DEVAN REED: Good day all. This is Devan speaking. Welcome to the IRP-IOT meeting on 29 August 2023 at 18:00 UTC.

This call is recorded. Please state your name for the record when speaking and kindly have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. Turning the meeting over to Susan Payne. Thank you.

SUSAN PAYNE: Lovely. Thanks very much, Devan. Again, thank you, everyone, for joining. I really appreciate it. So this is our call of the 29th of August. As usual, we'll just do a quick review of the agenda and updates to Statements of Interest, and then we'll get on with the substantive discussion.

So in terms of our agenda, the main agenda item is item two which is concluding the initial review of the proposed Rule 7. And in particular, we'll be starting from where we left off, which was in Rule 7 sub paragraph 25 about participation as an amicus. We'll reflect on the questions that we were discussing last week, which are summarized in my e-mail. I appreciate the input on that has been shared over the mailing list so far.

Agenda item three, time permitting, I think we could usefully have a discussion notification of the commencement of an IRP to third parties. It's something that we have touched on. Mike Rodenbaugh, as requested, sent around the suggestion over e-mail and there were some

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

exchanges on that. Some very helpfully pointed us to the text in Rule 6. So I think it's not specifically on consolidation, but obviously, some of the timings run from things like publications so it's sort of adjacent conversation. But I think it's as good a time as any, if we have time on this call to talk about that.

Proposed next call is the 12th of September, so two weeks time. That's mainly reflecting my lack of availability next week. But also conscious I think that next Monday is Labor Day in the U.S. So I think we might, in any event, have struggled to get a good turnout on the following day, but I'm unfortunately not available. But in the meantime, what I will aim to do shortly after this call is to circulate an updated version of this Rule 7 that reflects everything that we've discussed. That will give everyone plenty of opportunity to review it and ideally to share any feedback or any proposed edits or amendments so that we really can make significant progress between this call and the next one.

Okay. Then five is AOB, but I'll pause and see if anyone has anything they want to raise as AOB. All right. Okay. Back up to agenda item one then is the updates to Statements of Interest, if there are any, that anyone wants to flag to the group. All right, I'm not seeing any hands. I'm not hearing anyone. So we will take that as no updates this month, so that's perfect.

All right, agenda item two then is our discussion on Rule 7, picking up on Rules 7, paragraph 25. I think it's probably helpful to have that text from the clean version of the document in the window, Devan, if that's all right. I will just refer back to the specific questions that we were talking about on our last call and to see if we can reach a conclusion on some of

that. And 25 I think helpfully goes over the page. But we might be able to see all of it, I'm not sure. Possibly not. Oh well. I'm not sure you're going to manage it. Perfect. I don't know how you did that, Devan, but well done.

Okay. All right. So we have here Rule 25. We did make a good start on our discussion on this. Some of the things that we were debating were firstly to do with whether one can participate automatically as of right the moment one can demonstrate a material interest relevant to the dispute, that sentence from the beginning of the paragraph or whether there should be some kind of panel discretion. And then following on from that, if there is a panel discretion, do we feel that the group's identified in subparagraph 1.3.3 should have some automatic permission, i.e. there's no panel discretion, which I think is how it is drafted at the moment. Or would this be better expressed as a presumption that they have a right to participate so that there is at least some discretion for the panel?

Subparagraph four, I think there's been a certain amount of agreement already it's a kind of not necessary because it restates the general eligibility rather than identifying a specific group of interested entities. So certainly, my proposal is that we delete four. I've certainly seen some support for that on the mailing list.

Then finally, there was a question that came up raised by Malcolm about does material interest relevant to the dispute cover the sort of scenario where the entity might be materially impacted by a potential interpretation of the Bylaws that might be reached by the panel? So they're not impacted by the dispute per se, but depending on how that

dispute is decided by the panel, they could be impacted. Does that sort of material interest relevant to the dispute? Is that sufficiently broad that we feel comfortable that it covers that scenario?

