

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

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AFILIAS DOMAINS NO. 3 LIMITED'S  
POST-PHASE I HEARING BRIEF

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15 November 2019

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1. Afilias Domains No. 3 Limited (“Afilias”) addresses in this Phase I Post-Hearing Brief the three issues identified in the Panel’s letter of 9 October 2019.

**Issue 1: The status of the IRP Implementation Oversight Team (the “IRP-IOT” or “IOT”) and its relationship with ICANN and its Board, including the recourses available to a party wishing to challenge the IOT’s conduct or decisions**

2. As a preliminary matter, Afilias understands the Panel’s inquiry to arise from ICANN’s incorrect assertion in its Response to Afilias’ Amended Request for Independent Review Process that “Afilias challenges conduct by the IRP-IOT only; it has not alleged any inappropriate conduct by ICANN in the adoption of the Interim Supplementary Procedures and thus does not even have standing to pursue these claims in an IRP against ICANN.”<sup>1</sup> Similarly, at the Phase I hearing, ICANN’s counsel asserted that “Mr. McAuley and the IOT are not members of ICANN’s Board, nor are they ICANN’s directors, officers or staff. So, the actions or inactions of Mr. McAuley and the IOT ... are not the proper subject of an IRP.”<sup>2</sup> ICANN is wrong for three reasons.

3. ***First***, as discussed in Afilias’ Amended Independent Review Process (“IRP”) Request, and in Afilias’ briefing to the Procedures Officer (which Afilias specifically incorporated by reference in the Amended IRP Request<sup>3</sup>), Afilias’ claim is not limited to the conduct of the IRP-IOT. While Verisign’s David McAuley (the IRP-IOT Chair) instigated the eleventh-hour changes to Rule 7, he did so “***with the knowledge and assistance of ICANN personnel***”<sup>4</sup>—including, in particular, ICANN’s Samantha Eisner. Indeed, ICANN itself argues that Ms. Eisner drafted the changes made to Rule 7 in October 2018 that are the subject of Afilias’ claim.<sup>5</sup> There is also no dispute that ICANN staff—and in particular, Ms. Eisner and Mr. Bernard Turcotte<sup>6</sup>—were, along with Mr. McAuley, crafting and approving the procedures laid out in Mr. McAuley’s October 19<sup>th</sup> email that allowed him to “deem” the draft Rules approved notwithstanding the lack of any discussion or any vote on the “admittedly new”

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<sup>1</sup> ICANN’s Response to Amended Request for Independent Review Process (31 May 2019), ¶ 82.

<sup>2</sup> Transcript of Phase I Hearing (2 Oct. 2019), 7:5-8 (Mr. Steven Smith).

<sup>3</sup> Afilias’ Amended Request for Independent Review (21 Mar. 2019) (hereinafter, “Amended IRP Request”), ¶ 84.

<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> ICANN’s Supplemental Brief Regarding Phase I Issues (27 Sep. 2017) (hereinafter, “ICANN’s Supplemental Brief”), ¶ 10.

<sup>6</sup> Mr. Turcotte is an ICANN consultant who was specifically designated by ICANN to support the IOT.

Rule 7. Given that Ms. Eisner is an ICANN Deputy General Counsel and staff liaison to the IOT, Afilias' claims expressly encompass the actions of ICANN staff.

4. Moreover, Afilias has demonstrated (and the Procedures Officer effectively found) that the draft Interim Procedures submitted to the Board on 22 October 2018—and formally adopted by the Board on 25 October 2018—contained material misrepresentations to the Board about the “principles” that the IOT supposedly followed in preparing and submitting them for Board approval. These misrepresentations are included in the preamble to the Interim Procedures that were then adopted by the Board.<sup>7</sup> ICANN's legal department was involved in drafting these misrepresentations, which were directly incorporated into the Board's Rationale for its Resolution adopting the Rules.<sup>8</sup> Shortly after Verisign and NDC sought to appear as *amici* in this IRP in early December 2018, Afilias began examining the drafting history underlying these 11<sup>th</sup> hour changes to Rule 7 (which ICANN slowly started to make publicly available beginning in October 2018, continuing through April 2019). On 21 December 2018, Afilias submitted a letter to the ICANN Board, reporting what it had learned to that date, including, for example:

