

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Afilias Domains No. 3 Ltd.,) ICDR CASE NO. 01-18-0004-2702
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

ICANN'S RESPONSE TO THE BRIEFS OF AMICUS CURIAE

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INTRODUCTION

1. ICANN submits this Response to the Amicus Curiae Brief of Nu Dotco, LLC (“NDC”) and Verisign Inc.’s Pre-Hearing Brief (Phase II) (collectively, the “Amicus Briefs” and the “*Amici*”).).

2. The Amicus Briefs broadly address four issues: (1) the Panel’s jurisdiction and remedial authority; (2) the nature of ICANN’s Bylaws provisions in relation to competition, and whether those provisions require ICANN to make a determination regarding which applicant for a new gTLD would most effectively promote competition and award the gTLD on that basis; (3) whether Verisign’s potential operation of .WEB would be anticompetitive; and (4) whether the pre-auction conduct of NDC and Afilias complied with the New gTLD Applicant Guidebook (“Guidebook”) and Auction Rules.

3. With respect to the first three issues, the positions advocated in the Amicus Briefs are generally consistent with ICANN’s position as set out in its Response to Afilias’ Amended Request for IRP (“IRP Response”) and its Rejoinder Memorial (“Rejoinder”). The Panel’s jurisdiction is limited to reviewing “Disputes.”¹ “Disputes” are defined by Section 4.3(b)(iii) of the Bylaws as consisting of three categories of Claims.² The only category relevant to this IRP is Section 4.3(b)(iii)(A), which is “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws.”³ “Covered Actions” are defined as any 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.”⁴ Accordingly, the Panel’s jurisdiction is

¹ Bylaws, Art. 4, § 4.3(a).

² *Id.*, Art. 4, § 4.3(b)(iii). A “Claim” is defined as “a written statement of a Dispute” that commences an IRP. *See id.*, Art. 4, § 4.3(d).

³ *Id.*, Art. 4, § 4.3(b)(iii)(A).

⁴ *Id.*, Art. 4, § 4.3(b)(ii).

limited to reviewing whether alleged actions or failures to act by ICANN’s Board, Directors, Officers or Staff violated ICANN’s Articles of Incorporation or Bylaws.

4. The Panel’s remedial authority is defined by Section 4.3(o) of the Bylaws. ICANN agrees with the *Amici* that Section 4.3(o) provides an exclusive list of the Panel’s remedial powers; if it did not, then Section 4.3(o) would be meaningless. More specifically, ICANN agrees with the *Amici* that the Panel has authority to declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws,⁵ but the Panel does not have authority to award affirmative relief or to direct ICANN to take or refrain from any specific action. The only provision of Section 4.3(o) relating to affirmative relief is Section 4.3(o)(iv), which allows the Panel to “*[r]ecommend* that ICANN stay any action or decision, or take necessary interim action, *until such time as the opinion of the IRP Panel is considered[.]*”⁶ Section 4.3(o)(iv) confirms that the Panel’s authority with respect to affirmative relief is limited to making recommendations, and that such recommendations properly are made only for the limited period before the “the opinion of the IRP Panel is considered[.]”⁷

5. ICANN also agrees with the *Amici* that the Bylaws provisions relating to competition do not suggest—much less require—that ICANN must make a determination regarding which applicant for a new gTLD would most effectively promote competition and award the gTLD on that basis. ICANN’s obligations in relation to competition are set out in Sections 1.2(a) and 1.2(b)(iii) and (iv) of the Bylaws. Section 1.2(a) states that ICANN “must operate . . . through open and transparent processes that enable competition and open entry in

⁵ Bylaws, Art. 4, § 4.3(o)(iii).

⁶ *Id.*, Art. 4, § 4.3(o)(iv) (emphasis added).

⁷ *Id.*

Internet-related markets.”⁸ Section 1.2(b)(iii) and (iv) states that ICANN’s Core Values include “[w]here feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market” and “[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.”⁹ ICANN complies with these commitments and values by implementing policies that facilitate market-driven competition, as it has done with the New gTLD Program, which has introduced more than 1,200 new gTLDs. Where potential competition concerns arise in relation to the Domain Name System (“DNS”), including the New gTLD Program, ICANN defers to appropriate competition regulators such as the Department of Justice (DOJ). ICANN is not an antitrust regulator. Indeed, Section 1.1(c) of the Bylaws underscores that “ICANN does not hold any governmentally authorized regulatory authority.”¹⁰

6. As set forth in ICANN’s Rejoinder, the Guidebook does not require ICANN to choose among otherwise qualified applicants based on ICANN’s view of which applicant would most effectively contribute to competition.¹¹ ICANN does not have the expertise or resources to perform such an analysis and did not do so in evaluating applications. ICANN concurs with the *Amici*, however, that there is no economic evidence that the particular TLD of .WEB will meaningfully add to the competition that .COM already faces from all other TLDs, as set forth in the expert reports of Dr. Dennis Carlton and Dr. Kevin Murphy. Moreover, Afilias has submitted no valid economic evidence or analysis showing that Verisign’s potential operation

⁸ Bylaws, Art. 1, § 1.2(a).

⁹ *Id.*, Art. 1, § 1.2(b)(iii), (iv).

¹⁰ *Id.*, Art. 1, § 1.1(c).

¹¹ ICANN’s Rejoinder Memorial, ¶ 96.

