BRENDA BREWER: Good day, everyone. This is Brenda speaking. Welcome to the IRP-IOT Plenary Call on 12th September 2023 at 18 UTC. Today's meeting is recorded. Please mute your lines when not speaking and state your name before speaking for the record. And with that, I should also note that we do have apologies from Flip. There we go. And with that, I'll turn the meeting over to Susan. Thank you.

SUSAN PAYNE: Oh, sorry. Yes. Sorry. I'm off mute. Brilliant. Thanks very much, Brenda. Thanks for those who joined. I'm glad to see you all. Really appreciate you joining promptly as well. So, okay. As usual, first up, we are going to review the agenda and do updates to statements of interest just for a change. In terms of the agenda review, we've got a couple of action items. We'll talk about them when we get onto the substantive discussion, but the first was for me to update the text of Rule 7, which is the one on consolidation, etc.

And Bernand had circulated on my behalf, a red line against our clean version of the text, and that's really just so that you could all see readily what changes have been made based against the document that we've been working off. So that's in that Google Doc link. You've all had that for a good, nearly two weeks. So, the second action item was one for the group to review that and provide any feedback if any prior to our call today.

So, in terms of the rest of the agenda, agenda item 3, our key task here, I think, is for us to finalize that proposed text of Rule 7. And so that's

what we will do first. And then we will move on and review updated text on Rule 3. Rule 3 is the selection of IRP panelists. I've had an action item for a while to pick up amendments as we discussed on our last call where we discuss this and also to come up with some suggestions on the difficult issue that we were talking about, about lack of capacity of the standing panel, with real apologies that I have only just circulated that. So, I'm not anticipating that you all will have spent a huge amount of time looking at it, but I think we can usefully review it on this call and very much hoping that it's heading in the right direction or ideally that it's close to final.

Agenda item 5 will be just a quick update on the public comments and then noting that our next call September 19th. So that's next week. And then as ever, there'll be an opportunity for any other business if anyone has anything they want to raise. So, I'll just check now and see if there's anything anyone wants at this point to put on the agenda. And if not, we can circle back to the updates to statements of interest. Does anyone have anything that they need to note for the group? All right. So not hearing anything. That's all good. All right.

So, agenda item 2 was the action items. I quickly mentioned them when I was running through the agenda. So, I think we can just move straight on to agenda item 3, which is for us to get to the finalized version of the text on Rule 7 on consolidation intervention and participation as an amicus. And so, I'm going to ask Brenda if you could please pull that up for us. That's so good. That's the version in the Google Doc. And whilst Brenda is doing that, there we go. I think it should show up as a red line, Brenda. And I must say I had some problems with this when I wasn't logged in to Google Docs, but it was

fine when I was. I don't know if that makes any difference. No, it's the Google Doc, the Rule 71. Okay. So, everyone's saying they haven't seen red line changes. That's really frustrating.

BRENDA BRWER: Let me just see if I can change the view to-- Okay. I just clicked, what I did, Susan, was clicked on the link in the agenda, and this is what opened, but you weren't here, maybe.

SUSAN PAYNE: There was a version that Bernard had sent us that definitely showed up with red line for me, although everyone else is saying it didn't. Perhaps I should quickly email you the word version that I had, Brenda, and I'll do that now. Maybe we can work off that one.

BRENDA BREWER: I don't want to have you worked. Do you want to share your screen, or do you want to send it to me?

SUSAN PAYNE: I think I'm just going to send it to you now. I think I might struggle if I share my screen because I won't then be able to see all of a chat and everything. But it shouldn't take me a minute. Okay. All right. I'm sending that now. But it should be the same.

DAVID MCAULEY: I've resent you the link, Brenda. Try that one.

SUSAN PAYNE: Okay. In the meantime, while Brenda's calling that up, I will just start introducing this. As I said, it's a bit unfortunate that you or some of you don't seem to have seen the mark-up which is a bit disappointing. But what the document had was a markup of red text to show against the clean version that we've been working on. That's obviously not how things will stay. When we've got to an agreed form, we'll end up with a clean version and then a red line against the existing supplementary procedure rule that currently exists. But for the purposes of it being clearer to people on what changes have been made just in this last iteration, I marked up for our purposes against the red line. How are we doing? Has it come through yet, Brenda?

BRENDA BREWER: I received Bernice copy and there was the same. No red.

SUSAN PAYNE: Did you get my email yet?

BRENDA BREWER: No. I have not. Yes. There it is. Hold on. Let's see what this looks like. Open. Yeah. Yeah. That's got red on it. Hold on. I'll share this one.

SUSAN PAYNE: Okay. And I would say I had been planning to just not to go through it, really, because everyone has had it for a couple of weeks, and just noting that there were no comments in the Google Doc, no one expressed any objection to the version of the text that was being

circulated, and there weren't any comments. But I think since it looks as though at least a couple of you haven't seen the red line version, I will just quickly highlight it. You can see it here, but I'll quickly talk through it. I'll just identified that I made changes throughout as we discussed where instead of using the reference to the-- What's it called? I can't even remember what terminology we were using before. But we're now using the term first IRP panel, which is a reference to the panel that was first put into-- Oh, yeah, we were using dominant before. Instead of that, we're using first RP panel throughout as the one for the IRP that was commenced first.

