BRENDA BREWER: Good day, everyone. This is Brenda speaking. Welcome to the IRP-IOT Plenary #88 on 15 March, 2022, at 18:00 UTC.

Today's meeting is recorded. Attendance is taken from Zoom participation. We have received apologies from Kristina and Flip.

And I'm turning the meeting over to Susan. Thank you.

SUSAN PAYNE: Lovely. Thanks very much, Brenda. And thanks, everyone, for joining—those of you who've been able to. We do have a quorum, but I'm hopeful that we might get a few stragglers join us in the next few minutes as well. So it would be good if we have a few additional bodies here, but in the meantime, we can get going.

So, first up is the usual kind of review of the agenda and updates to statements of interest. Let's do statements of interest first just to get it out of the way. Anything that anyone needs to raise as a change to the SOI?

Okay, I'm not hearing anything, so I'm going to keep going. So for the rest of the agenda review, we'll review the status of the action item. I think it is a single item. I'm hoping to have updates from the subgroups, which may mean that Malcolm might be in the hotseat for initiation—somewhat unexpectedly, probably, from his perspective. But we'll see where we get to with that.

Then we'll want to continue with our discussion on the fixed additional time proposal and particularly circle back to confirm the kind of consensus that we appeared to reach on our last call, then move on from that to come back to the discussion on the repose and safety valve language. And in particular, we had some amended language and we had a concept for amended language that was circulated to the group about a month ago—a little more than a month ago, in fact. So hopefully there's been plenty of time to review those proposals and we can hopefully put those to bed as well. And just finally I'm confirming that our next call is on the 29th of March in the 18:00 UTC slot.

And we did indeed have a few others join us, so that is good news. Thanks, everyone, as I said, for joining. All we've done at the moment is just do the quick agenda review. Since we do have a few extra people who have just joined us there, is there anyone who has joined who needs to make any update to their statement of interest?

Super. Okay, not hearing anything. All right. Then Agenda Item 2 is the status of the action items. We had one action item, which was for Bernard to circulate the analysis of tolling versus fixed additional time. That was the work that he put in: trying to give examples of how this would work and what the impact would be on timeline. And that was done on the 23rd of February. So that action item is complete.

Then we can move straight on from that to Agenda Item 3, which is updates from the subgroups. We've got two underway.

And I think I saw that Mike Rodenbaugh has managed to join us, which is excellent. Mike, I'm hoping you could give us just a short update on the Initiation Subgroup, if that's possible.

MIKE RODENBAUGH: Sure, Susan. We had a few meetings. We had some disagreement between ICANN Legal and myself and Malcolm. And I think has Scott has chimed in a bit on that as well. We were waiting for hopefully some more comments from Malcolm on something. We have a report that we're working on to try to out to the group that, like I said, we're pretty near final on, I believe, subject to some final comments from the subgroup.

SUSAN PAYNE: Great. Thanks, Mike. I think Becky's hand is the first, by the look of things. Becky?

BECKY BURR: Thanks. And thanks for the update, Mike. There's one issue that I've become aware of. I think I saw a draft of the report regarding the payment of the filing fees right now for ICDR but also the filing fees going forward.

And I just want to say a couple of things. When I worked on this issue—this was before I was on the Board; during the accountability transition—then we did not spend a lot of time parsing through what ICDR calls an administrative fee or anything like that. But I think we did have a clear distinction in mind between the filing fees, which we

agreed ICANN would carry for community applications. But I don't think that there was ever any intention to have filing fees or others, including the mostly commercial litigant that we have, be borne by ICANN. It doesn't strike me as a [must] of maintaining the IRP panel, and it just strikes me as a bad policy to have somebody with no skin in the game as a complainant.

So I just wanted to put out there that I don't think that the group working on this at the time of the transition or the bylaws intended to have, in general, the filing fees covered by ICANN. And had that been the intention, I would have objected to it then. So I just wanted to let you guys know that, on that particular—

MIKE RODENBAUGH: If I could respond, I appreciate your viewpoint from that group at that time. I'm not sure if that group knew that the filing fee is actually $4,000. And I'm not sure if that group contemplated that ICANN, in fact, is paying zero dollars to administer the IRP today. ICANN Legal has confirmed that. So what is the bylaw say then? If it says that ICANN has to bear the administrative costs of the IRP, in fact, ICANN is paying nothing. ICDR is billing $4,000 for what they call an administrative fee. So I don't know. I respectfully have to disagree with you. I don't believe—

BECKY BURR: Let me just say I am not happy that ICANN is not bearing any costs of maintaining the IRP panel, which is the language. And I'm as unhappy about that as anybody. So please don't take my statement regarding the

filing fees as a statement that I'm comfortable with where we are now. I with that we had the standing panel, and I want that to take place. So we need to say that. That's not an okay situation, but I think it's also not a reason to have what I think is a policy issue associated with commercial players having no costs associated. So it's essentially cost-free to ICANN.

MIKE RODENBAUGH: Come on. That's obviously not true. It costs people plenty of money to prepare and file an IRP complaint against ICANN in attorneys' fees. So the bottom line is there's no skin in the game for ICANN. It's the reality.

SUSAN PAYNE: All right. Thanks for that. It sounds as though that's some of the background, if you like, to what you mentioned, Mike, as being the area of non-agreement in your small team/group.

But I do see a few other hands up. So, David, over to you.

DAVID MCAULEY: Thank you, Susan. Hi, everybody. I have a question for Mike. But, parenthetically, based on the discussion Mike and Becky just had, I'll note that I was very active in CCWG Accountability Work Streams 1 and 2, and I don't recall that either. And I would just give a +1 to Becky's comments.

The question I have for Mike is, could you just list the top two or three—the main issues—that the Initiation Group is grappling with? I don't have any knowledge of it. So I'm just interested. Thank you.

MIKE RODENBAUGH: Sure. I think there's two issues. Bernie can step in if I'm forgetting something. But really there's two issues that we talked about, and I think there's a third that we haven't started talking about yet. And I'm blanking on what that is at the moment. But the two issues that we talked about were the fact that ICANN has no information on its website about how to file an IRP, and the ICDR website is pretty terrible. It's frankly impossible to figure out how to file an IRP, unless you've already done one. And I think Bernie created a memo on that that's been circulated.