The drafting history shows that Section 7's language was amended ... at the 11<sup>th</sup> hour, when full discussion within the IRP-IOT (let alone a further public consultation) would not have been possible, and that this was likely ... done for the specific purpose of enabling VeriSign to argue that VeriSign and NDC have standing to intervene in the then-imminent IRP between ICANN and Afilias regarding the .WEB gTLD.<sup>9</sup>

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<sup>7</sup> Thus, the draft submitted to the Board misrepresented, *inter alia*, that the Interim Procedures “remain[ed] as close as possible to the current Supplementary Procedures or Updated Supplementary Procedures posted for public comment on 28 November 2016[.]” and that nothing in the Interim Procedures “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.” ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314], Sec. 2(e) (at p. 62). The assertions were simply false. Again, these misrepresentations remain in the preamble to the Interim Procedures. See Afilias Domains No. 3 Limited's Supplemental Brief on the Procedures Officer's Declaration and the Scope of *Amicus Curiae* Participation in Independent Review Process (27 Sep. 2019), ¶¶ 26-28; Procedures Officer Declaration (28 Feb. 2019), ¶¶ 104-105.

<sup>8</sup> ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314], Sec. 2(e) (at p. 62).

<sup>9</sup> Letter from A. Ali (Counsel for Afilias) to ICANN Board (21 Dec. 2018), [Ex. 260], Exhibit 1, pp. 1-2; 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 (12 Feb. 2019), ¶ 3, n. 11; *id.*, ¶ 29, n. 52.

Afilias requested the Board to “suspend the validity of the Interim Procedures subject to a complete and thorough investigation of the process by which they were developed.”<sup>10</sup> The Board has yet to respond to Afilias’ letter. As stated in Afilias’ Amended Complaint, “ICANN’s effectuation of the rule changes” violates numerous ICANN Bylaws.<sup>11</sup> ICANN’s “effectuation of the rule changes” of course includes the involvement of ICANN staff in drafting the changes; the Board’s adoption of the rule changes; the Board’s failure to amend or withdraw the eleventh-hour *amici* provisions; and ICANN’s continued reliance on the rule changes in this IRP. Afilias has plainly identified “Covered Actions” within the meaning of Article 4.3(b)(ii) of the Bylaws, *i.e.*, “actions or failures to act by or within ICANN committed by the Board, Individual Directors, Officers, or Staff members that give rise to a Dispute.”<sup>12</sup> Even assuming *arguendo* that anyone could conclude that the IOT is not part of ICANN, Afilias has identified actions and failures to act by ICANN’s staff members and the Board that violates the Bylaws.

5. **Second**, the IOT is part of ICANN. The IOT’s conduct (including its compliance with ICANN’s Bylaws) must be considered in determining whether ICANN’s staff and ICANN’s Board have acted consistently with the Bylaws in adopting and adhering to the *amicus* provisions of Rule 7. The IOT is a creation of ICANN’s current Bylaws, adopted on 27 May 2016, which required revised rules for ICANN’s accountability and review mechanisms, including for the IRP. ICANN’s new Bylaws specifically require ICANN to establish the “IRP-Implementation Oversight Team” (*i.e.*, the IRP-IOT). According to Article 4.3(n)(i) of the Bylaws:

An IRP Implementation Oversight Team ***shall be established*** in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established[,] the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP (“**Rules of Procedure**”) that conform with

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<sup>10</sup> Letter from A. Ali (Counsel for Afilias) to ICANN Board (21 Dec. 2018), [Ex. 260], Exhibit 1, p. 7. In the alternative, Afilias asserted that the Board should at least “declare the entirety of Section 7 ineffective pending a second comment period.” *Id.*

<sup>11</sup> Amended IRP Request, ¶ 88.

