BRENDA BREWER: Good day, everyone. Welcome to the IRP-IOT Plenary on 20 February 2024 at 18:00 UTC. Today's call is recorded. Please state your name before speaking. Have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. I've received apologies from Flip, Greg, and Kristina.

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

SUSAN PAYNE: Lovely. Thanks, everyone. Thanks for joining this 20th February call. We are largely working through the redline text from the legal draft on the [inaudible] sections of the [inaudible] [that they're] due to put out for public comment.

So as usual, I will start off with reviewing the agenda. We had a couple of action items that we'll circle back on. And I'll just note that [there at Agenda Item 2] Agenda Item 3 is the bulk of our discussion, which is continuing to review and agree any changes to be requested on the draft text. We'll be starting there at Rule 4B, which is where we got to at the end of the last call.

And then Agenda Item 4 is just noting, for people's reference, the timings of our two meetings at ICANN79. I hesitate to say that we'll probably use at least the first of those in finishing off going through this draft redline text. It's possible we'll get through to the end today, but I think it's probably unlikely [inaudible] sort of more to follow, really, on the plans for those two sessions, depending on how far we get today.

And then Agenda Item 5, AOB. Just seeing now if anyone has anything to add as AOB. And if not, I will come back to that at the end if anyone has anything they want to raise.

All right. If we go back up to the top of the agenda, then. Does anyone have any updates to their Statements of Interest that we need to [submit] to the group? All right, not seeing anything.

Then we can come on to the review of those—circling back on those action items. So the first one was in relation to Rule 3, Section 3E.

And actually, Brenda, could you call up the redline that's in the Google Doc? And we can actually go to that section. Thank you. So a little bit further down, it's Section 3E. Yes. Just there.

Okay. And the point that I took away to double-check on was that last sentence where it says "The administrator shall, if necessary, designate the presiding panelist in consultation with the tribunal." This just is a reminder of one of the situations where outside [helpers] have to step [in as] IRP Panel [inaudible].

And as a reminder—and as I circulated yesterday—[inaudible] how this is handled where outside assistance is needed is adapted from the ICDR Rule on this. And, actually, this reference to the tribunal is a reference from the ICDR Rules that I hadn't picked up on and had carried across inadvertently. But having looked back at the ICDR Rules, the other places where "tribunal" is used, the term "tribunal" or "arbitral tribunal," those two terms are used quite interchangeably in ICDR Rules.

So I would say in our supplementary procedures, therefore, this would be a reference to the IRP Panel. And so [we'd have] that sentence reading "The administrators shall, if necessary, designate the presiding panelist in consultation with the IRP Panel." And so that would be my suggestion. As I say, that then [inaudible] what the position is under the ICDR Rules, which this was based on.

I'm seeing agreement from David in the chat. I will pause and see if anyone has concerns about that [inaudible]. I think that makes sense.

Okay. And then if we scroll down the next item related to Conflict of Interest. [And that is] 5C, I think it is. 5C is that paragraph that says "Prior to accepting any appointments, potential IRP panelists are also [expected to consider] whether other circumstances of the [inaudible] IRP are liable to influence their decision." [inaudible]. They will be considered to have a conflict of interest.

And then we had that final sentence. "An example of such circumstance would be where considerations of nationality are material to the matters in dispute."

As we discussed on our last call, I think we felt comfortable that we didn't need that example. So the proposal is to strike that last sentence.

And Malcolm had offered us—he proposed some text to slightly revise the reference to conflict of interest to take into account considerations of there being a potential for an appearance of conflict of interest. And so there has been a little bit of toing and froing on the e-mail, particularly just in the run-up to this call. But I think where this probably has come out, or where I would suggest this has come out, is Malcolm's most recent

e-mail where he has suggested that we use the wording "prior to accepting any appointment, potential IRP panelists are also expected to consider whether other circumstances of the relevant IRP are liable to give rise to a conflict of interest or to give rise to the appearance of a conflict of interest."

And I did actually add that in to the Google Doc in case any of you were following this in your own copy outside of the call. It's not showing up in the window at the moment.

I don't know if maybe you can scroll down a tiny bit, Brenda. It may show up as one of the side comments. Yes, there it is.

So I think I will leave that with people. Interested now if there are any concerns about that. I think that makes sense and seems, to me, to capture what our intent is.

Apologies. Kavouss, I see your hand.

KAVOUSS ARASTEH: Yes. Good afternoon or good day. Like me, you lost your voice. Right? It seems that you have a little bit of difficulty [to talk].

SUSAN PAYNE: I'm afraid so, yes.

KAVOUSS ARASTEH: Yeah, yeah, yeah. I also lost my voice when I was in Dubai for one and a half months in conference, and have difficulty. Okay.

Now, could I ask you kindly to say the relation between C and D? I think D is a consequence action on C. Am I right or [wrong]?

SUSAN PAYNE: I think C and D are really talking about different points in time. So C is considering the situation where a panelist is being appointed and being selected from the pool of panelists to be an IRP panelist for the particular case. And they're expected to give consideration to whether they would have some kind of a conflict of interest.

And then D is just making it clear that this is an ongoing expectation. So if it becomes clear to the IRP panelist that a conflict develops after they have taken on the role as an IRP panelist, they do have this obligation then. So it's really to just reflect the fact that there's an ongoing obligation.

