BRENDA BREWER: Welcome to the IRP-IOT Plenary Call on 15 August 2023 at 18:00 UTC. Today's call is recorded. Please state your name before speaking and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation.

And with that, I'll turn the floor over to Susan Payne. Thank you.

SUSAN PAYNE: Thanks. I'm not on mute. Thanks, everyone, for joining. I was going to say this is our regular call. It's an addition that we've inserted in to the calendar just to try and get through the discussion on Rule 7, and hopefully to line us up for getting things out to public comment.

So first up, the usual review of agendas and updates to Statements of Interest. Let's do the SOIs first. Does anyone have anything to note? And seeing no hands, in terms of the agenda, it's a pretty short agenda. We'll continue the review and discussion on the small team proposed revision to Rule 7, which is the rule on Consolidation, Intervention, and Participation as an Amicus.

I've got a standing item for AOB in case there is any. And our next call is in a week's time which, again, is part of our push to get through things.

And I note that we've also now been joined by Greg Shatan. So, welcome, Greg. We have more than a quorum, so that's excellent. Thank you all for joining.

All right. So [we're, I think] straight into, then, the agenda Item 2 which is this continuation of the review of the small team's proposed Rule 7.

Brenda, would you be able to pull up the one that I circulated, which is the clean version but still annotated with comments including some comments from Liz. Thank you.

And you may find that it's helpful to also have it open on your own screens if that works better for you. Certainly, it can be a bit challenging seeing the annotations and so on in the Zoom room, but we'll do our best, obviously. And just to flag, I may toggle back and forwards a little. So please bear with me if I don't immediately see hands or whatever, although I'll do my best to keep an eye on both screens.

So I think that we pretty much had dealt with the top section, paragraphs 1-4, in our previous discussions. And so I think the place that we're best to start is probably from paragraph 5, which is the beginning of the section specifically on consolidation. I noted a bit earlier that there were some specific provisions that the small team was particularly interested in getting comments on, but I don't obviously want to preclude us or preclude any of you from discussing any of these provisions.

Mike, thanks for your comment in the chat. Yes, that is something that we discussed on a previous call, and I think we will be calling it something like "first commenced" or the like. The term "dominant IRP" is not well-liked, so that is a point where we need to revise.

I haven't made that change yet, but where you see "dominant IRP" throughout this document, please sort of read into it something like "first commenced." We probably won't call it "first IRP" or maybe even "initial."

I must say I would be happy with that terminology, but that terminology certainly seemed to be causing a bit of confusion to at least certainly one of our members who felt that might be interpreted as a reflection or a reference to the first ever IRP, or something like that, which obviously isn't the intent. It may be possible, obviously, to address that in the definition section. But, yes, something along those lines is what that will be changed to.

So if we could scroll down to 5, Brenda. And I think we've sort of touched on this provision, this Section 5 and the reference to "just and efficient." But just for completeness, I think it makes a good place to start. And what the small team was looking to address here—and, in fact, this is largely a carryover from the current rules—is this notion that the purpose of consolidation, if you like, is for fostering the just an efficient resolution of disputes, or more just and inefficient than addressing each dispute individually.

As I say, that's what the current standard is. The small group discussed it, in particular whether that was the right test. We talked about whether we should be matching the wider list of purposes of the IRP, and concluded that that's a purpose for all IRPs—so securing the Bylaws languages; securing the accessible, transparent, efficient, consistent, coherent, and just resolution of disputes. But we concluded after our discussions that those were the purposes of all IRPs, and we felt justice and efficiency were the ones to call out.

I don't think any of us were in disagreement in the small team, but we felt it was one of the items from the rule that we wanted to flag to the group to ensure that there's comfort with that language.

And I'm not seeing any hands, so I'm going to be largely taking silence as lack of opposition, and, therefore, we can move on.

And also just noting, as well, actually, that we've also been joined by Kristina as well. So welcome, Kristina. We've got a really good turnout on this call. Thanks again to everyone for joining.

All right. So paragraph 6. I think that clause 6 is certainly nothing significant to flag here. We've talked a little bit, the highlighted sections, around timing. And the small team hadn't agreed on a specific timing. We suggested perhaps 21 or 28 days. I think from our previous discussions on earlier calls, there's a feeling that that's probably around about the right timing.

Bearing in mind that an IRP is meant to be wrapped up within six months, albeit that's rather aspirational. But I don't think we've concluded one way or the other on whether it should be 21 or 28 days. And there was a general feeling that probably that's something that we tidy up at the end when we work out that the timings will work together.

The other thing we talked about, and I think, again, we touched on this last call, was the reference to publication in the current version of the rules, that it's a reference to the ... I think there's a reference to initiation of an IRP.

But the problem, I would say, with initiation is that if you're a third party looking to consolidate into another IRP, you don't necessarily know dates of initiation, and so publication seems to be a better reference point. Bearing in mind that we do know that [all] IRPs do get published on the ICANN website. And indeed, if there's a delay in publication of a later IRP,

that would extend the time available for seeking to consolidate. And so that actually drives an incentive to publish promptly.

Mike.

MIKE RODENBAUGH: Thanks, Susan. Yeah, I don't like things being keyed off publication necessarily, either, because who is bound to be looking at ICANN's website every day to see what is published? I think that there needs to be more of a "known or should have known" about that it was initiated standard to it. Or ICANN needs to be committing to publishing things, for example, in their community digest. And maybe that's better "publication" than just putting it on their website and hoping that people see it.