To the extent that I've seen views expressed on e-mail over the last couple of days, I would say that there seems to be a feeling so far expressed that we ought to retain some panel discretion. It shouldn't be some kind of participation as of right as an amicus, and therefore that would extend also to the subparagraphs 1.3.3 where there certainly has been some support for the suggestion that I think came from Kristina that we expressed this more as a presumption. So there's high expectation that those specific classes of people would be able to join as an amicus but not an absolute right. I see Kristina's hand. So I'll turn to you, Kristina.

KRISTINA ROSETTE: Thanks very much. I, of course, still support the idea that this should be a presumption. Part of the reason that I do so is that I think it accomplishes two complementary goals. One is to vest the panel with the discretion to make the determination. But also I think having it as a presumption preserves the opportunity in that I believe it was Mike that advocated for, for the claimant and ICANN to have the ability to oppose a party's participation as amicus. Obviously, if a potential amicus falls into one of the first three categories, the presumption I think should be entitled to a fair amount of weight. But I still think there would be scenarios in which either ICANN or the claimant could if they wanted to successfully oppose. So, bottom line is I continue to support the presumption. I think it accomplishes two goals that we might not

otherwise be able to achieve if we just make it automatic as a right. Thanks.

SUSAN PAYNE: Thanks, Kristina. Sam?

SAM EISNER: Thanks. From the ICANN side, I don't think we have a particular issue whether it's a presumption or participations of right. There is one benefit to defining areas of participation as of right just to keep in mind, which is if people fit within those, then what it does is it reduces the briefing or the likelihood of briefing and allows the IRP to continue on the substance of the IRP and not get embroiled into motions on amicus participation. I think we don't want the amicus decision to become kind of the sideshow that takes away from the substantive work. I think that's really the benefit of having the participation as of right. But I don't know that that's enough of a benefit to define categories as of right instead of using the presumption, as Kristina suggests. I just wanted to add that thought into the conversation.

SUSAN PAYNE: Thanks, Sam. That's certainly a consideration. I think it probably was the consideration that led to this Section 25 being drafted as it originally was. Having said that, I think as Kristina was noting in the chat, it's definitely not our expectation that we would delete 1.3.3. We would still anticipate that those particular groups of people with that particular specified interest would very likely be permitted to participate. There

would be that strong presumption but doesn't absolutely rule out the opportunity for one of the parties to object.

Okay. I guess I've heard on the call from Kristina on this. I know on our e-mail list, we had similar views. Becky expressed some views that she had brief comment. It was that it seemed to her that all of the cases irrespective need to have at least some evaluation by the panel because someone has to assess whether a prospective amicus meets the criteria. I absolutely would agree with that. That seems certainly sensible. Someone could claim that they fall within one of those categories, but that will be something of a question of fact. So there would always be a role for the panel on this.

I think, David, I recall, it also expressed a feeling that he agreed with that, and also expressed the point which was supported by Kavouss that it might be sensible to have some discretion for the panel, because otherwise, you theoretically could have a scenario where a large number of entities with a similar point of view might be able to demonstrate that they have some sort of materiality of view, but does the panel really wants to have 20 participants under an amicus standing if they don't necessarily hear anything different from those 20. So that, I think, as David suggests, is another sort of argument for giving an element of discretion at least to the panel. And as I say, from my recollection, Kavouss also expressed some agreement to that perspective that we wouldn't want to allow everyone in just because they officially kind of tick a box if that doesn't really add anything to the proceeding.

So I think based on the e-mail exchanges and what I've heard on this call, I think there's generally a kind of strong support there being some discretion for the panel, the categories 1.3.3 having a presumption that they'll be permitted to participate, but that would still then retain some degree of discretion and would address what we were talking about on our last call of allowing the parties to the IRP to have a say and at least be able to make submissions in opposition to someone joining us in amicus.

I'm just looking back at our e-mail, the summary of the different questions. I think that certainly addresses the first bullet and indeed the second one. I'm not hearing anyone supporting retaining subparagraph four. I believe I'm right in thinking that there was some support or some agreement for the removal of subparagraph four over our e-mail. As the person who had proposed that amendment in the first place, I definitely feel that in this context, it doesn't add anything. It's more kind of circular because it's not a specific class of people.