KAVOUSS ARASTEH: I'm sorry. I have difficulty with the word "develop." The panelist does not develop the conflict. Develop is to produce or to a start [inaudible]. The conflict is not developed. A conflict exists or it occurs, and so on. I may be wrong, but this morning when I read this from [multiple] authors, I had difficulty with the word "develop," and I said that may be wrong. That D has some connection with C. C is a sort of, I will say preamble of D.

But in any case, if you don't have the same idea as I have at least in the D, the term "develop" may be replaced by some other word.

SUSAN PAYNE: Thank you, Kavouss. So Liz has suggested in the chat that perhaps we could use, instead, "becomes aware of" rather than "develops." And I think that would address your point here.

KAVOUSS ARASTEH: Could you repeat that [inaudible]? Instead of "develop," what word [is used]?

SUSAN PAYNE: "Becomes aware of."

KAVOUSS ARASTEH: [inaudible]. Very good job.

SUSAN PAYNE: "[inaudible] where at any time"—

KAVOUSS ARASTEH: That is very good. Okay, good. Thank you.

SUSAN PAYNE: Yes, okay. And so then that D would say "where, at any time, an IRP panelist develops"—no, sorry—"becomes aware of a conflict of interest or"—[just citing] Malcolm's suggestion—"or becomes ..."

Apologies. Let me just scroll down. "Where, at any time, an IRP becomes aware of a conflict of interest or the appearance of a conflict of interest,

they must recuse themselves." And that was the other suggested change that Malcolm had made, just, again, reflecting there being an actual conflict or the appearance of a conflict.

And again, that certainly seems to make sense to me, and I think [inaudible] our intent. So I will just pause and see whether there are concerns to that. Again, in relation to that Section D, I did add that suggestion from Malcolm into the comments in the document so that it's captured there.

Liz.

LIZ LE: Thanks, Susan. It's Liz Le with ICANN Org for the record. So just to be comprehensive when we're defining conflict of interest, if we're including "a conflict of interest" and "or the appearance of a conflict of interest," perhaps we want to spell it out and say "actual, potential, or perceived, or the appearance of," whatever you want to use instead of "perceived conflict of interest" so that we also have the "potential" reference in there. Just something to flag for the group to consider.

KAVOUSS ARASTEH: Excuse me. Could you please repeat what she suggests?

LIZ LE: So what I'm suggesting is instead of just saying "conflict of interest" or "the appearance of conflict of interest," we might want to consider saying "an actual, potential, or perceived conflict of interest."

SUSAN PAYNE: Okay. Instead of the reference to "appearance of"? Is that your proposal? Or is it in addition?

LIZ LE: No. I mean you can—

SUSAN PAYNE: I think maybe—

LIZ LE: I think "perceived" or "appearance of" is the same. I think what we don't have is a potential. So it's just to make it clear that a conflict of interest can be defined as "actual, potential, or the appearance of conflict." That's what I'm suggesting. That if we are going to make it clear and add "appearance of conflict of interest," we might also want to add "potential" in there so that it is clear how we're defining conflict of interest in the rules.

SUSAN PAYNE: Okay. Thanks for that, Liz. I've got a couple of hands up now. So Kavouss first and then David.

Kavouss.

KAVOUSS ARASTEH: Yes. I am in agreement to put "potential" because we say that they should [rescuse] or excuse, and so on and so forth. It is potential. It is not the actual. But then even starting with "potential," I think we don't need to say this or that. The more words, the more problem with [inaudible]. I think with the one single word, the potential conflict of interest, they have to take decision or they have to [rescuse] or excuse or something. So only one word, but not "and/or" or something together. So I think "potential" is the most relevant one. Only one word, "potential." Thank you.

MALCOLM HUTTY: Thanks, Kavouss. David.

DAVID MCAULEY: Thank you, Susan. Hi, everybody. I normally think along the same lines that Liz does, but not in this case. I'll push back on this just a little bit. My concern here is that the word "potential" could be anything. I mean, the world is full of potential. It's limitless. And a potential conflict of interest is a situation where a conflict of interest does not exist but could develop. And so we cover that, I think, by the language "become aware of." And I'd rather stick with that than throw the word "potential" in there and invite people to point to any kind of attenuated circumstance and say, "That might be potential."

So, anyway, that's my thought. I'm not quite on board on that one. Thank you.

SUSAN PAYNE: Okay. I'm seeing a couple of agreements with David as well there. So I don't think we've got an agreement on this. I think I'm happy if you'd like to circulate that language to the group to pick up [inaudible] some of those who aren't on the call to see it, Liz. But I think, absence of a strong agreement, if you do decide to circulate it around, I think we'll stick with what we've got. And, obviously, there will be opportunity for a public comment to that effect if you feel you want to do so.

Kavouss.

KAVOUSS ARASTEH: Yes. I agree with David. The issue that [inaudible] potential because Liz proposed several words. [inaudible] "potential" among them, but I fully agree with David that "become aware" or "became aware" is sufficient. Thank you.

SUSAN PAYNE: Okay, all right. Then, in which case, I think let's keep this language as is, then. And obviously subject to the amendments [that we've been talking about] [inaudible] and the change of that reference to develop.

Liz, I think if this is one you want to pursue, perhaps it could be done as a comment, if that's okay.

All right. Then we will next move on to Section 4B. And the other follow-up point that was one for me—sorry, 4A, rather—was 4A Section 5. Malcolm had raised a concern about the reference to [inaudible] if part or all of a party's claim or defense was frivolous or abusive and had

expressed some concerns about that [inaudible] it was something that the group had previously considered.

