

27 March 2020

**By email**

Mr. Arif H. Ali  
Mr. Alexandre de Gramont  
Ms. Rose Marie Wong  
Dechert LLP  
1900 K Street, NW  
Washington, D.C. 20006-1110

Mr. Ethan Litwin  
Constantine Cannon LLP  
335 Madison Avenue  
New York, NY 10017

Mr. Jeffrey A. LeVee  
Mr. Eric P. Enson  
Ms. Kelly Ozurovich  
Jones Day LLP  
555 South Flower Street, Fiftieth Floor  
Los Angeles, California 90071-2300

Mr. Steven L. Smith  
Mr. David Wallach  
Jones Day LLP  
555 California Street, 26th Floor  
San Francisco, California 94104

Mr. James S. Blackburn  
Mr. Ronald Johnston  
Ms. Maria Chedid  
Arnold & Porter Kaye Scholer LLP  
777 South Figueroa Street, 44<sup>th</sup> Floor  
Los Angeles, California 90017-5844

Mr. Charles Elder  
Irell & Manella LLP  
1800 Avenue of the Stars, Suite 900  
Los Angeles, California 90067-4276

Mr. Steven A. Marenberg  
Paul Hastings LLP  
1999 Avenue of the Stars, 27<sup>th</sup> Floor  
Los Angeles, California 90067

**Afilias Domains No. 3 Limited v. Internet Corporation for Assigned Names and Numbers – ICDR Case No. 01-18-0004-2702**

Dear Counsel,

On behalf of the Panel, I write further to Afilias' request dated 6 March 2020 for clarification of the First Procedural Order in relation to Phase II of this IRP (**Clarification Request**); ICANN's submission and the *Amici's* joint submission on the Clarification Request, both dated 11 March 2020; and Afilias' response to those submissions dated 12 March 2020. The Panel is also in receipt of ICANN's response dated

Norton Rose Fulbright Canada LLP  
1 Place Ville Marie, Suite 2500  
Montréal, Quebec H3B 1R1 Canada

F: +1 514.286.5474  
[nortonrosefulbright.com](http://nortonrosefulbright.com)

**Pierre Bienvenu, Ad. E.**  
+1 514.847.4452  
[pierre.bienvenu@nortonrosefulbright.com](mailto:pierre.bienvenu@nortonrosefulbright.com)

Your reference  
01-18-0004-2702

Our reference  
1001083941

16 March 2020 to Afiliás' letter of 12 March, to which Afiliás has objected in an email communication also dated 16 March 2020.

The Panel also addresses in this letter the suggestions made in Mr. de Gramont's email dated 13 March 2020, sent on behalf of the Parties, regarding the follow up to be given to the Parties' respective Lists of Issues to be Decided in Phase II, submitted to the Panel under cover of Mr. de Gramont's 13 March email.

This letter and the attached Revised Procedural Timetable shall together constitute the Panel's Third Procedural Order in relation to Phase II of the IRP.

### **A. Clarification Request**

On 6 March 2020, Afiliás requested clarification (i) as to whether the *Amici* are permitted, in their Briefs, to add new documents to the record as exhibits or are limited to referring to exhibits that are already on record, or that will be added to the record by virtue of the Parties' upcoming submissions, and (ii) if the *Amici* are permitted to add documents to the record, for the Panel to set a deadline for documents to be produced by the *Amici* sufficiently in advance of the deadline for the Parties' submissions on 15 July 2020 in which the Parties will address the *Amici*'s Briefs.

#### **1) Submissions of the Parties and Amici**

In support of its Clarification Request, Afiliás argued that any new documents submitted by the *Amici* would inevitably be "cherry picked" and supportive of their submissions. According to Afiliás, the principles of fundamental fairness and due process require that it be granted an opportunity to request documents from the *Amici* if the latter are allowed to refer to documents that are not already in the record.

ICANN submitted in response that the Panel has decided, in its Decision on Phase I, that the *Amici* would be entitled to submit "briefings and supporting exhibits". ICANN added that the Panel also decided that the provisions of the Interim Procedures relating to the Exchange of Information do not apply to the *Amici*. In ICANN's view, Afiliás' concern regarding the possibility for the *Amici* to "cherry pick[]" documents is, for the time being, hypothetical. ICANN submits that if Afiliás believes that any exhibits submitted by the *Amici* are incomplete or present a misleading record, it should advance that argument in its response to the *Amici*'s submissions so the Panel can assign the exhibits their appropriate weight.