And then the second issue is the administrative fees of maintaining the IRP. Since ICANN, in recent cases, has been agreeing to pay the standing panel fees, although I've heard ICANN Legal say that have no obligation to do so—I see Liz in the chat again being careful, saying they're currently paying for the cost of them—there's nothing really obligating them to pay those panel fees because the standing panel doesn't yet exist. Nevertheless, they have agreed in recent cases to pay those, so really the issue is around the $4,000 filing fee and whether ICANN should be paying that as a cost of administrating the IRP.

DAVID MCAULEY: Thanks, Mike.

SUSAN PAYNE: Thanks, Mike. Apologies for the dog noise in the background.

Malcolm?

MALCOLM HUTTY: Thank you, Susan, and good evening, everyone. I don't know if now is the time you want to actually have a substantive discussion about this, but as I was somebody who probably worked with Becky in the CCWG on this issue as closely as anyone, I thought I would respond to the comments that Becky just made with those elements of it with which I actually agree and those that I don't share the same thoughts on.

Firstly, I do agree that the CCWG did not examine this question closely or spend a lot of time on it. And for certainly some elements of it, I think it would be really fairly to say that the CCWG did not properly turn its mind to the issue and therefore it's rather difficult to say, "This is what the CCWG intended or didn't intend in this area." It wrote out what it wrote out, and people said they were happy with it. And maybe we had different opinions amongst ourselves as to what that meant. Or maybe we just hadn't thought about some things.

I certainly don't think that the CCWG ever decided that it would be good that a complainant should pay a filing fee in order to ensure that they have skin in the game and that that was a positive intent. I absolutely don't recall any such agreement or even suggestion of that at the time. I think, actually, we were under the assumption that constructing a system there would be that ICANN would have that would exist and be

operated and that ICANN would be responsible for for funding itself operation … And therefore, my understanding was that the cost that you incurred as a claimant were going to stay with you. And the costs that ICANN incurred in defending itself would stay with ICANN. And then the cost of just running the system, well, were included in the clause that said ICANN would pay the administrative costs. That was my understanding of what that meant at the time. And it's still my understanding of what it properly ought to be intended to mean.

Now, certainly ICANN is giving it a very fine distinction here between costs of running the panel that doesn't exist but the bylaws say should exist and other costs of there being a system to even hear you, which, it's been claimed, are not the administrative costs of running the panel. And therefore there's no provision for them. And, there being no provision for such things, it's up to the parties between them to share those costs. And that means, when the ICDR says, "Here's a filing fee, claimant," then you have to pay because there's no provision otherwise.

Well, that seems to me a very fine distinction, especially to place on the fact that these costs only arise because ICANN hasn't chosen to—or hasn't yet managed to—implemented the standing panel [in] the system that was designed in the bylaws. And so these costs arise.

I find it very remarkable that there is apparently no contract between ICANN and the ICDR. I would have thought that, for a system that we've designed here to provide for the resolution of these disputes, ICANN would enter into an agreement with a dispute resolution provider to provide surfaces for dispute resolution. That contract would provide what we're supposed to do in order to provide the service that's

needed. And that would specify the services to be provided. And then there would be a fee for providing those services. And that, I would think, properly considered, in my own view, would be considered the administration costs—i.e., not the cost of the parties but the cost of administering the system.

But there may well be other interpretations that people can put on it in order to attempt to place costs on the claimants for things other the claimants' own costs. That, as a matter of policy, in my view, Becky, is a bad thing.

In my view, the idea is that people should have access to a system for resolving disputes, and they should pay their own costs in that but not for there being a system to resolve them. And

SUSAN PAYNE: Malcolm, can I pause you, if you don't mind?

MALCOLM HUTTY: Sure. Sorry. I went on too long. [inaudible]

SUSAN PAYNE: Well, as you said at the outset, I don't think this is the time for the substantive discussion on this. I think it is helpful for the wider group to understand what it is that's the bone of contention in your subgroup. But as I understand it, we'll be getting a report from your subgroup. And think the intent is that this debate is being brought back to the full

working group. But I think perhaps this isn't the time to get into the weeds on that. There's clearly a lot of disagreement.

MALCOLM HUTTY: Certainly, Susan. And absolutely I'm happy to table that. I think it is important, though, to understand why this has even come up in initiation and why is this actually considered something we should be discussing at all? And that's because, in order to initiate a claim, you are faced with signing a contract and agreeing to the terms that basically say that you will end up paying the costs that the ICDR incurs. And that is at the point of initiation. The very thing you're faced with is agreeing to that. And that makes it an initiation issue, as in, what should you be expected to agree to before you can even initiate a claim? And that's why it's an initiation question. Thank you.

SUSAN PAYNE: Thanks, Malcolm. And Liz has her hand up. So I do want to be evenhanded, but Liz—I appreciate that you undoubtedly are disagreeing with some of the things that have been said—if we could just keep it brief.

LIZ LE: Sure. Thanks, Susan. I think that this issue is actually ripe for discussion at the plenary level. And, in fact, at the last meeting of the subgroup, that was the decision that we arrived at because the group is at an impasse in terms of what is the scope of work should be undertaking.

A lot of the debate in terms of whether or not a filing fee constitutes an administrative cost of running the IRP mechanism itself, which is what is provided for as Org's responsibility under the bylaws, really seems to turn on interpretation of that section of the bylaws. So this is now an issue of interpretation of the bylaws that's causing the level of confusion. That shows that it's not an IOT issue because that wouldn't in implementation of the bylaws but is rather something that probably should be pursued in another mechanism teed up for a broader community conversation about whether or not the bylaws meant what they're intended to mean itself and whether it should cover filing fees because, from Org's standpoint, a filing fee, whether you are in arbitration such as this or you're in a COR proceeding, the plaintiff or the claimant is always the one that bears the cost of filing the fee to initiate a case. That is not the cost of maintaining the IRP mechanism itself.

With respect to the panelist fees, ICANN Org's lawyers [and] outside counsel have provided a written statement stating that, in the absence of a standing panel—I think this is since 2020—we've been paying for all panelist fees. And the work on establishing the standing panel is well on its way.

