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BRENDA BREWER: Good day, everyone. This is Brenda speaking. Welcome to the IRP-IOT meeting #80 on 2 November 2021 at 17:00 UTC.

Today's meeting is recorded. Kindly state your name before speaking and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation.

And I will turn the call over to Susan. Thank you.

SUSAN PAYNE: Thanks very much, Brenda, and thanks to those who've joined. This is our 2<sup>nd</sup> November call. As usual, we will do a quick review of the agenda and updates to statements of interest before we get on to the meat of the substance.

Just, first, any updates to statements of interest from anyone on here?

Okay. I'm not hearing anything or seeing any hands, I don't think. So let's assume no.

In terms of the agenda, we will look at the action items from the last call and indeed a couple that were being held over. We will then go on to spend the bulk of our time reviewing the graphical representation of the scenarios for extending the time. On the agenda, it says request for reconsideration, but this is about tolling as opposed to adding fixed additional time in accounting for other accountability mechanisms, such as the request for reconsideration, in case that isn't clear from the agenda.

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Then we'll just confirm the subgroups and the timings for those two calls, which will kick off next week. And our full group next meeting is in two weeks' time, on the 16<sup>th</sup> of November.

So, circling back then to Agenda Item 2, which is our action items list, we've got a couple that are allocated to ICANN Legal. I don't think we were expecting anything on them this time around, with the ICANN meeting having taken place. So one was for any substantive input on Malcolm's proposal on tolling. Or essentially this is the fixed additional time proposal. And the other was to look at the inputs on the safety valve language on the repose and provide an updated graph and any feedback as necessary.

So, Sam, not to put you on the spot or anything, but does in advance of the 16<sup>th</sup> of November seem like it would be workable for you?

SAM EISNER: Yeah. Thanks, Susan. I think, now that we're past the ICANN meeting, we're able to refocus on this.

SUSAN PAYNE: Super.

SAM EISNER: So thanks for the grace in not having for this time.

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SUSAN PAYNE:

No problem. I think, with the meeting, as always, running over a good kind of three weeks for people, you had flagged that it was going to be an issue.

Okay. We also had an action item for me to send an e-mail looking for further volunteers on the subgroups and flagging the subgroups that we're proposing to put in place. And so I did do that somewhat belatedly. That went out yesterday. And I have indeed had one additional volunteer to one of the groups as a result of that. But certainly the first two sub-teams will kick off next week. There is still space for people to volunteer. I have a feeling the people on this call are the ones who have volunteered already. So I'm slightly speaking to the converted. But hopefully we may have some additional participation from some of our other members.

And then the final action item was for Bernard, who is going to prepare a graphical representation of the scenarios for extensions of the time for filing.

And that's what we'll be coming on to look at. That was something that our member, Kavouss, in particular, was very keen to have. He was finding it difficult to visualize how these time periods would work and interplay with each other and what the impact of tolling or indeed the impact of adding a fixed time might be. And so he had asked if there was a way to show this more visually, which is what Bernard has endeavored to do. Unfortunately, I don't think we have Kavouss with us today, so I do hope that he will catch up on the recording.

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But in any event, I think hopefully we all find it useful. So I think really now we're moving on now to Agenda Item 3, which is where we'll review that.

And I'm going to turn this over to Bernard to take us through it. But I'm definitely looking for people to ask questions or provide feedback, particularly if something is not making sense. Do ask questions because it certainly has taken me a little time to get my head around. But hopefully this will prove to be helpful for us when we're thinking about how we might toll for time or alternatively consider Malcolm's alternative suggestion. So over to you, Bernard.

BERNARD TURCOTTE:

Thank you. Brenda, let's bring up the first sheet, please. I will advise right now that I'm the single person in the house with two dogs, so if you hear barking, apologies. But they seem to be pretty quiet now.

All right. What are we looking at? Really the idea we take from the proposal from ICANN on the safety valve—reiterate some known constants. It's the "120-day being aware," meaning, if there is clear evidence you were aware, you have 120 days to file an action. Under the current system, if you filed a CEP, tolling automatically kicks in and you are saved for some time. And we'll go through that.

The other major deadline is twelve months. I've reduced everything to days because I hate this mixing of months and days everywhere. I can lead to confusion. So I'm calling it the 365-day repose limit. If you were not aware during that period and the 365 passes, then you cannot file for an IRP unless you apply for the safety valve. And there is what I call

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an absolute deadline. And we have not agreed on this, but I'm just saying it's in the proposal right now. It's four years from the time of the action or the inaction.

There's the cooperative engagement process that we all know about. The interesting thing, of course, is that, if you're filing for CEP, you should file at a time that will at least allow you 15 days of the leftover time by tolling once the CEP is concluded so you can file an IRP if you so wish. I had forgotten that part when I was going through it in detail.

There is the RFR from the timeline document that ICANN Legal had provided us. I believe Sam had wrapped it up to 135 days, all included. And you have to file within 30 days of the action or inaction. The discussions so far have been that the RFR is for something different than an IRP and a CEP and therefore ICANN Legal's position is that tolling shouldn't necessarily apply. That's where we got into the discussion and Malcolm's proposal for some fixed additional time.

There's the ombudsman. We had our presentation from the ombuds. I think a number of members were in line with the ombuds statement that he would be uncomfortable to have the ombuds process be used for timing purposes of an IRP and that, really, we shouldn't include that in our considerations.

And finally at the bottom, if we can go down a bit, Brenda, we have our documentary information disclosure procedure (our DIDP). There was some discussions on whether it should be included to provide some extra time or not. DIDP is not really an appeals mechanism. As a matter of fact, filing a DIDP doesn't mean you're aware there's a problem. It's

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means you're just looking if there could be. So for the purposes of these simulations, at least, at this point, we will not build in extensions for the ombuds or for the DIDP.

So that's our basic lay of the land here. The dueling deadlines of 120 days of being aware and the 353-day repose ... Malcolm?

