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28 January 2019

VIA E-MAIL

M. Scott Donahey
International Centre for Dispute Resolution
American Arbitration Association
120 Broadway, 21st Floor
New York, NY 10271

Re: Cover Letter in Support of Afilias' Response to Requests to Participate as Amici in ICDR Case No. 01-18-0004-2702

Dear Mr. Donahey:

Enclosed with this letter is Afilias Domains No. 3 Ltd.'s ("**Afilias**") Opposition to the Requests by VeriSign, Inc. ("**VeriSign**") and Nu Dot Co LLC ("**NDC**") to participate in the IRP filed by Afilias as *amicus curiae*. Afilias' briefing contains a discussion of the drafting history of the Interim Procedures, as requested in your order dated 5 January 2019. For ease of reference, however, we discuss briefly Afilias' responses to the Topics identified in your order.

Topic 1: Public comments on updated procedures that discuss the amicus curiae concept and/or the portion of Article 7 on amicus curiae that ultimately became part of the Interim Supplementary Procedures.

The Public Comment period opened on 28 November 2016 and closed on 1 February 2017. The draft of Rule 7 did not include *amicus curiae* provisions so there were no public comments on "the portion of Rule 7 on *amicus curiae* that ultimately became part of the interim Supplementary Procedures."¹

¹ See Afilias Br. at ¶¶ 21-27, 52.

Three Public Comments were received that did discuss Rule 7.² Each proposed a limited expansion of participation rights to accommodate entities that had participated in “process-specific expert panels” pursuant to ICANN Bylaws Section 4.3(b)(iii)(A)(3), namely:

- Panels conducted by the World Intellectual Property Organization (WIPO), for new gTLD Legal Rights Objections (Fletcher Firm Comments; IPC Comments);
- Panels conducted by the International Chamber of Commerce (ICC), for Community Objections (Fletcher Firm Comments; NCSG Comments); and
- Panels conducted by the International Center for Dispute Resolution (ICDR), for String Confusion Objections (Fletcher Firm Comments).³

Each of these underlying “process-specific expert panels” were an arbitral forum in which evidence was taken, arguments made, and decisions rendered by a panel. The Public Comments were strictly limited to asking for participation rights in IRPs where decisions rendered by such panels were being challenged, given the newfound ability of losing parties in these proceedings to effectively appeal those decisions to an IRP panel.⁴ In that context, the NCSG, for example, proposed that such participants in underlying proceedings have the option to intervene.⁵

None of these Public Comments proposed or discussed the possibility of permitting any entity that had a material interest in the subject matter of the dispute to participate as a party or as an *amicus curiae* outside of IRPs that challenged decisions rendered by such underlying process-specific expert panels. None of these Public Comments proposed or discussed broader rights of participation for members of contention sets formed in the context of the New gTLD Program. None of these Public Comments proposed or discussed broader rights of participation for entities whose actions were referenced in a request for IRP. The reasons for this is self-evident: those rights were first included in the text of Rule

² See Afilias Br. at ¶¶ 28-32.

³ See Afilias Br. at ¶ 29-32.

⁴ See Bylaws Section 4.3(b)(iii)(A)(3) (added in the October 2016 Bylaws).

⁵ See Afilias Br. at ¶ 31.

7 on 19 October 2018, less than a week before they were adopted, and were never published for public comment.

Topic 2: Public Comments on the Role of the Procedures Officer.

The Public Comment Draft did not provide for mandatory third-party rights of participation in an IRP. Rather, a single Procedures Officer—a permanent position appointed from among the Standing Panel or, before its formation, by the ICDR—was to be given full discretion to allow or deny consolidation (based upon a showing that multiple IRPs concerned the same nucleus of operative facts) or intervention (based upon a showing that the proposed intervenor had standing as a Claimant under the Bylaws).⁶

The three Public Comments received that addressed the role of the Procedures Officer are accurately summarized in ICANN’s brief at paragraph 13.

