

**INDEPENDENT REVIEW PROCESS**  
**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 01 -18 – 0004 -2702

In the matter of an Independent Review

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS  
(ICANN),

Respondent

**ORDER ON ICANN'S REQUEST FOR CORRECTIONS**

31 March 2019

On March 26, 2019, the Internet Corporation for Assigned Names and Numbers (“Respondent”) filed ICANN’S Request for Corrections to the Declaration of the Procedures Officer, requesting that the Procedures Officer make three corrections to the Declaration of Procedures Officer, dated 28 February 2019. On March 28, 2019, Afilius Domains No. 3 Limited (“Claimant”) filed a Response thereto.

A. THE POWER OF A PROCEDURES OFFICER TO CORRECT HIS OR HER DECLARATION

In its general objection to ICANN’s Request for Corrections, Afilius cites to the International Dispute Resolution Procedures, particularly Article 33 entitled “Interpretation and Correction of Award.” There it states that “[w]ithin 30 days after the receipt of an award, any party . . . may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors . . .” ICDR Rules, Art. 33(1). Claimant argues that none of the requested corrections call for the correction of “clerical, typographical, or computational errors.” Afilius’s statement is correct. However, it does not address the fundamental problem with the application of the ICDR Rules to the present situation. The problem with this approach is that 1) the Procedures Officer is not an “arbitral tribunal;” and, 2) nothing in the ICDR rules or the Supplementary Rules provides for any action of any kind by a “Procedures Officer.” The Procedures Officer is a creature whose sole existence is based on the Interim Supplementary Rules, adopted by the ICANN Board of Directors in October 2018. The Interim Supplementary Rules do not refer to any application for interpretation and correction of a Declaration made by a Procedures Officer.

Conversely, there is nothing prohibiting the Procedures Officer from considering such a request. As the Procedures Officer does not wish to issue a Declaration which is inaccurate, the Procedures Officer will consider the three requests for correction made by ICANN and will rule on each of them. It will address each request in the order in which they were made, setting out the original language in the Declaration of the Procedures Officer that is sought to be corrected followed by ICANN's suggested revisions. Finally, the Procedures Officer will either grant or deny each of the three requests, setting forth the reasoning behind the ruling.

## B. REQUESTED CORRECTIONS AND RULINGS

### 1. Requested Correction No. 1

Change ¶ 2 from:

Afilias Domains No. 3 Ltd. (hereinafter, "Afilias") was one of the bidders that made up the contention set for the operation of the new gTLD .web. It initiated the Independent Review Process ("IRP"), asserting that ICANN violated its Bylaws in preparing to award the registry operating rights to Verisign, Inc. (hereinafter "Verisign"). Verisign had acquired the rights to operate as the registry for .web pursuant to a pre-award contract that it had entered into with the winning bidder, Nu DotCo LLC (hereinafter "NDC").

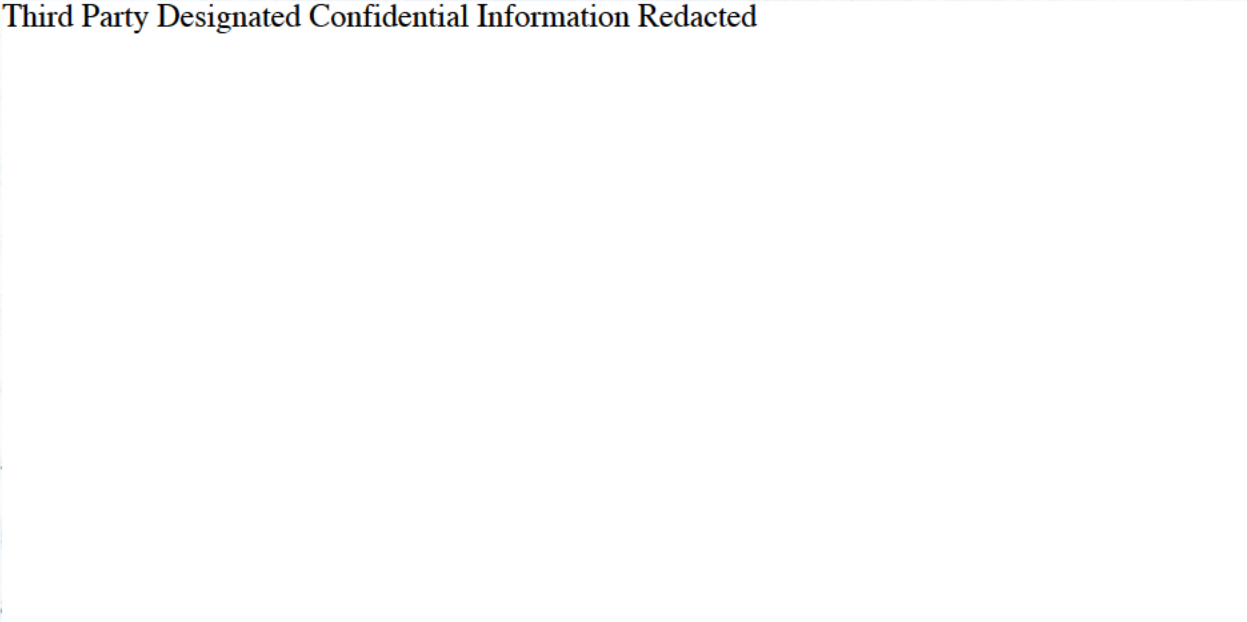
To:

Afilias Domains No. 3 Ltd. (hereinafter, "Afilias") was one of the bidders that made up the contention set for the operation of the new gTLD .web. It initiated the Independent Review Process ("IRP"), asserting that ICANN violated its Bylaws in preparing to award the registry operating rights to **Nu DotCo, LLC** (hereinafter "**NDC**"). Verisign, Inc. ("**Verisign**") had acquired the rights to **assignment of NDC's rights** to operate as the registry for .web, **if ICANN approves of the assignment**, pursuant to a pre-award contract that it had entered into with **NDC**.

**RULING ON REQUEST NO. 1:**

Denied.

Third Party Designated Confidential Information Redacted



ICANN's Base Registry Agreement – Updated 31 July 2017 (the "Registry Agreement") provides at Article 7.5, subsection (d):

**'If ICANN fails to expressly provide or withhold its consent** to any assignment, direct or indirect change of control of Registry Operator . . . **within thirty (30) calendar days** of ICANN's receipt of notice of such transaction . . . from Registry Operator, **ICANN shall be deemed to have consented** to such transaction."

Emphasis added.

Article 7.5, subsection (f)(iv) of the Registry Agreement provides in pertinent part:

**"ICANN shall be deemed to have consented to any assignment . . . or change of control transaction in which the Contracting Party is an existing operator**

of a generic top-level domain pursuant to a registry agreement between such Contracting Party and ICANN . . . unless ICANN provides to Registry Operator a written objection to such transaction within ten (10) calendar days of ICANN's receipt of notice of such transaction pursuant to this Section 7.5." Emphasis added.

Much more time has passed since ICANN received notice of the intent to transfer than that allotted in the Registry Agreement for ICANN to either approve of or object to the transfer. There is no indication that ICANN has ever consented to or objected to the transfer. Therefore, by operation of the Registry Agreement itself, ICANN has been deemed to consent.

#### **Requested Correction No. 2**

. Change ¶ 9 from:

NDC had entered into a pre-award Domain Acquisition Agreement with Verisign, Third Party Designated Confidential Information Redacted

Ultimately, NDC was the successful bidder in the auction process.

To:

NDC had entered into a pre-award Domain Acquisition Agreement with Verisign, Third Party Designated Confidential Information Redacted

Ultimately, NDC was the successful bidder in the auction process.

#### **RULING ON REQUEST NO. 2.**

Denied. On the same basis that Request No. 1 was denied.

### **Requested Correction No. 3**

Change ¶ 63 from:

The fact that David McAuley, the Oversight Committee chair and Verisign's employee, had "knowledge of Afilias's CEP or IRP prior to the ICANN Board unanimously approving the Interim Supplementary Procedures is inapposite and should make no difference to the enforceability of the *amici* rule.

To:

**Whether** David McAuley, the Oversight Committee chair and Verisign's employee, had "knowledge of Afilias's CEP or IRP prior to the ICANN Board unanimously approving the Interim Supplementary Procedures is inapposite and should make no difference to the enforceability of the *amici* rule.

### **RULING ON REQUEST NO. 3**

Denied.

The quoted statement from the Declaration of the Procedures Officer is not a finding of fact, but is rather an assertion made by one of the applicants for *amicus* status. This is set forth clearly in the text of the Declaration. This assertion may or may not have been inconsistent with other assertions made by the applicant. Nonetheless, the applicant made this assertion.

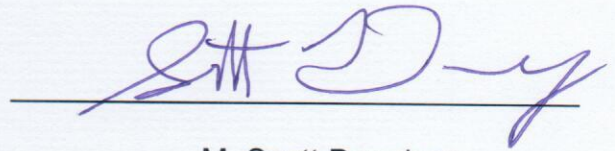
Should there be any doubt on ICANN's part, please compare the following quotation from the applicant's brief to the statement in paragraph 63 of the Declaration of the Procedures Officer set out above:

"Contrary to Afilias' Response, Mr. McAuley's knowledge of Afilias' CEP or IRP prior to the ICANN Board unanimously approving the Interim Supplementary Procedures is inapposite and should make no difference to the enforceability of the *amici* rule."

Verisign, Inc.'s Reply in Support of its Request to Participate as *Amicus Curiae* in Independent Review Process, ¶ 2, at 1.

The Procedures Officer will consider no more applications for relief of any kind from any party or applicant. All further communications should be directed to the Standing Panel, and, until such time as the Standing Panel is formed, to the IRP Panel for determination.

Dated: 31 March 2019



M. Scott Donahey  
Procedures Officer