And then the other change, which is reflected in paragraph 1 is that we wanted to reflect the consolidation wouldn't be permitted between binding and non-binding IRPs. And that if there is a consolidation or indeed-- Well, it doesn't make so much difference, I think, on an intervention, but if there was a consolidation or intervention, then it wouldn't change the nature of a proceeding. if it was binding and someone wanted to join the proceeding, then they couldn't also be requesting it to change to non-binding and vice versa. So that is the change in in paragraph 1 that was made.

In paragraph 2, there had been a reference to except as expressly stated here, and there was an objection to that, so it now says specifically that's a pretty non-substantive change. And the texting square brackets about say in exceptional circumstances or say extraordinary circumstances has also been removed. And so, we've just retained this concept of there being a presumption, if the parties are in agreement, there's a presumption that the panel will agree to the request. Obviously, it's open to the panel to take a different view, nevertheless.

So, moving on into paragraph in clause 3. The change here again was a deletion that we'd agreed on our previous call that we aren't specifically calling out the text that was in square brackets regarding cases of urgent requests for a consolidation arbitrator to be appointed by ICDR. And we are just sticking with that sentence as you see, regarding that you may have to-- That if there's no panel in place, the request to participate may have to be suspended until the first IRP panel does get put in place into moving on. And I will only flag really the substantive edits, I think, as I'm moving forward.

There were some tweaks into paragraph 4, just some minor language tweaks for clarity requested by one of our group members. Again, not substantive. And as we move down into 6, paragraph 6, we did spend some time talking about timing for when motions to request consolidation should be made. And we had one form of timing, which was that a request of motion should be submitted within-- and with the exact timing 21 or 28 days is something we're going to seek input from the community, or I think also is something we'll pick up when we're doing a cleanup of the rules at the end.

But we had already anticipated that within a set number of days of publication of the later IRP, there should be a motion submitted, but in paragraph b, we're now also including a deadline of within 60 days from the publication of the first IRP. And then allowing the first IRP panel some discretion on that if it deems that the purposes of the IRP are going to be furthered by accepting late motion for consolidation.

And the reason for that as we discussed was just so that there is some expectation that once the first IRP gets to a certain point, that it would

be in rather more exceptional circumstances that a later application to consolidate cases could be made just because, again reflecting on the expectation in the bylaws that these IRPs should get wrapped up in about 6 months. Then there ought to be some cutoff so as to not risk reopening things and generally causing disruption to the proceeding that's been underway for a fair period of time.

Okay. Then there are no real changes made to 7 or to 8 of any real substance, or indeed to 9. Paragraph 10 is a new one, and it is, again, as we discussed is for the-- It might be necessary to stay either or both of the IRPs involved in this communication for consolidation, pending a decision on whether to consolidate. And again, as discussed, with a proviso that the non-moving parties, so the parties who haven't been asking for consolidation, should have an opportunity to make representations on any state of their own IRP. Which seemed to give a balance of fairness. Clearly, the party who's seeking to consolidate has already made their decision and taken into consideration that a stay might be ordered. And so, they've made their determination themselves that it's something that they want to do.

We'll keep moving on. In paragraph 11. It's not shown up, I don't think, in that word version, but we did have a sentence at the beginning that said the dominant IRP panel may, in its discretion, order briefing on the propriety of consolidation of disputes, and that's been deleted. And the reason for that is because we now have separately in, I think it's in 9, we've given other parties a right to make a representation on the request for consolidation. So, we don't need that because, in fact, we're already we're allowing the parties to make representations rather than just if the panel permits it. So that was the main change to that.

And then we moved down to 12, and we talked about the need for some deadline, really, for the panel. And we should endeavor to include something upon that. And so, as we discussed, I think, therefore, included a provision in 12 to the effect that the first IRP panel should endeavor to make a decision on the motion for consolidation as soon as possible, and in any event to do so within 15 days of final submissions, and that there ought to be a brief statement of their reasons for their decision. Again, that timing is something that we'll get review to make sure that all the timings hang together in the final review. Okay. And other than that, there's nothing else of substance in relation to consolidation. So, I will just pause before we move on to intervention.

Okay. All right. I'm not seeing any hands or comments. So, on intervention, really. It doesn't look like a huge change in the document, but paragraph 19 or clause 19 rather, relates to the role of a supporting organization. And we did have some sort of just quite some discussion on this and whether a supporting organization should be participating in the dispute as a party or whether it was more appropriate to have them join us in amicus, and where our discussion came out was actually that we felt that it was appropriate to allow them to join in either capacity.

So, paragraph 19, that text was in the rule, but our discussion was whether it should stay there or not. And so, the change is simply to reflect the fact that the sporting organization probably isn't, or in many cases, wouldn't be joining as a claimant because they likely wouldn't meet the definition of a claimant, which is set out in the bylaws. And so, they're just simply being called an intervening party, but there's potential for a supporting organization to join as a party in the

proceedings. When we get on to amicus, you'll see that I also have reflected the conclusion we came to that we ought to give the SO the choice of the manner in which they participate.

Okay. In terms of paragraph 21. There were some changes to paragraph 21 to reflect the fact we-- it had not previously captured that if an application was being made to intervene, it didn't specifically say that the parties in the IRP that they were seeking to intervene in would be given a copy of their motion to intervene. So that's been added in. And then we have again this time limit of 21, 28 days from the publication of the IRP that they're seeking to intervene into, unless the, again, unless the panel in its discretion thinks that the purposes of the IRP are furthered by accepting it later.

