

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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

**ICANN'S RESPONSE TO PROCEDURES OFFICER'S QUESTIONS CONCERNING
THE DRAFTING HISTORY OF THE SUPPLEMENTARY PROCEDURES**

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INTRODUCTION

1. ICANN makes this submission in response to the Procedures Officer's request, as memorialized in paragraph 4 and Appendix A of the Memorandum of Conference Call No. 1, that the parties brief the drafting history of the creation of the Procedures Officer position, the *amicus curiae* rule, and the underscored language in Rule 7 in the Interim IRP Supplementary Procedures ("Interim Supplementary Procedures").

2. As ICANN shows in its Submission Regarding the Requests by Verisign and NDC to Participate as *Amicus Curiae* (served concurrently), the sole remit of the Procedures Officer in this proceeding is to apply the terms of Rule 7, as written, to determine whether Verisign and NDC have a "material interest" relevant to this IRP; and, if so, the Procedures Officer "shall allow participation by the *amicus curiae*."¹ The provisions of the Interim Supplementary Procedures concerning the right of an *amicus curiae* to participate in an IRP are not ambiguous, and the drafting history of those provisions therefore is not material to the resolution of Verisign's and NDC's requests to participate as *amicus curiae*.

3. ICANN understands that the Procedures Officer's questions are not suggestive of any intent to expand the Procedures Officer's mandate here. Indeed, ICANN appreciates the Procedures Officer's desire to understand the drafting history of the Procedures Officer position and *amicus curiae* rule, particularly in light of the fact that this is the first IRP in which these rules have been used. Accordingly, ICANN has addressed the Procedures Officer's requested topics below ("Topics for Briefing"). In order to fully respond to the Topics for Briefing, ICANN has provided the Procedures Officer with the relevant context for its responses, and rather than responding in a "Q&A" format, ICANN addresses the pertinent issues in chronological order. Accordingly, for the Procedures Officer's ease of reference, ICANN sets forth below the locations in this submission that respond to each of the Procedures Officer's Topics for Briefing.

¹ Interim Supplementary Procedures, Rule 7 ("Participation of *Amicus Curiae*).

TOPIC FOR BRIEFING	CITATION
1. Public comments on updated procedures that discuss the amicus curiae concept and/or the portion of Article 7 on <i>amicus curiae</i> that ultimately became part of the Interim Supplementary Procedures.	Paragraph 21, at Pages 11-12.
2. Public comments on the role of the Procedures Officer.	Paragraph 13, at Pages 9-10.
3. Records of IRP Implementation Oversight Team discussion and specific approval, if any, of the provision(s) discussing amicus curiae.	Paragraphs 15-46, at Pages 9-23.
4. Records of IRP Implementation Oversight Team discussion and specific approval, if any, of the provision(s) discussing the Procedures Officer.	Paragraphs 7-14, at Pages 6-9.
5. The reason for the underscoring of parts of the section headed “Participation as an Amicus Curiae” in Article 7 of the of the Interim Supplementary procedures.	Paragraph 51, at Page 24.
6. Public comments on the underscored sections of Article 7.	Paragraph 51, at Page 24.
7. Records of IRP Implementation Oversight Team discussion and specific approval, if any, of the underscored sections referenced in Section 5 above.	Paragraph 51, at Page 24.

<p>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.</p>	<p>Consistent with ICANN’s commitment to transparency, almost all of the records cited herein have been publicly available since they were distributed to the relevant Group or Team.² Accordingly, ICANN is providing hyperlinks to allow the parties and the Procedures Officer efficient access to the documents referenced in this submission. ICANN has attached to its submission copies of all documents not previously publicly available, as well as documents which, although publicly available to download from ICANN’s website, are not viewable on an internet browser.</p>
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I. The Development of the Supplementary Procedures Demonstrates A Consistent Intent to Permit Broader Participation in an IRP.

A. The IRP-IOT Was Created to Update the IRP Rules Of Procedure to Reflect the Enhanced IRP Process, Including Broader Participation in an IRP.

4. In 2014, a Cross Community Working Group on Enhancing ICANN Accountability (“CCWG-Accountability”)³ was created in response to requests from the global Internet community that ICANN’s then-existing accountability mechanisms be reviewed and enhanced in light of the changing historic contractual relationship with the U.S. Government anticipated through the Internet Assigned Numbers Authority (“IANA”) Stewardship Transition.⁴ Between December 2014 and February 2016, the CCWG-Accountability developed various proposals, which ultimately resulted in the creation of the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (“CCWG-WS 1 Proposal”).

² See ICANN Bylaws, 11 June 2018, Art. 3, § 3.1, <https://www.icann.org/resources/pages/governance/bylaws-en/#article3>.

³ Participation in the CCWG-Accountability was open to anyone, “regardless of whether they are members of the community,” and the group currently lists 199 participants. <https://community.icann.org/pages/viewpage.action?pageId=50823968>. The CCWG-Accountability’s activities were public—the records of meetings and discussions via an email listserv are still publicly available. See <https://community.icann.org/display/acctcrosscomm/Meetings>.

⁴ CCWG Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (“CCWG-WS 1 Proposal”), 23 Feb. 2016, ¶¶ 10, 12, at Pg. 8, <https://www.icann.org/en/system/files/files/ccwg-accountability-supplemental-proposal-work-stream-1-recs-23feb16-en.pdf>.

The CCWG-WS 1 Proposal made 12 recommendations for enhancing ICANN’s accountability, including a recommendation to “Strengthen[] ICANN org’s Independent Review Process.”⁵ Specifically, the CCWG-Accountability recommended, among other things: (1) modifying ICANN’s Bylaws to expand the scope of the IRP process;⁶ and (2) creating a CCWG to develop “[d]etailed rules for the implementation of the IRP (such as rules of procedure),” which would be approved by ICANN’s Board, including rules to broaden participation in an IRP by other interested parties.⁷

5. ICANN’s revised Bylaws (effective 1 October 2016) provide for the establishment of an IRP Implementation Oversight Team (“IRP-IOT”) in consultation with the Supporting Organizations (“SOs”) and Advisory Committees (“ACs”) and “comprised of members of the global Internet community,”⁸ and require the IRP-IOT to “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.”⁹ The Bylaws also specify that the final Updated Supplementary Procedures should be “published and subject to a period of public comment that complies with the designated period for public comment periods within ICANN org, and take effect upon approval by the Board.”¹⁰

6. The IRP-IOT is obliged to draft rules that “ensure fundamental fairness and due process” and, “at a minimum[,] address” a series of elements, including “[i]ssues relating to joinder, intervention, and consolidation of Claims.”¹¹ The IRP-IOT created the Procedures Officer to help fulfill the mandates to ensure fairness and due process, address joinder and

⁵ *Id.* ¶¶ 174-181.