The last issue that I do want to touch on that Mike brought up is about the IRP and ICDR page in terms of how to file an IRP. This is something that we've discussed and settled in the IOT and the subgroup itself [and] ICANN. So I was surprised to hear it come up now. ICANN is working on revising its own page to make it more user-friendly and visible for how to file an IRP. We've also had discussions with the ICDR on how to

improve their site, and they are definitely willing to our suggestions on how that can be done. Thank you.

SUSAN PAYNE: Okay, thanks, Liz. Great. So it looks like we can look forward to a lively and challenging debate on this when we have the report from the initiation group.

Greg, is your hand on this point?

GREG SHATAN: It is. I just have a brief question.

SUSAN PAYNE: Okay, go ahead.

GREG SHATAN: Thanks. My question is, what does the filing fee cover and how was the amount arrived at?

MIKE RODENBAUGH: I can just tell you that ICDR calls it an administrative fee, and they set that fee. I don't know if ICANN had anything to do with. I doubt it because there's no agreement between ICDR and ICANN.

SUSAN PAYNE: Okay, thanks. And I think probably that's something that, if it isn't already, hopefully will be that whatever information the group have will be included in the report that we get from that sub-team so that we can understand a bit better if indeed we know. All right, thanks for that.

I'll give a quick update on our second sub-team, which is the one on consolidation. I'll endeavor to keep it a bit quicker than that, hopefully. The Consolidation Team is working on the rule—I think it's Rule 7—which is the one on consolidation, intervention, and participation as an amicus, which is a bit of a mouthful. We have been meeting pretty regularly on the alternate weeks to these calls. So we last met on the 1st of March. Our next call is next week. I think, having initially been of the view or been proposing that those applications for consolidation, etc., that they should be determined or that they would be determined by a single panelist of some form, a little while back the sub-team came to the conclusion that we felt it was more appropriate, these decisions were quite important, and they were perhaps more better placed to be considered by the actual three-person IRP panel. And so we've been working on a kind of redraft to reflect that.

And we've consequently been discussing that, as a consequence of that, the likelihood is that, whilst there's a time period for bringing your request, your application, to intervene in the proceedings in whatever way you're seeking to intervene, they could well be a three-person panel in place at the time you bring the application in. So that application may not get heard immediately.

And so one of the things we've been discussing is whether there's any need, in the rules, to allow for an urgency of request—if circumstances

might require that request to intervene, to be heard in an urgent manner—where the panel isn't already in place. And it's safe to say I think none of us in the Consolidation Sub-Team can think of a scenario where that would be that requirement for urgency. But it's likely that this might be something that we'll bring back to the full group, particularly so that we can get the thoughts of the wider working group and some of the practitioners in particular. So that's one of the things that's likely to be a question we bring back.

And we've also been discussing whether these decisions to allow the intervention in some way ought to be appealable or subject to being overturned at a later date. When we were envisaging a single panelist, then we were also envisaging the idea that, in very, very limited circumstances once the three-panel was in place, perhaps there might be grounds—as I say, in very limited circumstances—for them to reverse the decision of the single panelist. But we're, I think, minded to conclude that, if the decisions being is made by the three-person panel, that's probably not appropriate.

And we also believe that, if there were a scenario that the decision had been made based on a defrauding of the panel—false or materially incorrect information having been given to the panel and be the basis for their decision—then there's a feeling in our small group that we don't need to write something into the rules regarding that undoubtedly there ought to be some kind of inherent right to overturn a decision that's essentially based on the panel having been defrauded.

So that's where we are. I think we're relatively close to having some to the end of our work and be able to bring it back. I'd like to say we might

be able to wrap things up after our next call—but one or two calls hopefully—and then we'll hopefully be able to bring our report back to this group.

So, at that, I think that's the end of updates from the subgroups, unless anyone has got any questions on the consolidation one. I should just pause to allow that first.

But I'm not hearing anyone, so that's perfect.

So we can move on to Agenda Item 4. And this is effectively a second reading, if you like, where we appear to have rich consensus on our last call to allow for fixed additional time in the context of the request-for-reconsideration process. And the aim of this really is not to repeat the same discussion that we've already had on our previous call but really just to explore whether there's any kind of new input and particularly whether there's anything from anyone who was perhaps not on the last call. Certainly, my expectation is that, if you weren't on the last call, you will have been able to catch up with the recording. And I certainly hope that's the case.

But just to remind everyone, this relates to concerns raised during the community comment periods and shared my members of this group: that the time limits for bringing an IRP, appreciating that there should be deadlines and time limits for bringing an IRP, shouldn't haven't the effect of cutting off a claimant from access to other accountability mechanisms which might otherwise serve to narrow or resolve the dispute. And [such is] the request for reconsideration in particular.

And so, initially, our discussions on this focused on tolling of the time period for bringing an IRP to allow for the time spent pursuing another mechanism, such as the request for reconsideration. But then there were some concerns raised about that: that that could be quite complex and lengthy, and that perhaps we need to build in a balance between the amount of time being allowed before an IRP is brought, and to ensure that there's a balance with the need to have a swift and efficient resolution of an IRP.

And so in response to that, Malcolm put forward a proposal, particularly with respect to the request for reconsideration, although he did consider other accountability mechanisms and concluded that this was appropriate for the request for reconsideration: we should allow a fixed period of additional time so that, effectively, where the claimant is brining in a request for consideration, they're either given the reminder of their time to bring their IRP or they're given a fixed amount of time when the request-for-reconsideration process ends; whichever is the longer.

So if the RFR process wrapped up quickly and they still had, for example, 60 days running on their 120-day time limit, well, then they have those 60 days. But if the RFR process took 135 days, which is the anticipated maximum, they would be out of time, and therefore they get 30 days because that is the fixed additional time that we're adding on at the end.

And as I said, on our last call, we had wide support or this—that this fixed additional time should apply to the request-for-reconsideration process—and where, of course, that request for reconsideration relates

to the same dispute (not, obviously, for some completely unrelated issue) and that it should be a period of 30 days that we propose to allow.