<sup>12</sup> “Disputes” include, *inter alia*, claims “that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws ...” ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) (hereinafter, “Bylaws”), [Ex. C-1], Art. 4.3(b)(iii)(A).

international arbitration norms and are streamlined, easy to understand and apply fairly to all parties.<sup>13</sup>

6. At an IOT meeting in December 2018, Ms. J. Beckwith Burr—an ICANN Board member and former IRP-IOT Chair, who has submitted a Witness Statement on behalf of ICANN in this case—explained that the IOT is “*a specific function* identified in the by-laws for implementation of the IRP[ ] rules.”<sup>14</sup> In response to a question from an IOT member as to the source of the IOT’s authority, Ms. Burr reiterated that the Bylaws represent the “document” that “governs” the IOT’s authority.<sup>15</sup>

7. ICANN argues here that its Board’s conduct must be evaluated under California’s business judgment rule. That is incorrect. ICANN must carry out its activities “in conformity with relevant principles of international law” as well as “local law.”<sup>16</sup> But even within the context of California’s business judgment rule, ICANN’s argument is unavailing because the Bylaws restrain the Board’s discretion in respect of the IOT. Not only do the Bylaws mandate that ICANN shall establish the IOT,<sup>17</sup> removing all Board discretion to do otherwise in its good faith judgment; the Bylaws further provide that the Rules proposed by the IOT “shall ... take effect upon approval by the Board, such approval not to be unreasonably withheld.”<sup>18</sup> The Board’s discretion to reject IOT proposed rules is thus limited by an objective reasonableness standard that is more restrictive than California’s business judgment rule. The corollary is that, even under the business judgment rule, once the Board learned that the process by which the *amicus* provisions violated the Bylaws in numerous respects (including for the discriminatory purpose of benefitting Verisign and NDC at the expense of Afilias), the Board was required to invalidate those provisions. Instead, the Board failed to act.

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<sup>13</sup> *Id.*, Art. 4.3(n)(i) (emphasis added).

<sup>14</sup> IOT Meeting #45 (13 Dec. 2018), Transcript, [Ex. C-82], p. 7 (emphasis added). Indeed, this was a mission critical function that was imposed on ICANN by the U.S. Government as a condition to transferring the IANA function to ICANN in 2014.

<sup>15</sup> *Id.*, p. 11 (“But in the meanwhile, the by-laws provision is the document that I think governs.”).

<sup>16</sup> Bylaws, [Ex. C-1], Art. 1.2(a). See also ICANN, Articles of Incorporation (approved on 9 Aug. 2016, filed on 3 Oct. 2016), [Ex. C-2], Art. III.

<sup>17</sup> Bylaws, [Ex. C-1], Art. 4.3(n)(i).

<sup>18</sup> *Id.*, Art. 4.3(n)(ii). The restriction on Board’s discretion to reject IOT proposed rules is unique. For example, Article 4.3(n)(iii) does not similarly limit the Board’s discretion to reject rules proposed by the Standing Panel. Indeed, the IOT’s authority under the Bylaws is materially different from, for example, an advisory committee (like CCWG-Accountability or the GNSO), which “have no legal authority to act for ICANN” and are thus limited to “report[ing] their findings and recommendations to the Board.” *Id.*, Art. 12.1.

8. For these reasons, the IOT can only be viewed as a part of ICANN, established pursuant to the ICANN Bylaws and exercising authority delegated by the ICANN Board to, among other things, draft rules of procedure for the IRP. In 2014, ICANN assumed the obligation to strengthen its accountability mechanisms, an obligation that is reflected in the Bylaws it adopted in May 2016. While ICANN has authority to determine its own internal accountability mechanisms—including the substance of the Rules governing IRPs—ICANN's Bylaws require it to delegate that authority to the IOT. While the Board retains some ability to reject Rules drafted by the IOT, it may not do so unreasonably. Accordingly, the IOT assumed at least part of ICANN's authority to draft the Rules for IRPs, *i.e.*, as Mr. Turcotte observed, it is ***“fully within the IOT's power, and in alignment with the Bylaws”*** to determine the substance of the Rules governing IRPs.<sup>19</sup> IRP-IOT misconduct is therefore subject to accountability to the community via the IRP. ICANN defines “accountability” as “the existence of mechanisms for independent checks and balances as well as for review and redress”<sup>20</sup> and the IRP has been described by members of the IOT, Cross-Community Working Group on Enhancing ICANN Accountability (“**CCWG-Accountability**”), and the ICANN Board as an “independent judicial function.” It would be illogical for ICANN to be able to avoid accountability by outsourcing such authority to a third party.