So, again, I had taken an action item to go away and double-check this. So, again, as I circulated yesterday, the concept of looking at all or part of a party's claim or defense and considering whether it was frivolous or abusive is something that, as a group, we have had in our draft for quite some time. And so it was not a product of the legal drafting process that's just happened. It's text that we've had for a steady period of time.

And then I also did note that is something that also is looked at in practice [and identified] the dot web case where in fact the IRP Panel specifically considered this issue about whether the whole of the claim or defense must be frivolous or abusive before the cost shifting can take place.

So, again, just flagging that for the group. I think this is probably, without going back to all of the recordings, I can't say for certain exactly the extent which [inaudible] the practice of the cost shifting that's been happening in existing cases was something that we did talk about. And this wasn't new text, basically. So just really concerning that this wasn't something that had come up as a result of the legal drafting exercise. And so on that basis, I'm proposing to keep it as is.

And, again, if there were concerns about this from you or your constituency groups, that's something that could be raised in the public [comments].

Okay. I am not seeing any hands, so I will take that as permission, then, to move on. And so we can move on now to our review of the new parts of the rules. We reached the end of 4A at the last call. And so if we start

to review Section 4B on the Time to File, I will note, on Malcolm's behalf, the standing objection that we are all aware that there is to the compromise that has been reached. And I think, with that noted, we can then move on to look at the specific amendments that were made in the drafting exercise.

So just as a reminder, we're not looking at this is [inaudible]. We're certainly not reading through line by line. Most of this text is something that we've already seen and that came from us, so we're really just reviewing the redlines to comfort ourselves that it reflects what we expect the rule to say.

And so with that in mind, if we look at 4B, there's a change from the reference to "ICDR" to "the IRP provider." I think that maybe a change that's been made in a few places by the legal drafters. I think this is something actually that we have talked about previously. I recall speaking about it in Hamburg, but it was raised by one of our group. And I think we had made an agreed decision to stick with "ICDR," the [reference to] "ICDR" rather than "IRP provider."

And noting that the current supplementary procedures refer to "ICDR," and that the rules are supplementary to the ICDR's own rules. So [inaudible] the term "IRP provider" is obviously more generic. In practice, if there were a change of provider, then I think the rules would have to be looked at because, [as I say], the whole of these rules are supplementary to what already is in the rules from ICDR.

So I will just pause and see whether there are thoughts on this, particularly, if there are strong views that we should change this to "IRP

provider." But bearing in mind that I do think we did discuss this, and we decided to keep the reference to the particular provider that we use.

All right. I'm not seeing any objections to that. I will make a note to change that back.

All right. And then if we move down on this Rule 4B, there's an amendment. There are a couple of references to section numbers I think are probably not a concern. In fact, the reference to [4D] which is a mockup, in fact, we did have in our draft, so I think I'm not concerned by that.

There's a reference to the statement of dispute being written. I think that seems uncontroversial [inaudible]. And then there are a couple of paragraphs where I did have some more substantive comments. I'm just going to quickly pause and look back and make sure they're in our hands. Okay.

So Section 3 here where it says "In order for an IRP to be deemed to have been timely filed, all fees must be paid to the provider within three business days." I don't have an objection to the text, but in our final draft that we've been working on [inaudible] document.

This was in Rule 4D rather than in Rule 4B. Section 6, Rule 4D. And so my suggestion is that we move it back there, which is where we have it. I don't think anything particularly turns on it, but that would be my suggestion.

But, again, I will pause and see if there's a strong feeling that it's preferable to have it here. Okay, I'm not seeing any hands.

All right. Brenda, if you could scroll back up to 4B. There, that's right. Section 4. This text [inaudible]. This text here—it's in green in my copy—is something that is currently elsewhere in the draft, but it's something that we had in this Rule 4B. So, again, I think the drafters may have just been looking at a slightly different version of the draft to the one that we had concluded with.

And so this is where it says "Under no circumstances [inaudible] to file a written statement of dispute more than four years after the date of action [or an action being] challenged in a dispute." [inaudible] in 4B rather than somewhere else in the rules.

I don't feel strongly, but, again, I'm just pausing to say my proposal would be similar to that because this is where we had it. But, again, I'm pausing to see whether there's any concern about that. Okay, I'm not seeing any. All right. In which case, I think, unless there are any other concerns on this 4B, I think we can move on to the next section. Okay.

All right. We're now on Rule 4C, which is the timing considerations for a claimant to file an IRP following a Request for Reconsideration. So this is effectively the section that deals with the concept of—actually, I'm not sure what. The concept of additional time if there's been a Request for Reconsideration.

Just noting that—and, indeed, the drafters have noted that the IRP-IOT had prepared concepts and principles but not draft text, particularly for this 4C, as was the case with 4A above. So there's a lot of redline text here because they have sought to [inaudible] in more legal terms. So I think

with that in mind, we'll read the individual sections and just see whether there are any concerns.

So 4C Section 1 "If, [inaudible] dispute, a claimant files a Request for Reconsideration (RFR) relating to the same dispute which RFR did not serve to wholly resolve the dispute, the claimant may submit a written statement of dispute pursuant to the requirements in Rule 4A and as provided in this Rule 4C." I think, to my mind, certainly, that seems to be a good reflection of what we had in our principles.

I'm just pausing. Not seeing any hands, so we'll keep moving down.

As I said, there's a lot of structured text, but we can move on to the new proposed language, subparagraph A. "If, at the time of publication of the approved resolution by the Board on the final disposition of the RFR [or publication of the summary dismissal by the BAMC where appropriate], the claimant is within the time frame to file a written statement of a dispute as provided in Rule 4B and the remaining time to file a written statement of a dispute is greater than or equal to 30 days, the claimant shall have this remaining time to file a written statement of a dispute."

