

7. Consolidation, Intervention and Participation as an Amicus

- 1) Any request for consolidation, intervention, and/or participation as an amicus shall be considered and determined by the IRP PANEL appointed to the involved IRP which was commenced first (the FIRST IRP). No consolidation will be permitted between binding and non-binding (as provided for under Bylaws 4.3(x)(iv)) IRPs, and the nature of the FIRST IRP will not be changed from binding to non-binding, or vice versa, as a result of any consolidation, intervention or participation as an amicus.
- 2) Except as otherwise specifically stated herein, actions on requests for consolidation, intervention, and/or participation as an amicus committed to the reasonable discretion of the FIRST IRP PANEL. Where all the Parties, proposed Parties and proposed amici consent to the request for consolidation, intervention, and/or participation as an amicus, respectively, then there is a presumption that the FIRST IRP PANEL will permit the request.
- 3) In the event that no IRP PANEL is in place for the FIRST IRP when a request for consolidation, intervention, and/or participation as an amicus is made the request will be suspended pending IRP PANEL appointment for the FIRST IRP.
- 4) In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section shall apply to each CLAIMANT and INTERVENING PARTY individually unless the FIRST IRP PANEL concludes otherwise, in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

- 5) Consolidation of DISPUTES may be appropriate when the FIRST IRP PANEL concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually.
- 6) All motions requesting consolidation shall be submitted to the IRP Provider with copies to ICANN and any parties to an IRP which is subject of a request for consolidation. Motions should be submitted:
 - a. within [21/28] days of the publication of the later IRP; and
 - b. within 60 days of the publication of the FIRST IRP

unless the FIRST IRP PANEL, in its discretion, deems that the PURPOSES of the IRP are furthered by accepting such a motion after such timelimits. The IRP Provider will direct the request to the FIRST IRP PANEL.

- 7) All motions for consolidation must be accompanied by the appropriate filing fee and must explain why the DISPUTES should be consolidated, in other words:
- a. What the common nucleus of operative fact is; and
 - b. Why consolidation would foster a more just and efficient resolution than addressing the DISPUTES individually.
- 8) All motions for consolidation shall also include a declaration by the moving party that:
- a. All statements it makes in its motion are true and correct;
 - b. They are not intentionally misleading the Panel; and
 - c. They are not filing the motion and seeking to consolidate for improper purposes. Improper purposes include, but are not limited to:
 - i. Having the primary intent to delay either IRP action or the resolution of an underlying proceeding;
 - ii. Seeking to harass ICANN, another IRP Claimant or any other party or potential party to the IRP proceedings; or
 - iii. Having the primary intent of changing the IRP Panelists who will hear either DISPUTE.

9) ICANN and any IRP CLAIMANT who is a Party to an IRP which is the subject of a request for consolidation shall be entitled to submit a statement in response within [21/28 days] of receipt of the motion to consolidate.

10) The IRP Provider or the respective IRP PANELS may stay either or both IRPs in their discretion pending a decision on the motion for consolidation, provided that the non-moving parties shall be granted an opportunity to make representations on any such stay to their IRP.

- 11) In considering whether to consolidate, the FIRST IRP PANEL should consider all relevant circumstances, including, without limitation:
- a. The views of all the parties
 - b. The progress already made in the IRPs, including whether allowing the request would require previous decisions to be reopened, steps to be repeated, or other duplication of work.

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- c. Whether an IRP PANEL has been appointed in more than one of the IRPs and, if so, whether the same or different panelists have been appointed.
- d. Whether granting a request to consolidate would create a conflict of interest for an already-appointed panelist.
- e. How consolidation better furthers the Purposes of the IRP generally, as compared to the proceedings continuing independently.

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12) The FIRST IRP PANEL should endeavour to make a decision on a motion for consolidation as soon as possible and in any event shall do so within [15] days of final submissions. The FIRST IRP PANEL shall provide a brief statement of the reasons for their decision.

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13) When IRPs are consolidated, they shall be consolidated into the FIRST IRP, unless otherwise agreed by all parties or the FIRST IRP PANEL finds otherwise.

