 Limited v. ICANN*, ICDR Case No. 01-18-0004-2702, Request for Independent Review (14 Nov. 2018), available at <https://www.icann.org/en/system/files/files/irp-afili-as-request-redacted-26nov18-en.pdf>.

⁴ Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (31 Oct. 2016), p. 8, available at <https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>.

⁵ Draft Updated Supplementary Procedures: Report of the IRP IOT (31 Oct. 2016), p. 4, available at <https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-iot-report-31oct16-en.pdf>. ICANN’s Cross Community Working Group on Enhancing ICANN Accountability (“**CCWG-Accountability**”) created the IRP-IOT in March 2016 to draft detailed rules of procedure for IRP enhancements described in the CCWG-Accountability Supplemental Final Proposal Work Stream 1 Recommendations. Those Recommendations only discussed providing a right of intervention to those entities that also satisfied the tests for claimant standing set forth in the Bylaws. No recommendations were made to provide participation rights in an ICANN Accountability Mechanism to *amicus curiae*, let alone any entity that could be significantly affected by a panel’s decision.

⁶ Section 4.3(b)(iii)(A)(3) of the ICANN Bylaws defines a category of Disputes that “resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws.”

VeriSign Undermines ICANN’s Rulemaking Processes for Its Own Benefit

On 18 June 2018, Afilias submitted its Notice Invoking the Cooperative Engagement Process to ICANN. ICANN publicly posted the Notice on 20 June 2018.⁷ On 30 August 2018, counsel to VeriSign (copying counsel to NU DOTCO LLC) wrote to the undersigned, *inter alia*, stating that “[we] are advised that Afilias has engaged a Cooperative Engagement Process” and threatening damages claims against Afilias in the “tens of millions of dollars.”

In September 2018, McAuley drafted a new set of Interim Procedures, which he circulated to the IRP-IOT on 5 October 2018 (the “**5 October 2018 Draft**”). In relevant part, this new draft of Section 7 now contained a new subsection for “Participation as an *amicus curiae*”:

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. 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.

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

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the 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. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.⁸

⁷ CEP and IRP Status Update – 20 June 2018 (20 June 2018), p. 1, *available at* <https://www.icann.org/en/system/files/files/irp-cep-status-20jun18-en.pdf>.

⁸ UPDATED Draft Interim ICDR Supplementary Procedures (25 Sep. 2018), p. 10, *available at* <http://mm.icann.org/pipermail/iot/attachments/20181005/f5a478db/25Sept2018UPDATEDraftInterimSupplementaryProceduresforICANN-0001.doc>.

The 5 October 2018 Draft made two critical changes to the possibility of third-party participation in an IRP reflected in the Public Comment Draft and indeed in any draft prior to Afiliias' invocation of CEP. First, *amicus curiae* standing was greatly expanded to include any entity with a "material interest" in the IRP. Second, entities that had participated in an underlying procedure before an expert panel—heretofore, the *sine qua non* for standing as third-party participant—were deemed to have a "material interest" and were thus granted a mandatory right to participate in the IRP.

At a subsequent meeting of the IRP-IOT on 9 October 2018, McAuley informed the group that he wanted to further revise Section 7, not as the IRP-IOT leader, but "as a participant here":

I do have concern about this and what I believe is that on joinder intervention, whatever we are going [to] call it[,] it's essential that a person or entity have a right to join an IRP if they feel that a significant—if they claim that a significant interest they have relates to the subject of an IRP. And that adjudicating the IRP in their absence would impair or impede their ability to protect that.⁹

On 10 October 2018, Afiliias provided a confidential draft of its IRP Request to ICANN's legal department in the context of its ongoing Cooperative Engagement Process with ICANN over the rights to the .WEB gTLD.

On 11 October McAuley proposed a further revision to Section 7 that significantly expanded the right of a third party to involve itself in an IRP:

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.¹⁰

Later on 11 October 2018, the IRP-IOT met again and discussed Section 7 specifically, including McAuley's new language. A member of ICANN's legal department, noted that McAuley's

⁹ IRP-IOT Meeting Transcript (9 Oct. 2018), p. 15, available at https://community.icann.org/download/attachments/90770283/Transcript_FINAL_IORP-IOT_9Oct2018.pdf?version=1&modificationDate=1539188244000&api=v2.

¹⁰ Email from D. McAuley to Members of the IRP-IOT (11 Oct. 2018), pp. 1-3, available at <https://community.icann.org/download/attachments/95094963/DMc.IRPrules.Joinder%20etc%5B1%5D.pdf?version=1&modificationDate=1539288995000&api=v2>.

proposed language greatly expanded the scope of claimant beyond the narrow definition provided in ICANN's Bylaws and offered to work with McAuley to draft alternative language.

McAuley emailed revised *amicus* rules to members of the IRP-IOT late in the day on Friday 19 October 2018.¹¹ Specifically, he proposed two additional categories of mandatory *amicus curiae*: (1) members of a contention set, and (2) entities that are significantly referred to in IRP filings. The first mandatory category was designed to cover NDC—a member of the .WEB contention set; the second mandatory category was drafted to cover VeriSign—referred to multiple times in Afilias' draft IRP Request, now in the possession of ICANN's legal department.

