BRENDA BREWER: Good day, everyone. This is Brenda speaking. Welcome to the IRP IoT plenary on 13 February 2024 at 18:00 UTC. Today's call is recorded. Kindly state your name before speaking and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. I have apologies from Mike Rodenbaugh. And with that, I'll turn the floor over to Susan Payne. Thank you.

SUSAN PAYNE: Thanks, Brenda. And actually, I'll add an apology from Flip. I don't see him on. I think that's probably apologies from him as well. Thanks, everyone, for those who have been able to join. It's our call of 13 February. As usual, we'll do a quick review of the agenda first off, and then we'll get into the meat of the call.

So in terms of action items, we had one which is noted there on the agenda with ICANN Legal circulating updated drafts of the rules. And the role for the rest of us was to review and provide comments or edits. I'll take a bit of time just to explain how we're going to sort of handle this and any redrafts we need. But really, the bulk of our call is going to be spent on agenda item four, which is for us to actually review those redline versions of the redrafted rules that have been circulated round and to try and reach agreement on whether we're happy with them as drafted or if there's any changes that we need to request. And as mentioned over email, starting with rule three and four, and we'll see how far we get. Our next meetings are also noted on the agenda, which is 20th of February. We're hoping to be able to have a meeting next week that ideally will get us to the end of this review of the rules. And

then we do have two sessions allocated to us at ICANN 79. And then finally AOB. I guess I'll just pause in case there's anything anyone wants to put on the agenda as AOB now. If not, we'll come back to that at the end. All right, and I'm seeing a few more join us as well, I think. That's good.

All right, then back up to the top and statements of interest. As usual, does anyone have any updates to their SOI that they need to flag to the group? All right, not hearing anything. Then we can move on, I think. So agenda item two, as we've already looked at, is just noting that action item which was done. So I'll go straight on to agenda item three and just a kind of a sort of a talk through of how I think we should be handling the review of the redrafts.

So basically we've got redline versions where in some cases some tidying up has been done to the rule text that we'd largely done redrafts essentially as part of the work of this group. But there were a few areas that we all are aware of where we'd as a group, we'd really got more of a sort of heads of agreement. But we haven't actually drafted the legal text for the rules that would reflect that. So that's now been done. And our task is to try to get through that, I think, as quickly as possible, because we're still keen to get this out for a public comment. So, as you'll have noted, I really have asked everyone to review those redline texts and provide input and comments before we get onto the call in question to discuss them, so that we can all come on the calls prepped for a discussion. And we're all in a position, hopefully, to reach an agreement. Then I think if we do have any changes to the drafts, we'll ask for Liz and team to take those back and update them. But obviously, this will then come back to this group for the final sign off. And we'll go

through all the rules before we sort of circle back to the beginning and start looking at any kind of redrafts that we need to look at.

And I think as far as possible, I'd like to avoid us starting to do kind of substantive redrafting or renegotiating of matters that we previously were in agreement on. As you've gone through the redlines, there are a few areas where there are questions and comments about X, do we need to do Y, is X group the right one to be making this decision? And I think where those questions are going to require substantive work from this group, I'm reluctant at this point, when we're about to go out to public comment, to start doing that. I think we'll reach a point where we'd never get the rules out. And so my intent would be for us to, if that's the case, if there's something sort of more substantive, that we'd hold that over and we'll think about that when we go through reviewing the public comment input. And if it seems appropriate, we can even flag that as a question that we ask the community as well. Okay, and then just a couple of final things to note is obviously the redlines that we've got are against our sort of final proposed text. And that's obviously very helpful because that allows us to see where there have been changes on what we all had reached agreement on. But for the purposes of the public comment, we will then need to have versions that are a redline against the existing rules. And we'll need a version that has those rationales that we've all been discussing for a few weeks inserted back in. So those are sort of substantive pieces of work in the sense that there's a bit of an effort required in order to put them together. But there'll be nothing new in that. That is just literally reinstating redlines or rationales that we've already agreed on. So I'm going to pause there,

just see if there's any questions, comments, concerns. And if not, we can move on to the actual sort of substantive review.

All right, great. I'm not seeing any. Okay, in which case, Brenda, could we have the Google Doc with the redlines, please, that Bernard circulated last week? And I think like many of you, I'm probably going to sort of toggle back and forwards a bit between a version that I've got on my own screen just so that I can see the comments and so on a bit more easily. If you're in the position to do so, you might also find that quite helpful. Hopefully we can manage. With that in mind, if I have toggled onto a different sort of version outside of the Zoom room, I might not see hands. So sort of apologies in advance. I will keep trying to check back in. But Bernard, if you don't mind kind of poking me, if someone has their hand up, that would also be super helpful.

All right. And I think what we need to do really is go through where there are sort of comments and questions that have been put into the documents. Obviously, rule three is one which—I have lost my train of thought. Rule three, I think, is one where we did have a fairly large amount of sort of drafted text, really. This is the rule about composition of the IRP panel. And so we can see where there are redlines, where sort of changes have been made, and they're relatively few. But there are a few questions and comments.

So if we start at the top, we've got a comment highlighting IRP panel and I'll just flag that. So at the top of rule three, paragraph one, there's highlighted just that the drafters have conformed some of the formatting. So I think going through the document, there are various areas where sometimes something is in capitals and sometimes it isn't

and so on. I think in some cases things had capitalized initial letters and sometimes they didn't, that kind of thing. So they've tried to go through and conform all of that. So that's just a note, I think. Ultimately, when the rules are finally published, there'll be a decision to make about whether we have defined terms in capitals or not quite how they're reflected. But for the present purposes, that's just the note to make that clear. Which I think probably nothing really [inaudible] certainly for the for the present purposes.