The *Amici* consider that the First Procedural Order in relation to Phase II clearly states that they may submit exhibits, without specifying that such exhibits are limited to those already in the record. The *Amici* stress that material evidence may be in their possession and not in the possession of the Parties. For that reason, the *Amici* argue that the Panel would be deprived of essential material if they are not permitted to file new exhibits. The *Amici* further contend that the Panel already ruled that the *Amici* may not propound discovery or be the recipient of information requests.

In response, Afiliás reiterates its fairness concerns. It also states that the First Procedural Order does not address the question of whether the *Amici*'s exhibits are limited to those on record, to documents that have previously been exchanged by the Parties, or to documents that have been produced in advance by the *Amici*. Afiliás also argues that the Panel's decision that the *Amici* cannot request document production from Afiliás does not necessarily imply that the reverse is true, because Afiliás bears the burden of proof with respect to its submission while the *Amici* have no such burden.

#### **2) Directions of the Panel**

In its Decision on Phase I, the Panel made clear that, under the Interim Procedures, the *Amici* are non-disputing parties whose participation in the IRP is through the submission of "written briefings", possibly supplemented by oral submissions at the merits hearing. The Panel also rejected the notion that, under

the Interim Procedures, the *Amici* can enjoy the same participation rights as the disputing parties. It follows that it is for the Parties, who bear the burden of proving their case, to build the evidentiary record of the IRP, and it is based on that record that the *Amici* “may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP Panel may request briefing” (see Rule 7 of the Interim Procedures).

The Panel expects the Parties, in accordance with the Procedural Timetable, to file the entirety of the remainder of their case as part of the second round of submissions contemplated by the timetable, that is to say, with the Claimant’s Reply and the Respondent’s Rejoinder. As evoked in the Panel’s Decision on Phase I (see par. 201), if there is evidence in the possession of the *Amici* that the Respondent considers relevant to, and that it wishes to adduce in support of its case, be it witness or documentary evidence, that evidence is required to be filed as part of the Respondent’s Rejoinder, and not with the *Amici*’s Briefs.

The Panel did not preclude the possibility in its Phase I Decision (and the Procedural Timetable) that the *Amici* might wish to file documents in support of the submissions to be made in their Briefs. By referring to such documents as “exhibits”, however, as other arbitral tribunals have in referring to materials to be filed with the submissions of *amicus* participants, the Panel did not mean to suggest that these “exhibits” (which the Panel would expect to be few in number, and to be directed to supporting the *Amici*’s submissions, not the Respondent’s case) would become part of the record and acquire the same status as the documentary evidence filed by the Parties.

Should a Party be of the view that documents submitted in support of the *Amici*’s Briefs are incomplete or somehow misleading, it will be open to that Party to advance the argument in response to the *Amici*’s submissions and to seek whatever relief it considers appropriate from the Panel.

In the present circumstances, the Panel does not see the need to clarify or add anything to what it said in its Phase I Decision on the subject of the scope of the Exchange of Information provisions of the Interim Procedures.

## **B. Lists of Issues to be Decided in Phase II**

By email dated 13 March 2020, the Parties informed the Panel that they had again attempted – without success – to agree a joint list of issues to be decided in Phase II. The Parties also submitted with that email message their respective proposed “joint” lists.

While unable to agree on a joint list of issues to be decided in Phase II, the Parties agreed on the following suggested procedure for the Panel ultimately to determine the questions on which the *Amici* will be invited to submit briefs. To quote from the Parties’ 13 March email communication:

We understand that the purpose of the issues list requested by the Panel is at least in part to assist the Panel in determining the questions on which the *Amici* will be invited to submit briefs. In that regard, we note that the Panel has directed the Parties and *Amici* to make “[s]ubmissions on questions as to which the *Amici* will be permitted to submit briefings to the Panel, as well as page limits and other modalities” by 24 April. The Parties together propose the following modification to the Procedural Timetable for Phase II in order to make those submissions as useful to the Panel (and the Parties) as possible. We propose that the Panel direct the *Amici* to provide to Afilias and ICANN the list of questions that they wish to address—along with their proposed page limits and modalities—by Friday, 27 March. That will give the Parties and *Amici* ample time to meet and confer on the proposed questions, page limits, and modalities. If the Parties and *Amici* can agree on these items, we will so advise the Panel on 24 April. If not, the *Amici*’s proposed list of questions will be submitted to the Panel on 24 April, along with submissions from the Parties and *Amici* concerning those areas on which they cannot agree.

