INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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

ICANN'S REPLY TO AFILIAS' RESPONSE TO THE REQUESTS OF VERISIGN AND NDC TO PARTICIPATE AS *AMICUS CURIAE*

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INTRODUCTION

1. The thrust of Afilias Domains No. 3 Limited's Response to the Requests of Nu Dotco LLC ("NDC") and Verisign Inc. ("Verisign") to Participate as *Amicus Curiae* in Independent Review Process ("Response") is the contention that, although NDC and Verisign have an unquestioned substantial interest in the subject matter of this Independent Review Process ("IRP"), they should be denied a voice in this proceeding because a Verisign employee was part of the community group that drafted and considered the Interim Supplementary Procedures. Afilias self-righteously invokes notions of good faith and equity in pursuit of a blatantly inequitable result. The inequity of Afilias' position compels its rejection, as does the hollow logic behind Afilias' effort to selectively negate the Interim Supplementary Procedures that Afilias itself has invoked and relied upon in this proceeding.

2. Afilias does not dispute that, under Rule 7, NDC and Verisign are entitled to participate in this IRP as *amicus curiae*. Indeed, NDC and Verisign have a "material interest" relevant to the dispute because, *inter alia*, NDC was a member of the contention set for .WEB, and Afilias refers repeatedly to both NDC and Verisign in Afilias' IRP Request and Request for Interim Relief. Under Rule 7, where a proposed *amicus curiae* has such a material interest relevant to the dispute and is a central player in the dispute, the Procedures Officer "shall allow participation by the *amicus curiae*." In fact, Afilias acknowledges that NDC and Verisign qualify as "mandatory *amici*" and that the Interim Supplementary Procedures do not give the Procedures Officer any discretion to reject their requests to participate.[1]

3. Nevertheless, Afilias takes the extraordinary position that the Procedures Officer should disregard Rule 7 altogether, even though the Procedures Officer role was created and exists solely as a function of Rule 7, and the Procedures Officer has no authority or jurisdiction to deviate from that Rule. The Procedures Officer is not authorized by Rule 7, or any other

[1] *See* Letter to M. Scott Donahey from Arif Ali dated 28 January 2019 at 5; *see also* Afilias' Response ¶ 56 (stating that the "categories of mandatory participants" in Rule 7 "covered NDC's and Verisign's situation with respect to Afilias' IRP against ICANN").

provision of the Interim Supplementary Procedures, to consider or decide a claim seeking to invalidate the Interim Supplementary Procedures. ICANN has accountability mechanisms that Afilias could use to challenge the validity of the Interim Supplementary Procedures, but Afilias chose not to pursue such a challenge. Instead, Afilias has affirmatively relied on the Interim Supplementary Procedures, including relying on Rule 7 by demanding appointment of a Procedures Officer to rule on NDC's and Verisign's *amicus* requests. Afilias cannot invoke Rule 7 when it serves Afilias' purposes, and then claim that the rule is invalid when it does not.

4. Moreover, the grounds on which Afilias asks the Procedures Officer to invalidate Rule 7 are legally inapplicable and factually baseless. Afilias first argues that the Procedures Officer should exercise "inherent equitable power" to bar Verisign from participating as an *amicus curiae* under Rule 7 because a Verisign employee, David McAuley, purportedly acted in bad faith by circulating a draft of the Interim Supplementary Procedures on 5 October 2018 that allegedly expanded the *amicus curiae* rule. This argument has no merit. The Procedures Officer does not have any "inherent equitable authority" to refuse to apply the Interim Supplementary Procedures according to their terms. The cases on which Afilias relies do not establish any "inherent equitable authority" in connection with an IRP; they refer to the power of United States federal courts when sitting as courts of equity. Nor did the 5 October 2018 draft materially change or expand the *amicus curiae* rule. And, in any event, the revisions in the 5 October 2018 draft on which Afilias relies were not prepared by Mr. McAuley, but were prepared by Sidley Austin, outside counsel to the Independent Review Process – Implementation Oversight Team ("IRP-IOT"), which was charged with drafting the Supplementary Procedures.

5. Next, Afilias' endeavors to resist application of Rule 7 to NDC, which is similarly meritless. Afilias argues that NDC should not be able to participate as an *amicus curiae* because its conduct in this proceeding is purportedly controlled by Verisign. But Afilias' contention that Verisign controls NDC's conduct is based on an apparent misreading of the Domain Acquisition Agreement. And, in any case, Afilias does not identify any provision of the Interim

Supplementary Procedures or any other legal doctrine under which NDC could be divested of its right to participate based on its agreement with Verisign.

6. From there, Afilias erroneously argues that ICANN should be "estopped" from relying on Rule 7 to support Verisign's and NDC's applications based on three alleged irregularities in the proceedings of the IRP-IOT. Afilias, however, does not identify any estoppel doctrine that plausibly could apply – in fact, none exists – and Afilias' allegations of irregularities are contrived and lacking in merit.

7. Specifically, Afilias asserts that the IRP-IOT violated its "mission statement" as articulated on the IRP-IOT's wiki page by not submitting a report on the final Interim Supplementary Procedures to the CCWG-Accountability. But the aspirational statement on the IRP-IOT's wiki page has no legal force and, in any case, the CCWG-Accountability was already defunct by October 2018, when the Interim Supplementary Procedures were completed. Afilias also asserts that the IRP-IOT should have initiated a second public comment period before submitting the Interim Supplementary Procedures to the ICANN Board, but Afilias' argument is based on inapposite sections of the ICANN Bylaws. The IRP-IOT complied with the only Bylaws provision applicable to public comment on the Interim Supplementary Procedures. Lastly, Afilias notes that two IRP-IOT members have taken the position that ICANN's legal counsel should not participate as members of the IRP-IOT. However, those two members have not asserted that the participation of ICANN's legal counsel in the IRP-IOT somehow invalidates the Interim Supplementary Procedures adopted by the Board. Moreover, Afilias ignores the comments of several other members of the IRP-IOT who argued that it was always intended that ICANN's legal counsel would (and should) participate on the IRP-IOT.