I think then the main question we have is does the term, the wording material interest relevant to the dispute cover the scenario Malcolm raised, are we comfortable that a third party who might not have been materially impacted by the action or inaction in question that's being challenged could nevertheless have a genuine interest in the outcome because of how the Bylaws might be interpreted by the panel when they're considering the case? I'd love to get some thoughts on that. I feel it does but I'm certainly not the deciding factor here. David?

DAVID MCAULEY: Thank you, Susan. Hi, everybody. I mentioned in my e-mail that I was thinking about what Malcolm suggested. I think he raises a fair point. But the question that occurs to me is, is it too attenuated? As part of the backdrop to this whole—what we're trying to engineer here, the rules, is I worry sometimes that we might be trying to overengineer the rules so as to create high guardrails, so that if the Standing Panel is a lovable bunch of idiots, we will nonetheless be able to maintain control. But I tend to be an optimist on whoever ends up being on the Standing Panel and because they will be professional arbitrators and panelists or whatever you want to call them. And I suspect that they will be well positioned and well capable of managing cases, knowing when, for instance, to cut off amicus briefs, knowing how to well and soundly exercise discretion. So I choose to be an optimist. I think we have to make the rules that give them the ability to manage the case as a panel should, not the ICDR but the panel.

So on Malcolm's case, I feel it may just be a little bit attenuated. So I'm a bit of the view that let's rely on the panel to sort things like this out. I think we'll probably have a panel soon. I know the Board Accountability Mechanisms Committee was supposed to meet yesterday, Sam, I think. At least I think I saw that agenda and the Standing Panel was on it. Now, that doesn't mean the Board's prepared to act right now. But I suspect that someday soon we'll have a Standing Panel. I'm optimistic that the panel will be able to manage these things. Thank you.

SUSAN PAYNE: Thanks, David. Sam?

SAM EISNER: Thanks. Just to come in behind David's comment on this first, I think we all should expect to see something in the near future from the Board on the Standing Panel, I think your optimism on having something in place sooner rather than later is well placed, David. But I also agree—and this probably falls into that place of falling more towards presumption than fighting about, do you meet one of these qualifications for as of right? Or is this something that we would need to build an as of right for? I think there's a potential for the outcome of IRP cases, particularly now that they are binding to impact people in multiple ways in the future. It really will be a matter of panel discretion as to whether or not the interest that people state in terms of what they might have to offer to the panel to educate them further on the topics that they wish to brief with an amicus setting, that really does seem to weigh more towards the discretion of the panel as opposed to a participation as of right. I think it will be up to the panel to identify if something is too attenuated a potential impact and to really get a sense of whether or not someone has something to offer towards the panel's decision in that realm or if they're really just kind of similarly situated as everyone else who participates within ICANN.

SUSAN PAYNE: Thanks, Sam. I confess, my assumption from Malcolm's intervention was not necessarily that he felt there ought to be a paragraph four or a paragraph five that covered this scenario, but more is it open to someone who is in that situation to bring themselves within this paragraph 25. I may have misunderstood him, and if so, I'll certainly

apologize. But I think 1.3.3, as we know, are not exhaustive. They're simply those particular categories of people that have been identified as having a material interest, and so already having got over one of the hurdles. But that doesn't prevent anyone else from making a submission to the panel that they too have a material interest that's relevant to the dispute. So as you, Sam and David, have been saying, this is still something that could be left as a question for the panel discretion.

Okay. I'm not seeing any other hands. I'm very happy to hear from anyone else on this. If not, I think I'm certainly not hearing any strong concerns. So I think I'm going to take this as a kind of feeling that that sort of scenario that Malcolm's raised is one that we feel that's obviously subject to the submissions that person or entity makes is capable of falling within eligibility for being considered for participation as an amicus. All right, I'm not seeing any further hands. So I think with that said, we can move on to paragraph 26.