McAuley then ensured that the IRP-IOT would not have a meaningful opportunity to consider or debate this new language:

As mentioned by Sam, we have an opportunity to have the board accept and approve 'interim rules of procedure' at ICANN 63 but we must move quickly to do so. . . .

I would like to note one particular area—that of Joinder, etc. (Rule 7). As you may recall that I, wearing my *participant* (not leader) hat, had suggested certain text and with Malcom's help we seemed to have achieved compromise.

As Sam attempted to draft the compromise in this respect she encountered difficulty in capturing appropriate language that she felt would be consistent with bylaws. Sam reached out to me in my participant capacity and we discussed over the ensuing days and so the language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity. I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list—a way to try to take advantage of board action at next week's meeting.

Could you please review these rules and if you have any concern please post to the list by 23:59 UTC on October 21.¹²

The events of 19 October were extraordinary. Despite the IRP-IOT's commitment to propose rules to the Board that remained as close as possible to the Public Comment Draft, the leader of the IRP-IOT ("wearing [his] participant (not leader) hat") was now proposing late in the day on a Friday that:

¹¹ Email from B. Turcotte to Members of the IRP-IOT (19 Oct. 2018), available at <https://mm.icann.org/pipermail/iot/2018-October/000451.html>.

¹² *Id.*

- The IRP-IOT consider and adopt a substantial expansion of intervention rights that were not reflected in the Public Comment Draft and which were not reflected in the recommendations of the ICANN working group that the IRP-IOT was tasked to draft into rules of procedure;
- That the IRP-IOP consider and adopt a substantial expansion of intervention rights proposed by its leader, acting in his capacity not as the head of the committee but as a VeriSign participant;
- That the IRP-IOT consider and adopt this substantial expansion of intervention rights without any group discussion and without any disclosure that the amendments were likely drafted to benefit the drafter's employer—VeriSign—in a specific IRP; and
- That despite having worked on the Interim Procedures for over two and a half years, members of the IRP-IOT now needed to review and comment on “language [that was] . . . not exactly as discussed on the calls” and that was **first provided to the IRP-IOT late in the day on Friday by midnight on Sunday**.

Unsurprisingly, given the time of disclosure and the weekend deadline, no comments were received. McAuley thus presented a draft of the Interim Procedures to the Board, containing his 11th hour edits to Section 7 still in redline, the next day.

In its Resolutions adopting the Interim Procedures, the Board noted:

The IOT began consideration of a set of Interim Supplementary Procedures in May 2018. 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.¹³

The Resolutions do not reveal whether the Board was aware of the substantial departure these “modifications” represented from the Public Comment Version of Section 7, nor do the Resolutions explain why modifications to Section 4 did require a second public consultation, while the substantial changes to Section 7 did not. The Resolutions do not explain whether the Board was aware that the VeriSign “modifications” to Section 7 were not made in response to the public comments, but rather at the 11th hour, by the IRP-IOT leader, acting in his “participant” capacity as an employee of VeriSign.

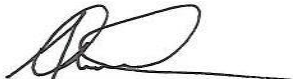
¹³ Adopted Board Resolutions | Regular Meeting of the ICANN Board (25 Oct. 2018), 2(e), *available at* <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en>.

It is also not clear whether the Board was aware that the two “modifications” proposed by VeriSign were likely drafted in anticipation of VeriSign’s and NDC’s imminent applications to intervene in the .WEB IRP. Indeed, what other explanation could there be for providing *amici* standing for members of a “contention set” where an IRP relates to an application in the New gTLD Program? In the two and half years the IRP-IOT had been considering and debating joinder issues, the concept of providing specific standing for contention set members had never been mentioned prior to 19 October 2018. The VeriSign language appears to have been precisely drafted to provide textual support for VeriSign’s and NDC’s eventual plans to seek intervention in Afilias’ IRP.

Rather than propose specific language that would enable his employer to intervene in an imminent IRP, McAuley should have recused himself from all discussions concerning the joinder provisions given his serious conflict of interest between his duty to ICANN and his obligations to his employer VeriSign. Moreover, given the substantial departure from the Public Comment Draft, the proposed Section 7 should have been the subject of a further public consultation before being adopted by the Board.

Afilias’ review of the process by which the Interim Procedures were developed is ongoing and Afilias reserves the right to supplement this submission. But based on what it has discovered to date, Afilias respectfully submits that the Board must, consistent with its commitment to a “bottom-up, multistakeholder policy development process,” suspend the validity of the Interim Procedures subject to a complete and thorough investigation of the process by which they were developed. At a minimum, the Board should declare the entirety of Section 7 ineffective pending a second public comment period.

Sincerely,



Arif Hyder Ali

Annex A

7. Consolidation, Intervention, and ~~Joinder~~²⁴. Participation as an Amicus

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

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

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER. ~~CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.~~²⁵, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

²⁴ There is no existing Supplemental Rule. The CCWG Final Proposal and May 2016 ICANN Bylaws recommend that these issue be considered by IOT. See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B); CCWG Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, 23 February 2016, Annex 07—Recommendation #7, at § 20.

²⁵ See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

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

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

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

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

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

Participation as an Amicus Curiae

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

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

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

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

⁴ During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of amicus curiae and in then considering the scope of participation from amicus curiae, the IRP PANEL shall lean in favor of allowing broad participation of an amicus curiae as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

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