That's not really changed, but what we did spend some time talking about and what I've tried to capture is that we had some texts that said filing a motion to intervene doesn't stop the clock on the intervener's own time to bring an IRP. And it was felt that the timing was likely such that that would have a significant impact on the ability of people to intervene because they would be at high risk of being out of time.

Sorry. I'm just checking the document, a minute. As we discussed with that's therefore reflected that that is still there, but it's subject to if the IRP panel is exceeding the time for making a decision, that's picked up in Rule 726, then the clock can stop after all. And I think that was the compromise that we reached. We give the panel a time limit. And if they are running over time, then that would be a reason why the intervener's time clock should be paused.

Paragraph 22and 23, nothing of any substance made to either of those. In paragraphs 24, this picks up something that that Mike Rodenbaugh had caught, which was that we hadn't included the clause that gave ICANN and the IRP claimant in the IRP that's the subject of the request. We hadn't given them the corresponding right to submit a statement in response, the same provision that we already have in consolidation, and we've missed it here. So, that's a duplication effectively of that text, and that's been added in now to reflect that. And with that having been made, then we also, in paragraph 25, have, as before, deleted that reference to the dominant IRP panel in its discretion ordering a briefing. Because we've now given the participants to the IRP and actually right to make a statement.

All right. I'm going to pause. I understand I've got a hand. Apologies. I am looking at this in a Google doc and not seeing hands. And indeed, I'm not seeing hands anyway, but I understand that Kavouss has his hand up. Is that correct? Kavouss, did you want to speak? Okay. It seems not, so I will keep going.

BRENDA BREWER: Kavouss, your line is open if you wish to speak. He disconnected once. I believe he may be having connection issues.

SUSAN PAYNE: Okay. Thanks, Brenda. Well, I'm sure we will hear from Kavouss when he's back if he did want to speak. All right. Having said that, we are then down at paragraph 26. And this is the timing for the IRP panel to make their decision on the motion for intervention that I mentioned

earlier. Again, as with consolidation, the proposal is 15 days of final submission, and they ought to provide a brief statement of their reasons. And so, if that timing is not being met, then that would be a reason for halting the clock for the intervener for their own opportunity to bring an IRP. And then for 27 and 28, there are no changes of any significance beyond the changes to some of the terminology that I mentioned before. So, I will pause again just before we go on to the amicus bit.

All right. Okay. On participation as an amicus. First off, we had had a discussion about the language that effectively had previously said that you could only participate as an amicus if you didn't satisfy the standing requirements to be a claimant. And that has been changed now to say even if they do not satisfy the standing requirements to be a claimant. And therefore, it does mean that now we are allowing both those who don't satisfy the standing requirements to be a claimant or those who do satisfy the standing requirements, but for whatever reason, don't want to join as a claimant. In either case, it is possible, for a person, group or entity to seek leave to participate as an amicus curiae.

And that was another significant change that we made as a result of our discussions during previous calls, that we felt that this should be something where someone who wishes to be an amicus should seek leave from the panel. It shouldn't be an outright right to join the proceeding in that way. And therefore, the other changes of substance in that section, we have retained the language that says, in the middle of that paragraph, [audio glitch - 00:29:52] is not a party to the dispute. That had been in square brackets for discussion amongst the group.

And on our last call, there was no objection to keeping that language in. So those square brackets have now been removed.

And then moving on the next sentence. There are some amendments too. So, I'll just refer to the whole sentence, which is without limitation to the persons, and groups and entities that may have such material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the dispute. And upon request of such person, group or entity to participate as an amicus curiae, then there should be a presumption that the IRP panel will commit the request. And so that is, again, a slight change that's been made where previously the listed groups or persons in 133, that it appeared that they had a right to participate as an amicus, and that now has been slightly toned down. So, there is a presumption, but that does by definition, then mean that the IRP panel does have some discretion in appropriate circumstances to refuse that still.

And as we discussed the class of groups or entities that was the catch all in paragraph 4 that previously existed. We discussed that length and concluded that the language wasn't appropriate for there to be a presumption for that particular text where it effectively just reiterated who can participate as an amicus. So, I deleted as we discussed that paragraph 4 that we spent quite some time talking about on our last call. And then moving further down the document. Paragraph 32 is new, but it's something that has been seen before, which says that ICANN and any IRP claimant who is a party to the IRP, which is a subject to a request for participation as amicus, shall be entitled to submit a statement within 21 or 28 days. I've spotted an error there where I've carried a text over from a previous paragraph. It shouldn't be receipt of

the motion to intervene. Obviously, it should be receipt of the request for participation as an amicus. So, I will need to make that change, but that, I trust is not too problematic.

And then the other thing to just reflect on is paragraph 33. That we did have a paragraph 33, but there was some amendment again to the text of that. So, it now states that if the IRP panel determines in its discretion and subject to the conditions set forth above, that the proposed amicus curiae has a material interest relevant to the dispute and that they have information expertise or other input that has a bearing on the issues in the dispute, which is likely to assist the IRP panel, they shall be allowed participation by the amicus curiae. So, that reference to the information expertise or other input that has a bearing on the issues and that's likely to assist the panel, that is the new language. And again, that is to reflect that there is a decision for the IRP panel to make. It's not simply a right to participate as an amicus.

