

**Subject:** Re: [IOT] Joinder issue  
**Date:** Wednesday, April 26, 2017 at 5:35:15 PM Pacific Daylight Time  
**From:** Samantha Eisner (sent by [iot-bounces@icann.org](mailto:iot-bounces@icann.org) <[iot-bounces@icann.org](mailto:iot-bounces@icann.org)>)  
**To:** Greg Shatan, McAuley, David  
**CC:** [iot@icann.org](mailto:iot@icann.org)  
**Attachments:** ATT00001.txt

Here are some thoughts from ICANN on Joinder

ICANN does not have objection in principle to a proper third party having the right to intervene or join in an IRP, including those who were party to the underlying expert panel (in the case of IRPs alleging that decisions of process-specific expert panels are in violation of ICANN Bylaws). Allowing proper intervention and joinder is likely enhance accountability. However, as we noted during the IOT call on 6 April, there needs to be further work on the rules surrounding the joinder/intervention process, including issues such as defining who can join, timing, and structuring interventions to be focused on the issue of the IRP (an alleged violation of ICANN's Bylaws or Articles) and not about resolving a dispute between the two parties.

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

There needs to be rules and criteria established as to who can join/intervene by right as well as who may be properly joined/allowed to intervene at the discretion of the IRP panels.

Intervention by right: The proposals identified by David McAuley and the IPC each discuss the concept of who would have a "right" to become a party to the IRP if they so wish, based upon involvement in an "underlying action". The IPC stated that "[a]ny third party 'directly involved' in underlying action being appealed to IRP should be able to join or intervene as claimant or in opposition to claimant." For both of these formations, even if the underlying action is a process-specific expert panel, it is not always clear who would be entitled to "notice" or appearance as of right. In the context of the New gTLD Program, for example, there are multiple panels, and not all are based on issues of resolving contention or granting priority among applicants. What are the rules that would guide decisions of who is entitled to notice/appearance? How are those balanced against the efficiency of the IRP process? Who is required to provide notice?

Discretionary intervention: David McAuley's proposal #5 suggests that "other 'interested' parties be able to petition the panel or procedures officer (whichever is acting) to intervene (as parties or as amici) and the decision in this respect will be up to the panel or procedures officer (whichever is acting)." What should the interested parties have to demonstrate (e.g., should the interested parties have to demonstrate harm based on an alleged violation 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 panel to exercise its discretion and allow the party to join in the IRP?

#### **Interim Relief**

Once a person/entity is granted party status to an IRP, then there is the question of where all they can participate throughout the proceeding. David McAuley's proposal #3 (set forth in his 29 March 2017 email) states that "[a]ll parties have a right to be heard in any petition for interim relief - whether amici can be heard on interim relief would be up to the panel or procedures officer (whichever is acting)." The

term "all parties" is too broad; as the IPC noted, we could presume that this is about parties to the underlying proceeding, but there would have to be definition (as discussed above) to confirm that there is appropriate tether to the subject of the IRP and that the person/entity can be brought in quickly enough so as not to delay the process of seeking or reaching a determination on emergency relief. Also, there should be clarification of whether this means that persons/entities other than the claimants have rights to seek interim relief in the IRP, which could greatly impact the IRP process.

### **Timing Considerations**

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. For example, would there be reason for parties external to ICANN to have a longer time frame than ICANN would to respond? How long should that be? Likewise, the timing on a party seeking to intervene in a petition for interim relief should take into account that interim relief process is an expedited process to provide emergency relief.

David McAuley's proposal #6 suggests "such joining parties to be given a reasonable amount of time to file their pleading or brief but this can be a relatively short period. They will have actual notice and the time should run from that date. They will have been a party below and so are in some degree prepared on the issues. I suggest 30 days here." In addition to the timing issues noted in the foregoing paragraph, further thought should be given to how the time allotted for parties to petition how does the time allotted for parties to file their pleadings impact both the interim relief process as well as the overall expectation of a six-month proceeding.

### **Confidentiality Concerns and Other "Party"-Related Concerns**

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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**From:** <iot-bounces@icann.org> on behalf of Greg Shatan {Redacted}>  
**Date:** Wednesday, March 29, 2017 at 6:39 AM  
**To:** David McAuley {Redacted}>  
**Cc:** "iot@icann.org" <iot@icann.org>  
**Subject:** Re: [IOT] Joinder issue

I agree with these points.