MALCOLM HUTTY: Sorry. When you say that we won't build in either tolling or additional time for DIDP, who decided that?

BERNARD TURCOTTE: I said "for the purposes of the examples here." I'm not saying that that is out. That's up to the group. But the simulations, from being overly complex, I'm not using them here. So I did not say we would not—

MALCOLM HUTTY: Okay. So you're just de-scoping this to not include DIPD. Okay, fine. Thank you.

BERNARD TURCOTTE: Yes. That is what I was trying to say. Obviously failed.

Any other questions?

Okay, not seeing anything.

Let's go to the IRP tab. This is a slightly updated sheet. And I'll show you in a minute where. All right. So Day 0 is the date of the action or

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inaction. You'll see up there that we've broken this down a bit. And you've got the Day 350 in there, which is 15 days before the 365 limit, which is the ultimate limit for applying for CEP if you're going to.

In Scenario 1, if you file an IRP within the deadline, that means you have up to 365 days to do so. In Scenario 2, if you don't file within the year, you can apply for an IRP via the safety valve up to and including Year 4. But after that, there is an absolute cutoff.

Susan?

SUSAN PAYNE:

Thanks, Bernard. Just for the avoidance of doubt, that—and it is referenced certainly in Scenario 1—365 days in the repose—absolute deadline if you like—but, obviously, once awareness is fixed, then the claimant has 120 days from whenever that awareness occurs. So, again, I think this was an attempt to keep this simple. But just for absolute clarity, a claimant who knows about the disputed event or disputed decision doesn't have 365 days once they know. They only have 120. Thanks.

BERNARD TURCOTTE:

Yeah. And that was exactly the point of the scenario I've added: Scenario 3.

And if we go down just a bit, please, Brenda, and get the next one in. All right. So in this one, as a confirmation of being aware, there is an RFR that is filed on Day 15 after the action or inaction. Now, if it takes a full 135 days or longer ... But for the purposes of an example here, we're

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taking 135 days. So it starts on Day 15 and it will end on Day 150. And if the RFR concludes unsuccessfully—as far as the plaintiff is concerned, of course—120-day-being-aware deadline is passed as of Day 135. If you filed on Day 15, that means you're aware. If you have a 120 days from the time you're being aware, that's Day 135. If you're on Day 150, the 120-day-being-aware limit is passed.

Now, my understanding—and maybe Sam can just confirm this—is that the safety valve would apply to the 120-day limit also. Is that correct?

SAM EISNER:

I'm not sure I understand the question.

BERNARD TURCOTTE:

Well, in the safety valve document, we're saying, I believe, that it's clear that we can apply after the repose period of 365 days, but if you have gone past the 120-day-being-aware deadline, is the safety valve also available?

SAM EISNER:

So yes. I think part of the safety valve language that we had proposed was really about some of the issues that Kavouss had raised: what is there is something that really kept someone from physically being able to notify ICANN or file their dispute? So, yeah, there are situations where we'd imagine that the 120 days could pass but an IRP could still be filed.



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BERNARD TURCOTTE: Okay. So that's exactly what I've done here in Scenario 3. In yellow, we've got that period that extends to the end of Year 4, where someone can apply to use the safety valve. Doesn't mean they're guaranteed, of course, in the way we're talking about. And that would be that.

Sam?

SAM EISNER: Right. But I'm not sure that a situation where a person had enough knowledge and ability to go through a reconsideration process would be able to document why they then needed to use a safety valve in order to file an IRP after a reconsideration process. If we're able to discuss that better within the tolling instead of considering that a safety valve thing ... Because I don't think that that is one of the examples that would serve anyone as it related to the CEP valve.

BERNARD TURCOTTE: Maybe, but I'm just trying to illustrate the safety valve. And we'll get into some of the tolling and fixed additional time in the other examples. But, technically, someone—and this is what we're trying to clear up here, just to make sure everyone has the same understanding ... If the safety valve could apply to the 120-day-being-aware, even if ... This is not a great example in Scenario 3. Is that correct, Sam?

SAM EISNER: Yes. I could apply were someone aware, but I don't think it would apply to a situation where someone was aware, used a different process, and

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then tried to use the safety valve after it. I'm not sure that's the purpose of the safety valve.

BERNARD TURCOTTE:

Okay, great. So we'll note that this is not a great example but it could apply to the safety valve. All right, great. Thank you.

Let's move on to our second tab, please, Brenda. All right. RFR. Scenario 1 is essentially the same scenario we just looked at in Scenario 3 from the IRP in that, on Day 15, an RFR is filed. And of course, if an RFR is filed, we will consider this as the plaintiff being aware. So the 120-day clock starts, if you will. Or the timer—the countdown timer.

If the RFR takes 135 days, as is probable, then it would conclude on Day 150. We're saying here, if it concludes unsuccessfully, the 120-day-being-aware deadline is passed and no IRP or CEP can be filed. So that's the current situation as far as I understand it. And everything past Day 150 is in red because you can't file an IRP.

Are we all good with the current situation?

Going once, going twice, done. Okay.

Scenario 2: the same as Scenario 1 but with tolling applied to the 365-day repose deadline for filing an IRP. Of course, this doesn't help because we have the two deadlines. We have the 120-day-being-aware and the 365-day repose. An RFR still times us out on the 120-day-being-aware, and therefore tolling on the 365-day repose deadline only[,] when it comes to an RFR, will not change anything. On Day 150, you will still have gone past the 120-day-being-aware deadline as of Day 135 and

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therefore you cannot file an IRP even if the 365-day repose was extended with tolling.

Are we all okay with that one?

Okay—

MALCOLM HUTTY: What do you mean by “are we okay with it”?

BERNARD TURCOTTE: Is it clear?

MALCOLM HUTTY: No.

BERNARD TURCOTTE: Ah, okay.

MALCOLM HUTTY: I’m not really following your presentation, I’m afraid, Bernie.