If we move down the document into 2A, there's a question here for us to consider. And this may be one where we start to get into, is this something that requires substantive discussion? At the moment, we have 2A drafted as if one party has not selected a panelist within 30 days of initiation of the IRP. Then at the request of the other party, the standing panel shall make the selection from within its ranks. And it goes on to say what happens if they don't do so within a timely manner. And so there's a question from the legal drafters just to clarify who is making that decision, the standing panel or the chair.

Now, I will pause and see if there are thoughts on this, but I will say my initial reaction to this was that I feel this is something that we did discuss, but possibly even something that we went back and forwards on a little bit. And I feel we came out at a point where we felt that it was sort of at the point where we were so close now to having a standing panel, it's really the role of the standing panel to come up with their own procedures for how they do some of these sort of administrative things. And so I think I feel that we had chosen to say standing panel somewhat deliberately. But I will just pause and see if anyone disagrees. Otherwise, my preference would be that we keep it as is, but perhaps

we do highlight this as something potentially we could ask the community if they want to express thoughts on. Kristina.

KRISTINA ROSETTE: Susan, my recollection is similar to yours, but what I think we may want to do, and I have no strong view as to whether it goes in here or it goes into the rationale document, but I think in places like that where we have, or at least our recollection seems to be that we've made the decision to defer that to the standing panel, I think it probably wouldn't hurt to explicitly say that so that the standing panel, once it's appointed, knows that its kind of first order of business is to get its administrative house in order. Thanks.

SUSAN PAYNE: Thanks, Kristina. I think that makes sense to me. David.

DAVID MCAULEY: Thank you, Susan. And like Kristina, my recollection is like yours, but I think—And this will probably be after public comment, maybe, maybe after public comment, I'll come down with the view that it should be up to the standing panel until a chair is appointed and then it should be the chairs. Just because something like this probably ought not to be decided by a committee, but moved on fairly quickly. Nothing to keep the chair from consulting his or her colleagues, but so I'm okay with standing panel for the time being. Thanks.

SUSAN PAYNE: What we'll do is we will make a note, and that probably, it probably does make sense, I think, given we have those rationale documents, we can make a note that we add something to the rationale that just flags this as that this is a decision we've made that we're anticipating perhaps that the standing panel will come up with their own processes for this kind of thing. And that will serve both as a reminder then and an indicator for the standing panel. But also will serve to highlight this for the community when they're looking to put in their public comments. Okay, thank you. And I think, I'm just going to toggle to the other document, but I think it's the same comment for B on the standing panel or the chair, so I think we have addressed that.

All right. And then, if we stroll down, which takes us to the next couple of comments that I had just added. David, sorry, that's an old hand, isn't it? I'll just pause.

DAVID MCAULEY: No, it's actually new. I just wanted to ask you a procedural question, Susan. Do you want us to flag, as we go through this, flag questions that we might want to ask the community in the public comments? And the reason I'm asking is, I see one possible question in paragraph, subparagraph B.

SUSAN PAYNE: Yeah, I think, why not? I think if there's something that we feel we should be calling out, we have called out some things already, like around timing. So yes, why not?

DAVID MCAULEY: Well, then maybe we should ask the community, with respect to subparagraph B, and this is the one where the two panelists don't agree on the third. You know, should we make this action of breaking that logjam subject to the request of the parties, or should it be something that the panel simply moves on and does? Because an IRP, once it's filed, is supposed to be done fairly quickly. If both parties are invested in delay, does that matter to us? So that phrase, at the request of either party, we might ask the community do you approve of this? Something like that. Thanks.

SUSAN PAYNE: Okay, so the question is just whether the community feel that it's appropriate that this is at the request of the parties, or whether they actually feel the standing panel themselves should be moving things along if there's no action being taken.

DAVID MCAULEY: Yeah. Yes, thanks.

SUSAN PAYNE: Okay. That sounds reasonable to me. Any objections from anyone to us asking that question? All right, I'm not seeing anyone, so that's another couple of things to flag. All right, then we are now down at the footnotes. And just my first comment was that generally, I think the footnotes, which were in the sort of working draft of the document that was being worked off of to produce the redlines. Generally, when we

put together the rationale document, we captured these kind of footnotes in the rationale text instead, so that we didn't need to have the footnotes as well. With that in mind, therefore, is there support for just taking these footnotes out? I think in the text, as we got to the point that we've reached with close to final documents before we started this exercise, we had taken the footnotes out. So, that would be my proposal, unless there's concern about doing so. And we effectively rely on that rationale text that has that sort of explanation and clarification. Oh, Kristina.

KRISTINA ROSETTE: Yeah, Susan, I'm fine with, I think, and I think it actually streamlines the document to remove where the footnote text is or should be in the rationale. I think it's fine to take it out of the document. However, I do think it probably makes sense to just keep a footnote that says see rationale document, so that people know that there's some explanatory text there.

SUSAN PAYNE: So, for any text where we've got a footnote, your suggestion would be we just have a footnote there that says go to the rationale.