27 March 2020



The Panel accepts the Parties' suggested modifications to the Procedural Timetable, and accordingly directs the Parties and *Amici* to comply with the procedure set out above, as jointly suggested by Afilias and ICANN, except that the date for the *Amici* to provide to the Parties the list of questions that they wish to address, along with their proposed page limits and modalities, is hereby extended from 27 March 2020 to 8 April 2020. A revised Procedural Timetable reflecting those changes is attached to this letter.

The Panel will schedule a conference call with the Parties and *Amici* early in the month of June to discuss whether, in light of the current pandemic, the modalities of the August hearing should remain unchanged, or be revised.

Sincerely,

A handwritten signature in black ink, appearing to read 'Pierre Bienvenu'.

Pierre Bienvenu, Ad. E.  
Senior Partner

cc: Prof. Catherine Kessedjian, M4bb  
Mr. Richard Chernick, JAMS  
Mr. Tom Simotas, ICDR  
Ms. Virginie Blanchette-Séguin, NRFC

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS  
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**ICDR Case No. 01-18-0004-2702**

**AFILIAS DOMAINS NO. 3 LIMITED,**

*Claimant*

**v.**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,**

*Respondent*

---

**REVISED PROCEDURAL TIMETABLE FOR PHASE II**

---

27 March 2020

Members of the IRP Panel

Catherine Kessedjian  
Richard Chernick  
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

## REVISED PROCEDURAL TIMETABLE FOR PHASE II

| <u>No.</u> | <u>Action</u>   | <u>Party</u>                     | <u>Date</u>   |
|------------|---|----------------------------------|---------------|
| 1.         | Simultaneous requests to produce (via Redfern Schedules)  | Afilias and ICANN                | 6 March 2020  |
| 2.         | Simultaneous responses/objections (via Redfern Schedules)   | Afilias and ICANN                | 13 March 2020 |
| 3.         | List of agreed issues to be decided in Phase II and, as the case may be, list(s) of additional issues to be decided in Phase II                       | Afilias and ICANN                | 13 March 2020 |
| 4.         | Simultaneous replies to responses/objections (via Redfern Schedules)  | Afilias and ICANN                | 20 March 2020 |
| 5.         | Hyperlinked list of constituent elements (as of that date) of the Phase II record   | Afilias and ICANN                | 20 March 2020 |
| 6.         | Panel ruling on outstanding objections  | N/A                              | 27 March 2020 |
| 7.         | <i>Amici</i> to provide to Afilias and ICANN the list of questions that they wish to address (along with their proposed page limits and modalities)   | VeriSign and NDC                 | 8 April 2020  |
| 8.         | Production of documents   | Afilias and ICANN                | 17 April 2020 |
| 9.         | Filing of Privilege logs, in accordance with PO No. 2   | Afilias and ICANN                | 24 April 2020 |
| 10.        | Submissions on questions as to which the <i>Amici</i> will be permitted to submit briefings to the Panel, as well as page limits and other modalities | Afilias, ICANN, VeriSign and NDC | 24 April 2020 |
| 11.        | Reply (along with all supporting exhibits, witness statements, expert reports and legal authorities)  | Afilias                          | 1 May 2020    |
| 12.        | Rejoinder (along with all supporting exhibits, witness statements, expert reports and legal authorities)  | ICANN                            | 29 May 2020   |
| 13.        | <i>Amici's</i> Briefs (along with all supporting exhibits, if any, and legal authorities)   | VeriSign and NDC                 | 26 June 2020  |
| 14.        | Simultaneous Responses to the <i>Amici's</i> Briefs   | Afilias and ICANN                | 15 July 2020  |
| 15.        | Parties to identify witnesses called for cross-examination at the hearing   | Afilias and ICANN                | 24 July 2020  |
| 16.        | Final status and pre-hearing conference   | Afilias, ICANN, VeriSign and NDC | 29 July 2020  |

| <b><u>No.</u></b> | <b><u>Action</u></b>     | <b><u>Party</u></b>              | <b><u>Date</u></b> |
|-------------------|--------------------------|----------------------------------|--------------------|
| 17.               | Hearing                  | Afilias, ICANN, VeriSign and NDC | 3-7 August 2020    |
| 18.               | Post-hearing submissions | Afilias, ICANN, VeriSign and NDC | TBD                |