BERNARD TURCOTTE: That’s quite fine. I’m saying Scenario 2 ... Maybe I didn’t introduce it well enough. Forest from the trees. I’ve been on this for a week. So apologies. It’s the same as Scenario 1. We have an RFR which starts on Day 15, but what we do in this case is add tolling to the 365-day repose

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limit only and not the 120-day-being aware. So that's what this would look like in Scenario 2. In RFR, we are tolling only the 365-day repose deadline and not the 120-day-being-aware deadline. And therefore, because we time out on the 120-day deadline, this doesn't provide any advantage for anyone. So tolling only for the 365-day repose deadline is not useful in the case of an RFR. Is that any clearer?

MALCOLM HUTTY: Okay, where does it say that?

BERNARD TURCOTTE: Where does it say what, Malcolm?

MALCOLM HUTTY: That without the ... Where does it say ... I'm not sure ... I suppose I was struggling. What are you trying to say here, Bernie?

BERNARD TURCOTTE: So if you read Column A, Line 7, RFR Scenario 2. Same as Scenario 1, where there's no tolling for RFR. But in Scenario 2, we're applying tolling but only to one of the limits, the 365-day repose deadline.

MALCOLM HUTTY: Okay. Am I correct in understanding that these scenarios are altering both the facts of their case and also the rules that are applied to them? Is that what you're doing?

BERNARD TURCOTTE: No. I'm saying, what would it look like? This is only a simulation of what it would look like if we apply tolling to RFR but only to the 365-day repose deadline.

MALCOLM HUTTY: But Scenario 1 and Scenario 2—do they both have the same set of facts and just different rules?

BERNARD TURCOTTE: Yes.

MALCOLM HUTTY: Okay.

BERNARD TURCOTTE: I see David. Maybe David will be able to help us here.

DAVID MCAULEY: Thanks, Bernie. Unfortunately, I won't be. I'm a bit in the same boat with Malcolm. And what I want to say is I think what you're describing, Bernie, is sort of straightforward and will become clear for me, but I have to say that, when the ICANN meeting ended late Thursday, my Friday and Monday ... I mean, post-ICANN meetings are very busy for me. And yesterday, when I got your mail, I was quite deeply involved in some ccNSO. And so I think, for many of us, it may be the same. That is,

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it's good to go through this chart, but I think we're going to have to go through it again on the 16<sup>th</sup>. It's not that easy to follow. Even though I think you're doing well with this, I think it's not that easy to follow on taking it up this quickly.

.Anyway, that's my comment. I'm sorry—

BERNARD TURCOTTE:

And I fully understand that. I have to tell you, when I said it took me a while to produce this, there were a great many versions. I've tried to include scenarios that would be meaningful. And, yes, it may take ... Even Susan and I, when we went through it, had to walk through some of it.

Susan?

SUSAN PAYNE:

I was just going to say—and I don't know if this helps at all or not—as I understand these two scenarios, #1 and 2, it arguably why one might conclude that tolling or some other mechanism such as the fixed additional time is important because Scenario 1 is one where there isn't any tolling, and the complainant in question brings a request for reconsideration and, by the time that finished, they're out of time.

And then, in Scenario 2, if we only toll the outer time limit of the repose, the 365 days, that scenario is intended to demonstrate that that isn't adequate for the claimant in this scenario because they're fixed with knowledge. So at that point, the moment they're fixed with knowledge—and they clearly have knowledge because they've filed

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their request for reconsideration—then the 365-day repose becomes kind of academic for them because they’ve only got 120 days. And so, although we’re tolling the 365 days, that scenario is meant to demonstrate that that’s of no benefit whatsoever to this particular claimant because they’re out of time on 120 days. And I don’t think it’s really intending to do more than that. I don’t know if that helps or hinders.

BERNARD TURCOTTE: Thank you, Susan. Scott?

SCOTT AUSTIN: Listen, I think that Susan’s elaboration on what is a summary analysis in the first column was extremely helpful, but I think this is similar to what I run into when I’m trying to summarize a case with a parenthetical and citation. And that is that certain terms get left out that would be very helpful in understanding it. And that’s what, I think, is the part we’re struggling with—at least I am—because Susan just elaborated and, if we said, “RFR Scenario 1: no tolling or FAT”—and maybe that even needs to be spelled out ... And essentially that’s there if you look at the subsequent columns. But I think there’s a lot to digest between the acronym and between the omitted terms that would help us to understand why this scenario begins a red block or a red bar at 181. I mean, I sort of understand now, but these[,] as Susan said [...] Knowledge of basically: set the deadline ... Because they had knowledge but, filing a request for reconsideration, they knew what was going on, they knew there was a problem, and they had 135 days to cure it or to

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initiate and IRP and they didn't do that. So if they didn't, their deadline would be 120 days and they didn't do that. So they can't have an IRP or a CEP.

BERNARD TURCOTTE: That is correct.

SCOTT AUSTIN: A few words added to your parenthetical there, I think, would go a long way. Or maybe some additional verbiage. And I understand you use summary language to fit the space, but I think—

BERNARD TURCOTTE: That's a problem when you have a mathematician doing stuff for lawyers.

SCOTT AUSTIN: No, no, no. I—

BERNARD TURCOTTE: I appreciate it, Scott.

SCOTT AUSTIN: Well, you have very limited space. And believe me, I've been there. That's a very difficult thing to [inaudible].



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BERNARD TURCOTTE: All right. Thank you.

MALCOLM HUTTY: Thanks, Scott. That was really helpful. There I think you really put your finger on why I was running into confusion: what does the red versus green signify? I had assumed that red versus green signified whether you were able to file an IRP or whether you were not under certain circumstances. Is that not right? Because if so, as you said, shouldn't the red block kick in at 120, not 180? Or maybe at 135 if you don't get knowledge until Day 15? But not 180. Why would it come in at 180? I don't understand.

BERNARD TURCOTTE: Oh, no. The point of not having the red is that I would have to re-split the lines. And maybe what I should do is exactly that so that the red goes exactly up against the right date. Here I was just saying that, yes, the 120-day-being-aware ends on Day 135, and after that, you can't file an IRP even if the RFR is concluded.