8. In short, it is undisputed that Rule 7 of the Interim Supplementary Procedures entitles Verisign and NDC to participate as *amicus curiae*. The Procedures Officer has no authority or jurisdiction to deviate from the terms of Rule 7 based on Afilias' allegations of irregularities within the IRP-IOT, or on any other such claims. Moreover, even if the Procedures

Officer had jurisdiction to disregard the rule, Afilias' allegations of irregularities in the proceedings of the IRP-IOT are without merit and should be rejected on this ground as well.

9. In addition, Afilias' contention that *amicus curiae* may participate only before the IRP Panel, and not before the Emergency Panelist, should also be rejected. Both the text of the Interim Supplementary Procedures and common sense mandate that *amicus curiae* do not lose their right to participate merely because an Emergency Panelist has been appointed to preside while the IRP Panel is being constituted.

10. Finally, the Procedures Officer does not have jurisdiction to consider Afilias' request for an order that *amicus curiae* participation be limited to submission of briefs, and or to consider NDC's and Verisign's request for an order entitling them to submit evidence and participate at hearings. The Procedures Officer's sole remit is to determine whether NDC and Verisign have a material interest relevant to this dispute pursuant to Rule 7 of the Interim Supplementary Procedures and, if so, to issue an order allowing their participation as *amicus curiae*. The Procedures Officer has no jurisdiction to determine the nature of, or procedure for, any later submissions or participation by *amicus curiae*. Those matters are entrusted to the IRP Panel and the Emergency Panelist.

I. The Interim Supplementary Procedures Govern this Dispute and Mandate that Verisign and NDC Be Permitted to Participate as *Amicus Curiae*.

A. The Procedures Officer Must Apply the Interim Supplementary Procedures According to Their Terms.

11. Afilias acknowledges that, under Rule 7 of the Interim Supplementary Procedures, NDC and Verisign qualify as "mandatory *amici*" and that the Procedures Officer has no discretion to deny their requests to participate.[2] Nevertheless, Afilias argues that the Procedures Officer should refuse to apply Rule 7 based on alleged improprieties and irregularities by the IRP-IOT in drafting the Interim Supplementary Procedures, and on NDC's agreement to seek ICANN authority to assign the .WEB gTLD to Verisign.

[2] Letter to M. Scott Donahey from Arif Ali dated 28 January 2019 at 5; *see also* Afilias' Response, ¶ 56.

12. The Procedures Officer does not have the authority or jurisdiction to consider, much less grant, the relief Afilias seeks. As ICANN established in its Submission Regarding the Requests by Verisign and NDC to Participate as *Amicus Curiae* ("Submission"), the role of the Procedures Officer exists solely as a function of Rule 7 of the Interim Supplementary Procedures and his powers are created, defined, and circumscribed by that Rule.[3] The remit of the Procedures Officer is "to adjudicate requests for consolidation, intervention, and/or participation as an *amicus*."[4] With respect to *amicus* requests, the Procedures Officer's sole task is to "determine[s], in his or her discretion . . . [whether] the proposed *amicus curiae* has a material interest relevant to the DISPUTE."[5] Nowhere in the Interim Supplementary Procedures – or any other ICANN policy, procedure or rule – is there even a suggestion that a Procedures Officer has the authority to adjudicate the validity of any aspect of the Interim Supplementary Procedures or to determine that ICANN or any other party is barred from relying on them, as Afilias requests. Indeed, if the Procedures Officer were to take the incredible step of invalidating Rule 7, there would be no rules applicable to the pending *amicus* request, the sole source of the Procedures Officer's authority would be extinguished, and the office of the Procedures Officer would never have validly come into existence.

13. If Afilias wished to challenge the validity of the Interim Supplementary Procedures, the proper mechanism to do so would have been to file a Reconsideration Request under Section 4.2 of ICANN's Bylaws or, if Afilias could establish standing as a claimant, to file an IRP challenging the Board's approval of the Interim Supplementary Procedures. Afilias chose not to seek reconsideration after the Board adopted the Interim Supplementary Procedures, and the time for doing so has now lapsed.[6] Likewise, Afilias has not attempted to file an IRP

[3] ICANN's *Amicus* Submission ¶ 6.

[4] Interim Supplementary Procedures, Rule 1 (defining "Procedures Officer").

[5] Interim Supplementary Procedures, Rule 7.

[6] Bylaws Art 4, § 4.2(g)(i)(A) (mandating that Reconsideration Requests challenging Board actions, must be brought within 30 days after the date on which information about the challenged Board action is first published in a resolution, which in this case was 25 October 2018).

challenging the Board's adoption of the Interim Supplementary Procedures. On the contrary, Afilias has affirmatively relied on the Interim Supplementary Procedures, including by demanding appointment of a Procedures Officer to rule on NDC's and Verisign's *amicus curiae* requests.[7]

14. Afilias' claims of improprieties and irregularities in the IRP-IOT's drafting of the Interim Supplementary Procedures are a meritless attempt to distract the Procedures Officer from the limited task with which he is entrusted, and to lead the Procedures Officer into matters far beyond his narrow jurisdiction.

1. The Procedures Officer Does Not Have "Inherent Equitable Power" to Disregard Rule 7 as it Applies to Verisign.

15. Afilias' claim that the Procedures Officer has "inherent equitable power" to refuse to apply Rule 7 is supported only by Afilias' footnote citation to three wholly inapposite federal court decisions.[8] Those decisions hold that a court of equity may dismiss a plaintiff's complaint, or bar a defendant from relying on an equitable defense, where the litigant has engaged in perjury or fraud in relation to the claims or defense. For example, *Aptix Corp. v. Quickturn Design Sys. Inc.*, 269 F. 3d 1369 (Fed Cir. 2001) (Ex. 264), involved a suit for patent infringement in which the plaintiff submitted fabricated evidence in order to falsely claim that he conceived an invention 10 years earlier than he actually had. The court dismissed plaintiff's claims under the unclean hands doctrine on the basis of plaintiff's "premeditated and sustained campaign of lies and forgery." *Id*. at 1373. In the passage on which Afilias relies, the Court of Appeals found that "courts" have "'inherent powers' to punish bad faith conduct during litigation[.]" *Id*. at 1378.