Those are the changes that I made in the document. That's been a very quick canter through, but I think that hopefully, that's given people a final reminder of what the changes were made. They were as we discussed or ones that I tweaks that I made to try to capture, what we'd reached agreement on and the concepts that we wanted to reflect in the document. And as I said, I had been planning to really not actually run through this in that detail because it has been with everyone for a couple of weeks and there hadn't been any comments or input in the Google document. But I felt given that I heard that some of you hadn't seen any red lines in the Google Doc, which is surely unfortunate, I think it was worth taking the time to quickly canter through it and just

highlight the changes so that you can all feel comfortable that they are ones you're expecting to be made.

And so really, with that having being said, I think it's just a quick pause to just make sure that there are no significant concerns or significant objections with any of those changes. And provided that they're not, we can then, I think, take this as being our agreed text for the purposes of now seeking the input from the community. Okay. I'm seeing a hand from Sam. Sam.

SAM EISNER: Thanks, Susan. And I appreciate all the work on this. I only have one area that I wanted to flag an issue, but I also want to clarify that from the ICANN side, we would not consider it something that we would tell the group not to move forward to public comment if there's a different position desired by the group. But one area that we or I can't recall if we had a chance to talk about at the plenary level. I know that we've flagged it and there was a possibility of some email discussion on it, and I'm not sure that Flip has really been back into the group since it was flagged.

But it was on that issue of discussing the data between the ICDR current procedures that have the consolidation arbitrator in them versus our group recommending the use of the panel within the first filed IRP and making sure that we were comfortable with not relying on the process as it's been evolved at the ICDR level. Because that did not actually exist when we were doing the first round of the supplementary procedures. That's a newer update.

And so I just wanted to make sure that we were closed in terms of this group's decision on it or discussion on it, but also again, if the group chooses to move forward with that with the current language in here, we're not going to object to it or do anything to hold up that proceeding, but ICANN might be flagging that there are already existing processes to handle who hears it within the ICDR proceedings when we get to that public comment.

SUSAN PAYNE: Thanks, Sam. Yeah. And I think it is worth just a reminder on that. So, I think it was probably not the last call, but perhaps the one before that, where we did look at this. And from my recollection, I may be wrong, but I think I do believe that Flip actually was on. And we did have some debate back and forth, people had had the opportunity to look through the ICDR rules and a kind of comparison that I'd attempted to do. The upshot of that was a feeling that we should stick with what we have, which is this, referring these decisions to a three-person panel. Certainly, for present purposes and for seeking community input. So, we did definitely reflect on that. And I do think that Flip actually was on when we had that discussion. I may be misremembering, but I feel that I'm not. But, yes, we certainly did have that discussion, and that was the conclusion we reached.

So, I think that I'm not keen to reopen that one again. Particularly at this point. I think we can put this out as it is. And perhaps this is something that we should flag in the public comments so that it's clear to people that this is something of a change of approach and see what the view of the community is. Sam, yes.

SAM EISNER: Thanks, Susan. I appreciate that. It sounds like it might be a meeting that I wasn't able to because I know that there was one recently that I wasn't able to get to, so I really appreciate that rundown. And, yes, first of all, I don't want to reopen that issue now. I think your sense in just moving forward to public comment is right, though I think it does make sense for us to maybe put a bit of a flag in there in that narrative around public comment.

SUSAN PAYNE: Thanks for that, Sam. Yes. Then I think we're all on the same page here. So, I'm not seeing any other hands at the moment. I'm taking silence as agreement, really, at this point, and or at least support for the document as it is, bearing in mind that it we will be getting input from the community. Thanks to everyone. And apologies for having to drag everyone through it in a slightly long-winded manner, but I'm happy to say we can put Rule 7 to bed. So that's super. All right. And in which case we can, I think, move on to our next agenda item, which is relates to Rule 3.

And Rule 3 is the rule that deals with panelist selection, IRP panelist selection. It doesn't deal with the appointment of the standing panel for the avoidance of doubt, but it does deal with panelists are drawn down from the standing panel or elsewhere, to stand as the three-person panel for an IRP. So, in which case, again, Brenda, would you mind now putting up that Rule 3 text. I think that was that other text

that you did put up in the window a bit earlier. There it is. Perfect. Thank you.

And again, I want to apologize for the late circulation of this. I had very much hoped to get to this sooner, but I'm afraid I simply didn't. And then when I came to do so, it did take me a little while. Therefore, I totally appreciate that people won't have had much time, if any, to really look at this. But I do think it's helpful to run through it and flag what I've done, and get any immediate sense from people, but we can hopefully wrap this text up relatively quickly. Again, these edits that have been made are ones that seek to reflect matters that we agreed on our call or concepts where we maybe weren't quite agreed on what the text should look like, but we've got some sense of what we wanted this rule to say.

There's an awful lot of red text in here. Most of this red line text is was existing red line text against the current version of the interim rules. And so, I haven't made all of these changes now. What I did do was use highlighter, which makes it very bright, to just so that it's really clear where the differences are. And again, I think if it's okay with everyone, I will just quickly run through and highlight them. There are a handful of places throughout this Rule 3 where I made a general edit, which is there's sometimes there's been a bit of confusion between the IRP panel and the standing panel.

So, for the avoidance of doubt, there are handful of places where I've added in a reference to make it really clear if we're talking about the IRP panel where it may be might not have been sufficiently clear otherwise. So, as we're going through, there'll be a handful of edits of that nature

just flagging that that's the IRP panel we're talking about and not a standing panel in that particular context.

