

Appendix A

Excerpts from ICANN's Submissions Stating Its Position that ICANN Is the Proper First Instance Decision-Maker for Afilias' Allegations that NDC Violated the New gTLD Program Rules and Its .WEB Application Should Be Disqualified

1. The New gTLD Program Rules do not expressly address the propriety of the DAA and other impugned conduct of NDC.
 - a. ICANN's Response to Amended Request for IRP ¶ 63: "[T]he Guidebook breaches that Afilias alleges are the subject of good faith dispute by NDC and Verisign, both of which are seeking to participate in this IRP pursuant to their *amicus* applications. For instance, Afilias' overarching theme that the NDC/Verisign agreement is anticompetitive is flatly denied by Verisign, which is prepared to come forward with evidence of its intentions for .WEB, Verisign's competitors, and the fact that Afilias' competition claims have already been thoroughly investigated by DOJ. Likewise, many of Afilias' technical arguments regarding the Guidebook and Auction Rules have also been contested by Verisign and NDC in correspondence to ICANN. For their part, NDC and Verisign claim that Afilias violated the .WEB auction rules and should itself be disqualified by ICANN."
 - b. ICANN's Rejoinder ¶ 82: "Afilias argues that ICANN's discretion can only be exercised consistent with ICANN's Articles and Bylaws by disqualifying NDC's application. This is not the case for a number of reasons. First, determining that NDC violated the Guidebook is not a simple analysis that is answered on the face of the Guidebook. There is no Guidebook provision that squarely addresses an arrangement like the DAA. A true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA. This analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN."
 - c. ICANN's Post-Hearing Brief ¶ 138: "The testimony at the hearing confirmed that there is a good-faith dispute between the Amici and Afilias about whether the DAA violates the Guidebook or Auction Rules. Thus, it is not a foregone conclusion that NDC is or is not in breach. And ICANN's witnesses confirmed that ICANN has not determined whether the DAA violates the Guidebook or Auction Rules due to the enduring hold on .WEB."
 - d. ICANN's Post-Hearing Brief ¶ 139: "Afilias alleges that ICANN was required to reject NDC's application because NDC violated the Guidebook Terms and Conditions by omitting 'material information . . . namely that it was obligated to assign .WEB to VeriSign.' But the term 'material information' is not defined anywhere."

2. Even if it was determined that NDC breached the New gTLD Program Rules, the Rules do not mandate any particular penalty – to the contrary, they grant ICANN broad discretion to determine the appropriate penalty.
- a. ICANN’s Response to Amended IRP Request ¶ 64: “[T]he alleged Guidebook violations identified by Afilias do not call for the automatic disqualification of NDC, as Afilias requests of this Panel. Instead, the Guidebook grants ICANN discretion to determine whether information not disclosed to ICANN – or any other potential Guidebook violation – warrants disqualification. An immediate and less-than-fully-informed disqualification of NDC of the sort sought by Afilias is unprecedented, not mandated by the Guidebook, and could violate ICANN’s obligations to act fairly and transparently as to NDC.”
 - b. ICANN Rejoinder ¶ 4: “In its Reply, Afilias continues to argue that ICANN’s Articles and Bylaws required ICANN to automatically disqualify NDC in 2016 after ICANN received a copy of the DAA. But Afilias overlooks the fact that the violations of the Guidebook and Auction Rules that it alleges do not require the automatic disqualification of NDC’s application or rejection of its winning bid for .WEB. Instead, the Guidebook and Auction Rules, together with ICANN’s Bylaws, provide ICANN with substantial discretion to determine whether NDC committed a breach of the Guidebook or Auction Rules and, if so, the appropriate remedy or penalty, if any.”
 - c. ICANN Rejoinder ¶ 79 “Afilias argues in its Reply that ‘ICANN was required to disqualify NDC’s application and bid in August 2016 when ICANN first learned of NDC’s violations, whether as a matter of automatic disqualification pursuant to the applicable standards, or as a matter of the reasonable exercise of ICANN’s discretion pursuant to those same standards.’ Afilias is wrong. None of NDC’s alleged breaches of the Guidebook or the Auction Rules, even if true, requires automatic disqualification. Instead, the Guidebook and Auction Rules provide ICANN with significant discretion to determine what the penalty or remedy should be, if any, for a potential breach of their terms.”
 - d. ICANN Rejoinder ¶ 81: “ICANN has taken no position on whether NDC violated the Guidebook, but even if ICANN agreed with Afilias’ interpretation of the Guidebook and the effect of the DAA, ICANN still would not be under an obligation to automatically disqualify NDC. Instead, the Guidebook provides ICANN with substantial discretion in addressing and remedying breaches of its terms. For example, Section 1.2.7 of the Guidebook, which Afilias claims was violated by NDC failing to disclose its arrangement with Verisign, explicitly states that ‘[f]ailure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading *may result* in denial of the application.’ The Guidebook provides elsewhere that each applicant ‘acknowledges that any material misstatement or misrepresentation (or omission of material information) *may cause* ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant.’ The Terms and Conditions of the Guidebook, which Afilias claims were violated by an alleged transfer of NDC’s rights and