And I had a question, which I have actually flagged in the document, just in relation to that text that's currently in the square brackets referring to "summary dismissal by the BAMC where appropriate" [really is the question].

And I don't know, Liz, if you can answer this, but it wasn't clear to me why this is in square brackets, which seems to suggest that the text is perhaps considered not to be necessary, or there's some question about whether this should be included rather than, I think, what we had where we had

this reference in regular brackets. I don't know if you can comment on that, although I can see Mike's hand up. So I'll turn to Mike first, but if you are able to shed any light, Liz, that would be super.

Mike.

MIKE RODENBAUGH: Thanks, Susan. I think pretty strongly that these should be keyed not from publication of the resolution, but from notification of the resolution to the requester, which sometimes comes several days after publication by ICANN because nobody should be bound to be watching for ICANN to publish something on their website. I think we've agreed on that principle in general, earlier, several times.

SUSAN PAYNE: Okay, thanks. [Before I] come back to that, Mike, Liz confirmed that the brackets in that reference, the square brackets can come out. Thanks for that, Liz. All right.

And then, Mike, your point is relating to the reference, I think, in probably both of these, the A and B, as to where it says "If, at the time of publication of the approved resolution," then that's when the timing starts to run. I'm just looking back at our—the text above this is what we had in our heads as agreement. And in our heads as agreement, we did refer to publication—

MIKE RODENBAUGH: They're different situations, Susan.

SUSAN PAYNE: No. I mean, I'm just looking up to the red text that struck out where our heads as agreement and said "If the claimant is not past the deadline to file an IRP as of the time of publication of the approved resolution by the Board." So we were referring to publication. So I'm making the point that in this exercise of the legal drafting, this hasn't been changed.

I can see that you disagree on that, and I think this might be one where this is quite a substantive point. And we did, as we discussed on the last call, we're endeavoring not to reopen substantive points that the group discussed. Which is not to say that it isn't a good point and that it isn't something that should be raised in the public comments, but I'm reluctant to reopen again this discussion about when is the right time albeit that we will undoubtedly get comments from community on this issue. Now—

MIKE RODENBAUGH: I can't understand why we would want to key it from publication when ICANN is dealing with a specific requester who they've already filed an RFR. ICANN has adjudicated the RFR. Why should the time frame start from any date other than when ICANN notifies the requester about the disposition of the RFR? Why should the requester be bound to be looking at ICANN's website every day? It doesn't make any sense.

SUSAN PAYNE: Yeah. I hear what you're saying.

MIKE RODENBAUGH: Okay.

SUSAN PAYNE: And as I say, I'm not even necessarily thinking you're wrong, but this is where we have come out as a group. And we've had [inaudible] pretty stable [inaudible] on this for months now, so I'm really reluctant to start renegotiating our terms of agreement. This is going out to a public comment, and I quite expect you to make this point. I suspect there may be others in the community that will make it, too.

David.

LIZ LE: Thank you, Susan. I think you're both making good points. I think Mike is making a very good substantive point about notification, but I think you make a very good point, Susan, about this is not where we are in the process right now; that should be brought up in public comments.

I think that's a fair statement, Mike, what Susan's saying to you. When we get to the public comments or wherever we talk about this, I may disagree with you that it makes no sense that someone has to watch their page. When someone's filed an RFR, they're going to be watching the page. But I think it's a fair point to make, substantively. But I think we can get past it now and look for it in public comments.

In fact, I'd like to raise something like that, Susan, when we're done with this particular point, about the introductory paragraph. It may not be appropriate now. Maybe I'll have to do it in public comments, but it might

be. It's one of those opaque areas like we're talking about right now. Thank you.

SUSAN PAYNE: Thanks, David. Kavouss.

KAVOUSS ARASTEH: Hello? Are you giving me the floor?

SUSAN PAYNE: Yes, please.

KAVOUSS ARASTEH: Yeah. I'm sorry. Can I talk on little "a" if possible?

SUSAN PAYNE: Yes, please do.

KAVOUSS ARASTEH: Yeah. Little "a." First of all, I don't know why sometimes you have this [publication] [inaudible]. I don't know what that is. I'll leave it to you. But in little "a," the construction of the sentence does not seem to be appropriate because at the last line, we use or you use the word "shall" is mandatory. The claimant does not have any mandatory action [inaudible].

The construction of the sentence, because he used "if"—that is conditional. The last [inaudible] "it would have" this [remaining] time, but not "it shall have." There is [no one] mandatory for it. If such a thing happened, it would have this time available. But it shall not. So I don't think that this "shall" is appropriate here.

SUSAN PAYNE: Thanks, Kavouss. I'll leave it to the group to see if there is support for changing it. Personally, I feel "shall" is the correct term and "would" makes less sense to me in the context. But if there is support from the group to change it, then we can certainly do so.

Liz.

LIZ LE: Hey, Susan. It's Liz Le with ICANN Org for the record. I agree with you in terms of your point that we've had this discussion about timing of publication, that language. And so I agree with you in moving forward as stated.

And also, the other thing that I do want to flag is that while Mike is correct that ICANN does provide a notification to a requester of a Reconsideration Request when there has been a disposition from either the BAMC or the Board on the Reconsideration Request.