16. The other two cases that Afilias cites are to the same effect. In *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945) (Ex. 265), the Supreme Court upheld the dismissal of a patent infringement suit based on a finding that the

[7] Letter to Kenneth Reisenfeld from Arif Ali dated 5 December 2018. (Ex. 8.)

[8] Afilias' Response ¶ 59 & n.114.

plaintiff obtained the patents through knowingly false submissions to the patent office. The Supreme Court described the unclean hands doctrine as "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief[.]" *Id.* at 814. In *Asis-Isotoner Gloves, Inc. v. Berkshire Fashions, Inc.*, 792 F. Supp. 969 (S.D.N.Y. 1992) (Ex. 266), the district court barred the defendant from relying on an equitable laches defense that had been based on fabricated testimony, stating that "[a] court may decline to exercise its equitable powers in favor of a party whose 'unconscionable act . . . has immediate and necessary relation to the matter that he seeks in respect of the matter in litigation.'" (Ellipses in original, internal citation omitted.)

17. These authorities have no relevance here. The Procedures Officer's powers derive solely from the Interim Supplementary Procedures and, in particular, Rule 7. The Procedures Officer's sole remit is to determine whether Verisign and NDC have a material interest relevant to this IRP pursuant to the terms of Rule 7. If so, the Procedures Officer "shall allow participation by *amicus curiae*." An IRP is similar to an arbitration.[9] ICANN showed in its Submission that domestic and international authorities hold that a private decision-maker presiding over an arbitration has no authority to depart from the procedural rules governing that process.[10]

18. Further, even if the unclean hands doctrine were available here (and it is not), Afilias does not show any conduct by Verisign that could justify invoking that doctrine. Initially, Afilias contended that Mr. McAuley revised the 11 October 2018 version of the draft Interim Supplementary Procedures, which, according to Afilias, "provide[d] two additional

[9] ICANN Bylaws, Art. 4, § 4.3(a) (viii) ("The IRP is intended to hear and resolve Disputes for the following purpose . . . (viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction"), 4.3(n)(i) (the rules of procedure for the IRP process shall "conform with international arbitration norms . . . ."); 4.3(x) ("The IRP is intended as a final, binding arbitration process.").

[10] ICANN's Submission Regarding the Requests by Verisign and NDC to Participate as Amicus Curiae ¶ 5; *see also* 9 U.S.C. § 10(a)(4) ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . where the arbitrators exceeded their powers . . . .").

categories of *amici* standing."[11] ICANN established in its Submission that Afilias' allegation was false: the 11 October 2018 version was not drafted by Mr. McAuley and did not create any new categories of *amici* standing.[12] Faced with this fact, Afilias makes no effort to defend or rehabilitate its initial accusation.

19. Instead, Afilias asserts a new theory, which is equally meritless. Now, Afilias contends that Mr. McAuley made revisions in a 5 October 2018 draft of the Interim Supplementary Procedures that had the effect of permitting a person with a material interest in the dispute to intervene as an *amicus curiae* in any type of IRP process, whereas, in Afilias' view, earlier versions had permitted *amicus curiae* participation only in an IRP arising from a decision of a process-specific expert panel.[13] As shown below, however, Afilias' assertion that prior drafts of the Interim Supplementary Procedures was so limited is wrong. And, in any event, the 5 October 2018 draft was not prepared by Mr. McAuley, it was prepared by the IRP-IOT's outside counsel, Sidley Austin.[14]

20. Afilias also notes that, by virtue of Article 1, Section 1.2(a) of ICANN's Bylaws, which requires ICANN to operate for the benefit of the Internet community, Mr. McAuley had a duty to act solely for the public benefit, and not for the benefit of his employer (Verisign).[15] However, there is no evidence that Mr. McAuley acted contrary to the public benefit. As noted, Mr. McAuley was not responsible for drafting the *amicus curiae* rule. And, in any case, the *amicus curiae* rule serves the interests of the public by entitling any person, group or entity with

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[11] Letter to Tom Simotas from Arif Ali dated 8 December 2018 (Ex. 9).

[12] ICANN's Submission Regarding the Requests by Verisign and NDC to Participate as Amicus Curiae ¶¶ 8-9.

[13] Afilias' Response ¶¶ 51, 52. A "process-specific expert panel" refers to a panel formed under Article 3.2 of the New gTLD Applicant Guidebook to resolve four specific types of objections to a new gTLD application: (1) string confusion objections; (2) legal rights objections; and (3) limited public interest objections and (4) community objections. *See* gTLD Applicant Guidebook, Ex. 10(available at https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf).

[14] 11 July 2018 E-mail from Rebecca Grapsas to David McAuley, Samantha Eisner, Liz le and Bernard Turcotte (Ex. 11).

[15] Afilias' Response ¶ 61 & n.117.

a material interest in the subject matter of an IRP to be heard. Afilias does not even attempt to explain how barring interested persons from being heard possibly could serve the interests of the Internet community.[16]

21. Finally, Afilias asserts that Mr. McAuley had a duty to disclose when he was not acting in his capacity as the IRP-IOT Chairman.[17] However, Mr. McAuley did disclose when he was acting "as a participant," and not as the IRP-IOT Chairman. For example, Mr. McAuley clearly stated that he was acting as a participant when he proposed revising Rule 7 to entitle any person to join an IRP as a party if "they claim that a significant interest [that] they have relates to the subject of the IRP."[18] Ultimately, however, that proposal was rejected.

2. The Procedures Officer Does Not Have the Authority to Decline to Apply Rule 7 to NDC.

22. Afilias argues that NDC should be barred from acting as an *amicus curiae* because NDC allegedly lacks independence from Verisign.[19] Yet Afilias does not identify any legal doctrine or authority that possibly could support denying *amicus curiae* status to NDC on this basis, and ICANN is not aware of any.