Otherwise, paragraph 2 talks about the panel selection, and specifically, I think specifically deals with panel selection, but from the standing panel. But 2(a) and 2(b) address how to keep the process moving in terms of if one party perhaps is not appointing their panelists in a timely manner, or if the two parties have selected their panelists, but then they can't agree on a third panelist. So that's paragraphs (a) and (b). And we talked about where this needs to be referred on to someone to address that sort of stalemate situation. We had been proposing that it be referred on to the IRP providers administrator, but feedback from some of our practitioners, in particular, was that they felt that if we've got standing panel in place, it really ought to be something that the standing panel should control the activity in this case.

And as a compromise, we then concluded that perhaps what we should do is give the standing panel a relatively short period of time. it had been suggested perhaps 48 hours, perhaps 72 hours. I've gone with 72, just I think to give the standing panel a little bit more time. And so, the concept is therefore that the standing panel should have 72 hours in paragraph a. If one of the panelists, one of the parties rather hasn't picked their panelists, the standing panel has 72 hours to pick a panelist for them instead. And then the fallback that if they don't meet deadline, then the IRP administrator could take over this job and make that selection.

And then in paragraph b, as I said, this is reflecting the situation if both the parties have identified their panelist, but the 2 panelists can't agree

on the third one, then again, who should make the decision. And again, as before, we felt that we probably should refer this back to the standing panel that using whatever their own processes are, to make the appointment of the third panelist for them if they can't agree themselves. In this case, we did think that perhaps the fallback position of the IRP providers administrator might become more relevant because 2 of the standing panelists are already unable to agree. And so, it suggests it might be something where it's quite difficult for the standing panel to make this decision. So, again, we've got that full back of going to the IRP provider and having them make the selection, but still making it from the standing panel because that's already in place, and there's a presumption really that the standing panel will get used.

And I think, the other thing that we discussed and agreed was that we wanted to flag that this was the situation to the community. And so there are a couple of footnotes 1 and 2 down at the bottom of that page—if you wouldn't mind scrolling down, Brenda—where I have tried to reflect that there a little bit. Well, it's not too long, but I just included the footnote that said the IOT considers that once the standing panel is in place, then it should be responsible for resolving panelist appointment issues. But the IRP provider administrator should act as a fallback where the standing panel is unaged reach agreement for some reason. And that footnote applies to both that paragraph a and paragraph b. So that's simply reflecting, as I said, what I've just been speaking about now.

Okay. I can see Kristina's hand, so this is a good point to pause. Kristina.

KRISTINA ROSETTE: Hi. I had some concern about footnote 3 only because it essentially highlights that we didn't propose-- that by talking about how we didn't propose a specific process for a party to make representations about lack of capacity, the omission of any corresponding text about the requisite diversity of skill and experience. I just think it highlights that we haven't dealt with that, or that we weren't able to agree on it. And however we want to characterize what ended up happening such that the text that had been proposed on that point was removed, I do think we also need to reference it here. I hope that was clear. Thanks.

SUSAN PAYNE: Thanks, Kristina. So, let's have a look at paragraph, I think it's paragraph 3. That's it. Thank you. Actually, before we do that, if you could go back to 2, I think it is, Brenda. I will just reflect there that in that first paragraph of section 2, I left in the text that refers to the panel, that not having capacity due to other IRP commitments, or the requisite diversity of skill and experience needed for a particular IRP proceeding. So that reference there, I believe we didn't feel that we should be deleting it, and so I didn't. And that obviously corresponds to what the bylaws language says.

And so, then when we come down to paragraph 3, what I did do was make the point that in paragraph 3, I therefore remove that reference "due to other IRP commitments". Because what I'm now just proposed as language is that it says if the standing panel does not have the capacity, it must notify the claimant and ICANN in writing. And

therefore, that leaves open that it's not simply the lack of capacity due to IRP commitments, but it's the lack of capacity more generally. So, it's the other forms of lack of capacity as well. But I agree, that this is still just a proposal that the standing panel can make their own determination about whether they have a lack of capacity.

And then as we had discussed on the call, and I agree, I think I know you were not especially comfortable with this, Kristina, but I think the feeling of the group appeared to be that we should delete that second sentence. So, we don't specifically give the parties a right to raise this, but recognizing that we believe that if a party does think that the IRP, that the standing panel just simply doesn't have capacity for any of the reasons, we may not have built a specific process, but one would expect that they would raise it with the standing panel. And so that is how I had captured what I think was the feeling of the group overall, but with that footnote that says to the community, this is what we're suggesting. We haven't built in a process. Do you agree or do you disagree?

And I'm going to just pause and see if there's any other views on this at this point. If not, it may be one that people want to spend some time thinking about and reflecting on the language and seeing whether they are comfortable with it. Kristina, thanks.

KRISTINA ROSETTE: Hi. Brenda, can you scroll back down to that footnote that goes to that paragraph 3? I think what would be helpful for me and perhaps for others is to change move the parenthetical on the second to last line that says lack of capacity open "of any form" further up to the end of

what is currently the fourth line of that footnote. To make clear earlier that we're talking about lack of capacity, whether it's due to other IRP commitments or requisite diversity of skill and experience. Because I think how the language appears I think it's easy for people to focus on just lack of capacity due to IRP commitments and not necessarily the diversity of skill. In other words, I think we just need to highlight for folks that it's the capacity for either reason. And I think we do that, but I think we do that earlier in footnote that might avoid some of the confusion like my own. Thanks.

SUSAN PAYNE: Okay. Thanks, Kristina. All right, David.