So, yes, I could fix that to show, starting on Day 135, you can't file an IRP, or 15 days before a CEP. Good point if it's going to help with the understanding, but I didn't want to have too many lines showing on the graph. And I was trying to keep it consistent between the various tabs, but we can certainly work on that.

[inaudible]

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MALCOLM HUTTY: Yeah. If the red versus green is supposed to show where you can file, then surely the labels for that should be changed. It's just we need to show when that is if that's the intent. If that's not the intent of what this is showing, then I'm lost.

BERNARD TURCOTTE: No, it is the intent. It's just, because of the way I've chosen to line up the columns, they don't line up perfectly. But the intent is definitely what you're describing. And in this case, [in] the first two scenarios here, what it should show is that, after Day 135, you cannot file an IRP in these scenarios.

MALCOLM HUTTY: Okay.

BERNARD TURCOTTE: Scott, your hand is still up.

SCOTT AUSTIN: Sorry. That's an old hand.

BERNARD TURCOTTE: Okay. Mike?

MIKE RODENBAUGH: Hey. I just want to understand. Is it the situation then, with this proposal or these proposals, that somebody can ... I'll just ask a yes-or-

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no question first of all. If I'm in an RFR and my [FR] is not over, I can be timed out and not able to file an IRP?

BERNARD TURCOTTE: That is correct, yes. Under the current rules, that is the case. And what we discussed in the previous tab is that the safety valve might apply to your case if you time out in this situation. Sam was saying, when she was commenting, "I used this exact example in the previous case that the safety valve was not met for that, but the safety valve could apply to timing out on 120 days." As I say, these are just illustrations to show what happens.

MIKE RODENBAUGH: I appreciate it. Well, I think we should be absolutely clear that no one can ever be timed out from challenging the decision on an RFR via an IRP. I think that's ludicrous. I don't think ICANN wants that either. Otherwise, what's going to happen? Everyone that files an RFR, just to be safe, will file a CEP—everybody. So ICANN is going to have a lot of CEPs to manage.

BERNARD TURCOTTE: Or I believe what happens currently is that people filed an IRP based on the—

MIKE RODENBAUGH: Yeah. Well, even worse.

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BERNARD TURCOTTE: Yeah. The decision of the RFR. But, yes, that is essentially correct, Mike. But you'll see—

MIKE RODENBAUGH: But I've heard Sam say before that these things aren't sequential. But I'm sorry. I just strongly disagree with that. In almost every case, in fact, they have been sequential and they should be sequential. ICANN should want them to be sequential, I would think. Certainly, rather than fighting three different things at the same time, they could ... That makes no sense. They should be sequential.

BERNARD TURCOTTE: All right. And we've got some more scenarios down here.  
  
David is next.

DAVID MCAULEY: Thanks, Bernie. Out of your discussion with Mike, a question occurs to me. And it strikes me that ... Let me ask this. It is possible under the scenarios that we're looking at that somebody could be timed out of making a claim on an action or inaction while an RFR is pending. But that same time out doesn't apply to making a claim about the results of the RFR by the Board. Now, the results of the RFR might have to ... A claim on that would probably have to be framed differently because it's not necessarily against the original action but how the Board handled the RFR. But that's not timed out. And I got a little confused in the

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discussion. But I think it must be that somebody has 120 days from the time of the RFR action to make a claim about it.

Anyway, that's my thought. Thank you.

BERNARD TURCOTTE:

No, I think you've exactly touched on it, David.

And I see Sam has her hand up. And she'll certainly bring some clarity to this. Sam?

SAM EISNER:

Thanks. So I think David was more expressing the way people have been using the reconsideration process and the IRP and what looks like it's sequential but is not. They take the outcome of a reconsideration and say, because the Board decided the reconsideration that way, they then violated the bylaws in a way that gives rise to an IRP. So in an earlier communication in this group, we've said, in that way, it looks sequential but it's not because they come from a different act.

So nothing that we're talking about today has any impact on someone being able to bring an [R]FR on a later act. We're looking at, when a claimant believes that the same act gives rise to both a reconsideration and an IRP—that the same act both violates ICANN process and is potentially violating ICANN's bylaws—how do those two go together?

And the reason that we've said before that it's not sequential is because the bylaws have never said that it's sequential. The bylaws have never allowed timing to go between one or the other because these two have

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different bases and different acts, which is one of the things that I noted in the chat. So we can't always say that, when you become aware of a reconsideration, it's not always the awareness of the same thing that would impute awareness for an IRP. They might be the same. They might be different. But there are different things that are upheld under each process. And I think, as we continue looking at it, it's important to say, okay, where is it important for ICANN to be on notice that a person who's in a reconsideration process also thinks that it could give rise to an IRP? Where is that notice to ICANN? When should that happen?

And so I don't want anyone to mistake that [...] We agree from the ICANN standpoint that the number of disputes that might wind up in an IRP [being] minimized is a benefit. Making sure that we have enough process beforehand and enough availability of potential other places where people are resolving their disputes with ICANN beforehand is a value that we also support. But we also think it's really important to make sure that we're not treating these as the same process because they're not. They do different things. But when we say that, we're not trying to say you must go through a process here and a full process there. I think this conversation on tolling allows us to find some middle ground.

But I agree. I think all need some more time to digest and maybe reflect a little bit more on how these scenarios have been laid out because I'm not sure the timing all fits. But we'll keep looking at it.

BERNARD TURCOTTE:

All right. Thank you, Sam. Susan?