SUSAN PAYNE: Thanks, Mike. I guess that's certainly something we could suggest, the digest option. I think it is possible, obviously, to sign up for alerts. And I think none of these things come as a total surprise to anyone. I can't believe that if you're initiating an IRP or you're in the middle of a Cooperative Engagement Process, that you're not keeping an eye on what's going on with related IRPs that might be appropriate to consolidate into.

So I do think that this is probably less of a risk than you feel it is. But we could certainly propose something about the digest. I don't think we can ensure that it happens, but we could make some kind of a

recommendation to that effect. I'll see what others think. I have got a few hands up.

Kristina.

KRISTINA ROSETTE: I certainly understand the concern that Mike is raising here. However, I think the "known or should have known" standard as a practical matter is likely to actually insert more uncertainty and delay, and frankly just messiness. I am not aware of anyone who has filed an IRP that hasn't been looking at that section of ICANN's website fairly closely.

I would be totally fine with—and if there isn't one anywhere else, then I would certainly suggest that we do it—that we actually insert a requirement that ICANN must publish the IRP complaint within a certain amount of days after it's been filed and considered to be commenced. And to even go so far as to, obviously, you don't want to designate a specific hyperlink or anything, but a section of the website. Because my recollection, and I'm going to defer to Sam on this, is there isn't actually a formal requirement anywhere that ICANN publish the IRP documents.

So we may decide—and, frankly, I think we probably should decide—that having such a requirement is something that we want to add on. Thanks.

SUSAN PAYNE: Thanks, Kristina. I'll go to Sam.

SAMANTHA EISNER: Thanks. Kristina, I don't recall if there's a formal requirement documented anywhere or not. Though, clearly, that's our practice. Liz, if you recall anything, jump in. But we'll check on that. We don't have a problem with any sort of requirement to publish, of course, because that's our intention.

We do have sometimes issues when IRPs are sent to the ICDR. And so the claimant might say that it's commenced, but there is a problem. Maybe it's a payment of fees or other things that hasn't quite been perfected. And then also, we have had times where people might include confidential information within the IRP.

And so ICANN has, in the past, had to go back to the party filing the IRP to identify what information should actually be withheld from the public record so that there's a properly-redacted version because IRPs are different from reconsideration where everything must be public. Of course, we prefer for IRPs to be based on publicly-available information, but there are times within an IRP where there is confidential information that's shared and is removed from the record.

And so there are times where there are things that might not actually be fully within ICANN's control, that there's this timeline of: ICANN get an IRP and ICANN should just put it up tomorrow. That would be our goal, of course. But there are practical things that come up. But ICANN does support the idea that IRPs should be posted as soon as it is appropriate for us to do that. So I just wanted to [apply that].

I would counsel against building into here any specific link or any specific reference to a currently existing communication tool with the ICANN

community. So we do have that community digest, and that goes out regularly. But we don't want to build into the procedures, I don't think, reference to a communication path that might get overtaken or used in a different way. So I would counsel us against using something like that in here, but definitely make sure that we have clearly documented where things are published.

Currently, we do have that persistent IRP page that we use to publish the proceedings, but we will look and see if there's any reference to any sort of timing requirement for when those go up, to Kristina's point.

SUSAN PAYNE: Thanks, Sam. Becky.

BECKY BURR: Yeah. I was going to raise all of the perfection issues that Sam just mentioned. And the only other thing I'll say is, I am really opposed to a "know or should have known" standard, particularly if publication doesn't constitute you should have known because that means they can file whenever. And that could really, I think, affect a hardship on the earlier-filed dispute.

SUSAN PAYNE: Thanks, Becky. I'm hearing, yes, there's quite a lot of concern for that "known or should have known" standard, which I certainly understand. I think it does seem to build in quite a bit of additional uncertainty. And we really do want to try to build more certainty rather than less.

I think, also, to some extent, it would build an uncertainty for an applicant for consolidation because it is that. It's an application, and various considerations will be considered by the panel, including things like what progress has been made in the other case and so on. And so we don't want to be encouraging people to spend their time and resources in making applications that seem like they're in time because they only just found out about an IRP.

But in practice, when the panel looks at it, they will reject it. So I think maybe we ... And I'm, yeah, noting a bit more support for—or, rather—opposition to the "known or should have known" standard. I think the publication and inclusion of some references to publication, some obligations of publication, if they don't exist already, does seem to have support.

So, again, I think we can probably, to the extent if there isn't something already, we probably can harden that up and include a recommendation that makes it clear.

I take on board what you said, Sam, about some of the uncertainties and maybe things that need to be sorted out perfection of the complaint in some way or redaction of the public record before it gets published. On the whole, I don't think that's the end of the world. Indeed, in some ways, I think that means that running the time limit from publication is arguably, then, preferable to something like a time limit running off initiation of an IRP because once it does get published, that's a clear date. Whereas, as you've just pointed out, there can be some uncertainties about when something is formally initiated or not.

So I think we've got pretty good agreement on trying to firm up the publication requirement a little and to move forward on that basis.

Mike.

MIKE RODENBAUGH: Okay, fine. But I think we at least need a definition of publication—where exactly will it be published, for example. And I feel like, still, there should be some ... In certain cases at least, there should be an obligation on ICANN to notify people. Maybe it's not consolidation because, okay, now you're talking about two IRPs. So that's not such a problem, honestly. My concern was more addressed to the intervention scenario rather than consolidation, so I should have probably waited.