And so that's a very long introduction from me, if you like. That's, as I say, where I think we reached on our last call. And I'm just looking to hear from anyone if they feel there are any additional considerations that need to be raised or indeed whether they feel that we don't in fact have consensus of this group to put that forward as our proposal to the wider community. So I'm just going to pause—ah, okay. So I've got hands from Liz and from Kurt. Thanks. Liz?

LIZ LE: Thanks, Susan. So I think we had a pretty lengthy discussion about this at the last [call] you mentioned. And without repeating, the point is ICANN Org did go on the record to express our concerns about the proposed mechanism insofar as, when you calculate the timing, it ends up basically being a de facto tolling mechanism because there are situations where claimants can end up getting more time than they would—otherwise, under the 120-day period—when you add to the days of the processing of the account of the reconsideration process itself.

So I think the example we brought up was if the reconsideration request was filed on Day 29 and then the reconsideration process runs for 135 days and then you add an additional 30 days on top of that. The claimant would get 195 days in which to file an IRP as opposed to the 120 days. So we had serious concerns about that.

And I think we've also previously indicated that we have some concerns about considerations that need to be given about the notice itself: if such a mechanism were to be adopted, there has to be noticed provided [of that] the claimant or the individual or entity would intend to file an IRP down the line if the reconsideration request does not resolve the issues at hand.

But I think the other thing we brought up that's really also equally as important on the last call is the fact that we support the idea that a claimant should have the proper amount of time to prepare for an accountability mechanism and to fully participate in the accountability mechanisms that are afforded under the bylaws. But we don't necessarily think that this is where you would apply such additional time as opposed to under the CEP process itself and that this could be something that would be addressed during CEP to consider if there needs to be additional time added once the party is in CEP, and the CEP has concluded.

And so, really, I understand that the group is maybe ready to make a decision today, but we think it needs to be looked at—the proposal—as a package. And there are concerns about that there may be unintended impact on timing, and there should be a fuller decision on tolling once we have the CEP rules developed.

And so while we support the group going forward, we do want to note our reservations that we cannot support this until we are able to look at this in its totality with the CEP rules in mind and to see whether or not this is a mechanism that is something that would benefit the potential claimant to a reconsideration or an IRP process. Thank you.

SUSAN PAYNE: Thanks, Liz.

Kurt, over to you.

KURT PRITZ: Thanks really much. I'm not in a really good spot, so I hope I'm clear. So my recollection is that we discussed the issues Liz brought up at length. And, at the end, consensus of the group was to adopt Malcolm's compromise with two caveats. One is that I think Malcolm said a 60-day period in there, and we sort of took a dart draw and decided 50 days was enough. But we wanted to hear from Mike Rodenbaugh and others who are actually in this business to determine if that was adequate, or too much, or about the same amount of time. So we wanted to hear their judgement for that on that tweak. Then we would agree to this as a conclusion of the group. And at the end of our deliberations and during the rest of the work, if there are scenarios that are raised, such as the ones Liz just raised now by some combination of factors, we took it off the shelf and tweak it. But there's no way to solve all the problems in parallel. So our decision was to complete this one.

So we want to hear from Mike and others about the 30-day period and then say this is done. And then, when we're ready to publish, we give it a logic test to see if it still works. Thank you.

SUSAN PAYNE: Thank you very much, Kurt. That certainly aligns very closely with my recollection. And just to add, Liz, I think you had raised, on our last call,

the feeling that there would need to be something built into to ensure that ICANN Org and the community had some notice that an IRP might be a likely outcome. And I think there was some willingness to consider that. I don't think that that was in any way ruled out. So I don't think that that is a barrier to us taking this forward. And indeed, if you want to put a proposal forward on that basis, that would be extremely helpful.

But, yes, as Kurt says—Kurt, your hand is still up, but I think it's an old one—if our practitioners in this group—I think that may mean, for the present purposes, mostly Mike because we unfortunately don't have Flip with us—if you have any particular thoughts on what the suitable time period for the fixed additional time that we should add is, I think we would appreciate hearing from you. But certainly where we reached on the last call was, tentatively, 30 days.

MIKE RODENBAUGH Hey, Susan. I can't even figure out how to raise my hand for some reason on here, so I'm just speaking. I have not really understood where this is coming from at this point yet. So sorry I can't give you my view on it. I frankly don't even understand where this 30-day fixed additional time is supposed to start from. So that's an issue I need to understand. Sorry I can't really help today.

SUSAN PAYNE: Okay. And that's probably putting you a bit on the spot. But perhaps if we have a summary that gets circulated, there'll be an opportunity for you and hopefully for Flip to raise any thoughts over the e-mail.

But in terms of where the timing would run from, it would effectively be from when the request for reconsideration process is finished. And so I'm not sure that we've talked about that in detail, but to my mind, that's when there's a final ruling.

MIKE RODENBAUGH: Got it. Okay.

SUSAN PAYNE: Which I guess is … I'm speaking without us having discussed it specifically, but my assumption would be it's when the Board makes their decision on the request for reconsideration.

MIKE RODENBAUGH: Okay. So the time to file an IRP wouldn't be told until that date, and then the claimant would get 30 days to file.

MALCOLM HUTTY: Perhaps I could help?

SUSAN PAYNE: Please do, Malcolm.

MALCOLM HUTTY: Mike, basically the idea here is that, in tolling, while the other process—the RFR—is in, you would stop the clock on how much time they've got to file and restart it at the end of the process. Under this alternative

proposal, you don't stop the clock, which means that the time to file could run out during the RFR process. However, we would add on, starting at the conclusion of the RFR process, a fixed period in which you would be allowed to file. So it wouldn't be however long you had left before you went into the RFR. It could be less than that or potentially more than that. It'd be a fixed, like, 30 days. You got 30 days from when the RFR concludes to file, regardless of whether you'd be in time or out of time or whatever there. That was why fixed additional time is considered an alternative to tolling.

MIKE RODENBAUGH: Okay. But it sounds to me like that, in fact, you're tolling the IRP filing date during the reconsideration period and then giving—

MALCOLM HUTTY: The distinction is it's not a variable amount. It's a fixed amount. So you could, if were tolling, file your RFR on, like, the first day, and then that stops the clock, and then you've got 120 days after the end of the RFR in which to file. Under this, no, you wouldn't have. That time will run out during the RFR process and you'll only have 30 days.

