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BRENDA BREWER: Good day, everyone. Welcome to the IRP-IOT Meeting #81 on 16 November 2021 at 19:00 UTC.

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

I have received apologies from Mike Rodenbaugh and Mr. David McAuley will be delayed. And with that, I'll turn the call over to Susan. Thank you.

SUSAN PAYNE: Thanks very much, Brenda. And thanks, everyone, for joining. It's our regular full working group call. So without wasting any more time, I will quickly review the agenda. First up, are there any updates to Statements of Interest? I'm not hearing any so I'll keep going.

So we'll circle back on the action items from the last meeting. I have down, as number three, review them. But I'm not sure that there will be too much to review.

Then looking to get just brief updates from the two subgroups that have now begun their work. So that's the Consolidation Subgroup and the Initiation one. Both of them have just had one meeting in this sort of new phase so probably fairly brief updates, but nonetheless.

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Then we will review the graphical representation scenarios of the interplay of various timings and the tolling of time limits, in particular, in respect to the request for reconsideration.

Agenda item seven was to review updated safety valve and repose language, but I don't think we have that. So it may be that we have a slightly shorter call this week.

And then finally, just for the for the next meeting, just to note in the agenda that we're meeting in two weeks time on the earlier time of 17:00 UTC.

So, yes. Moving back up to agenda item two then, we've got a couple of action items that we are waiting on. I think both from Liz and Sam and the ICANN Legal team. First up, to get any comments that they have on Malcolm's proposal that he put around as a sort of fixed available time as perhaps an alternative to tolling, as we had been looking at it. And then the second one is, as I mentioned, that updated language with respect to the repose and safety valve proposal to take into account some of the input from previous calls and in the Google Doc.

So before moving on or perhaps this counts as agenda item three, I'm just wondering, Liz, I can't see Sam on the call but I can see that you're with us. Is there any update on those various items by any chance, or at least an indication of timing?

LIZ LE:

Yes. Hi, Susan. This is Liz Le from ICANN Legal for the record. Thank you for your question. I do want to note for the record that Sam, she will

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join shortly. She's just currently handling another matter and she'll join us soon as that is completed.

With respect to the updates on the two action items under agenda item number two, I think we previously made our comments on Malcolm's proposal on timing verbally, and we expect that we'll be able to have something in writing as well as our written response to the safety valve language by the next IOT meeting.

SUSAN PAYNE: Okay. Thanks, Liz. If at all possible, if it could be just a little in advance of the call so that people have a chance to review, that would obviously be really helpful.

LIZ LE: That's our intent.

SUSAN PAYNE: Yeah, yeah. Thank you. You mentioned that you'd given some comments on Malcolm's proposal verbally. It was my understanding that they were kind of your sort of off-the-cuff preliminary comments on that proposal and that you had wanted to look at it in more detail and firm those up. If those comments haven't changed and you have nothing to add, then that's great. I'm just reacting to what my understanding was when you gave your previous comments. Essentially, if you haven't got additional comments on Malcolm's proposal, then that's fine and we have your comments. But just looking to you to clarify, really.

LIZ LE: Okay, sure. You are correct. We commented on it. The comments were essentially where our position and how we view Malcolm's proposal, but you're right in that we didn't fully provide a complete evaluation to it, which is what we are working on with respect to our written comments. So we do want the opportunity to provide a wholesome response in writing to Malcolm's proposal.

SUSAN PAYNE: All right. Thank you.

LIZ LE: Sure.

SUSAN PAYNE: I'm just conscious that time is moving on. So we'll look forward to having those for the next call, hopefully, and to being able to have some kind of a substantive discussion, if that's possible, please.

All right. Okay. So moving on, then I think we're on agenda item four, which is an update from the Consolidation Subteam. I am really happy, Scott, if you'd like to give an update, but I was rather assuming that I probably would do so. So I will just pause and see if you wanted to. Alternatively, I will start and you should feel happy to chip in if there's anything you want to add.

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SCOTT AUSTIN:

Thanks, Susan. I appreciate it. But no, I think you're in a much better position. I did attend but I'm not as up to speed on what's going on as you are. But thanks for the opportunity.

SUSAN PAYNE:

Lovely. Thank you. So the Consolidation Subgroup is one that did meet previously and had done a certain amount of work, and then we sort of got a little, I guess, sidetracked and hadn't met for a little while. So this is the kind of reconvening of that group. We have an additional member in the form of David McAuley, having lost a member and his colleague or former colleague, [inaudible]. So, really, our first meeting or first reconvened meeting last week, we spent some time really just kind of all of us getting back up to speed. So we reviewed the revised draft of rule seven, which was something of a kind of straw person. And we also had captured in an e-mail various areas of agreement that we felt we'd previously reached, and so we reviewed them. Actually, in the course of reviewing that, some new questions did come up.

Most notably, when looking at how the appointment of the—I'll call them the consolidation arbitrator for the purposes of this update, what was the procedures officer—how that appointment is made from the Standing Panel of arbitrators, we had previously been talking about some kind of a sort of taxi rank notion, whereby members of the Standing Panel would take it in turns, and that way, they would all sort of equally share that role. Particularly, given that if you are the consolidation arbitrator, you're not going to also be a panelist on the same sort of set of proceedings. And so it seemed important to try to

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share the pain. And so we had previously come to the conclusion that probably a taxi rank process was the way to go.