23. Moreover, Afilias' contention that NDC lacks independence from Verisign is not supported. Third Party Designated Confidential Information Redacted

[16] Allowing interested persons to participate in an IRP also furthers ICANN's Core Value of "[s]eeking and supporting broad, informed participation . . . at all levels of policy development and decision-making." *See* ICANN Bylaws, 18 June 2018, Art. 1, § 1.2(b)(ii).

[17] Afilias' Response ¶ 61.

[18] Ex. 202 at 16 (quoted in Afilias' Response ¶ 53).

[19] Afilias' Response ¶¶ 62, 65.

[20] *See* Afilias' Response ¶¶ 63-64.

24. In fact, under Rule 7, NDC has a material interest relevant to this IRP because it was a member of the .WEB contention set and it is significantly referred to in the IRP briefings. In addition, NDC obviously has a substantial interest in this IRP, since it is the prevailing bidder in the gTLD auction that Afilias seeks to invalidate. Accordingly, the Procedures Officer "shall allow participation" by NDC.[21]

3. The Procedures Officer Does Not Have Authority to Bar ICANN from Relying on Rule 7.

25. Afilias argues that "ICANN should be estopped" from relying on the Interim Supplementary Procedures to support Verisign's and NDC's Requests based on three alleged irregularities with respect to the IRP-IOT.[22] In Sections II.B-D below, ICANN demonstrates that Afilias' allegations of irregularities have no merit. In any event, however, the Procedures Officer should not even reach these claims because the Procedures Officer must apply Rule 7 according to its terms. The Procedures Officer may not disregard or deviate from the Interim Supplementary Procedures under principles of equitable estoppel any more than he may do so under notions of "inherent equitable authority."

26. Moreover, Afilias identifies no estoppel theory that possibly could apply here. Indeed, Afilias cites no legal authority of any type to support its contention that the Procedures Officer can bar ICANN from relying on Rule 7. Traditional equitable estoppel applies where one party "made a definite misrepresentation of fact, and had reason to believe that the [other party] would rely on it; and (2) the [other party] reasonably relied on that misrepresentation to his detriment." *Buttry v. General Signal Corp.*, 68 F.3d 1488, 1493 (2d Cir. 1995); *Sprague v. General Motors Corp.*, 133 F.3d 388, 403 (6th Cir. 1998). That doctrine has no conceivable relevance here as to ICANN, nor is there any other recognized estoppel doctrine that could plausibly apply.[23]

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[21] Interim Supplementary Procedures, Rule 7.

[22] *See* Afilias' Response ¶ 2 & Sec. 3.

[23] For example, under "Estoppel" Blacks' Law Dictionary defines 19 types of estoppel: "assignee estoppel", "assignor estoppel", "estoppel by acquiescence", "estoppel by agreement", "estoppel by contract",

B. Amicus Curiae Have the Right to Participate in this Proceeding before both the IRP Panel and the Emergency Panelist.

27. Section III of ICANN's Submission showed that the right of *amicus curiae* to participate "before an IRP Panel" includes the right to participate before an Emergency Panelist. The provisions of the Interim Supplementary Procedures regarding the IRP Panel apply *mutatis mutandis* to the Emergency Panelist pursuant to Rule 5. Moreover, the IRP is a single proceeding. The Emergency Panelist merely serves as a temporary decision-maker where a Request for Interim Relief is filed before an IRP Panel is constituted. Once the Panel is constituted, the Emergency Panelist automatically loses jurisdiction, and the Request for Interim Relief is submitted to the IRP Panel. It would make no sense for *amicus curiae* to lose the right to participate merely because an Emergency Panelist is temporarily presiding while an IRP Panel is being constituted. Afilias does not respond to any of these arguments.

28. Afilias argues that Rule 10 of the Interim Supplementary Procedures (Interim Measures of Protection) suggests that, where interim relief is granted on an *ex parte* basis, only a party can submit an opposition after the order granting interim relief is issued.[24] The part of Rule 10 on which Afilias relies states:

> *Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible*.

29. Afilias' reliance on this sentence is misplaced. First, Afilias' construction of this provision is wrong. Rule 10 states that an Emergency Panelist ***must*** accept briefing from any party who was not heard before an *ex parte* grant of interim relief. Rule 10 does not preclude an

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"estoppel by deed", "estoppel by election", "estoppel by laches", "estoppel by misrepresentation", "estoppel by negligence", "estoppel by representation", "estoppel by silence", "judicial estoppel", "legal estoppel", "marking estoppel", "promissory estoppel", "prosecution-history estoppel", "quasi-estoppel" and "technical estoppel." (Ex. 12.) A cursory review of the definitions shows that none those estoppel doctrines have any plausible application here.

[24] Afilias' Response ¶¶ 88, 89.

Emergency Panelist from also accepting briefing from *amicus curiae*. On the contrary, pursuant to Rule 7, the IRP Panel and Emergency Panelist may request and receive briefing from *amicus curiae* on any questions that they deem appropriate. Second, the provision on which Afilias relies concerns only the submission of briefs to an Emergency Panelist in circumstances where the Emergency Panelist already has granted interim relief on an *ex parte* basis. That situation does not arise here, where interim relief has not been sought or granted on an *ex parte basis.*

30. Afilias also points to a proposal that Mr. McAuley circulated on 3 May 2017 which stated that "[n]o interim relief . . . can be made without allowing those given amicus status a chance to file an amicus brief[.]"[25] Afilias asks the Procedures Offer to infer from the fact that this proposal was not adopted that the IRP-IOT meant to prohibit *amicus curiae* participation before an Emergency Panelist. That inference is unwarranted.

31. First, by its plain terms, the provision that Mr. McAuley proposed did not address whether *amicus curiae* can participate in a request for interim relief at all; rather, it would have required *amicus curiae* to be heard from ***before*** interim relief could be granted. The IRP-IOT decided not to include such a requirement, and instead to include that interim relief could be granted on an *ex parte* basis.