But, for example, we're going to allow supporting organizations to intervene. Well, first of all, getting a supporting organization to make a decision within 30 days is a pretty heavy lift. I think we all need to understand it's almost impossible, really.

And secondly, supporting organizations aren't typically going to be watching the IRP webpage. So I think, at least in that instance, and I can think of maybe one other instance where there's an underlying proceeding that had two competing parties that, you know, ICANN ought to have a duty to notify that party or notify the supporting organization that their policy is now in question so that they are aware that they have an opportunity to intervene.

SUSAN PAYNE: Thanks, Mike. Yeah, but that ... Well, let's see if there's any pushback on that. But that sounds sensible, at least certainly in the case of the SO. Again, we may have touched on this on our last call. I feel like we've had some discussion on this. I can see a problem where it's not clear to anyone or it's not clear to ICANN who they should be notifying. So unless we can identify really clear sets that will identify clear classes of person who get notified, like the SO whose policy is in the mix.

But I think it's quite dangerous to assume that ICANN will know who they should be notifying. So I do have some reservations about that unless, as I say, we can come up with a really clear set of people who should be notified.

Yeah. Okay. And thanks for that in the chat. So I'll read out, and then I'll come to Kristina. Mike suggested two specific instances. One is the SO whose policy is implicated. Or if the IRP is relating to an underlying dispute that involves two or more parties. And, yeah, that may be a more reasonable ask.

But turning to Kristina, and then also Sam. Kristina first.

KRISTINA ROSETTE: I'm not philosophically opposed to what Mike is suggesting, however I have some concerns about situations, for example, where the complainant may not actually say clearly in the complaint at any point, "We are challenging Policy X." And then it puts an onus, you know, having a notification obligation to an SO whose policy was implicated then kind of creates an interpretation burden on ICANN, which I'm not really quite sure is fair.

There's also an issue with where you have, and I'm thinking maybe the gTLD application context where there is a contention set. And then the winner who ends up signing a Registry Agreement with ICANN later files an IRP, and then ICANN has to try and figure out how to notify the other party especially if that party rode off into the sunset once their application didn't go forward.

I just have concerns about where we draw the line, just as a practical matter, on what ICANN's notification obligations are. One way to address the interpretation issue—though, again, I'm not keen on this; it would have to be set up as something automated to not be overly burdensome—is that just, as a matter of fact, every time an IRP commences, there's an email notification to the chairs of all the SOs and the ACs. And the chairs of the SOs and ACs can then take it upon themselves to say, "Is our SO policy implicated here" and then make the decision accordingly.

I do understand the point you're making, Mike, but as with an SO whose policy is implicated, I don't know that they wouldn't already know, except for instances where the complainant hadn't clearly pled it or articulated it. In which case, I'm not sure how ICANN would know either. I'm really struggling with the implementation of that and just the fairness of it. Thanks.

SUSAN PAYNE: Thanks, Kristina. Sam.

SAMANTHA EISNER: Thanks. From the ICANN side, I appreciate the worry that ... You know, this would have to be a very clear notice statement. As an example, we actually already have ... In the current interim supplementary procedures under Section 6 for written statements, we had identified, for IRPs that are about process-specific panel challenges such as those within that gTLD program, that ICANN actually has an affirmative obligation to notify the other parties within that panel, within that set about the existence of the IRP.

So there are other specific instances where the persons are easily ascertained and the purpose for that [notice] makes sense. Let's talk about them. We have some examples of that already. But we do need to make sure that it's a well-defined instance and that it's not up to ICANN's interpretation as to whether or not something fits into that because we wouldn't want to build in a vague role here such as implicated by policy or implicates a policy.

Where's the line on that? Is it when someone's challenging an action that happened under the IRP program—or not the IRP, sorry—under the new gTLD program? And that goes back to a GNSO policy recommendation. Where is that line? So I worry about something being clear enough on that. I think if there's a need to build in somewhere some expectation that there's some sort of notice to specific groupings of people, such as Kristina recommended, the chairs of the SOs and ACs, just to note, "Hey, a new IRP was filed" or something. And we could maybe try to figure that out.

But we wouldn't necessarily want to be in a position of trying to identify who, itself, might be interested in any new IRP for the purpose of notice. So it has to be, I think, a really clear line.

And I wanted to make sure that everyone saw within the chat, Liz pulled out from the Bylaws. There is a posting standard. It says that ICANN shall post documents promptly when they become available. And so we do have a standard in there. So, of course, it's up to some discretion as to what does "promptly" mean. Are we meeting that standard? But there already is a bit of time rule and an obligation from ICANN to make that filing.

And just to be clear again, ICANN has maintained the IRP documents at a persistent website address, so it's not like we changed where they're found. So people also always do have the ability to set up a feed for notifications when things come up. But that really is people actively seeking information, or at least actively knowing that they should be doing that versus that push from ICANN.

SUSAN PAYNE: Thanks, Sam. I really appreciate the reminder about the Bylaws provision. That's really helpful.

Mike's making a comment in the chat that the ICANN website has ... He says about a million. I don't know if that's actually the case. But a very large number of old pages, and can we be more specific? I think there's a reason, probably in the Bylaws, why it's not more specific. Obviously, we know that they are published in a specific place in the website.

And perhaps if we are including something here, we could reference something like in publication in the specific part of the ICANN website dedicated to IRPs or something like that which does exist. We don't want to be including links and so on because those things can change.