KRISTINA ROSETTE: Yeah, where the explanatory text is in the rationale. Because what I think we want to avoid is people reading this first, firing off or drafting a whole bunch of comments, and then reading the rationale document, realizing, oh, well that just takes care of all the questions I had. So, I

think we want to emphasize that people need to refer back and forth, unfortunately, probably simultaneously.

SUSAN PAYNE: Thanks. Yeah, I mean, or preferably even better, they actually start with the version with the rationales. And whilst I think your suggestion is a good one, there's perhaps something that goes alongside that, which says as part of the introduction to this public comment, we say to them we strongly suggest you start with the rationale document.

KRISTINA ROSETTE: That totally works. Yeah.

SUSAN PAYNE: Okay. All right, thank you. And then, having said that, I then did notice that the footnote number, well, I don't know what number it is, because the numbers are crossed out, but the second one down, I think, is one that we don't seem to have captured into our rationale documents, which is the one that says the IoT considers that once the standing panel is in place, then it should be responsible for resolving panelist appointment issues. But the IRP providers or ICDR administrator should act as a fallback where the standing panel is unable to reach agreement for some reason. And I think that wasn't captured. And so my proposal would be to capture that one in line with what we've been just discussing and get that one moved over into the rationale document in the appropriate place. David?

DAVID MCAULEY: Thank you, Susan. So anyway, since we brought it up, I thought I'd, and it appears in B too, I think what 4.3k in the bylaw provides for is not that the administrator picks the panelist or breaks the logjam, but that the administrator's rules apply, whatever the rules are at the time. And so that's a small nit, but I think it might be worth clarifying when we do the final draft. So I thought I'd flag it because it comes up in the footnote too. Thank you.

SUSAN PAYNE: Thanks, David. Yes, I think perhaps this was probably for the shorthand. This maybe was slightly shorthand text. So we can do that. And so I'm making a quick note. All right. Okay. Then moving on. I think I'll take us to, let's see where we are. Next, I think we need to just go over the page and we have a few redlines just in the rule at the, if you could scroll down, Brenda. Thank you. So looking at this rule, there's a few, as you can see, redlines, but I think they all reflect that sort of conforming approach that the drafters were taking. So sort of rather than anything substantive, although I will say that at the top we do have just that first sort of sentence, which, if I read it from over the page, it starts by saying, in the event that a standing panel is not in place when the relevant IRP panel must be convened or is in place but does not have capacity, we had said panelists will be selected and the proposal here is that the IRP panel shall be selected. I think it's the same thing. I don't have any concerns about that, but I'll just pause in case anyone does.

Okay, I'm not seeing any concerns. All right. And then we can scroll down, I think, to the next note. It relates to subparagraph C. And we have subparagraph C begins with, if one party has not selected a

panelist within 30 days of the commencement of the IRP, and we have a note from the drafters to say, consider clarifying that the timeline should be 30 days from when the standing panel informs the—[inaudible] Okay, what I was saying was we have—I'm not quite sure where I dropped. So, if one party has not selected a panelist within 30 days of the commencement of the IRP, and the suggestion was, do we consider clarifying that that timeline should be 30 days from when the standing panel informs the parties that it does not have capacity. That obviously isn't quite the same timing. So, a question to the group, really, whether there is comfort in making that change, or whether we should keep what we have, which I think is probably my preference, but I'm not sure. But make that note, again, that this is alongside, well, in fact, we've asked the community, generally, for their views on timings, and I think this goes sort of hand in hand with that. But this 30 days from when the standing panel informs the parties that it does not have capacity, Okay, I'm not seeing any hands. David, would you mind clarifying, are you supportive of the change or to sticking with what we have?

DAVID MCAULEY: No, I was saying, I thought the change seemed fair. Thanks.

SUSAN PAYNE: Okay. Kristina.

KRISTINA ROSETTE: I think I'm really conflicted because it basically then if it's 30 days from when the standing panel informs the parties, then it's 44 days from the notice of the initiation of the proceeding. And that's kind of a long time. On the other hand, however, saying it's 30 days from that notice of initiation of proceeding. And I just want to drop a footnote that I want to go back and check something because I just want to make sure that commencement of the IRP doesn't have a different meaning than notice of initiation. But then we're only giving the parties 16 days and I don't know, maybe we split the difference. 44 seems too long, but 16 seems way too short.

SUSAN PAYNE: I can see David's support for that. I'm a bit reluctant just at this point in time to start changing it. I think my preference, because it does seem like this is one that requires a bit of thinking about, my preference is to keep it as it is, but highlight it as something that we'd like some thoughts on, is this long enough? David.

DAVID MCAULEY: Thank you, Susan. I just want to say I could certainly support splitting the difference, but I don't have strong feelings in this area. And I think your points are good one too about making changes. So I would support that too. So you might take consideration of my comments off the table here. I just don't have strong feelings in this respect. Thanks.

MALCOLM HUTTY: [inaudible] Susan's suggestion as per my comments in the chat.

SUSAN PAYNE: Thanks, Malcolm. Okay. I think I'm going to sort of exercise chair's prerogative and stick as we are, but note that that's another thing that we'll flag as a question. Okay. Thank you. Our next question from the drafters comes in paragraph E, which is about striking the names objected to I think probably. We should all take a moment to just read E. And while you're doing that, maybe I will ask Brenda, would you mind giving me a dial out? Because this is this is proving a bit unsustainable. So I'll just leave everyone to read E and have a think about the question that's asked about whether we have limits on the numbers that can be struck out. Okay. Malcolm.