9. ***Third***, even if the IOT is viewed as independent of ICANN, ICANN cannot avoid its accountability to the internet community by simply outsourcing mission critical projects. The Bylaws provide that their “Commitments and Core Values ***are intended to apply in the broadest range of circumstances.***”<sup>21</sup> The Commitments, in particular, “reflect ICANN's fundamental compact with the global Internet community and are intended to apply ***consistently and comprehensively to ICANN's activities.***”<sup>22</sup> Indeed, the sole reason that the CCWG-Accountability was created, the Bylaws amended, the IRP-IOT formed, and the IRP strengthened, was that the U.S. government required ICANN to do so as a condition of transferring the IANA functions to ICANN.

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<sup>19</sup> IRP-IOT Meeting #44 (29 Nov. 2019), Transcript, [Ex. C-83], p. 10 (emphasis added).

<sup>20</sup> ICANN, Recommendations to Improve ICANN Staff Accountability, *available at* <https://www.icann.org/public-comments/accountability-recs-2017-11-13-en> (last visited 13 Nov. 2019), [Ex. C-84], p. 4.

<sup>21</sup> Bylaws, [Ex. C-1], Art. 1.2(c) (emphasis added).

<sup>22</sup> *Id.* (emphasis added).

ICANN cannot avoid its obligation to strengthen its accountability mechanisms by delegating responsibility for doing so to a committee that supposedly has no accountability and then take no action when its breaches of the Bylaws have been reported to the Board. ICANN's position here, that it is not accountable for the procedural faults and material misrepresentations made by the committee created by ICANN's own Bylaws to draft the rules of this accountability mechanism is fully incompatible with ICANN's undertakings to the U.S. government and to the Internet community. ICANN's position would leave a party wishing to challenge the IOT's conduct or decisions with no recourse—a position that is in itself inconsistent with the fundamental requirements of the Bylaws.

**Issue 2: The timeliness of Afiliias' Rule 7 Claim, in light of the arguments set out in para. 31-32 of ICANN's Supplementary Brief**

10. Afiliias timely filed its Rule 7 Claim on 21 March 2019. Rule 4 of the Interim Procedures provides that an IRP must be commenced “no more than 120 days after a CLAIMANT *becomes aware* of the material effect of the action or inaction giving rise to the DISPUTE ....”<sup>23</sup> ICANN incorrectly asserts that “the ‘material effect’ of the asserted violation must be the Board’s allegedly wrongful adoption of Rule 7 ... on October 25, 2018.”<sup>24</sup> Once again, ICANN ignores Afiliias’ actual claim and the record before the Panel.

11. When ICANN approved the Interim Procedures (including the *amicus* provisions) on 25 October 2018, Afiliias had no reason to know about the “process” by which the *amicus* provisions had been slipped into Rule 7 over the preceding weekend. Afiliias therefore had no reason to know that that process violated ICANN's Bylaws—let alone reason to be aware of the “material effect” of those violations. Indeed, as stated in Afiliias’ Amended IRP Request and its submissions to the Procedures Officer—and as demonstrated by the factual findings of the Procedures Officer’s Declaration—Afiliias also had no reason to believe at the time that the IOT, in conjunction with ICANN staff, had materially misrepresented the process by which *amicus* provisions were

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<sup>23</sup> Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted October 25, 2018), [Ex. VRSN-1], Sec. 4 (at p. 5) (emphasis added). Article 4.3(n)(iv)(A) of the Bylaws specifically provide that the IRP Rules of Procedure must set forth “[t]he time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute[.]” Bylaws, [Ex. C-1], Art. 4.3(n)(iv)(A).

<sup>24</sup> ICANN's Supplemental Brief, ¶ 32.

prepared and inserted in Rule 7.<sup>25</sup> Based on the Board Resolutions justifying the adoption of the Rules, Afilias had no reason to know or even suspect that Mr. McAuley, with the assistance of ICANN staff, had fundamentally redrafted the *amicus* provisions in the 11<sup>th</sup> hour to *require* the participation of parties in the situation of Verisign and NDC as *amici* in this IRP.