All right. I'm hearing support for the publication, but I'm hearing less support, I think, for something that goes a great deal further than that. It would be helpful if others do feel that we should be looking to have that imposition of notification on ICANN to notify groups like the SOs. Or as Mike is mentioning, those involved specifically in an underlying dispute where ...

I'm hearing it from Mike. I think on our previous call we heard it also from Flip. So it certainly is the case that the practitioners amongst us seem to be relatively aligned on this. I'm not hearing, as I say, a great deal of other support. But equally, only a couple of people are opposing. So I'm not quite sure where this lands us.

Okay. Thanks, David. So David is less in favor of notification. I think perhaps where we have landed, at least for now, is we're supportive of the publication concept. The notification concept, I think, is not well fleshed out yet.

Mike, if you wanted to put on the mailing list a proposal that we could see whether there's sufficient support for. And in any event, perhaps this is something that we can flag to the community in public comment to see whether there is strong need for something more than publication. I guess I am struggling. Outside of the SOs, I'm struggling to see how anyone who, certainly in the case of consolidation—that's two IRPs being

consolidated. I don't think anyone bringing an IRP doesn't have a pretty good idea of what other IRPs are in the offing. The fact that disputes go into cooperative engagement is itself published. Information is published about that. So you even have an awareness of what's in that process that hasn't yet gone into an actual IRP?

Thanks, Mike. Yeah, I know. But nonetheless, maybe that's something else we need to look at. That CEP updates are maybe sporadic. Well, then that's also something that we need to bear in mind and perhaps touch on when we get to RCEP rules if we don't think that the place to do it is here. But it was more to try and flag that I think there are ... People outside of the dispute do have some awareness that issues are in dispute.

So, yeah. Okay. I'm seeing Kristina's comment in the chat again. She would support notification if it's one that doesn't require interpretation and guesswork over who needs to be notified. So that kind of notification that she mentioned to SO chairs. Perhaps that's a starting point.

Mike, as I said, if you wanted to put something to the email list a bit more fleshed out because, obviously, we're trying to do this on the hoof here. And that's not fair to you to necessarily have all the answers on this call, but if you want to put something more fleshed out to the list, then please do so. Otherwise, I think we're looking at publication and, at most, notification to the chairs.

David, I saw your hand. It's gone down. Is that a ...

DAVID MCAULEY: Susan, I could make a quick point because I was quiet, just commenting in chat. But I just wanted to stress the point that you were making. And that is, people are aware of what's coming down the line. People who have an interest in an issue are looking. I'm very much against giving another obligation to ICANN to interpret things. And even deciding what needs to be interpreted would itself be interpretation. I just think publication—publishing well, publishing in a couple of places, or whatever it takes. But don't put a burden on someone to read [through] ...

ICANN, when they get a complaint, their job is to defend it or to concede it. But don't give them the burden to try and understand it insofar as what its implications are with respect to letting other people know. I don't know. It just strikes me as being odd. I'm very much against the notice idea. Thank you.

SUSAN PAYNE: Sorry. Talking on mute there. Okay, thanks. Thanks, David. I think we can leave that there for now. Let's move on to the next paragraph. Apologies. I'm not going through this quite as quickly as I'd hoped, but it's important that we have these discussions.

Okay. So paragraph 7 regards ... Highlighted in that paragraph is a reference to the appropriate filing fee. That's really highlighted because earlier in the small groups discussions, they were running somewhat in parallel with the separate discussions that we were having on filing fee. And so I think that's probably addressed now, albeit ...

Well, are they? Is it appropriate that there's an actual fee for consolidation? I think that may also be one that we circle back to towards the end of or work on these rules in terms of making sure we've covered off that things will fit together properly.

But the other point to flag here is just that we felt that when one's seeking to consolidate, there should be some sort of explanatory statement, basically, as to why consolidation is appropriate. And particularly flagging what the items identified previously in paragraph 5 are. So, what are the common nucleus of operative facts and why consolidation would foster a more just and efficient resolution than addressing the disputes individually.

It's also, I think, incumbent on the applicant for consolidation to be setting out their case, basically, for ... So, why it's appropriate. Why the panel should agree rather than not. And that would be, I think, the expectation.

And then moving on to paragraph 8, this is something that we wanted to flag. As a small team, we felt that there ought to be some kind of a declaration, using that term quite loosely. I think, in practice, that could be something that really was effectively some kind of a tick box on a form to have the party moving for consolidation to make a declaration that their statements are true and correct; that they're not intentionally misleading the panel about the circumstances; that they're not filing the motion to seek to consolidate for improper purposes.

And we identified non-exhaustive, improper purposes in subparagraphs, i through iii. So the first being: "having the primary intent to delay either

IRP action or the resolution of an underlying proceeding. Seeking to harass ICANN and other IRP claimant or any other party or potential party to IRP proceedings." Or the third one was "having the primary intent of changing the IRP panelists who would hear their dispute." So that's the party seeking to consolidate.

And that third one was the one that we specifically one wanted to highlight because we did have some discussion about it and about the fact that consolidation is ... Inevitably, there's going to be some change to panelists as a result of consolidating because you no longer will have two panels. You'll have one that will be hearing the whole case or the two cases, or however many cases are consolidating.

There's an effect or a potential effect of changing who IRP panelists might be, but what we're seeking to particularly address here is that the consolidation process shouldn't be used primarily just as a means of changing the panelists. And so we do think that it's ...