All right, 26. There's a small change here, some important changes over the current rules, but ones which hopefully are not particularly contentious. So it talks about all request to participates as an amicus must meet the requirements of the written statement, the original, the current rule says "must contain the same information," and we felt that "meet the requirements" was a better phrasing. I must also specify the interest of the amicus curiae. Include the same declaration as referred to at Rule 7 subparagraph eight. And that is the declaration about the statements in the motion being true and correct. They're not intentionally seeking to mislead the panel and they're not filing the request for improper purposes, including having the primary intent to delay the action, seeking to harass ICANN or an IRP claimant or any

other party or potential party, or having the primary intent of changing the IRP panelists hearing the dispute. I think it's probably unlikely in the case of an amicus that that would be the case in any event. They're not a party to the proceedings. So really, that shouldn't have the effect of causing a panelist to have a conflict of interest. But I think if that were a situation where allowing an amicus to participate would give a panelist a conflict of interest, I think that probably is something that would be taken into consideration when they were exercising their discretion. But the point here is really just that we were asking the entity seeking to join as an amicus to make a sort of comparable declaration.

Okay, pausing briefly. I'm not seeing any hands or comments in the chat. I think it looks as though we've lost Sam, unfortunately, but Liz is still with us. So that's a shame that we've lost Sam, but not a problem.

All right, moving then on to paragraph 27. This is a new one. This is new text that the small team was proposing that all requests to participate as an amicus curiae should be submitted to the IRP provider who would direct them on to the dominant IRP panel. Reminder that we are changing that term. We won't be using the term "dominant". It will probably be something like first commenced if already in place. And if there's no IRP panel in place, then the IRP provider shall refer the request to the IRP panel once it's appointed, and then request to participate as an amicus must be made. We proposed within 30 days of the publication of the IRP unless the IRP panel in question in its discretion deems that the purposes of the IRP are furthered by accepting such request after 30 days.

We've talked about timing a bit. I think timing probably is something that, again, as a small team, we were keen to get the input of the group on a number of timing issues. We have said that we'll probably circle back and double-check on them to see that everything hangs together when we have set of rules. But the idea here is to give some time limit after which an amicus, if they want to participate, they should express that desire at a relatively early stage so as not to kind of hold up the proceedings or cause delay. But I'm very keen to get thoughts on that in particular, that timing, and whether given that an amicus is not joining as a party, whether there is a strong feeling on 30 days and perhaps is that too short. Is timely intervention or rather timely application for participating in this manner perhaps less of an issue, and therefore, something where a slightly longer time period might seem appropriate? Very happy, as I said, to get your thoughts. And the small team had 30 days in there as a proposal, but definitely was something we were flagging as wanting to get the views of the group. Okay, David?

DAVID MCAULEY: Thank you, Susan. Hi, everybody, again. I like the 30 days, especially because there's a wiggle room for the panel if fairness requires an exception. I'm keeping in mind the target, albeit I recognize the target is probably quite ambitious of getting an IRP done within six months. But 30 days, I mean, people are going to be watching cases, I think people that are likely—Amici will know a case has been filed. But in any event, I think this sounds reasonable. Thank you.

SUSAN PAYNE: Thanks, David. All right. Any other thoughts on this one? Otherwise, I think we will probably stick with 30 days certainly for now and subject to our general review on timing at the end. Okay. I am not seeing any hands or comments in the chat so let's keep going.

All right, paragraph 28. Again, reminder that that reference to dominant IRP panelist, one that we will be changing. So don't worry too much about the terminology. But paragraph 28 says that if the RIP panel in question determines in its discretion and subject to the conditions set forth above that the proposed amicus curiae has the material interest relevant to the dispute. It shall allow participation, and then it goes on to say in addition to the written statement referred to in paragraph 26 above and that is the one with the declaration, "Any person participating as an amicus may, at the request and in the discretion of the IRP panel, submit to the IRP panel written briefing or briefings on the dispute or on such discrete questions as the IRP panel may request and subject to any deadlines, page limits, and rights of other parties to file briefings in response or other procedural rules as the IRP panel may specify in its discretion."

Much of that is existing text or reflects existing concepts. However, we did include particularly the reference to the possibility of the rights of the parties to file responses. But I think the first thing to flag here is that, as we've already been discussing, I think we're slightly changing the nature in which these decisions are made. So as this is currently drafted, it's envisaging that if someone has a material interest relevant to the dispute, then they have participation as of right. So that does need to be amended to reflect that we're referring this to the discretion of the panel. So that's the first thing to just flag. That's a change we've

already talked about that obviously hasn't been made yet. But other than that, this envisages that essentially when permitted to participate as an amicus, the role that you have and the ability you have to submit briefings or other information is basically at the panel's discretion. So there's not specific rights given in the rules, it's subject to what the panel feels that they need the amicus's brief input on. And that's how 28 is drafted.