But on our last call, when we were reviewing that, we did have some further thoughts about this. And particularly, there are some concerns about what happens if there are particular skills that might be needed, either in the person of the consolidation arbitrator because of what they're trying to consider or indeed in terms of a particular skillset that might be needed on the panel and not wanting to take a potential panelist out of operation by them having been the consolidation arbitrator. So I certainly don't think we have a conclusion on this, but it's definitely an area that we'll now need to look into a bit further. So our previous assumptions about a taxi rank may not still be entirely valid.

Then prior to the next call, we've all taken an action item to review the public comment inputs during the first public comment on draft rules that happened really some years ago now. We also are reviewing what might be termed the kind of legislative history leading to this particular section of the rules, and particularly leading to the adoption of this notion of the amicus participation. The purpose in that is really for us to identify whether more holistically, whether there are any other issues relating to this rule seven that we need to be thinking about on top of any of the really specific questions that we started our review on.

So that's, as I say, an action item for us all to do and to share our thoughts on. On our next call, we will then look at that more substantively. And then we're also going to have an updated draft of the straw person on rule seven, which is an action item for me, so that we

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can see a little bit more clearly what it is that's been agreed and what are sort of still outstanding points for us to be working on.

So I think for now that's it. We don't really have a chair volunteer from our group. In the absence of one, I am sort of taking on that role. But there is still an opportunity for one of the subgroup to volunteer to take on the subgroup chair, kind of rapporteur position. I think that's it for us now. As the other subgroup is, we're meeting on the alternate week between our plenary group calls. So we'll be meeting next Tuesday.

And that's it, I think, for me. I'm happy to take any questions if anyone has any. But as I say, it's sort of kind of early days. In the absence of any hands or questions that I can see in the chat, I will now turn to Malcolm, if that's okay, Malcolm, for a quick update on the other subgroup, the Initiation one.

MALCOLM HUTTY:

Yes. Thank you. The first meeting was really just a getting organized meeting. So we appointed or we elected on Mike as chair of the subgroup. We raised some questions about documents that we sought to have access to. That is really the one. What are the documents that are made available to the claimants and what does the claimant have to fill out in order to actually initiate something? We also asked if there is some kind of process document describing how the initiation goes, and what steps need to be taken in order to do that, either that's available internally or that is available or that's published either way. What actually constitutes the definition of the end of initiation and an active case? We think that there may be actually some guidance in the bylaws

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themselves on that but we're looking at that. Also, what are the existing sort of payment? Things we had a bit of a discussion about payments and the status of the filing fee. And ICANN say that they considered that filing fee was not an administrative charge, which led to a bit of question, discussion, as to what is the nature of an administrative charge and what is the nature of filing fee for the administration of the service that's not an administrative charge. Anyway, that resulted in asking, okay, so what does ICANN actually pay for? A, how much is this? And B, categorically, what is this described as and what is this described as covering? Then that led to, more generally, what is ICANN's contract with the dispute resolution service provider, the ICDR? And can we have access to that under NDA, if necessary? And that raised the possibility that maybe that it was confidential. So that then went with a request for list to look into that. And also, if it turned out that that was not available, would that be because ICANN wouldn't share it with us or because it was confidential and ICANN won't allow it to share it with us? And if it were the latter and they were being prevented from that by nature of the agreement with the ICDR, could we establish some point of contact so as to ask the ICDR to waive any such confidentiality or a limited waiver so that the group could do its work? All of which landed on Liz without any prior notice. So we had no complaint whatsoever that she wasn't able to really answer those questions like that. But she kindly volunteered to take them all away and make the appropriate inquiries internally, which will mean that we hopefully will have a stack of papers to review prior to the next time we meet so that we can get stuck in or at least that's what we're hoping.



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SUSAN PAYNE:

Thanks very much, Malcolm. Thank you for actually the really fulsome update which is really appreciated, particularly given I sprung this on you with about one minute to go before the call. That all sounds really promising. It's a really useful exercise to make sure that everyone is on the same page. I think, as you're indicating, as you start trying to look at this work, it's actually quite difficult to find some of the information about initiation. And I think if this group is finding it quite hard to find, then one assumes that it's also not that easy to locate for a potential claimant, particularly a potential claimant who maybe isn't being represented by someone who's brought one of these cases before. So I think this will all prove to be really useful information. And indeed, it might even lead to some kind of recommendation from us about sort of gathering relevant, appropriate materials in some place where they maybe are a bit more accessible. Recognizing we obviously can't direct, if that's the case, but I think if it's quite hard to find this information, then it would probably be beneficial for the wider community if that's made a bit easier. So thanks very much.

MALCOLM HUTTY:

But at this stage, we're well short of being in the position of making any sort of recommendations simply in evidence gathering mode at this moment. When it comes to recommendations, I don't know what we might be able to do, actually. We are supposed to be writing the rules of procedure. It's possible that some things could be written into the rules of procedure, either to make certain disclosures or to provide pointers, or indeed actually to provide instructions that when such and such happens then entity X, whether that's ICANN, whether that's ICDR or so forth, will do Y. I don't know what's possible there. But we're well in

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advance of reaching the stage of even thinking about that. We've been in evidence gathering mode.

SUSAN PAYNE:

Absolutely, and completely understood. I'm sort of jumping ahead a little, but just was finding it interesting from your update that actually it does appear that some of this information wasn't immediately obvious to people in terms of what it is and where it is and where it sits. If nothing else, this will have been a really useful exercise in fleshing all of that out.