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14) The FIRST IRP Panel shall continue in place for the consolidated IRP proceedings unless one or more of the panelists is unable to continue and withdraws due to conflict of interest, in which case the Party whose panelist withdraws will select a further panelist in accordance with Rule 3.

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15) If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration, provided that the FIRST IRP Panel shall have the discretion to determine otherwise.

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16) Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the FIRST IRP PANEL, shall direct that all materials related to the DISPUTE be made available to parties that have had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the FIRST IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

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Intervention

17) Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the FIRST IRP PANEL, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

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18) Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the FIRST IRP PANEL may order in its discretion.

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19) In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as an INTERVENING PARTY to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

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20) Any person, group or entity who intervenes pursuant to this section will become a Party in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other Parties in that matter and be bound by the outcome to the same extent as any other Party.

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21) All motions requesting permission to intervene shall be submitted to the IRP Provider, who will direct the request to the FIRST IRP PANEL and copy the existing Parties to the IRP. Motions should be submitted within [21/28 days] of the publication of the JRP unless the FIRST IRP PANEL, in its discretion, deems that the PURPOSES of the IRP are furthered by accepting such a motion after that timelimit. Filing a motion to intervene does not stop the clock on the intervener's own time to bring an IRP unless the FIRST IRP PANEL exceeds the time for decision-making referred to at Rule 7(26) below, and so a potential intervener should consider whether they will be at risk of being out of time, should the motion be rejected.

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Do we make this 60 days to align with Consolidation?

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22) All requests to intervene must be accompanied by the appropriate filing fee, contain the same information as a written statement of a DISPUTE and, explain why the right to intervene should be granted, in other words:

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- a. What the common nucleus of operative fact is; and
- b. Why allowing intervention would foster a more just and efficient resolution than addressing the DISPUTES individually.

23) All motions for intervention shall include a declaration by the moving party that:

- a. All statements it makes in its motion are true and correct;

- b. They are not intentionally misleading the Panel; and
- c. They are not filing the motion and seeking to intervene for improper purposes. Improper purposes include, but are not limited to:
 - i. Having the primary intent to delay the IRP action or the resolution of an underlying proceeding;
 - ii. Seeking to harass ICANN, another IRP Claimant or any other party or potential party to the IRP proceedings; or
 - iii. Having the primary intent of changing the IRP Panelists who will hear either DISPUTE.

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24) ICANN and any IRP CLAIMANT who is a Party to an IRP which is the subject of a request for intervention shall be entitled to submit a statement in response within [21/28 days] of receipt of the motion to intervene.

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Should this be even shorter, e.g. 14 days, to keep things moving?

25) In considering whether to allow intervention, the FIRST IRP PANEL should consider all relevant circumstances, including, without limitation:

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- a. The views of all the parties.
- b. The progress already made in the IRP, including whether allowing the request would require previous decisions to be reopened, steps to be repeated, or other duplication of work.
- c. Whether granting a request to intervene would create a conflict of interest for an already-appointed panelist.

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26) The FIRST IRP PANEL should endeavour to make a decision on a motion for intervention as soon as possible and in any event shall do so within [15] days of final submissions. The FIRST IRP PANEL shall provide a brief statement of the reasons for their decision.

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27) The FIRST IRP Panel shall continue in place after an application for intervention is granted unless one or more of the panelists is unable to continue, and withdraws, due to conflict of interest, in which case the Party whose panelist withdraws will select a further panelist in accordance with Rule 3.

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28) Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the FIRST IRP PANEL, shall direct that all materials related to the DISPUTE be made available to entities that have intervened unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the FIRST IRP PANEL shall rule on

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objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an Amicus Curiae

29) Any person, group, or entity that has a material interest relevant to the DISPUTE, even if they do not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws, may seek leave to participate as an amicus curiae before an IRP PANEL, subject to the limitations set forth in these sections 29 – 34. The purpose of participation as an amicus curiae is to assist the IRP Panel by offering information, expertise or other input that has a bearing on the issues in the DISPUTE. For the avoidance of doubt, an amicus curiae is not a party to the DISPUTE. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of such person, group, or entity to participate as an amicus curiae, then there is a presumption that the IRP PANEL will permit the request;

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) the outcome of which is material and relevant to the DISPUTE;
- ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and
- iii. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity;

30) All requests to participate as an amicus must meet the requirements of the Written Statement (set out at Rule 6), specify the interest of the amicus curiae, include the same declaration as referred to at Rule 7(8) and must be accompanied by the appropriate filing fee.