32. Second, Mr. McAuley's proposal applied to requests for interim relief generally, not specifically to requests heard by an Emergency Panelist. As ICANN showed, requests for interim relief normally are made to the IRP Panel and an *amicus curiae* unquestionably has the right under the Interim Supplementary Procedures to participate when such a request is made to the IRP Panel.[26] The fact that Mr. McAuley's proposal was rejected says nothing about whether an *amicus curiae* may participate in the special situation where a request for interim relief is heard by an Emergency Panelist in circumstances where the regular IRP Panel has not yet been constituted.

[25] Afilias' Response ¶ 90.

[26] ICANN Submission ¶ 20.

33. Third, the version of the draft Supplementary Procedures before the IRP-IOT at the time Mr. McAuley made his proposal did not include the language that was later added to Rule 5 stating that the provisions of the Supplementary Procedures regarding the IRP Panel apply *mutatis mutandis* to the Emergency Panelist.[27] The addition of the *mutatis mutandis* provision made it unnecessary to devote a separate rule to addressing whether *amicus curiae* may participate before an Emergency Panelist.

C. The Procedures for and Nature of *Amicus Curiae* Participation Are Matters Entrusted to the Emergency Panelist and IRP Panel.

34. Afilias requests an order that participation by *amicus curiae* be "limited to the submission of briefs" and that they be barred from participating in hearings, submitting evidence or raising new issues.[28] Inversely, Verisign and NDC request an order that they may: (1) submit briefs on all substantive issues; (2) submit evidence; (3) access all filings and evidence submitted by the parties; and (4) have full participation rights in any hearings.[29] Afilias, Verisign and NDC's requests in this regard at this juncture should all be denied without prejudice because they are beyond the authority of the Procedures Officer.

35. The Procedures Officer's sole function in this proceeding is to determine if Verisign and NDC have a material interest relevant to this IRP and, if so, to issue an order allowing them to participate as *amicus curiae*. Nothing in Rule 7 or in any other provision of the Interim Supplementary Procedures gives the Procedures Officer authority to determine the manner in which *amicus curiae* will be permitted to participate. On the contrary, as shown in ICANN's Submission (Sec. 4), Rule 7 clearly entrusts to the IRP Panel and Emergency Panelist all questions regarding the nature of, and procedure for, the participation of *amicus curiae*.

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[27] Ex. 235 (available at https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf).

[28] Afilias' Response ¶ 3 & Sec. 5.

[29] Request by Verisign, Inc. to Participate as Amicus Curiae in Independent Review Process ("Verisign Request") ¶ 5; Request by Nu DotCo, LLC to Participate as Amicus Curiae in Independent Review Process ("NDC Request) ¶ 16.

These matters are not properly before the Procedures Officer, and ICANN therefore takes no substantive position on them at this time.

II. Afilias' Arguments Concerning the Drafting History of the Interim Supplementary Procedures Are Wrong and Irrelevant.

36. As set forth above, the Procedures Officer has no authority to disregard the Interim Supplementary Procedures and no jurisdiction to rule on whether the IRP-IOT properly carried out its mission in drafting the Interim Supplementary Procedures. Thus, Afilias' allegations regarding purported irregularities and improprieties in the drafting of the Interim Supplementary Procedures are not relevant to the matters before the Procedures Officer. But given the nature of the claims, ICANN is compelled to respond to Afilias' meritless allegations of irregularities and improprieties in the proceedings of the IRP-IOT.

A. Beginning in February 2018, The Draft Supplementary Procedures Allowed Participation in an IRP By Any Person, Group or Entity with a Material Interest.

37. Contrary to Afilias' contention,[30] the IRP-IOT never contemplated limiting *amicus curiae* participation only to IRPs challenging the decision of a process-specific expert panel. The starting point with regard to this issue is Section 4.3(n)(iv)(B) of ICANN's Bylaws, which mandates that the revised Supplementary Procedures address "[i]ssues relating to joinder, intervention, and consolidation of Claims." There is no indication in the Bylaws that the requirement to address joinder and intervention is limited to IRP proceedings arising from a decision of a process-specific expert panel.

38. From the very beginning, IRP-IOT members recognized that the revised Supplementary Procedures should "make sure that all of the relevant parties were at the table," such as "where one party is making a claim about actions and violations of the Bylaws but another party is directly affected as well even if on the other side."[31] Afilias wrongly argues that the reference in these early discussions to intervention by persons "materially affected by the

[30] Afilias' Response ¶ 14.

[31] *See* IRP-IOT Meeting # 5 (20 July 2016), Transcript (Ex. 227), pp. 28-29.

action or inaction" shows that they contemplated participation only by persons with claimant standing.[32] But ICANN's Bylaws do not give claimant standing to anyone materially affected by an action or inaction. They limit claimant standing to persons that have suffered "an injury or harm that is directly and causally connected to the alleged violation."[33] These discussions show that members of the IRP-IOT were interested in allowing participation by any person directly affected "even if on the other side" from the claimant, *i.e.*, if the person benefited from the ICANN action or inaction, and therefore did not have an injury sufficient to confer claimant standing.

39. Nevertheless, the draft Supplementary Procedures approved for public comment and published on 28 November 2016 limited joinder to persons with claimant standing.[34] However, the public comments regarding Rule 7 supported granting broader participation rights to interested parties.[35] Afilias incorrectly claims that those comments were focused exclusively on an IRP challenging a decision of a process-specific expert panel.[36] While it is true that the comment from Fletcher, Heald & Hildreth was limited in this way, other comments regarding non-party participation were not so limited.

40. For example, the Noncommercial Stakeholders Group ("NCSG") submitted a comment suggesting that "all parties to the underlying proceeding have the right to intervene – the right to be heard in the challenge to their proceeding."[37] Afilias contends that the NCSG's reference to an "underlying proceeding" was limited to "those who los[e] arbitration decisions," which Afilias equates with decisions by a process-specific expert panel.[38] But the reference to

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[32] Afilias' Response ¶ 23.

[33] ICANN Bylaws, § 4.3(b)(i).

[34] Updated Supplementary Procedures for Independent Review Process (IRP) (28 Nov. 2016), Ex. 221.

