

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. )  
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**ICANN'S SUBMISSION REGARDING THE REQUESTS BY VERISIGN AND NDC  
TO PARTICIPATE AS *AMICUS CURIAE***

Jeffrey A. LeVee  
Eric P. Enson  
Kelly M. Ozurovich  
JONES DAY  
555 South Flower Street, 50<sup>th</sup> Fl.  
Los Angeles, CA 90071  
Tel: +1.213.489.3939

Steven L. Smith  
David L. Wallach  
JONES DAY  
555 California Street, 26<sup>th</sup> Fl.  
San Francisco, CA 94104  
Tel: +1.415.626.3939

Counsel to Respondent  
The Internet Corporation for  
Assigned Names and Numbers

## INTRODUCTION

1. ICANN makes this submission in response to the written requests submitted by Verisign, Inc. (“Verisign”) and Nu Dotco LLC (“NDC”) to participate in this proceeding as *amicus curiae*. Verisign and NDC each requests the right to participate as *amicus curiae* in this IRP through: (i) submission of briefs on all substantive issues before the Emergency Panelist and the IRP Panel; (ii) submission of evidence on issues before the Emergency Panelist and IRP Panel; (iii) access to all filings or evidence submitted by either ICANN or Afilias on issues before the Emergency Panelist and the IRP Panel; and (iv) full participation in any hearings before the Emergency Panelist or the IRP Panel.<sup>1</sup>

2. The sole question before the Procedures Officer is whether Verisign and NDC meet the criteria for participation as *amicus curiae* in this IRP. If so, the Procedures Officer “shall” issue an order designating Verisign and NDC as *amicus curiae* in this IRP. The IRP is a single proceeding, and a determination that Verisign and NDC meet the criteria to participate in this IRP as *amicus curiae* means that they may participate in matters regarding interim relief before the Emergency Panelist as well as matters to be considered by the IRP Panel. To the extent that Afilias disputes this issue, the Procedures Officer’s order should make clear that a determination that Verisign and NDC are entitled to participate in this IRP as *amicus curiae* extends to matters before the Emergency Panelist. However, the exact nature of, and procedures for, their participation, including whether either will be allowed to submit evidence or participate in any hearings, is beyond the remit of the Procedures Officer. Instead, such issues will be determined, as appropriate, by the Emergency Panelist and the IRP Panel.

3. ICANN supports Verisign’s and NDC’s requests to participate as *amicus curiae*

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<sup>1</sup> 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.

in this IRP. Rule 7 of the ICANN IRP Interim Updated Supplementary Procedures (the “Interim Supplementary Procedures”) mandates that any person, group, or entity with a “material interest” in the dispute who does not have standing as a claimant must be allowed to participate as an *amicus curiae*. As discussed further below, there can be no serious dispute that Verisign and NDC both have material interests in this IRP, and neither Verisign nor NDC has standing as a claimant. Therefore, Verisign’s and NDC’s requests to participate as *amici curiae* should be granted.

**I. The Interim Supplementary Procedures Were Duly Adopted by the ICANN Board and Must Be Applied According to their Terms.**

4. ICANN’s IRP is established by Section 4.3 of ICANN’s Bylaws. As part of its application for the .WEB gTLD, Afilias agreed to submit to the accountability mechanisms established by ICANN’s Bylaws, including the IRP, for the resolution of any disputes that may arise from Afilias’ application.<sup>2</sup> Pursuant to Section 4.3(n)(ii) of the Bylaws, the Rules of Procedure for the IRP “take effect upon approval by the Board[.]” The Board approved the Interim Supplementary Procedures by a resolution dated 25 October 2018.<sup>3</sup> Accordingly, they govern this IRP.

5. The Procedures Officer has no discretion to decline to give effect to the Interim Supplementary Procedures and, specifically, Rule 7 of the Interim Supplementary Procedures, which provides for the participation of *amicus curiae*. See, e.g., *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 832 (11th Cir. 1991) (arbitrators exceed their authority when they fail to give effect to the agreed arbitration procedures); New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V(d) (an arbitral award may be denied

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<sup>2</sup> New gTLD Applicant Guidebook at 6-4 (available at <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>).

<sup>3</sup> <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.e>.

enforcement if “the arbitral procedure was not in accordance with the agreement of the parties”); ICDR Rules, Art. 1(1) (“[T]he arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing.”); *In the Matter of an Independent Review Process Between Booking.com B.V. and ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 March 2015) (“There is no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. Nor, in this case, does our authority extend to opining on the nature of the policies or procedures established in the Guidebook.”).<sup>4</sup>

6. The role of the Procedures Officer exists solely as a function of Rule 7 of the Interim Supplementary Procedures and his/her powers are created, defined, and circumscribed by that Rule. The Procedures Officer has no further powers and thus no authority to decide any matter not expressly reserved under Rule 7.