MALCOLM HUTTY: I don't see any problem here. As written, I would read it as meaning that they had an indefinite number of peremptory challenges without cause. I would have thought that that was not actually a problem that was likely to be abused because if ICANN were to abuse it, they wouldn't be doing themselves any favors. Generally, with regard to the process, and if an individual claimant were to do it, well, why would they? Because they're the ones seeking a hearing. So, but I would be happy to put the drafters' questions as questions to community.

SUSAN PAYNE: Thanks, Malcolm. Certainly, I'll come to Kristina first and then I'll just make a comment as well. But Kristina.

KRISTINA ROSETTE: Thanks very much. I would prefer that we not put a limit on how many, on limiting the number of names that can be stricken. If I'm reading the ICDR rules correctly, there's no current limitation now. I'm not aware that the absence of any limitation has caused significant problems. But in the event that it has, I would certainly be open to hearing more about that. In the absence of that, I would prefer no limit. Thanks.

SUSAN PAYNE: Thanks, Kristina. And that point was one that I was going to make, which is, although this had to be sort of my—marginally tweaked this text in order to make it fit with our rule in terms of things like changing some of references to panelists from arbitrators and that kind of thing. This is essentially picked up and carried over from the ICDR rules. And so, I would say the same that the current ICDR process doesn't have limits. And like you, I'm not aware of it having been a problem. Certainly, those of our group who are practitioners, sort of practitioners in this area, didn't express this as having been a problem. So, I'm minded again to keep as is. But if it seems appropriate, this could be one where we do ask the question. But I think if we ask the question, we perhaps ask that pointing out that this is what the current arbitration will say.

Okay. All right. Then I'm just going to toggle back to the other version. There's a reference right at the end of that paragraph E to the tribunal. And it says that [inaudible] shall, if necessary, designate the presiding panelist in consultation with the tribunal. And they say it's unclear what the tribunal refers to. It's not defined anywhere in the draft and we should clarify. That is a good point. It is carried over, as I just said, this has been carried over from the ICDR rules. And so, I'm not sure either

who the tribunal is. But perhaps it is a reference. I think maybe that's one where I might need to have a quick look at the ICDR rules themselves. I'm not sure the standing panel, because I think this whole situation comes into play where you potentially don't have a standing panel for some reason. Either because there isn't one or there is one in place but it doesn't have capacity. I guess it could be in consultation with the standing panel if we have one. I'm rambling a little bit because I'm not sure of the answer. I may take an action item on myself to just double check back on the ICDR rules in case I can work out what it's meant to be a reference to. And then we can reconvene on that one, I think. I'm just making myself a note. All right. We'll keep moving down. I think nothing of particular note. Apparently I've got a hand. Kristina.

KRISTINA ROSETTE: Yeah, I was just going to note I stuck in the comment that I think tribunal should be party selected panelists. But that applies only in the instance where the two party selected panelists that there is no agreement. That wouldn't address the situation where the panel, the standing panel doesn't have capacity. So I just wanted to flag that my party selected panelists is not necessarily correct.

SUSAN PAYNE: Okay. Yeah. I mean, it does seem one of these situations where it may be just really unlikely. Yeah, I've made a note of that as well. And I will see if I can work out what the situation would be in our rules if I've carried this over from ICDR back in the day. So, yeah, I'll double check

this after the call because I can't do it while we're on the call and we'll see where we get to.

All right. Let's keep moving down. We're into conflict of interest now and there's a question here for us. Oh, no, sorry. In paragraph four rather, we've got a note from the drafters. Refer highlighting rule three of the supplementary procedures. Okay. It says the draft rule three language indicated that this section three of these supplementary procedures and they want to confirm that it was a reference to rule three. Okay. So the text of four is in the event an IRP panelist resigns or is incapable of performing the duties of a panelist or is removed, the position becomes vacant and substitute panelists shall be appointed pursuant to the provisions of ... Yeah, I think it is this rule three. I think that is the intent. That's the whole of this rule three is about selecting panelists. Any disagreement there? All right. Not seeing any hands, so I'm going to assume that's correct.

All right. And then we're now in the conflict of interest section in paragraph A, bylaws. There's a reference to the bylaws article 4.3 Q1. So the note from the drafters is to note that per bylaws 4.3 Q1 and then capital B, the IRP IOT is tasked with developing additional independence requirements, including term limits and restrictions on post term appointments to other ICANN positions. And so it's for us to consider developing such requirements.

I think that's a note for us to bear in mind. We have. I think, Bernard, we have a sort of a document that you're keeping for us of tasks that we need to do. I don't think we need to do that for the purposes of what we're doing here. But I think this is just highlighting to us that that is an

additional thing that's been put on our plate for us to bear in mind. But again, I'll just pause and just make sure that no one has concerns about that. But Bernard is going to add that to our list.

All right. Then I'm going to keep moving, moving on. And paragraph 5C. There is a question here in C where we've got the wording. Actually, I'll read you all of C. C says prior to accepting any appointment, potential IRP panelists are also expected to consider whether other circumstances of the relevant IRP are liable to influence their decision such that they would be considered to have a conflict of interest. An example of such circumstances would be where considerations of nationality are material to the matters in dispute. And the question or the note for us is to consider whether an example is necessary at all and/or to clarify this example. OK, so Malcolm.

