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RECORDED VOICE: This meeting is now being recorded.

BECKY BURR: Thank you very much for getting that started. I'd like to start, if we could, with the supplemental rules [inaudible], which is one of the two documents I sent around, if you could bring that up.

I was actually looking for the [rule?] document.

Thank you. So, for everybody's information, as you know, the current provider for the IRP dispute resolution in ICANN is by International Center for Dispute Resolution. And the ICPR dispute resolution rules are the basis which independent review is conducted. In addition, ICANN has supplemental rules that [inaudible] the [ICDR?] rules into certain... So harmonize the [ICDR] rules as applied in the [IRP?] context to the ICANN bylaws.

One of the things that we need to be in a position to do in fairly short order, is modify the supplemental procedures to conform to the new bylaws which will go into effect. And so, what we propose to do is walk through the current wheels, have a discussion among the group with respect to modifications to the current rules, this is a fairly near-term deliverable that we have to do.

Then, focus on the [IRP?] for providers and panelists, and then walk through, in [lower?] detail, the rules by which the IRPs would be conducted, not just the supplemental rules, but [inaudible] detailed scope. So this, I think, this meeting or the next meeting will focus on

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the supplemental rules. And we have several documents that are in the works, and David [inaudible] has been working very intensely on this, but has no voice, and so we're not going to [inaudible] today, but David, I'm sure everybody joins me in hoping that you feel better very soon.

So, just in terms of the [ICGR?] rules, as we go through these things, we're going to need to add some definitions, these definitions here are pretty plain vanilla. But we think that we will need to use this to define covered actions and disputes and other things that are in the new bylaws.

One of the things that is... Do I have scroll control for everybody or do I need to tell people where I am?

In any case, I'm on scope. This provision will need to be modified to reflect the scope of the conflicts, the covered disputes which would be defined above, and those covered disputes, of course, would be actions or failures to act in violation of the bylaws, or articles of incorporation, or the other disputes the IANA related disputes that are covered here.

Going down to the covered and the number of independent review panelists, actually we're going to have to add a section here on the independent review panel itself, and the standing panel, but we're also going to ask to provide, that the standing panel may not be in place when things kick off. The number of panelists here is three, which is what we decided to go forward.

I think more important for our conversation is that, are the provisions of the conduct in the independent review. And I'd like to have some discussion on this point, because it is not something that the CCWG

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discussed in length. ICANN has traditionally, its supplemental rules have essentially said only the hearings would be in-person only, in an extraordinary event.

I have to say that ICANN, and I won't speak for ICANN, but based on my knowledge of IRP, ICANN has not been entirely successful in holding the line. I think that the panelists have largely made determinations about when they thought it would be helpful for them to have in-person hearings, but the goal of this, the sort of overall goal here is to try to have the disputes be resolved [inaudible] through electronic conversations, telephone conferences, in order to keep costs down.

And obviously, the evidence issues here are that, and written statements, all of that stuff has to be submitted in writing in advance, and the in-person hearing shall be limited to argument only. So, I would like to open it up for discussion here regarding [inaudible] conduct, the extent to which we want to hold the line on making in-person hearings, the extraordinary event, whether we want to say this should be determined by the panelists based on, you know, sort of keeping in mind what the need for efficiency and for [inaudible].

Kavouss has asked in the chat, what the status of the supplementary rules? The rules that are up here right now, are the rules that are in force at the moment, as part of ICANN's existing independent review process. We will need to modify these rules to ensure that they reflect the new bylaws provisions here. I see Amy's hand.

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AMY STATHOS: Yes, hi Becky, thank you. I just wanted to respond to that in terms of the status, just a couple of points kind of more global before you get in more detail. One, the one thing that I wanted to point out is that the ICVR was instrumental in helping develop these supplemental procedures, as their group looked at the documents in relation to the bylaws when the...

Let's say, for example, when the bylaws changed back in 2013. So I just wanted to point out that the ICVR will also have a role in ensuring that what the supplementary procedures say, are consistent with the bylaws. So I just wanted to make sure that we pointed that out.

BECKY BURR: Okay, that's great.