Topic 3: Records of IRP Implementation Oversight Team discussion and specific approval, if any, of the provision(s) discussing amicus curiae.

As noted above, the Public Comment Draft published in November 2016 lacked any *amicus curiae* provisions. In response to the Public Comments, the IRP-IOT proceeded to discuss joinder language that would allow relevant entities to participate in an IRP that challenged the decision of an underlying “process-specific expert panel” proceeding as either a party or as an *amicus curiae*. Party rights were further restricted to those entities with Claimant standing. Those that lacked Claimant standing could participate as an *amicus curiae* if they had participated in the underlying proceeding or otherwise had a material interest in the Dispute. The fact and manner of such intervention was in all respects entrusted to the sole discretion of the Procedures Officer.⁷ The May 2018 Draft incorporated these limited rights of participation.⁸ During the 7 June 2018 IRP-IOT meeting, Rule 7 was described as “agreed upon.”⁹

⁶ See Afilias Br. at ¶¶ 21, 24-25.

⁷ See Afilias Br. at ¶¶ 28, 36-42.

⁸ See Afilias Br. at ¶¶ 45-47.

⁹ See Afilias Br. at ¶ 47.

Significantly and materially revised *amicus curiae* language was subsequently proposed in a new draft set of rules circulated on 5 October 2018.¹⁰ This draft provided for *amicus curiae* participation upon a showing that the entity “has a material interest relevant to the DISPUTE,” subject to the discretion of the Procedures Officer. Participants in relevant underlying proceedings before process-specific expert panels were afforded a mandatory right to participate as an *amicus curiae*. Subsequently, on 11 October 2018, VeriSign’s David McAuley, the IRP-IOT Committee Chair, proposed further revisions to the joinder provisions. McAuley’s proposal provided for a mandatory right for third parties to intervene as Claimants upon a showing (1) of a significant interest relating to the subject matter of the IRP and (2) that intervention was necessary to protect that interest.¹¹

On Friday 19 October, McAuley circulated a further draft of the complete set of Interim Procedures, which reflected further changes to Rule 7’s joinder provisions.¹² The October 19 Draft provided for additional mandatory rights of participation as *amicus curiae* for (1) any member of a relevant contention set and (2) any entity whose actions are specifically referred to in a request for IRP.¹³ As no comments were received regarding the October 19 Draft over the weekend, McAuley (acting as the leader of the IRP-IOT) unilaterally deemed the October 19 Draft to have been “approved” and submitted it (reflecting the joinder language that he had pushed for as a “participant”) to the Board on Monday 22 October 2018.¹⁴ The Board approved the Interim Procedures three days later.¹⁵

Topic 4: Records of the IRP Implementation Oversight Team discussion and specific approval, if any, of the provision(s) discussing the Procedures Officer.

The appointment provisions and the Procedures Officer’s role in consolidating multiple IRPs are largely unchanged from the Public Comment Draft. Those provisions were

¹⁰ See Afilias Br. at ¶ 51.

¹¹ See Afilias Br. at ¶ 54.

¹² See Afilias Br. at ¶ 55.

¹³ See Afilias Br. at ¶¶ 55-56.

¹⁴ See Afilias Br. at ¶¶ 57-58.

¹⁵ See Afilias Br. at ¶ 73.

discussed on 20 July 2016 and agreed to, as evinced by the 31 October 2016 report that accompanied the Public Comment Draft.¹⁶

The role of the Procedures Officer in considering requests to intervene as a Claimant was also largely agreed in 2016 as well, although these provisions were the subject of further tinkering within the IRP-IOT over the next two years. But the central premise of the Intervention section, that entities may intervene in an IRP where those entities can demonstrate Claimant standing, is reflected in the Public Comment Draft. Intervention rights were discussed at the 1 June 2016, 20 July 2016 meetings and were set forth in draft language on 19 July 2016, 26 July 2016, 17 August 2016, 22 August 2016, 29 August 2016, and 31 October 2016.¹⁷