MIKE RODENBAUGH: As long as you have at least 30 days from the end of the RFR, I think that's enough, personally.

MALCOLM HUTTY: That's what we wanted to ask you because the strawman proposal had been 60 days, but that was just [inaudible] number. And we wanted to ask you, since the group, at the last meeting, thought, "This sounds like a good proposal. This fixed additional time is fine." But we just want to check with someone who's actually done it (i.e., you): would 30 days be long enough to file?

MIKE RODENBAUGH: Yes, provided the RFR decision … From the date of the decision, 30 days should be enough time to decide whether to file the IRP and to file it, I think.

MALCOLM HUTTY: Perfect. That's what we wanted to ask you.

MIKE RODENBAUGH: I'm still not really understanding what you're saying about tolling because it sounds to me like, in fact, that means that you're not on the clock to file an IRP so long as the RFR is pending. So to me that's just telling me the IRP is tolled until you [inaudible].

MALCOLM HUTTY: Well, you sort of are. It's similar to tolling. It's a variant on tolling because the amount of time that you have is different under this system versus the standard tolling system.

MIKE RODENBAUGH: I understand because what you're saying is it would be 120 days from the end of the RFR. And what you're saying is, in the case where an RFR is filed, the time to file an IRP is going to be 30 instead of 120 days.

MALCOLM HUTTY: Well, the thing is, if you file the RFR on the first day on which you're able to file, then under tolling you would have 120 days after the conclusion. But if you don't file until the 30th day after you're able to file the IRP, then you've got 90 days left if you had tolling. And if you wait for 60 days and then file an RFR and then the clock stops, then you have 30. So depending on what day you file the RFR, if the clock were stopping, the amount that you'd have left on the end would change, whereas on this it doesn't change. You've got a fixed amount of 30 days after it's concluded.

MIKE RODENBAUGH: That to me is much more clean that the tolling scenarios you were just mentioning. I don't think your IRP filing date should relate to your RFR filing date. I think it should relate to the RFR conclusion date.

SUSAN PAYNE: And, Mike, that is the proposal.

MIKE RODENBAUGH: Okay.

SUSAN PAYNE: As Malcolm is saying, it's intending to ensure that you're not out of time. But we've been discussing the concept of tolling and then pausing the clock, if you like, and then restarting it from the point that it got to. And this was a suggested alternative to try and address some of the concerns that had been raised about things like the sort of complexity that that raised and potentially concerns about there being really quite substantial periods of time then that might be running, just because of how long an RFR process takes.

MIKE RODENBAUGH: This cleaner, simpler rules seems to be a bunch better of an idea to me. So good job.

SUSAN PAYNE: Good. Thank you for that. That's really helpful input.

David?

DAVID MCAULEY: Thank you, Susan. I just wanted to make one statement. I was a member of the small group and I agreed with it along the lines that you and Malcolm and Kurt have described. And I remember, Liz, we weren't quite in agreement. Even if an RFR was filed on Day 119—when somebody filed their RFR—they would still get 30 days at the end. I actually think that's a good outcome. That's a good compromise.

I just wanted to mention about CEP. When the small group discussed this, I was actually thinking of it in the context of RFR mostly. And when

we do get as a group to doing CEP rules, if we see something idiosyncratic about CEP that makes an outcome maybe different there once we listen to CEP practitioners, we ought to be open with it.

So I agree with what Liz said just several moments ago, but let's be attentive to CEP possibly differently when the subject comes up. But for now, I'm very much on board with the compromised solution we came up with. Thank you.

SUSAN PAYNE: Thanks, David. I think that has been the view that we've taken: we know we have to work on rules and will do so. And so it seems appropriate, in the context of CEP, to be thinking about it then. But for the present purposes, bearing in mind that we've got these rules that we do need to finalize (and then we hopefully will move on to looking at CEP rules), we don't want everything to be on hold pending some other piece of work. We'll potentially never finish anything. But that doesn't preclude us coming to a different conclusion on CEP. And indeed it actually doesn't preclude us from coming back to this. If it becomes clear we need to tweak this for some reason, then we can do so.

Okay. All right. Well, I'm not seeing any more hands, and so I'm hopeful that we are in agreement on this now and that I can circulate something to confirm to that effect on the mailing list: that we have reached what essentially is a consensus of this group, albeit that the objections or concerns raised by Liz on behalf of Org are noted. Okay, thank you.

All right. So we've got about 35 minutes left. We, I think, can move to Agenda Item 5, which is coming back to the repose and safety valve

language. We had some draft language on Rule 4 that was dealing with things like the repose and also the safety valve to allow for a filing of an IRP—a late filing, if you like—in limited circumstances. And we have spent a couple of calls looking at that text that was some proposals. We've got a compare document which Bernard is circulating which compares the two more recent ones: our draft (or the group's draft) and then ICANN Lega's proposed language in response. And I think, following our discussions, we have got some tweaks to be making to the draft language.

But there were two areas where, when we came out of the last call, the group had felt that warranted a bit more work and perhaps and perhaps some suggested redrafted language. One was on the use of the term "material affect," when we're talking about the claimant being impacted by the action or inaction. And the second one was about who hears the application for a late filing of an IRP. As it's in the draft in the moment, there's a reference to the IRP panel, but obviously we don't have an IRP panel until we've got an IRP. So there isn't a panel in place.

And so I had taken an action item to make proposals for the people's consideration on both of those two points. And I did circulate that sometime ago now so that everyone has had an opportunity to, I hope, have a look at what I circulated.

Additionally, Malcolm had circulated an e-mail after a call (I think it was on the 9th of February) suggesting an amendment regarding to include some text about the considerations that panelists ought to have in mind—or whoever is making the decision on the late application—where there's an application to bring an IRP out of time.

So, again, that's some text that was circulated some weeks ago now. I don't think we've had feedback on the e-mail list on any of that. And so I think this is our opportunity hopefully to circle back to all of that language and see whether people are comfortable with those suggestions or indeed whether people have alternative suggestions that they want to put forward that perhaps they might follow up with with some language over e-mail or in the document that's capturing the draft rule.