12. On 5 December 2018—roughly six weeks after the Board approved the Interim Procedures—Verisign and NDC informed the ICDR of their intent to participate as *amici* in this IRP.<sup>26</sup> On 11 December 2018, Verisign and NDC formally submitted their applications to participate as *amici*. Prior to that time, Afilias had no reason to examine ICANN’s internal documentation leading to the adoption of the *amicus* provisions. In the process of preparing its response to the *amicus* applications, Afilias questioned why Rule 7 appeared to have redlined notations under the very sections relied upon by Verisign and NDC in their applications. Accordingly, Afilias began to review the voluminous drafting history of Rule 7 at that time. Based on the available documents, Afilias stated its concerns to the Board in its letter dated 21 December 2018. In conveying those concerns—and asking the Board to undertake an investigation of the matter—Afilias specifically stated that it was continuing to review the issue:

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.<sup>27</sup>

13. Indeed, because the documentation appeared incomplete regarding the 11<sup>th</sup> hour edits to Rule 7, Afilias also submitted a DIDP Request (i.e., a request made under ICANN’s “Document Disclosure Policy”) on 21 December 2018. The DIDP Request sought “[a]ll communications between Samantha Eisner and David

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<sup>25</sup> See *supra* at ¶ 4.

<sup>26</sup> Letter from NDC & Verisign to ICDR (5 Dec. 2018), [Ex. C-85], p. 1.

<sup>27</sup> Letter from A. Ali (Counsel for Afilias) to ICANN Board (21 Dec. 2018), [Ex. 260], Exhibit 1, p. 7 (emphasis added).

McAuley concerning the development, drafting, text, effect, or interpretation of the Interim Procedures ... including all communications concerning or that reference the modifications to Section 7 that were circulated to the IRP-IOT on 19 October 2018.”<sup>28</sup> As Afilias has previously reported to this Panel, in ICANN’s response to the DIDP Request, dated 20 January 2019, ICANN stated that “it has begun publishing responsive emails” as “Off-List Correspondences” (i.e., correspondence that ICANN did not routinely post to the IRP-IOT website).<sup>29</sup> ICANN proceeded to publish six (6) emails, all of which it cited in its briefing to the Procedures Officer. Even after the Procedures Officer issued his Declaration on 28 February 2019, the record provided by ICANN appeared incomplete. Accordingly, in April 2019, Afilias submitted a second DIDP Request. Beginning on 26 April 2019, and continuing through early May 2019, ICANN proceeded to post *an additional eighty-six (86) documents* responsive to the DIDP Request that Afilias had made in *December 2018*.<sup>30</sup> The documents produced in April-May 2019 included the 12 October 2018 email between Mr. McAuley and Ms. Eisner, for which Afilias sought leave to add to the record on 20 September 2019 (which leave the Panel granted on 1 October 2019),<sup>31</sup> and which was discussed at the Phase I hearing.

14. Given this record of misrepresentation, concealment, and extraordinary delays by ICANN in producing documents revealing the violations at issue, ICANN’s assertion that Afilias was aware of “the material effect of the action or inaction” giving rise to the Rule 7 claim on 25 October 2018—when the ICANN Board adopted the Interim Procedures—is most charitably described as lacking in merit. Looking at the record in the light most favourable to ICANN, the earliest date on which Afilias was aware of “the material effect” of the Bylaw violations committed in adding the *amicus* provisions to Rule 7 is 5 December 2018—when Verisign and NDC announced their intention to the ICDR to submit applications to participate as *amici*. Again, Afilias had no reason to examine the drafting history behind the *amicus* provisions prior to that date—and even then, ICANN had failed

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<sup>28</sup> *Id.*, p. 3.

<sup>29</sup> See Letter from Afilias to the Panel (30 Sep. 2019), p. 2.

<sup>30</sup> See *id.*

<sup>31</sup> Letter from the Panel to Parties & Proposed Amici (1 Oct. 2019), p. 2.

to disclose the most relevant documents to the public as of the date. But even assuming *arguendo* that the 120-day period should commence on 5 December 2018, such period would not have elapsed until 4 April 2019. Again, Afiliias filed its Amended IRP Request on 21 March 2019.

15. Furthermore, ICANN ignores that Afiliias' claim is not limited to the violations of the Bylaws committed by the IRP-IOT and ICANN staff in the manner in which they added the *amicus* provisions to Rule 7. Afiliias' claim includes the Board's failure to address those violations, even after receiving Afiliias' 21 December 2018 letter, the record before the Procedures Officer, and the Procedures Officers' Declaration. Indeed, the inaction of ICANN to take any corrective action—and its insistence that “[this] Panel is obligated to apply Rule 7 according to its terms unless and until ICANN’s Board amends or withdraws it”<sup>32</sup>—constitute ongoing violations of the Bylaws, the material impact of which continues to accrue.