⁶ *Id.* ¶ 178, at Pg. 34.

⁷ *Id.* ¶ 178, at Pg. 35.

⁸ ICANN Bylaws, 1 October 2016, Art. 4, § 4.3(n)(i), <https://www.icann.org/resources/pages/bylaws-2016-09-30-en>.

⁹ *Id.*

¹⁰ *Id.* § 4.3(n)(ii).

¹¹ *Id.* § 4.3(n)(iv) and § 4.3(n)(iv)(B).

related issues, and efficiently resolve disputes.

B. The IRP-IOT Created the Procedures Officer to Adjudicate Specific Requests in Accordance with the Draft Updated Supplementary Procedures.

7. The concept of a Procedures Officer was discussed at the outset of the IRP-IOT's work. The IRP-IOT discussed having a single IRP panelist (rather than the three-member IRP Panel¹²) vested with the authority to resolve joinder, intervention, and consolidation requests. In other words, the Procedures Officer was intended as a referee or magistrate to adjudicate a specific set of requests in accordance with the draft Updated Supplementary Procedures.

8. On 19 July 2016, Becky Burr, in her then capacity as IRP-IOT Chair,¹³ circulated the first draft of the proposed Updated Supplementary Procedures.¹⁴ The concept of a Procedures Officer was discussed in two places: (1) the Definitions section; and (2) in Rule 7. First, the draft defined "PROCEDURES OFFICER" as:

a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and joinder, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for interim relief.¹⁵

9. Rule 7 stated:

¹² The 1 October 2016 Bylaws established an omnibus standing panel of seven or more members ("Standing Panel"), from which the members of the three-member IRP Panel hearing each Dispute would be selected. ICANN Bylaws, 1 October 2016, Art. 4, § 4.3(j), (k). Recognizing that the Standing Panel might not be fully constituted before an IRP was filed, the Bylaws also provided a process for selecting members for an IRP Panel if the Standing Panel was not in place when the IRP was filed. *Id.* Art. § 4.3(k)(ii).

¹³ In November 2016, Ms. Burr joined the ICANN Board. As a result, Ms. Burr could no longer serve as a member or Chair of the IRP-IOT, though she continued participating in the IRP-IOT based on her role as an ICANN Board member. Transcript of 22 November 2016 IRP-IOT meeting, at Pg. 1, https://community.icann.org/pages/viewpage.action?pageId=61607509&preview=/61607509/63149990/IRP-IOT_22November.pdf.

¹⁴ 19 July 2016 email from B. Burr to IOT list re "Materials for tomorrow's call," <https://mm.icann.org/pipermail/iot/2016-July/000015.html>.

¹⁵ 19 July 2016 draft Updated Supplementary Procedures for ICANN IRP, Definitions, <https://community.icann.org/display/IRPIOTI/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home?preview=/96211302/102141166/CCWG%20Counsel%20Draft%202016%2007%2019%20-%20Redline%20against%202013%20ICDR%20Supplemental%20Procedures.pdf>.

At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. A CLAIMANT may join in a single written statement of a DISPUTE, as independent or alternative claims, as many claims as it has that give rise to a DISPUTE.¹⁶

10. During the IRP-IOT conference call the next day, the group discussed the concept of a Procedures Officer:

a Procedures Officer is also a concept that, although we provided in the proposal for the consolidation and intervention and joinder, we didn't really specify the mechanisms by which that would take place. The drafters have proposed creation of a Procedures Officer who would be "a single member of the Standing Panel" that would be "designated to" deal with these kinds of "requests for consolidation, intervention, and joinder." And as we said, until the time the Standing Panel is in place, there would be [someone] appointed by ICDR while they are the provider here.¹⁷

11. Ms. Burr then noted that she understood the proposed rules concerning the Procedures Officer to mean that:

¹⁶ *Id.* Rule 7.

¹⁷ Transcript of 20 July 2016 IRP-IOT meeting at pg. 6-7, https://community.icann.org/pages/viewpage.action?pageId=59649458&preview=/59649458/60493345/CCWG_IRP-IOT_20_July.pdf.

a procedures officer would be appointed from the standing panel – so that’s from the larger panel – to consider requests for consolidation, intervention and joinder.

And that consolidation, intervention and joinder would be allowed at the discretion of the procedures officer and that consolidation would be appropriate when the procedures officer concludes that there’s sufficient common nucleus of operative facts that the joint resolutions of the dispute would foster justice and an efficient resolution and any person or if they qualified to be a claimant. So anybody who would be materially affected by the action or inaction of ICANN would be permitted to intervene with the permission of the procedures officer.¹⁸

12. On 2 November 2016, the CCWG-Accountability reviewed and approved publication of draft Updated Supplementary Procedures for community input through ICANN’s public comment processes.¹⁹ The draft published for public comment included the same definition for Procedures Officer set forth in the 19 July 2016 draft Updated Supplementary Procedures.²⁰ The version of Rule 7 published for public comment likewise remained unchanged, except as it related to page limits.²¹

13. The IRP-IOT received three public comments concerning the Procedures Officer. Two commenters opposed the creation of a Procedures Officer, asserting that the IRP Panel as a whole should determine whether joinder, intervention, or consolidation is appropriate.²² A third commenter stated that the IRP Panel should determine, on a case-by-case basis, whether the entire Panel or the Procedures Officer should determine consolidation, intervention, and joinder

¹⁸ *Id.* at Pg. 27.

¹⁹ Public Comment Page, Updated Supplementary Procedures, <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>.