So if we could start with the e-mail. The original date of the e-mail is the 7th of February, Brenda, but I also did just circulate it to this group just about an hour before the call started. But it's my e-mail of the 7th of February. If we could have that in the Zoom room, that would be really helpful.

BRENDA BREWER: Yes, you can. Give me one second. I have two e-mails. [inaudible]

SUSAN PAYNE: Yeah, I think that's it. Perfect.

BRENDA BREWER: There we go.

SUSAN PAYNE: Perfect. Thank you. So hopefully we can scroll down as we go. But effectively we had had some concerns about that language, "material

affect." I think we talked about it on a couple of calls. It was felt to be a bit clunky and not ideal. But equally what I included in my e-mail, just to give some context and remind us all, was the bylaws language because I think the term "material affect" was drawn out of the bylaws language and particularly some of the definitions in 4.3B. And so included those for background.

But if we scroll down a bit further, Brenda, if you don't mind … I will tell you when to stop; I think we may go to the next page then.

BRENDA BREWER: Well, let me look at that e-mail again.

SUSAN PAYNE: Oh, okay. Hang on. Let me keep talking anyway. Scott Austin had, on our last call, said, "Well, why don't we just say something like "materially affected," which is just better English. And I think I agreed with him. Having gone back to the bylaw language, I think "materially affect" still suitably follows the kind of language being used in the bylaws. And it does make more sense. And so we then would be looking at referencing. So effectively, when we're talking about the 120 days—and I'm hoping we might get the second page up, but …

BRENDA BREWER: This is the e-mail in full. So here's your attachments, too.

SUSAN PAYNE: Yeah, it should be in the e-mail body, but it should be a bit further—yeah. Keep going. Up. Sorry about this.

BRENDA BREWER: No worries.

So this is our agenda.

SUSAN PAYNE: Oh, this is … So it's the e-mail—sorry about this, everyone—of that I circulated at 17:04 today?

BRENDA BREWER: Yeah. That's what I have.

SUSAN PAYNE: So really, at the beginning, there's a reference to the bylaws and then there's some text for Clauses A and D.

BERNARD TURCOTTE: Okay, I think I know what the issue is—

SUSAN PAYNE: It's the attachment. Sorry. It's one of the attachments.

BERNARD TURCOTTE: Yeah. Is in the body of the main e-mail? Because we didn't put that into PDF. But the two attachments we have in PDF.

BRENDA BREWER: Well, this is the whole e-mail from … Okay, it's to the IRP, from Susan today.

SUSAN PAYNE: Yeah, but it was the e-mail that was attached as opposed to the e-mail.

BERNARD TURCOTTE: Those two file I sent to you, Brenda.

BRENDA BREWER: Right. I have them. So I'll just open …

BERNARD TURCOTTE: Okay.

BRENDA BREWER: This is the one from Malcolm, but you wanted the other one from yourself, which is this one—open—which you probably can't see. Let me share that one.

SUSAN PAYNE: Yes. That's the one. Thank you.

BRENDA BREWER: No worries.

SUSAN PAYNE: So if we could scroll down to where it says A—exactly; the language for A and then the language for D. So basically this would lead to a relatively small change to the text, but it's essentially saying that the claimant has 120 days from being aware of reasonably should have become aware of being materially affected by the action being challenged in the dispute. That's little 1 or little—similar language dealing where there's a failure to act. So little 2 would be disputes challenging Board or staff action within 120 days of the date on which the claimant became aware or reasonably should have become aware of being materially affected by the failure to act being challenged in the dispute.

And then there's a similar amendment proposed to Clause D, which is the one talking about the written statement and when it has to be filed. And so there's just, again, a reference to being "materially affected by" captured in that.

As I say, I haven't heard from anyone expressing reservations about this language. So I'm hoping that all agree that this makes sense. Not really wanting to draft on this call or anything, but I hope you have all had a reasonable opportunity to look at this. And as I say, I haven't had any feedback suggesting anyone has any sort of suggested amendments.

So I will just pause and see if there's any feedback or if anyone does have any concerns. Otherwise, this can be incorporated into the draft rule. And then we'll have the rule as a whole recirculated.

Okay, I'm not hearing anyone.

And the second point then, if we move on to the second point where I said I would circulate a proposal—yes, it's number two, Brenda, as you can see … And initially I was planning to circulate some language, but I actually found, when I was trying to draft it, that it felt like we needed to have an agreement in principle that could then be picked up in the drafting. And this is to address who is going to make the decision. As I said, it's because we don't actually have a three-person panel in place until there is an IRP because the parties choose the panelists. And so, if you're seeking to bring a late IRP, you haven't commenced an IRP and therefore you haven't appointed the panelists.

So my suggestion would be that we have these applications submitted to the IRP provider and that they should be heard by a single panelist and that, if and when we have the standing panel in place, it would be a panelist selected from that standing panel but that, whilst we don't have the standing panel in place, it would be for the IRP provider to appoint a single panelist to decide this application using the procedure that's in the ICDR rules for appointing.

And then, really, we do need to have some kind of certainty on this, I think. And so my next suggestion was that it really ought to be a decision. Once that single panelist has made that decision, it ought to final and really only a reconsideration by the full panel once it's

appointed if there was some kind of material and fraudulent misleading so that they were mislead into making a decision that they wouldn't otherwise have made.

And, really, yes, as I said, this is a suggestion. It's very much intended to get feedback and kick off a discussion if others think that this is unworkable or have some alternative suggestions for how we handle this. But it seems to me that this is a path forward, bearing in mind that it's not practical to leave these … Unless we're expecting the late claimant to bring their IRP before they know whether they're going to be allowed to bring it out of time, we won't have a three-person panel.

Malcolm?

MALCOLM HUTTY: Thank you, Susan, and thank you for the work you put into this. I did wonder if the primary thing when a standing panel was in place—the primary idea—was that it would be a single panelist selected from the standing panel. My question would be, well, who selects that single panelist then? Certainly, as you went on to explain the alternative—that the ICDR actually has a procedure for dealing with this—I wonder whether that should not be the rule that we use always.