Again, just kind of pausing to see whether that raises any concerns or anyone wants to express any input on that paragraph 28. If not, I think again we can move on and take that one obviously subject, as I say, to the amendment that I need to make about the discretionary nature of the participation that will be made after this call. All right, we can then move on. Oh, sorry. Kavouss, I just saw your hand.

KAVOUSS ARASTEH: Good evening, good afternoon, good morning. First of all, I appreciate very much your devotion. I have never seen such lengthy rules, so many paragraphs, and so on, so forth. So if you continue this discussion, this 29 will become 39 or 49 or 59. I think it's more than sufficient. I don't want. I have read that. I have one problem from very beginning and that is dominant IRP. I don't understand the meaning of dominant. What do we mean dominant? You mentioned that part is dominant for me is disturbing. On this, you put an asterisk and describe what you mean by dominant because there is no dominant IRP. IRP is IRP. No IRP dominant specific to the audience. That is my question and I hope that you will reply to that. Other than that one, I think you have to try to end these very lengthy rules, which are a lot of things. The more you put, the more

problem we have in future to further interpret that. I don't want to comment that. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Yeah, I think I've mentioned a couple of times already on this call. But just to reiterate, we've taken on board or I've taken on board the comments you made about the reference to dominant. I just haven't updated the draft yet. That's an exercise that I am part way through, and that's what I will do after this call. But yes, I appreciate your concern about the term dominant and it will be amended to say something like first commenced IRP or if it's a reference to the IRP panel for the first commenced IRP. So all of those references throughout this document to dominant are coming out. We'll definitely make that change.

You'll be pleased to hear that in terms of the lengthiness, we are almost at an end. Paragraph 29 is the last one. So you'll be pleased to hear, we can practically wrap this up. So paragraph 29, let's go on to that one. I think this is kind of new text but it reflects something that was text for each of the types of participation. So it's not a surprise. It's something that is currently reflected in the rules as well. But just as a person participating as an amicus curiae shall be given access to all publicly available written statements, evidence, motions, procedural orders, and other materials in the dispute in a timely manner, where the claimant or ICANN claims that any such materials are confidential, the IRP panel shall determine in its discretion, and if so, the extent to which and the terms on which such material documents must be made available to the person participating as an amicus.

We have very similar language in respect of parties intervening and parties where there's a consolidation of disputes. Given that someone participating as an amicus isn't a party, this may be one which requires more thought from people but it may be that you're comfortable with this. It wasn't something that the small team specifically was flagging to the group. I think in the small team, we were happy with this, particularly given that we built in some panel discretion where materials are confidential. But again, I will just pause and see whether there are any comments, concerns, questions on paragraph 29. All right, I'm not seeing any hands and not seeing anything in the chat.

So with that, thank you all very much. We have reached the end of our first run through. The task for me, really, now is to just make the few changes that we have all discussed during our calls. There are a few, there are some areas where people very helpfully pointed out that we were missing elements such as references to opportunities for parties to object and that kind of thing. So there are some fairly important changes to make, and also more drafting ones, including things like some of the terminology that's being used. But I will do my very best to circulate the updated draft as soon as possible during the course of this week so that you will have it for a good period before our next call. In fact, it may be sensible if I provide it in a form of a Google Doc so that there's also an opportunity for people to go in and make suggested edits, if there are any, so that we can come into the next call being fairly comfortable, I hope, with where the text has got to. And if anyone has any particular drafting changes or suggestions where they think further clarity is needed, they can actually make them in the Google Doc over the course of the next couple of weeks before we come into our call so

that we can wrap up this section on consolidation as quickly as possible. Okay. Thank you all very much.