MALCOLM HUTTY: I would delete the example, but I would also think that it's not just whether they would be liable to influence. It's also give rise to the appearance. Is that covered by such that they would be considered or is that actually a qualifier to it? I'm not sure the language of the previous sentence is clear.

SUSAN PAYNE: Okay. I'm noting that. Kristina.

KRISTINA ROSETTE: Yeah, as the person who gave nationality as an example here, I'm happy to drop it. I do think Malcolm makes a good point. You know, as the

lawyers on the call know, in some cases, it's more about the appearance of a conflict than the actual existence of a conflict. I was just going to note that maybe this is one where we delete that example, but flag perhaps in the rationale that this is an area, this is a provision in which if the community thinks it would be helpful to have examples that maybe they want to suggest them and we'll take them under consideration. Thanks.

SUSAN PAYNE: Thanks. David.

DAVID MCAULEY: Thank you, Susan. I just wanted to say I agree with what Malcolm said, and I think whenever the next appropriate time is for coming up with language, we could address the appearance issue. I, with respect, disagree with Kristina's idea that we—I think it's better not to have an example, frankly, and I wouldn't want to ask the community for examples. What if we got 50? It would just be too time-consuming to go through them. And I just, I, my preference would be strongly that we not have an example. Thank you.

SUSAN PAYNE: Thanks, David. I must say I slightly share the concern that we could end up with 50 different examples and then we have to try and decide what to do with them. Perhaps it may be preferable not to ask the question. But it may be that we need to be reflecting on whether considered to have a conflict of interest is the right terminology. Again, I feel a bit like

this might be again one that is unwise to start opening up at this point. But I do think the intent behind that was more than, my assumption would have been it was more than, it encompassed the appearance of, but it may be that that language isn't sufficiently clear. My preference, I think, would be for us to have a public comment and then reflect on whether the language is adequate. Yeah. And Kristina is saying that she also thinks that we intended to encompass appearance of conflict. Malcolm.

MALCOLM HUTTY: I'm actually reading this over and over. I think it's a grammatical issue. It's the such that, yeah, as written, the such that appears to refer to the liability to influence. Whereas actually the intent is that it refers to the circumstances. So it ought to read something like expected to consider whether other circumstances are liable to influence their decision or the circumstances are such that they would be considered to have a conflict of interest, give rise to the appearance of a conflict of interest. Yeah, that sort of thing. That sort of objective outside look rather than the internal view as to whether there is actually a conflict as the panelist decides. So it's the such that language that I think is doing the damage here.

SUSAN PAYNE: So you're saying the circumstances are liable to influence their decision or—

MALCOLM HUTTY: It's really what we want to say. There's two alternatives here.

SUSAN PAYNE: Yes, so there should be an or such that they would be considered to have a conflict of interest.

MALCOLM HUTTY: Yes. And I prefer the language of give rise to the appearance rather than considered because the considered implies an outside independent judgment that they had a conflict of interest. Whereas what we're concerned about is just the general sense of propriety. You know, everything being seen to be whiter than white. I think likely to give rise to the appearance is actually quite a common phrase. I've encountered it before.

SUSAN PAYNE: Okay. All right. I think we do seem to have quite a lot of support for making that change. So I think perhaps I will slightly break my own rule and we will make that sort of slightly more substantive change. The feeling is that what we've got currently isn't really reflecting what we intended.

Malcolm, if you had a moment to drop into an email what you suggested, that would be helpful if you have time.

MALCOLM HUTTY: Happy to.

SUSAN PAYNE: Thank you. Perfect. All right. I'm going to keep going down in the document. Okay. We now then reach rule four. Okay. So rule four and 4A. 4A is the principles of initiation that we can now start looking at. Obviously, this first section, 4A, is one of the ones where we as a group hadn't drafted language for the rule, but we had drafted a set of principles. And so there is what looks like an awful lot of redline here, but I think that is for that reason, that that we basically asked the legal process to actually come up with this section. Malcolm.

MALCOLM HUTTY: I don't want to be disruptive or to waste the group's time, but since this is an approval meeting, can I formally enter into my standard objections regarding the ultimate repose function and have that written into the record on my own behalf? And my belief that this is also on behalf of Greg Shatan, who I believe supports it, Mike Rodenbaugh, who I believe supports it, and whose name escapes me because she hasn't been here for so long, but was for many years a member of this group and also supports it every time she's asked. Anyway, thank you. Can we have that just written into the record? And I don't want to waste the group's time.

SUSAN PAYNE: I think we can write this record on our own behalf. I'm not sure we can write on behalf of others, some of whom haven't come to a meeting for more than a year. It may well be that they—

MALCOLM HUTTY: In that case, can you please write in my objections to that decision? Because they made this case over and over again for years. And the fact that this group has gone on for so long and has worn them out should not be ignored. So if that's your ruling, then so be it. But please also have it written into the record my objection to that ruling. Thank you.

SUSAN PAYNE: Fine. Okay. But I would say we appreciate, we're very aware of your objection and it has been reflected in the text. And it's made very clear. And we're going out to the public for this comment period. And they will be very clear that there is an opportunity to comment on this. And we've reflected the fact that this was a difficult compromise that not everyone is in agreement on.

MALCOLM HUTTY: Which I welcome. I wasn't trying to reopen it, Susan. But the last time we went to public comments, I was accused of having supported something that I didn't just because I was seeking to avoid being disruptive to a view that went against me. So I just want to be clear about this.