²⁰ Draft Updated Supplementary Procedures, 31 October 2016, Definitions, <https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>.

²¹ *Id.* Rule 7.

²² dotMusic Public Comments on Updated Supplementary Procedures, at Pg. 3-4, <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfzqApbhRMhH.pdf>; Comments of GNSO-IPC on Draft IRP Updated Supplementary Procedures, at Pg. 2, 6-7, <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdf75S74tOev.pdf>.

issues.²³

14. The IRP-IOT considered these comments, but ultimately decided to preserve the role of the Procedures Officer as the mechanism for determining issues arising under Rule 7.²⁴

C. The IRP-IOT Created an Amicus Rule in Response to Public Comments and to Enable the IRP Panel to Effectuate the Purposes of the IRP by Securing Transparent and Just Resolutions of Disputes.

1. The IRP-IOT Always Intended to Ensure that All Relevant Entities Had An Opportunity to Be Heard in an IRP.

15. Ever since its third meeting on 1 June 2016, the IRP-IOT intended to provide a mechanism for *amicus curiae* briefing in the Updated Supplementary Procedures. During that meeting, the IRP-IOT Chair recognized that certain IRP disputes “also implicated the rights and interests of other folks,” and that the Updated Supplementary Procedures should “make sure that all of the parties and interests are before the [IRP] panel at the right time.”²⁵ The Chair encouraged the IRP-IOT to “mak[e] sure that there’s an efficient way for other parties who have an interest in the dispute to make their views known or to be participants.”²⁶

16. In response to the Chair’s comments, Edward McNicholas of Sidley Austin, counsel hired to assist the CCWG-Accountability, recommended that the IRP-IOT consider “whether there should be something short of full intervention, **such as an amicus brief**, so that people who feel they want to say something about a dispute can present arguments and present

²³ Registries Stakeholder Group Statement, at Pg. 2, <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdf/tzWUYHrLU.pdf>.

²⁴ See “Joinder Issue” presentation, <https://community.icann.org/pages/viewpage.action?pageId=64069813&preview=/64069813/64077877/Joinder%20issue%20IOT%203.23.17.pdf>; transcript of 23 March 2017 IRP-IOT meeting at Pg. 28, https://community.icann.org/pages/viewpage.action?pageId=64069813&preview=/64069813/64079672/IRP-IOT_Meeting_23March2017.pdf.

²⁵ Transcript of 1 June 2016 IRP-IOT meeting at Pg. 25-26, <https://community.icann.org/pages/viewpage.action?pageId=59641145&preview=/59641145/59645193/irp-iot-3-01jun16-en.pdf>.

²⁶ *Id.* at Pg. 26.

concerns to a panel without having to jump fully into the dispute.”²⁷ The Chair agreed that “that probably makes sense in some of these things.”²⁸

17. On 20 July 2016, during the IRP-IOT’s fifth meeting, the Chair noted that the directive to address issues concerning interveners “was something that we had talked about as it was important to make sure that all of the relevant parties were at the table.”²⁹ As noted above, the objective was to ensure that “anybody who would be materially affected by the action or inaction of ICANN would be permitted to intervene.”³⁰ Amy Stathos, ICANN’s Deputy General Counsel and liaison to the IRP-IOT, then explained that “particularly with the New gTLD Program,” the results of an IRP challenging ICANN’s determination under the New gTLD Program could affect members of a contention set that did not bring the IRP and are therefore not parties to the IRP.³¹ Ms. Stathos noted that in several instances, those other applicants for the string at issue in an IRP “have wanted to even present briefing or something along those lines and participate [in the IRP].”³²

2. Public Comments Supported an Amicus Rule.

18. As noted above, the CCWG-Accountability reviewed and approved publication of draft Updated Supplementary Procedures on 2 November 2016 for community input through ICANN’s public comment processes.³³ Members of the public were invited to submit comments on the draft Updated Supplementary Procedures through 1 February 2017.³⁴ The IRP-IOT was

²⁷ Transcript of 1 June 2016 IRP-IOT meeting at Pg. 26, <https://community.icann.org/pages/viewpage.action?pageId=59641145&preview=/59641145/59645193/irp-iot-3-01jun16-en.pdf> (emphasis added).

²⁸ *Id.* at Pg. 27.

²⁹ Transcript of 20 July 2016 IRP-IOT meeting at Pg. 28, https://community.icann.org/pages/viewpage.action?pageId=59649458&preview=/59649458/60493345/CCWG_IRP-IOT_20_July.pdf.

³⁰ *Id.* at Pg. 27.

³¹ *Id.*

³² *Id.*

³³ Public Comment Page, Updated Supplementary Procedures, <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>.

³⁴ <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>.

required to analyze public comments and consider amending the draft Updated Supplementary Procedures in light of the comments.³⁵

19. The draft Updated Supplementary Procedures that were posted for public comment in November 2016 provided in Rule 7, in relevant part:

Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. . . . Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER.³⁶

20. Although this proposal would have permitted *some* of “the relevant parties” to join “the table,” it did not provide an avenue for *all* entities the IRP-IOT had discussed including during the 20 July 2016 meeting—*i.e.*, the members of the contention set who did not bring the IRP and other persons materially affected by the action at issue in the IRP, but who do not qualify to be an IRP claimant.

21. The IRP-IOT received five public comments concerning Rule 7 from 28 November 2016 to 2 February 2017. As noted above, three comments concerned the role of the Procedures Officer. One of those comments and two other comments asserted that entities involved in the underlying action that is the subject of an IRP should have broader participation rights in that IRP.³⁷ The comments, in relevant part, were:

GNSO-INTELLECTUAL PROPERTY CONSTITUENCY	FLETCHER, HEALD & HILDRETH	NONCOMMERCIAL STAKEHOLDERS GROUP
Any third party directly involved in the underlying action which is the subject of	[T]he Updated Supplementary Procedures must permit any party to an	[The proposed rules] only have the disgruntled party and ICANN as the parties to

³⁵ *Id.*

³⁶ Draft Updated Supplementary Procedures, Rule 7, <https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>.