We did discuss that it would be quite difficult to prove but that, nonetheless, we felt that having this kind of statement was appropriate. And so that was, in particular on this paragraph 8, one of the things that we wanted to flag. But, indeed, keen to get reactions to all of that.

Mike.

MIKE RODENBAUGH: Thanks, Susan. Yeah. I have no problem with this for consolidation. But for intervention, I don't think this third point makes sense that the

panelists aren't going to change due to an intervention. So I think it should probably be deleted there.

SUSAN PAYNE: Yeah. Thanks, Mike. I suppose the only thing might be that you could [seek] to join a case because you know who the panelists are and you want them to hear your case, too, and they wouldn't hear your case otherwise because they're already busy. But I ... Again, keen to hear others' thoughts on this.

Kristina.

KRISTINA ROSETTE: Mike, you're certainly right. I think the situation that we were envisioning in the intervention context was the possibility that by intervening, the intervening claimant, by virtue of their presence in a proceeding, would create a conflict with the existing panel. And one of the panelists would then have to recuse themselves. So it's a different context or a different circumstance, but I do think, and I think the small group felt that in the intervention context, that was the context in which you could have the applicability of that primary intent of changing the IRP panelists. Thanks.

SUSAN PAYNE: Thanks, Kristina. Yes. That's a good point that I had forgotten. Again, we weren't sure that this was something that was very easy to prove one way or the other, but we felt it's more a statement of expectation, I guess. But it would at least ground a pushback from the other party to such a

consolidation or intervention, as the case may be, if appropriate. So, yeah, I think ...

Mike, I guess I'm not ... Does Kristina's explanation give you some comfort on this one?

MIKE RODENBAUGH: Well, I guess it could be more specific. I think there was language in there already about the scenario she mentioned; that it would create a Conflict of Interest. I guess, honestly, it doesn't really matter if it stays here because, just, it would never be the primary intent of changing the IRP panelists, I guess, except maybe in this situation where someone's trying to create a conflict of Interest. If that's the issue, then why don't we just say it specifically?

SUSAN PAYNE: Yeah. I think you might be right. I think in some cases, it could be broader than that. I guess that was our thinking, particularly in the case where there are two ... I guess particularly in the consolidation scenario because you've already potentially got two panels. You could, in theory, not like your panel and be seeking to consolidate to get rid of your panel. And that would not really be a conflict of interest scenario in that particular case.

MIKE RODENBAUGH: Again, I didn't have any problem with the consolidation.

SUSAN PAYNE: Yeah.

MIKE RODENBAUGH: Only intervention context, whatever. And nobody is going to ever say or acknowledge that it was their primary intent to change the IRP panelists. They're going to say their primary intent was to do a whole bunch of other things like hold ICANN accountable. So I don't really worry about this creating any sort of effect on people's ability to bring a claim. So it doesn't bother me.

SUSAN PAYNE: Okay. All right. Thank you. Okay. All right then. I'm not seeing any other hands on this one, so, again, I'm looking to silence as non-objection.

On paragraph 9, I think this is new text, but it was something that we were all agreed on fairly early on in the small team; that this right, basically, for others involved ... So the other claimant involved in the IRP, where there's a request to consolidate, and ICANN ought to get some right of response, is effectively what this is providing for.

And there was a comment from Flip who suggested that we shouldn't refer to "claimant" because they might be an intervenor or they might be an amicus. But I think my reaction to that ... I did pause and think about it. But, obviously, if someone is an intervenor, they become a claimant. That's how we've drafted this. And so I think "IRP claimant" in that context can cover that scenario.

In the case of the amicus, I think we've very deliberately crafted a slightly different set of rules, and I don't think ... Again, looking to hear if others

disagree, but it doesn't seem to me that this is necessarily a place where we want to give an automatic right to an amicus. But in the section when we get to the parts of the rule about how we treat amicus participation. There would be scope for them to ask for a right to put in some briefing. But certainly as envisaged, the amicus isn't a party, so they don't get the rights of a party.

It's maybe difficult for us to address that in this context here. It may be preferable if we think about this again when we get to the actual section on Amicus. But I just wanted to flag that comment that Flip had made and why I think, certainly in the case of the amicus, it's addressed in the current language.

Okay. I'm not seeing any hands, so I'll keep moving on, I think. In paragraph 10, or subsection 10. This is something that we did at least sort of touch on our last call because we looked at the ICDR Rules. But essentially, we didn't ... In the current version of the IRP rules, we don't really have any guidance, for want of a better word, on the considerations that the IRP panel should take into account when they're deciding whether to agree to a request for consolidation or not.

That is something that's in the ICDR Rules. This text is not absolutely identical to the ICDR Rules, but as we talked about on our last call, it's basically built off that. So the proposal is that these non-exhaustive considerations or circumstances that the IRP panel should take into consideration when they're deciding whether to agree to a consolidation:

- the views of the parties

- the progress that's already been made in the IRPs, including whether allowing the request would lead to duplication of work or reopening issues or so on

- whether an IRP panel has been appointed in more than one of the IRPs

And the reason why it says "more than one" is because we've given this decision to the IRP panel in the first commenced IRP. So there's always a panel by its very nature. So that's why we've just referred to whether there are other IRP panels already in place and whether there's any kind of overlap or difference between the panels. That might be something that was a factor.