Okay. Thanks very much. So that's our subgroups. We now, I think, are on agenda item six, which is to come back to review the updated version of the graphical representation of the scenarios for tolling and extending by a fixed time extension. And that's something that Bernard has circulated to us, but I think it makes sense to have another look at that now that it's been revised. So at this point, I think I'm going to turn over to you, Bernard, if that's okay and if the barking dogs permitting.

BERNARD TURCOTTE:

It looks like they're taking a nap now, so we should be good. All right, Brenda, do you have the document?

BRENDA BREWER:

I do. One moment. This pretty green one, right? That's the one?

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BERNARD TURCOTTE: Yeah. Let's go to definitions, the first tab.

BRENDA BREWER: Okay.

BERNARD TURCOTTE: All right. Just a reminder for folks, if you didn't catch that, let's go to the top. All right. So here we're making some assumptions to be able to look at the timelines. As Malcolm pointed out, there have been no decisions. We have not included tolling or fixed the additional time for the Ombuds or did peer request. It doesn't mean that the group will not decide to do that. But just for simplicity's sake, we've decided not to include them.

Fixed additional time, we've abbreviated to FAT. And 120 days limit for being aware is part of the two deadlines we're looking at in this set of graphical representations. There's the 120 days being aware of or should have been aware, and there is the repose deadline of 365 days. Of course, if CEP is invoked then currently there is tolling. In these scenarios, we'll look at what happens if we replace tolling by fixed additional time or not, etc. So just some definitions if you want to have a look at those. Let's go to the second tab, IRP only, please, Brenda.

All right, top of the page. So on this one, day zero is the day the action or inaction occurred and is publicly confirmed in scenario one. Within the deadline of 365 days, an IRP can be filed. So, if you become aware within that period, you can file.

In scenario two, post one year deadline. If the plaintiff only becomes aware of the one-year deadline after the fact the one-year deadline. Then we are looking at the safety valve language which would provide an additional three years and take you all the way to the end of year four, and that after that period, it's in red. There is no IRP which can be filed. I've colored this yellow because it's not guaranteed that you can file during that period you can apply to see if you meet the criteria and if that will be accepted.

Scenario three, if we go down a bit, basically, in this case, if we look at an RFR being filed on day 15, we have been advised by ICANN Legal the usual length of these things is 135 days. So that would take you to day 150 for the conclusion. Now, of course, there's 120 days being aware limit, and if you're filing an RFR for the same cause, that's very important. As we've been told, what people are doing nowadays is they are filing an RFR, and when they time out on the 100 down the time then they file another complaint under CEP or an IRP directly. But they are related but they have timed out so they're using this other procedure. Now, one would assume that if you time out on that 120 days that you could apply for the safety valve also, which would take you to the end of four years, but this I have extrapolated. Maybe Liz can confirm that for us. I have bored Liz to death. Okay.

LIZ LE:

No, I'm sorry. I'm sorry, Bernie. I didn't catch what you just said right there. It was too busy reading your chart. Can you repeat the question?

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BERNARD TURCOTTE: Yeah, sure. In scenario three here, if the RFR takes you to day 150, you have timed out 120 days being aware. So it is part of the idea that if this happens, you could still apply for the safety valve and potentially be allowed to file an IRP in such a case?

LIZ LE: Assuming that you meet all the other standards, and then yeah. Yes. You have an option of filing for the safety valve, and then have the option of filing an IRP if you meet standards and the safety valve from the discretion of the panel to grant the motion.

BERNARD TURCOTTE: That's what I'm showing here so that is correct. All right. And then the way it's written right now, that would be applicable in the yellow time zone. And the way it's written now would also timeout, an absolute timeout after four years.

Okay. So that's the first one. I'll be glad to take any questions before we switch, if there are any. Going once, going twice, okay. CEP, next tab, please.

All right. A few more scenarios here. Now, the CEP requirement, the plaintiff must apply within 15 days of the deadline prior to day 351. The idea here is if you're applying for CEP, because there is tolling, the clock or the timer stops. But when the CEP is concluded, the timer starts again. They want to ensure that you have at least 15 days to file an IRP post CEP. So if we look at that, the green zone, you can apply for a CEP anywhere in that up to day 350. Because after that, you will be beyond

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the 15-day limit. So you have an extra 15 days just to go straight to IRP without CEP.

All right, scenario one. We look at that, which is the current situation. CEP we're proposing that in this scenario, CEP is filed on day 91, which would confirm the plaintiff is aware. However, this stops the clock/timer for the 120-day being aware deadline because this is CEP and currently the rules allow for tolling. So, what this means is when the tolling stop is over, you will still have your full 120 days being aware to file your IRP.

So here what we're proposing is that the CEP is concluded on day 350. Day 351, tolling clock begins again. And the 120-day being aware deadline has 120 days left, which will take you to day 471, allowing you to file an IRP. After that point, you will have run out on the being aware deadline, even if you are past the repose deadline because there was tolling. So that's the current situation with these proposed dates for the scenario. Are we all good with that? Okay. Let's go to scenario two.

Same as scenario one, but tolling is replaced by a 30-day fixed additional time. Now, again, we have not decided that it's 30 days. We're just using 30 days as an example. Malcolm had originally proposed 90, I believe. And David had come back and said 30 or maybe 45 or 60. I've just thrown in 30 for simplicity. Again, at this point, if we end up using this, we will have to determine the length that it is. But for this example, again, it's fixed additional time. So what it would look like if we replace tolling by fixed additional time, using the same day 91 CEP is filed, day 211, 100 days being aware deadline expires. But here we are using fixed additional time. So when CEP concludes, we will give an extra 30 days.

