

# JONES DAY

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172210-665051

March 8, 2019

## Via Email

Tom Simotas  
Finance Manager  
International Center for Dispute Resolution  
120 Broadway, 21st Floor  
New York, NY 10271

Re: Afilias v. ICANN; ICDR Case No. 01-18-0004-2702

Dear Tom:

I write with reference to the above-captioned Independent Review Process (“IRP”) and, in particular, the Declaration of the Procedures Officer, dated 28 February 2019.

As you know, this IRP is governed by ICANN’s Interim Supplementary Procedures, which the ICANN Board adopted on 25 October 2018. Rule 7 of the Interim Supplementary Procedures creates a “Procedures Officer” who:

shall be appointed from a STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, requests for consolidation, intervention, and/or participation as an *amicus* 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 the appointment of panelists for consolidation.

On 11 December 2018, Verisign, Inc. (“Verisign”) and Nu Dotco, LLC (“NDC”) applied for *amicus* status in the above-referenced IRP. Ultimately, the ICDR appointed M. Scott Donahey as the Procedures Officer. Over the course of the ensuing weeks, ICANN, Afilias, Verisign, and NDC filed various briefs and, on 21 February 2019, Mr. Donahey presided over a telephonic hearing associated with the Verisign and NDC requests.

On 28 February 2019, Mr. Donahey issued a thirty-eight page Declaration. Thirty-seven pages of that Declaration, however, provide some history of ICANN (with considerable

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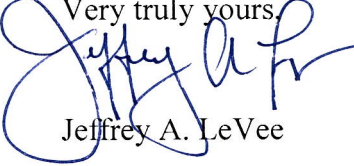
inaccuracies, and seemingly based considerably on Mr. Donahey's own research) along with the positions of ICANN, Afilias, Verisign, and NDC on the merits of the *amicus* applications. On the thirty-eighth page – the page that (presumably) was to begin Mr. Donahey's analysis and conclude with his ruling on the *amicus* requests (as required by Rule 7 of the Interim Supplementary Procedures) – Mr. Donahey instead decided that he would not perform his job as Procedures Officer and would not rule on the *amicus* requests. Instead, Mr. Donahey wrote:

As one of the principal purposes of the IRP is to “[e]nsure that ICANN is accountable to the global Internet community and Claimants” (Bylaws, Section 4.3(a)(iii)), the Procedures Officer declares that the issues raised in the present matter are of such importance to the global Internet community and Claimants that they should not be decided by a “Procedures Officer,” and therefore the issues raised are hereby referred to the Standing Panel, and, until such time as the Standing Panel is formed, to the IRP Panel for determination. (Emphasis added)

By declining to rule on the only matter before him – whether the *amicus* applications of Verisign and NDC should be granted – Mr. Donahey acted inconsistent with Rule 7 of the Interim Supplementary Procedures, which provides that a decision on an *amicus* request in an IRP is “committed to the reasonable discretion of the PROCEDURES OFFICER[,]” subject to the limits on his discretion imposed by that Rule. Section 7 does not permit the Procedures Officer to decline to rule on an *amicus* application, nor does Section 7 permit the Procedures Officer to refer an *amicus* request or any other matters to the Standing Panel, or until a Standing Panel is formed, to the IRP Panel. Mr. Donahey had no jurisdiction or authority to make such a referral, and the IRP Panel has no jurisdiction or authority to consider, much less decide, the two *amicus* requests. Under the Interim Supplementary Procedures, NDC's and Verisign's *amicus* requests must be decided by a Procedures Officer, and may only be decided by a Procedures Officer.

In short, Mr. Donahey did not perform the responsibilities of a Procedures Officer, and the net effect is that the *amicus* applicants have not received a ruling on their applications, which Mr. Donahey was obligated to adjudicate. Accordingly, the ICDR must appoint a new Procedures Officer to rule on the *amicus* requests submitted by Verisign and NDC, and ICANN hereby requests that it do so promptly. Once that new Procedures Officer is appointed and confirmed, the parties should be required to confer as to whether the briefing previously submitted to Mr. Donahey needs to be supplemented in any way.

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Very truly yours,  
  
Jeffrey A. LeVee

cc: Counsel for Afilias  
Counsel for NDC  
Counsel for Verisign

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