³⁷ Comments of GNSO-IPC on Draft IRP Updated Supplementary Procedures, at Pg. 2, <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdf75S74tOev.pdf>; Fletcher, Heald, & Hidreth, P.L.C. Comments in Response to the New Draft of the “Updated Supplementary Procedures” for ICANN’s IRP, at Pg. 3-4, <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfAkzQ0N4xz2.pdf>; Comments of the Noncommercial Stakeholders Group (NCSG) on the Updated Supplementary Procedures for IRP, at Pg. 4-5, 7 <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfLoCFUVHjfN.pdf>.

<p>the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s).³⁸</p>	<p>arbitration proceeding resolving a gTLD dispute to intervene as a matter of right in an appeal of or other post-decision challenge to the arbitral decision.³⁹</p>	<p>the proceedings. All others have to apply to accepted. . . . That’s not the procedure in any other litigation forum which practices due process. Everywhere else, all parties to the underlying proceeding have the right to intervene -- the right to be heard in the challenge to their proceeding. Here too, such a Right of Intervention (a material change to Section 7 of these Procedures) must be added. . . .</p> <p>Should the winning party not have the time and resources to fully engage in the IRP, they should at least be able to file proceedings analogous to Amicus Briefs to inform the IRP Panel of information that is materially-relevant to the proceeding and of which the winning party may be in sole possession.⁴⁰</p>
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3. The IRP-IOT Revised the Draft Updated Supplementary Procedures to Address the Public Desire for Participation of Entities Involved in the Underlying Action at Issue in the IRP.

22. In response to the public comments concerning non-party involvement in an IRP, the IRP-IOT deliberated the issue for several months in 2017 and 2018, and ultimately agreed that the non-party involvement concept should be divided into two separate concepts: (i)

³⁸ Comments of GNSO-IPC on Draft IRP Updated Supplementary Procedures, at Pg. 2, <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdf75S74tOev.pdf>.

³⁹ Fletcher, Heald, & Hidreth, P.L.C. Comments in Response to the New Draft of the “Updated Supplementary Procedures” for ICANN’s IRP, at Pg. 3-4, <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfAkzQ0N4xz2.pdf>.

⁴⁰ Comments of the Noncommercial Stakeholders Group (NCSG) on the Updated Supplementary Procedures for IRP, at Pg. 4-5, 7 <https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfLoCFUVHjfN.pdf> (emphasis added).

intervention by entities that satisfy the standing requirements for a claimant, which entities would be permitted to intervene in the IRP as a claimant; and (ii) entities with a material interest relevant to the dispute that do not satisfy the requirements for a claimant, which entities would be permitted to participate as *amicus curiae*.⁴¹ The evolution of this determination is summarized below and available in full in the publicly available records of IRP-IOT meetings and communications cited herein.

23. During the IRP-IOT’s 23 March 2017 meeting, then IOT Chair David McAuley⁴² circulated a document organizing public comments about Rule 7, which recognized that several commenters sought broader participation rights for entities involved in the action at issue in the IRP.⁴³ Addressing the public comments, Mr. McAuley stated:

there are ways that we can approach this. I think it’s a fair request that [entities] involved below who won at the expert panel, and now see their win being challenged, should be able to be parties, and should have a right to be parties, I can see that. We can also consider whether there are ancillary parties that might have a right to file an amicus brief, a friend of the court kind of brief. But as I set the table, I shouldn’t take up all the air time, so let me just open the floor to ask if people want to comment on this subject⁴⁴

24. ICANN liaison Samantha Eisner noted:

I think we do need to be careful as we consider these, that we recall what the definition of disputes are, and that we don’t write rules that allow people to re-litigate a panel decision through the IRP, but make sure that any one that we would allow join[d]er, or

⁴¹ See Interim Supplementary Procedures, Rule 7, <https://www.icann.org/en/system/files/files/irp-interim-supplementary-procedures-25oct18-en.pdf>.

⁴² Mr. McAuley, who worked at Verisign and had been a member of the IRP-IOT since its first meeting on 14 January 2016, succeeded Ms. Burr as Chair of the IOT, at the request of the CCWG-Accountability co-chairs. See Transcript of 22 November 2016 IRP-IOT meeting, at Pg. 1, https://community.icann.org/pages/viewpage.action?pageId=61607509&preview=/61607509/63149990/IRP-IOT_22November.pdf.

⁴³ “Joinder Issue” presentation, <https://community.icann.org/pages/viewpage.action?pageId=64069813&preview=/64069813/64077877/Joinder%20issue%20IOT%203.23.17.pdf>.

⁴⁴ Transcript of 23 March 2017 IRP-IOT meeting at pg. 29, https://community.icann.org/pages/viewpage.action?pageId=64069813&preview=/64069813/64079672/IRP-IOT_Meeting_23March2017.pdf.

for this instance, using the example of the expert panel, that it's tethered to whether or not that expert panel decision resulted in a violation of ICANN bylaws or articles, and that we make sure that we tailor any join[d]er to supporting that discussion within the IRP.⁴⁵

Mr. McAuley agreed that “[n]one of the things that we’re talking about should enlarge, or can enlarge, in my opinion, enlarge on what the [B]ylaws provide.”⁴⁶

25. The IRP-IOT continued to discuss the public comments via email correspondence; on 29 March 2017, Mr. McAuley proposed (in his role as participant) several modifications to Rule 7, including “[t]hat all parties [to the underlying proceeding] have a right to intervene or file an amicus brief, as they elect. If they elect to become a party they take on all rights/obligations of parties,” and that “other ‘interested’ parties be able to petition the panel or procedures officer (whichever is acting) to intervene (as parties or as amici) and the decision in this respect will be up to the panel or procedures officer (whichever is acting).”⁴⁷ Another participant, Greg Shatan, supported Mr. McAuley’s proposals.⁴⁸

26. Between April 2017 and August 2017, the IRP-IOT continued to discuss third party participation in IRPs. Mr. McAuley continued to propose a “two level[.]” option, in which certain entities would be allowed to participate as parties and others permitted to file “a brief to the panel letting them know our thoughts on this important subject.”⁴⁹ ICANN’s liaisons from

⁴⁵ *Id.* at Pg. 30.

⁴⁶ *Id.*

⁴⁷ 29 March 2017 email from D. McAuley to IRP-IOT, <https://mm.icann.org/pipermail/iot/2017-March/000169.html>.