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So again, day 350 CEP is concluded without resolving the issue. Day 351, FAT guarantees plaintiff 30 days from the conclusion of CEP. So that will take you day 381. So you can file an IRP up to day 381. And if you compare that to the previous point, you'll see here we go to day 381. And basically, under these scenarios, we would go to day 471. Is that okay for everyone?

All right, scenario three. Tolloed CEP initiated prior to 350-day limit, continues past day 365 repose deadline. So basically, we're starting on day 91. There's a CEP that is filed. It ends on day 545 unsuccessfully. On day 546, the timer starts again for a new 120-day being aware deadline, which will take you to day 666, where you can file an IRP up until that point. It's just showing that if you go way past the repose deadline of 365 days where that will take you. Are we all good on that one?

Okay, scenario four, which is the same as scenario three. But again, instead of using a tolling, we're using a fixed additional time. And again, we see that this ends on day 576 versus the tolling scenario, which would end on day 666. So that's our CEP examples trying to show what happens under various scenarios. Any questions?

Okay. RFR. Let's blow that up a bit because we can't read it. Okay. So here the RFR, which is the Request for Reconsideration, as we have stated in the previous points, we're using a base time of 135 days to resolve, which means that if there's 120 days being aware and you're using the same claim for the RFR and for the CEP, then basically you time out. And that's what we see here. If you start on day 15 and it takes 135 days, day 15 is the day that you are signifying that you are aware or should have been aware. Well, if you're filing, you are aware,

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and therefore, you're timed out at day 115, you cannot file an IRP. Scenario two, please.

In scenario two, the same as scenario one in basic concept, but in this case, the plaintiff will also file a CEP at the same time it is filing an RFR. Both claims are the same here. That's what we're saying very clearly. We asked that question at our last meeting, and we said that this could happen. So basically, if you file an RFR and a CEP on day 15, basically, the clock/timer stops and you will have your 120 days being aware to file after that.

So if, in this case, the RFR concludes on day 150, the CEP is still active. And if we look at the right-hand side of this—I don't know if we can go to—there we go. So here I've pushed it out to day 455. CEP ends unsuccessfully. Day 456 timer/clock starts again post CEP. Deadline for 120 day being aware is now day 576, which is 456 plus 120. But if we are using—oh, that's wrong with the CEP. So you go today 576. Sorry, I got confused on those last two points there. So if the CEP has ended, you have until day 576 to file. I'll fix in the next version of that. All right. Let's go back to the front of this.

Scenario three here, same as scenario one, but tolling applying to the RFR. So this is one of the points we discussed last time is if there's a Request for Reconsideration, tolling should apply. So again, we have our day 15 filing. Tolling is being applied. That would mean that the clock/timer stops. We go to day 150 which is the usual amount of time the process takes to conclude on RFR. On day 151, the clock/timer starts again for the 120 day being aware deadline, which will take you from 151 plus 120 to 271. You can file for CEP or an IRP in there.

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Of course, you if you're filing a CEP with the 15-day rule, you do not have until 271. You have until day 256. So, that is why you have a yellow there on day 257 because of possibility of filing a CEP has expired. And then on day 272, your possibility of filing an IRP has expired with the additional time for filing an IRP, the 120 day being aware. Is that clear? Okay. Let's go to the next scenario, please.

Scenario four. Go further up. So what happens if we replaced tolling on the RFR by fixed additional time, which was Malcolm's proposal to sort of bridge the gap? Day 15, the RFR is filed. Day 136, 120-day being aware deadline has passed but FAT will apply, meaning you get day 150 off. RFR concludes. Day 151, FAT guarantees plaintiff 30 days to file an IRP prior to day 182. If we use the 15-day prior rule then you would have to file a CEP a little earlier than that. I see Sam's here. Sam?

SAM EISNER:

Thanks. I guess I'm a little confused and it could be something that we could fix with rules. If there's still a remaining purpose for CEP and if we agree that CEPs are important within the process, then I wouldn't see why if we had a 30-day time period remaining to file a CEP—and it might just be my issue in reading this. I assume what you're saying is a CEP—there'd be a 15-day window after the conclusion of the Request for Reconsideration within which a CEP could be initiated. And then if it's not initiated within that 15-day window, there's still another 15-day window for someone to initiate an IRP without filing a CEP.

BERNARD TURCOTTE:

That is correct. That's what I'm trying to show here.

SAM EISNER: Okay.

BERNARD TURCOTTE: That's the way I read the rules is that if you're going to file a CEP, you have to do so 15 days before the IRP deadline so that the CEP tolling can give you 15 days to follow your IRP once it's concluded.

SAM EISNER: Right. Okay.

BERNARD TURCOTTE: All right. Okay. Scenario five, same as scenario one, but with fixed additional time of 30 days applied to both the RFR and the CEP. So what would that look like? Basically, on day 151, that guarantees the plaintiff 30 days to file a CEP or an IRP. Day 181 is a CEP is filed and there's no tolling, and then we take that out to when the CEP is concluded. If we can go to the right, please, Brenda.

If on day 366, 365-day deadline has expired but CEP is active. Day 486, the last day to file an IRP and concludes unsuccessfully. FAT guarantees 30 days starting on day 456 to file an IRP, and day 486 is the last day to file an IRP. If we're using fixed additional time, instead of tolling for CEP, come day 487, you cannot file an IRP unless you use the safety valve. I think that's the last scenario on that one. Sam?

