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March 26, 2019

Via Email

Tom Simotas
Finance Manager
International Center for Dispute Resolution
120 Broadway, 21st Floor
New York, NY 10271

Re: Afilias v. ICANN; ICDR Case No. 01-18-0004-2702

Dear Tom:

ICANN writes in response to Afilias' letter of 25 March 2019. Afilias' letter is notable in failing to address any of the arguments in ICANN's letter of 20 March 2019, or to argue that the Procedures Officer actually resolved the sole issue that he was appointed to decide. Instead, Afilias makes a wholly new request for the ICDR to seek "clarification" from the Procedures Officer regarding the basis for his Declaration. Afilias' request should be rejected.

First, Afilias is wrong in stating that it would be "consistent" with the Procedures Officer's discretionary authority to decide that the *amicus* applications can be determined only after the IRP Panel rules on Afilias' claim that Rule 7 was improperly adopted. This argument is premised on an inaccurate description of the Procedures Officer's Declaration. The Procedures Officer did not purport to defer his determination until after the IRP Panel rules on Afilias' Rule 7 claim—indeed, Afilias had not even filed such a claim until last week (three weeks after the Procedures Officer issued his Declaration). Rather, the Procedures Officer purported to assign the task of deciding whether proposed *amicus curiae* satisfy Rule 7 to the IRP Panel. As ICANN laid out in its letter dated 20 March 2019, the Procedures Officer does not have the authority to make such an assignment, and the IRP Panel has no jurisdiction to decide the *amicus* requests.

Second, it is not within the Procedures Officer's discretion to decide whether the IRP should be bifurcated or to require the IRP Panel to decide Afilias' challenge to Rule 7 before the Procedures Officer decides whether proposed *amicus* satisfy Rule 7. The Procedures Officer's discretion is strictly limited to the determination of whether the proposed *amicus* has a material interest relevant to the dispute; if so, then the Procedures Officer must allow its participation as *amicus curiae*:

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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*.

Third, there is no basis for Afiliias' request for a further "clarification" from the Procedures Officer explaining why he thought he had jurisdiction to assign his responsibilities to the IRP Panel or providing further detail regarding his reasoning. The Procedures Officer's Declaration acted outside his jurisdiction, and Afiliias essentially concedes as much by abandoning any further argument on the point. Asking Mr. Donahey to issue a further explanation for his Declaration would achieve nothing other than to cause additional unproductive litigation, expense, and delay.

The situation here is no different than the analogous circumstance in which a consolidation arbitrator fails to rule on a request for consolidation and instead purports to refer the issue for determination to one or both of the underlying tribunals. In that instance, the ICDR unquestionably would need to appoint a new consolidation arbitrator to make the necessary determination.

Accordingly, a new Procedures Officer should be appointed without further delay to promptly determine the *amicus* requests so that the applicants, if granted *amicus* status, have the opportunity to be heard by the IRP Panel.

Very truly yours,

Handwritten signature of Jeffrey A. LeVee in blue ink, with the initials "DLW" written to the right of the signature.

Jeffrey A. LeVee

cc: Counsel for Afiliias
Counsel for NDC
Counsel for Verisign