

Malcolm Hutty email of 3 December 2017

See highlighted text below...

Here is what Liz has proposed:

1. If the person or entity participated in the underlying proceeding, (s)he/it/they receive notice.

1.A. If the person or entity satisfies (1.), above, then (s)he/it/they have a right to intervene in the IRP.

1.A.i. BUT, (s)he/it/they may only intervene as a party if they satisfy the standing requirement set forth in the Bylaws.

1.A.ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an amicus.

2. For any person or entity that did not participate in the underlying proceeding, (s)he/it/they may intervene as a party if they satisfy the standing requirement set forth in the Bylaws.

2.A. If the standing requirement is not satisfied, the persons described in (2.), above, may intervene as an amicus if the Procedures Officer determines, in her/his discretion, that the entity has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute.

I personally (not as IOT lead) find this acceptable and encourage each of you to consider it. If you object, or have comments, please come on list by Dec. 7th or join the call to make your points. This is drawing to a completed second reading at the Dec. 7th call.

I have some questions about this language (three issues).

First issue:

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Paragraph 1.A.i appears to say that if a person who was involved in the underlying procedure has standing, they may only intervene as a party and not as amicus.

Is that intentional? If it is actually deliberate to deny people who have standing the right to intervene as amicus, I would like to hear the reason.

However I suspect it is an accidental artefact of drafting.

Second issue

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Paragraph 2.A says that the Procedures Officer may award to someone who does not have standing the right to intervene as amicus, but only if

"the entity has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue"

Standing requires the party to be "materially affected". So I think a party that can satisfy the test above will have standing.

Accordingly, Paragraph 2.A is superfluous and should be removed.

Third issue

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As I said earlier in this discussion, I am concerned that in limiting rights to intervene to those that actually have standing, we are depriving people of the right to intervene who are satisfied with the current situation but would have had standing had ICANN done as the Claimant wants.

I think such people should have the right to intervene in opposition to the Claimant.

David asks:

For changes to text I ask for specific language proposals, not just observations. We are entering the home stretch on these public comments to the draft supplementary procedures and we need specific text to consider.

I would like to suggest the following alternative to Liz's text, which cures all three issues identified above:

1. A person or entity that satisfies any of the following tests shall have the right to intervene either as a party, or as amicus, at their option:

a) a person or entity who also has standing under the bylaws to

challenge the decision or action under review;

b) a person or entity who would have had standing under the bylaws to challenge ICANN's decision or action, if ICANN had decided or acted as the Claimant alleges it ought to have done;

c) a person or entity who would have had standing under the bylaws to challenge ICANN's decision or action, if ICANN had decided or acted as the Procedures Officer, in his absolute discretion, considers a reasonably plausible outcome should be Claimant be successful.

2. A person or entity that does not have the right to intervene under paragraph 1 may nonetheless intervene as an amicus, but not as a party, if they participated in the underlying procedure that gave rise to the decision or action under review.

3. When an IRP case is filed challenging the a decision or action by ICANN, ICANN shall notify all persons and entities that participated in the procedure that gave rise to that decision or action."

I also happen to think this wording is easier to understand, but perhaps that's just because I wrote it!

Having written this out, I see that the effect is that everyone who participated in the underlying process has a right both to notice and to intervene as amicus. That's not something new in my text, it's also true of Liz's text, but my text makes it more obvious.

Is it really intended to give these rights so broadly?