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SAM EISNER: Sorry. Can you go back to the beginning of this the first? First one. No, stay at scenario five. I just want to read what that was again. So this is suggesting—I'm confused about what's happening at the end with the 30 days after CEP. So is there an assumption that there's a 30-day—

BERNARD TURCOTTE: After CEP concludes, exactly. So we're replacing tolling and CEP by fixed additional time in this scenario.

SAM EISNER: Okay.

BERNARD TURCOTTE: So when CEP concludes, you're guaranteeing the plaintiff 30 days after the CEP concludes to file an IRP.

SAM EISNER: Okay. I guess I have a question about that and how that would mirror up. I know that we haven't yet discussed the CEP rules to the extent that we just said there's fixed additional time after CEP. There then also have to be some level of making sure that a CEP deadline was also sufficiently considered so that it wasn't—you don't wait until the end to file a CEP and then gain 30 days, right? It's about bringing things within a proper time period but also making sure you're reserving enough time to bring a meaningful claim at the end.

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BERNARD TURCOTTE:

This is just an example to illustrate what could happen. I'm not proposing anything particular here. I'm just saying if we were to replace tolling in CEP by fixed additional time, this is what it might look like. Also, if at the same time, we're applying fixed additional time, instead of tolling to an RFR. And right now, there is neither for an RFR.

Okay. We're almost at the end of it. Hang in there, folks. RFR and CEP combined. Okay. Let's increase the size of that. Okay. Go back up to scenario one. We're just two scenarios away from being through this.

Day 15, RFR and CEP are filed, which confirms the plaintiff is aware, given tolling is being applied to the 120-day being aware deadline and 365-day repose deadline, the timer/clock stops on day 15. This implies that the 120-day being aware timer/clock will start again when the RFR is completed and will give the plaintiff 120 days of being aware time remaining, and the 365-day repose deadline will have 350 days left. That at least is my understanding of this, and we could look at that.

So if we say the RFR concludes on day 150 unsuccessfully, CEP is still active and the clock/timer is still stopped. If we go to the right, please, Madam Brenda. Okay.

I did on purpose here to go beyond the day 365 for the standard repose. Day 455, CEP ends unsuccessfully. Day 456, the clock/timer starts again post CEP. Deadline for 120-day being aware is now day 576. And there's no need to consider the repose deadline because it'll be beyond that. As we said earlier, these are dueling deadlines. That's the first one to be met that applies. So that would give you until day 561 to apply for CEP, if we're keeping the 15-day rule.

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I shouldn't have had that there, sorry. So I've got to correct that one, too. Just when you're looking at these, sometimes you get confused. I'll fix that in the next version.

You have up until day 576 with the 120-day being aware to file an IRP. Susan?

SUSAN PAYNE:

Thanks. So I think I've put my hand up for the thing that you spotted as you were going through it. Like we've already done this—

BERNARD TURCOTTE:

Right. I got to fix that. So that'll be an easy fix. It's just there's a blank green up until that day 577. If we go down in our final scenario—and we go left. Scenario one but fixed additional time of 30 days applied to both RFR and CEP, which means no tolling. So basically, if the RFR is filed, which confirms the plaintiff is aware, given fixed additional time is being used, there is no tolling and the clock/timer does not stop. Day 135, the 120-day being aware deadline will expire. Day 136, 120-day being aware deadline has passed. Day 150, the RFR concludes unsuccessfully. Day 151, FAT guarantees plaintiff 30 days to file a CEP or an IRP up to day 181. And we're saying the plaintiff will do that. Day 181, CEP is filed. Again, no tolling. We're using fixed additional time. And if we go to the right on that one, day 366, 365-day repose deadline has expired but CEP is active. Day 455, CEP concludes successfully. Fixed additional time guarantees the plaintiff 30 days starting on day 456 to file an IRP. And day 486 is the last day to file an IRP if we are using fixed additional time instead of tolling.

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And that's it. So I've got those two little fixes there to handle one on this page and one the other page because CEP has already been used. But that sort of gives you a lay of the land of what these things could look like. I don't see any questions so I'll turn it back over to you, Susan.

SUSAN PAYNE:

Thank you. Any reactions or questions on this? Now would be a good time to put your hands up. Otherwise, really just a reminder that the reason for having this is this is just to try to give a more sort of visual representation of some different scenarios so that it's easier to, as I said, to visualize what's going on. Some of our working group in particular had found it difficult to sort of get their head around the idea of tolling or indeed Malcolm's suggested potential alternative for tolling of the fixed additional time, and so wanted to see something a bit more visual. So that's what this is.

All of these are essentially just example timings. The 135 for the Request for Reconsideration is set out in the bylaws as being an intended outer limit for one of those actions, although it's not an absolute fixed deadline. But that is taken from the bylaws, but in relation to some of the rest of it, there's no specific timing on something like the CEP. But Bernard tried to use examples that generally would be taking things out of time so that we can see why there's this feeling that some kind of time extension, whether that's a tolling or a fixed additional time is going to be beneficial in order that one accountability mechanism doesn't put the claimant out of time for bringing their IRP. Okay, Sam?