SUSAN PAYNE:

Thanks. I put my hand up, but actually a number of people either in the chat or also actually on the mic have probably said what I was going to say. I suppose where I've been coming at this is, yes, we do know that, in some cases, the claimant ends up bringing an IRP on the outcome of the request for reconsideration. And that's essentially a workaround because they're out of time. But we shouldn't be encouraging people to jump through judicial hoops to bring themselves back into time by stretching the argument about what their claim is like. I mean, yes, Mike is saying there could be new grounds introduced in the IRP—for sure—but frequently what you're really saying is, "I asked you to reconsider it and you've come to the same conclusion, but it's not really the same conclusion that you're challenging. It's the initial decision and you're twisting yourself always in order to try and achieve that." And it seems to me to be far preferable to be allowing them to actually bring the claim that is the one they really want to bring.

But anyway, I'm sorry. I'm starting to advocate for a position here, where, really, we're just trying to understand the scenarios as Bernard is trying to present them so that we can get our heads around what it means if we say there's no tolling, for example, or what it means if we do toll. So I'll stop. Sorry.

BERNARD TURCOTTE:

All right. Thank you, Susan. Well, this is a lot of discussion. And at a minimum, I'm pleased that my diagrams are causing this kind of discussion.

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I'd like to finish off the RFR scenarios. If we can go to Scenario 3, please, Brenda. All right. So in Scenario 3, it's the same as Scenario 1, meaning the claimant's facts were all the same. And, yes, we understand, throughout these scenarios, that the basis for an RFR and the basis for an IRP could be different. But just for the purposes of illustration, we're creating this perfect little world here. So in Scenario, it's the same as Scenario 1 but with tolling applying to both the 120-day-being-aware deadline and the 365-day repose deadline for filing an IRP. So what would it look like if there was a recommendation to apply tolling to the 120-day deadline?

So if we go the first green box, Day 15, the RFR is filed. Day 150: the RFR concluded unsuccessfully. 120-day-being-aware deadline has not been used because, if we use the filing of the RFR as the basis for being aware, then, if there is tolling, the clock or the timer stops the day the RFR was filed. So none of the 120 days were used. I hope people are following me here.

So there's still 120 days starting from Day 151 because we end on Day 150 and we have 120 days starting on Day 151. So the new being-aware deadline, if we're using tolling the way it has been described, would create a new 120-day-being-aware deadline on Day 271. So you would have up to that point to file a CEP or an IRP—maybe not a CEP because, as we saw earlier, ICANN asks that you file a CEP at least 15 days before the IRP deadline so that, when the CEP concludes, you still have a minimum of 15 days to file an IRP.

All right. So that's Scenario 3: tolling applying to both the 120-day-being-aware deadline and the 365-day. There's no point in calculating

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the 265-day repose extension because the 120-day-being-aware deadline times out before 365 days.

Now, are there any questions on this one?

No. Okay.

Let's go to Scenario 4. Brenda, could you bring that up a bit, please? Thank you. All right. In Scenario 4, it's the same as Scenario 1 but with fixed additional time. I've shortened it to FAT. I apologize. I love my acronyms. And for the purposes of all these examples, [for] the fixed additional time, I believe Malcolm suggested 60 days originally. In our last discussion, I believe David said 30 days seemed to make more sense. In the ICANN rules for CEP, they believe 15 days seems to be a minimum to file an IRP after the CEP concludes. So just for the purposes of illustration here, I've arbitrarily decided to use 30 days. Please don't get excited, Malcolm. It doesn't mean we've decided on 30 days. It's simply for the purposes of illustration. So, similarly to Scenario 2, simply applying fixed additional time to the 365-day repose deadline absolutely makes no difference here because you still time out on the 120-day-being aware deadline.

Any questions on that one?

No? Okay.

Scenario 5 is the same as Scenario 1 but we are saying fixed additional time of 30 days is applied to both the 120-day-being-aware deadline as well as the 365-day absolute deadline. And what we see here is the RFR is filed on Day 15. Day 150: the RFR concludes unsuccessfully. The 120-

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day-being-aware deadline now has 30 days added by fixed additional time from Day 151 to Day 181. So if we have a fixed additional time when a process completes of 30 days, then, basically, from Day 151 to 181, you could now file an IRP. And that, if you will, is the second half of Scenario 3, where we apply tolling to both. And in Scenario 5, we apply fixed additional time to both. And there you can see that, of course, you get more time on tolling for an RFR, but you still get some additional time on a fixed-additional-time scenario.

Is that okay for everyone?

Okay.

I believe we've got one more, Brenda? No? Okay.

So in comparing 3 and 5, if you're adding time by tolling, you get 271 days under these scenarios—no, you can keep it down, Brenda. I'm looking at the last slides there. Yeah. If use fixed additional time under these scenarios, you would get 181 days. And what's 271? That's the day when you can no longer file an IRP. So, basically, under tolling, it would take you to Day 271. Under fixed additional time, it would take you to Day 181, which is a difference of 90. But it shows that there is time available after the RFR concludes on the fixed additional time, which I believe was the basis of what Malcolm was talking about.

Any questions on these?

Okay. We're good. All right.

Let's go to the CEP tab. All right. Thank you. All right. So if you have a CEP in this case, there is no doubt that the cause for which the plaintiff

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is filing is the cause which could be used in an IRP if the CEP is not successful. You will remember, in the previous tab, we had the discussion where Sam was saying, “Well, the basis for an RFR may be significantly different from an IRP or CEP complaint and therefore the being-aware deadlines are completely different.” And I think there’s a fair amount of discussion back and forth on that point. But basically, if nothing else occurs[,] on Day 350 you have to have applied for CEP because there’s this requirement for applying 15 days before the IRP deadline because there is tolling, meaning you will automatically get 15 days whenever the CEP ends. And we’ll run through some of the scenarios for those things.

Before we go there, any questions? We’re all good?

Okay. I possibly made everyone fall asleep.

So on Scenario 1, [on] CEP and IRP with tolling—so tolling applies to both—that is the current situation. So on Day 91, a CEP is filed, which stops the timers for the 120-day-being-aware and the 365-day repose deadline. So the timer will start again on Day 351 after the CEP concludes on Day 350. So for the purposes of this example, we’re saying the CEP will run from Day 91 to Day 350.