7. The provisions of the Interim Supplementary Procedures concerning the right of an *amicus curiae* to participate in an IRP are not ambiguous. Therefore, the drafting history of the *amicus* rule is irrelevant, and the Interim Supplementary Procedures must be applied according to their terms. ICANN nevertheless appreciates the Procedures Officer’s desire to understand the background surrounding his role, especially since this is the first time a Procedures Officer has ever been used. Thus, ICANN concurrently submits its Response to Procedures Officer’s Questions Concerning the Drafting History of the IRP Supplementary Procedures. In that Response, ICANN demonstrates that, contrary to Afilias’ statements in its 8

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<sup>4</sup> Available at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

December 2018 letter to the ICDR, the *amicus* rule **was not** inserted into the Interim Supplementary Procedures at the last minute, nor was it adopted as a result of “malfeasance” by Verisign.

8. Afilias incorrectly states that the *amicus curiae* rule was “first circulated” on 11 October 2018, one day after Afilias provided a draft of its IRP Request to ICANN, and two weeks before the Interim Supplementary Procedures were adopted by the Board.<sup>5</sup> To the contrary, a draft of the *amicus curiae* rule was circulated and publicly posted ***eight months earlier***, on 8 February 2018, in the Report of the Independent Review Process-Implementation Oversight Team (“IRP-IOT”) following Public Comments on Updated Supplementary Procedures.<sup>6</sup> The version of Rule 7 in that February 2018 report states that “any person, group or entity” that does not satisfy the standing requirements of the Bylaws “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.”<sup>7</sup> This provision was added in response to public comments (to an earlier draft approved by the IRP-IOT on 2 November 2016) suggesting that the draft Updated Supplementary Procedures should allow for the participation of interested persons in an *amicus curiae* capacity. A modified version of the *amicus curiae* provision was incorporated in a draft of the Interim Supplementary Procedures dated 8 May 2018, which was circulated to the IRP-IOT and publicly available on

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<sup>5</sup> Letter from Arif Ali dated 8 December 2018 at 2.

<sup>6</sup> Draft Report of the IRP-IOT Following Public Comments on the Updated Supplementary Procedures for the ICANN IRP, at Pg. 4-5 (available at <https://community.icann.org/download/attachments/59643726/IRP.IOT.ReportonPubComments.Rules%28V2%29.pdf?version=1&modificationDate=1519322649000&api=v2>).

<sup>7</sup> *Id.* at 5.

ICANN's website.<sup>8</sup>

9. In October 2018, the draft *amicus curiae* rule was further revised to give additional definition to the “material interest” requirement by specifying that a member of the contention set for a new gTLD that is the subject of an IRP, and/or a person, group, or entity whose actions are significantly referred to in the IRP briefing, have material interests sufficient to participate in the IRP as *amici*. Contrary to Afilias’ contention, however, this revision did not “creat[e] two new categories of *amici*.”<sup>9</sup> Rather, members of a new gTLD contention set at issue in an IRP and persons whose actions are significantly referred to in the IRP briefing, would invariably have a “material interest” entitling them to act as *amicus curiae* under the pre-October 2018 version of the rule. Moreover, the revision was not suggested by David McAuley of Verisign, as Afilias suggests. The revised language was drafted by Samantha Eisner, ICANN’s Deputy General Counsel and liaison to the IRP-IOT, in response to a suggestion by Malcolm Hutty (a member of the IRP-IOT) to specify the categories of persons who are entitled as a matter of right to participate as *amicus curiae* in an IRP.<sup>10</sup> Mr. Hutty has no affiliation with Verisign, and Ms. Eisner was not aware of Afilias’ draft IRP Request at that time.<sup>11</sup>

## **II. The Interim Supplementary Procedures Require that a Party with a Material Interest Be Allowed to Participate as an *Amicus Curiae*.**

10. Rule 7 of the Interim Supplementary Procedures unambiguously provides that a person, group, or entity without standing to act as a claimant is entitled to participate in an IRP

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<sup>8</sup> <https://community.icann.org/download/attachments/59643726/8-May-2018-Draft-INTERIM-Supplementary-Procedures-IOT%20IRP.pdf?version=1&modificationDate=1525885526000&api=v2>.

<sup>9</sup> Letter from Arif Ali dated 8 December 2018 at 3.

<sup>10</sup> Transcript of Meeting of IRP-IOT on 11 October 2018 at 13-16 (available at [https://community.icann.org/download/attachments/95094963/ICANN-10112018-FINAL-en\\_IOT.pdf?version=1&modificationDate=1539634832000&api=v2](https://community.icann.org/download/attachments/95094963/ICANN-10112018-FINAL-en_IOT.pdf?version=1&modificationDate=1539634832000&api=v2) (“Similarly if you -- even if you don't qualify as a claimant, but you satisfy the conditions in this paragraph you should be allowed to intervene as an amicus and it shouldn't be merely discretionary. That's the aim. Not [to] change the definition of who qualifies as a claimant. That should be untouched by this language.”).