SAM EISNER:

Thanks, Susan. Thanks to Bernie for this work. I think it is really helpful to see and I think from my view, we raised the issue before about how reconsideration and IRPs are not necessarily linked. But I think that this also shows that when they are from the same claim, the ability to challenge ICANN on the basis of a reconsideration as well as the ability for a claimant to bring IRP, I think this really shows that there can be meaningful time for people to bring any appropriate claim against ICANN, particularly through the use of the fixed additional time mechanism, which also creates possibly some more reasonable outer limits. So I just wanted to make sure that there was some understanding from some view from the ICANN Legal side that I think that this really is a helpful documentation of the fact, as Malcolm had raised earlier, that maybe this fixed additional time concept, as opposed to an extended out, stopping the clock could be a really meaningful way to look at this and make sure that we give claimants the right opportunities to come in and challenge, but also to come in within the CEP and use the CEP in good faith to narrow the issues that might go to an IRP. So I think it's really important to make sure, to the extent we would have a fixed additional time, that that we would acknowledge as Bernie had in here that there would still be an opportunity to bring a CEP with some time remaining after that as is normal practice now to then perfect an IRP, if it still needs to be brought. So I think this is a really helpful way to show that there's some room for us to really move forward on this item.

SUSAN PAYNE:

Thanks very much, Sam. Scott?

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SCOTT AUSTIN:

I guess I haven't had a chance to check, but one of the things that raised when we first brought it up was about the CEP actually is amongst the defined terms in ICANN's official site list of definitions. I don't know if it's built specifically for IRP and things like that. But I just noticed that it seemed to be missing from the various definitions. I wonder if that's been changed based on this discussion, all the work that Bernie has done.

The second thing is that during the discussion, data was referenced the fact that some people are abusing or have in the past abused CEP and filed the CEP on one subject and then used it essentially so they could get through a particular point, and then come in with an IRP on something totally different. Is that something we should be looking at or has been looked at? Or have we already made a decision that that's not in our remit? I just wondered if that was an area that was somewhat acknowledged during the discussion, but I didn't hear if that's something that we should do something about as part of this group. Thanks.

SUSAN PAYNE:

Thanks, Scott. If Malcolm will forgive me, I will just quickly respond. In terms of the definition, the CEP or Cooperative Engagement Process, I guess, is a defined term in the sense of it is provided for in the bylaws. But in the definitions on this document, I think we've probably got definitions for something like the Request for Reconsideration. So it



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perhaps is not unhelpful to maybe also just have a reminder of what the CEP is.

SCOTT AUSTIN: Let me just point out for clarification. It's not even on this document. My comment was about the actual icann.org, the list of numerous defined terms. And I remember I was not familiar with the CEP as a process initially, and so I went to look for them there and it did not seem to be there, which somewhat surprised me considering it's a separate process. And you mentioned it's provided in the bylaws. Thanks.

SUSAN PAYNE: Thanks, Scott. Sam's asking if you're meaning ICANN's glossary of terms, and I think you probably are.

SCOTT AUSTIN: Yes.

SUSAN PAYNE: That's really interesting. There we go. Sam is offering to look at that with the Language Services Team and make sure it gets included. I suspect it's just an oversight.

On your other point, I guess I'd be looking to others to weigh in on that about the CEP being used to stop the clock and then an IRP being brought on a different matter. It's not something I'm familiar with. I

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think I'm aware of us having previously talked about certainly a perception that perhaps the Request for Reconsideration might get used to by time. I'm not really aware of there being a perception of the CEP having been abused. But I will defer to others as well, in case I may have missed this. But in the meantime, I'll turn to Malcolm.

MALCOLM HUTTY: Actually, I think Sam was trying to come in on that point. So I'd happily defer to her and come back after she's just addressed a pointed issue because I had something else slightly different.

SUSAN PAYNE: Okay. Thanks. Sam?

SAM EISNER: Thanks, Malcolm. To your question, Scott, I think that while there's always an opportunity for people to use processes in inappropriate ways, the CEP has a purpose and people are expected to participate in good faith. I'm not aware of, though. I'm not on a team that really actively participates in CEP, so that's my caveat here. I'm not aware of a situation where we have identified that people have not participated in CEP in good faith. I'm sure that there could be signals that were raised or not, but we would hope that people would come to the table for the purpose of trying to make sure that the issues that were to be presented in IRP were clear or could be limited meaningfully in some way. It really does create an onus both on ICANN and on the claimant to come to the table in a particular way and to participate.

So I think that while there's a risk of gaming or potential abuse across any of that processes, I'm not sure that there's anything other than imposing that good faith standard that we would need to build into the process to counteract that. We should go proceed as we have before. If we were to find that someone only filed the CEP for the purpose of getting more time to file an IRP, that would probably be closer to a not-so-good faith. But that would be borne out in the conversations, whether there was anything meaningful to talk about. But again, I don't think that that's something that we've talked about from practice. It's just something to be aware about and make sure that people who are coming into the system to hold ICANN accountable are acting accountably themselves.

SUSAN PAYNE:

Sorry. Malcolm, if you wouldn't mind, I think Bernard put his hand up and it's possible he's coming back on this as well. So I might just check in with Bernard before I come back to you just to put this to bed.

BERNARD TURCOTTE:

Quickly, I think I may have been the source of that. Scott, what I was referring to is that people use the RFR. And then because they time out, they go into a CEP or an IRP, although they're not meant to be the same process for the same things that Sam has said. But sometimes, they end up being very related and it's just because they have timed out that they then go to this other means of getting into an IRP. I was talking about the CEP. I was talking about what happens when someone goes

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to an RFR and then times out. I think maybe that's where the confusion rose. Thank you.

SUSAN PAYNE:

Great. Thank you. Malcolm, thanks for your patience. Over to you.