DAVID MCAULEY: Thank you Susan and Kristina. I guess I just have an observation, and it harkens back to discussion that we had earlier where I was not in complete agreement with Kristina, and I forget where everybody stood on this, but it's another area where the lack of clarity in the bylaws is a little bit unfortunate, I think. But when we talk about the lack of requisite skill and experience, etc., I was of the view back then that what was being spoken about was the requisite, the required background that a panelist has to have under 4.3 (j).

And that paragraph simply talked about panelists having—I'm looking at that part of the bylaw—panelists having to have significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution, and or arbitration.

When we get to the other language, the last thing I think we should encourage or hope for is that people argue that if I bring a claim that is maybe a battle of trademark or whatever, that I'm entitled to somebody that knows the details about trademarks. Or if I bring an arbitration about building a bridge, then I'm a title to an arbitrator who's a civil engineer. I think that's nonsense. I personally don't buy off on that. I think that what we have a right to is a skilled arbitrator with the skills described in 4.3(j), and otherwise, to the extent they're lacking in background, they should call on the experts that they have a right to call on under the bylaws. And so, it was just a disagreement, I guess, on how we-- It's going to I think the argument's going to erupt because the bylaws are not necessarily clear, but I just wanted to make the observation again. Thank you.

SUSAN PAYNE: Thanks, David. I do appreciate it. And I recall that you did make that point. At the same time, there are two different provisions in those bylaws. And, yes, absolutely. There's something about what standing panel members, the sorts of skill and experience and expertise they should have, but there is this separate reference that talks about if the standing panel doesn't have capacity and it's not just about capacity because they're all too busy. It specifically calls it out. I do think that it would be a very unusual circumstance where they didn't have capacity for some other reason, but there could be a dispute that was so arcane that-- I don't know. I don't know.

I think we all have agreed that it's not meant to be a free for all on a pointing from outside of the standing panel. It is meant to be an

exceptional circumstance. And so, if you have suggestions on how better to reflect the text in the footnote or if there's more that should be said there, I'm not sure, but I think this is one where we need to flag it to the community though. I think even in this group, we're not really on agreement. Okay, I've got a couple of hands, so I will turn-- Oh, I've got three now. So, Kavouss, you're first.

KAVOUSS ARASTEH: Yes. Good time to everyone. Thank you very much for the efforts. I think there are some grammatical mistakes, some reference mistake, and some practical problem in this document. I take the third one. I think 72 hours is very vague. First of all, it is too short. And second, if you count 72 hours, sometimes coincident with Friday evening, Saturday, Sunday, and Monday time difference, it remains few hours only. So, if everyone agreed with the concept of 72 hours, instead of 72 hours of three, we should write three working days, but not 72 hours. This is first point.

But even that sometimes in my view, because there are some difficult cases and it will be too short if the panel is there or panel does not agree a very short time, then as a fallback, the ICDR culminating. We should not put such a pressure to the panelists or standing panel. So, I suggest that we first convert any time from hours to working days. And second, if possible increase the period to some workable and practical case.

And the second one is a reference is very small issues. Sometimes referred that as indicated in d below. In fact, it is not d but e below, but

not d. And the other time, there are some grammatical mistakes. I'm sure you would rectify or identify that. If not, I will come in later. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Yeah, very happy to hear other thoughts on timing. That 72 hours, as I said, on the call, we were just trying to come up, as I recall, with a relatively short period of time to give the standing panel. There had been a mention of 48 hours or 72, and I felt 48 was too short. I am open to making it longer if there's a strong feeling from this group that it needs to be a bit longer than that. We could make it five working days or seven days or something like that if people feel that that is more reasonable. I don't feel strongly committed to 72 hours. David.

DAVID MCAULEY: Thank you, Susan. Two points. One, I agree with Kavouss. I think 72 hours-- I didn't raise it earlier just because you described it as a compromise. I thought, well, I'll just let it go, but it's a fair point. I wouldn't say working day since that varies from country to country, but I think five days would be warranted. And just to get past holidays or weekends, long weekends, whatever. The fallback if we kick it over to the ICDR, it's going to take two weeks. So, let's encourage the panel to get it done more quickly. So, I would say five days.

The second point's more important. It's on the discussion we were having just a moment ago, and I just wanted to reiterate a point that you made, which I think is an important one. And that is that the interpretation I'm using on skills, experience, etc., I think will lead to

more use of the standing panel and less going outside of the standing panel in search of someone who has experience in x, y, or z. And so, I think a reasonable argument could be constructed that when there's an ambiguity in the bylaws, it would be construed, consistent with maintaining the design of the IRP, which in our case includes a standing panel and use of a standing panel especially in a context where decisions are coming down that carry way the precedence. So, I just wanted to say thank you for making that point. It's an important one that I neglected to make, and I would like to underscore it. Thank you.

SUSAN PAYNE: Okay. Thanks, David. Sam.

SAM EISNER: Thanks. I wanted to echo a view similar to what David was saying, but also to note, there's also a different portion of the bylaws that helps identify and bring in additional expertise when necessary. So, it's not always necessary to use the panel or to view the specific background components of the panel as they might be specifically related to the dispute because at (iv), so this would be 4.3(k) for the bylaws state upon request an IRP panel, the IRP panel shall have access to independent skilled technical experts at the expense of ICANN, although all substantive interactions between the IRP panel and such experts shall be conducted on the record, except when public disclosure could materially and unduly harm participants, such as by exposing trade secrets or violating rights of personal see.