31) All requests to participate as an amicus curiae shall be submitted to the IRP Provider, who shall direct them on to the IRP PANEL if already in place. Where no IRP PANEL is in place the IRP Provider, shall refer the request to the IRP PANEL once appointed. Requests to participate as an amicus must be made within 30 days of the publication of the INDEPENDENT REVIEW PROCESS unless the IRP PANEL, in its discretion, deems that the PURPOSES of the IRP are furthered by accepting such a request after 30 days.

32) ICANN and any IRP CLAIMANT who is a Party to an IRP which is the subject of a request for participation as an amicus shall be entitled to submit a statement in response within [21/28 days] of receipt of the motion to intervene.

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A person, group or entity that is directly and materially impacted by the Covered Action which is the subject of the DISPUTE, but does not meet the requirements to be a CLAIMANT...

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33) If the JRP PANEL determines, in its discretion, subject to the conditions set forth above, that the proposed amicus curiae has a material interest relevant to the DISPUTE and that they have information, expertise or other input that has a bearing on the issues in the DISPUTE which is likely to assist the IRP PANEL, it shall allow participation by the amicus curiae.

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34) In addition to the Written Statement referred to at paragraph 30 above any person participating as an amicus curiae may, at the request and in the discretion of the IRP PANEL, submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, subject to such deadlines, page limits, rights of the parties to file briefings in response and other procedural rules as the IRP PANEL may specify in its discretion.

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35) A person participating as an amicus curiae shall be given access to all publicly-available written statements, evidence, motions, procedural orders and other materials in the DISPUTE in a timely manner. Where a CLAIMANT or ICANN claims that any such materials are confidential, the IRP PANEL shall determine in its discretion[4] whether and if so the extent to which and terms on which such material documents must be made available to a person participating as an amicus curiae.

4 During the pendency of these Supplementary Rules, in exercising its discretion in allowing the participation of amicus curiae and in then considering the scope of participation from amicus curiae, the IRP PANEL shall lean in favor of allowing broad participation of an amicus curiae as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

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Public comments – brief summary

Dot Music – Procedures Officer will lead to undue costs. Matters should be determined by the IRP panel.

IPC – Any third party directly involved in the underlying action which is the subject of the IRP should be able to petition to join or intervene, either as a Claimant or in opposition. Multiple Claimants should not be limited collectively in the page limit (costs can be addressed by panel). Requests to join should be determined by the IRP panel and not the PO.

NCSG – All parties to the underlying proceedings should have the right to intervene, or file an amicus brief. For a challenge to a Consensus Policy, the Supporting Organization and its Stakeholder Group must be in a position to defend their work.

Fletcher law firm – Provide notice to all original parties to underlying proceedings. Right of intervention to all such parties. Panel should hear from such parties before any decision on interim relief. For a challenge to a Consensus Policy, the Supporting Organization and its Stakeholder Group must be in a position to defend their work. Provide notice to the SO, SG, C that developed the Policy. Mandatory right to intervene by those who participated in creation of the Policy. Comparable right to intervene into CEP.

RySG – IRP Panel may be better able to determine applications

Revisit timing:

Consolidation ST refers the question of what the appropriate timing is to the full plenary WG. Interim rules set a time limit of 15 days from initiation of the IRP.

ST consider that consolidation and intervention should have the same time limits, and that 21 or 28 days would be appropriate – both to be put to the full WG for a decision.

NB: We will need to review all timings at the end to ensure they work.

Having timing run from publication places everyone in the same position. Where the requestor is one of the identified groups who will be notified by ICANN, notification should happen no later than publication. The Bylaws contain an obligation to publish promptly on the website.