[35] *See* ICANN's Response to Procedures Officer's Questions Concerning the Drafting History of the Supplementary Procedures ¶ 21.

[36] Afilias' Response ¶ 28.

[37] Comments of the Noncommercial Stakeholders Group (NCSG) on the Updated Supplementary Procedures for IRP, at Pg. 4-5, 7, available at https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfLoCFUVHjfN.pdf) (Ex. 236 at 35-36).

[38] Afilias' Response ¶ 31.

"arbitration decisions" cited by Afilias appears in a different section of the NCSG's comments (*i.e.*, Section 2 "Notice"). Section 3 of NCSG's comments regarding "Right of Intervention" contains no reference to "arbitration decisions" nor any suggestion that the right to intervene should be limited to an IRP arising from a decision of a process-specific expert panel.

41. Similarly, the Intellectual Property Constituency ("IPC") submitted a comment stating that "[a]ny third party directly involved in the underlying action which is the subject of the IRP" should have the ability to participate.[39] In explaining its proposal, the IPC used an IRP arising from a Legal Rights Objection as an example of a proceeding where the winning party should be entitled to participate in an IRP to protect its victory.[40] However, the IPC's comment was not limited to an IRP arising from a Legal Rights Objection. Rather, it sought to "afford appropriate due process for all interested parties (not just those who may be aligned with the claimant or claimants on the issue(s) under review)."[41]

42. On 8 February 2018, after nearly a year of discussing the public comments and potential revisions, the IRP-IOT issued and publicly posted a report stating that it had "agreed on certain revisions, presented below, to the draft U[pdated] S[upplementary] P[rocedures] prompted by those comments."[42] With respect to joinder and intervention, the IRP-IOT agreed to revise Rule 7 to provide as follows:

> *1. 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 receive notice.*

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[39] Comments of the Intellectual Property Constituency Comments on the Draft Independent Review Process Updated Supplementary Procedures at 2 (available at https://forum.icann.org/lists/comments-irp-supp-procedures-28nov6/pdft75S74tOev.pdf) (Ex. 236 at 25).

[40] *Id*. at 6-7 (Ex. 236 at 29-30).

[41] *Id*. at 7 (Ex. 236 at 30).

[42] Report of the IRP-IOT Following Public Comments on the Updated Supplementary Procedures for the ICANN Independent Review Process, Ex. 20, at 4-5 (available at https://community.icann.org/pages/viewpage.action?pageId=79430443&preview=/79430443/79434258/IRP.IOT.ReportonPubComments.Rules_clean.pdf).

1.A. If a person, group, or entity satisfies (1.), above, then (s)he/it/they have a right to intervene in the IRP as a party or as an amicus, as per the following:

1.A.i. (S)he/it/they may only intervene as a party if they satisfy the standing requirement set forth in the Bylaws.

1.A.ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an amicus.

2. For any person, group, or entity that did not participate in the underlying proceeding, (s)he/it/they may intervene as a party if they satisfy the standing requirement set forth in the Bylaws.

2.A. If the standing requirement is not satisfied, the persons described in (2.), above, 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.

43. A modified version of this revision was incorporated into a draft Interim Supplementary Procedures dated 8 May 2018, which was circulated and posted on ICANN's website.

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.*[43]

44. Afilias misconstrues the 8 May 2018 draft (and by extension the 8 February 2018 report) as allowing joinder only in an IRP arising from a process-specific expert panel. Afilias contends that the parenthetical reference to a "process-specific expert panel" in the first sentence means that every reference to a "proceeding" in the draft rule is limited to a process-specific expert panel.[44] Afilias then goes a step farther, asserting that the second paragraph of the draft rule, which allows a "person, group or entity that did not participate in the underlying proceeding" to intervene, should be construed as applying only to an IRP arising from a decision of a process-specific expert panel.[45]

45. Afilias' construction is not consistent with the language of the 8 May 2018 draft or the 8 February 2018 report. The IRP-IOT chose to use the general term "proceeding" and to put "process-specific expert panel" in parentheses. As a result, the draft rule encompasses all proceedings, and merely uses a process-specific expert panel as an example. If the IRP-IOT had intended these provisions, which would logically apply to all IRPs, to be confined to IRPs arising from a "process-specific expert panel," there would have been no need to make reference to the more general term "underlying proceeding" in the first sentence of the proposed rule. Instead, the text would have simply read: "If a person, group, or entity participated in a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3) . . ." That more focused language, however, was not used, which shows that a more general application was always intended.

46. Afilias contends that its cramped reading of the draft Rule 7 is necessary to be consistent with the public comments regarding joinder and excerpts from discussions of the IRP-

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[43] Ex. 1 (available at https://community.icann.org/download/attachments/59643726/8-May-2018-Draft-INTERIM-Supplementary-Procedures-IOT%20IRP.pdf?version=1&modificationDate=1525885526000&api=v2).

[44] Afilias' Response ¶ 47 & n.92.

[45] *Id*. at ¶ 47.

IOT that Afilias references in its Response.[46] However, as shown above, the public comments advocated broad rights of intervention that were not limited to an IRP arising from a decision of a process-specific expert panel. Further, while Afilias has identified IRP-IOT transcripts showing discussions concerning the right of ***participants*** in a process-specific expert panel to receive notice and a right to intervene in an IRP challenging the decision of such a panel, the IRP-IOT provided for far broader rights of intervention by allowing intervention by any person with a material interest in the dispute regardless of whether they participated in the underlying proceeding. And, clearly, if a person meets the standing requirements of a claimant, that person is entitled to participate in any IRP, not only those arising from the decision of a process-specific expert panel. Construing draft rule 7 as Afilias suggests would lead to the illogical conclusion that even a person with standing as a claimant is barred from participating in an IRP unrelated to a process-specific expert panel. This certainly is not the case.