AMY STATHOS: Yeah, they would just simply expect what we say, their group will make sure, since they are the ones that have to operate pursuant to those supplementary procedures.

BECKY BURR: Okay, so that probably means that we need to get those two ICVR in a timely fashion for them to weigh-in on the consistency.

AMY STATHOS: Right, yeah. They do have to have a loop in there for sure, possibly two depending on their internal work.

BECKY BURR: So Amy, could you talk just for a bit about your, ICANN's experience with the ICVR and with the supplemental [inaudible] with respect to, you know, the conduct of these disputes during telephone conferences as opposed to in-person hearings and the like? I think there is probably, there has been a variety of responses based on the different IRPs.

AMY SATHOS: Sure. And this kind of goes to a point that we made previously about kind of the decision making roles of the various parties involved, meaning the provider itself, the panel, and then potentially what we had talked about earlier, which would be one designated member of the standing panel once that is in place. We've had all different kinds of hearings when it gets to the final hearing.

Initially, we actually do always have a scheduling hearing or call, conference call, with just the parties before the panel is in place, and that's a standing operating procedure. And then we will have another scheduling call once the panel is in place, but the final hearing we've done many different ways.

We've done... And it has all been based on what the parties have asked for, as well as what the panel believes it needs to help it make its decision. So we've had pure telephonic, we've had video conferences, we've had video conferences where all of the panels are, panelists are in separate places, and they all decided to gather. We've had in-person hearings as well.

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The in-person hearings are, in terms of everybody in the same room, is the rarest because of the costs and expense, I think most people are conscious of that, but it really has been across the board.

BECKY BURR: Okay. So, it really does depend on... In that case, the call about what kind of hearing is appropriate is made by the panel, I take it?

AMY STATHOS: Yes, they do take the parties' input, but they are the ultimate decision maker. At least currently.

BECKY BURR: Okay. Any comments on that? So I think what Amy has suggested is that the experience in [inaudible] has been, it has varied quite a bit, depending on the IRP and make nature of the dispute, that panel has made the determination based on input from all of the parties to the dispute. And so one question going forward, I think is you know, do we want to have that reality reflected here in the language as opposed to the language about it being an extraordinary event?

Or do we really want to retain the extraordinary event, [inaudible] show that the result would be telephone conferences. Any comments on that from participants?

We have no views?

Okay. Well, we'll continue to sort of walk through this. Kavouss?

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KAVOUSS ARASTEH: Yes, good day. I have a simple question. You said that ICGR may modify the supplementary [inaudible]. I asked the question, whether they can do it without referring back to community, or whether they just propose something to be changed? Just a simple procedure question. Thank you.

BECKY BURR: So I think that Amy's response is, although of course, we do [inaudible] have an important role in ensuring that this procedure are consistent with the bylaws, the ICGR, what they would do, would review whatever comes out of our process to ensure that it is consistent with the bylaws. In other words, they could come back to us and say, we don't think that you've fully implemented the bylaws.

They couldn't say, you have to do something that is inconsistent with the bylaws.

Okay. Also in this conduct of the independent review panel, the panel which had responsibility for determining the timetable. Now we do have, in the bylaws a sort of goal of having this be completed, having an IRP be completed within six months. And so, these rules would have to be modified to reflect that. Upon having said that, of course, our six-months is not a hard and fast, it must be done, the panel has to conduct the hearing, but...

And they have to, you know, ultimately determine the timeline that fits the dispute and serves equity and fairness and the like. But we will be

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modifying this to reflect the CCWG's conclusion that we need to strive to make things, to make this process more efficient. Okay, then going down to the next section on written statements.

The current revisions limit initial written submissions to 25 pages each, double spaced, and in 12-point font. And this, of course, does not... That would be the sort of argument that the parties would put forth. That would not include evidence, or witness statements, or the like. And here, the IRT may request additional written submissions from the parties to review and from other groups, if they wish. And I know that they have actually, in the past, made such requests.

I just want to test out here that the page limit. It is certainly quite common in US courts to have page limits, and the page limits vary from court to court. So each court sets its own rules. I think, 25 pages is on the more condensed end of the scale, but I've never seen, and anything more than, you know, 50 in the federal courts. So, and in some courts, the limit is actual a word limit as opposed to a page limit.