In some instances, there could be a potential IRP claimant that is not the requester of a Reconsideration Request. In which case, the only way that a potential claimant would know about a decision on a Reconsideration Request is by the publication of that decision on the reconsideration page

itself. There would be no e-mail notice provided to a potential claimant. It would only be provided to a requester of the Reconsideration Request.

KAVOUSS ARASTEH: Susan, I'm very sorry. I'm not convinced of your argument. "Shall" is incorrect. Either delete it—"the complainant have this [inaudible]" or "will have this" [inaudible]. But not "shall." "Shall" is not correct. Thank you. I disagree with that.

SUSAN PAYNE: Okay. Thanks, Kavouss. I'm sorry. I'm not seeing any support for your suggestion. As I said, if there's strong support from this group to change it, then we'll change it. But I don't think that there is. So thanks for raising it. If this is something you feel very strongly on, then I think I'll have to refer you also to their public comment period. But I hope that you can live with "shall."

Liz, thanks for your point. I'm not quite clear. I don't think you're intending to suggest that someone who hadn't filed an RFR [inaudible] be less be able to take advantage of this potential extension of time. So I'm not sure how that comes into play, but I will note your comments.

Kavouss.

KAVOUSS ARASTEH: Thank you very much. I have done this practice for many, many years. This is a conditional sentence. If the conditional starts with "if," the remaining part, the second part will be "would" but not "shall." "Shall" is

obligation. It does not have any obligation to use the time, but it would have to use the time. But not obligation. You may not use [it at all]. So "shall" is not correct, and I [confirm] my understanding. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Your comment is noted. I don't know what more you want me to say. There is not support for the change from the group. Speaking for myself, I don't believe "would" is the correct word. That does not read correctly. So as I said, I note that you feel this, if you want to make a public comment to that effect, then you should certainly feel entitled to. Thank you.

All right. I am going to move on to 4B because I think I'm not seeing any more hands. So 4B states that—sorry, Brenda. I'm in Rule 4C, Section 1B. Thank you. So it's below that red text. We have too many A's and B's and C's. There we are. Sorry. It is not 4B. It is 1B, and you were just there. If we could scroll back up. There, stop. Stop, stop, stop. Thank you. Okay, so B.

"If the claimant is not within the time frame established above"—in Rule 4C (1)(a)—"the claimant shall have 30 days from the time of the publication of the approved resolution by the Board on the final disposition of the RFR or publication of the summary dismissal by the BAMC where appropriate to file a written statement of a dispute."

So I think, again, as previously—those square brackets—we've agreed and come out. I made a note that we no longer have the term "Fixed Additional Time" or FAT being used. I don't think that this is essential. It's something that we were using in our group. The rule seems to make

sense without giving this the particular—defining this as a term called "fixed positional time." But I did want to flag it to the group.

So I will just pause. Okay. I'm not seeing any concerns about that, so I think that is fine. All right. Then we can proceed on with Section 2 here, just below. In order to submit a written statement of a dispute under this Rule 4C, the claimant, at the time such claimant files the RFR relating to the same dispute, must have been within the time frames established in Rule 4B to file a written statement of a dispute.

I'm noting, David, you have your hand up. David.

DAVID MCAULEY: Thanks, Susan. I just wanted to ask one question before we left 4.C(1). And I'm late in mentioning this. I apologize. But I'm wondering, one, if this is a substantive change that I have to make in a comment or if it's something we can do here. And that is to add the word "timely" so that the first sentence of 4.C(1) points anyone could read "If prior to filing a written statement of a dispute, the claimant filed a timely Request for Reconsideration ..." The word "timely" is not there right now.

So it's just a suggestion I have, and I guess my thought was prompted when I was reminded of the bracketed language that there can be summary dismissals. Lack of time on this would be basis, I assume, for one of them. But if it has to be done in a comment, I'm happy to do that, too. Thanks.

SUSAN PAYNE: Thanks, David. I think, perhaps, let's look back at what we had in our agreement. Yeah, I don't think we have that concept. I can see your point. It does make sense to me. But it does also seem as though it is somewhat substantive. So I think, given that I've been strict with Mike and others, I think that may be one that has to come up in public comment. Thanks, David.

All right. Okay. And then we can move on to Section 4D—Rule 4D, rather. Rule 4D, limited circumstances for requesting permission to file after the 24-month limit. Section 1, there is a tweak in terms of references, there's a deletion to references to 4A and 4B, and a replacement with just a reference to 4B. But as I noted in a comment in the document, we had actually just got that reference just for being our final version of our draft. So I think nothing really turns on that.

We also can see, there, a reference in the second sentence to "such a claimant shall ..." It's proposed "seek leave to file a late written statement of a dispute rather than apply for permission." Again, that seems to me to be a reasonable drafting amendment, and I didn't see anyone objecting to that prior to the call. And, indeed, there are no hands at the moment on the call. So I think that seems fine.

I'm just going to pause and come back to the room just to make sure I don't have any hands up. All right. And I think, then, we can scroll down.

Okay. In paragraph 1A, there's a reference to the exceptional circumstances. Most of this text is as we had agreed. Malcolm here has suggested inclusion of little "i" and little "ii" to make this clearer. He says

he's added this to clarify that this is disjunctive (i.e., the claimant only needs to show one of these conditions was met). Okay.

I think I'll read the whole thing just for completeness. So "demonstrating clear and convincing evidence that either exceptional circumstances not caused by the claimant out of the claimant's control prevented the claimant either, one, from becoming aware of the action or inaction being challenged in the dispute when it's within the time frame set forth in Rule 4B; or, two, being eligible under the Bylaws as a claimant within those time frames."