And so, if understanding a specific area, for example, of very deep intellectual property law is necessary or if it's about an arcane area of an issue that becomes relevant in the dispute, which of course the IRP panel should never be in a position of deciding an intellectual property dispute. They'd be deciding if ICANN violated its bylaws and how it took an action relating to an intellectual property dispute, for example. And so maybe at that point, it might make sense to reference the ability of the panel to seek this external expertise when those types of issues might arise as opposed to suggesting that the panel composition itself needs to go outside of the bylaws. Because I agree with David on trying to uphold the preference for the use of the standing panel whenever we can.

SUSAN PAYNE: Thanks. Yeah. I guess the question is where does one reference it? But maybe one references it in 3 somewhere in terms of the standing panel when it's determining it doesn't have capacity. Let me ponder on that. I'll go to Kavouss while I'm doing so. Kavouss.

KAVOUSS ARASTEH: Susan, you referred several times to the due to lack of expert or expertise. I think this time, I put the heart of the member of the CRG that the panelist that we have suggested to the ICANN Board, all of them, they are experts. So, lack of expertise is not a proper text. Perhaps we should say lack of expertise in the associated subject on the table. Because the issue on the table may need specific expertise that

may not exist, but we should not generalize that the panelists, they have lack of expertise on the issue as referred to in bylaw.

Second point that in footnote 1, when you refer to IOT considers patati patata, the second line you said that should act as a fallback. So, you want to give more power to ICDR. I have no problem. But ICDR could act as a fallback when all efforts were exhausted in the panel, standing panel. So, you should add that once all efforts were exhausted then ICDR should come in. I don't want to immediately disregard the expertise of the panel and the action and function of the panel and go to the ICDR. However, if there is a deadlock, we don't want on the other hand, to have a block or blockage of the thing. So, we need to do something. So, you need to add the qualifier once all efforts in this regard were exhausted by a standing panel.

And then with respect to the reference, not mistake, but edits, I'm sure that you will take it. And this is grammatical, there are two or three grammatical that you use, the double verb, which you need to take one of them but both of them. Thank you.

SUSAN PAYNE: Thanks, Kavouss. So, I will just quickly respond to a couple of those comments if you don't mind. So, in terms of perhaps the lesser one, the one regarding using the IRP provider as an administrator as a fallback, that is strictly as is reflected in the rule itself. So, this is just a footnote for explanation for the community while we're seeking input and comment. But the actual rule reflects that this is only going back to the ICDR administrator to pick the panelist if every other opportunity-- if the

parties are not doing what they should do in terms of picking their own panelists, or the two panelists already selected by the parties can't reach agreement and then it's gone to the standing panel and they have not appointed a panelist either. It is only that to go back to the ICDR administrator. And if there's a standing panel in place, they still are still picking a panelist from the standing panel. So, this is not intended to use the role of the standing panel at all. It is just trying to break a timing deadlock if for some reason, time is being wasted in getting three panelists appointed. That is all.

But to your most substantive points, the one about expertise, just to be really clear, and we did talk about this at some length when we were discussing this rule before. The bylaws language refers to requisite diversity of skill and experience. It isn't expertise, and we had some discussion about expertise and precisely what the meaning of expertise was and this point that that you made about the panelists being experts. But the bylaws language is not a reference to expertise, but to experience. And so that is why that terminology is being used because it is picked directly from the bylaws. It's not my own language. It's bylaws language. And that is all.

And indeed, as you'll see, the proposal in this draft is to take it out in most cases so that it's not even included here. But expertise is not the term that is used in this context. And David is saying expertise is in a different part of the bylaws in 4.3 (j), which is about appointment of the standing panel. But that is not what we're talking about.

Okay. Good. I think we're all on the same page now. All right. And in terms of we were talking about paragraph 3, paragraph 3 then goes on

to, as before in paragraph 2, have a process for what happens if there isn't a standing panel in place or if there is this unexpected lack of capacity. And so, I included a new paragraph, sub paragraph (a) there. Which is just specifically that, to try to address comments that I think it was Greg made that sometimes there might not be enough people on the standing panel to have three standing panel members, but it might be that some standing panel members could still be appointed. And so, to reflect that, I have included this provision that we talked about for if there is a lack of capacity, the standing panel chair may propose a process for IRP panel selection.

But if they do not do that, then the following paragraphs which deal with other means of appointing a panelist should then apply. And so those other means are not changed from previously. You'll be pleased to see there's no highlighted text there. So, it's a process yes, again about the party's picking a panelist from outside of the standing panel and so on. And ultimately, going through the ICDR panelist appointment process, if all else fails, as we had previously captured in this rule and we agreed on.

And so, then if we can scroll further down, Brenda. I'll just see if there's anything else of note to capture. Not really much in the way of changes, but I did include a reference to timing in relation to conflict of interest. We had talked about whether if we are asking panelists to sign a declaration but they don't have a conflict of interest, we had talked about whether seven days was long enough. There was certainly a feeling that we should keep it to seven days if possible, but that is depending on who is on the standing panel. If there are standing panel

members who actually are part of a very large law firm, for example, it might actually be quite challenging for them to do that in seven days.

And so, you will see footnote 4, which I have therefore added to flag this again as something we specifically would welcome input on and say that the IOT proposes a time limit of seven days for panelists to confirm they have no conflict of interest in order to keep things moving and bearing in mind that there is a bylaws expectation that IRP should be concluded in six months. However, depending on the makeup of the standing panel, some IOT members expressed concern that this may be insufficient to do conflict checks across a large law firm, for example.