Any comments on the page limit? Meanwhile, David, I think going back to the conduct of the independent review, that suggestion that claimant certified that the claim is brought in good faith and believe that it qualifies as a legitimate IRP, and not for improper purposes and I can certainly make sense, I am sure that there is some kind of certification required under the standard [ICBR?] rules, though it's probably not specific to this. Kavouss.



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KAVOUSS ARASTEH: Yes. Not on page limit. I have one question about the last, one line, sorry, the last line of the section five, mainly, why we said parties and not party? How many parties there are? Because we mentioned that the one who [inaudible]... and other parties. Why two? Thank you.

BECKY BURR: So ICANN is a party, and the claimant, whether it's a SO or an individual claimant, would be a party, so there are always at least two parties. I don't think it's the Board, but I think it's the internet, it's ICANN, it's the corporation that's the party, if I have that right. But we also will be talking about sort of the possibility of consolidating planes, where we may be adding parties, so if two different claimants have very similar claims for purposes of efficiency and justice, we would bring all of those claims together.

So we could have, you know, three or four parties in that case. Okay, I don't see any other comments on page limits, so I'm going to take it, for the moment, we are comfortable with 25-page limit, recognizing that it doesn't cover evidence, that it is essentially the arguments that's to be made by the parties.

Okay. The next provision, provision six, talks about summary dismissal, and provides that an IRP panel may summarily dismiss any request for independent review, where the requestor has not demonstrated that it meets the standing requirements for initiating the independent review, or where there is a settlement. Now we also provide in the bylaws that a panel may dismiss a request that lacks substance that is frivolous or [inaudible].

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And so, we have this [inaudible], frivolous, or [inaudible] request. I seem to recall that we, that [inaudible] the term [inaudible] in another context, so we would have to review that to make sure that we would reflect the CCWG's views here.

Kavouss?

KAVOUSS ARASTEH:

Yes. Two small questions. One question is that, why they put standing [inaudible] requirement? Does it make it change if it meets the requirements for initiating the independent review? Why you put the Board [standing]? This is question one.

Question two is just, [inaudible] the consistency. These standing requirements for requirements on those, the things that we have already mentioned in the CCWG recommendation and in bylaw, and would it possible to cross-reference them? Saying that unstipulated in, that means that, you know, what is the standing requirements? This is just for clarification. Thank you.

BECKY BURR:

So, I believe that we would need to define the requirements for bringing a case. And the concept of standing is a legal concept that says, essentially, you have been, you know, you have met, that you are materially effected in, consistent with the language in the bylaws and the like. I'm going to ask Amy and the other experts here on the panel. It seems to... If I was a provider, I would not want to have rules of

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procedures that were referred out to another document that could change.

I think I would want the onerous to be on if ICANN's bylaws were to change somehow, we would have to come back and affirmatively modify the rules, but the rules themselves should be pretty self-contained. So that, I think, is why I would structure the way that it structures here. Yes, Kavouss, is that a new hand?

KAVOUSS ARASTEH:

Yes. Just a suggestion. Usually, in other area, in the terms of the standing to say, the requirement is enforced. That is what you said, [inaudible] therefore the standing, [inaudible] suggesting, in terms of the standing, whether it could say, requirement enforced. Thank you.

BECKY BURR:

Okay. I mean, I think the term standing is not absolutely necessary here. We need to make it clear what those requirements are, and that's really what matters. So, are there any other issues related to summary dismissal here? Here we have, you know, the notion is that a panel [inaudible], needs to be formed and before this call is made, one question is, do we want to provide a procedure that, you know, allows for a sort of expedited review of a request before a panel is actually formed?

So say by the, you know, the president or the chair of the standing panel, or by, you know, well, or do we feel that it is necessary to actually

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have the panels formed before a decision to dismiss is taken? Any thoughts on that?

Okay. Kavouss?

KAVOUSS ARASTEH: Are we on section seven please?

BECKY BURR: We are just moving to section seven now. [CROSSTALK]

KAVOUSS ARASTEH: I'll wait. [Inaudible] come to that, thank you.