All right. I had initially hoped to have done some of that redraft exercise already, but I'm afraid I didn't manage it. So I think what we can usefully do instead is what's set out in agenda item three, which is to have a discussion about notification. It's something that has come up in the context of consolidation. Because we've been generally setting our time limits and our obligations from when the IRP is published as being something that's more readily known by a third party rather than the date of an IRP's initiation. But as a result of that, there were some concerns expressed notably by Mike Rodenbaugh but I think possibly also shared by Flip, so essentially from some of our practitioners, about third parties and some specific classes of third parties whether there ought to be an obligation for ICANN to actually notify. Mike is flagging to me in the chat that it's more relevant to intervention rather than consolidation. I think that's probably right, because obviously when consolidating, there are two IRPs already. It's I would say probably also relevant to participation as an amicus for the same reason as for intervention. After we'd had some discussion this topic, Mike was asked if he could go and give some thoughts to some particular circumstances or categories of participants for who there ought to be some obligation on ICANN to notify. Just reflecting that when we did discuss this so far, the counterview that was expressed was of course that we don't want to impose on ICANN some obligation that's incredibly difficult for them to meet. If it's not something that's very apparent to them, whether someone has the necessary interest, ICANN shouldn't be having to trawl through an IRP with a written statement to try and work out what the

issue in dispute is and whether there are third parties who may or may not be interested. So to the extent that there might be some obligation to notify, it ought to be one that is readily identifiable for ICANN if we're going to put this obligation on them. We'll come in a minute to the proposal that Mike had sent. But just before we do that, Sam very kindly reminded us in e-mail that they're actually in Rule 6, so not in this section on consolidation but in a separate rule. There is actually some reference to ICANN having a duty to notify in limited circumstances. That's the circumstances set out here at the top of this text. So that first paragraph there is taken from interim Rule 6. I just reproduced it so that it was easy for us to review it. It essentially says that for any dispute that's resulting from a decision of a process-specific expert panel that's claimed to be inconsistent with ICANN's Articles of Incorporation or Bylaws as specified at Bylaws Section 4.3(b)(iii)(A)(3). Any person, group, or entity that was previously identified as within a contention set with the claimant regarding the issue under consideration within such expert panel preceding show reasonably received notice from ICANN that the IRP process has commenced. And then it goes on to talk about the timing of that which is reasonable efforts to do so within two business days of ICANN receiving notification from ICDR that the IRP has commenced. Now, that's a very specific circumstance of just other parties in a contention set as I read it.

If we could scroll down, Mike Rodenbaugh had proposed a couple of scenarios. One of those, in fact, was the very one that is already covered in Rule 6. So the IRP claimant being someone within a contention set and that the notification should go to the others in the contention set. But Mike also identified another scenario where the IRP claimant isn't

an applicant but I think he's thinking of new gTLD application processes. So the scenario where the party bringing the IRP, the claimant, wasn't the applicant for the TLD but perhaps is objecting to the TLD going forward.

So there's an example that Mike has given which is the Persian Gulf TLD. That's purely as an example of the kind of situation. It's not intended in the example to be any kind of reference to whether the appropriateness of that IRP or who had brought the IRP action. It's just an example of a situation where someone might be have a clear interest in this scenario because you've applied for a TLD and someone else has bought an IRP based on your application. And from Mike's perspective, that's another scenario where your unknown entity, it's not difficult for ICANN to understand who you are or that you have a direct, relevant interest in knowing about this IRP.

So I think at the moment, as I say, we have that scenario to that Mike mentions is already an obligation under the interim rules, and I don't think we're proposing to change that. But I think the question is whether there's support for that scenario one, that situation, not where Persian Gulf is simply an example for the applicant for a TLD in that kind of scenario to also get notification. I will pause there and see whether there are any hands. Liz?