obligations, state that ICANN’s ‘decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely *at ICANN’s discretion.*’”

- e. ICANN Post-Hearing Brief ¶ 21: “Afilias’ attempt to create this linkage by asserting that ICANN had an absolute and unqualified obligation under its Articles and Bylaws to disqualify NDC’s application (and award .WEB to Afilias) as a result of NDC’s alleged violations is overreaching and untenable. Afilias can point to no provision of the Articles or Bylaws that required ICANN to automatically disqualify NDC and award .WEB to Afilias, because there is none.”
- f. ICANN Post-Hearing Brief ¶ 149: “Nor is it a foregone conclusion that, if NDC is found to be in breach of the Guidebook or Auction Rules, NDC must be disqualified. As set forth above, ICANN has discretion to determine an appropriate remedy for a violation of its rules. There are a range of remedies or penalties – including but not limited to disqualification – that ICANN could employ if it were to find that NDC did violate the Guidebook or the Auction Rules. It is not, as Afilias suggests, simply a choice between disqualifying NDC or condoning the DAA. Selecting the appropriate remedy would involve the balancing of competing interests and policies as well as ICANN’s Commitments and Core Values.”

3. The Guidebook and Auction Rules give ICANN discretion with regard to the interpretation and application of the New gTLD Program Rules – including whether they have been breached and, if so, what penalty, if any, to assess – and state that ICANN has ultimate responsibility for administering the New gTLD Rules.

- a. ICANN’s Response to Amended IRP Request ¶ 21: “Importantly, an applicant’s failure to inform ICANN that previously submitted information has become untrue or inaccurate does not require denial of an application. The Guidebook gives ICANN discretion to determine whether the changed circumstances are material and what consequences, if any, should follow from a failure to disclose those circumstances, which could include denial of the application.”
- b. ICANN Rejoinder ¶ 23: “The Guidebook, however, explicitly vests ICANN with significant discretion over the Program. For instance, because the Board has the ‘ultimate responsibility’ for the Program, the Guidebook reserves to the Board ‘the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.’ Likewise, the Guidebook states that ICANN’s ‘decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion.’ The Guidebook also makes clear that material misrepresentations by applicants ‘may cause’ ICANN to disqualify an application. And other materials related to the Guidebook, such as the Auction Rules and New gTLD Auction Bidders Agreement (‘Bidders Agreement’), state that ICANN’s interpretation of the rules ‘shall be final and binding’ and that ICANN has the discretion to select an appropriate remedy, if any, for violation of the rules.”