The role of the Procedures Officer, however, changed substantially over time as regards his discretion to allow or deny *amicus curiae* participation. In several drafts circulated over the course of 2017, the Procedures Officer uniformly was granted complete discretion to allow or deny intervention in an IRP and, further, complete discretion regarding whether to allow such intervenors party or *amicus* status.¹⁸ The Procedures Officer retained complete discretion over third party intervention through the May 2018 Draft.¹⁹

In the October 5 Draft, the authority of the Procedures Officer was restricted, in that parties that had participated in underlying arbitral proceedings were granted a mandatory right to participate in relevant IRPs.²⁰ The Procedures Officer's discretion was further restricted by the October 19 Draft's revisions to the *amicus curiae* provisions, which created two additional classes of mandatory *amici*.²¹ Those provisions were never discussed or approved by the IRP-IOT, but were rather deemed approved by McAuley based on the absence of any comments over the weekend of 20-21 October.

¹⁶ See Afilias Br. at ¶ 24.

¹⁷ See Afilias Br. at ¶¶ 20-24.

¹⁸ See Afilias Br. at ¶¶ 36, 42, 44.

¹⁹ See Afilias Br. at ¶ 46.

²⁰ See Afilias Br. at ¶ 51.

²¹ See Afilias Br. at ¶ 55.

Topic 5: The reason for the underscoring of parts of the section headed “Participation as an Amicus Curiae” in Article 7 of the Interim Supplementary procedures.

It appears that the referenced underscoring was the result of an 11th hour “cut and paste” from emails exchanged between Samantha Eisner of ICANN and David McAuley of VeriSign, whereby the underscored language had been developed.²² It does not appear that this artifact of last-minute drafting was intended to convey any emphasis to the underscored language.

Topic 6: Public comments on the underscored language of Article 7.

The underscored language of Rule 7 was developed by Samantha Eisner and David McAuley between 16-19 October 2018. It was never published for public comment.²³ The relevant emails, which are annexed to the Eisner Declaration, were first disclosed by ICANN in January 2019 in response to Afilias’ Documentary Information Disclosure Policy Request.

The underscored language, which created broad mandatory rights for third parties to participate as *amicus curiae* went far beyond the limited Public Comments that had been received in response to the Public Comment Draft. As discussed above, the Public Comments were strictly limited to providing third parties participation rights in IRPs where decisions of underlying “process specific expert panels” were being challenged, pursuant to Section 4.3(b)(iii)(A)(3) of ICANN’s Bylaws.²⁴

Topic 7: Records of IRP Implementation Oversight Team discussions and specific approval, if any, of the underscored sections referenced in Section 5 above.

The underscored language in Rule 7 was never discussed by the IRP-IOT at any time. Indeed, the IRP-IOT did not meet between 19 October 2018 (when this underscored language was first provided to members of the IRP-IOT) and 25 October 2018 (when the ICANN Board adopted the Interim Procedures).

²² See Afilias Br. at ¶ 55.

²³ See Afilias Br. at ¶¶ 52-58.


²⁴ See Afilias Br. at ¶¶ 28-32.

Specifically, the underscored language was provided to the IRP-IOT by email, late in the day on Friday 19 October 2018, as part of a 14-page set of rules.²⁵ When no comments were received by Sunday 21 October 2018, McAuley, acting as Chair of the IRP-IOT, *deemed* the underscored language to have been approved by the IRP-IOT and submitted the entire set of rules proposed on 19 October 2018 to the Board for approval on Monday morning.²⁶ The Board approved the entire set of rules, including the underscored language three days later, on 25 October 2018.²⁷

Topic 8: Please attach all documents as exhibits which support your statements regarding the above topics. ICANN, please use exhibit numbers 1-199. Afilias, please use exhibit numbers 201-399.

A binder of the documents referenced in Afilias' brief is included with this letter.

Best regards,



Arif Hyder Ali

Counsel for Claimant

²⁵ See Afilias Br. at ¶ 57.

²⁶ See Afilias Br. at ¶ 58.

²⁷ See Afilias Br. at ¶ 73.