LIZ LE: Thanks, Susan. This is Liz Le with ICANN Org for the record. So I think, in this instance, the use cases that Mike has set forth to us seem like reasonable use cases in terms of determining who should receive

notice. As you stated, the second use case is already in the interim rule. And with respect to the first use case, it is directly that is the applicant that it applied for dot Persian Gulf TLD, I think. But from the Org standpoint, the concern with the standard here of materially affecting an application outside of these two specific use cases, that may be something that is a little bit too nebulous and difficult to determine, because to say ICANN Org can easily tell from the face of an IRP complaint whether or not there is relief that would materially affect a gTLD application, the concern is that is vague, and in some instances, it may be that Org would not be able to tell beyond whose say in the first scenario the applicant for that TLD and may not notify someone who may be materially affected by the IRP filing itself, and then that would create an issue here in terms of whether or not ICANN Org satisfied its notice obligations under the rules. So I think the concern is how do we further define and make the criteria more specific because the term materially affecting seems to be too broad from our standpoint. Thank you.

SUSAN PAYNE: Thanks, Liz. Yes, I'll turn to David.

DAVID MCAULEY: Thanks, Susan. I tend to agree with Liz. I think the examples on the screen and notifying all applicants for a specific string when that specific string is the subject of the litigation, I think that makes sense and seems easily done and objectively done. But when you introduce subjective standards like materially affecting, I think Liz is right on point, then

you're giving ICANN the job of making the decision of who to notify if inevitably it's not going to work out, that's going to become a cause of contention itself. And so maybe a way to do this to skin this cat and make sure everybody's aware of it is to try and overcome the problem that currently the IRPs are docketed on a page. So it's hard to find, hard to get to, etc. Maybe on the new gTLD website, when the ODP or ODA develops it, there could be an IRP corner prominently at the top or in the middle of the page that lists every IRP that's filed that has anything to do with new gTLDs and leave the burden on the applicants and on the claimants to then go find if a case affects them. I just don't think it's fair to say to ICANN, "You have to do the decision-making here and you better get it right because inevitably, that's not going to happen in every case." It's just a human factor. Thank you.

SUSAN PAYNE: Thanks, David. I can see Mike's put something in the chat but he's also got his hand up. So, Mike, I'm going to turn to you because I think you may have a solution here. That was something that was also exchanged on e-mail but I think I may have missed. I've lost you. Mike?

MIKE RODENBAUGH: I'm here. Can you hear me?

SUSAN PAYNE: Yeah.

MIKE RODENBAUGH: Thanks, Susan. Yeah, we did have some e-mail on this last week. Becky raised the issue that Liz and David just raised, and that's fine. I think we can agree on a more specific standard. And here it is in the chat where the gTLD string that is the subject of the IRP is the same as or is a translation, transliteration, or IDN of or is a plural of the applied-for string. I guess that would be in the intervener's applied-for string to be a little more specific. Well, Becky agreed that was workable and I don't know if anybody else on the call has thoughts on that now.

SUSAN PAYNE: Thanks for that, Mike, and thanks for flagging that. So just to repeat, the suggestion was to go a little further than the identical string but in a managed way. So as you said, a translation, transliteration, or IDN of in addition to being the same as, or it's a plural of the applied-for string. David is noting he thinks that seems fair. Becky is reminding us that although she may have expressed a view that that seemed okay, her view is not definitive and commenting that it's relatively easy to do if the strings are the same or plurals in the same language, and that translations, transliterations, and IDNs may be more complicated. I confess that that was my immediate reaction as well, when I was reading that text, it was a slight concern. Is ICANN going to know that at the outset where that kind of question may be one that's quite complex? Mike?

MIKE RODENBAUGH: Yeah, I just don't think so. I think the first sentence in the IRP complaint is probably going to identify what the string is in English. And also

ICANN is going to have the pairings of translations, plurals, IDNs. By the time any IRP would be filed, all that analysis will have been done by ICANN long ago in the preliminary phases of the evaluation process. So I think that's just kind of a red herring argument and not a real worry.

SUSAN PAYNE: Thanks, Mike. Noted. David?

DAVID MCAULEY: Thanks, Susan. I just wanted to clarify what I was saying earlier, given the example that Mike has put in the chat and all helpfully. Thank you. I think it's workable as long as it's objective. In other words, ICANN can check the name that's being litigated in the IRP, the string rather, and say, "Okay, now we're going to walk over here and check everybody that applied for it, and translations, and maybe plurals." But keeping Becky's points in mind about some complexities in IDN, this is a subset of the possible people to be notified. And the words materially affect are the ones that concern me and it sort of raises the point Malcolm made in a separate discussion, and that is, so if this is litigation about a string, is it possible that an interpretation that comes along here could affect litigation on another string, and that is not something where I think ICANN has to notify anybody because it's subjective. It's not a job that is in ICANN's wheelhouse or that they should have to do in my opinion. Thank you.