Now, again, if we go to block F8, where we see Day 351, the tolling timer begins again since the CEP concluded on Day 350. So it starts on Day 351. The 120-day-being-aware deadline has 30 days left because it was started on Day 91. So there are 90 days which have gone. So this deadline is pushed to Day 381. And the 365-day repose would be pushed out an additional 275 days, which is 365 days minus 90 from Day

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351 to Day 626. But since that is way past the augmented 120-day-being-aware line, it doesn't matter. So the Day 381 ... The IRP can only be filed up to Day 381 because the 120-day extended toll deadline ends there.

Is that good?

Okay.

Scenario 2. So I just wanted to look at what would happen if we would replace tolling by fixed additional time. So if we have exactly the same thing—a CEP filed on Day 91—and it concludes on Day 350 without resolving the issue, starting on Day 51, the fixed additional time would extend the 120-day-being-aware deadline as well as the 365-day repose deadline from Day 351 to end on Day 381. So basically, in this case, we would end up on Day 381, being the 120-day-being-aware limit being extended out to. And the extension of the 365-day repose wouldn't matter because we would time out on the 120-day-being-aware, even if it's being extended.

Sam?

SAM EISNER:

Sorry. I'm not following something on this one. I'm not sure how we're out two years on this one.

BERNARD TURCOTTE:

Okay.

SAM EISNER: I feel like I'm missing something here.

BERNARD TURCOTTE: Okay. Well, I'm sure it's me. I'm not explaining it properly. But if a CEP is filed on Day 91, where Day 91 is 91 days since the action or inaction, are we good with that?

SAM EISNER: Yes.

BERNARD TURCOTTE: Okay. And in this scenario, what we're looking at is we're replacing the tolling with fixed additional time, just to see what happens. So on the CEP in this scenario, there is no tolling. There is just fixed additional time.

SAM EISNER: Okay.

BERNARD TURCOTTE: So, similarly to the previous case, in this scenario, the CEP concludes on Day 350 without resolving the issue.

Now, on fixed additional time, that means that, starting on Day 351, the 120-day-being-aware deadline is extended 30 days.

SAM EISNER: Got it. Sorry. I was reading this and looking at the last row, which was some of my confusion.

BERNARD TURCOTTE: Okay.

SAM EISNER: Okay. Sorry. Thank you.

BERNARD TURCOTTE: So therefore the 120-day-being-aware deadline is now Day 381. And we don't care what happens to the repose deadline being extended because, well, in this case, they are fairly close.

SAM EISNER: I'm not sure that that's how fixed additional time works, though. So fixed additional time—I don't know if it adds to the initial time because you haven't stopped the clock. Fixed additional time means, after something ends, you have only that fixed additional time because, you haven't stopped the clock, the 120 days has run but you still have 30 days after.

BERNARD TURCOTTE: Well, that's what I was trying to say.

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SAM EISNER: It's like one or the other.

BERNARD TURCOTTE: Yeah. Good point. This is what I was trying to say. If that's unclear, I'm sorry. But, yes, technically the 120 days has run out, but we're still giving you 30 days from that point on. If that's clearer, I can use that language.

SAM EISNER: Yeah.

MALCOLM HUTTY: No, Bernie. That's not that you get 30 days after the 120 days. No, that's not what fixed additional time means.

BERNARD TURCOTTE: No, you don't get 30 days after the 120 days runs out. You get 30 days after the CEP concludes.

MALCOLM HUTTY: Correct.

BERNARD TURCOTTE: Even if the 120-days-being-aware ran out before the conclusion—

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MALCOLM HUTTY: The fixed additional time proposal is that, if time has run out for whatever reason, during a process in which fixed additional time is granted, then, at the end of that process, you have that much time in which to file, regardless of any other rules or deadlines. That's the proposal. It's quite straightforward.

BERNARD TURCOTTE: Yeah. And that's exactly what we're demonstrating here. We're saying that Day 351 of Scenario 2 is when the CEP—no. Day 350, the CEP ends. Therefore, starting on Day 351, you get an extra 30 days to file an IRP, which takes you out to Day 381.

Sam?

SAM EISNER: Old hand.

BERNARD TURCOTTE: Old hand. Okay.

Oh, are we okay, Malcolm?

MALCOLM HUTTY: Yeah. Please carry on.

BERNARD TURCOTTE: All right. Thank you. So we have a Scenario 3, where we ... Just for looking at things where CEP gets long—and from what Mike has told us,



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sometimes they can be very long—I wanted to look what happens when CEP goes well beyond the 365-day repose deadline. So, again, Day 91 of Scenario 3: CEP is filed. And here we’re looking at the idea that we will be running the CEP until Day 545, where the CEP ends unsuccessfully for the plaintiff. The timer starts again and a new 120-day-being-aware deadline is now Day 576. So, basically—where are we here; right—the new 365-day repose deadline is 546 plus 275 but cannot be used because the 120-day-being-aware deadline will expire prior to this. So we can push this to Day 576 for the limit of the 120-day-being-aware deadline. So it just shows that, if you’re using—this is tolling, obviously—tolling, then you can push things out.

Sam?

SAM EISNER: Going back to the conversation you just had with Malcolm, this isn’t the pushing of the 120 days. This is 545 plus 30 because you get 30 at the end of the close of CEP.

BERNARD TURCOTTE: Right. That’s it. Exactly.

SAM EISNER: So this isn’t the 120-day. This is the adding on.

BERNARD TURCOTTE: The additional time after, yes.

SAM EISNER: Okay.

BERNARD TURCOTTE: We'll correct the language, yes.

SAM EISNER: Okay.

BERNARD TURCOTTE: Okay. And then we've got basically looking at with fixed additional time when the CEP ends after the repose deadline and it looks essentially the same.

Can we go down a bit, Brenda? Okay. And we've got a final one, which is: tolled CEP initiated prior to 350 day but continues past the 365-day repose between the parties. So basically that shouldn't be Day 91 there. That should be Day 61: CEP is filed. And the timer stops on Day 61, which will leave 60 days for the 120-day-being aware timer, and 315 days on the 265-day repose timer. And then, if the CEP ends on Day 545, basically then, just to be clear, as Sam has said, we could add 30 days.