BECKY BURR: Okay. Greg?

GREG SHATAN: Thank you. Greg Shatan. Sorry if this has been covered before. I joined late. The paragraph on summary dismissal doesn't make it clear whether the IRP panel can dismiss the [inaudible], or if the other party, essentially ICANN, needs to essentially move for dismissal. As to whether the panel, I guess that should be clarified.

As to whether the panel should be formed, [inaudible] that if they're going to be reviewing 25 page submissions, that should go to the panel in question and not to the standing panel, otherwise the standing panel

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kind of ends up being an overall gatekeeper for initial consideration of cases, which I think would be a different format.

BECKY BURR:

Thanks Greg. Do you have a view on whether the panel should be able to dismiss something, even if it hasn't received a request for...? So for example, it gets done moving papers, ICANN has not requested dismissal, and it determines on its own that the papers are deficient.

GREG SHATAN:

I haven't really formed a view yet. I can think of good arguments for both, possibly a different standard. I don't know if we want to overly complicate things. It seems that if something is, as it says, it rises or lowers the level of being [inaudible], frivolous, or [inaudible], so that seems to me to be something that should be responding, or self-determined by the panel.

I guess, in a sense, it's a question of, you know, how we want the procedure to go. But I don't have a firm thought at the moment, yet.

BECKY BURR:

Okay. Any other views on that? So, to me, I think, there are two questions. One is, if the claimant simply fails to demonstrate that they are harmed, that they have been harmed, or that they will be harmed, and therefore they don't meet the requirements, and that's apparent to the panelists based on the information that's submitted to the party, I guess I'm not sure that it's absolutely necessary that ICANN should have

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to, you know, put together the papers after dismissal, although I suspect it wouldn't in any case.

The frivolous or [inaudible] call I think is, you know, I agree with Greg. We need to think what the standard for that would be. But what I'm seeing from the group is that as to summary dismissal, the sentiment of the group is that the panel should be formed, and it's the panel session make a determination for summary dismissal, as opposed to appointing a particular [inaudible], or any particular [inaudible].

Okay. Going now to section seven, the interim measure of protection. Now this is a place where the CCWG did have substantive views on requests for interim relief. So essentially, that we would call prospective relief or injunctive relief, relief in the nature don't do something, don't change the status quo while this is being articulated. And there was a very clear standard for that there.

So the, that is something that definitely needs to be put in place. Now, here... So the ICANN bylaws actually contemplate a standing panel, although a standing panel is not, doesn't really exist. But one of the questions is sort of, do we want essentially the panel to be able to designate an emergency panelist who would adjudicate requests for interim relief, and in the event that the standing panel is in place?

So while the ICDR to appoint an emergency panelist to review and rule on requests for emergency relief. As you may recall, the standards that we have set for, this kind of relief is harm for which there is no adequate remedy in the absence of the emergency relief. Either likelihood on the success of the merits, or sufficiently serious questions

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related to the merits, and then a balance of hardships, tipping decidedly towards the party seeking relief. So we do have a standard that will put in here directly from the bylaws, but so one question I have is, does anybody have thoughts on essentially providing that an emergency panel will be designated by the standing panel, according to its rules, and in the event that there is no standing panel in place, but the ICDR rules would come into play to determine, to appoint an emergency panelist?

Any objections to that? Kavouss?

KAVOUSS ARASTEH:

No objections, but the only thing is that the emergency panel, how it is established is the [inaudible] the initial panel cannot be, because of one of the reasons. How is this possible to have an emergency? Is it a different criteria to establish emergency panel? Or is it the same criteria as the standard panel? Just a question for clarification.

BECKY BURR:

No, I'm talking about an emergency panelist. So if there is a panel, then the panel itself would say, would appoint one of its members to deal with the request for interrogatory or injunctive relief. If there is no standing panel yet, and there is a request for interim protection, then the ICDR has rules for appointing an emergency panelist, and we would default to those rules, you know, it would be somebody who was entirely neutral, and who did not have, you know, and who had no conflict of interest, but they would called in and appointed by this ITDR,

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to rule on a request for interim protection, while the panel is being formed.