SUSAN PAYNE: Thanks, David. I think there was a general feeling that we want to try and avoid the nebulous kind of materially affecting type language. We all know what we're trying to achieve here. I think I may optimistically have read Mike's e-mail as that part of the e-mail as being to introduce the concept. But I think just as we in Rule 6 have some specific class of person identified, I think if we're going to impose this kind of obligation, then it needs to be specific classes of person or applicant or whatever they get notified. Where ICANN can effectively tick a box, are they in a contention set with tick? Yes. Then we notify. Do we have to work out if there's a material impact on some third party or someone who might think they're materially impacted but ICANN doesn't realize it? I think we want those who ought to know about it to know about it, but we don't want to create some uncertainty that leads to potentially if ICANN gets this wrong, an IRP being brought because someone wasn't notified. That's not what we're trying to achieve here. Yes?

MIKE RODENBAUGH: What you just said, though, I mean, that is the natural course what will happen. If ICANN doesn't notify that party, then they'll have no choice but to start their own IRP. So we're just trying to put a reasonable objective obligation on ICANN to notify logical parties who are in the same contention set or whose string is clearly at issue, that they have a chance to intervene, rather than wait for a decision and then file another IRP.

SUSAN PAYNE: Thanks, Mike. Indeed, I think we're on the same page. Okay. So we have a proposal, as is in the chat that you've seen, that it should be slightly broader than the same string or plurals in the same language and extend to translations, transliterations, IDNs. I'm looking for support or objection, I guess, for that proposal. Otherwise, I think this is one that we can take to our e-mail list. As I say, it's relevant to consolidation. But I see this as being something that gets inserted in a separate rule. I don't see this as something that we insert in the consolidation rule. So we don't necessarily have to have this finalized for our public comment. But we do want to capture this and reflect where we are in agreement. It would be good to appreciate whether there's support for that extension to kind of non same language equivalents.

Mike, you say that but I'm not sure that it should. I think there is an obligation to notify but I don't think it necessarily needs to live in the intervention rule. I think it may be that it lives in the initiation rule. I think where it currently is which is in Rule 6, which is about written statements, is also not the right place. But provided that people can find it, it doesn't have to be in that rule.

Okay. All right. Okay, I'm not seeing any further hands on this one. I think perhaps the way forward is if I circulate where I think we've got to on this and we can take it from there. But I will circulate it with the proposal as suggested by Mike in the chat that came out of the discussion between him and Becky, so the version that includes the non-identical language equivalents as well. We can continue this one on a future call or we can hopefully even wrap it up over e-mail.

All right. With that then, I think we have probably reached the end of the call for today's purposes. I'll pause and just see if anyone's got anything they want to raise as AOB. And if not, I'm not seeing any hands, then—oh, David?

DAVID MCAULEY: Thanks, Susan. So we're not going to meet next week. I would suggest that some call soon, we just sort of scope out what we want to do at ICANN78 so that we can prepare for it. It's not probably fair to put the burden of preparation for all of ICANN78 on your shoulder. So just an idea for an agenda item. Thanks.

SUSAN PAYNE: Thanks, David. Absolutely. It's a bit of chicken and egg. I think if we can get to a point where we can do a public comment, then that takes us down one path at ICANN78. If it becomes clear we can't do that, it slightly changes our path. So very keen to wrap up what we're doing on the sort of rules so that we've got identified what we could put out to public comment. But I absolutely appreciate that. The end of October will be here before we know it.

All right. Thanks very much. Okay. With that, I'm going to give you 20 minutes back. So thanks very much, everyone. Please keep an eye out. I'll circulate the updated text. And, yes, as previously said, looking to have engagement over e-mail or in the Google Document before we come into the next call because we really need to be in agreement on that text at the end of the next call. All right, thanks, everyone. Speak to you soon.

[END OF TRANSCRIPTION]