Purely a drafting note -- it should be clear that the "parties" referred to in item 2 are the parties in the underlying proceeding, and the "amici" referred to in item 3 are the amici in the underlying proceeding.

I would suggest considering 45 days for the time period in item 6, considering that SO/AC/SG/C parties can require levels of approval/discussion beyond those of most other parties.

Geg

Greg Shatan

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On Wed, Mar 29, 2017 at 4:14 AM, McAuley, David via IOT <[iot@icann.org](mailto:iot@icann.org)> wrote:  
Dear Members of the IRP IOT,

In this email, I want to move forward and seek your input on the issue of "Joinder" that was mentioned in several public comments and that was raised in the last call Thursday March 23rd.

The public comments on this topic were from (1) [Fletcher, Heald & Hildreth\[forum.icann.org\]](mailto:Fletcher.Heald&Hildreth@forum.icann.org), (2) the GNSO's [IPC\[forum.icann.org\]](mailto:IPC@forum.icann.org), and (3) the GNSO's [NCSG\[forum.icann.org\]](mailto:NCSG@forum.icann.org) (these three raised other issues as well).

The comments make these suggestions:

- [Fletcher](#): Provide actual notice to all original parties to an appeal to IRP of an underlying Third Party Proceeding (see expert panel decision appealability at Bylaw 4.3(b)(iii)(A)(3));
- [Fletcher](#): Provide mandatory right of intervention to all parties to the underlying proceeding being appealed to IRP;
- [Fletcher](#): Require IRP panel to allow all such parties to be heard before deciding on interim relief or protection;
- [IPC](#): Any third party "directly involved" in underlying action being appealed to IRP should be able to join or intervene as claimant or in opposition to claimant. (Multiple claimants should not have one collective 25-page limit for Written Statements);
- [NCSG](#): Right of intervention must be added for the winning party below. At the

least they should be able to file briefs as *Amici* – meaning “friends” of the panel;

- NCSG: Emergency panels/interim relief requests must be openly heard with all relevant parties present.

As mentioned in the call, we are directed by bylaws that provide for:

- Just resolution of disputes (Section 4.3(a)(vii)); and
- Fundamental fairness and due process (Section 4.3(n)(iv)).

In addition, the bylaws specifically direct that the rules address “Issues relating to joinder, intervention, and consolidation of Claims...” (Section 4.3(n)(iv)(B)).

The current [draft\[icann.org\]](#) of the updated supplementary procedures deals with joinder etc. at section 7 on page 8. The current draft leaves these matters up to a procedures officer and allows joinder by those who qualify as a claimant – which the winning party below is unlikely to be.

With these things in mind, as a participant in this group I propose that we agree the following points and, at a suitable time, ask Sidley to draft appropriate language into the draft supplementary procedures. I believe these comments have made reasonable and persuasive points about ensuring that the winning party below can defend the judgment below and will likely be a more motivated party in this respect than ICANN, although ICANN will be motivated, of course, to defend the notion that its compliance with an expert panel would not violate the article or bylaws. Suggestions:

1. That all parties to the underlying proceeding get timely notice (including copies of all pleadings and other filed documents) of the institution of IRP;
2. That all parties have a right to intervene or file an amicus brief, as they elect. If they elect to become a party they take on all rights/obligations of parties;
3. That all parties have a right to be heard in any petition for interim relief – whether amici can be heard on interim relief would be up to the panel or procedures officer (whichever is acting);
4. That all parties each enjoy equivalent rights/obligations with respect to pleadings – e.g. length, manner of filing, etc.
5. That other “interested” parties be able to petition the panel or procedures officer (whichever is acting) to intervene (as parties or as amici) and the decision in this respect will be up to the panel or procedures officer (whichever is acting).

6. That such joining parties to be given a reasonable amount of time to file their pleading or brief but this can be a relatively short period. They will have actual notice and the time should run from that date. They will have been a party below and so are in some degree prepared on the issues. I suggest 30 days here.

I welcome discussion on list and, if we need, on next call.

David

David McAuley  
International Policy Manager  
Verisign Inc.

**Redacted**

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IOT mailing list

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