⁴⁸ 29 March 2017 email from G. Shatan to IRP-IOT, <https://mm.icann.org/pipermail/iot/2017-March/000170.html>.

⁴⁹ Transcript of 6 April 2017 IRP-IOT meeting, at Pg. 21-30, https://community.icann.org/pages/viewpage.action?pageId=64077895&preview=/64077895/64083733/IRP-IOT__18_6_April.pdf; transcript of 4 May 2017 IRP-IOT meeting, at Pg. 3-5, https://community.icann.org/pages/viewpage.action?pageId=64081164&preview=/64081164/64950378/IRP_IOT_0504ICANN1900UTC%5B2%5D.pdf; handout “Suggestions for disparate Joinder Comments,” <https://community.icann.org/pages/viewpage.action?pageId=64081164&preview=/64081164/64948553/IRP%20disparate%20joinder%20comments%20.pdf>; transcript of 11 May 2017 IRP-IOT meeting, at Pg. 5-6, https://community.icann.org/pages/viewpage.action?pageId=64084338&preview=/64084338/66063101/IRP_IOT_0512ICANN1300UTC.pdf.

the Legal Department emphasized that the proposals needed substantial clarification concerning how the Procedures Officer or IRP Panel would determine whether an entity was an “interested party” and whether they would be permitted to intervene as *amici* or as parties.⁵⁰ ICANN also sought to adhere to the Bylaws’ remit concerning the types of disputes that may be heard in IRP and the parties that may bring them. In this vein, ICANN reminded the IRP-IOT that the Bylaws did not grant the IRP-IOT power to change the nature of IRP party status, but ICANN suggested that it would be consistent with the IRP-IOT’s remit to permit broader opportunities for *amicus curiae* participation in IRP.⁵¹

27. Other participants provided input on the proposed changes and were generally supportive of (or neutral to) the concept of *amicus curiae* participation.⁵²

28. On 28 May 2017, the IRP-IOT agreed in concept to modify Rule 7 to incorporate an *amicus curiae* role for certain entities,⁵³ but continued to debate the exact parameters of the rule.⁵⁴

29. On 8 February 2018, the IRP-IOT discussed a draft memorandum (which was publicly available) directed to its counsel (Sidley Austin), which reflected the IRP-IOT’s

⁵⁰ See Transcript of 6 April 2017 IRP-IOT meeting, at Pg. 21-30, https://community.icann.org/pages/viewpage.action?pageId=64077895&preview=/64077895/64083733/IRP-IOT_18_6_April.pdf; 26 April 2017 email from S. Eisner to IRP-IOT, <https://mm.icann.org/pipermail/iot/2017-April/000197.html>; 9 July 2017 email from E. Le to IRP-IOT, <https://mm.icann.org/pipermail/iot/2017-July/000265.html>.

⁵¹ See Transcript of 27 July 2017 IRP-IOT meeting, at Pg. 23, https://community.icann.org/pages/viewpage.action?pageId=66087375&preview=/66087375/69274782/IRP-IOT%20SUBGROUP_07272017-FINAL-en.pdf.

⁵² See Transcript of 27 April 2017 IRP-IOT meeting, at Pg. 13, https://community.icann.org/pages/viewpage.action?pageId=64077897&preview=/64077897/64948112/IOT-IRP_0427ICANN1900UTCfinal%5B1%5D.pdf; 27 April 2017 email from M. Huty to IRP-IOT, <https://mm.icann.org/pipermail/iot/2017-April/000201.html>; transcript of 11 May 2017 IRP-IOT meeting, at Pg. 6-8, https://community.icann.org/pages/viewpage.action?pageId=64084338&preview=/64084338/66063101/IRP_IOT_0512ICANN1300UTC.pdf.

⁵³ Transcript of 18 May 2017 IRP-IOT meeting, at Pg. 8, https://community.icann.org/pages/viewpage.action?pageId=64084340&preview=/64084340/66067788/IRP-IOT_5-18-17%20ICANN%20200-300%5B1%5D.pdf; 18 May 2017 IRP-IOT meeting page, <https://community.icann.org/pages/viewpage.action?pageId=64084340>. See also 5 June 2017 email from D. McAuley to IOT, <https://mm.icann.org/pipermail/iot/2017-June/000251.html>.

⁵⁴ See 11 August 2017 email from D. McAuley to IRP-IOT, summarizing issue status, <https://mm.icann.org/pipermail/iot/2017-August/000289.html>.

analysis of and response to the public comments on the draft Updated Supplementary Procedures. Among other things, the draft instructed Sidley Austin to amend Rule 7 to give “a right to intervene in the IRP as a party or as an amicus” to any person, group, or entity that “participated in an underlying proceeding (a process-specific expert panel . . .),” and to allow any other person, group, or entity that did not participate in the underlying proceeding (and does not satisfy the standing requirement to be a claimant) to “intervene as an amicus if the Procedures Officer determines, in her/his discretion, that the entity has a material interest at stake”⁵⁵ A revised draft of the memorandum to Sidley Austin was circulated to the IRP-IOT and made publicly available on 20 February 2018, which contained the same proposed revisions to Rule 7 as those set forth in the 8 February 2018 version of the memo.⁵⁶

4. All Iterations of the Interim Supplementary Procedures Provided for Amicus Briefing.

30. On 8 May 2018, Ms. Eisner, on behalf of ICANN, circulated “a draft proposed set of Interim Supplementary Procedures” for the IRP-IOT’s consideration.⁵⁷ Ms. Eisner explained that

The purpose of this document is to see if we can quickly reach agreement on an interim set of supplementary procedures that could be put in place in the event that we have an IRP filed prior to the time that there is a completed set of Supplementary Procedures available. Currently, the Supplementary Procedures that are in force are those that correspond to the old Bylaws, and we think that it’s important to have a set in place that moves closer to the intent of the new Bylaws, while we understand there is still time needed to get to a final set. . . . NOTHING that is included in this set of Interim Supplementary Procedures is intended to preclude a

⁵⁵ Draft Report of the IRP-IOT Following Public Comments on the Updated Supplementary Procedures for the ICANN IRP, at Pg. 4-5, https://community.icann.org/pages/viewpage.action?pageId=79430443&preview=/79430443/79434258/IRP.IOT.ReportonPubComments.Rules_clean.pdf.