SUSAN PAYNE: Okay. All right. That's good. David.

DAVID MCAULEY: Thank you, Susan. I think Malcolm's point about the standing objection is a fair one. You know, we ought to assume that that's there. I have remembered the name. I bet, Malcolm, you were talking about Robin Gross.

MALCOLM HUTTY: I was indeed. Thank you, David.

DAVID MCAULEY: You're welcome. But this discussion—and I know where this is sort of a parenthetical to what we're doing. I'll just be very brief. But this discussion raises the point. How do we get to closure? And I think our list is going to be important to us in this because there are people like Robin who haven't been here for a while. So we're going to need to recognize ourselves, the small group of us, that we're going to have to go to list. And we need to put our thinking caps on for those who are going to be in Puerto Rico for ICANN 79. How do we encourage people to come back now that we're getting to a a important decision point? I've thought we could do encouragement on the list, but I think we need to think of creative ways to get our group back together. And as I said in chat early on, I'm very thankful to you, Susan, to Bernie and to Brenda, Liz, Sam, whoever it was, has been instrumental in getting us time at ICANN 79. Thank you for that. But we're coming up to an important point. We're going to have to rely on list, but we need to get people's attention and draw them back. Robin and everybody else. So anyway, I guess I'm venting, but I think it's an important point. And Malcolm's comment made me think of it. Thank you.

SUSAN PAYNE: Thanks, David. You know, if people have suggestions or even want to take advantage of their own contacts to encourage some reengagement, that would be very welcome. You know, I have on various cases reached out to people individually and it hasn't necessarily had the effect of bringing them back to the group. And there is only so much that can be done, but I certainly have no objection at all. If we can find a way to get them to reengage, I would be obviously very supportive of that.

All right. Let's start with rule 4A. As I said, we had some principles of initiation here. We didn't have draft text. So I'm trusting that you have all reviewed what has been drafted and that to the extent that you have any concerns about what's been drafted not reflecting what our agreement was, that you would have flagged it. So we don't have a huge number of comments, but there are some and some of them are some questions from the drafters and some of them are a few things that I noted. So I think as before, I think we'll just go through picking up the comments. And my assumption is that the text itself, people have generally [inaudible].

Okay, so the first of those notes is I think just pointing out, noting that we had prepared concepts and principles and not draft text to rules 4A and 4C. And I don't think it's a question. It's just a note for them to explain what the drafters have been doing. I think that that's fine.

If we move down, there's something that I picked up on, that we had in our original text of our principles something to the effect that the filing

fee was intended to be a first gate to limit trivial or vexatious uses of the process. But the amount should not be so high as to have a chilling effect, discouraging potential claimants from using the process. That's not something that's been captured at the moment in the draft rule. I'm not sure that it fits within the procedural rules. And so a question really, or perhaps even a suggestion from me, is that perhaps we need to have a separate document that captures some of these principles and that they become part of the recommendations to the board, whether a handful of principles or things that we had in our document that really don't fit in the rules as such. And does that seem like a sensible option so that it remains part of our output at the end of this process? And if so, does it need to go out to public comment or indeed is there some other way that we capture this? And so I will pause and see if I have any hands. David.

DAVID MCAULEY: Thank you Susan. By the way, another parenthetical, I didn't use the Google Doc. So I just made comments in writing on the Word doc and thought that I'd bring them up here on the phone and I have as we've gone along. So apologies for that. I tend to, anyway, forget that Google Doc. I just didn't use it. So anyway, on this particular issue, I think we can keep the rule. I think we shouldn't put a money amount, just put the applicable fee. This group, if that's our task to set the fee, then we could do it and tell the ICDR. And I know we did discuss what is the amount. It needs to be high enough to be a serious case, but not too high to dissuade people from bringing legitimate cases.

And I think it's also related to another part of the discussion we had that blew me away. That is, I had not realized that the filing fee was reimbursed to the claimant at the end of the case by ICANN. And the practitioner said, yes, that's in fact the case. And so if that is the case, then whatever the amount is, as long as it's not something like a million dollars, the plaintiff or the claimant is going to get it back. So it seems to me that we should probably not have too much trouble resolving this, deciding what an applicable fee is whenever the time comes. But I think if we used applicable here, we'd probably be able to have a rule. Thank you.

SUSAN PAYNE: Thanks, David. I just dropped briefly, so I'm just reconnecting in the Google, in the Zoom room, I think. But in the meantime, yeah, I think I had perhaps passed over—apologies—that first question. I missed it from the drafters saying, do we want to set the actual fee and have the fee in the rules? I don't believe we do. I don't think that was ever our intention. I certainly don't think—It never seems like a good idea to draft a rule and put an actual monetary figure in the rule, because that doesn't then allow for inflation or changes in that monetary figure without a whole exercise of redoing the rules. So certainly I agree with you. I don't think we should be setting the fee. I don't think that was our intent, or indeed that it was our intent that we had a figure. So I think probably sort of nothing more than a reference to there being a fee is what we're really intending here.

But that does bring me to, I had leaped over this whole paragraph one entirely. It does bring me to the comment that I had flagged, which is

that as presently drafted, that first sentence says the written statement of a dispute filed by the claimant shall be accompanied by the appropriate filing fee. And that's somewhat inconsistent with what we say later on, which is something that's in the current rules and that we have retained, which is that in order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days as measured by ICDR of the filing of the request with them.