Sam?

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SAM EISNER: Sorry. I was an old hand but I just want to make sure I understand. This one is not about having fixed additional time. This is when you stop your clock on Day 91. Right?

BERNARD TURCOTTE: Well, it should be Day 61. Sorry. It says 61 in the writing and then I forgot to change the Day 91 [at the top there].

SAM EISNER: Okay. So you stop your clock on Day 61. So then this would demonstrate the difference between tolling equal stopping the clock versus giving fixed additional time. So there'd be 60. So it'd be 545 plus 60 here as opposed to in the fixed additional time, which would be 545 plus 30.

BERNARD TURCOTTE: That is correct.

SAM EISNER: Okay.

BERNARD TURCOTTE: All right. Yay! We're getting there.

All right. And on the final tab [...] I still there are a few things to fix on this. And thanks for all the comments. Final tab, Brenda. RFR, CEP, IRP. Okay. So, basically, here what we're saying is, if we have an RFR, CEP, an IRP, and there is no fixed additional time or tolling for the RFR, does this

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bring up the question: can CEP be filed while an RFR is active? And if it can, do we assume it stops the 120-day timer? So here I assumed it was, but I noted it as a question for Sam, just to be sure that this could work.

So is it a reality if someone, as we mentioned earlier when we were going over the RFR, could file a CEP right after they start an RFR and stop their clock? And I don't see anything against it in the rules, but I think it's something we haven't discussed.

Any thoughts on this, Sam?

SAM EISNER:

Right, there's no limitation on someone being able to file a CEP, even if they have a request for reconsideration going. So that could happen.

BERNARD TURCOTTE:

Okay. And technically they could be for the same cause of action, right?

SAM EISNER:

Correct. And then the filing of the CEP would stop a clock on the IRP and likely would have no impact on the request for reconsideration because of the separate process handled through a different place, heard by different people. And then the pendency of the reconsideration could be something that the parties would discuss in the CEP to maybe agree that maybe they don't even have anything really to discuss until the reconsideration concludes.

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BERNARD TURCOTTE:

Okay. Excellent. So that is that scenario that we have there. So that should have been labeled—yes—Scenario 1. All right.

So here the scenario that we have is that someone launches an RFR. After launching an RFR, someone also files a CEP. In all these scenarios, it's the same cause of action. And therefore, once the CEP is filed, the timers stop. Therefore, as Sam has said, people in the CEP may well decide that they want to wait for the results of the RFR before continuing their discussions. But the timer has stopped, so you're not going to get timed out on the 120-day-being-aware.

Are we all clear on that?

Looks like. Okay.

Scenario 2. Madam Brenda, please. [In 1, an] RFR, CEP, IRP, followed by ... RFR followed by CEP followed ... All with tolling. So we bring back from our example the tolling. And RFR is filed. Once the RFR is filed, the clock stops. The RFR is concluded. The remaining time is added in a tolling scenario at the conclusion of the CEP, to both the 120-day-being-aware and the 365-day repose deadline. And if you walk your way through the scenario—and I think everyone is probably really sick of scenarios at this point—just look at the end. Basically, we're saying the CEP here takes you out to Day 725 and concludes unsuccessfully. The 120-day-being-aware deadline has 15 days left starting on Day 726 and ends on Day 741.

And then we have, as the final scenario, the same thing but where we replace tolling with fixed additional time of 30 days when things run out. So when your CEP finishes—here we've got it finishing it on Day

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648 unsuccessfully—fixed additional time allocates 30 days. Let's forget the verbiage. Sam has pointed out that that's not accurate. So starting on Day 648, you would get the standard 30 days after that, meaning starting on Day 649 to 679, to file an IRP if you want.

Kavouss?

KAVOUSS ARASTEH:

Good morning, good afternoon, good evening, good night, good everything. What do we do with all these scenarios? What will we do with 741? First of all, what is the origin or where is the origin of this document? Who prepared that?

BERNARD TURCOTTE:

I prepared this document, and we ran through the definitions at the beginning of the call. The idea is to look at the impact of various methods for adding time on the 120-day-being-aware deadline, as well as the 365-day repose limit.

KAVOUSS ARASTEH:

I'm sorry. Don't interpret that I'm opposing to what you have prepared or undermining or underestimating—

BERNARD TURCOTTE:

I'm not taking that approach at all.

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KAVOUSS ARASTEH: No, on. Please, please, please [inaudible] because sometimes some people are not good friends of mine. I know two or three people, in particular, the ombudsman, that did not treat me properly. So I'm not opposing to what you said. Are you still voting for ICANN Secretariat or are you now from some other entity?

BERNARD TURCOTTE: No, I'm supporting the IOT for ICANN.

KAVOUSS ARASTEH: So thank you very much. So you still remain our friend. So we appreciate you.

I am not sure whether we are going in the right direction. Thank you very much [for] all details. And if you publish that sometime for public comment, maybe very few people will follow what is happening—very few people. And the remaining do not have any comments. And what we do, as I have experienced at least during the last six-and-a-half years, is we just base ourselves on the very limited number of public comments and we throw to the basket what we have done before, as we did several times. We work hours and hours, days and days, weeks and weeks, and then go to the public comment. All of a sudden, one or two public commenters did something or they do something and then we deduce, okay, they are right and we are wrong. So I hope I am not wrong. Thank you.