⁵⁶ See 20 Feb. 2018 email from D. McAuley to IRP-IOT, <https://mm.icann.org/pipermail/iot/2018-February/000367.html>. See also <https://community.icann.org/download/attachments/59643726/IRP.IOT.ReportonPubComments.Rules%28V2%29redline.pdf?version=1&modificationDate=1519322689000&api=v2/>.

⁵⁷ 8 May 2018 email from S. Eisner to IRP-IOT, <https://mm.icann.org/pipermail/iot/2018-May/000390.html>.

different procedure being included in the final version concluded through the IOT process.⁵⁸

31. The 8 May 2018 draft Interim Supplementary Procedures was presented as a redline against the 31 October 2016 draft Updated Supplementary Procedures, circulated to the IRP-IOT for review and comment, and made publicly available. A copy of the 8 May 2018 draft of the Interim Supplementary Procedures is attached hereto as Exhibit 1. The 8 May 2018 draft Interim Supplementary Procedures included new language in Rule 7 that provided, with respect to “Intervention and Joinder,” that an entity that participated in an underlying proceeding “shall have a right to intervene in the IRP as a CLAIMANT or as an *amicus*,” depending on whether the entity satisfied the requirements for standing as a claimant. The new language further provided that an entity that did not participate in the underlying proceeding may intervene as an *amicus* “if the PROCEDURES OFFICER determines, in his/her discretion, that the proposed *amicus* has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT.”⁵⁹

32. Between May 2018 and September 2018, the IRP-IOT continued to discuss the Interim Supplementary Procedures, and ICANN and Sidley Austin drafted revisions to the draft Interim Supplementary Procedures.⁶⁰

33. On 24 September 2018, Mr. McAuley, as IRP-IOT Chair, emailed the IRP-IOT and proposed that they attempt to complete the Interim Supplementary Procedures by 11 October 2018, so that they could be “presented to the Board at its meeting in Barcelona” on 25 October 2018.⁶¹

34. On 5 October 2018, Bernard Turcotte, an ICANN contractor responsible for

⁵⁸ *Id.*

⁵⁹ Exhibit 1, at Pg. 8-9 (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>).

⁶⁰ Eisner Decl. ¶ 4.

⁶¹ 24 September 2018 email from D. McAuley to IRP-IOT, <https://mm.icann.org/pipermail/iot/2018-September/000435.html>.

supporting the IRP-IOT, circulated an updated draft of the Interim Supplementary Procedures (which was dated 25 September 2018) to the IRP-IOT.⁶² The 25 September 2018 draft was also posted to the IRP-IOT home page.⁶³ This draft included a sub-section of Rule 7 concerning “Participation as an Amicus Curiae.”⁶⁴ Consistent with the IRP-IOT’s extensive discussions concerning parties to the underlying proceedings and public comments to the same effect, Rule 7 stated (among other things) that:

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. . . . 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)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an amicus before the IRP PANEL.⁶⁵

35. On 9 October 2018, the IRP-IOT considered the proposed changes to Rule 7.⁶⁶ Mr. Turcotte, in his support role, presented the draft Rule 7 in order to facilitate comments from the IRP-IOT. Mr. McAuley commented that he was “concern[ed]” about the proposal, “and what I believe is that on joinder intervention, whatever we are going to call it it’s essential that a person or entity have a right to join an IRP if they feel that a significant—if they claim that a significant interest they have relates to the subject of the IRP.”⁶⁷

36. Following this statement, on 11 October 2018, Mr. McAuley proposed revising

⁶² 5 October 2018 email from B. Turcotte (on behalf of D. McAuley) to IRP-IOT, <https://mm.icann.org/pipermail/iot/2018-October/000444.html>.

⁶³ See 25 September 2018 UPDATE Draft Interim Supplementary Procedures, <https://community.icann.org/display/IRPIOTI/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home?preview=/96211302/96212606/25%20Sept%202018%20UPDATE%20Draft%20Interim%20Supplementary%20Procedures%20for%20ICANN%5B1%5D.pdf>.

⁶⁴ 25 September 2018 UPDATE Draft Interim Supplementary Procedures, Rule 7.

⁶⁵ *Id.*

⁶⁶ Transcript of 9 October 2018 IRP-IOT meeting, at Pg. 13-16, https://community.icann.org/display/IRPIOTI/IOT+Meeting+%2342+%7C+9+October+2018+@+19%3A00+UTC?preview=/90770283/96209798/Transcript_FINAL_IORP-IOT_9Oct2018.pdf.

⁶⁷ *Id.* at Pg. 15.

Rule 7 by modifying the *Intervention* portion to broaden opportunities to intervene in an IRP as a claimant (rather than as an *amicus*):

In addition, any person, group or entity shall have a right to intervene as a CLAIMANT where (1) that person, group or entity claims a significant interest relating to the subject(s) of the INDEPENDENT REVIEW PROCESS and adjudicating the INDEPENDENT REVIEW PROCESS in that person, group or entity's absence might impair or impede that person, group or entity's ability to protect such interest, and/or (2) where any question of law or fact that is common to all who are similarly situated as that person, group or entity is likely to arise in the INDEPENDENT REVIEW PROCESS.⁶⁸

37. On the same day, the IRP-IOT again discussed Rule 7 in its meeting. Mr. McAuley explained his proposed revisions, and Malcolm Hutty indicated that he supported them.⁶⁹ Ms. Eisner, on behalf of ICANN, opposed this addition on the grounds that it would significantly expand the categories of persons who may be parties to an IRP proceeding and potentially allow persons to act as claimants who do not qualify as claimants under the Bylaws. Ms. Eisner counter-proposed moving those entities “to a[n] amicus status.”⁷⁰

38. Ms. Eisner added that “one of the things that we had talked about, many times as we were going over this, was the fact that claimant has a very specific definition under the bylaws,” and that having a significant interest in the outcome of an IRP did not meet the standing requirements for being a claimant. Although ICANN did not “have any concern with allowing those people to be [p]art of a proceeding,” ICANN asserted that “giving them claimant status, gives them certain rights under the [B]ylaws that actually opens up the IRP to be used in ways that are not anticipated.”⁷¹

⁶⁸ 11 October 2018 email from D. McAuley to IRP-IOT, <https://mm.icann.org/pipermail/iot/2018-October/000449.html>.