And so in this paragraph here, we seem to be slightly inconsistent with that three-day leeway, let's put it that way. And so my feeling is that this does need to be slightly tweaked to reflect the fact that there is a written statement of dispute and the appropriate filing fee required, but they aren't necessarily required to be filed at the same time. Apologies. Liz?

LIZ LE: Thanks, Susan. I understand what you're saying. I think maybe we can clarify a little bit because I think the filing fee has to be submitted, if I recall correctly from when I was a practitioner of IRP, it gets filed with the notice and then this statement of dispute is then accompanied with the notice, but I think the fee is attached to the notice. That's what it has to be accompanied by.

SUSAN PAYNE: Sorry, apologies. Could you say that again? I don't think I followed.

LIZ LE: Yeah. So I, as I recall, when an IRP is filed, there is a notice of IRP. That's just a one-form paper, page paper that has to be filled out. And when that notice is filed, I think that's when the fee has to be filed with the notice. And then usually what happens is the statement of dispute is also then attached to the notice. So I think, I understand we can put in, I think your proposal to put in the three days from what was section 3D, maybe we can put it up here. Maybe we want to clarify that it gets filed within three days with the notice and the appropriate fee within three days.

SUSAN PAYNE: Yeah, I'm not exactly sure what I'm asking, if I'm perfectly honest, but I do feel like we, at the moment we've got two clauses that just don't seem entirely consistent. And so, you know, maybe that is the answer, is to have that just clarified and including in that clarification might be, you know, bringing that clause up here. It might be a more appropriate place for it to sit. So I think perhaps that's a point to note for an amendment that we'll be seeking, if that's all right, Liz.

LIZ LE: Yeah, that's fine.

SUSAN PAYNE: Okay, thank you. Okay. And then I'm also going to jump back to another, one of the other comments that I missed at the beginning of this section on principles of initiation. I will just reflect on the point that I was trying to make, which was just a sort of overarching comment is that we had,

again, back to, we had a number of principles on initiation that we had in our document, and some of them aren't captured here in the rules. So for example, the first one that we had was about the need for clarity for claimants and potential claimants, relevant information being available, there being a section in the ICANN website, relevant forms and fees being, you know, readily findable. That, you know, all the rules should be in the same place, language should be clear, terminology uniform, that sort of thing. And then at the very end, we had one that was related to the wording of the ICDR form, which was a principle that we also captured about, you know, some improvements needed to the form, which we discussed, and those changes to the form were something that were needed, that fits with the ICANN legal team, it was not something that we need to do, but we've captured it in our principles. So it's really just back to that initial question that I started to ask the group, which is, it seems to me that those principles are quite important, they were things that we talked about quite considerably and they do reflect our sort of shared agreement on things, improvements we'd like to see, but they don't really fit in [inaudible].

So back to that question, I think my suggestion from me, which is that we perhaps capture this somewhere else in a separate document that just is a document that reflects, you know, kind of other outputs from the group or other recommendations from the group that aren't recommendations about the rules, and so this would be one of them where we've got a few of these principles relating to initiation that we don't capture in the rules. And so I'm not seeing any objections to that. I think I'll sort of leave that with people, but that would be my suggestion because I think otherwise some of that good work that we did might get

lost just because it doesn't fit in the procedural rules. And one of them relates to, as I was saying at the beginning, that principle about what the level of the filing fee in terms of it not being a barrier to entry, but being a sort of discouragement for the frivolous is something that we would want to not have lost.

And then also in there, in... Brenda, if you could scroll down to where we've got the section that's all crossed out about the filing fee in that first red paragraph there that is right in the middle, that second highlighted section where it says, "Rather than attempt to develop such complex rules, dealing with a waiver, this should be addressed via the process envisaged in 4.3Y." And I think that again is something that isn't in the procedural rules, but that is, I think, something we should put into the rationale document for this section. And that would be my proposal. Kristina.

KRISTINA ROSETTE: Susan, you kind of took the words out of my mouth. I was going to suggest that that whole highlighted bit in what was 4A that has been crossed out, the filing fee should be a first gate rather than attempting, and then further on ICANN should review. I think it would be prudent and frankly efficient to include it in the rationale as a note to the community. I don't want folks to kind of get hung up on the IRP, you know, the IOT isn't going to make any recommendations on the fee, and it could end up being really high and this isn't right, da da da. I don't want people to have to spend a lot of time on something that we've actually already kind of agreed on. And I think if we don't at least include some mention of it in the rationale, I think there are folks who

will unnecessarily spend time on it. You know, they may agree with everything we say, but because we haven't actually pointed it out in the rationale and it's not in the rules, they're not going to know our view.

And also, I would just note, following up on Liz's comment earlier, I just went back to the ICANN page on the .Amazon IRP, and under the rules that applied at that time, you filed a notice of request to initiate an IRP that was kind of a one pager that had all of the information about the parties, etc. And then you also accompanied an actual request for independent review process. And the filing fee went with the notice, if that helps. And that's the link I put in the chat.

SUSAN PAYNE: Okay. Excellent. Thank you. That's really helpful. All right. Good. I agree. I think some of that, those principles, you're absolutely right. They do sit nicely into the rationale document. And so that's something that we can reflect on. And I'm going to scroll down a bit further. And I think that there's some more text in relation to the filing fee and looking at similar processes and so on. But again, if, you know, your comments just then, Kristina, I think they do sit quite nicely in the rationale document. And I think those are in the document. I think those are all the comments from the drafters in this section 4A. And I think from my review, I was fairly comfortable with where the redline, blueline, has come out in terms of the draft text for this section. But I will just, you know, give one sort of final opportunity for anyone to flag anything. Malcolm.

