

[IOT] Open Joinder/Intervention Issues

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- Previous message: [\[IOT\] IRP IOT teleconference July 11 at 19:00 UTC - Agenda](#)
- Next message: [\[IOT\] Process flow for SO/AC work on creating standing panel \[renamed subject line\]](#)
- **Messages sorted by:** [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

As referenced on the 12 June IOT call, there are several open items surrounding the joinder/intervention process that need further clarification and development. These issues were raised by ICANN during the IOT call on 6 April and in ICANN's 26 April email, and have not been addressed or developed as part of the proposal that has been presented for first/second readings. As we have previously stated, ICANN does not object in principle to a proper third party having the right to intervene or join in an IRP because allowing proper intervention and joinder is likely to enhance accountability. However, there needs to be further work on the rules surrounding the joinder/intervention process relating to the following issues.

Who can intervene/join? By right or "interested parties"

As noted in ICANN's 26 April email, there needs to be rules and criteria established as to who can join/intervene by right as well who may be properly joined/allowed to intervene at the discretion of the IRP panels.

The second proposed clause of states: "That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion."

Further clarification and development is needed on the standard of review that is to be applied by the Procedures Officer when determining the extent to which an intervenor may participate. What should the interested parties have to demonstrate (e.g., should the interested parties have to demonstrate harm based on an alleged violation by ICANN of the Bylaws or Articles? What are appropriate interests that will be supported?). What types of briefings and opportunity to be heard are needed in order to allow an interested party to petition the Procedures Officer to exercise his or her discretion and allow the party to join in the IRP?

Also fundamental to this question is understanding if there are different levels of "joining" an IRP? Should a person/entity that can allege that they have been harmed by an alleged ICANN violation the Bylaws/Articles be treated differently than a person/entity that just has an interest in someone else's claim that the Bylaws were violated? Keeping the purpose of the IRP in mind, does it make sense to treat each of these as having "IRP-party status"? It would also be helpful to clarify if IRP-party status includes the ability to be a prevailing party, is entitled to its own discovery, and if such discovery would be coordinated or consolidated with that of the claimant?

Interim Relief and Settlement

Further clarification is needed for the proposed sentence in the second paragraph that states: "No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement."

This is another area where the Supplemental Rules would benefit from clarity between the types of intervention. An amicus curiae, as generally understood, typically does not participate as a party to a proceeding. The concept of allowing for briefing at the interim relief stage from an amicus, or a third party that believes it has an interest in the outcome (with IRP-party status or not), could be appropriate, but more information is needed as to the timing and expectation of what intervention or briefing is expected to achieve.

What standard is the panel adhering to when considering an amicus? Are there timing requirements of when the process should be invoked? The timing for an amicus curiae to comment on interim relief should take into account the fact that the interim relief process is an expedited process to provide emergency relief. For example, at what point in time can an amicus curiae comment on interim relief – during the briefing stage seeking interim relief or after the IRP Panel makes a determination an interim relief?

In regard to the settlement of issues presented in an IRP, the settlement of disputes is a private and often confidential process between two parties. It is unclear how and why an amicus curiae, who is not a party to the IRP, would be entitled to have input in the settlement amongst two (or more) parties to an IRP. What is the procedure for such a process? What types of briefings and opportunity to be heard are needed in order to allow an amicus curiae to comment on interim relief or settlement? Parties are not even required to notify or brief the panel during settlement discussion, and the panel does not have an opportunity to vet a settlement, so what else would need to be changed (and on what grounds) to make this intervention into a settlement feasible and justified as to cost and burden to the parties? Parties should not be required to prolong an IRP if they would prefer to end it.

Also, as noted below regarding confidentiality concerns, how is the right of an amicus curiae to approve settlement terms balanced with the interests of the parties to the settlement to keep the terms of the settlement confidential?

Additional development is needed to ensure that an amicus curiae's exercise of its rights to comment on interim relief or settlement does not delay the emergency relief and prejudice the rights of the parties to the IRP.

Timing Considerations

As discussed in further detail in ICANN's email of 26 April, further clarification and development is needed regarding timing of the joinder and intervention processes. The amount of time in which a party has to intervene or join in the IRP and the briefing schedule for such motion should take into consideration the intent under the Bylaws for IRP proceedings to be completed expeditiously with a written decision no later than six months after the filing of the Claim if feasible.

Confidentiality Concerns and Other "Party"-Related Concerns

As discussed in further detail in ICANN's email of 26 April, another issue for consideration pertains to the extent to which confidential information can/should be shared with parties intervening/joining. For example, if a claimant wants to submit confidential information in support of its IRP, it should be able to protect that information from being accessible to intervenors, some of whom could be competitors or contracted parties. Do intervenors get access to information exchanged between ICANN and the claimant? How will discovery methods apply to intervenors? Do intervenors have all rights as any other party to the proceeding, up to and including the ability to be determined as the prevailing party?

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