⁶⁹ Transcript of 11 October 2018 IRP-IOT meeting, at Pg. 12, https://community.icann.org/display/IRPIOT/IOT+Meeting+%2343+%7C+11+October+2018+@+19%3A00+UTC?preview=/95094963/96210667/ICANN-10112018-FINAL-en_IOT.pdf.

⁷⁰ *Id.* at Pg. 12-13.

⁷¹ *Id.*

39. In response, Mr. Hutty asserted that the entities being discussed should have the option of either intervening as a claimant or as an *amicus*.⁷² Mr. McAuley agreed with Mr. Hutty, but said that he “would be willing to look at language” if ICANN proposed further revisions.⁷³

40. Ms. Eisner responded, noting that “it’s very important that if we have a right for someone to come in as a claimant, language such as significant interest here doesn’t align with the standing requirements of the [B]ylaws which require an allegation of material harm,” and that therefore the IRP-IOT should not adopt Mr. McAuley’s proposed revisions to the intervention section of Rule 7.⁷⁴

41. Mr. Hutty then suggested that, “even if you don’t qualify as a claimant, but you satisfy the conditions [proposed by Mr. McAuley] you should be allowed to intervene as an *amicus* and it shouldn’t be merely discretionary.”⁷⁵ Mr. McAuley indicated that he “can live with” Mr. Hutty’s clarified proposal.⁷⁶ He asked Ms. Eisner to circulate a revised proposal for Rule 7, reflecting the colloquy.⁷⁷

42. Ms. Eisner proposed revising the *amicus curiae* section of Rule 7 to more specifically define the situations in which a proposed *amicus curiae* should be found to have a material interest relevant to the dispute. As noted above, Rule 7 already provided that any person with a material interest relevant to the dispute who does not have standing as a claimant would be entitled, upon application, to participate as an *amicus curiae*. It further provided that a person that “participated in an underlying proceeding (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3))” would be deemed to have such a “material interest.”⁷⁸ In an

⁷² *Id.* at Pg. 13.

⁷³ *Id.* at Pg. 14.

⁷⁴ *Id.* at Pg. 14-15.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at Pg. 16.

⁷⁸ 25 September 2018 UPDATE Draft Interim Supplementary Procedures, <https://community.icann.org/display/IRPIOTI/Independent+Review+Process+->

effort to provide further clarity, on 16 October 2018, Ms. Eisner drafted new language for the *amicus* section of Rule 7, which added two categories of entities who would be deemed to have a material interest: (a) in an IRP arising out of an application for a new gTLD, persons who were part of a contention set for the new gTLD; and (b) persons whose actions are significantly referred to in the briefings before the IRP panel.⁷⁹

43. When she sent the proposed language to Mr. McAuley and Mr. Turcotte, Ms. Eisner stated that the Interim Supplementary Procedures should not “give other associated rights for defense of claims or other things that would create a new type of ‘party’ (i.e., not claimant but not *amicus*) participation in the IRP” because “I do not think we have that dictate at this time from the IOT.”⁸⁰ Ms. Eisner also proposed a new footnote to the rule, stating that the IRP Panel should “consider how the purposes of the IRP set forth at Section 4.3(a) of the ICANN Bylaws are furthered, including the need for coherent, consistent and just resolution of DISPUTES” when considering *amicus curiae* matters.⁸¹

44. In addition to several revisions that did not change the substance of Ms. Eisner’s proposed additional categories of entities deemed to have a material interest in the proceeding, Mr. McAuley proposed two substantive changes to the rule. First, on 17 October 2018, Mr. McAuley proposed revising the new footnote by adding a sentence directing the IRP Panel to “allow persons, groups or entities with a material interest relevant to the DISPUTE to participate broadly as an *amicus curiae* consistent with” ICANN’s Bylaw concerning joinder and consolidation in IRP.⁸² Ms. Eisner revised the footnote to delete Mr. McAuley’s proposed sentence and instruct the IRP Panel to “lean in favor of allowing broad participation of an *amicus*

[+Implementation+Oversight+Team+%28IRP-IOT%29+Home?preview=/96211302/96212606/25%20Sept%202018%20UPDATE%20Draft%20Interim%20Supplementary%20Procedures%20for%20ICANN%5B1%5D.pdf](#)

⁷⁹ Eisner Decl. ¶ 5; Exhibit 2, 16 October 2018 Email from S. Eisner to D. McAuley and B. Turcotte.

⁸⁰ Exhibit 2, 16 October 2018 Email from S. Eisner to D. McAuley and B. Turcotte.

⁸¹ *Id.*

⁸² Exhibit 3, 17 October 2018 Email from D. McAuley to S. Eisner.

curiae as needed to further the purposes of the IRP,”⁸³ and Mr. McAuley agreed to the revision.⁸⁴

45. Second, on 18 October 2018, Mr. McAuley proposed expanding the third category of entities that would be deemed to have a material interest in the proceeding to include entities in cases where the briefings before the IRP Panel “significantly refer to . . . interests held by a person, group or entity that is external to the DISPUTE.”⁸⁵ Ms. Eisner did not agree with that proposal, noting that “it’s not clear what this means . . . or what conduct or minimum standard we are saying qualifies for mandatory amicus status,” and “we don’t want to develop the amicus as a right as an easy way to plead in friendly parties by saying ‘x also has a significant interest in this outcome.’”⁸⁶

46. Ultimately, Mr. McAuley accepted Ms. Eisner’s proposed revisions to Rule 7 on 19 October 2018⁸⁷ and, as described further below, circulated the revised draft to the IRP-IOT with an explanation of the discussions resulting in the revision.