And I will pause and see whether there are any concerns about this. I think that probably does make it easier to read. I do also think it's within the intent. Does anyone feel this is substantive and that at this point in proceedings, we shouldn't make that change? Okay, I'm not seeing any, so I think we can accept that.

All right. And then paragraph B. There's no major change in that made by the legal drafters. Just a reference to Rule 4B, rather than Rule 4A. And, again, noting that, actually, that is one that we had made a change ourselves in the final version of this rule. So I think that's something that we had already done.

I had a message that I had a hand up, but I can't see any hands. Okay, I'm pausing just in case.

DAVID MCAULEY: Susan, I had a hand up, but I'm having some—

SUSAN PAYNE: Hello, David.

DAVID MCAULEY: Well, I'm having some issues with the computer, so please ignore it.

SUSAN PAYNE: Oh, okay. Rogue hands.

DAVID MCAULEY: Thanks.

SUSAN PAYNE: All right. Thank you. Okay. So then we can be moving down into the remainder of that Section 1. It says that "the application for leave to file a written statement of a dispute pursuant to this Rule 4D shall include an explanation of how the claimant satisfies the standing requirements set forth in the Bylaws."

And there, I think it's just the main changes. There's obviously that one about changing permission to seeking leave and removal of the word "late." But noting that it is for an application under this particular Rule 4D. So those amendments seem to me to be acceptable.

I will pause again and just make sure no one has any concerns. Okay. All right, we can keep moving. This paragraph number 2 is one that we were just talking about a little earlier. I crossed it out because in our final draft that we've been working on, this was in Rule 4B. And when we were

looking at Rule Four B, I had moved that up there. So that's just the corresponding change made into this rule.

Okay. Then we can move on to Section 3. All right. Again, there's a change from the reference to applications for permission. Instead using the term any request for leave to file a written statement of dispute under this Rule 4.

And so [inaudible] again of the reference too late. And other than that, again, amending to add in the word "written" for "written statement of dispute." Other than that, those changes all do seem uncontroversial to me. I will, again, just pause and see whether anyone has any comments or concerns. But if not, we can continue on.

Okay. All right. And then Section 4. Have I moved to the wrong place? Section 4. That's right. Oh, hang on. Sorry. No, there is a bit under that Section 3, subparagraph (c) and (b). Sorry, there's some additional text. Sorry. So it's not Section 4. It's still part of Section 3. Nothing in this rule. I'll read this because there are a few changes. Nothing in this rule 4D(i) is intended to preclude a claimant who has initiated an IRP in the good faith belief that their claim is within time. But where that timeliness is successfully challenged from then seeking leave to pursue that IRP. Pursuant to this Rule 4D.

I think the most substantive addition here is that reference to it being a good-faith belief. So we'll just pause again to ensure that there are no concerns about that amendment. I'm not seeing any so we can keep going.

All right. Now, we are on Section 4, and Section 4 deals with who is considering these applications. And, again, I'm not necessarily going to propose to read through all of this. I think everyone's had plenty of time to read it. They're mostly the same changes from—application for permission is now a request for leave, and so on. In subparagraph A, it's clarified, as you can see, that "where the standing panel is in place, ICANN claimant shall endeavor to agree on a single panelist from the standing panel. Certainly, that is not text we had, but I think is very much what was intended. So I'll pause again and just see if anyone has concerns, but I think that was certainly the intent. And it's clear from the text that we agreed that that was the intent.

Okay. Then let's go to paragraph 5. There's a question from or comments from the drafter. So paragraph 5 says "When considering whether an application should be permitted to file an IRP came out of time, the panelist shall have regard to the purposes of the IRP and any jurisprudence of prior IRP Panel relevant to the interpretation of this clause in the light of the purposes. And so we have a note from the drafter suggesting that we change "have regard to" into "consider." "So that the panelist shall consider the purposes of the IRP." That's one suggestion.

And I think the other "let us note," there's a comment there that—I'm not sure what that reference to "clause" is. I think it's a reference to the whole of rule 4D as they suggest.

And I can see now I've got a couple of hands. So apologies for keeping you waiting those few minutes.

All right. So first of all, I have Kavouss, please. You have the floor.

KAVOUSS ARASTEH: Excuse me on number 5, in the last line, it says "In light of the purposes." When you use the article "the" purposes, which purposes? Purposes that you have already referred to? Because we have to say what purposes. Perhaps it was previously [inaudible] "in the light of" but not "in light of." "In the light of" and then when we say "the purposes." Which purposes? What do we mean by "the purposes?"

So, two points. First, third line, "the" should be there. It was deleted. It should come back. "In the light of." This is the standard text. Not "in light of." "In the light of." And then we say "the purposes." Which purposes? Thank you.

SUSAN PAYNE: Thanks, Kavouss. Malcolm.

MALCOLM HUTTY: Thank you. I must say I disagree with changing "have regard to" to "consider" for this reason. "Have regard to" implies deference to those purposes. "Consider" merely means take them as one input on an equal footing with other inputs. It was our intent here that the purposes of the IRP should guide the interpretation of this clause. And, really, any decision should be made, essentially, in line with and in support of the purposes. So I would disagree with downgrading that to "consider." I would actually consider that a substantive change that is not timely made.

As regard to the clause that's being referred to, I think the clause that's been referred to this clause itself (i.e., that subparagraph 5). Thank you.