16. Finally, even assuming *arguendo* that the Panel were to conclude that Afiliias “became aware of the material effect of the action or inaction” giving rise to this claim on 25 October 2018 (which conclusion would be in error), ICANN should be equitably estopped from contesting the timeliness of Afiliias' Rule 7 Claim. That is because ICANN consented to the addition of the claim by Afiliias in an amended IRP Request that would only be made *after* the Procedures Officer issued his Declaration.

17. Afiliias expressly informed ICANN counsel via email on 9 January 2019 that it intended to amend its Request for IRP. Afiliias explained to ICANN that it would “make sense to wait until after Mr. Donahey’s ruling ... before agreeing upon a schedule for Afiliias to submit the [A]mended IRP [R]equest”<sup>33</sup> because, in part, the amendment may be “based on matters that arise from the legislative history briefing and Mr. Donahey’s decision concerning these matters.”<sup>34</sup> ICANN *agreed* to this proposal.<sup>35</sup> The Procedures Officer, however, did not issue his Decision until 28 February 2019—well after ICANN claims that the limitations period concluded for Afiliias' Rule

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<sup>32</sup> ICANN's Supplemental Brief, ¶ 43.

<sup>33</sup> Email from A. de Gramont (Counsel for Afiliias) to J. LeVee et al. (Counsel for ICANN) (9 Jan. 2019), [Ex. C-86].

<sup>34</sup> Email from A. de Gramont (Counsel for Afiliias) to J. LeVee et al. (Counsel for ICANN) (10 Jan. 2019), [Ex. C-87].

<sup>35</sup> Email from J. LeVee (Counsel for ICANN) to A. de Gramont (Counsel for Afiliias) (10 Jan. 2019), [Ex. C-88].

7 Claim. ICANN cannot not raise a timeliness argument where ICANN (1) knew that Afilias planned to submit its Rule 7 Claim after 22 February 2019; and (2) *consented* to Afilias submitting its Rule 7 Claim after 28 February 2019. ICANN cannot now raise the timeliness issue after Afilias relied on its consent in regards to the submission of the Amended IRP Request.

18. For the foregoing reasons, the Panel should reject ICANN's timeliness objection.

**Issue 3: The relevance (if any) to the resolution of Phase 1 issues, of the authority given to IRP Panels under section 4.3(o)(v) of the Bylaws, to "take such other actions as are necessary for the efficient resolution of Disputes"**

19. If the Panel decides not to declare the *amicus* provisions of Rule 7 unenforceable due to manner in which they were added to the Bylaws in this Phase I, then the language of Section 4.3(o)(v) will be relevant to determining the extent to which the Applicants can participate in the rest of this IRP.<sup>36</sup>

20. Section 4.3(o)(v) of the Bylaws provides that the Panel "shall have the authority," *inter alia*, to "[c]onsolidate Disputes if the facts and circumstances are sufficiently similar, and take such actions as are necessary for the efficient resolution of Disputes." As is the case with all legal instruments, the Bylaws' provisions must be read in the context of the entire document. Indeed, Section 4.3(o) specifically states that it is "[s]ubject to the requirements of this Section 4.3...."

21. Section 4.3(o)(v) must therefore be read in conjunction with the other provisions of Section 4.3, including Section 4.3(a), which sets forth the "Purposes of the IRP." Section 4.3(a) provides that IRPs are intended, among other things, to:

- "Reduce Disputes by creating binding precedent ...."
- "Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes."
- "Lead to binding, final resolutions consistent with international arbitration norms that are

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<sup>36</sup> As stated in Afilias' Supplemental Brief and at the Phase I hearing, if the Panel does not grant Afilias' claim to declare the *amicus* provisions unenforceable in this Phase I, then Afilias asks the Panel to join that claim to Phase II; allow the Applicants to participate on a provisional basis (applying the provisions of Rule 7 according to their terms and consistent with the Bylaws); and decide the claim with the other claims in Afilias' Amended IRP Request. Afilias reserves the right to seek the shifting of costs to ICANN for this and the other claims in the Amended IRP Request.

enforceable in any court with proper jurisdiction.”