MALCOLM HUTTY:

Thank you. I actually just wanted to come in on something that Bernard had said when he was referring to my proposal for fixed additional time. I wasn't necessarily recommending the fixed additional time system in all cases. Actually, I think in order to decide whether we thought fixed additional time was an adequate substitute for tolling, we would have to look at what that meant in practice and what the basis of doing that was, and how much time there would be at the end of the other process in order to do it, how much fixed additional time you're having, and whether that seemed appropriate, given the nature of the process that was doing. I put some criteria up in my slide deck, which we can come back to when we look at each individually, if you like.

However, while I'm on the floor, I think I might be able to assist Sam. She was saying that she felt that we were really heavily reliant on good faith to prevent people abusing these processes by restarting one of these processes to spin out time, and then switching to have a IRP on a different topic at a later stage, and that could be potentially a bad faith thing to do.

I think, Sam, I would be stricter with the claimants than you are in this regard. I don't think it's sufficient to say that we rest on an expectation

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of good faith here. I think that if someone starts one of these processes on one topic and we have tolling, then that is tolling only for that topic. If they then wish to bring an IRP on a different topic, the clock hasn't stopped on that other unrelated topic. There's only stopped on the things that are reasonably connected with the process at hand and wouldn't be stopped with regard to unconnected issues. So it's not stopping the clock with regard to the claimant, it's stopping the clock with regard to the claim. And that I think would be a stricter standard and would act more forcefully to prevent any such gaming that you might be otherwise concerned about. I hope that helps.

SUSAN PAYNE:

Thanks, Malcolm. Sam is agreeing in the chat. It looks like there's a meeting of minds here, which is excellent. Okay. Any more questions or comments on the scenario document that we've been reviewing, just as a final opportunity? Okay, I am not seeing any more.

In which case, our next agenda item was to look at the updated language on the repose and safety valve. And indeed, I think we'll need to be returning to the conversation on tolling versus fixed additional time. But we're not really in a position to do that here on this call. I think we really do need to do that on our next call. So very much looking forward to those comments and that language from Liz and Sam. Sam?

SAM EISNER:

Thanks, Susan. I apologize for not having it ready. There might be some benefit in am I just raising our question to the group on it, though, on

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what we're working on with it, if you would indulge me without having language to share.

SUSAN PAYNE: Absolutely. Go ahead.

SAM EISNER: Thanks, Susan. We've taken back—Liz and I are part of a larger legal team, of course, that we work on with these matters. So we're coordinating across our team to make sure that any language that we bring back isn't something that we're going to say, "We really can't live with that." We want to make sure that we're here in good faith too in participating in this. But one of the things that we think might be of some value and we're looking at and that could bring some more certainty is mirroring a bit of the timing language to how we already have our reconsideration timing laid out in the bylaws. I might have mentioned this before, but one of the things that the reconsideration process has always allowed for challenge to both Board and staff action. And one of the really big things that happened with the transition language on the IRP is that it became not only an opportunity to challenge Board action or inaction, but we introduced the ability to challenge staff action as well. That was one of the reasons why we couldn't just port over the timing language that we had in the old bylaws because it only addressed Board action. So it wasn't sufficient to address the broader types of actions that could not be challenged under an IRP.

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There are differences between how people would find out about Board action and staff action, and that's already represented within the reconsideration process. There we have timing—as it relates to Board action, the timing is from the date certain of the publication of the resolutions. And that's a 30-day period after the timing of the resolutions. On staff action, the language looks much more like the language that we've already seen on the IRP about when the claimant becomes aware or should be aware.

One of the things we were thinking of was that it might help to provide a little bit more clarity on the IRP side. It's, of course, what we're looking at to also include that differential. We know in the past, the IRP used to be timed from the posting of the ICANN Board minutes. And it was, I believe, a 60-day period after the posting of the ICANN Board minutes and that was for Board action. We think that there's likely an opportunity here to again go to the posting of the minutes because that's the time when the Board briefing materials come out to you. That's the time when all the information that's available about why the Board took its decision becomes available to the party who wishes to challenge it. And then we would then have the staff action worded similarly to how we've already had it worded, and then also recognize the potential for inaction on both the Board and staff side, which would have similar language.

I just wanted to preview that a little bit for this group and what we'll be coming back with on the repose and safety valve document. This doesn't, of course, change the safety valve portion. The safety valve stays, it's just the timing of when a challenge could be raised against action. One of the things that would tend to do actually, particularly as

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it relates to Board action is while we would maintain, what we currently have is 120 days if that is enforced, would actually, in practice, add more days to that because we typically have at least a 45- to 60-day window before minutes are published. There'll be 40- to 60-day window normally before their clock even starts. So that in practice would actually add some more time. But we wanted to just preview that for a second so that the group wasn't taken aback when we finalize some language to get back to you on this.

SUSAN PAYNE:

Thanks, Sam. Whilst that's percolating with people, perhaps I'll use my chair's prerogative and just ask a question. Is this a suggestion from you that we write that into the rules, as opposed to more of a kind of working assumption for us all as to when someone is likely to be deemed to have known or ought to have known? I'm not phrasing this very well. Because it seems to me there is a different provision in the bylaws for the Request for Reconsideration. There's different language in the bylaws for these two mechanisms. Notwithstanding that, presumably, it could have been possible to put the same language in. One has to assume that that was deliberate. And to my mind, it seems like perhaps the deliberate element is that there may be a scenario where someone is bringing an IRP where perhaps they just didn't know. They're not an ICANN participant. They are late to the table. The date on which they had actual knowledge may not have been the date of publication of a minute. And there may be circumstances where a panel would feel that they ought to have known equally, that they ought to have known that the minutes had been published. It seems to me like it's a different date. Albeit that in many cases, I could envisage that



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actually that works absolutely fine, and that in the case of many claimants, the publication of the minutes might well be the date when they have all the information to be genuinely considered to know about the action that they want to challenge. I don't know if I've posed that as a question, really, or if it's just a statement.