SUSAN PAYNE: Apologies. Thanks, Malcolm. Okay. Noting your point in relation to "has regard to." And I think, given that the drafters themselves haven't actually made this change. They've simply suggested it. So with that in mind, I think "have regard to" is the text that we'd all agreed on, and it's still there in the document that moment. So I think we should keep it as is, in the spirit in which we've been doing this work.

I think I should revert back to Kavouss, who raised a concern about the reference to purposes at the end. Kavouss, it's intended to be a reference to the purposes of the IRP that are referred to in that same sentence. I think it's quite clear, but I see your hand.

KAVOUSS ARASTEH: This, maybe for you, is clear. But for me, it's not clear. When you say "of the purposes," [inaudible] is the purpose of IRP or you say something, "the purposes listed above." But the term used, "in light of," I suggest that "in the light of." But purposes should be clear. What purposes? In the second line, you say "the purposes of the IRP." Do we think the same thing in "in the purpose of IRP"? Or what purpose? "In the purposes" is vague, unclear. Which purposes? Thank you.

SUSAN PAYNE: Thanks, Kavouss. I'm at a bit of a loss, really. I think we refer to the purposes of the IRP in the same sentence.

David.

DAVID MCAULEY: Thanks, Susan. I think we could fix that latter issue just by saying "in light of such purposes." I don't think that would be a material change or substantive.

But with respect to the word "clause" that was being asked about by the drafters, I think it's fair to say clause/section/paragraph, whatever, may be confusing, so I would suggest we just put "Rule 4D" there. That's the rule that we're trying—you know, 4D. But, anyway, that's it. Thank you.

SUSAN PAYNE: Thanks, David. I think that is the intent. And, indeed, "4D" would encapsulate Section 5 as well. And so it would cover both.

Kavouss.

KAVOUSS ARASTEH: Yes. I agree with David saying that "in the light of such purposes." Thank you.

SUSAN PAYNE: Okay. All right. I think we can amend "the purposes" to "such purposes." I don't think that's a substantive change that would be outside of my imposed rule, so I will make a note for myself that we need to reflect that change.

All right. Let us move to Section 6. So the [inaudible] is that "ICANN shall have the right to respond to a claimant request for leave to file." Sorry. Request for leave to file submitted pursuant to this Rule 4D. "The IRP Panel may establish deadlines and/or page limits in connection with this response."

I will pause and see whether there are concerns about that. I think that was intended, in any event.

Kavouss.

KAVOUSS ARASTEH: Yes. I think your first line of six, ICANN shall have "the" right but not "a" right. It's not A, B, C, D. Has "the'" right to respond. Not "a" right. Thank you.

SUSAN PAYNE: Okay, thank you. I think either works. I don't feel strongly. Does anyone have concerns about changing that to "the"? All right. We will note that as well. Okay. And I don't think any concerns about the IRP establishing deadlines on page limits.

All right. Then Section 7. At the end of this rule 4D, and this is the other section which we had previously looked at earlier in our final draft. We have this language in 4D, and in the draft that we've just been looking at, we saw it earlier, the reference to the timing for [payment of fees]. So as I mentioned when we looked at this just a few minutes ago, I have reflected it back here, which is where it was in our final draft.

So, again, I will pause, but I'm not seeing any hands or anything in the chat raising concerns about that. Okay, all right.

Well, we're motoring on. The next rule we have to look at is 5B on translation. Let's see how we get on with this [inaudible]. It's not too much substantive, so I think it is worth us trying. We may get through this.

All right. So beginning in Section 1, there's some additions of some paragraphs that I think we didn't have in this Section 1. So numbered paragraph i and ii, and replacement of our language "as well as" by the word "and," which I think is actually much better and clearer. So unless anyone has any concerns about that, I think that's definitely an improvement to the drafting.

Okay. We have throughout—and I think this is an amendment, actually, that's being made throughout the rules—references to "a written statement of a dispute." We have tended to use "written statement of dispute" throughout, but that actually does reflect, I think, what is in the current rules. So, again, I don't think there's anything substantive about that change.

Section 3. There is a bit more to look at here, and I will note the comments from the drafters because they did make a fair number of changes. The note to the group is that the rule as originally drafted is confusing. Subsection (i) suggests that they can request translation later as long as they aren't specifically requesting the items in the i subparagraph (a) or i subparagraph (b). But then the original subsection (ii) said that "it could otherwise be filed later if the claimant later recognized the need for

translation services," which seems to set up a freestanding requirement to justify requesting translation later.

So they have revised paragraph ii to just allow subsequent submission regardless because, otherwise, it isn't clear. This is quite long, actually, and I won't read all this. I think you can all see this. And, certainly, when I read this and I was going through—and I hope you've all done the same—I think what has been drafted does reflect what our intent was.

But I will just read through the actual section, and maybe that's the easiest thing, just to give people time to get comfortable. "A request for translation services: (i) must accompany the written statement of a dispute if the claimant is: (a) seeking reimbursement of the cost of translating the written statement of the dispute into English, or (b) seeking translation of ICANN's written statement in response from English into the language identified by claimants as claimant's preferred language for the proceeding. Defined term, 'claimant's preferred language.' But paragraph ii may otherwise be made subsequent to the written statement of a dispute."

And then it goes on to say "Where the request for translation services is made with the written statement of a dispute, it does not count towards the page limit for the written statement of a dispute." And that final text was text that we have.