- whether granting the request to consolidate would create a conflict of interest for an already-appointed panelist

- how consolidation better furthers the purpose of the IRP generally, as compared to allowing the proceedings to continue independently

And that's an important reminder for us and for the panel. If there's no consolidation, no one is preventing someone from continuing with their IRP. They're simply doing so independently rather than the two or more cases being joined into a single action.

So again, I think I'll just kind of pause and see whether there are any reactions to that. Otherwise, again assuming that there's a degree of comfort with what we've been proposing. All right. Not seeing any hands, so I think we can keep going.

Paragraph 11. This one is ... Again, I think some of this text, if I recall correctly, there may have been some reference to the IRPs being consolidated into one case or the other, and I don't now recall.

But our proposal is that the consolidation should be into what we've got written here as the dominant, the first commenced IRP, unless otherwise agreed by all the parties or the panel that's making this consolidation decision concludes otherwise. But the general principle would be: you've got to consolidate into one case or the other, and so the consolidation should be into one that was commenced first.

And again, pausing briefly. If not, then we can keep going to paragraph 12.

And moving on from that and consequential to that, the IRP panel for that first commenced IRP, then, is the one that continues in place for the consolidated proceedings. And that would be the case unless any of the panelists, as a result of that consolidation, now have a conflict of interest and have to withdraw. And if that were the case, then the party whose panelist has been withdrawn will select a new one, basically following the panel selection rules that we've been talking about at Rule 3.

I think that to the small team's mind, that made sense, and so we obviously don't want to go building a new rule. There's an existing rule about panel selection, and that's the intent. But we've got a dominant IRP panel or an IRP panel in place for the first commenced IRP because that's the one that is making this decision on consolidation. So we know we definitely have a panel for this one, and that's the panel that will keep going.

And then, again, I'll just keep going, as I'm not seeing any hands.

On 13, what we then are proposing is that where they consolidate, generally each existing dispute will no longer be subject to separate consideration after that point. But we did include the proviso that's highlighted there that the IRP panel would have a discretion to determine otherwise.

And the reason why that was included was that it was highlighted—by, I think, it was Sam—that in fact, in practice, in at least one case where there had been consolidation ... And, actually, I want to say it was the .web case, but I don't actually know if that's the case. I don't recall which one, and I'm not sure it matters which one. But there had been at least one previous case where the panel had kind of maintained some separation in the two proceedings. And so we ought to at least build in for that possibility since it has been something that's happened in practice.

And so, as I say, that's the reason for that language. But generally speaking, I think the assumption would be that once consolidated, the cases are sort of handled as one, effectively.

And again, I'm not seeing any hands, so I'll just keep going to paragraph 14, which will get us to the end of the consolidation-specific section.

So there is an exception to production of materials that's dealt with in Rule 8. But except for that, the provision here expects that the IRP panel will direct that all materials related to the dispute be made available to the entities that have had their claim consolidated. And that would be

unless one of the claimants or ICANN objects to disclosure as harming confidentiality, personal data, or trade secrets.

In which case there would be, you know, it would be something that the IRP panel would have to make a ruling on. And we've got a reference in here to "the purposes of the IRP and appropriate preservation of confidentiality."

The expectation here is obviously that if you're consolidating two claims into one so that the proceeding now is a single claim, then for the two or more claimants to be able to properly handle their case, they need to be able to see all the materials. If they're not able to do so, then this wouldn't work. So that's the expectation. But there's built in just the possibility that there might be some confidential information or something of the like that needs to be considered. And it will be for the panel to determine how to address that.

Okay. I'm waffling a little. I'm not seeing any hands on this. So if there are none, again, I think we'll be taking this that there's a degree of comfort with that and support for that provision. All right. I'm not seeing any hands, so I think then we can move on to the section on intervention. And that is starting at paragraph 15.

Mike.

MIKE RODENBAUGH: Just real quick. You say "entities" in the second line, and that should probably just say "parties."

SUSAN PAYNE: In the second line of ...

MIKE RODENBAUGH: 14.

SUSAN PAYNE: 14. Okay. Let me read this. Yeah. I think that's probably right. By that point, they are a party. Aren't they?

MIKE RODENBAUGH: They could be individuals. That's my only concern.

SUSAN PAYNE: Yeah, okay. Thank you. I'm just making a note. All right.

Okay, paragraph 15. The section on intervention. And I think I'm right in saying that this paragraph 15 ... I'm looking back to the redline version as well just to make sure I'm not misleading anyone. But that is a carryover from the current version of the rules. So the only real change we made here was taking out the reference to the procedures officer and replacing it with the concept of it being the IRP panel that's making this decision on intervention.

But as a small team, we did want to flag this and ensure that everyone remains comfortable with this notion that there is a standing requirement, basically, for intervening. And essentially, in order to be eligible to intervene, you need to qualify as a claimant. And "claimant" is a term that's defined in the Bylaws as, you know, effectively ...

So you've got to have been specifically impacted by the action in question—I'm not quoting the Bylaws here, but as set out in the Bylaws language. And so this is making it clear that it's not anyone who has the right to intervene into an IRP. Only those who actually would have been eligible to bring their own claim are eligible to apply to be an intervenor instead.

And I think reflective of the fact that this is viewed as being in order to dispose of cases more justly and efficiently by not having multiple IRPs on essentially the same issues going forward when they could have been operated as a single case.

So as I say, this is what the current standard is. And we didn't, in the small team, see any reason to change that, but we wanted to specifically call it out for the wider group.