- “Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.”<sup>37</sup>

22. Section 4.3(o)(v) must also be read in conjunction of Section 4.3(x), which provides that “[t]he IRP is intended as a final, binding arbitration process,” and further that:

- “IRP Panel decisions are binding final decisions to the extent allowed by law ....”
- “IRP Panel decisions and decisions of an en banc Standing Panel upon appeal are intended to be enforceable in any court with jurisdiction over ICANN ....”
- “ICANN intends, agrees, and consents to be bound by all IRP decisions of Disputes of Covered Actions as a final, binding arbitration.”<sup>38</sup>

23. The position of the Applicants—that they can participate “fully” in this IRP, but that they will not be bound by the IRP’s decision—cannot be reconciled with these provisions. That position, if adopted by the Panel, will not advance the purposes of the IRP. It will not reduce disputes by creating binding precedent; it will not secure the efficient, consistent, and coherent resolution of Disputes; it will not lead to a binding resolution, consistent with the norms of international arbitration. The position of the Applicants does not, to use the language of Article 4.3(o)(v), promote the “efficient resolution of Disputes.” It would result in a procedure that is neither “efficient” nor will lead to a “resolution of Disputes.” To the contrary, if adopted by this Panel, the position of the Applicants will significantly increase the length, costs, and complexity of this IRP—and, if Applicants do not like the result, will allow the Applicants to delay even further the final resolution of the issues before this Panel, seeking a different, inconsistent result in another forum.

24. Therefore, if the Panel determines to allow the Applicants to participate in these proceedings—and without being bound by the result—the Panel must limit their participation to that of *amici* as understood under the norms of international arbitration as well as the terms of Rule 7. Again, Rule 7 provides that a “person participating as an *amicus curiae* may submit to the IRP PANEL written briefing(s) on the DISPUTE or on such

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<sup>37</sup> Bylaws, [Ex. C-1], Arts. 4.3(a)(vi), (vii), (viii), and (ix).

<sup>38</sup> *Id.*, Arts. 4.3(x)(i), (ii), and (iii).

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.” There is nothing in the text of the *amicus* provisions—or in the norms of international arbitration—that would allow non-binding *amicus* participation beyond the submission of written briefs that would be of particular assistance to the Panel, as determined by the Panel “in its discretion.”<sup>39</sup>

25. As explained by Afilias at the Phase I hearing, the language of footnote 4 that accompanies the “written briefing(s)” text of Rule 7—and which provides for the IRP Panel to “lean in favor of broad participation of an *amicus curiae* as needed to further the purposes of the IRP”—was part of the language added to Rule 7 at the eleventh hour. Even putting aside the manner in which the footnote was inserted into Rule 7, under any proper construction, the words “broad participation” contained in the footnote must be read in the connection with the accompanying text—which provides only for “written briefing(s).” It cannot be read to broaden *amicus* participation beyond written briefings.

26. All of that having been said, as Afilias has made clear both before and at the Phase I hearing, Afilias would not object to full participation by Verisign and NDC (again, on a provisional basis, and without giving up its claim that the manner in which the *amicus* provisions violated Rule 7)—*if* Verisign and NDC agree to be bound by the conclusions of this Panel. It is here that the language of Article 4.3(o)(v) has special relevance. The specific language—“and take such other actions as are necessary for the efficient resolution of Disputes”—is similar to that found in many international arbitration rules. Such rules confer broad authority on the arbitral tribunal to conduct the proceedings in whatever manner it deems appropriate to advance the fair and efficient resolution of the dispute, when the rules are silent with respect to a particular issue. Thus, for example, Article 20 of the ICDR Rules provide:

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated

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<sup>39</sup> Indeed, there is no reason for the Panel to decide whether “written briefing(s)” are needed to further the purposes of the IRP until after the Parties have made their main submissions.