I think my only comment, as I'm just looking at this now, would be that I think the usual form in which we number paragraphs has us using A, B, and C and then i, ii, etc., as a subparagraph to that. So I think the numbering might, to my mind, is the wrong way around compared to our

practice in the rest of the document. But aside from that, I think that the amendments to the draft reflect what our intent was.

So I will pause and just see if there are any concerns. Let's see. I'm not seeing any. Okay.

So I think we can then move to Section 4. Again, there's a fair number of redlines in this, so I'll read Section 4. "Any request for translation services must be submitted in English." And that is new, the reference to the request being submitted in English.

"Identify the claimant's preferred language, and include an explanation of why the claimant needs such services in order to be able to fairly participate in the proceedings. The request for translation services should also explain the extent to which the claimant or its representative has a suitable level of understanding to permit their participation in more than one language, including, in particular, the competency of the claimant or its representative in an official language of the United Nations.

"Any accompanying statement explaining the need for translation services shall not exceed five pages of text, double-spaced using 12 point font."

So we have here a couple of edits. We have this clarification that the actual request for translation should be in English. There's a deletion to the reference to the designated form. I don't know if there is a designated form. I'll defer to ICANN Legal on that.

And then I would say the large amount of text about the explanation that should be given in the request does mirror some of the points that are

later referred to in paragraph 8, which are considerations that have to be borne in mind when considering the request for translation services. So they do, to my mind, make sense because they reflect the points that need to be taken into consideration when considering the request.

I will pause and see whether there are any concerns here. Okay, I'm not seeing any, in which case, we can keep going. We have about 10 minutes before the end of the call, but, actually, we have relatively few actual amendments to the text in this Rule 5B. So we may, I think, be able to get through this.

Section 5. The edits are very much just changes to references to paragraph numbers. And therefore, we move down to Section 6. And we have some change here, just in terms of the last sentence where it is referencing the determination being "the emergency request should be made as a preliminary issue for the proceedings."

And that emergency request, that whole section is about the emergency requests. And therefore, again, I think this is a sensible drafting revision to reflect the text. And as I said, none of the group, I think, have expressed any concern in the Google Doc. So unless there's any comment now, I think we can accept that one and keep going.

All right. In Section 7 there's changing "hearing" to "hearings," which, again, seems non-substantive. And then in Section 8, we have very minor amendments, really, I think. And I don't see any comments from the drafters on that, or from any of the group.

I think the main point is that the reference at the end to where "the claimant or its representative has a suitable level of understanding to

limit purpose and participation in more than one language of which one is the UN language, then translation services will be limited to that UN language where possible," that was text that in our draft had been part of subparagraph (iii). And it now is moved out to be part of the main body of Section 8. But to my mind, it looks fine like that.

Again, just having a look and not seeing any hands, so I think we can keep going.

I'm scrolling down the document. Section 9. No changes from our drafting. Section 10, likewise.

Section 11. The only amendment is a reference to "the claimant" rather than without the "the."

Section 12 has no edits.

Section 13. We have some small edits, again, made by the drafters so that it would now read "A claimant may rely in the IRP proceedings on its own translation only if it is a certified translation from a qualified independent service provider." It's a tweaking, but I think has the same meaning. So, again, I haven't seen any concerns on this.

And we'll just quickly have a look. Not seeing any hands.

All right, and then we can go finally to Section 14. "The IRP Panel may order that the deadline for submission of documents"—and here is a new addition—"or other papers, and the timing of any appeal be amended to take into account reasonable delays generated by the translation of documents, transcripts, or panelist decisions."

And, again, really, the only substantive changes is the reference to "or other papers." And that seems in place of "etc.," and it seems a reasonable drafting amendment.

So I think with that, if I don't see any hands, I think we have reached the end of Section 5B. And I think at this point, we ought to stop. And when we reconvene, we will look at Rule 7, which is the section on Consolidation, Intervention, and Participation as an Amicus. Okay.

All right. So just to move on, then, to look at what we'll do at ICANN79. I mentioned that we have a couple of meetings. We will finish going over the draft text for Rule 7 at that first meeting. I don't think we've got specific action items, so we should, I think, make good progress with that.

And then we will then circle back, I think, during that meeting and then the subsequent one to review any changes that we were asking the drafters to make and just agree that those are the ones that we had agreed on.

And then we will look to have a next meeting at some point shortly after the ICANN meeting. We would normally have the week after the ICANN meeting off, and so we would be looking to schedule something for the following week, which I think is Tuesday the 19th of March. And, ideally, we would hope that we could have the relatively small number of amendments that needs to be made to this draft done by then.

Okay. I think that's as far as we can get. I'll also give some thought—we do have to think about the Cooperative Engagement Process. I think that's probably one of the more urgent sets of rules that ought to be done. And it might be something that we can work on whilst the public

comment is out. We should also, I think, take some time to look at the rest of the rules and just be sure that we don't need to revise anything else.

So I'll give some thought to have something that we can do if we have managed to get all the way through our public comment text while we are in meetings in Puerto Rico so that, yes, we may be able to start on something else that is also on our plate.

Yeah. Noticing David's comments, also, about appeals.

Okay. All right. I think that's as far as we can go. We're at the 90-minute mark. Thanks, everyone. We don't have a call next week, but we are meeting the following Saturday, I want to say the 2nd of March. So I look forward to seeing at least some of you in person, and, hopefully, the rest of you can join us remotely. Thanks very much.

Brenda, we can stop the recording.

MALCOLM HUTTY: My apologies, everyone. I'm afraid I won't make it to Puerto Rico, but I'll try and join remotely.

[END OF TRANSCRIPTION]