All right. Okay. I'm not seeing any hands, so that's super.

And paragraph 16 is also something that's carried across from the previous rules and just makes it clear that the party in question doesn't already ... The reason why they're [seeking] to intervene is because they don't already have an ongoing case already running. But they do have potential claims, and they stem from the common nucleus of operative fact.

And again, as I say, that's something we carried across from the previous version of the rules. Hopefully, again, there's comfort with this.

Perhaps requiring a bit more discussion is paragraph 17. And this is relating to the role of the supporting organization which developed a

consensus policy involved when a dispute challenges a material provision of that consensus policy in whole or in part. The current version of the rules ...

This, again, is carried across from them. The current version of the interim rules gives the supporting organization the right to intervene as a claimant in that situation and says that right is exercisable through the chair. But we did have a fair amount of discussion on this in the small team, and it was something we specifically wanted to get the input from the full group on.

First off, we felt that on the assumption that the supporting organization is effectively participating in defense of their Consensus Policy, or in order to explain their consensus policy, or for whatever reason, they don't meet the Bylaws definition of a claimant because they're not suffering damage as a result of the action or inaction being challenged. Or at least they may not be in that scenario anyway.

And so we at the moment have this provision here that says that they can intervene and they intervene as a claimant, but they don't actually meet the standard of being a claimant. And so we felt that was potentially problematic.

And so we then went on to consider if we assume that we do agree with the concept of allowing the supporting organization to participate in this dispute, how is the best way for this to be done. And one of the options we talked about was just allowing them to be a third party to the proceedings but calling them something like an intervening party. So that

they participate as a party, but we're not specifically calling them a claimant because they perhaps don't actually meet the standard.

But the alternative that we also talked about was whether, in fact, the better scenario or the better option is for them to participate as an amicus. And could their interests be adequately addressed by allowing them to participate as an amicus?

And so that is where we got to. I don't think we had agreement in the group one way or the other. We felt that this was quite a big decision, and it was one that was more appropriate to be made by a fuller group of the IOT.

So I can see Mike's hand, and I will go to you. Mike.

MIKE RODENBAUGH: Thanks, Susan. Yeah. I just don't see how realistic it is for an SO to actually participate as a party in an IRP. They just move too slow. They don't have lawyers, typically, that are working for them that they would be paying for. Or at least that process would take quite a while to get counsel on board. It just doesn't seem to make sense. And just, fundamentally, they're never going to act within 21 or 28 days to intervene anyway.

But then if somehow they did, I think they would just really drag out the process and cause a lot of delay because they're just not equipped to act quick enough within an active litigation, which is what an IRP is. So to me, this just really doesn't make sense thinking further about it. And it makes a lot more sense that they could be amicus and file a brief, like is typically

allowed by nonprofit organizations, interest groups, etc., in court proceedings.

SUSAN PAYNE: Thanks, Mike. That's really helpful to have that insight from you. Anyone else with thoughts on this? I think the points Mike has made are ones that we certainly did discuss or did have in our minds when we were discussing this. And as I say, I don't think in the small team we firmly agreed one way or the other, but it is reasonable to think about.

Well, it's certainly a relevant point that if we're given very short time limits, or at least the presumption of very short time limits, it will be certainly difficult for an SO to participate, to get themselves organized in order to participate. Although, presumably, again, if it's something that they feel very strongly about, they likely will have had a bit of lead time in terms of there having been a CEP and so on.

But nevertheless, it's difficult, I think. For most of us who participate in a stakeholder group or a constituency, it's reasonably difficult to imagine even at that level being able to organize sufficiently. And, of course, this is at the SO level.

Okay. I'm not seeing any other comments on this one. It would be helpful if there are strong views. I think I'm more inclined personally to give the SO the right to participate as an amicus. It seems more appropriate to me. But, still, I'm not sure that I've got strong reactions one way or the other. Or I don't know that I've got some sufficient views having been expressed yet.

Kristina.

KRISTINA ROSETTE: Sorry. Apologies for the unmuting delay. I certainly have no objection to adding—basically mirroring this language in the amicus section. But I do think even if we think it's extremely unlikely that it will ever be used by an SO to intervene, I'm uncomfortable at a certain level with denying them the right to do so. It's more of kind of a visceral fairness reaction. I'll certainly go with the consensus of the group, but maybe this is one of those sections that whichever way we end up on it, we specifically direct folks' attention to. Thanks.

SUSAN PAYNE: Thanks, Kristina. And that's certainly an alternative option. I think, as drafted at the moment, the amicus section effectively is drafted in such a way as it's available for anyone who doesn't qualify to participate in some other means, so doesn't qualify as a claimant.

Now, you could argue that the SO doesn't qualify as a claimant either, but perhaps with some tweaking to that, there's nothing to prevent us from allowing the SO to have either option available to them. Noting in our own minds that we think they're very much more likely to use the amicus path than the intervenor path.

Greg.

GREG SHATAN: Thanks. I agree that we should not exclude the possibility of having SOs participate as intervenors. They're probably not stepping into the show as a claimant per se, but as a party with the interests arising from the same operative facts.

But putting that aside for the moment, I think we should not limit the SOs to merely an amicus role even though I think 99 times out of 100, that's exactly where they will find themselves. But the 100th time could be critical to some situation. Thanks.