with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

2. The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute.<sup>40</sup>

27. It is of particular significance that the “take such other actions” language of Article 4.3(o)(v) is part of the same provision authorizing the Panel to “[c]onsolidate Disputes if the facts and circumstances are sufficiently similar ....” NDC, for its part, has plainly articulated a Dispute against ICANN in its Supplemental Brief. Thus, NDC asserts that ICANN sent it a final Registry Agreement on 14 June 2018, and that NDC signed and returned the Registry Agreement to ICANN that same day.<sup>41</sup> NDC complains that ICANN “either agreed or unilaterally decided not to execute the Registry Agreement that it sent to NDC (and NDC executed) over a year ago,” and that “[t]his has harmed NDC by depriving it of the rights and benefits as the winner of the .WEB auction[.]”<sup>42</sup> NDC also claims that it has “direct knowledge” of “misconduct” by Afilias that should lead ICANN to “disqualify Afilias from the right to operate .WEB.”<sup>43</sup> NDC maintains it “is a real party to the underlying IRP[.]”<sup>44</sup>

28. Similarly, Verisign asserts that both NDC and Verisign must be “allowed full participation as necessary to protect their interests in these proceedings.”<sup>45</sup> Verisign claims that the relief sought by Afilias in this IRP is “in direct contravention of [NDC’s and Verisign’s] existing contracts with ICANN and with each other,”<sup>46</sup> because ICANN has not already delegated .WEB to NDC, and therefore NDC has not been able to assign the .WEB registry agreement to Verisign, as required by the Verisign-NDC Domain Acquisition Agreement. But if that were true, then ICANN’s decision to wait until the conclusion of this IRP proceeding before executing a .WEB registry agreement must also be in “contravention” of NDC’s and Verisign’s asserted contractual rights. Verisign, like NDC, is effectively asserting claims against ICANN that could be resolved through this IRP.

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<sup>40</sup> International Centre for Dispute Resolution, *International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)* (1 June 2014), Art. 20.

<sup>41</sup> NDC’s Supplemental Brief (27 Sep. 2019), ¶ 18.

<sup>42</sup> *Id.*, ¶ 40.

<sup>43</sup> *Id.*, ¶ 4.

<sup>44</sup> *Id.*, ¶ 41.

<sup>45</sup> VeriSign’s Supplemental Brief (27 Sep. 2019), ¶ 4.

<sup>46</sup> *Id.*, ¶ 24.

29. Yet neither NDC nor Verisign sought to intervene in this IRP, and neither brought an IRP that could be consolidated with this one. Under the circumstances, Afilias submits that the Panel could—consistent with its authority to “take such actions as are necessary for the efficient resolution of Disputes” under Article 4.3(o)(v)—condition the participation of the Applicants beyond the “written briefing(s)” provisions for *amici* under Rule 7 on their commitment to be bound by the Panel’s conclusions. Particularly where, as here, Afilias would not object to the full participation of Verisign and NDC—on the condition that they agree to be bound by the Panel’s conclusions—it is within the Panel’s authority to take such action “for the efficient resolution of Disputes.”

30. Specifically, the Applicants would need to agree, consistent with Article 4.3(x) of the Bylaws, that the IRP is a final, binding arbitration process with respect to the Panel’s factual findings and conclusions of law, without a *de novo* review, and enforceable in any court with jurisdiction.

31. If, however, Verisign and NDC are not willing to be bound by the Panel’s conclusions, then for the reasons stated above and in our prior submissions, the Panel should limit their participation to at most “written briefing(s)” as provided for in the plain language of Rule 7 and as consistent with the norms of international arbitration.

### Request for Relief

32. In light of the above, and in addition to Afilias’ submissions before the Procedures Officer and its Supplementary Brief, Afilias respectfully requests that the Panel:

- i. reject ICANN’s objection that Afilias did not timely file its Rule 7 Claim;
- ii. conclude that ICANN’s effectuation of the *amicus* provisions of Rule 7 of the Interim Procedures (including the manner in which the provisions were added and ICANN’s continued adherence to them) violates the Bylaws, and declare the *amicus* provisions to be unenforceable on that basis;
- iii. deny Verisign’s and NDC’s Requests; and,
- iv. alternatively, should the Panel decide to let Verisign and NDC participate in this IRP, limit their participation to provisional participation and to “written briefing(s)” as provided for in Rule 7, *or* condition their fuller participation on their commitment to be bound by the Panel’s

resolution of this IRP (and in either case, decide the merits of Afiliias' Rule 7 claim with the other claims in Phase II).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Arif H. Ali', written over a horizontal line.

Arif H. Ali  
*Counsel for Claimant*