SUSAN PAYNE: Thanks, Malcolm. Well, I did reproduce ICDR Rule 13.6 so that you can see it. It's a little clunky. You can see certainly the start of it just on the screen. And it involves the administrator sending simultaneously to the parties an identical list of names for consideration and [them] having a

certain period of time to strike names off and so on and so forth. So we think—

MALCOLM HUTTY: But that what happens when the parties can't agree. Yeah, that's a resolution procedure. But presumably the [full] position is that parties agree. And this what's used when they can't agree. Is that right?

SUSAN PAYNE: Yes, I think that's right. But are you suggesting that this process could work for when there's a standing panel in place?

MALCOLM HUTTY: ICANN and the claimant agree on who's going to be the single person to hear this preliminary issue. If they can't agree, they use that process, yes.

SUSAN PAYNE: Yeah, potentially I think that's workable.

MALCOLM HUTTY: If not that, then we've got this alternative idea that you suggested of that a single panelist is selected. And then that raises the question of, well, who does the selecting?

SUSAN PAYNE: And that's exactly why it'd be useful to have a discussion on the principles before I or someone else starts trying to draft because, yes, we would need that. Thank you.

David?

DAVID MCAULEY: Thank you, Susan. I join with Malcolm in thanking you for the considerable work that went into this. So thanks very much for that. And like Malcolm, I wish for the situation where ICANN and the claimant could agree.

But I tell you I have a concern here. And what the concern here is is [forming] out of what we're now calling possibly a out-of-time claimant to file for the special ability to leave. I believe we've discussed that this would be in terms of extraordinary circumstances and, in the absence of giving someone in such extraordinary circumstances, the ability to bring a claim[, and] justice would be done—something that would be against fundamental fairness. And we have not yet constructed the words that would describe that gateway.

And my concern with a single panelist is that the application would become uneven amongst the seven or nine or however many members of the standing panel there are.

And so I feel hesitant here because I would like to see the three-member panel when it gets stood up to have the ability to look at that decision with a view toward what you said—the grounds that you said—but also with a view to maintaining consistency in application of this

extraordinary avenue to file a claim. So I'm expressing some hesitancy and need to think it through further, but I'm interested in consistent application of the leave to file. Thank you.

SUSAN PAYNE: Thanks, David.

Sam?

SAM EISNER: Thanks, Susan. I, too, appreciate the work that's been going into this. And I think the question about what happens when the standing panel is seated is something worth looking at. And I think that might also be something that we might want to consider once we have the standing panel in place. There will be a group of items. And indeed it's one of the things that the bylaws suggest that the standing panel would have a role in: identifying places where the procedures could be improved or things that we might need to think about.

So this could be the type of question that we would pose to the standing panel about how this could work because there are also opportunities to consider, would we go for the default ICDR process, where only those members of the standing panel would be available for consideration to be appointed for this? Or would it be something where we'd like to have a chair of the standing panel responsible for making these types of appointments and selections because one of the things that could happen as a result of bringing in a panelist to decide this type of interlocutory issue would be that that panelist might also not be

deemed available or the broader issue. So there could be some place to balance procedure versus substantive knowledge so that we're not knocking out a panelist who might actually be very well-suited to hear the merits of the issue later if the matter proceeds to IRP because they've been used on one of the interlocutory issues at the beginning.

So we might not have to solve all of this right now, given that there is a default procedure. And that might be one of the things we could table for further conversation once we have a standing panel in place.

SUSAN PAYNE: Thanks, Sam. Just to be sure I understand, is there any concern for present purposes or for the present time, let's say, about having this decision made by a single panelist and utilizing of the default procedure if we need to? I'd love to understand that from the group because, whilst I hear all of the comments about how this may well be something that's a very suitable question on procedure that the standing panel, when we have it in place, could consider, the fact remains that we don't have a standing panel in place. It still, to my mind, looks to be a very long way off. The community group that is due to be working on the appointment of the standing panel members hasn't even met yet, despite having been put in place nearly a year ago. Yes, at some point we'll have a standing panel, but we have to have some process in place for while we haven't got one because it could be months still.

Sam?

SAM EISNER: Thanks, Susan. I raised by hand to response to the initial question, which was I think it makes sense to have this as an issue that could be solved by a single panelist—that we don't have to go through a full empanelment process in order to get some of these initial issues about how can move forward in an IRP. I think that the single-panelist issue does make sense.

And your other note raises a different item for us (and we can take this back): that we'll endeavor from the ICANN side to provide some updates to the IOT on the work of the seating of the standing panel. One of the things that happened is we just had a meeting yesterday of the first Community Representatives Group. So that is work is starting to progress—clearly not as quickly as it should have. So that is in the works, but we'll make sure that IOT has the ability to understand where they can find updates on the work that's going on there. Thanks.

SUSAN PAYNE: Thanks, Sam. And my apologies then. I was out of date. If they met yesterday, then that is great news.

SAM EISNER: No worries. Thanks.

SUSAN PAYNE: Greg?

GREG SHATAN: Thanks. I was just going to mention that we met for the first time yesterday. David McAuley is also on the team as are Heather Forrest, Donna Austin, Cheryl Langdon-Orr, Kavouss Arasteh, and … I'm sorry, I don't have all the names in front of me, but we met this past Monday. It was a very well-organized meeting. Lots of resources have been put together. So we're not starting from a shape-of-the-table situation, at least. And we're scheduled to meet next Monday and to go on a steady march and hopefully make up for lost time through efficiency, where a journey of a thousand miles begins with a single meeting. Thanks.

SUSAN PAYNE: Thank you, Greg. That's, I think, really good news. I think all of us here are very, very keen that the standing panel should be in place, not least because it would be lovely not to have to address in the rules what we do when we do not have one. And indeed I think we all feel that it's something that the accountability work expected and we're all supportive of. So I'm really pleased that you have now met. Hopefully, you will march, as you see, efficiently onwards.

All right. So we have a few more minutes. We, I think, maybe have time to at least look at Malcolm's language. And this is addressing, I think, the point that, David, you were touching on just now about ensuring consistency and avoiding unfairness.

So, Brenda, it is the other attachment, the one that was Malcom's e-mail.

BRENDA BREWER: Okay. I'm looking.