47. Thus, Afilias is wrong in asserting that the revised draft circulated on 5 October 2018 significantly changed the *amicus curiae* rule.[47] Indeed, if the 5 October 2018 draft had effected such a fundamental change, one would expect the members of the IRP-IOT to have commented on it during their subsequent meetings or by email. However, the transcripts of the IRP-IOT meetings on 9 October 2018 and 11 October 2018 contain no record that anyone viewed the 5 October 2018 draft as substantively changing the *amicus curiae* rule, nor do the email list records after the circulation of the 5 October 2018 draft.

B. The IRP-IOT Was Not Required to "Report Back" to the CCWG Accountability.

48. Afilias also urges the Procedures Officer to set aside the Interim Supplementary Procedures because they were presented "[d]irectly to the Board [w]ithout [f]irst [r]eporting [b]ack to the CCWG-Accountability."[48] In so doing, Afilias significantly mischaracterizes the

[46] Afilias' Response ¶ 47.

[47] Afilias' Response ¶ 52.

[48] Afilias' Response at 41.

relationship between the CCWG-Accountability and the IRP-IOT. In reality, nothing in ICANN's Bylaws imposes a requirement that the IRP-IOT "report back" to the CCWG-Accountability. The CCWG-Accountability Work Stream 1 (WS1) in its final report expressly recognized that the "[d]etailed rules for the implementation of the IRP (such as rules of procedure)" would be developed by a distinct group organized for that purpose, not by the CCWG-Accountability itself.[49]

49. The CCWG-Accountability never recommended that it be given oversight or other "approval" rights before the draft Supplementary Procedures were submitted to the Board. In fact, when ICANN's new Bylaws took effect on 1 October 2016 to reflect the enhancements to ICANN's accountability mechanisms, the Bylaws made no mention of the CCWG-Accountability in relation to the IRP-IOT's work. Instead, the Bylaws stated:

> *(n) Rules of Procedure*
>
> *i. 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 international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.*
>
> *ii. The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA naming functions and are not resolved through mediation. The Rules of Procedure shall be published*

[49] The Independent Review Process Implementation Oversight Team (IRP-IOT) Draft Recommendations, Ex. 13, (available at https://www.icann.org/public-comments/irp-iot-recs-2018-06-22-en).

> *and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN, and take effect upon approval by the Board, such approval not to be unreasonably withheld.*[50]

50. The remit of the CCWG-Accountability is expressly defined in Article 27 (Transition Article) of the Bylaws.[51] Article 27 enumerates nine (9) separate topics for "review and develop[ment]" by the CCWG-Accountability in connection with Work Stream 2, none of which concern, let alone even reference, the work of the IRP-IOT. Nor did the CCWG-Accountability ever indicate an intent to be active in the IRP-IOT's work. The fact that the IOT's work is separate from the Work Steam 2 work of the CCWG-Accountability is made plain on the IOT's public webpage:

> *It is important to note that the IRP-IOT was included as part of WS2 for administrative simplicity but is in fact independent of WS2. Current expectations are that the IRP IOT will continue beyond the scheduled completion date for WS2 of June 2018.*[52]

51. It defies logic that the IRP-IOT would be subject to a continuing reporting obligation to an entity that was intended to be temporary and potentially non-existent at the completion of the IRP-IOT's work. Indeed, the CCWG-Accountability concluded its work in June 2018 as planned.[53] Thus, as a practical matter, no CCWG-Accountability even exists for the IOT to "report back" to and seek approval from with respect to the Interim Supplementary Procedures.

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[50] ICANN Bylaws, 1 October 2016, Art. 4, § 4.3(n) (emphasis added), (Ex. [VRSN] 2) (available at https://www.icann.org/resources/pages/bylaws-2016-09-30-en).

[51] *See id.*, Art. 27, § 27.1(b).

[52] The Independent Review Process Implementation Oversight Team (IRP-IOT) Draft Recommendations, Ex. 13, (available at https://www.icann.org/public-comments/irp-iot-recs-2018-06-22-en).

[53] Co-Chairs Statement from CCWG-Accountability Meeting in Panama City (26 June 2018), Ex. 14 (available at https://www.icann.org/news/blog/co-chairs-statement-from-ccwg-accountability-meeting-in-panama-city ("This then concludes the work of the CCWG-Accountability.")).

C. The IRP-IOT Was Not Required to Go Through a Second Public Comments Period Before Submitting the Draft Interim Supplementary Procedures to the Board.

52. Afilias asserts that ICANN's "designated practice for public comment periods" required the IRP-IOT to seek further public comment on the proposed changes to Rule 7 before presenting the Interim Supplementary Procedures to the Board.[54] However, Afilias ignores the declaration of Samantha Eisner, Deputy General Counsel of ICANN, which contradicts Afilias' position. As Ms. Eisner explains:

> *ICANN's Bylaws require that certain documents, including the Updated Supplementary Procedures, be posted for public comment before they are adopted by the Board. However, this requirement does not mean that after public comments are received, every subsequent iteration of the document, or portions thereof, must be posted for further public comment prior to Board adoption.*[55]

53. Instead of addressing this evidence, Afilias claims that because the IRP-IOT found it appropriate to seek further public comment on a different rule (Rule 4), "the IRP-IOT was inconsistent" in not subjecting Rule 7 to further public comment.[56] But the fact that the IRP-IOT opted to seek further public comment for a single rule does not establish a "practice" or other requirement to always solicit further public comment for subsequent iterations. Instead, it demonstrates that the IRP-IOT recognized that additional public comment might be warranted in certain circumstances but not in others.[57] With respect to Rule 4, the IRP-IOT determined that an additional round of public comment was necessary; for Rule 7, the IRP-IOT made no such finding.[58]

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[54] Afilias' Response ¶ 74.

[55] Eisner Decl. ¶ 7.

[56] Afilias' Response ¶ 74.

[57] The Independent Review Process Implementation Oversight Team (IRP-IOT) Draft Recommendations, Ex. 13 (available at https://www.icann.org/public-comments/irp-iot-recs-2018-06-22-en).

[58] Afilias extensively quotes from the IRP-IOT meeting transcripts and an email reflecting discussions of when a further public comment period might be appropriate, but the majority of these passages reflect discussions concerning Rule 4, and none addressed Rule 7.