47. Ms. Eisner did not know that Afiliat had confidentially shared its draft Request for IRP with ICANN the week before through the Cooperative Engagement Process (which is often a precursor to filing an IRP), on 18 October 2018.⁸⁸

II. The Board Was Aware of the Late October Revisions to the Supplementary Procedures When it Approved Them.

48. On 19 October 2018, Mr. McAuley circulated draft Interim Supplementary Procedures to the IRP-IOT, which included Ms. Eisner’s proposed revisions, asking the IRP-IOT to “please review these rules and if you have any concern please post to the list by 23:59 UTC on

⁸³ Exhibit 4, 18 October 2018 Email from S. Eisner to D. McAuley.

⁸⁴ Exhibit 5, 18 October 2018 Email from D. McAuley to S. Eisner.

⁸⁵ *Id.*

⁸⁶ Exhibit 6, 18 October 2018 Email from S. Eisner to D. McAuley.

⁸⁷ Exhibit 7, 19 October 2018 Email from D. McAuley to S. Eisner.

⁸⁸ Eisner Decl. ¶ 6.

October 21. If we are agreed I will forward for board action.”⁸⁹ On 21 October 2018, Mr. Turcotte sent a message to the IRP-IOT “to confirm that the deadline is now past and that no responses were received.”⁹⁰

49. The IRP-IOT had been debating *amicus* rules for years prior to Board approval. Specifically, the IRP-IOT first began discussing the *amicus* issue in June 2016, and it spent the ensuing months developing the proposed language. Mr. McAuley requested comments by 21 October 2018 because, as he made clear in his email attaching the proposal: it was “a way to take advantage of board action at next week’s meeting.”⁹¹ Indeed, a regular meeting of the Board was scheduled to take place in Barcelona, Spain on 25 October 2018, during one of ICANN’s scheduled public meetings that are held three times each year and are open to all. As a result, many members of the IRP-IOT were present in Barcelona when Mr. McAuley’s email was sent, and it is eminently reasonable to conclude that IRP-IOT members would be focusing on IRP-IOT and other ICANN-related business during this time, despite it being a “weekend deadline.”

50. On 25 October 2018, ICANN’s Board considered the proposed Interim Supplementary Procedures.⁹² Consistent with the Board Accountability Mechanisms Committee’s recommendation, the Board adopted the Interim Supplementary Procedures as they appear on ICANN’s website.⁹³ The Board noted that although the IRP-IOT began considering a set of Interim Supplementary Procedures in May 2018, the Interim Supplementary Procedures were “the subject of intensive focus by the [IRP-]IOT” on 9 and 11 October 2018, “with the

⁸⁹ 19 October 2018 email from B. Turcotte (on behalf of D. McAuley) to IRP-IOT, <https://mm.icann.org/pipermail/iot/2018-October/000451.html>.

⁹⁰ 21 October 2018 email from B. Turcotte to IRP-IOT, <https://mm.icann.org/pipermail/iot/2018-October/000452.html>.

⁹¹ 19 October 2018 email from B. Turcotte to IRP-IOT <https://mm.icann.org/pipermail/iot/2018-October/000451.html>.

⁹² <https://www.icann.org/resources/board-material/agenda-2018-10-25-en>.

⁹³ Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 October 2018), <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.e>. See also Interim Supplementary Procedures, <https://www.icann.org/en/system/files/files/irp-interim-supplementary-procedures-25oct18-en.pdf>.

intention of delivering a set [of interim rules] to the Board for [its] consideration at ICANN63.”⁹⁴ The Board also recognized that the IRP-IOT made further modifications to “four sections” after the 9 and 11 October 2018 meetings, “and a set reflecting those changes was proposed to the [IRP-]IOT on 19 October 2018,” and subsequently presented to the Board.⁹⁵ Accordingly, the Board was well aware of the timing of the revisions to the Interim Supplementary Procedures when it adopted them.

51. As the Procedures Officer in this matter has noted, a portion of the “Participation as an Amicus Curiae” section of Rule 7 is underlined. ICANN’s investigation of this issue, including its review of the IRP-IOT’s meeting transcripts, meeting minutes, and email correspondence, does not indicate that any special meaning should be taken from the underlining beyond the fact that those words were added over the weeks leading up to the 21 October 2018 deadline for final IRP-IOT comment and approval. Indeed, the underlined text tracks directly to the edits that Ms. Eisner drafted between 16 and 19 October 2018, and, as such, it likely is nothing more than a remnant of the drafting process. These edits were not posted for public comment, so no public comments address them.

III. The IRP-IOT Was Not Required to Submit the Supplementary Procedures for Further Public Comment.

52. Afiliias argues that Rule 7 should have been the subject of a further public consultation before being adopted by the Board. Not so.

53. The draft Updated Supplementary Procedures were published for public comment in November 2016, consistent with ICANN’s designated practice for comment periods.⁹⁶ The Interim Supplementary Procedures approved by the Board are derived from that November 2016 draft.

54. ICANN’s general practice did not require a *further* public comment period after

⁹⁴Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 October 2018), <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.e>.

⁹⁵ *Id.*

⁹⁶ ICANN Bylaws, 18 June 2018, Art. 4, § 4.3(n)(ii), <https://www.icann.org/resources/pages/governance/bylaws-en>.

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.⁹⁷

55. The IRP-IOT did not determine that further public comment was necessary for Rule 7 of the draft Supplementary Procedures.

56. Finally, even though there was no formal public comment period regarding the revised *amicus* provisions within Rule 7, it should be noted that the *amicus* rule was developed *in response to* public comments. Moreover, all of the IRP-IOT's meetings were public, meaning that anyone was free to participate. All of the IRP-IOT's discussions—including email discussions, transcripts, and recordings of IRP-IOT meetings—were publicly available. Every draft of the Updated Supplementary Procedures was publicly available; the first draft that included the *amicus* rule under discussion was posted in February 2018, eight months before the Board approved the Interim Supplementary Procedures. To the extent any member of the global Internet community wished to interpose an objection or otherwise propose further discussion on any topic within the IRP-IOT's remit, it was free to do so. But neither Afilias nor any other entity ever opposed the concept of permitting participation in an IRP by entities with a material interest in the underlying dispute.

Respectfully submitted,

JONES DAY

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Dated: January 16, 2019

⁹⁷ Eisner Decl. ¶ 7.