SUSAN PAYNE: Thank you.

Oh, Greg, is that a new hand?

BRENDA BREWER: Nope. Sorry. I think it's this one.

SUSAN PAYNE: I think it's …

BRENDA BREWER: Its this Malcolm's? Yes?

MALCOLM HUTTY: That one, yeah.

SUSAN PAYNE: Yeah. So when we were looking at the language for this rule in the repose and the safety valve, Malcolm had raised on the call a concern about us not having really or not giving really any real guidance to the panel, panelists, or whoever it is who's making the decision and that perhaps it would be appropriate for us to at least give some guidance in terms of what consideration they should be bearing in mind when making a decision whether to allow someone to bring their IRP late.

And so this is the suggestion that Malcolm had circulated, which was effectively that, when considering whether to permit the filing of the IRP claim out of time, the panelists shall have regard to the purposes of the IRP an any jurisprudence of IRP panel relevant to the interpretation of this clause … in light of the purposes. I think that's what it says where it's slightly cut off. So basically, it's to try to build in some guidance for the panel/panelist that they should be having consideration to what the point of the IRP in order … As we know, there are various provisions in the bylaws about the purpose of the IRP. And to the extent that any precedent builds up, they would look to previous decisions, and we could therefore hope to see some consistency of decision developing.

And, again, this is language that Malcolm threw out as a suggestion. I haven't seen any reactions to that over e-mail, but if there are reactions now, then that would obviously be very welcome. But, again, otherwise, this probably won't be the last opportunity to talk about this if we have a new version of the rule circulated, where all of these suggestions/amendments are gathered.

David?

DAVID MCAULEY: Thank you, Susan. I actually had seen this before today's meeting and I liked the language that Malcolm used. And so I think this is great. I still have my hesitancy about one panelist, but knowing that the work on coming up with a standing panel is now underway and that, when we're done, our results won't be subject to public comment or all the time-consuming stuff, maybe it's now such an edge issue that this is just fine.

But in any event, I do have that hesitancy about one panelist, but the language from Malcolm—thank you, Malcolm—I think is good language. So that's my reaction. Thank you.

SUSAN PAYNE: Lovely. Thanks very much for that, David.

Anyone else? Any reaction to that language or particularly any strong concerns? Or anyone who feels that they would like to noodle on this and propose any improvements? That would obviously be welcome as well.

I'm not seeing any hands, so I'm cautiously taking this as that people feel that this is heading in the right direction.

So perhaps, I think, the next step—I think this may be a task that I'm going to having to give myself—is … We had some areas where on the draft language on this particular rule, during our first conversation when we went through the rule and the comparison. We did suggest or agree to some tweaks. And then we also have these three areas where there is some more tweaking to do. So perhaps it's time for a new draft to get circulated so that people can see where it looks as though we were coalescing around an agreement. So I think I'm giving myself an action item to look at that before our next call and circulate something.

Okay. And I think, unless anyone has anything else that they would like to raise now on this call, that probably brings us close to the end.

David?

DAVID MCAULEY: It's just a suggestion, Susan. Thank you. On the assumption that there will be a meeting in The Hague, I think it would do our group well if we could get together, if people are going—and I understand that there are limitations, and this pandemic has been a tremendous challenge—if there's a possibility, we ought to talk about it early to see if we could get maybe a room for the morning after the meeting ends. Everybody is busy before the ICANN meeting starts. It's just a suggestion, but I think four hours together or something like that would really be very good for our group to try and make progress on some things. Thank you.

SUSAN PAYNE: Thanks, David. Good suggestion. And we've only just wrapped up one ICANN meeting, but I think we're about to go into the planning stage of the next one. So it's very timely for us to start thinking about that. I think it would be helpful if we're able to get some time. I don't know how easy it would be, but I think it would be beneficial for us to try and do some in-person work to the extent we can. Thank you.

Well, we see what we can do. Yes, thank you for the suggestion.

All right. We have our next call on the 29th of March. Kurt is saying in the chat, "Isn't this a policy forum where work should be devoted to working on policy work?" I think that's right, although I think that that also included cross-community work. And this is something that arose out of the CCWG. I don't absolutely know the answer. Maybe Brenda or Bernard can give us some thoughts on this when they've had a bit of time to explore whether it's a possibility for us to meet.

Sam?

SAM EISNER: Just a note from the ICANN side, as I see some of the planning work going as we're really trying to get ourselves to the The Hague to deliver a good hybrid meeting. I know that there's a lot of effort to focus the work for this policy meeting on delivering a really good hybrid experience for the core parts of the meetings. So I don't know how much tertiary meetings or auxiliary meetings are being considered around the ICANN meeting date. So that might be a consideration, too.

SUSAN PAYNE: Okay. Thanks for that. We'll bear it in mind. Well, if nothing else, perhaps we should have an IOT gin and tonic to help. I think for some of us we haven't yet seen each other in person perhaps other—certainly for a long time. So perhaps that wouldn't be the worst thing to do.

All right. Let's call it a day at this point, and we will reconvene in a couple weeks' time. So thanks very much, everyone. I think it has been a really long, hard slog, but I think we are making some progress. And I feel like we may even be seeing the light at the end of the tunnel on this one now. So thanks, everyone, or all of your engagement.

BRENDA BREWER: Before we end—I am so sorry—Bernie, I see the next plenary is the 24th. I base that on the Doodle poll.

SUSAN PAYNE: Oh, I think that's the Consolidation Sub-Team.

BRENDA BREWER: Oh. Then I must rename it. So I apologize. I sent it out to everyone. My fault. I thought that Doodle was a plenary Doodle. So I'll change the invitation for the 24th to the Consolidation Team.

SUSAN PAYNE: Thanks, Brenda.

BRENDA BREWER: I'm glad we discussed this. And I will make sure that on the 29th, I will get another invitation out.

SUSAN PAYNE: Okay, good. Super.

BRENDA BREWER: Thank you. Thank you so much.

BERNARD TURCOTTE: All good.

SUSAN PAYNE: Thanks very much.

BRENDA BREWER: Thanks, all.

SUSAN PAYNE: Thanks, everyone. Have a good rest of your day.

[END OF TRANSCRIPTION]