SAM EISNER:

I think I understand what question you're asking there. And I think from the outset, at the at the CCWG accountability time, we didn't get into that level of detail. So it wasn't necessarily a concern about whether someone would never have known. It was more so that there was a lot of operational detail, there was a lot of implementation detail, but that wouldn't be solved at the CCWG level so they put it to implementation. I appreciate that there are situations where people would never have known. If this is about something that impacts that fully ICANN outsider and someone who never would have known—and I think that in many ways the work that we've done on the safety valve and the acknowledgement that there would be a safety valve is that perfect solution to that hole of what if someone's not watching? What if someone doesn't know? Because then that would be that ability to express of, "I'd never heard of ICANN before and I didn't know I was impacted until this. And this is why I really couldn't have brought this claim." I think that that's one of those places where the work we've done on the safety valve alleviate some of that concern about the negative impacts of the people who don't follow ICANN. Also, for those who are following ICANN and are there provides a little bit more certainty. It provides a date certain against which to measure X. So, there's no question from people as to when they're supposed to act or

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not. It can achieve both of those, particularly when we look at it with the safety valve mixed in.

But I want to really just to forecast this. I think it's a good question, something we should be thinking about. But I also didn't want this group to be taken aback or taken by surprise when the language looks a little bit different in structure from what you'd seen before. Of course, we're also looking at the specific edits and questions that have been raised during our previous conversation too that whatever we get back, we'll also address those too.

SUSAN PAYNE:

Okay. Thanks very much, Sam. Malcolm?

MALCOLM HUTTY:

Thank you. I'd like to follow up with a follow-up question to Sam there, actually, because we've seen things slightly differently. And it's possibly because of my perspective. Just for the benefit of everyone who's not familiar, I'm from the Non-Contracted Parties House. I'm from the ISP Constituency. So really, I'm here thinking in particular of parties who have no direct relationship with ICANN, who are not really participants in the ICANN processes, who are not, for some definition of the term, members of the ICANN community. At least, certainly not those that you see attending meetings, checking the website, understanding what's going on and what's being developed, and so forth, people who really could very well be completely blindsided by some new thing that they only become aware of when it hits them very directly and have no idea about it beforehand.

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So when Sam said that the people that are not watching this and weren't aware there was something that was going on would be dealt with by the safety valve language, I think that's potentially very helpful. So I'd like to be clear then, that the kinds of circumstances I was just describing is the kind of thing that's meant to be covered by the clear and convincing evidence of extraordinary circumstances language that we've put, and that currently stands in the safety valve language, because that would help clarify things a lot, really, about the concern about whether that language is sufficient. It wasn't intended at all to extend things or I would never have wanted to extend things. And for those that are active participants in a process and wants to drag things out forever, actually my concern is for those that had no good reason to expect that engaging with ICANN was the thing they needed to do, until suddenly ICANN does something that affects them directly. Perhaps I could turn that back to Sam. Is that indeed the meaning that you put on and, in turn, by that language of convincing evidence of extraordinary circumstances?

SAM EISNER:

Sorry. I don't have the exact language in front of me, but I do think that it's a fair reading of it. That what we intend, what this group intends by the safety valve and what we've been asked to draft to is for those situations where people don't know. So we're not talking about the willful avoidance situations. We're not talking about the time where someone thinks, "This might happen, but I'm going to go sit under a rock and turn off all my news feeds and avoid it and stop engaging in ICANN so I can say that I wasn't there." But this also goes to the good faith conversation we were having earlier.

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I think that we all can imagine that there will be times when strangers to ICANN, people who don't even know that they're impacted by ICANN processes could be impacted. Those are likely the types of people to be claimants, who were negatively impacted by an act that they believe are against ICANN's bylaws but had no idea that ICANN was even there or that ICANN was taking action. They don't have to be totally ignorant of ICANN. Of course, it's not a standard that we're making. But they weren't aware that there was any action that ICANN was taking that was going to impact them and then they find out later, I would think that that is the purpose of the safety valve. That's who I've always thought we were drafting it to, and then we also have the situations that Kavouss put up which are the people who just for other reasons, even if they knew they physically were unable to come to ICANN. But I think that those are the two worlds of claimants that we're really trying to address through the safety valve.

MALCOLM HUTTY:

Thank you.

SUSAN PAYNE:

Great. Thank you. Thank you for that, Sam. That sounds quite encouraging. I think we'll all look forward to seeing that and appreciate that what we may look a little different to what we've seen previously will receive it with that understanding based on your comments just now. Thank you very much for that. I think you weren't on the call at the beginning but Liz did mention that you are aiming to have that for us for the next call or just in advance of the next call so that it's

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something that we can look at reasonably substantively on our next call in two weeks' time. That obviously would be really appreciated.

Okay. I will just pause then and see if anyone has any other business that they want to raise. Otherwise, I will give you a couple of minutes back on your day. All right, I'm not seeing or hearing anyone. With that, thanks very much, everyone, for a useful call. We can stop the recording, please, Brenda.

**[END OF TRANSCRIPTION]**