54. Afilias argues that Sections 3.6(a) and 4.4(a) of the Bylaws demonstrate ICANN's "designated practice for public comment periods" and required an additional round of public comments here, but neither of those sections apply to the Interim Supplementary Procedures.[59] Section 3.6(a) concerns "policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties."[60] This refers to policies developed through the Supporting Organizations' policy development processes, which are further specified in the ICANN Bylaws. The Interim Supplementary Procedures are not developed through the policy development process and are not considered "Policy Actions" under this provision.[61] Similarly, Section 4.4(a) concerns the Board's "periodic review of the performance and operation of each Supporting Organization, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee" and states that the results of these reviews "shall be posted on the Website for review and comment."[62] This provision has no relation to the Interim Supplementary Procedures. The Bylaws' specific provisions for public comments in two inapposite circumstances do not establish an overarching practice for public comment under all other circumstances.

55. Rather, the only Bylaws provision that applies to public comment on the Interim Supplementary Procedures is Section 4.3(n)(ii), which states that the rules of procedure for IRPs "shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN."[63] And, again, as Ms. Eisner made clear in her declaration, the IRP-IOT complied with ICANN's public comment practice by posting the Interim Supplementary Procedures for public comment prior to ICANN Board consideration.[64]

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[59] Afilias' Response ¶ 74.

[60] ICANN Bylaws, 18 June 2018, Art. 3, § 3.6(a).

[61] ICANN Bylaws, 18 June 2018, Art. 3, § 3.6(a) (Notice and Comment on Policy Actions).

[62] ICANN Bylaws, 18 June 2018, Art. 4, § 4.4(a).

[63] ICANN Bylaws, 18 June 2018, Art. 4, § 4.3(n)(ii).

[64] Eisner Decl. ¶ 7.

D. The Presence of ICANN's Legal Counsel on the IRP-IOT Is Not Improper and Does Not Invalidate the Interim Supplementary Procedures.

56. Afilias claims that two members of the IRP-IOT "raised concerns about the participation of members of the ICANN Legal Department … in the IRP IOT as full members of the community."[65] However, while Afilias cites the opinions of two IRP-IOT members, it ignores the opinions of other more numerous IRP-IOT members who supported the participation of ICANN's legal counsel.

- *"we formed this IOT granting active member status to ICANN legal staff because at that time we felt that both Org and the Board were not contributing in a timely and coordinated fashion. Hence we asked that they got involved in a deeper manner and granting them this status was our way to guarantee that they would be contributing in a pro-active fashion rather than a reactive one."*[66]

- *"As I recall, when we discussed this (now a long time ago) we collectively determined that it was in fact appropriate for someone from ICANN Legal to be an active part of the discussion."*[67]

- *"I have to say I find it surprising that members believe that procedural rules for a formal dispute resolution mechanism can be drawn up by the claimant side of the bar, to the complete exclusion of meaningful participation by the respondent side of the bar (ICANN alone is guaranteed a seat as respondent in each and every IRP), and think that such rules pass muster under the bylaws requirement of fundamental fairness and due process. And I am surprised as well that the composition of the IOT as directed by bylaws – i.e. comprised of members of the global Internet community - could exclude ICANN in a participatory role especially when read in connection with other bylaw provisions such as the one I*

[65] Afilias also references Jones Day's participation in the IRP-IOT, but Jones Day has never been considered a participant. IRP-IOT meeting transcript, 27 April 2017, Ex. 15 at Pg. 1, (available at https://community.icann.org/pages/viewpage.action?pageId=64077897&preview=/64077897/64948112/IOT-IRP_0427ICANN1900UTCfinal%5B1%5D.pdf).

[66] 7 December 2018 email from L. Felipe Sanchez Ambia to IRP-IOT, Ex. 16 (available at https://mm.icann.org/pipermail/iot/2018-December/000479 html).

[67] 6 December 2018 email from B. Burr to IRP-IOT, Ex. 17 (available at https://mm.icann.org/pipermail/iot/2018-December/000475 html).

> *noted above, and in view of this common practice over many years. ICANN appears to me to qualify as a member of the global Internet community….".*[68]

57. Contrary to Afilias' suggestion, the participation of ICANN legal counsel in the IRP-IOT does not represent a conflict of interest. There is nothing unusual or improper about parties choosing dispute resolution procedures that will apply to their own disputes. Indeed, "[i]t is up to the parties to agree on the procedure to be adopted in [an] arbitration process." Domke on Commercial Arbitration § 8:23 (Ex. 19). Thus, parties to arbitrations always "specify the rules that w[ill] govern their arbitrations," and U.S. law requires that courts "respect and enforce the parties' chosen arbitration procedures." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018); *see also* 9 U.S.C. § 4 (requiring federal courts to issue orders "directing that . . . arbitration shall proceed in the manner provided for in" the parties' arbitration agreement). As a result, "parties remain free to alter arbitration procedures to suit their tastes." *Epic Sys.*, 138 S. Ct. at 1623.

58. In any event, Afilias does not contend that there is any merit to the opinions of the two IRP-IOT members who contended that ICANN's legal counsel should not participate in the IRP-IOT. Nor does Afilias argue that the participation of ICANN's legal counsel somehow invalidates the Interim Supplementary Procedures approved by the ICANN Board. Accordingly, the fact that two members of the IRP-IOT recently questioned the involvement of ICANN's legal counsel has no conceivable relevance.

CONCLUSION

59. For these reasons, the Procedures Officer should issue an order designating Verisign and NDC as *amicus curiae* in this IRP, including in proceedings before the Emergency Panelist. Other issues concerning the precise manner of Verisign's and NDC's participation are outside the jurisdiction of the Procedures Officer and should be left for the Emergency Panelist and IRP Panel to decide.

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[68] 7 December 2018 email from D. McAuley to IRP-IOT, Ex. 18 (available at https://mm.icann.org/pipermail/iot/2018-December/000483 html).

Respectfully submitted,

JONES DAY

Dated: February 5, 2019

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Jeffrey A. LeVee

Counsel for Respondent ICANN