- c. ICANN Rejoinder ¶ 84: “Afilias’ additional argument that ‘nothing in the [Auction Rules] suggests that ICANN has any discretion in enforcing’ the Auction Rules is simply incorrect. The Auction Rules grant ICANN significant discretion to interpret and enforce the rules and to determine the appropriate remedy for violation of the rules. Specifically, the Auction Rules make clear that ‘[i]f any dispute or disagreement arises in connection with these Auction Rules, including the interpretation or application of these Auction Rules, or the form, content, validity or time of receipt of any Bid, ICANN’s decision shall be final and binding.’ And the New gTLD Auction Bidders Agreement (‘Bidders Agreement’) expressly states that an applicant ‘acknowledges that it may be subject to a penalty of up to the full amount of the Deposit and forfeiture of its Applications or termination of its registry agreements for a serious violation of the Auction Rules or Bidder Agreement.’ Thus, there is no question that ICANN has the discretion of determining whether a ‘serious violation’ has taken place and, if so, what the appropriate penalty or remedy should be, if any.”
- d. ICANN’s Post-Hearing Brief ¶ 89: “[L]eft unrebutted by Afilias at the Hearing is the principle that the unambiguous provisions of the Guidebook and Auction Rules vest in ICANN substantial discretion to determine whether an applicant has violated the terms of either and, if so, what action to take. Indeed, Afilias did not examine a single ICANN witness regarding the Guidebook and Auction Rules provisions that bestow this discretion on ICANN, the scope of ICANN’s discretion, the manner in which ICANN exercised this discretion or the policy reasons behind this discretion.”
- e. ICANN’s Post-Hearing Brief ¶ 138: “The Guidebook and Auction Rules grant ICANN significant discretion to determine whether a breach of their terms has occurred, and if so, the appropriate remedy, and Afilias presented no evidence or argument at the Hearing contesting ICANN’s discretion or the fact that it is limited only by the requirement that it must be exercised ‘consistently, neutrally, objectively, and fairly[.]’”
- f. ICANN’s Post-Hearing Brief ¶ 139: “At the Hearing, Afilias made no effort to challenge the fact that the Guidebook and Auction Rules do not require ICANN to automatically disqualify an applicant that breaches their terms. In fact, the very sections of the Guidebook and Auction Rules that Afilias claims to have been breached are explicit in giving ICANN discretion to determine whether their terms have been violated and to determine the appropriate remedy for any violations.”
- g. ICANN’s Post-Hearing Brief ¶ 142: “The Auction Rules, however, also grant ICANN significant discretion to interpret and enforce the rules and to determine the appropriate remedy in the event of their violation. Specifically, the Auction Rules make clear that ‘[i]f any dispute or disagreement arises in connection with these Auction Rules, including the interpretation or application of these Auction Rules, or the form, content, validity or time of receipt of any Bid, ICANN’s decision shall be final and binding.’ And the Bidders Agreement expressly states that an applicant ‘acknowledges that it may be subject to a penalty of up to the full amount of the Deposit and forfeiture of its Applications or termination of its registry agreements for

a serious violation of the Auction Rules or Bidder Agreement.’ Thus, there is no question that ICANN has the discretion of determining whether a ‘serious violation’—or any violation—of the Auction Rules has taken place and, if so, what the appropriate penalty or remedy should be.”

4. It is for ICANN—not this IRP Panel—to decide whether NDC violated the New gTLD Program Rules and, if so, the appropriate consequences.
 - a. ICANN Response to Amended IRP ¶ 65: “Afilias’ requested relief from the IRP Panel goes far beyond what is permitted by ICANN’s Bylaws and calls for the Panel to decide issues that are reserved to the discretion of the ICANN Board.”
 - b. ICANN Post-Hearing Brief ¶ 143: “[T]he Guidebook and Auction Rules provide ICANN with the discretion to determine if a breach occurred and, if ICANN makes such a determination, to determine the appropriate remedy. There is no basis for the Panel to interfere with this discretion.”

Appendix B

Schedule of Fees Incurred Responding to Article 33 Application

Name	Position	Total Hours	Total Fees
Enson, Eric	Partner	Redacted - Privileged and Confidential Information	
Howe, Wendy	Paralegal		
LeVee, Jeffrey	Partner		
Livnat, Hadas	Librarian		
Olivo, Renee	Project Assistant		
Smith, Steven	Partner		
Wallach, David	Partner		
Watne, Kelly	Associate		
TOTAL			