Greg?

GREG SHATAN:

Thanks. Greg Shatan again. It's unclear to me, here, whether again, this is something that is only [inaudible], or if it's required motion, or it can, if there can be a motion of some sort in order to seek what is essentially a preliminary injunction or equitable relief on an interim basis. And unclear also, maybe this is at the next level of detail, whether there is something that needs to be separately argued in the papers, or separate papers need to be submitted to support interim relief.

So I think we need to clarify that again, what is the process by which this happens? At this point, you know, only seems to start with the recommendation of a panel, of an IRP panel, or of an emergency panelist, but it's unclear, again, whether this is entirely self-started [inaudible], or whether this is, can be or must be based on the complainant's request for interim relief. Thanks.

BECKY BURR:

All excellent questions. So I think the questions that Greg has served up are very important, are if a party... Does a party have to ask for interim relief? Or can a panel decide on its own? I think the way this is setup, is that the, it could go either way. I am not... You know, I could go either way on this. I could say, you know, if somebody is filing a claim, then the onerous is on them to request a stay.



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And if that is the case, then we have to say, go back to our, you know, our page limits and say, you know, does that have to be argued within the 25 pages? Or do we give them, you know, separate place to argue, make the case that there is harm for which no adequate remedy is available?

That there is a likelihood of success on the merits, or serious questions related to the merits? Or and that, you know, the balance of hardships tips towards them? So again, questions on that. Amy?

AMY STATHOS:

Hi. Thanks Becky. So a couple of points one, to date, this had been a request by the moving party. So there has never been a time where the panel has taken its own initiative to say something. One of the things that we have to also appreciate is that in some cases it may be difficult for a panel, without argument from the parties seeking the injunctive relief, or whatever else it might be, to understand exactly what they would halt or stop.

So just to date, it has always been, there has been a separate argument made by the party. Occasionally it has been as part of their initial submission, and occasionally it has been a separate paper. It has not been one way that it has gone to date.

BECKY BURR:

Okay. Thank you, that's very helpful. Greg?

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GREG SHATAN:

Thanks. Greg Shatan again. That's very helpful background. I think it leads to the point I was going to make, which is that I think that items six and seven, or at least how they are initiated, need to be viewed kind of together essentially as to whether the panelists, or even the standing panel, or emergency panelist, has kind of broad powers to kind of manage the case to either throw it out, or to stop ICANN in its tracks based entirely on the panel's own judgement of what has to happen, or whether it's incumbent on the parties to essentially at least, initiate and make the case for these sorts of things.

So, and I think that's kind of a philosophical question. How much power does the panel have to kind of, you know, make or break the case at any given time, versus how much they're serving as kind of a decider of issues put before it by the party, such that the issue of summary dismissal needs to be put before it by ICANN, and the issue of interim measures needs to be put before it by the complaint?

Seems to me that procedurally, overall, I think we have to kind of at least consider whether we need to be consistent across the two. And if we're being inconsistent, we need to justify why we're being inconsistent. And thinking back to some other discussions we've had on other groups, typically, I'm no litigator anymore at least, while of course, can in exceptional circumstances do all kinds of things, typically they rely on what's put before them in most cases by the parties.

So if you have a great lawyer who argues a novel theory, he may win a case that a more plodding lawyer who can't come up with a new theory would lose. So not up to the judge to say, did you ever consider X, Y, Z. So, here again, I think my tendency would be to put more of the

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onerous on the parties to initiate either interim measures of relief or dismissal, rather than giving the panel kind of really broad self-starting powers of disposal and interim relief. Thanks.

BECKY BURR: Okay, thank you Greg. Okay, Kavouss.

KAVOUSS ARASTEH: Yes. I don't think that we could give the power of dismissal to any party. The party said something, and the dismissal is by someone else. The one who submits something could not ask for a dismissal. So dismissal is as it is today. I have no problem for the interim, but I don't think we should link up this [inaudible]. Thank you.

BECKY BURR: Thank you. Okay. We will need to think about that as we put together the draft and make sure that we're consistent on it. I, like Greg, don't have a problem suggesting that the claimant should be in the position of making this request and demonstrating that the request meets the criteria for the interim relief, but that's something we'll get a chance to review once we get a draft in front of you. Yes Kavouss?