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BERNARD TURCOTTE: Kavouss, I think what we're trying to do here, as we stated when we started the explanation—and I've noted a number of comments to help this along, if you will ... But simply this is not for publication. This is just to help the group understand what the impact of the current rules and what the impact of some possible changes would be on extending the time for filing an IRP. That's all we're trying to do here: illustrate the—

KAVOUSS ARASTEH: Last comment for the stupid people like me. Please, whenever you use any acronym, spell it out fully at the beginning. FAT: Fixed Additional Time. I didn't know what FAT means. Thank you very much. You explained that. There are many, many other things: CEP, PTT, APT, IPT, IOR, EOR. Please, whenever an acronym appears at the first start in any document, it should be fully spelled out in order that we do not [look here on this]. So I have now several pages here. I write down whatever acronyms people use. Sometimes, people, for "How are you?" say, "HOU?" This is "How are you?" We should avoid acronyms. This is American-style. I'm not American. I am not against the acronyms, but I would like it to be spelt out fully when it appears the first time in order so that we can fully that. Thank you very much. And I hope it is not taken as criticism at all. Thank you.

BERNARD TURCOTTE: Oh, well, if you were to have come earlier, Kavouss, you would have seen a lot of other, stronger suggestions. So I don't take that badly at all.



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All right. Thank you for bearing with me. I will gather up the comments that have been made. I will review this. As we have noted there, there are a few things to help move this along. And as David has said, maybe we'll have to go through this again if people feel it's useful. But I will certainly go through it and give it a cleanup and a fix-up of all the various things.

With this, unless there are any other questions, I will hand it back to you, Susan.

SUSAN PAYNE:

Thanks very much. And thanks, everyone, for sticking with this. It does take a little bit of getting your head around, but I think the aim of what Bernard has done here is to try to help us appreciate what currently happens and also what might happen in some of these scenarios that we're proposing—if we don't toll time, what's the impact; if we do toll time, what's the impact?—and to try and show it in the context of these different mechanisms.

For anyone who wasn't here right at the start of the call, I think it would be beneficial to go back and listen to the recording with the Zoom room open to try to follow what was said because it did take a little, as I say, bit of getting one's head around. And recognizing that it is quite complex, I think, perhaps, we may have to return to this again. But just to remind everyone, this is just a set of examples to try to illustrate what the impacts would be in particular scenarios.

Okay. Kavouss, is that a new hand.

KAVOUSS ARASTEH: Yes, a new hand. I feel guilty if I would not express my sincere appreciation to Bernie. Really, it's helpful, if not for all, at least for me. With this explanation, I will look at that one and try to understand because sometimes we make some suggestion but we don't know what the impact is of such suggestion. This document, as you very rightly mentioned, illustrates the impact, the consequence, of any decision made. Bernie, thank you very much indeed.

SUSAN PAYNE: Excellent. Thank you. And I'll second that. It's really appreciated. I know it took an enormous amount of time and head-scratching, but hopefully it will help us going forward.

Okay. So we have just actually not that long left on our call. That took a little longer than perhaps I thought it would, although it's complex and it definitely helped that people were asking questions in order to be sure that they were understanding or indeed, as Bernie said, to identify some areas where it would help to be providing a bit more clarity. And we did actually get some sort of substantive comments as well happening, including in the chat. So I think this has been really beneficial.

The next item we had on our agenda is really just to cover off the work that's going to be proceeding in subgroups. And as per my e-mail yesterday, we are going to start with two of the subgroups next week. So that's the one on consolidation and the one IRP initiation. We discussed on our last call the idea that, if we ran all four of them

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together, that really was going to be quite burdensome, particularly for anyone who was volunteering for more than one subgroup.

Again, I think I'm probably preaching largely to the converted in that sense that the people on this call are generally ones who have volunteered, but just a reminder that there is still time to volunteer if you haven't. But those two sub-teams, the one on consolidation and the one on IRP initiation, will have their call next week—so during the two time slots that we normally use for these meetings. So the Consolidation Team will meet at 17:00 UTC, and then the IRP Initiation Team will meet at 19:00 UTC. And, again, if you haven't volunteered but are interested in working on either of those topics, there is certainly space for you to do so.

In terms of those groups, I think one of the first exercises for the groups in question will be to self-organize. And, essentially, someone will ideally need to volunteer to be a leader on that sub-team when you meet. So the first task will be probably to do that and to just remind yourselves of what your task is.

And I think what we'll try and do is have regular check-ins during our full IOT calls, just a quick status update, obviously, on the first call after the next one of these calls. It's likely that status update would be fairly brief. But the idea is that it will allow us all to just have a very high-level oversight of what's going on.

And a reminder, too, that anything coming out of this sub-team needs to be approved by the full group. So it's not a given that we would just rubber-stamp what comes out of the sub-teams. There still will need to

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be agreement by the full IOT, but obviously we will have hopefully a range of participants from the working group reflecting different perspectives. And hopefully we can full assured, when they do have final outputs, that they have considered all the issues that we perhaps are then subsequently thinking about during the main call.

Okay. I think, at this point, I will just pause and see if anyone has any questions or comments.

David?

DAVID MCUALEY:

Thanks, Susan. Not a question, really, but maybe a suggestion to put some more work on your plate. And maybe that is just an e-mail this week to the entire IOT saying, "Next week, we're going to change the manner in which we work a little bit. For those of you have sort of fallen away, you may want to take a real close look at this and come back and join one or more of these subgroups," because IOT full membership is many, many good people here and we ought to make it easy and welcoming for those sort of possibly lost interest—I'm not saying that they have; I don't know—to come back and join us. Thanks.

SUSAN PAYNE:

Yeah. Thanks, David. Good suggestion. Obviously, at some point, people have the opportunity to volunteer, but we can't make them do so. But, yes, certainly it would be nice if some of those people who have perhaps been a bit quieter and less able to attend would find the time

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to participate in at least one of the subgroups. So thanks for that suggestion.

Okay. As I mentioned at the beginning, our next call of the full plenary is on the 16<sup>th</sup> of November, but for those of you who volunteered for the first two subgroups, you'll be meeting next Tuesday.

All right. I think I can give you four minutes of your time back unless anyone has anything else they want to raise before we wrap up.

Okay. I'm not hearing anything. So, Brenda, we can stop the recording, please. And thank you very much, everyone, for your participation today.

**[END OF TRANSCRIPTION]**