MALCOLM HUTTY: So I have slightly lost track, but we are on cost shifting. Otherwise, I'll hold my mic for the appropriate time.

SUSAN PAYNE: The cost shifting section is in this section 4A, I think. I'm going to have to find it now. I think, perhaps, bring up your point, Malcolm, because I'm not quite sure if we're there or not.

MALCOLM HUTTY: In the section on cost shifting that the editor has added, they seem to have introduced a new concept, which is that the cost can be shifted if the panel decision finds that all or part of a party's claim or defense is frivolous or abusive. I don't know where that all part of came from. Have we actually even discussed that? It doesn't appear in the bylaws.

SUSAN PAYNE: I don't think we have discussed it as such. I think as a matter of practice, that is what happens. Having read some of the IRP decisions, it seems to me that that is what the panelists do. They look at different parts of the claim and they may find that one element of your claim was frivolous and then they would cost shift the cost in relation to that element. That is, I think, what happens in practice. Liz, I'll turn to you.

LIZ LE: Thanks, Susan. Just to follow up on what you said, that's correct. Also, I think it comes from the language that you see on the first sentence that states, notwithstanding the above, whether three-person IRP panel

making is IRP panel decision finds that part or all of the parties' claims, defense is frivolous or abusive. That's why it then takes it and continues on with that rationale to pay, to shift or apportion of the filing fees and so on.

SUSAN PAYNE: That would be my understanding. I guess I'm going to... Well, I guess my question, then, Malcolm, is what is your suggestion? Perhaps we remove the reference to part of, but I don't believe that that will change what happens in practice. I'll go to David first. Sorry, I just realized David has his hand up.

DAVID MCAULEY: Thanks. I was just looking at the bylaw before Malcolm put it in there and that's what the text says, indeed. I think he's right. Literally, those words part of do not appear, but I think there's a necessary implication that would support what the practice is and that is a claim. It talks about a claim or defense, but rarely does a claim not have parts. Certainly, people argue multiple defenses. I think a claimant would be very unhappy if there were 10 elements of the defense and one of them was frivolous, if the entire cost were shifted. So, I think it's a sensible, probably necessary, probably supportable implication from the words claim or defense, just based on the practice of people tend to litigate alternative theories, etc. Anyway, those are my thoughts. Thanks.

SUSAN PAYNE: Yeah, thanks. Thanks. And I'm noting Kristina's view of the application of substantive change, but I'll go back to Malcolm. You've got your hand up again.

MALCOLM HUTTY: Okay. This is obviously something that will matter greatly to the parties and particularly to a claimant who potentially risks very severe financial consequences if they have to start paying ICANN's costs. I basically agree with David and others that have spoken that it's likely that some form of this will happen, but there is a question of granularity here and what level of granularity the panel should be looking at when deciding, "Oh, well, this small bit was frivolous, so we will shift it over." And I think there's likely to be, in the event of this thing happening, the parties will actually want to argue about this. And given that, I think it will probably behoove us to stick as closely to the bylaw's text as possible and let the panel itself decide upon how large a portion of the overall case needs to be considered that to invoke this clause, rather than us create the rule that says, "If even any part of it is, then they should do so." So I think we should stick closely to the existing bylaws here and let that be argued over in the proceeding that's referred to later, which is about where the parties have actually given right to be heard on this matter. Yes, as David says, arguments over cost shifting is provided for, indeed, exactly. So let's not skew that argument by adding words to the bylaws that don't exist at the moment.

SUSAN PAYNE: Okay. I mean, I'm a little bit confused, though, Malcolm, because I'm looking again at the text and that's not part of the redline. I mean, that is what we'd agreed as one of our principles. So you're now opposing that. Is that correct?

MALCOLM HUTTY: I thought that was... Was I misreading that? I did ask whether this was something that we'd discussed. If I'm opening up a new point now that's out of order, then okay, fine, disregard it. And maybe take that as a suggestion we should invite comments on it. And nothing more. If I'm out of order, I apologize. I thought this was... Maybe I misread that.

SUSAN PAYNE: I will double check. I will double check to make sure I'm not misrepresenting things. But I thought, I think just quickly looking at this in what seems to be paragraph five, I think that's the number it's got. That bit isn't part of the redline text. But I think it's a point to note for... I'll double check just to be sure that I'm not misleading you. And we'll note that this is something for calling out for the public comment.

All right, apologies. We are more than at time. I had meant to wrap up a little bit quicker than that. Assuming that we can get quorum, we will have another call next week to try to keep going. We didn't get to the end of all of the sections of rule four this time around. But I think we'll try to get through rule four and hopefully make some progress on the rest of the rules if at all possible. So we'll be looking for people to have reviewed right through to the end of the document by next week, hopefully. I have already noted Kristina is not available. Is anyone else

not going to be available next week? Just to get a sense of whether we're likely to get a quorum. Okay, it looks like hopefully we'll manage a quorum next week. So we will keep going. We'll be meeting this time next week then on the 20th. All right, and sorry for running over. Thanks very much for all of your input and discussion. It's really helpful and we are getting there. Okay. All right. Thank you. Brenda, we can stop the recording.

[END OF TRANSCRIPT]