KAVOUSS ARASTEH: Thank you. Sorry, old hand, I'm sorry.

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BECKY BURR:

Okay. All right. The standard of review, I think this will change significantly. This is the, because the standard of review is set out in the bylaws, and was a significant portion of the CCWG's work. We've discussed it at length. So that is going to entirely change. Also, the declarations and [inaudible] effective in IRP declaration, well first of all, these are [inaudible] decisions, and again the CCWG report does address the form and effect of those decisions, that this language will change significantly.

And likewise the cost, the allocation of costs are provided for in the CCWG report and the bylaws. So, we sort of walked our way through this, and my hope is that we will be able to have, for review, a draft on our call next week. My understanding at the ICANN legal has been working through a draft document which would be done, be reviewed by [inaudible] and Ed, but I'm hoping they're sufficiently forewarned that we would actually be able to really look at finalized, or finalized subject to our review, language to get this done.

And I know that David is also doing some work that will help us make sure that we've crossed the T's and dotted the I's. Avri [Inaudible] speaking slowly today, which I doubt, but also notes that she's not sure that she agrees that the panel shouldn't be able to initiate protection. Is that consistent with the question of making this more acceptable, a more accessible tool [inaudible]?

And I think probably what we should do... We're not making, you know, any calls, any final decisions in one call. And I think we're introducing a lot of new material that people would want to think about over time. Can I just ask, Amy or Stan if we think, you know, we're going to be

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sufficiently far enough along to get a draft to [inaudible] and Ed and then be able to actually review a draft language next week at this time?

AMY STATHOS: Hi Becky. This is Amy. Yeah, I think we'll be in a good place to do that.

BECKY BURR: Okay, great. So Holly is making a request to let us know when [inaudible] will have the document to review. So you guys can work that out offline, but it would be great if we could get it in time to distribute it to the group in advance. Greg?

GREG SHATAN: Thanks. Greg, just following up on Avri's point. I think that, without wanting to mimic the American judicial system too much, that just generally has a broader ability to act, in essence to aid, a complainant when the complainant is pro se, in other words, engaging in this so it has the benefit of council, and will grant certain liberties to a pro se litigant to one that's represented.

So, I don't know if we want to... As we consider how to make this accessible, you know, the issue of representation, and if it's not just the most creative, the question of what the panel, you know, can't necessarily make the case for the complainant, but how all of this will work and, you know, whether in essence it's a legal aid for complainants who, you know, won't be represented.

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I think there are a bunch of issues around accessibility, and the power of the panelists to do what they think is right, which is a double-edged sword, of course. And the extent to which the competence and thoughtfulness of the complainants is what, you know, tends to hold the order of the day.

So that's, I think again, just a bunch of different things to consider as we look at how these cases go forward. And again, we shouldn't be making stuff up entirely, but we should also be looking at arbitral norms probably more than judicial norms. Thanks.

BECKY BURR:

That's a completely fair question. We do have some language in the report, regarding the development of a pro bono [inaudible] that goes into it. David has asked about how ICANN tracks based [ICVR?] rules and rule changes. And David the response is, they do, and not very often, we're notified in advance.

So, thanks everybody. What we will do next week is endeavor to get the draft language out there. David is working on a document that will help us make sure that we've gotten everything that we need. Now just to be clear, you know, these are the supplemental rules. We will have a chance as we go forward looking at the rules more broadly to, you know, to make sure that we've crossed all of our T's and dotted our I's, but we do need to ensure a baseline so that the proper rules are in effect when the new bylaws go into place, which is why we're moving reasonably quickly on this.

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So, we will spend at least one more session on these interim rules next week. and I think with that, we're prepared to give back 30 minutes of your day or your evening, depending on where you are.

And Kavouss has noted that whatever we come up with, under the supplementary rules, must remain within the envelope of the bylaws, and that is absolutely correct. Everything that we do is constrained by that.

Okay, thanks everybody. Talk to you next week.

**[END OF TRANSCRIPTION]**