On the other hand, once the IRP is commenced, standing panel members could begin their conflict checks immediately. So, before there is a prospect of them being appointed, there will be some time after appointment, basically, after commencement of the IRP when they could already start doing their checks. And then also that there will generally be advanced notice on potential IRPs, since claimants are encouraged to enter into CEP first.

So, just two different explanations for why the standing panel members have likely got more notice of the possibility that they might need to do a conflict check, than just at the point where a party is coming to the standing panel and trying to make an appointment. That is really what that footnote is intended to reflect. And as I said, flagging that we, again, welcome community input.

Okay. And then I think if we could keep scrolling down, Brenda. I think that maybe, yes, that is the end of the changes of substance.

BRENDA BREWER: Beautiful picture, right?

SUSAN PAYNE: Well, empty. Empty. Okay. All right. I'm noting some spelling things that have been flagged. That's very helpful. I will be able to go back and fix those. But I think, obviously, you will haven't had time to look at this. We are keen, I think, to include this in the public comment, but there's certainly an opportunity for people to reflect on this text. And I certainly am not expecting everyone to sign this off now. So, I think I will ask that people review this text between now and the next call, and we'll come back to this again on our next call. And I would very much hope we might reach agreements. So, ideally, comments please to be shared over email before we come into our next call on this Rule 3.

All right. And I'm very conscious of the time. We're at 20 minutes past the hour. So, I think, we should go back to our agenda and just see what else there is to do. Ah, number 5, next steps on the public comment. Okay. So, over the last couple of weeks, Bernard and I have been working to—and Bernard has been doing the bulk of this work, obviously—working to pull the rules together that we are putting out to public comment. The ones that we've been talking about, they deal with in translation, with the timing rule, and that includes the fixed additional time concept that we developed, and that safety valve concept, to allow for exceptional circumstances for a late IRP.

Also, the principles that we developed on initiation and our proposal is to include that as part of Rule 4 since it seems to fit quite naturally

there. We have Rule 7 which we have just finished up on consolidation intervention and participation as an amicus. Oh, and ideally also this Rule 3 on IRP panel selection, those are what we are looking to put out to public comments.

We have, however, been reflecting on what it is that we are issuing to the public to review. And I would say it's probably me who's come to the conclusion that I feel that we can't simply put the draft text of the rules out without some explanatory document that reflects, at a high level, the principles, the issues that we have discussed and where we have come to a conclusion and why. And flags to the community also some of these points that we're very specifically hoping we will get input on. When I say document, I think this will all be in one document, but that work still needs to be done.

And when thinking about the work that's needed to do that and the fact that I am sure that that amongst this group, you would feel that you want to review that sort of text and wouldn't want something to go out to public comment that you hadn't had an opportunity to review and comment on. I think I have sadly come to the conclusion that I think it is extremely optimistic for us to think that we can get this out to public comment before that ICANN78 meeting. Which is not at all to suggest that the work should slow down. The strong intent is to get it out very shortly after the ICANN78 meeting, but it does mean, I think, is that we will probably use our sessions at ICANN78 that I hope will be allocated to have a real go at finalizing that text to the extent that we still need to.

And so, what the proposal is is that we will work through rule by rule in turn just bringing the text to the group, circulating it in advance so people have an opportunity to read. And the expectation is that people will come to a call having read it and ideally having already flagged if there are strong concerns of real substance with the explanatory text. And I think that's probably as much as I can say now. Yes. I mean, that is the proposal. I am disappointed that I think we just aren't realistically going to make a deadline of getting something out to public comment before ICANN78 because in reality, that means getting something finished, getting all of that text finalized in the three weeks and I just simply don't think that we can do it.

And I also think that from past experience, the more thought that goes into the information that's given to the community and the questions that's asked of them, the more valuable a public comment exercise is. I really I don't want to do a public comment exercise that's simply a tick box exercise. I want us to get valuable input from the community rather than just have gone through the motions. So, I will pause there. David.

DAVID MCAULEY: Thank you, Susan. So, I will salute you for coming reluctantly to that conclusion. I actually had come to it earlier myself, but recognized reasonable folks can differ on this, but I think you're right. My only comment right now would be is could we dedicate a little bit of time next week on the 19th to talk about what ICANN78 is going to look like for us. And if Bernie or Brenda has any idea how much time we would have by next week, it would be helpful. But in any event for us, just sort

of discuss let's assume we have, I don't know, four hours. What would it look like? What will we try to accomplish? Thanks, Susan.

SUSAN PAYNE: Yeah. Thanks, David. Yes, I think we will. As I say, I've reluctantly come to this conclusion really only today, or yesterday, overnight, and today. And so, what I thought ICANN78 was going to look like is going to be a little bit different to what it will look like. So, for sure, yes, we can spend some time on that. All right. Then I will pause again just to see whether there is anything anyone else wants to raise as AOB. And if not, I will-- I'm not seeing any hands, so I'm going to give you two minutes of your time back. And thank you all very much for joining and really appreciate you bearing with me on the slightly tedious run through of Rule 7 and Rule 3. But it, obviously, is an important exercise for us to have done. Okay. Thank you very much, everyone. Brenda, we can stop the recording.

DAVID MCAULEY: Bye-bye.

SUSAN PAYNE: Bye, everyone.

[END OF TRANSCRIPTION]