SUSAN PAYNE: Thanks, Greg. Okay. So I think we've got a compromise there, then. Haven't we? We think it's unlikely. It will probably be an unusual circumstance when this is used, but for safety's sake, we're not comfortable with removing this right. But we'll make sure that when we get to the amicus section, if we need to tweak it in order to ensure that we haven't excluded the SO from being an amicus as a result of this, we can do that.

All right. Okay. Then we can move on to paragraph 18 [inaudible]. It feels like this is taking quite a while, but I think we will probably find now, as we did in the small team, that a lot of what we're considering is very similar to what we've already been considering when we've been talking about consolidation. And so we will start to, I think, speed up a little bit.

So paragraph 18. Nothing particularly to flag here. I think this is also a provision that's carried over from the previous rules that if they're granted the right to intervene, they become a claimant. They get given all the rights and responsibilities of a claimant and so on.

Greg, I think that's an old hand, but I'll just pause. Yeah. Old hand. Good.

And then moving on to 19. We did tweak this a little to flesh this section out a bit, but we're essentially talking about the request for permission to intervene. It should be submitted to the IRP provider who will direct it to the panel.

Again, in terms of timing, we haven't firmed up on exactly the timing, but we'll have to do that when we do the wrap-up at the end. And this is a matter that's referred to the IRP Panel's discretion if it deems that ... Oh, sorry. We're granting a discretion to the IRP panel if it deems that the purposes of the IRP are furthered by allowing a late request to intervene. Then they do have some discretion to allow that.

But something that is a new concept is this last sentence, which is that in filing a motion to intervene, it doesn't stop the clock on the intervenor's own time to bring their own IRP. And so it's flagged in the rules that the potential intervenor has to have this in their mind and has to risk, has to consider if they have days left on their time clock, it's probably unwise of them to seek to intervene, frankly, and then find themselves out of time. And so this is specifically identified in the rule just to ensure that no one is taken by surprise by that.

But that was our proposal. I think, in part, we didn't feel it was appropriate to have interventions be a way of trying to get around the timing rules for someone to just file an application to intervene as a means of buying some time for themselves. And so that was, I think, at least part of the thinking.

Mike.

MIKE RODENBAUGH: Yeah. That's interesting, and I can't disagree with what you just said. But on the other hand, basically it just means that intervention is almost never going to happen because IRP panels rarely make decisions within 21 or 28 days in my experience. Like, almost never. First of all. They typically take months, and sometimes, like, six or eight months.

So, yeah, I think basically if you don't give intervenors more time or stay their time to file an IRP, then they're only realistic avenue in 99% of the cases ... Well, really it's 100% of the cases because they can never count on an IRP panel ruling on their intervention motion within whatever it is, 120 days. So there'll be absolutely no case in which they would seek to intervene. They would just file their own IRP and then seek to consolidate.

SUSAN PAYNE: Thanks, Mike. Sam.

SAMANTHA EISNER: To Mike's point, I think maybe we should consider language similar to what we have on the desired timing for a panel to complete its hearing of an IRP. Right? So we have language in the Bylaws ... I forgot the exact wording, but we encourage a decision to be reached within six months. Or that's our stated preference. But that a panel doesn't have ... It's not like a use-it-or-lose-it.

And I take Mike's point that that's kind of how it's framed here, that the panel is encouraged to issue it as expeditiously as possible, hopefully

within a short time frame. But that the panel also has the discretion to hear it within the time frame it needs and to manage the proceedings accordingly to properly hear the request for intervention, because I am not sure that we actually have the power to mandate to the panel that they have to do something in 28 days.

SUSAN PAYNE: Thanks, Sam. And actually, I was just looking back at the handful of notes I made from our last call on this because, actually, I think we did have a discussion right at the end of our call last time about the time for a decision. And I think there was a strong feeling that we did need to give a deadline for a decision and that it should be pretty short. I think we were actually even talking about perhaps even 15 days.

Albeit, we maybe are encouraging rather than being able to set an outright deadline. I'm not sure that we can't tell the panel how quickly to act, but I'll be interested to hear further on that.

So we did actually have in mind that we would try and give these decisions a pretty short turnaround time, which maybe will go some way to addressing Mike's point. It may still be the case that it's ... I mean, I think someone would have to be at least preparing their own IRP at the same time to ensure they didn't run out of time. But, yes, I think maybe that will at least go some way to help.

Having had endless discussions about the timing for bringing an IRP, I think we'll probably all be quite reluctant to reopen that. There are all sorts of other scenarios that did pause the time clock.

But I'm just being reminded of the time here, and so I think maybe we won't get to a solution on this. I'll make a note that we're on paragraph 19. And I think, perhaps, let's all ponder on this, and we can come back to it next time. Although I'm very happy if there are further thoughts in the meantime for them to get shared on email as well on this because we certainly don't want to make an intervention a kind of nullity.

But I think we equally ... I think there was certainly, in the small team, at least, we were reluctant to start opening up the timing rule again. But that's not to say that we don't need to consider this further.

All right. I'm sorry. I'm rambling, and we are actually just at time. So in summary, I think we will come back to this and we'll pick up at this clause 19. I encourage people to share on email over the next week.

Mike, if you wish to give some thought and put pen to paper to flesh out the concept of notification that you think would be reasonable, we can also take that forward over email, at least initially. Thanks very much.

And now I'm over time, so our next call is this time next week. And I will just pause briefly and see if anyone has anything else they want to raise now. Otherwise, again, apologies for running over. All right. Thanks, everyone.

And thanks, Brenda. We can stop the recording.

[END OF TRANSCRIPTION]