<sup>11</sup> Declaration of Samantha Eisner ¶ 6.

proceeding as an *amicus curiae* if (s)he or it has a material interest in the dispute. It states:

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

11. The Procedures Officer’s sole function is to determine whether a proposed *amicus curiae* has a material interest relevant to the dispute, subject to the conditions set forth in Rule 7. The Procedures Officer’s discretion is limited to that determination. If a proposed *amicus curiae* has a material interest relevant to the dispute, the Procedures Officer “shall allow participation by the *amicus curiae*.”

12. Rule 7 establishes three categories of persons, groups or entities deemed to have a material interest relevant to the dispute and who “shall be permitted to participate as an *amicus*[.]”

*“Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an amicus before the IRP PANEL:*

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

13. NDC and Verisign clearly fall within category (iii), and NDC also falls within category (ii). NDC “was part of a contention set for the string at issue in the IRP,” and NDC and

Verisign both are “significant[ly] refer[red] to” in Afiliias’ IRP Request, as well as its Request for Interim Measures in this IRP. Indeed, Verisign is referred to 123 times in Afiliias’ IRP Request and 57 times in Afiliias’ Request for Interim Measures; NDC is referred to 130 times in Afiliias’ IRP Request and 44 times in Afiliias’ Request for Interim Measures.

14. Moreover, regardless of subsections (ii) and (iii), NDC and Verisign indisputably have material interests relevant to this IRP. As the winning bidder in the .WEB auction, NDC paid \$135 million for the right to operate .WEB. Verisign provided the financing for NDC’s bid in exchange for NDC’s agreement, once NDC entered into a Registry Agreement for .WEB, to request that ICANN permit NDC to assign that Registry Agreement to Verisign. The relief Afiliias seeks is to prevent NDC or Verisign from operating .WEB, and to require ICANN to enter into a Registry Agreement with Afiliias for the operation of .WEB. It is difficult to imagine circumstances in which non-parties could more clearly have material interests in an IRP.

15. NDC and Verisign also clearly do not satisfy the standing requirements under ICANN’s Bylaws to be claimants with respect to the IRP that Afiliias has initiated. To be a claimant, a person “must suffer an injury or harm that is directly and causally connected to the alleged violation.”<sup>12</sup> Here, in its IRP Request, Afiliias alleges that ICANN violated its Bylaws by not disqualifying NDC as the winning bidder for .WEB as a result of NDC’s agreement with Verisign to seek permission to assign the Registry Agreement for .WEB to Verisign. NDC and Verisign did not “suffer an injury or harm” as a result of this alleged violation, and they therefore do not have standing as “claimants” in this IRP.

16. In sum, NDC and Verisign each has a material interest in this dispute. Therefore, the Procedures Officer must allow NDC and Verisign to participate in this IRP as *amicus curiae*.

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<sup>12</sup> Bylaws, Art. 4.3(b)(i).



### III. NDC and Verisign Are Entitled to Participate Before the Emergency Panelist and the IRP Panel.

17. The Interim Supplementary Procedures do not expressly address whether an *amicus curiae* may participate before an Emergency Panelist. Rule 7 entitles a person, group, or entity who has a material interest relevant to the dispute to “participate as an *amicus curiae* before an IRP PANEL” and to “submit to the IRP PANEL written briefing(s) on the DISPUTE[.]” Read in context, however, the references in Rule 7 to the rights of *amici* to participate before “an IRP PANEL” include a right to participate before an Emergency Panelist in that IRP.

18. The provisions of the Interim Supplementary Procedures regarding the IRP Panel—including the *amicus* provisions—apply *mutatis mutandis* to the Emergency Panelist.

Rule 5 of the Interim Supplementary Procedures states:

*“In the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief pursuant to the Bylaws, Article 4, Section 4.3(p), the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate.”* (Emphasis added).

19. Thus, the Emergency Panelist is required to accept written briefings from *amicus curiae* in circumstances where the IRP Panel, if it were constituted, would be required to accept such submissions. Indeed, in granting Afilias’ request for discovery in support of its Request for Interim Measures, the Emergency Panelist in this IRP already has held that the powers and duties of the Emergency Panelist are co-extensive with those of the IRP Panel.<sup>13</sup>

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<sup>13</sup> See Decision on Afilias’ Request for Production of Documents in Support of Its Request for Interim Measures, Sec. 2. The Emergency Panelist based this part of his decision on Article 6(3) of the ICDR Rules, which the Emergency Panelist characterized as vesting “an emergency arbitrator with ‘the same authorities as that of an arbitral tribunal.’” (Decision on Afilias’ Requests for Production ¶ 2.4.) In fact, Article 6(3) states only that “[t]he emergency arbitrator shall have the authority vested in the arbitral tribunal under Article 19.” Article 19 addresses the powers of the arbitral tribunal to rule on its own jurisdiction and determine the existence or validity of an arbitration agreement. It does not address discovery, which is dealt with in Article 21 of the ICDR Rules.

20. An Emergency Panelist does not preside over a separate IRP proceeding. Rather, an Emergency Panelist merely serves as a provisional decision maker to deal with requests for interim measures in circumstances where an IRP Panel has not yet been constituted. Accordingly, a determination that an applicant for *amicus curiae* status has a material interest entitling it to participate in an IRP necessarily means that it may participate before both the Emergency Panelist and the IRP Panel. Rule 10 of the Interim Supplementary Procedures, which establishes and defines the role of an Emergency Panelist, states that interim relief may be requested from the “IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL[,]” in which case the Standing Panel will select an Emergency Panelist to hear the request. Moreover, if the IRP Panel is constituted while a request for interim measures is still pending, then the Emergency Panelist automatically is divested of jurisdiction and the request for interim measures goes before the IRP Panel.<sup>14</sup> A person, group, or entity with a material interest is entitled as a matter of right to participate as an *amicus curiae* in a request for interim measures made to the IRP Panel. It would make no sense for a proposed *amicus* to lose that right merely because an Emergency Panelist is required to preside over the request for interim measures due to the fact that an IRP Panel has not yet been constituted.

21. This common sense conclusion is consistent with Footnote 4 to the Interim Supplementary Procedures, which states that the discretion to allow participation from an *amicus curiae* should be exercised “in favor of allowing broad participation of an *amicus curiae* as needed to further the purposes of the IRP set forth in Section 4.3 of the ICANN Bylaws[.]” Afilias’ Request for Interim Measures seeks to block ICANN from entering a Registry

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Nevertheless, Rule 5 of the Supplementary Rules makes clear that the duties of the Emergency Panelist are co-extensive with those of the IRP Panel, including with regard to the participation of an *amicus curiae*.

<sup>14</sup> ICDR Arbitration Rules, Article 6(5) (“The emergency arbitrator shall have no further power to act after the arbitral tribunal is constituted.”).

Agreement with NDC for the operation of .WEB, and NDC's subsequent assignment of that agreement to Verisign (subject to ICANN's approval). Permitting NDC and Verisign to participate in proceedings related to Afilias' Request for Interim Measure is necessary to further the IRP's purpose of "secur[ing] the accessible, transparent, efficient, consistent, coherent and just resolution of disputes," as set forth in Section 4.3(a)(vii) of ICANN's Bylaws.

**IV. Issues Concerning the Manner in Which *Amici* May Be Allowed to Participate in an IRP Must be Determined by the IRP Panel or Emergency Panelist, as Appropriate.**

22. Verisign and NDC request an order determining not only that they have a right to participate as *amicus curiae*, but also 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.<sup>15</sup> ICANN takes no position with regard to the substance of these requests at this time because these issues are outside the jurisdiction of the Procedures Officer. Accordingly, Verisign's and NDC's requests for an order determining the nature of, and procedures for, their participation as *amicus curiae* should be denied without prejudice.

23. Under the Interim Supplementary Procedures, the remit of the Procedures Officer is "to adjudicate requests for consolidation, intervention, and/or participation as an *amicus*."<sup>16</sup> With respect to *amicus* requests, the Procedures Officer's sole task is to "determine[s], in his or her discretion, subject to the conditions set forth above, [whether] the proposed *amicus curiae* has a material interest relevant to the DISPUTE." If so, then the Procedures Officer "shall allow participation by the *amicus curiae*."

24. Any further issues concerning the precise manner in which an *amicus* is to participate in the proceeding are to be decided by the IRP Panel or Emergency Panelist (as appropriate). This is addressed expressly by Rule 7 of the Interim Supplementary Procedures,

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<sup>15</sup> Verisign Request ¶ 5; NDC Request ¶ 16.

<sup>16</sup> Interim Supplementary Procedures, Rule 1 (defining "Procedures Officer").

which states that “[a]ny person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.” This is consistent with the general principle that the IRP Panel controls the procedure in proceedings before it, which is enshrined in Rule 5A of the Interim Supplementary Procedures and Article 20 of the ICDR Rules. As noted, these rules apply *mutatis mutandis* to the Emergency Panelist pursuant to Rule 5 of the Interim Supplementary Procedures.

### CONCLUSION

25. 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 their participation are outside the jurisdiction of the Procedures Officer and should be left for the Emergency Panelist and IRP Panel to decide.

Respectfully submitted,

JONES DAY

By: Jeffrey A. LeVee / ALW  
Jeffrey A. LeVee

Counsel for Respondent ICANN

Dated: January 16, 2019